ECLI:EU:C:2017:982

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

20 December 2017 (*)

(Action for annulment — Implementing Decision (EU) 2015/1289 — Imposition of a fine on a Member State in the context of economic and budgetary surveillance of the euro area — Manipulation of statistical data relating to the deficit of the Member State concerned — Jurisdiction — Regulation (EU) No 1173/2011 — Article 8(1) and (3) — Delegated Decision 2012/678/EU — Articles 2(1) and (3) and 14(2) — Regulation (EC) No 479/2009 — Articles 3(1), 8(1), 11 and 11a — Rights of defence — Charter of Fundamental Rights of the European Union — Article 41(1) — Right to good administration — Articles 121, 126 and 136 TFEU — Protocol No 12 on the excessive deficit procedure — Existence of an infringement — Misrepresentations — Determination of the fine — Principle that penal provisions may not have retroactive effect)

In Case C-521/15,

ACTION for annulment under Article 263 TFEU, brought on 29 September 2015,

Kingdom of Spain, represented by A. Gavela Llopis, A. Rubio González and A. Sampol Pucurull, acting as Agents,

applicant,

v

Council of the European Union, represented by E. Dumitriu-Segnana, A.F. Jensen and A. de Gregorio Merino, acting as Agents,

defendant,

supported by:

European Commission, represented by J. Baquero Cruz, J.-P. Keppenne, M. Clausen and F. Simonetti, acting as Agents,

intervener,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta, M. Ilešič, J.L. da Cruz Vilaça and J. Malenovský (Rapporteur), Presidents of Chambers, E. Juhász, A. Borg Barthet, D. Šváby, A. Prechal, C. Lycourgos, M. Vilaras and E. Regan, Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 April 2017,

after hearing the Opinion of the Advocate General at the sitting on 1 June 2017,

gives the following

Judgment

1 By its application, the Kingdom of Spain seeks the annulment of Council Implementing Decision (EU) 2015/1289 of 13 July 2015 imposing a fine on Spain for the manipulation of deficit data in the Autonomous Community of Valencia (OJ 2015 L 198, p. 19, and corrigendum at OJ 2015 L 291, p. 10; 'the contested decision').

Legal context

Statute of the Court of Justice of the European Union

2 Article 51 of the Statute of the Court of Justice of the European Union is worded as follows:

'By way of derogation from the rule laid down in Article 256(1) [TFEU], jurisdiction shall be reserved to the Court of Justice in the actions referred to in Articles 263 and 265 [TFEU] when they are brought by a Member State against:

(a) an act of or failure to act by the European Parliament or the Council, or by those institutions acting jointly, except for:

– decisions taken by the Council under the third subparagraph of Article 108(2) [TFEU];

– acts of the Council adopted pursuant to a Council regulation concerning measures to protect trade within the meaning of Article 207 [TFEU];

– acts of the Council by which the Council exercises implementing powers in accordance with [Article 291(2) TFEU];

...'

Provisions relating to economic and monetary policy

Primary law

3 By virtue of Article 119(1) TFEU, the activities of the European Union and the Member States are to include the adoption of an economic policy which is based, inter alia, on the close coordination of Member States' economic policies and on the definition of common objectives.

4 In that context, the European Commission is entrusted inter alia, by Articles 121(3) and 126(2) TFEU, with a role consisting in examining the economic and budgetary situation of the Member States, on the basis of the information forwarded by them, and in assisting the Council in the surveillance task given to it in this area.

5 The Council for its part has, in accordance with Article 121(3) and (4) TFEU, the power to monitor and assess economic developments in the Member States and compliance with the broad economic-policy guidelines set for each of them, as well as to address the necessary recommendations to them. Furthermore, it is authorised, by virtue of Article 126(6), (7), (9) and (11) TFEU, to decide that a Member State has or is liable to have an excessive deficit and to address various recommendations and decisions to it, including decisions giving it notice to take measures to reduce its deficit and decisions imposing a fine upon it. Finally, the Council is empowered to adopt, on the basis of Article 136(1) TFEU, measures specific to Member States whose currency is the euro, with the aim of strengthening the coordination and surveillance of their budgetary discipline as well as of setting out economic policy guidelines for those Member States and keeping those guidelines under surveillance.

6 Those provisions are supplemented by Protocol No 12 on the excessive deficit procedure, annexed to the EU and FEU Treaties ('Protocol No 12').

Secondary legislation

7 On 7 July 1997 the Council adopted a set of measures grouped together under the name 'Stability and Growth Pact', including in particular Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (OJ 1997 L 209, p. 1) and Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure (OJ 1997 L 209, p. 6).

8 On 16 November 2011 the Parliament and the Council adopted five regulations and a directive that were intended to reform the Stability and Growth Pact fundamentally. Two of those regulations amended Regulations No 1466/97 and 1467/97 respectively. The other three are concerned with strengthening the economic and budgetary surveillance carried out by the Council and the Commission under Articles 121 and 126 TFEU.

– Regulation (EU) No 1173/2011

9 One of the regulations referred to in the previous paragraph is Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area (OJ 2011 L 306, p. 1), which constitutes the legal basis for the contested decision and is itself founded on Articles 121 and 136 TFEU.

10 Recitals 7, 8, 16, 17 and 25 of Regulation No 1173/2011 state:

'(7) The Commission should play a stronger role in the enhanced surveillance procedure as regards assessments that are specific to each Member State, monitoring, on-site missions, recommendations and warnings. ...

(8) In order to ensure a permanent dialogue with the Member States aiming at achieving the objectives of this Regulation, the Commission should carry out surveillance missions.

...

(16) In order to deter against the misrepresentation, whether intentional or due to serious negligence, of government deficit and debt data, which data is an essential input to economic policy coordination in the Union, fines should be imposed on Member States responsible.

(17) In order to supplement the rules on calculation of the fines for manipulation of statistics as well as the rules on the procedure to be followed by the Commission for the investigation of such actions, the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission in respect of detailed criteria for establishing the amount of the fine and for conducting the Commission's investigations. ...

...

(25) The power to adopt individual decisions for the application of the sanctions provided for in this Regulation should be conferred on the Council. As part of the coordination of the economic policies of the Member States conducted within the Council as provided for in Article 121(1) TFEU, those individual decisions are an integral follow-up to the measures adopted by the Council in accordance with Articles 121 and 126 TFEU and Regulations [No 1466/97 and No 1467/97].'

11 Article 8 of Regulation No 1173/2011, headed 'Sanctions concerning the manipulation of statistics', provides:

'1. The Council, acting on a recommendation by the Commission, may decide to impose a fine on a Member State that intentionally or by serious negligence misrepresents deficit and debt data relevant for the application of Articles 121 or 126 TFEU, or for the application of [Protocol No 12] on the excessive deficit procedure annexed to the TEU and to the TFEU.

2. The fines referred to in paragraph 1 shall be effective, dissuasive and proportionate to the nature, seriousness and duration of the misrepresentation. The amount of the fine shall not exceed 0.2% of [the gross domestic product] of the Member State concerned.

3. The Commission may conduct all investigations necessary to establish the existence of the misrepresentations referred to in paragraph 1. It may decide to initiate an investigation when it finds that there are serious indications of the existence of facts liable to constitute such a misrepresentation. The Commission shall investigate the putative misrepresentations taking into account any comments submitted by the Member State concerned. ...

Upon completion of its investigation, and before submitting any proposal to the Council, the Commission shall give to the Member State concerned the opportunity of being heard in relation to the matters under investigation. The Commission shall base any proposal to the Council only on facts on which the Member State concerned has had the opportunity to comment.

The Commission shall fully respect the rights of defence of the Member State concerned during the investigations.

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 11 concerning:

(a) detailed criteria establishing the amount of the fine referred to in paragraph 1;

...

(c) detailed rules of procedure aimed at guaranteeing the rights of the defence, access to the file, legal representation, confidentiality and provisions as to timing and the collection of the fines referred to in paragraph 1.

...'

12 As provided in Article 9 of Regulation No 1173/2011, headed 'Administrative nature of the sanctions', the sanctions imposed pursuant, inter alia, to Article 8 are to be of an administrative nature.

13 In accordance with Article 14, Regulation No 1173/2011 entered into force on the 20th day following its publication, on 23 November 2011, in the *Official Journal of the European Union*, that is to say, on 13 December 2011.

