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Citation for published version (APA):

Chamon, M. (2018). Fining Member States under the SGP, or how enforcement is different from implementation under Article 291 TFEU: Spain v. Council. *Common Market Law Review*, 55(5), 1495-1520.

Document status and date:

Published: 01/01/2018

Please check the document version of this publication:

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Fining Member States under the SGP, or how enforcement is different from implementation under Article 291 TFEU: *Spain v. Council*

Case C-521/15, *Kingdom of Spain v. Council of the European Union*, Judgment of the Court of Justice (Grand Chamber) of 20 December 2017, EU:C:2017:982

1. Introduction

While this case finds its origins in the context of the reinforced economic governance in the Eurozone, it is of fundamental importance for the EU legal order at large. Although the Lisbon Treaty seems to regulate exhaustively the implementation of EU law through Article 291 TFEU, the Court in the present case has carved out the enforcement of EU law (at least *vis-à-vis* the Member States) therefrom. In addition, the judgment clarifies subsidiary issues related to the procedural rights of Member States in enforcement proceedings under EU law. The fundamental constitutional point raised by this judgment relates to the executive function of the Council as it identifies a previously unknown *sui generis* implementing power. The Court did so in order to hold Article 51(a), third indent, of the Statute (which entrusts jurisdiction to the General Court) inapplicable and to accept jurisdiction to hear the case.

The actual dispute itself resulted from the amendment of the Stability and Growth Pact (SGP) by the six-pack. One feature of the six-pack was that it introduced sanctions also in the preventive part of the SGP.¹ This is also reflected in Article 8 of Regulation 1173/2011² which henceforth allowed the Council to impose fines on euro Member States for the manipulation of statistics, or more precisely for the “misrepresentation by Member States of deficit and debt data either intentionally or through serious negligence”. The

1. Martucci, “La longue marche vers le cadre budgétaire intégré de la zone euro”, 616 *Rev. de l’UE* (2018), 157–165; Antpöhler, “Emergenz der europäischen Wirtschaftsregierung – Das Six Pack als Zeichen supranationaler Leistungsfähigkeit”, 72 *ZaöRV* (2012), 353–395, 367.

2. Art. 8 does not as such come under the Regulation’s chapter III (on sanctions in the preventive part of the SGP) but it is in overarching provision relevant to the entire application of Arts. 121 and 126 TFEU.

legislature deemed this power necessary in light of the role played by statistical fraud in triggering the Greek and euro crises.³

2. Factual background of the case and legal issues

2.1. Legal framework

Article 8 of Regulation 1173/2011 prescribes that the Commission is empowered to make all necessary investigations, especially when there are serious indications that a Member State is misrepresenting its deficit and debt statistics. The Regulation is careful to spell out that any sanctions imposed are administrative in nature but, given their punitive character, it also emphasizes that the “Commission shall fully respect the rights of defence of the Member State concerned during the investigations”,⁴ *inter alia* laying down a right to be heard and the opportunity to comment on all facts relied upon by the Commission. Ultimately, fines are imposed by the Council, acting under normal (not reversed) QMV rules, pursuant to a Commission recommendation.

Article 8 of Regulation 1173/2011 thus links up with the provisions of Chapter III of the earlier Regulation 479/2009, dealing with the quality of data supplied by (all) Member States. To ensure the quality and comparability of statistics, Regulation 479/2009 instructs the Commission (Eurostat) to carry out regular dialogue visits to the Member States, and mandates it to carry out methodological visits “where significant risks or problems with respect to the quality of the data have been clearly identified.”⁵ Although the methodological visits clearly have a “corrective” dimension to them, they have no punitive character, nor do they result in punitive measures. As a result, the question of the rights of defence does not arise and Regulation 479/2009 merely provides that “the Commission (Eurostat) shall transmit its provisional findings to the Member States concerned for comments.”⁶

The actual link between Article 8 of Regulation 1173/2011 and Eurostat’s methodological visits to Member States is then only made explicit in the Commission’s Delegated Decision 2012/678,⁷ supplementing Regulation

3. See Lastra and Louis, “European Economic and Monetary Union: History, trends, and prospects”, 32 *YEL* (2013), 1–150, p. 122.

4. See Art. 8(3) of Regulation 1173/2011, O.J. 2011, L 306/1.

5. See Art. 11b(2) of Regulation 479/2009, O.J. 2009, L 145/1 as amended by Regulation 679/2010, O.J. 2010, L 198/1.

6. See Art. 11 of Regulation 479/2009.

7. Delegated Decision 2012/678, O.J. 2012, L 306/21.

1173/2011 and establishing the framework for its investigations. The Decision provides in its Recital 8 that any formal investigation (under Regulation 1173/2011) is normally to be preceded by a methodological visit (foreseen in Regulation 479/2009). This is not a condition *sine qua non*, however, since Article 2(3) of the delegated decision provides that “[t]he 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 Regulation (EC) No 479/2009.”

2.2. *Facts of the case*

The relevant facts of the case may be summarized as follows: in May 2012 Spain notified Eurostat that the deficits for the years 2008–2012 which it had reported two months earlier (in March 2012) had to be revised in light of undeclared expenditure by the Autonomous Community of Valencia. Eurostat subsequently carried out four visits to Spain in a period spanning from May 2012 to September 2013. The first of these visits was organized as a “preparatory technical visit”, the next two as “dialogue visits” and the last one as an “ad hoc” visit.⁸ In July 2014 the Commission initiated the formal investigation under Regulation 1173/2011.⁹ In May 2015 the Commission concluded its investigation and adopted a recommendation for the Council to impose a fine,¹⁰ which the Council did in July 2015, requiring Spain to pay EUR 18.93 million.¹¹

Before challenging the Council’s fine in the presently annotated case, Spain had also challenged the Commission’s 2014 decision to initiate investigations. Spain requested the annulment of the Commission’s decision since (i) it related to data on years preceding the entry into force of Regulation 1173/2011, (ii) Spain claimed it had given clear and adequate explanations for the revision of the data and (iii) because the Commission had allegedly launched its investigation secretly, thus breaching Spain’s rights of defence.¹² The General Court dismissed this action as inadmissible in line with its well-established jurisprudence on the lack of legal effects produced by preparatory measures.¹³

8. Judgment, para 69.

9. *Ibid.*, para 29.

10. *Ibid.*, para 30.

11. *Ibid.*, para 31.

12. Action brought on 22 Sept. 2014, Case T-676/14, *Spain v. Commission*, see O.J. 2014, C 388/25.

13. Case T-676/14, *Spain v. Commission*, EU:T:2015:602.

2.3. *Legal issues and pleas*

The first issue which the Court had to address was one of jurisdiction. The contested decision had initially been adopted and published as a “Council Decision” but was retroactively requalified as a “Council implementing Decision”, presumably to be in line with Article 291(4) TFEU. In terms of allocation of jurisdiction between the General Court and the Court of Justice this was important, since Article 51 of the Statute of the Court provides that the exception to the General Court’s general jurisdiction for direct actions does not apply when the Council acts at issue are either trade defence measures, implementing measures in the sense of Article 291(2) TFEU or acts based on Article 108(2) TFEU. In those three scenarios the Court of Justice does not exceptionally have jurisdiction and the general rule (conferring jurisdiction on the General Court) applies again.

The pleas advanced by Spain in the procedure before the Court partially mirrored those it advanced before the General Court but also targeted the formal investigation of the Commission and the Council’s fine. From a procedural perspective and according to Spain, (i) the Commission had infringed its rights of defence by pursuing part of its investigation through visits outside the framework of the delegated decision; and (ii) the Commission had violated the principle of good administration (specifically the requirement of impartiality) by drawing the members of its formal investigative team largely from the same civil servants that had conducted the visits from May 2012 to September 2013. Substantively, Spain argued (iii) that it had not misrepresented any data in the sense of Article 8(1) of Regulation 1173/2011; and (iv) that the fine was incorrectly calculated and could only be based on the data related to years following the entry into force of Regulation 1173/2011.

3. **The Advocate General’s Opinion**

3.1. *Jurisdiction*

On the issue of jurisdiction, Advocate General Kokott found in favour of referring the case to the General Court after weighing the elements in favour and against this position. According to the Advocate General, a case could be made to attribute jurisdiction to the Court of Justice, since the classification of an act by the Council itself is not determinative for its legal classification,¹⁴

14. Opinion, para 45.

and since the basic legislative act did not refer to Article 291 TFEU.¹⁵ In addition, the procedure *in casu* showed some similarities with the infringement procedure of Article 258 TFEU,¹⁶ and the contested decision was a follow-up measure to the decisions taken by the Council under Articles 121 and 126 TFEU which, differently from Article 291 TFEU, confer executive powers directly on the Council.¹⁷ The Advocate General also invoked the *Short-selling* case in which the Court had ruled that Article 291 TFEU in any event is not exhaustive as to the assignment of implementing powers,¹⁸ thus providing the possibility of the contested decision having been adopted pursuant to a *sui generis* implementing power (and thus not pursuant to Art. 291 TFEU).¹⁹

On the other hand, the imposition of a fine appeared to the Advocate General as a typical “implementing” measure,²⁰ the fact of it being directed to a Member State rather than a private person not being relevant.²¹ In addition, the Advocate General noted that the exception to an exception should not be interpreted strictly, since it triggers a return to the general rule.²² As a counterargument to the one based on Articles 121 and 126 TFEU, the Advocate General observed that any sanctions imposed by follow-up measures are distinct from the measures adopted pursuant to the Treaty provisions themselves, resulting in a low risk that both would have to be adjudicated in the same dispute.²³ Finally, the Advocate General noted that recognizing the jurisdiction of the General Court would allow for an additional level of judicial review.²⁴ While it is unclear which of these arguments tilted the balance, Advocate General Kokott ultimately concluded that the action should have been brought before the General Court.

3.2. *Rights of defence*

With its first plea, Spain in essence complained of the fact that the Commission had relied on information gathered during the visits under

15. *Ibid.*, para 46.

16. *Ibid.*, para 53.

17. *Ibid.*, paras. 49–50.

18. In *Short-selling*, the Court ruled that the legislature may confer implementing powers on an EU agency, even if Art. 291 TFEU only foresees the Member States, Commission or Council adopting implementing measures. See Case C-270/12, *United Kingdom v. Council and Parliament*, EU:C:2014:18.

19. *Opinion*, para 52.