– *Delegated Decision 2012/678/EU*

14 The Commission adopted, on the basis of Article 8(4) of Regulation No 1173/2011, Delegated Decision 2012/678/EU of 29 June 2012 on investigations and fines related to the manipulation of statistics as referred to in Regulation No 1173/2011 (OJ 2012 L 306, p. 21), which entered into force, in accordance with Article 16 thereof, on the 20th day following that of its publication, on 6 November 2012, in the *Official Journal of the European Union*, that is to say, on 26 November 2012.

15 Article 2 of Delegated Decision 2012/678, headed 'Initiation of the investigations', states, in particular, in paragraphs 1 and 3:

'1. The Commission shall notify the Member State concerned of its decision to initiate an investigation, including information of the serious indications found of the existence of facts liable to constitute a misrepresentation of general government deficit and debt data arising from the manipulation of such data as a result of either intent or serious negligence.

...

3. The Commission may opt not to conduct such an investigation until a methodological visit has been carried out in accordance with a decision taken by the Commission (Eurostat) under [Council Regulation (EC) No 479/2009 of 25 May 2009 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community (OJ 2009 L 145, p. 1)].'

16 Article 14 of Delegated Decision 2012/678, headed 'Criteria with regard to the amount of the fine', states:

'1. The Commission shall ensure that the fine to be recommended is effective, proportionate and dissuasive. The fine shall be established on the basis of a reference amount that may be modulated upwards or downwards when taking into account the specific circumstances referred to in paragraph 3.

2. The reference amount shall be equal to 5% of the larger impact of the misrepresentation on the level of either the general government deficit or debt of the Member State for the relevant years covered by the notification in the context of the excessive deficit procedure.

3. Taking into account the maximum amount established in Article 13, the Commission shall in each case take into consideration, where relevant, the following circumstances:

...

(c) the fact that the misrepresentation was the work of one entity acting alone or, alternatively, the misrepresentation was the result of a concerted action by two or more entities;

...

(e) the degree of diligence and cooperation, alternatively the degree of obstruction, shown by the Member State concerned in the detection of the misrepresentation and in the course of the investigations.'

– Regulation No 479/2009

17 Regulation No 479/2009, as amended by Council Regulation (EU) No 679/2010 of 26 July 2010 (OJ 2010 L 198, p. 1) ('Regulation No 479/2009'), was adopted, as stated in recital 1 thereof, in order to codify Council Regulation (EC) No 3605/93 of 22 November 1993 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community (OJ 1993 L 332, p. 7), which entered into force on 1 January 1994 and was subsequently amended on a number of occasions. Regulation No 479/2009 entered into force, in accordance with Article 19 thereof, on the 20th day following its publication, on 10 June 2009, in the *Official Journal of the European Union*, that is to say, on 30 June 2009.

18 Recitals 9 and 10 of Regulation No 479/2009 state:

'(9) The role of the Commission, as statistical authority, in that context is specifically exercised by Eurostat, on behalf of the Commission. As the Commission department responsible for carrying out the tasks devolving on the Commission as regards the production of Community statistics, Eurostat is required to execute its tasks in accordance with the principles of impartiality, reliability, relevance, cost-effectiveness, statistical confidentiality and transparency … The implementation by the national and Community statistical authorities of the Recommendation of the Commission of 25 May 2005 on the independence, integrity and accountability of the national and Community authorities should enhance the principle of professional independence, adequacy of resources and quality of statistical data.

(10) Eurostat is responsible, on behalf of the Commission, for assessing the quality of the data and for providing the data to be used within the context of the excessive deficit procedure ...'

19 Chapter II of Regulation No 479/2009, headed 'Rules and coverage of reporting', contains inter alia Articles 3 and 6.

20 Article 3 provides, in particular, in paragraphs 1 and 2:

‘1. Member States shall report to the Commission (Eurostat) their planned and actual government deficits and levels of government debt twice a year, the first time before 1 April of the current year (year n) and the second time before 1 October of year n.

...

2. Before 1 April of year n, Member States shall:

(a) report to the Commission (Eurostat) their planned government deficit for year n, an up-to-date estimate of their actual government deficit for year n-1 and their actual government deficits for years n-2, n-3 and n-4;

...’

21 Article 6(1) of Regulation No 479/2009 is worded as follows:

‘Member States shall inform the Commission (Eurostat), as soon as it becomes available, of any major revision in their actual and planned government deficit and debt figures already reported.’

22 Chapter III of Regulation No 479/2009, headed ‘Quality of data’, includes inter alia Articles 8, 11 and 11a.

23 Article 8(1) of Regulation No 479/2009 states:

‘The Commission (Eurostat) shall regularly assess the quality both of actual data reported by Member States and of the underlying government sector accounts compiled according to ESA 95 ... Quality of actual data means compliance with accounting rules, completeness, reliability, timeliness, and consistency of the statistical data. ...’

24 Article 11 of Regulation No 479/2009 provides:

‘1. The Commission (Eurostat) shall ensure a permanent dialogue with Member States’ statistical authorities. To this end, the Commission (Eurostat) shall carry out in all Member States regular dialogue visits, as well as possible methodological visits.

2. When organising dialogue and methodological visits, the Commission (Eurostat) shall transmit its provisional findings to the Member States concerned for comments.’

25 Article 11a of Regulation No 479/2009 states:

‘The dialogue visits are designed to review actual data reported …, to examine methodological issues, to discuss statistical processes and sources described in the inventories, and to assess compliance with the accounting rules. The dialogue visits shall be used to identify risks or potential problems with respect to the quality of the reported data.’

Background to the dispute and the contested decision

26 On 30 March 2012 the Kingdom of Spain reported the amount of its planned and actual government deficits for the years 2008 to 2012 to the Statistical Office of the European Union (Eurostat) and provided it with the corresponding data (‘the notification of 30 March 2012’).

27 On 17 May 2012 the Kingdom of Spain informed Eurostat that the amount of those deficits should be revised to take account of the fact that certain autonomous communities had incurred more expenditure in the years 2008 to 2011 than that taken into account in order to establish the amounts disclosed in the framework of the notification of 30 March 2012. That undeclared expenditure amounted to EUR 4.5 billion (that is to say, more than 0.4% of GDP), of which the sum of EUR 1.9 billion (that is to say, nearly 0.2% of GDP) was attributable to the Comunitat Valenciana (Autonomous Community of Valencia, Spain) alone.

28 That information prompted Eurostat to carry out a series of visits to Spain in May, June and September 2012 and September 2013.

29 On the basis of Article 8(3) of Regulation No 1173/2011, the Commission adopted Decision C(2014) 4856 of 11 July 2014 on the launching of an investigation related to the manipulation of statistics in Spain ('the decision to launch the investigation').

30 On 7 May 2015 the Commission adopted a report in which it concluded that the Kingdom of Spain had misrepresented data relating to its deficit, as referred to in Article 8(1) of Regulation No 1173/2011. More specifically, it took the view that the Kingdom of Spain had been guilty of serious negligence in submitting, in the notification of 30 March 2012, incorrect data relating to the accounts of the Autonomous Community of Valencia even though the Sindicatura de Comptes de la Comunitat Valenciana (Court of Auditors of the Autonomous Community of Valencia, Spain) pointed out each year that the Intervención General de la Generalitat Valenciana (Audit Office of the Autonomous Community of Valencia, Spain) validated accounts containing irregularities connected with a failure to record certain health expenditure and a failure to comply with the accrual principle. On that ground, the Commission recommended that the Council adopt a decision imposing a fine on the Kingdom of Spain.

31 On 13 July 2015 the Council adopted the contested decision, in which it concluded that the Kingdom of Spain had been seriously negligent in providing Eurostat with misrepresentations in March 2012 (recital 5) and established the amount of the fine to be imposed upon it (recitals 6 to 13). For that purpose, the Council found, first of all, that, in the light of the impact of the misrepresentations at issue, the reference amount for the fine had to be set, in accordance with Article 14(2) of Delegated Decision 2012/678, at EUR 94.65 million. It then took the view that that amount should be reduced to take account of various mitigating circumstances, relating in particular to the fact that a single regional authority was responsible for those misrepresentations and the fact that the national statistical authorities had, for their part, cooperated in the investigation.

32 Article 1 of the contested decision states:

'A fine of EUR 18.93 million is imposed on [the Kingdom of] Spain for the misrepresentation, due to serious negligence, of government deficit data, as set out in the report of the [Commission] on the investigation related to the manipulation of statistics in Spain as referred to in Regulation (EU) No 1173/2011.'