20. *Ibid.*, para 47.

21. *Ibid.*, para 48.

22. *Ibid.*, para 54.

23. *Ibid.*, para 57.

24. *Ibid.*, para 56.

Regulation 479/2009 and *prior* to the formal investigation to build its case. On this, the Advocate General noted that Regulation 1173/2011 requires there to be *serious* indications of misrepresentation, deducing from this that a mere suspicion would not allow the Commission to initiate a formal investigative procedure.²⁵ To this end, the Delegated Decision 2012/678 requires the Commission to rely on the instruments provided by Regulation 479/2009 to substantiate the required serious indications.²⁶ Advocate General Kokott found this to constitute the first phase in the (broadly construed) investigation procedure. Under the second phase, the Commission's powers are not based on Regulation 479/2009 anymore but on Regulation 1173/2011 with the initiation of the *formal* investigation procedure.²⁷

To the Advocate General, the essence of Spain's complaint lay in the fact that its rights of defence had not been respected during that first phase of the investigation procedure. Noting that Regulation 479/2009 does not explicitly guarantee those rights (cf. above),²⁸ the Advocate General observed that a general requirement of respect for the rights of defence can in any event be drawn from the Court's case law.²⁹ In light of this case law, especially in the area of anti-trust, the Advocate General suggested that the rights of defence guaranteed in the second phase (under Regulation 1173/2011) might not be sufficient to make up for the lack of safeguards in the first phase.³⁰ Elaborating this analogy further, however, she noted that there is a fundamental difference between an undertaking in an anti-trust procedure and the procedure *in casu*: for Member States, there is a duty of loyal cooperation under Article 4(3) TFEU,³¹ and Spain's rights of defence had thus not been violated.³²

3.3. Impartiality

As regards Spain's argument that the objective impartiality of the Commission was put into doubt by the personal overlap between the teams conducting the visits and the investigation team, the Advocate General sidestepped the more fundamental issue whether a Member State can rely on Article 41 of the Charter. While the Commission argued against this, Advocate General Kokott noted that in any event there is a general principle of

25. *Ibid.*, para 64.

26. *Ibid.*, para 67.

27. *Ibid.*, paras. 73–74.

28. *Ibid.*, para 80.

29. *Ibid.*, para 81.

30. *Ibid.*, paras. 82–83.

31. *Ibid.*, paras. 88–93.

32. *Ibid.*, para 94.

a right to good administration which includes impartiality.³³ On the merits, she in principle agreed with Spain and identified a series of alternative institutional proceedings that would have ensured greater impartiality.³⁴ This was not the endpoint of the Advocate General's reasoning, however, as she proceeded by applying Article 52(1) of the Charter by analogy: a restriction of the right to an impartial administration could be justified if it is provided by law and if the essence of the right is respected. In testing these conditions, the Advocate General relied *inter alia* on the delegated decision to argue that the restriction was founded on an adequate legal basis.³⁵ The essence of the right to an impartial administration was not affected, in turn, because it is the Council, rather than the Commission, that takes the final decision on a fine.³⁶ The Advocate General further held the restriction to be proportionate given the complex nature of the subject matter to be investigated and the Commission's limited (human) resources and the fact that it is also in Spain's interest that Eurostat civil servants familiar with the file are part of the investigation.³⁷

3.4. *The concept of misrepresentation*

In its third plea, Spain argued that (i) a revision of provisional statistics in good faith cannot qualify as a misrepresentation, that (ii) even if there was misrepresentation this was not relevant since the Commission had not (yet) relied on the statistics to assess Spain's compliance with the SGP and that (iii) its misconduct could not be qualified as *serious*.

In a rather contorted way the Advocate General found that revisions of provisional data may indeed be misrepresentations: although she explicitly recognized that a Commission delegated act cannot determine the scope of the provision in the basic legislative act which it purports to supplement, she nonetheless referred to the delegated decision which provides that revisions resulting from methodological changes or from reviewing temporary figures are not necessarily misrepresentations *if* they are clearly and adequately explained.³⁸ However, the revision *in casu* resulted from a correction of Valencia's downright misapplication of the accounting rules. As a result, it was a misrepresentation, regardless of whether Spain could give adequate explanations.³⁹

33. *Ibid.*, paras. 96, 97.

34. *Ibid.*, paras. 101, 103.

35. *Ibid.*, para 106.

36. *Ibid.*, para 107.

37. *Ibid.*, paras. 110–112.

38. *Ibid.*, paras. 122–123.

39. *Ibid.*, para 126.

On the second issue, the Advocate General relied on the text of Regulation 1173/2011 to rule out the proposition that sanctions could only be imposed if the misrepresentation had resulted in knock-on effects in the enforcement of the SGP. The objective finding of a misrepresentation (that is intentional or the result of serious negligence) is in itself sufficient for the Council to impose fines.⁴⁰

On the third question, the Advocate General noted that while the origin of the misrepresentation lay in the misapplication of the accounting rules by Valencia, the actual contentious offence was the *reporting* of the data to the Commission.⁴¹ Since the reporting took place after Regulation 1173/2011 entered into force, the Advocate General dismissed Spain's arguments on the retroactive application of the Regulation.⁴² Since Spain had conceded that Valencia had patently breached the EU's accounting rules, and given that Spain is accountable for the conduct of its subnational authorities, the Advocate General concluded that the reporting of data resulting from a manifestly incorrect application of the accounting rules amounted to serious negligence in the sense of Article 8 of Regulation 1173/2011.⁴³

3.5. *The calculation of the fine*

Spain's fourth plea centred around the correct interpretation of Article 14(2) of the Commission's delegated decision, which sets out how the Commission is to calculate the fine it recommends to the Council. That provision lays down a maximum of 5 percent of the "larger impact" of the misrepresentation for the relevant reported years. Spain seemed to rely on the Danish, Estonian and Swedish language versions of the Decision to argue that the reference amount should not be the sum of the impact of the misreporting in the four years concerned but only the highest number of the four years in question. The Advocate General rejected this reading based on a textual reading of the provision and in light of its purpose.⁴⁴ Spain's objection to the application of Regulation 1173/2011 to budgetary years preceding the Regulation's entry into force also fell flat with the Advocate General, who again recalled that Spain's offence did not lie in the calculation of the expenditure as such, but in the reporting of the data to the Commission.⁴⁵

40. *Ibid.*, paras. 133–136.

41. *Ibid.*, paras. 139–140.

42. *Ibid.*, para 147.

43. *Ibid.*, paras. 144–145, 151.

44. *Ibid.*, paras. 162–165.

45. *Ibid.*, paras. 170–172.

4. The Court's judgment

4.1. *Jurisdiction*

As to the question whether the contested decision was an implementing measure in the sense of Article 291(2) TFEU (the only relevant exception listed in Art. 51 of the Statute), the Court, like the Advocate General, observed that the species of implementing powers is not exhaustively regulated in Article 291(2) TFEU.⁴⁶ The Court therefore proceeded by verifying whether the implementing power *in casu* was an implementing power in the sense of Article 291(2) TFEU.⁴⁷ Crucially and determinatively, the Court noted that this required taking account of Article 291 TFEU *as a whole*.⁴⁸ In doing so it noted that the Council's function under Article 291(2) TFEU is essentially the same as that of the Member States under Article 291(1) TFEU, the difference being that under Article 291(2) TFEU *uniform* conditions in implementation are required (for whatever reason).⁴⁹

Linking this to the contested decision, the Court found that the act of imposing a fine on a Member State is conceptually different from the types of acts which Member States could adopt under Article 291(1) TFEU.⁵⁰ In further support of its finding, the Court noted that one of the other two exceptions in Article 51 of the Statute, *viz.* the trade defence measures which the Council might adopt, would become completely redundant if the relevant exception *in casu* (implementing measures of the Council pursuant to Art. 291 TFEU) was to be construed so broadly as to also encompass the contested act.⁵¹ For the sake of completeness, the Court added that Regulation 1173/2011 does not refer to Article 291 TFEU and that the purpose of the power the exercise of which led to the contested decision is not the uniform implementation of EU law but the deterrence of Member States from misrepresenting budgetary statistics.⁵²

4.2. *Rights of defence*

On Spain's rights of defence the Court noted that (some of) Eurostat's visits had taken place before the entry into force of the Commission's delegated

46. Judgment, paras. 41, 43.

47. *Ibid.*, para 44.

48. *Ibid.*, para 45.

49. *Ibid.*, paras. 47–48.

50. *Ibid.*, para 49.

51. *Ibid.*, para 50.

52. *Ibid.*, paras. 52, 53.

decision and before launching the formal investigation procedure,⁵³ but all of them after the entry into force of Regulation 1173/2011, which requires the Commission to respect the Member States' rights of defence.⁵⁴ Although the Court held that the Regulation only applies to the proceedings in the formal investigation, it equally found that the rights of defence should also be upheld beforehand.⁵⁵ The Court then answered positively on the question whether Regulation 479/2009 allowed the Commission to perform the four visits before launching the investigation and whether Spain's rights of defence were respected during those visits: ensuring the soundness of the statistics reported by Member States authorities is precisely the function of the dialogue and methodological visits foreseen by Regulation 479/2009.⁵⁶ The fact that a *sui generis* "ad hoc" visit, but no formal methodological visit, had been carried out by Eurostat did not amount to an *ultra vires* act according to the Court since the delegated decision makes clear that there is no absolute obligation to organize a methodological visit.⁵⁷ Based on the documents before it, the Court also found that the Commission had informed Spain that its visits related to the possible misrepresentation of data collected by Valencia.⁵⁸

4.3. Impartiality

Like the Advocate General, the Court explicitly refrained from addressing the question whether a Member State can rely on Article 41 of the Charter, noting that the right to good administration in any event reflects a general principle of EU law.⁵⁹ On the merits, the Court held that the Council and Commission were wrong to argue that the impartiality of the Commission was not at issue as it is the Council that imposes fines under Regulation 1173/2011.⁶⁰ Rather, each actor in a composite procedure is required to be impartial in dispensing its responsibilities.⁶¹ Verifying whether the personal overlap in Eurostat teams breached the requirement of impartiality, the Court noted that the visits on the one hand and the investigation on the other hand are subject to different frameworks and pursued different purposes.⁶² The former come under Regulation 479/2009 and are part of the permanent cooperation between