33 The contested decision was notified to the Kingdom of Spain on 20 July 2015 and then published in the *Official Journal of the European Union* on 28 July 2015.

Procedure before the Court and forms of order sought

34 The Kingdom of Spain claims that the Court should:

– annul the contested decision;

– in the alternative, reduce the amount of the fine imposed by the contested decision by limiting it to the period after Regulation No 1173/2011 entered into force; and

– order the Council to pay the costs.

35 The Council contends that the Court should:

– declare that the action falls within the jurisdiction of the General Court of the European Union and refer it to the latter;

– failing this, dismiss the action; and

– order the Kingdom of Spain to pay the costs.

36 By decision of 26 January 2016, the President of the Court of Justice granted the Commission leave to intervene in support of the form of order sought by the Council.

Jurisdiction

Arguments of the parties

37 The Council and the Commission submit that the action is brought against an act by which the Council exercised an implementing power in accordance with Article 291(2) TFEU, so that it falls within the jurisdiction of the General Court pursuant to the third indent of subparagraph (a) of the first paragraph of Article 51 of the Statute of the Court of Justice of the European Union. The power to adopt decisions imposing fines on Member States if statistics are manipulated, provided for in Article 8(1) of Regulation No 1173/2011, has to be regarded as falling within exercise of an implementing power within the meaning of Article 291(2) TFEU since it involves uniform implementation of that regulation. Furthermore, and as recital 25 of that regulation states, it is justified to confer such an implementing power on the Council and not the Commission.

38 The Kingdom of Spain responds, in essence, that the argument that the contested decision is an implementing decision for the purposes of Article 291(2) TFEU is questionable, as recital 25 of Regulation No 1173/2011 links the individual decisions by which the Council imposes sanctions on Member States if statistics are manipulated not to the need to ensure uniform conditions for implementing that regulation, but to the powers directly conferred on the Council by the FEU Treaty in economic matters.

Findings of the Court

39 Under subparagraph (a) of the first paragraph of Article 51 of the Statute of the Court of Justice of the European Union, jurisdiction is to be reserved to the Court of Justice, by way of derogation from the rule laid down in Article 256(1) TFEU, in the actions for annulment and for failure to act referred to in Articles 263 and 265 TFEU when they are (i) brought by a Member State and (ii) against an act of the Parliament, the Council or those institutions acting jointly.

40 By virtue of the third indent of that provision of the Statute of the Court of Justice of the European Union, acts by which the Council exercises implementing powers in accordance with Article 291(2) TFEU are, however, excluded from that reservation of jurisdiction.

41 The present case concerns an action for annulment which (i) has been brought by a Member State and (ii) is against an act of the Council. The action therefore falls within the jurisdiction of the Court of Justice, unless the contested decision constitutes an act by which the Council has exercised an implementing power, within the meaning of Article 291(2) TFEU.

42 Article 291(2) TFEU provides that, 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.

43 In this connection, it should be noted first of all that Article 291(2) TFEU is not the only provision of EU law that confers an implementing power on the Council. Other provisions of primary law may confer such a power on it directly (see, to that effect, judgments of 26 November 2014, *Parliament and Commission* v *Council*, C-103/12 and C-165/12, EU:C:2014:2400, paragraph 50, and of 7 September 2016, *Germany* v *Parliament and Council*, C-113/14, EU:C:2016:635, paragraphs 55 and 56). In addition, acts of secondary legislation may establish implementing powers outside the regime laid down in Article 291 TFEU (see, to that effect, judgment of 22 January 2014, *United Kingdom* v *Parliament and Council*, C-270/12, EU:C:2014:18, paragraphs 78 to 86 and 98).

44 Next, since the contested decision, given that it finds an infringement and imposes a sanction on its perpetrator pursuant to the powers conferred on the Council by Article 8(1) of Regulation No 1173/2011, must be regarded as an act adopted in the exercise of an implementing power (see, by analogy, judgments of 27 October 1992, *Germany* v *Commission*, C-240/90, EU:C:1992:408, paragraphs 38 and 39, and of 1 March 2016, *National Iranian Oil Company* v *Council*, C-440/14 P, EU:C:2016:128, paragraph 36) and since Article 291(2) TFEU is just one of a number of possible legal bases for the exercise of such a power by the Council, it must be determined in the present case whether that power does in fact fall within Article 291(2) TFEU.

45 For that purpose, account should be taken of Article 291 TFEU as a whole, it not being possible to read paragraph 2 of that article in isolation from paragraph 1, which provides that Member States are to adopt all measures of national law necessary to implement legally binding EU acts.

46 It is true that Article 291 TFEU is contained in Section 1, headed ‘The legal acts of the Union’, of Chapter 2 of Title I of Part Six (relating to institutional and financial provisions) of the FEU Treaty. However, Article 291 TFEU, as is clear from the wording of paragraphs 1 and 2 thereof, does not relate to all legal acts of the European Union, but only to a specific category of them, namely ‘legally binding acts’. This common reference in both those paragraphs to ‘legally binding acts’ requires the meaning of that concept to be determined for Article 291 TFEU as a whole.

47 Whilst Article 291(1) TFEU lays down the principle that the various Member States have the task of adopting all measures of national law necessary to implement legally binding EU acts, Article 291(2) TFEU provides that those acts are to confer implementing powers on the Commission or the Council whenever their uniform implementation is necessary. In such a situation, the objective of uniform implementation of those acts precludes their implementation by the various Member States by means of measures adopted under their respective national law, which would clearly result in a risk of divergence, a risk that is inherent in the coexistence, within the legal order of the European Union, of potentially divergent national implementing measures.

48 It follows that Article 291(2) TFEU relates solely to legally binding acts of the European Union which lend themselves in principle to implementation by the Member States, like those to which Article 291(1) TFEU refers, but which, in contrast to the latter acts, must, for a particular reason, be implemented by means of measures adopted not by each Member State concerned, but by the Commission or the Council, for the purpose of ensuring that they are applied uniformly within the European Union.

49 That is clearly not so in the case of an act which establishes a power consisting in the imposition of a fine on a Member State. Such an act does not lend itself in the slightest to implementation by the Member States themselves, as implementation of that kind involves the adoption of an enforcement measure in respect of one of them.

50 The foregoing analysis is, moreover, confirmed by reading in conjunction with each other the exceptions to the reservation of jurisdiction to the Court of Justice which are laid down in the second and third indents of subparagraph (a) of the first paragraph of Article 51 of the Statute of the Court of Justice of the European Union. An interpretation of the third indent under which all implementing acts adopted by the Council fell within the exception for which it provides would render the exception in the second indent entirely redundant. The latter exception relates to acts of the Council adopted pursuant to a regulation concerning measures to protect trade within the meaning of Article 207 TFEU and therefore relates specifically to a situation in which the Council implements an EU act.

51 In the light of these factors, a decision such as the contested decision cannot be regarded as having been adopted in the exercise of an implementing power conferred on the Council in accordance with Article 291(2) TFEU.

52 Moreover, Regulation No 1173/2011, pursuant to which the contested decision was adopted, contains no reference to Article 291(2) TFEU.

53 Furthermore, Regulation No 1173/2011 is based on Articles 121 and 136 TFEU, as stated in paragraph 9 of the present judgment. The conferral upon the Council, on the basis of those articles, of the power whose exercise is given concrete form by the contested decision is not justified by the need to ensure that that regulation is implemented uniformly but, as recitals 16 and 25 thereof state, by pursuit of an objective consisting in deterring the Member States from misrepresenting data that is essential for the discharge of the responsibilities which Articles 121 and 126 TFEU confer on the Council so far as concerns the coordination and surveillance of the Member States' economic and budgetary policies.

54 It follows that the Court of Justice has jurisdiction to hear the present action.

The action

55 In support of its action, the Kingdom of Spain relies on four pleas in law, alleging, respectively, that the rights of the defence were infringed, that the right to good administration was infringed, that there was no infringement and that the fine imposed upon it by the Council is disproportionate.

The first plea: infringement of the rights of the defence

Arguments of the parties

56 The Kingdom of Spain submits that the contested decision infringes the rights of the defence, as guaranteed by Article 8(3) of Regulation No 1173/2011 and by Delegated Decision 2012/678, since that decision attributes an infringement to it in reliance upon information that was gathered when a series of visits were carried out in Spain in May, June and September 2012 and September 2013.