53. Ibid., para 62.

54. Ibid., para 66.

55. Ibid., paras. 67, 68.

56. Ibid., paras. 71–73.

57. Ibid., paras. 74–77.

58. Ibid., para 80.

59. Ibid., paras. 89–90.

60. Ibid., para 93.

61. Ibid., para 94.

62. Ibid., para 96.

national authorities and Eurostat while the latter comes under Regulation 1173/2011 and entrusts an exceptional and more inquisitorial task to the Commission.⁶³ It follows from this, according to the Court, that Eurostat and the Commission necessarily make different assessments, whereby the former's assessment does not in itself prejudice the latter's assessment.⁶⁴ As a result, the simple overlap as such cannot amount to a breach of the requirement of objective impartiality.⁶⁵ The Court added to this that the recommendation to the Council under Regulation 1173/2011 is made by the Commission as a college, not by Eurostat (or the investigation team) and that again the Commission conducts the formal investigation (not Eurostat).⁶⁶

4.4. *The concept of misrepresentation*

Without referring to the Commission's delegated decision (unlike the Advocate General), the Court found that the concept of misrepresentation in Article 8(1) of Regulation 1173/2011 also covered misrepresentations of provisional data.⁶⁷ Similarly to the Advocate General, but more pointedly, the Court further noted that Article 8(1) of the Regulation defines "misrepresentations by reference to the subject matter of the data concerned, [not by reference] to the specific effect that they are supposed to produce."⁶⁸ As to whether there was serious negligence on the part of Spain, the Court rejected Spain's argument that a misrepresentation originating from one autonomous community within Spain could not qualify as serious negligence on the part of Spain, and while it accepted that Spain had cooperated in good faith, it found that this could only have a bearing on the calculation of the fine, not on the qualification of the infringement.⁶⁹

4.5. *The calculation of the fine*

On the retroactivity of the fine, the Court noted that the Member States were under an obligation since 1994 to report correct data to Eurostat and that the actual misrepresentation by Spain occurred in March 2012, after the entry into force of Regulation 1173/2011.⁷⁰ As to the correct interpretation of Article 14(2) of the Commission's delegated decision and the determination of the

63. *Ibid.*, paras. 97–98.

64. *Ibid.*, paras. 99, 100.

65. *Ibid.*, para 101.

66. *Ibid.*, para 102.

67. *Ibid.*, paras. 118–122.

68. *Ibid.*, para 124.

69. *Ibid.*, paras. 131–132.

70. *Ibid.*, paras. 148–152.

correct reference amount, the Court agreed with the Advocate General that the provision should be interpreted in light of the purpose of the sanctioning mechanism, *viz.* deterring the Member States from misrepresenting the statistics on their debt and deficits.⁷¹ In light of this, the Council had properly calculated the fine imposed on Spain.

5. Comment

The present case, decided by the Grand Chamber, gives much food for thought and this in relation to a number of questions of EU law, amongst which the Council's executive powers; the relationship between Commission delegated acts and formal legislation; the application of the reinforced SGP; the procedural guarantees enjoyed by the Member States (including in how far they can invoke the Charter); and the *effet utile* interpretation of EU law.

5.1. *The Council's executive powers*

The Lisbon Treaty introduced, in Articles 289 to 291 TFEU, the distinction between legislative acts, delegated acts and implementing acts. As far as implementing acts go, Article 291(1) TFEU explicitly lays down the idea of *Vollzugsföderalismus*: in the EU's federal set-up, federal legislation is normally implemented at the State level, not by a federal administration. However, Article 291(2) TFEU immediately makes clear that exceptions apply when binding EU law requires uniform conditions in its implementation. In such a case, the Commission is empowered with an executive function. Exceptionally the Council may be so empowered, since Article 291(2) TFEU provides that "in duly justified cases and in the cases provided for in Article 24 and 26 TEU" the Council retains an implementing function post-Lisbon.

Still, in addition to Article 291(2) TFEU there are also numerous "autonomous executive powers" (*vertragsunmittelbare Verwaltungskompetenzen*) to be found in the Treaties: legal bases conferring a non-legislative competence directly on the Council (or exceptionally the Commission).⁷² The procedure through which the Council acts pursuant to these legal bases may *prima facie* seem identical to a special legislative procedure, but since the legal bases do not explicitly qualify the procedure as legislative, the acts adopted pursuant thereto are not legislative in nature and

71. *Ibid.*, paras. 158–162.

72. See e.g. Art. 42, 43(3), 66, 75, 78(3), 103(1) TFEU.

the procedure is not subject to the requirements of public deliberation (cf. Art. 16(8) TEU) or subsidiarity scrutiny (protocol No 2).⁷³

One could say that pre-Lisbon these autonomous executive powers had remained invisible in the Treaties, given that the legislative or non-legislative nature of a procedure was not explicitly indicated, but it would be more accurate to say that the Lisbon Treaty created the “autonomous executive powers” as a(n) (intergovernmental) counterweight to the introduction of the legislative act (and the concomitant procedural requirements).⁷⁴ The result is that the Court of Justice in recent years has been confronted with new questions related to the Council’s primary law executive powers.⁷⁵ The question *in casu* raised the issue whether, apart from the Council’s executive powers recognized in Article 291(2) TFEU, and those based directly in primary law, there is still another category. After all, the Council’s decision imposing a fine was adopted pursuant to Article 8 of Regulation 1173/2011, not pursuant to a Treaty legal basis. If the decision was to be qualified as an implementing decision in the sense of Article 291(2) TFEU, the Court of Justice (as opposed to the General Court) would not have jurisdiction in light of Article 51 of the Statute. The only way to accept jurisdiction for the Court of Justice was to rule that the “implementing decision” *in casu* was a species altogether different from the Council’s autonomous executive powers and its implementing powers under Article 291 TFEU.

While the Advocate General weighed up different arguments for and against, one of the more important considerations in her reasoning was arguably the fact that, conceptually, the power to adopt an individual sanction

73. For a discussion, see Bast, “New categories of acts after the Lisbon reform: Dynamics of parliamentarization in EU law”, 49 CML Rev. (2012), 885–928, at 894–897; Ritleng, “The reserved domain of the legislature: The notion of ‘Essential Elements of an Area’”, in Bergström and Ritleng (Eds.), *Rulemaking by the European Commission – The New System for Delegation of Powers* (OUP, 2016), pp. 145–148.

74. Liisberg notes that the issue of autonomous executive powers was not really discussed in the Convention’s Working Group on Simplification. See Liisberg, “The EU Constitutional Treaty and its distinction between legislative and non-legislative acts: Oranges into apples?”, Jean Monnet Working Paper 01/06, at 18.

75. For instance the question how the Council ought to choose between exercising such an executive power and an alternative legislative power (together with the Parliament) in Joined Cases C-103 & 165/12, *Parliament and Commission v. Council*, EU:C:2014:2400; Joined Cases C-124 & 125/13, *Parliament and Commission v. Council*, EU:C:2015:790. See Chamon, “Institutional balance and Community method in the implementation of EU legislation following the Lisbon Treaty”, 53 CML Rev. (2016), 1501–1554, at 1514–1515. Or the question whether such a Council executive act may amend a prior legislative act in Joined Cases C-643 & 647/15, *Slovakia and Hungary v. Council*, EU:C:2017:631. See Chamon, “De interinstitutionele verhoudingen bij de uitoefening van primairrechtelijke uitvoeringsbevoegdheden in de ruimte van vrijheid, veiligheid en recht”, 66 SEW: *Tijdschrift voor Europees en economisch recht* (2018), 70–76, at 72–73.

is typically an implementing power.⁷⁶ The Advocate General did not link this to the Court's post-Lisbon case law on Articles 290 and 291 TFEU. In *Biocides* or *ECHA Fees*, the Court defined the function of implementation as "providing further detail in relation to the content of a legislative act".⁷⁷ This function does not seem transposable to the case at hand. While the Court did not refer to this case law either, it effectively built a functional argument: by reading paragraphs 1 and 2 of Article 291 TFEU together, it implicitly found that the Member States, Commission and Council all perform *the same function* when they act under those paragraphs. Whatever the Commission or Council do under Article 291(2) TFEU should therefore be something which the Member States are also capable of doing, were it not for the uniform conditions that are required. As the Court notes, this does not seem to apply to a decision to impose a fine on a Member State.

The Court could have further tied this to its established case law on the implementation of EU law by the Member States (now under Art. 291 TFEU). In the *Yugoslav maize* case, the Court held that under Article 5 EEC the Member States are required to take all the measures necessary to guarantee the application and effectiveness of EU law. This general provision is now to be found in Article 4(3) TEU and has a specific expression in Article 291(1) TFEU.⁷⁸ *In casu* the Court held that even if an act of secondary EU legislation does not prescribe any penalties for the infringement of its provisions, Member States are required both to enforce that legislation with effective, proportionate and dissuasive sanctions and to proceed in this enforcement with the same diligence "as that which they bring to bear in implementing corresponding national laws."⁷⁹ The enforcement of EU law through sanctions thus clearly comes within the notion of the implementation of EU law.⁸⁰

While the Court now accepted that the Council's power in question is an implementing power in a generic sense, it rejected the claim that it was an implementing power in the sense of Article 291 TFEU. The Court could do so

76. Opinion, paras. 46–47.

77. Case C-427/12, *Commission v. Parliament and Council (Biocides)*, EU:C:2014:170, para 39.

78. In this sense, Dubos finds that Art. 291(1) TFEU could also be read not as a confirmation of a reserved competence of the Member States, but as a competence granted to the Member States under EU law. See Dubos, "Objectif d'efficacité de l'exécution du droit de l'union européenne: La tectonique des compétences", in Neframi (Ed.), *Objectifs et compétences dans l'Union européenne* (Bruylant, 2012), p. 295.