57 First, the first three visits during which that information was gathered took place at a time when Member States which were the subject of investigation procedures founded on Article 8(3) of Regulation No 1173/2011 were not yet guaranteed observance of their rights of defence, since Delegated Decision 2012/678 had not yet entered into force. In addition, all that information was gathered before the investigation procedure was even initiated in July 2014, and therefore outside the procedure provided for by that delegated decision and in breach of the right to be informed which the delegated decision guarantees the Member State concerned. Moreover, the delegated decision requires the Commission to carry out a methodological visit before an investigation procedure is initiated, but such a visit did not take place in the present case.

58 Second, the circumstances in which that information was gathered are not consistent with the requirements laid down by the EU legislature for the purpose of ensuring that the rights of the defence are observed. In this regard, the Kingdom of Spain submits that Regulation No 479/2009 does not constitute a legal basis authorising Eurostat to gather information relating to possible misrepresentations, as referred to in Article 8(1) of Regulation No 1173/2011, and that it was not informed in advance of the actual purpose of the visits carried out in the present case. Accordingly, the Spanish authorities cooperated with the Commission without contemplating that the information collected by it might subsequently be used to justify the initiation of an investigation procedure.

59 The Council, supported by the Commission, states in response, first, that the visits prior to the decision to launch the investigation were organised on the basis of Regulation No 479/2009 and with the aim of reviewing the revised data reported by the Kingdom of Spain in May 2012, following a provisional submission in April 2012.

60 Second, the Commission observed the Kingdom of Spain's rights of defence from the time of the decision to launch the investigation. In particular, it disclosed to the Kingdom of Spain, when notifying it of that decision, the information which it possessed concerning the existence of serious indications of facts liable to constitute misrepresentations, in accordance with Delegated Decision 2012/678. Subsequently, the Commission observed the various rights which the Kingdom of Spain is guaranteed by Article 8(3) of Regulation No 1173/2011. In any event, even if the rights of the defence were infringed, the Kingdom of Spain does not demonstrate that the infringement affected the outcome of the procedure and warrants on that basis annulment of the contested decision.

Findings of the Court

61 It is apparent from the Court's settled case-law that observance of the rights of the defence is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting him, a fundamental principle of EU law which, first, must be guaranteed even in the absence of specific provisions in that regard and, second, requires that the person against whom such proceedings have been initiated should be placed in a position in which he may effectively make known his views on the facts and the infringement of EU law that are raised against him before a decision appreciably affecting his interests is adopted (see, to that effect, judgments of 10 July 1986, *Belgium* v *Commission*, 40/85, EU:C:1986:305, paragraph 28; of 12 February 1992, *Netherlands and Others* v *Commission*, C-48/90 and C-66/90, EU:C:1992:63, paragraphs 44 and 45; and of 14 June 2016, *Marchiani* v *Parliament*, C-566/14 P, EU:C:2016:437, paragraph 51).

62 In the present case, it is not in dispute that the contested decision relies on information that was gathered by a Commission department, namely Eurostat, when visits were carried out in Spain in May, June and September 2012 and September 2013, that is to say, before the decision to launch the investigation was adopted on 11 July 2014 and, as regards three of the visits, before Delegated Decision 2012/678 entered into force on 26 November 2012.

63 It is therefore necessary to examine, in the first place, whether the fact that that information was gathered before those two events means that the contested decision is vitiated by an infringement of the rights of the defence.

64 In that regard, it is to be noted that, in the case of investigation procedures such as that giving rise to the contested decision, the Parliament and the Council adopted specific provisions in order to ensure observance of the rights of the defence. They are set out in Article 8(3) of Regulation No 1173/2011 and have been applicable since that regulation entered into force on 13 December 2011. Those specific provisions state that the Commission has the power to decide to initiate an investigation when it finds that there are serious indications of the existence of facts liable to constitute a misrepresentation. In addition, they require the Commission, where it exercises that power, to respect fully the rights of defence of the Member State concerned and, more specifically, to take into account any comments submitted by that Member State during the investigation and to hear it before submitting a proposal for a decision to the Council, so that the proposal is based only on facts on which the Member State has been able to comment.

65 Thus, the Commission has not only been empowered, since 13 December 2011, to gather information relating to the existence of serious indications of facts liable to constitute a misrepresentation, as referred to in Article 8(1) of Regulation No 1173/2011, but also has the obligation to gather such information before the initiation of any investigation procedure under Article 8(3) of that regulation, a procedure in the course of which the rights of defence that the Member State concerned is guaranteed will then have to be fully observed.

66 Accordingly, it must be held that, as the various visits carried out, in the present case, in Spain were organised from May 2012, and therefore after Regulation No 1173/2011 entered into force on 13 December 2011, the fact that Eurostat gathered on those visits the information referred to in paragraph 62 of the present judgment does not mean that the contested decision is vitiated by an infringement of the rights of the defence.

67 As regards, in the second place, the Kingdom of Spain's arguments to the effect that the circumstances in which that information was gathered are not consistent with the requirements laid down by the EU legislature for the purpose of ensuring that the rights of the defence are observed, as is apparent from paragraph 64 of the present judgment, it is in principle after the initiation of the investigation procedure provided for in Article 8(3) of Regulation No 1173/2011 that the Member State concerned may fully assert those rights, since that procedure alone is capable of resulting in a decision imposing a sanction on that Member State on the ground that it made misrepresentations as referred to in Article 8(1) of that regulation.

68 That said, it is also apparent from the Court's case-law that it is necessary to ensure that exercise of the rights of the defence, in the context of a procedure that may result in an act finding the existence of an infringement, is not impaired where operations are organised before the initiation of that procedure which enable information to be gathered that may be decisive for establishing such an infringement (see, to that effect, judgments of 7 January 2004, *Aalborg Portland and Others* v *Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P

and C-219/00 P, EU:C:2004:6, paragraphs 63 to 65, and of 27 April 2017, *FSL and Others* v *Commission*, C-469/15 P, EU:C:2017:308, paragraph 43).

69 In the present case, it was on the basis of Regulation No 479/2009 that Eurostat carried out the four visits which enabled the information upon which the Council relied in the contested decision to be gathered. As is apparent from the correspondence and reports annexed to the application, first, the two visits which took place in June and September 2012 were organised as 'dialogue visits', within the meaning of Article 11a of that regulation, second, the visit which took place in May 2012 was organised as a 'preparatory technical visit' for the first of the two dialogue visits, and, finally, the visit in September 2013 was organised as an 'ad hoc visit'.

70 Accordingly, it is necessary to determine whether the gathering of information relating to the existence of possible misrepresentations, as referred to in Article 8(1) of Regulation No 1173/2011, is authorised by Regulation No 479/2009 and, if so, whether the circumstances surrounding the organisation of the visits during which that information was gathered in the present case complied with the procedural requirements laid down by the EU legislature and preserved the Kingdom of Spain's ability to exercise its rights of defence in the context of the subsequent investigation procedure.

71 As regards, in the first place, the question whether the gathering of information relating to the existence of possible misrepresentations is authorised by Regulation No 479/2009, it must be pointed out that Article 3(1) of that regulation requires the Member States to report to the Commission twice a year data relating to their planned and actual government deficit and level of government debt, in order to enable the Commission and the Council to fulfil their respective responsibilities under Articles 121 and 126 TFEU and Protocol No 12. It is specifically when that data is misrepresented by a Member State that Article 8(1) of Regulation No 1173/2011 permits the Council to attribute an infringement to it and to impose a fine upon it, as the Advocate General has noted in point 66 of her Opinion.

72 Also, Article 8(1) of Regulation No 479/2009, read in the light of recitals 9 and 10 thereof, assigns specifically to Eurostat responsibility for carrying out, on behalf of the Commission, an impartial and independent assessment of the quality of that data, by checking its compliance with accounting rules, its completeness, its reliability, its timeliness and its consistency. For that purpose, Eurostat has in particular the power to carry out, under Article 11a of that regulation, 'dialogue' visits in the Member States, in order to review actual data reported, carry out a methodological and accounting assessment of that data and identify risks or potential problems with respect to its quality. That Commission department is thus empowered to identify, in that context, and generally, risks and potential problems concerning the reliability of the data at issue.

73 Thus, Regulation No 479/2009, and more specifically Article 11a thereof, constituted a legal basis authorising Eurostat to gather, in the course of visits such as the two dialogue visits and the preparatory technical visit referred to in paragraph 69 of the present judgment, information relating to possible misrepresentations.

74 As regards the fourth visit referred to in that paragraph, carried out in order to investigate specifically the accounts of the Autonomous Community of Valencia, it is true that such a visit is not expressly provided for by Regulation No 479/2009.

75 However, Article 11 of that regulation provides that Eurostat is to conduct a permanent dialogue with Member States' statistical authorities. Such a permanent dialogue necessarily entails Eurostat being able to carry out the various visits and missions called for by the discharge of its

responsibilities, in addition to the visits specifically referred to by that article. Moreover, recitals 7 and 8 of Regulation No 1173/2011 specifically call on the Commission to carry out, in the context of that permanent dialogue, on-site missions and surveillance missions in the Member States.

76 Accordingly, it must be held that Article 11 of Regulation No 479/2009 constituted a legal basis authorising Eurostat to gather information relating to possible misrepresentations in the course of that fourth visit.

77 As regards, furthermore, the Kingdom of Spain's argument that a methodological visit should be carried out before an investigation procedure is initiated, it need only be stated that Delegated Decision 2012/678 provides, in Article 2(3), that the Commission may opt not to initiate an investigation until such a visit has been carried out, and does not therefore impose an obligation upon it in that regard.

78 So far as concerns, in the second place, the question whether the four visits at issue were carried out in conformity with the procedural requirements laid down by the EU legislature and in such a way as not to impair exercise of the rights of defence to which the Kingdom of Spain was entitled in the context of the subsequent investigation procedure, it must be noted, first, that Article 11(2) of Regulation No 479/2009 provides that the provisional findings made in the context of dialogue visits organised in the Member States must be transmitted to the latter in order to enable them to make comments.

79 In the present case, the provisional findings made in the context of the preparatory technical visit and the two dialogue visits referred to in paragraph 69 of the present judgment were submitted to the Kingdom of Spain for comment, as attested by the Eurostat report annexed to the application, which incorporates the comments submitted by the Kingdom of Spain after it was sent a provisional version of that document. Furthermore, the Kingdom of Spain was informed beforehand, and in detail, of the precise purpose of those visits, and in particular of the fact that they would concern, amongst other issues, the data relating to the Autonomous Community of Valencia, as is apparent from the documents referred to in paragraph 69 of the present judgment.

80 Second, the Kingdom of Spain was informed, sufficiently clearly and specifically, before the visit organised in September 2013 that that visit would relate, in particular, to possible misrepresentations of the data relating to the Autonomous Community of Valencia, as the same documents disclose.

81 Accordingly, it must be held that the circumstances surrounding the organisation of the visits which were carried out in Spain by Eurostat in May, June and September 2012 and September 2013, and during which the information forming the basis of the contested decision was gathered, complied with the procedural requirements laid down by EU law.

82 Consequently, it must be held that exercise of the Kingdom of Spain's rights of defence, in the context of the investigation procedure that took place before the contested decision, was not impaired by the various visits that resulted in Eurostat gathering that information before the investigation procedure was initiated.

83 It follows from all the foregoing considerations that the Council did not infringe the Kingdom of Spain's rights of defence in relying, in the contested decision, on the information gathered when those visits took place.

84 Therefore, the first plea is unfounded.

Second plea: infringement of the right to good administration

Arguments of the parties

85 The Kingdom of Spain contends that the contested decision infringes the right to good administration, enshrined in Article 41(1) of the Charter of Fundamental Rights of the European Union ('the Charter').

86 It is incompatible with the requirement of objective impartiality inherent in that right for the Commission to entrust the conduct of an investigation procedure founded on Article 8(3) of Regulation No 1173/2011 to persons who previously took part in the visits that led the Commission to take the view that there were serious indications of facts justifying the initiation of such a procedure. In the present case, three of the fourteen members of staff who took part in the visits carried out by Eurostat in Spain, before the decision to launch the investigation was adopted, also formed part of the four-person team which was subsequently set to work by the Commission in the context of the investigation procedure. Furthermore, the department to which those three persons belong, namely Eurostat, presents a risk of partiality since it is responsible for assessing the debt and deficit data submitted by the Member States and therefore has an interest that an investigation procedure be conducted against the Member State which is alleged to have manipulated such data. Accordingly, it should be concluded that the investigation procedure was conducted under conditions that did not guarantee the Commission's objective impartiality and that that infringement of the right to good administration renders the contested decision, adopted by the Council at the end of that procedure, unlawful.

87 While submitting that the Kingdom of Spain cannot invoke Article 41(1) of the Charter as it is a Member State and not a person within the meaning of that provision, the Council, supported by the Commission, agrees that the Kingdom of Spain can rely upon the principle of good administration as a general principle of EU law. That said, the fact that the Commission entrusts the conduct of an investigation procedure initiated under Regulation No 1173/2011 to members of staff who previously took part in visits organised on the basis of Regulation No 479/2009 does not breach that principle, since the two procedural frameworks at issue are legally different. That is particularly the case as, at the end of such an investigation procedure, it is an institution other than the Commission, namely the Council, which is called upon to adopt a decision concerning the existence of a manipulation of the statistics and to impose a fine on the Member State concerned.

Findings of the Court

88 Article 41(1) of the Charter, which is headed 'Right to good administration' and forms part of Title V of the Charter, which is headed 'Citizens' rights', provides in particular that every person has the right to have his or her affairs handled impartially by the institutions of the European Union.

89 In the present case, it is a Member State that relies upon that provision. Without adopting a position as to whether a Member State may be regarded as or equated with a 'person' within the meaning of that provision, and can on that basis rely on the right that it lays down, which the Council and the Commission dispute, it should be pointed out that that right reflects a general principle of EU law (judgment of 8 May 2014, *N.*, C-604/12, EU:C:2014:302, paragraph 49), which may be relied upon by the Member States and in the light of which the contested decision should therefore be assessed.

90 Indeed, it is clear from the Court's case-law that the EU institutions are required to observe that general principle of law in the context of administrative procedures that are initiated against

Member States and are liable to result in decisions adversely affecting them (see, to that effect, judgments of 15 July 2004, *Spain* v *Commission*, C-501/00, EU:C:2004:438, paragraph 52, and of 24 June 2015, *Germany* v *Commission*, C-549/12 P and C-54/13 P, EU:C:2015:412, paragraph 89 and the case-law cited).

91 In particular, it is incumbent upon the EU institutions to comply with both components of the requirement of impartiality, which are, first, subjective impartiality, by virtue of which no member of the institution concerned may show bias or personal prejudice, and second, objective impartiality, under which there must be sufficient guarantees to exclude any legitimate doubt as to possible bias on the part of the institution concerned (judgment of 11 July 2013, *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, paragraphs 154 and 155 and the case-law cited).

92 In the present case, whilst the Kingdom of Spain does not call the Commission's subjective impartiality into question, it contends, on the other hand, that the contested decision is unlawful on the ground that the Commission breached the requirement of objective impartiality by entrusting the conduct of the investigation procedure to a team largely composed of members of Eurostat's staff who had already taken part in the visits organised by Eurostat in Spain before that procedure was initiated.

93 First of all, it must be pointed out that, as the Kingdom of Spain rightly submits, the Council and the Commission are not justified in asserting that such a line of argument must be rejected on the ground that it is the Council, and not the Commission, that adopted the contested decision at the end of the investigation procedure.

94 In the light of the Court's case-law cited in paragraph 91 of the present judgment, it must be held that, where a number of EU institutions are given separate responsibilities of their own in the context of a procedure initiated against a Member State that is liable to result in a decision adversely affecting it, each of those institutions is required, in respect of its own activities, to comply with the requirement of objective impartiality. Consequently, even where only one of them has breached that requirement, such a breach is liable to render the decision adopted by the other at the end of the procedure at issue unlawful.

95 Consequently, it is incumbent upon the Court to determine whether there are sufficient guarantees to exclude any legitimate doubt as to possible bias on the part of the Commission where it entrusts the conduct of an investigation procedure such as that which resulted in the contested decision to a team largely composed of members of Eurostat's staff who had already taken part in visits organised by Eurostat in the Member State concerned, before that procedure was initiated.

96 In that regard, it must be stated that those visits, on the one hand, and that investigation procedure, on the other, fall within separate legal frameworks and have different purposes.

97 The visits which Eurostat may carry out in the Member States, on the basis of Articles 11 and 11a of Regulation No 479/2009, have the purpose of enabling that Commission department to assess, in accordance with Article 8(1) of that regulation, the quality of the government debt and deficit data reported twice a year by the Member States, as is apparent from paragraphs 72 and 75 of the present judgment.