79. Case 68/88, *Commission v. Greece*, EU:C:1989:339, para 25.

80. See also Haguenu-Moizard, "Sanction nationale du droit Communautaire: Sanctions effectives, proportionnées et dissuasives", in de la Rochère (Ed.), *L'exécution du droit de l'Union, entre mécanismes communautaires et droits nationaux* (Bruylant, 2009), p. 205. This arguably shows how the Court's definition of "implementation" in Case C-427/12, *Biocides* was too restrictive (cf. *supra*).

since it had noted earlier, drawing on *Short-selling*, that Article 291 TFEU does not exhaustively define the EU institutions' and bodies' implementing powers. While the Court's finding *in casu* indeed logically follows from *Short-selling* it only underscores the latter decision's (and the present one's) potential to undermine the reform purported by the Lisbon Treaty.⁸¹

While the Court's reasoning until this point was consistent and in itself sufficient to accept jurisdiction, the additional argument which it drew from Article 51 of the Statute itself seems misguided. The Court's argument on the relation between the exceptions in Article 51 reads a certain logic into that Article that is not actually there (any more): the current wording of Article 51 is identical (apart from the references to the numbering of the Lisbon Treaty) to that introduced following the Nice Treaty.⁸² However, under the Nice Treaty, measures adopted in the Common Commercial Policy (CCP) were typically not subject to the comitology regime (of the current Art. 291(3) TFEU). Following Lisbon this anomaly was corrected and the implementing measures in the CCP are now all adopted by the Commission and no longer by the Council.⁸³ This means that the second exception under Article 51(a) has become void in any event. In light of these considerations, the Court's argument based on a systematic reading of Article 51 loses force.

What are the broader ramifications of the Court's decision? Firstly, but purely formally, implementing measures sanctioning Member States cannot be qualified as implementing measures in the sense of Article 291(4) TFEU.⁸⁴ The present decision of the Court also further undermines the Commission's role as the primary executive at EU level, despite Articles 290–291 TFEU. The simplification brought by the Lisbon Treaty is another casualty. This because whenever an implementing power is to be exercised at EU level, the Commission can no longer simply be assumed to be the default actor on which to confer the implementing power.

81. Chamon, *op. cit.* *supra* note 75, at 1535.

82. See Council Decision 2004/407 amending Arts. 51 and 54 of the Protocol on the Statute of the Court of Justice, O.J. 2004, L 132/5.

83. Although one could refer here to Art. 14(2) of Regulation 2015/1843 laying down procedures to ensure the exercise of the Union's rights under international trade rules, that Article actually provides that certain retaliation measures are to be adopted *directly* based on Art. 207 TFEU. Apart from the fact that this seems incompatible with Art. 207 TFEU, which (unlike Art. 133 EC) only allows the adoption of measures laying down the framework for the CCP (but no longer measures implementing the CCP), measures based directly on Art. 207 TFEU do not come under the second exception of Art. 51(a) of the Statute either.

84. See e.g. Council Implementing Decision 2017/2350 on imposing a fine on Portugal for failure to take effective action to address an excessive deficit, O.J. 2017, L 336/24. This decision is based on a different provision of Regulation 1173/2011.

Indeed, in *Short-selling* the Court opened the possibility to grant an implementing power to an EU agency despite this possibility not being foreseen in the Treaties.⁸⁵ It thereby did away with the idea that Article 291 TFEU exhaustively regulates the implementation of EU law.⁸⁶ Nonetheless, *Short-selling* could still be read as only exceptionally allowing a conferral of powers to an EU agency rather than to the Commission.⁸⁷ What the present case does is require the EU legislature to determine first what type of implementing power it wishes to confer. Is it an implementing power in the sense of Article 291 TFEU? Or is it an implementing power that cannot be properly exercised by the Member States? In the latter case the rules of Article 291 TFEU do not apply and the Council may be empowered, without any justification. The Court's decision thus goes in the opposite direction of the course advocated by some commentators who even argued that the possibility to entrust the implementation of EU law to the Council pursuant to Article 291(2) TFEU was an anomaly under the new Treaties.⁸⁸ Kollmeyer for instance argued that the reference to the Council in Article 291(2) TFEU was purely declaratory, in the sense that it reaffirmed the Council's autonomous executive powers conferred by specific Treaty Articles.⁸⁹

Of course, the fact that the Court has now identified another species of implementing power does not necessarily mean that these implementing

85. For a discussion of this case, see e.g. Chamon, "The empowerment of agencies under the *Meroni* doctrine and Article 114 TFEU: Comment on *United Kingdom v. Parliament and Council (Short-selling)* and the proposed Single Resolution Mechanism", 39 *EL Rev.* (2014), 380–403.

86. Although this is the most natural reading of Art. 291 TFEU, resulting in the observation by Türk that "[g]iven the comprehensive nature of Article 291 TFEU for the adoption of Union implementing acts ... it would not seem permissible to pursue the implementation of certain Union acts outside the regime of Article 291 TFEU"; see Türk, "Lawmaking after Lisbon", in Biondi, Eeckhout and Ripley (Eds.), *EU Law after Lisbon* (OUP, 2012), p. 78.

87. See Chamon, "Beyond delegated and implementing acts: Where do EU agencies fit in the Article 290 and 291 scheme?", in Tauschinsky and Weiß (Eds.), *The Legislative Choice Between Delegated and Implementing Acts in EU Law – Walking a Labyrinth* (Edward Elgar, 2018, forthcoming).

88. Schütze, "'Delegated' legislation in the (new) European Union: A constitutional analysis", 74 *MLR* (2011), 661–693, at 693; Lenaerts and Desomer, "Towards a hierarchy of legal acts in the European Union? Simplification of legal instruments and procedures", 11 *ELJ* (2005), 744–765, at 756. But see Kröll who argued that the exception in Art. 291(2) TFEU allowing the Council to exercise executive powers should be interpreted in light of the pre-Lisbon case law that sanctioned this practice; see Kröll, "Delegierte Rechtsetzung und Durchführungsgesetzgebung und das institutionelle Gleichgewicht der Europäischen Union", 66 *Zeitschrift für öffentliches Recht* (2011), 253–298, at 287.