98 The investigation procedure is governed by Article 8(3) of Regulation No 1173/2011 and has the purpose, in accordance with that provision, of enabling the Commission to conduct all investigations necessary to establish the existence of misrepresentations of that data, made either

intentionally or by serious negligence, where it finds that there are serious indications of the existence of facts liable to constitute such a misrepresentation.

99 In the light of those separate legal frameworks and different purposes, it must be held that, even though the data which is the subject of, first, those visits and, second, that investigation procedure may partially coincide, the assessments which Eurostat and the Commission are respectively called upon to make in respect of that data are, on the other hand, necessarily different.

100 Consequently, the assessments made by Eurostat as to the quality of some of that data, following the visits made in a Member State, do not, in themselves, prejudge the view that might be taken by the Commission regarding the existence of misrepresentations relating to the same data should it subsequently decide to initiate an investigation procedure in that regard.

101 It follows that the fact that the conduct of an investigation procedure founded on Article 8(1) of Regulation No 1173/2011 is entrusted to a team largely composed of members of Eurostat's staff who have already taken part in visits organised by Eurostat in the Member State concerned on the basis of Regulation No 479/2009, before the institution of that procedure, does not, as such, permit the Court to conclude that the decision adopted at the end of that procedure is unlawful on account of a breach of the requirement of objective impartiality to which the Commission is subject.

102 Furthermore, it should be noted, first, that it is not to Eurostat, whose responsibilities are clearly defined by Regulation No 479/2009, as has been set out in paragraph 72 of the present judgment, but to the Commission, and therefore to the Commissioners acting as a collegiate body, that Article 8(3) of Regulation No 1173/2011 reserves (i) the power to decide to initiate the investigation procedure, (ii) responsibility for conducting the investigation and (iii) the power to submit to the Council the recommendations and proposals that are necessary at the conclusion of the investigation.

103 Second, Regulation No 1173/2011 does not entrust Eurostat's staff with any responsibility of their own in the conduct of the investigation procedure.

104 Accordingly, the role assigned to Eurostat's staff in the investigation procedure cannot be regarded as decisive for either the conduct or the outcome of that procedure.

105 It follows from the foregoing considerations that the fact that the conduct of the investigation procedure was entrusted to a team largely composed of members of Eurostat's staff who had already taken part in visits organised by Eurostat in Spain, before that procedure was initiated, cannot be regarded as vitiating the contested decision on account of an alleged breach by the Commission of the requirement of objective impartiality.

106 Therefore, the second plea is unfounded.

Third plea: there was no infringement

Arguments of the parties

107 The Kingdom of Spain contends that the various conditions required by Article 8(1) of Regulation No 1173/2011 in order for the Council to be justified in finding an infringement were not satisfied in the present case.

108 In that regard, it submits, first, that the facts which have been imputed to it cannot be classified as ‘misrepresentation’. Facts constituting misrepresentation, which amounts to an infringement prohibited by Article 8(1) of Regulation No 1173/2011, should be distinguished from those that fall within mere revision of data previously reported to Eurostat, which is a step permitted by Article 6 of Regulation No 479/2009. More specifically, Article 8(1) of Regulation No 1173/2011 should be understood as only permitting the Council to impose sanctions in respect of misrepresentations by the Member States regarding actual data. By contrast, misrepresentations regarding provisional data must be considered not to fall within the scope of that provision. An interpretation to the contrary would render Article 6 of Regulation No 479/2009 redundant inasmuch as that article permits the Member States to revise the provisional data that they have previously reported to Eurostat. In the present case, the facts referred to by the contested decision should have been regarded as falling within revision of the provisional data disclosed to the Commission in the notification of 30 March 2012, a matter of which Eurostat took note by publishing the revised data at issue.

109 Second, Article 8(1) of Regulation No 1173/2011 is to be regarded as not permitting the Council to impose sanctions in respect of all misrepresentations, but only those which have had the effect of jeopardising the economic and budgetary coordination and surveillance carried out by the Council and the Commission under Articles 121 and 126 TFEU and Protocol No 12. In the present case, the misrepresentations alleged against the Kingdom of Spain did not significantly prevent the Council and the Commission from discharging their responsibilities in this respect, on account of the speed with which the data at issue was subsequently revised and the amount of the expenditure concerned.

110 Third, serious negligence cannot be attributed to the Kingdom of Spain. The contested decision focuses on the existence of misrepresentations that concern only the deficit of a single autonomous entity, within the entire government deficit, whereas the relevant Member State, as a whole, displayed diligence. Nor does the contested decision take any account of the cooperation which that Member State provided during the investigation conducted by the Commission, after spontaneously reporting the irregularities at issue to the Commission.

111 The Council, supported by the Commission, counters, first of all, that the fact that Eurostat publishes data revised pursuant to Article 6 of Regulation No 479/2009 does not preclude a sanction from being imposed on the Member State concerned under Article 8(1) of Regulation No 1173/2011 when the publication of that data follows upon misrepresentations.

112 Next, the Council and the Commission state that Article 8(1) of Regulation No 1173/2011 permits a sanction to be imposed in respect of any misrepresentation of deficit and debt data relevant for application of Articles 121 and 126 TFEU and of Protocol No 12. All that data is essential to their tasks of economic and budgetary coordination and surveillance, as is apparent from recital 16 of Regulation No 1173/2011. Accordingly, the effect of a misrepresentation should be taken into account not in order to establish whether there is an infringement, but only in order to calculate the corresponding fine, as Delegated Decision 2012/678 permits and as was done in the present case.

113 As regards, finally, whether there is serious negligence attributable to the Kingdom of Spain, the Council and the Commission submit, first, that the Kingdom of Spain must be held responsible for the conduct of its territorial entities, as it would be in the context of an action for failure to fulfil obligations, and that it is not consistent with the facts to claim that that Member State spontaneously reported the existence of misrepresentations to the Commission. Second, the cooperation which such a Member State displayed during the investigation has no effect on establishment of the

infringement provided for in Article 8(1) of Regulation No 1173/2011, but may nevertheless be taken into account as a mitigating circumstance when calculating the fine, as Delegated Decision 2012/678 permits and as was done in the present case.

Findings of the Court

114 It must be stated at the outset that the Kingdom of Spain does not dispute the facts relied upon by the Council against it. It is thus common ground, first, that the data reported by the Kingdom of Spain to Eurostat on 30 March 2012 reduced its actual and planned government deficits for the years 2008 to 2011 by EUR 4.5 billion, of which EUR 1.9 billion was in respect of the Autonomous Community of Valencia alone, second, that the reduction concerning that entity is attributable to the fact that over a number of years the Audit Office of the Autonomous Community of Valencia validated accounts containing irregularities connected with a failure to record certain health expenditure and failure to comply with the accrual principle and, finally, that that situation endured despite repeated warnings given by the Court of Auditors of the Autonomous Community of Valencia.

115 On the other hand, the Kingdom of Spain calls into question the legal classification of the facts thus relied upon by the Council, by means of three series of arguments, the substance of which is recalled in paragraphs 108 to 110 of the present judgment and whose assessment requires first and foremost the interpretation of Article 8(1) of Regulation No 1173/2011.

116 As set out in that provision, three conditions must be met in order for the Council to be able to find an infringement. First, the Member State concerned must have made misrepresentations, second, those misrepresentations must concern deficit and debt data relevant for the application of Articles 121 and 126 TFEU or of Protocol No 12 and, third, that Member State must have acted intentionally or with serious negligence.

117 So far as concerns the first of those three conditions, the Kingdom of Spain contends, as is apparent from paragraph 108 of the present judgment, that Article 8(1) of Regulation No 1173/2011 must be understood as meaning that misrepresentations made regarding provisional data do not fall within the scope of that provision.

118 In that regard, it must, however, be pointed out that the wording of Article 8(1) of Regulation No 1173/2011 refers to all misrepresentations by the Member States, without limiting the scope of that provision to certain types of statements or errors. Furthermore, recital 16 of Regulation No 1173/2011, which sets out the objective pursued by that provision, states that it is intended to deter the Member States from making misrepresentations, without distinguishing between various types of misrepresentation.

119 Thus, it must be held that the scope of Article 8(1) of Regulation No 1173/2011, read in the light of recital 16 thereof, encompasses all misrepresentations by the Member States of data relating to their deficit and their debt which, as mentioned in paragraph 71 of the present judgment, must be reported to Eurostat under Article 3 of Regulation No 479/2009, including misrepresentations regarding data of a provisional nature.

120 That conclusion is not called into question by the Kingdom of Spain's argument that the inclusion within the scope of Article 8(1) of Regulation No 1173/2011 of misrepresentations made regarding provisional data would render Article 6 of Regulation No 479/2009 redundant inasmuch as that article permits the Member States to revise the provisional data that they have previously reported to Eurostat.

121 As is apparent from its very wording, Article 6 of Regulation No 479/2009 is designed not to give the Member States the power to inform Eurostat in the specific case where they revise provisional data following the discovery of a misrepresentation as referred to in Article 8(1) of Regulation No 1173/2011, but to oblige them, generally, to inform Eurostat of all instances of major revision of previously reported data. It therefore obliges the Member States to report both instances of revision of provisional data and instances of revision of actual data, irrespective of the power conferred upon the Council to impose a sanction on them if the data at issue has been misrepresented. The inclusion of misrepresentations relating to provisional data within the scope of Article 8(1) of Regulation No 1173/2011 accordingly has no effect on the operation of Article 6 of Regulation No 479/2009.

122 Consequently, the Kingdom of Spain's argument that Article 8(1) of Regulation No 1173/2011 must be understood as meaning that misrepresentations made regarding provisional data do not fall within the scope of that provision is unfounded.

123 As regards, next, the second condition referred to in paragraph 116 of the present judgment, the Kingdom of Spain submits that Article 8(1) of Regulation No 1173/2011 permits the Council only to impose sanctions in respect of misrepresentations which have had the effect of jeopardising the economic and budgetary coordination and surveillance carried out by the Council and the Commission under Articles 121 and 126 TFEU and Protocol No 12.

124 In that regard, it should be recalled that, as provided in Article 8(1) of Regulation No 1173/2011, the Council has the power to impose sanctions in respect of misrepresentations by the Member States of deficit and debt data relevant for the application of Articles 121 and 126 TFEU and Protocol No 12. Thus, that provision defines such misrepresentations by reference to the subject matter of the data concerned, namely the deficit and debt of the Member State at issue. On the other hand, it contains no indication as to the specific effect that they are supposed to produce, contrary to what the Kingdom of Spain contends.

125 Accordingly, Article 8(1) of Regulation No 1173/2011 must be interpreted as permitting the Council to impose a sanction in respect of all misrepresentations of data relating to the debt and deficit of the Member State concerned, irrespective of whether they have had the effect of jeopardising the economic and budgetary coordination and surveillance carried out by the Council and the Commission.

126 Therefore, the Kingdom of Spain's argument referred to in paragraph 123 of the present judgment is unfounded.

127 As regards, finally, the third condition referred to in paragraph 116 of the present judgment, under which the Member State concerned must have acted intentionally or with serious negligence in order for an infringement to be attributable to it, the Kingdom of Spain contends that it cannot be regarded as fulfilled since, first, the misrepresentations at issue in the present case concern only the deficit of a single autonomous community, within the entire government deficit, and, second, the Kingdom of Spain cooperated in the investigation conducted by the Commission, after spontaneously reporting the irregularities at issue to it.

128 So far as concerns, in the first place, the argument relating to the fact that the misrepresentations at issue in the present case concern only the deficit of a single autonomous community, within the entire government deficit, it need only be stated that assessment as to whether there is serious negligence on the part of the Member State concerned, for the purpose of classification as an infringement under Article 8(1) of Regulation No 1173/2011, depends not on the

extent to which the irregularities giving rise to the misrepresentations made by the Member State were of a limited nature, but on the magnitude of the Member State's breach of the obligation to exercise due care owed by it when drawing up and checking the data to be reported to Eurostat under Article 3 of Regulation No 479/2009.

129 In the second place, so far as concerns the fact that the Kingdom of Spain cooperated in the investigation conducted by the Commission, after spontaneously reporting the irregularities at issue to it, it must be pointed out that, as has been noted in paragraph 65 of the present judgment, initiation of the investigation procedure provided for in Article 8(3) of Regulation No 1173/2011 must be justified by there being serious indications of facts liable to constitute a misrepresentation made intentionally or by serious negligence.

130 It follows that it is necessary to assess whether that serious negligence exists in the light of the facts constituting misrepresentation, while disregarding that Member State's conduct after the misrepresentation.

131 Accordingly, contrary to the Kingdom of Spain's contentions, neither the fact that the misrepresentations at issue in the present case concern only the deficit of a single autonomous community, within the entire government deficit, nor the fact that the Kingdom of Spain cooperated in the investigation conducted by the Commission, after spontaneously reporting the irregularities at issue to it, is capable of calling into question the classification of serious negligence adopted by the Council.

132 Nonetheless, it should be noted that, whilst the fact that the Member State concerned cooperates in the detection of the misrepresentation and in the course of the investigations does not affect whether there is an infringement, it may be taken into consideration as a mitigating circumstance when calculating the fine, pursuant to Article 14(3)(e) of Delegated Decision 2012/678.

133 For all the foregoing reasons, the third plea must be rejected, in its entirety, as unfounded.

Fourth plea: the fine is disproportionate

Arguments of the parties

134 In its application, the Kingdom of Spain contended that the fine imposed by the contested decision is disproportionate because the time-frame taken into account to calculate it was defined incorrectly.

135 In that regard, it submitted that the Council infringed Article 14(2) of Delegated Decision 2012/678 according to which the fine must be calculated on the basis of a reference amount corresponding to 5% of 'the larger impact of the misrepresentation on the level of … the … deficit … for the relevant years covered by the notification'. That wording is to be understood as meaning that the Council must, first of all, measure the impact of the misrepresentations on the level of the deficit for each of the years covered by the notification and concerned by the misrepresentations, then, determine the year in respect of which that impact is largest and, finally, set the reference amount on the basis of this impact alone. In the present case, such an interpretation should have led the Council to set the reference amount on the basis of the expenditure not declared by the Kingdom of Spain in respect of 2011 alone (that is to say, EUR 862 million). However, the Council set the reference amount on the basis of the undeclared expenditure in respect of all the years that were covered by the notification of 30 March 2012 and concerned by misrepresentations, namely the

years 2008 to 2011 (that is to say, approximately EUR 1.9 billion). Accordingly, it is right that the Court should correct that error by reducing the reference amount to EUR 43.1 million (instead of EUR 94.65 million) and, consequently, the fine to EUR 8.62 million (instead of EUR 18.93 million).

136 In its reply, and then at the hearing, the Kingdom of Spain added, in this context, that the error committed by the Council had also resulted in it breaching the principle that penal provisions may not have retroactive effect.

137 In its defence, the Council, supported by the Commission, stated in response that the fine imposed by the contested decision had been calculated in accordance with Article 14(2) of Delegated Decision 2012/678. That provision is to be understood as meaning that the Council must, first of all, determine which years are covered by the notification and concerned by misrepresentations, then, measure the entire impact of those misrepresentations on the level of the deficit for all the years at issue and, finally, set the reference amount for the fine on the basis of that entire impact. In the present case, such an interpretation correctly led the Council to set the reference amount on the basis of the expenditure not declared by the Kingdom of Spain in respect of all the years that were covered by the notification of 30 March 2012 and concerned by misrepresentations, that is to say, the years 2008 to 2011.

138 The Council also submitted in its defence that, in so far as the Kingdom of Spain contests the retroactive application of Regulation No 1173/2011, the misrepresentations taken into account in order to calculate the fine were made on 30 March 2012, that is to say, after the entry into force of Regulation No 1173/2011, on 13 December 2011.

139 Nevertheless, at the hearing, the Council and the Commission submitted that the reliance on the principle that penal provisions may not have retroactive effect must be regarded as a plea in law put forward at the stage of the reply, that is to say, a plea which is new, within the meaning of Article 127(1) of the Rules of Procedure of the Court of Justice, and inadmissible under that provision.

Findings of the Court

– *Admissibility*

140 As provided in Article 127(1) of the Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

141 Nevertheless, in accordance with the Court's settled case-law, an argument which amplifies a plea made in the application initiating proceedings and is closely linked with it cannot be declared inadmissible (see, to that effect, judgment of 16 July 2015, *Commission* v *Parliament and Council*, C-88/14, EU:C:2015:499, paragraph 13 and the case-law cited).

142 In the present case, first of all, the Kingdom of Spain's argument that the fine imposed by the contested decision was imposed in breach of the principle that penal provisions may not have retroactive effect forms part of the arguments in the reply which amplify the fourth plea put forward in the application initiating proceedings. Also, analysis of that argument and that plea reveals that they both criticise one and the same aspect of the contested decision, namely the fact that the Council calculated the reference amount for the fine which it intended to impose on the Kingdom of Spain by taking account of all the misrepresentations made by the latter in the notification of

30 March 2012, relating to undeclared expenditure in respect of the years 2008 to 2011, instead of taking account only of the misrepresentations made by it in respect of 2011. On that basis, the argument and plea at issue are closely linked.

143 On those grounds, the argument alleging breach of the principle that penal provisions may not have retroactive effect must be declared admissible.

– *Substance*

144 It is necessary to examine the argument alleging breach of the principle that penal provisions may not have retroactive effect, since it calls into question the very existence of the fine imposed on the Kingdom of Spain, and then the arguments relating to infringement of Article 14(2) of Delegated Decision 2012/678, which relate only to the manner in which that fine is calculated.

145 So far as concerns, in the first place, the argument alleging breach of the principle that penal provisions may not have retroactive effect, it should be pointed out first of all that it is clear from the Court's case-law that the principle that penal provisions may not have retroactive effect constitutes a general principle of EU law (see, to that effect, judgments of 10 July 1984, *Kirk*, 63/83, EU:C:1984:255, paragraph 22, and of 8 February 2007, *Groupe Danone* v *Commission*, C-3/06 P, EU:C:2007:88, paragraph 87). That general principle of law requires the infringement attributed to a person and the penalty imposed on that basis to correspond to those which were laid down at the time when the action or omission constituting the infringement occurred (see, to that effect, judgments of 10 July 1984, *Kirk*, 63/83, EU:C:1984:255, paragraph 21, and of 8 September 2015, *Taricco and Others*, C-105/14, EU:C:2015:555, paragraph 56).

146 More specifically, first, that general principle of law is also applicable to fines of an administrative nature (see, to that effect, judgment of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 202). Consequently, the imposition of a fine under Article 8(1) of Regulation No 1173/2011 cannot escape application of that general principle of law, notwithstanding the fact that Article 9 of the regulation states that such a sanction is of an administrative nature.

147 Second, the Member States are also entitled to rely on the general principle that penal provisions may not have retroactive effect, in order to call into question the legality of the fines imposed upon them if they fail to comply with EU law (see, to that effect, judgment of 11 December 2012, *Commission* v *Spain*, C-610/10, EU:C:2012:781, paragraph 51).

148 As to whether that general principle of law has been breached in the present case, as the Kingdom of Spain contends, it is to be noted first of all that, under Article 3(2) of Regulation No 479/2009 and the materially identical provision that was previously contained in Regulation No 3605/93 which entered into force on 1 January 1994, the Member States have been required, since that date, to report to Eurostat, before 1 April of each year, their planned government deficit for the year at issue, an up-to-date estimate of their actual government deficit for year n-1 and their actual government deficits for years n-2, n-3 and n-4.

149 It was under that provision that the Kingdom of Spain sent Eurostat the notification of 30 March 2012, setting out, in particular, the data relating to its government deficits for the years 2008 to 2011, as is common ground between the parties.

150 Next, Article 8(1) of Regulation No 1173/2011 has provided, since that regulation entered into force on 13 December 2011, that misrepresentation by a Member State, intentionally or by

serious negligence, of the data in such a notification constitutes an infringement liable to result in the imposition of a fine.

151 In the present case, it is common ground between the parties that the notification of 30 March 2012, which was made after Regulation No 1173/2011 entered into force, contained misrepresentations of the data relating to the government deficits of the Kingdom of Spain for the years 2008 to 2011 and, more specifically, reduced the deficits of the Autonomous Community of Valencia in those years, as is clear from paragraphs 114, 135 and 137 of the present judgment.

152 Accordingly, the infringement attributed to the Kingdom of Spain and the sanction imposed upon it on the basis of Article 8(1) of Regulation No 1173/2011 correspond to those which were laid down at the time when those misrepresentations were made. Consequently, the contention that the contested decision breaches the principle that penal provisions may not have retroactive effect must be rejected as unfounded.

153 As regards, in the second place, the Kingdom of Spain's argument alleging infringement of Article 14(2) of Delegated Decision 2012/678, on the ground that the fine imposed upon it was calculated incorrectly, it is apparent from recital 7 of the contested decision that the Council determined the reference amount for the fine in reliance upon that provision, which was itself adopted on the basis of Article 8(4) of Regulation No 1173/2011 and with the aim stated in recital 17 of that regulation.

154 As provided by Article 14(2) of Delegated Decision 2012/678, the reference amount had to be set, in the present case, at 5% of the larger impact of the Kingdom of Spain's misrepresentations on the level of its deficit for the relevant years covered by the notification of 30 March 2012.

155 It is common ground between the parties, first, that 'the relevant years covered' by that notification, within the meaning of Article 14(2) of Delegated Decision 2012/678, are the years 2008 to 2011, second, that the 'impact' of the misrepresentations on the level of the deficit of the Kingdom of Spain, within the meaning of that provision, corresponds to the amount of the expenditure of the Autonomous Community of Valencia that was not declared in those years and, third, that that expenditure amounts to EUR 29 million for 2008, EUR 378 million for 2009, EUR 624 million for 2010 and EUR 862 million for 2011, that is to say, nearly EUR 1.9 billion in total.

156 On the other hand, as stated in paragraphs 135 and 137 of the present judgment, the parties disagree as to how the concept of 'larger impact', within the meaning of Article 14(2) of Delegated Decision 2012/678, is to be defined, in the absence of any definition in that provision.

157 The various language versions of the provision in which that concept appears do not enable its meaning to be determined clearly and unequivocally, as the Advocate General has noted in point 163 of her Opinion.

158 Accordingly, the concept at issue should be interpreted in the light of the context and objective of Article 14(2) of Delegated Decision 2012/678 (see, to that effect, judgment of 4 February 2016, *C & J Clark International and Puma*, C-659/13 and C-34/14, EU:C:2016:74, paragraph 122 and the case-law cited).

159 Since Article 14(2) of Delegated Decision 2012/678 is intended to specify the criteria for establishing the amount of fines imposed pursuant to Article 8(1) of Regulation No 1173/2011, its wording should be interpreted in the light of the aim pursued by the latter provision.

160 As has been noted in paragraph 118 of the present judgment, Article 8(1) of Regulation No 1173/2011 has the aim of deterring the Member States from making misrepresentations, by permitting the Council to impose penalties in respect of them. Article 8(2) of that regulation states that the fines referred to in Article 8(1) must be effective, dissuasive and proportionate to the nature, seriousness and duration of the misrepresentation.

161 As the Advocate General has observed in point 165 of her Opinion, if the concept of 'larger impact' in Article 14(2) of Delegated Decision 2012/678 were to be understood as meaning that a fine must be calculated on the basis of the impact that misrepresentations had in a single year, although they concern a number of years, the fine would be neither proportionate to the period covered by those misrepresentations, nor, therefore, dissuasive.

162 Accordingly, the concept of 'larger impact', within the meaning of Article 14(2) of Delegated Decision 2012/678, must be understood, in the light of the aim pursued by the provision at issue, as referring to the entire impact that the misrepresentations had on the deficit or the debt of the Member State making them, over all the years that are covered by its notification and concerned by the misrepresentations.

163 In the present case, the Council could therefore legitimately take the view, in recital 7 of the contested decision, that the reference amount for the sanction to be imposed on the Kingdom of Spain had to be set at 5% of the total amount of the expenditure not declared by it, in respect of the Autonomous Community of Valencia, in the years 2008 to 2011.

164 In the light of all the foregoing considerations, the fourth plea must be rejected as unfounded.

165 As all the pleas put forward by the Kingdom of Spain in support of its action for annulment must be rejected, the action must be dismissed in its entirety.

Costs

166 Article 138(1) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. In the present case, since the Kingdom of Spain has been unsuccessful, it must, in accordance with the form of order sought by the Council, be ordered to bear, in addition to its own costs, those incurred by the Council.

167 In addition, Article 140(1) of the Rules of Procedure provides that the Member States and institutions which have intervened in the proceedings are to bear their own costs. Consequently, the Commission must bear its own costs.

On those grounds, the Court (Grand Chamber) hereby:

1. **Dismisses the action;**

2. **Orders the Kingdom of Spain to bear, in addition to its own costs, those incurred by the Council of the European Union;**

3. **Order the European Commission to bear its own costs.**

[Signatures]

* Language of the case: Spanish.