89. Kollmeyer, *Delegierte Rechtsetzung in der EU – Eine Analyse der Art. 290 und 291 AEUV* (Nomos, 2015), pp. 348–349.

powers necessarily have to be exercised by the Council. Indeed, bodies other than the Council (the Commission, EU agencies, still other bodies) could also be empowered. Since the legislature should not have unfettered discretion in this regard, it would be useful here to apply the rule, *mutatis mutandis* from Article 291(2) TFEU, to confer this power by default on the Commission and only exceptionally on the Council (or other bodies).

5.2. *Jurisdiction of the Court*

How should the outcome of the Court's reasoning on Article 291 TFEU and Article 51(a), third indent, of the Statute be assessed from a practical perspective? In terms of efficiency and legal certainty, the outcome is clearly preferable since the Court will decide in first and last instance. On the other hand, the type of decisions that are now reserved to the Court do not seem to be of particular constitutional importance. This especially so in light of the recent reform of the General Court. Not coincidentally, that reform has resulted in the Court of Justice proposing an amendment to its Statute in order to broaden the jurisdiction of the General Court to the effect that it encompasses infringement proceedings under Articles 258 and 259 TFEU.⁹⁰ Only infringement cases with "constitutional importance" (which the Court of Justice remarkably limits to issues coming under Title V of part Three of the TFEU) would still be reserved to the Court. Advocate General Kokott's argument referring to the similarity of the procedure with Article 258 TFEU procedures would thereby be undermined.⁹¹ At the same time, the Court also proposes to transfer jurisdiction from the General Court to the Court in proceedings under Article 263 TFEU whereby a Member State challenges a Commission decision ordering that Member State to pay the fines imposed by the Court in an Article 260(2) TFEU procedure.⁹² While such cases may at first sight seem similar to the presently annotated case, it should be remarked that when such a Commission decision will be scrutinized, this will already be the third occasion for judicial review. In contrast, in cases in which a Council decision imposing a fine under Regulation 2011/1073 is reviewed, the Court will be seized only once. Given these unclear cost-benefits, the Court's doctrinal clarification on the notion of implementation in Article 291 TFEU appears all the more remarkable.

90. See Council of the European Union, Doc. 7586/18 of 28 March 2018.

91. Opinion, para 53.

92. For an earlier suggestion to this effect, see Prete, *Infringement Proceedings in EU Law* (Kluwer Law International, 2017), p. 395.

5.3. Commission delegated acts and formal legislation

One issue that did not prominently feature in this case and which probably would have merited greater attention was the relationship between the Commission's delegated decision from 2012 and the 2011 Regulation which it supplemented. Let us recall here that Spain essentially contested the validity of the Council's fine in light, firstly, of the 2011 Regulation and also in light of the Commission's delegated decision. Under Article 290 TFEU however, a Commission delegated act cannot alter the essential elements of the basic legislative act and furthermore has to conform to the objectives, content, scope and duration of the delegation as defined by the basic legislative act. Although Advocate General Kokott herself noted this,⁹³ she also relied on the Commission's delegated decision to interpret Article 8 of the legislative regulation.⁹⁴ The Court itself did not do so explicitly, although it evidently scrutinized the contested decision in light of the delegated decision insofar as Spain had produced arguments to this effect.⁹⁵

Yet, when the Court finds that the contested decision conforms to the provisions of the Commission's delegated decision, this raises the question, from the applicant's perspective, whether the delegated decision conforms to the basic legislative act (and the general principles of EU law). While this is no criticism of the Court, since it is not required to verify the internal legality of the Commission's delegated act of its own motion,⁹⁶ Spain could have included this eventuality in its litigation strategy. As noted elsewhere, when a party contests the legality of an implementing or a delegated act it seems useful to raise, in the alternative, an objection of illegality directed at the basic legislative act or, in this case, the Commission's delegated act.⁹⁷

To illustrate this relying on the facts of the present case: Spain *inter alia* challenged the decision insofar as the Council had found Spain to be "seriously negligent", a notion laid down in the legislative act but elaborated in the Commission's delegated act. Evidently, a Member State would want to see this notion interpreted restrictively, and would therefore be advised to include a (subsidiary) claim in its application that if its conduct was "seriously negligent" in the sense of the delegated act, the latter ought to be reviewed in light of its basic legislative act and other relevant higher-ranking rules of

93. Opinion, para 122.

94. *Ibid.*, paras. 67, 121, 123, 142.

95. See judgment, paras. 77, 132, 153 et seq.

96. Lenaerts, Maselis and Gutman, *EU Procedural Law* (OUP, 2014), p. 365.

97. Chamon, "Limits to delegation under Article 290 TFEU: The specificity and essentiality requirements put to the test", 25 MJ (2018), 231–245.

Union law.⁹⁸ Another example could be the upwards or downwards modulation of the fine in accordance with the criteria defined by the Commission in Article 14 of its Delegated Decision 2012/678. In the contested decision, the Council explicitly relies on these criteria, as defined by the Commission, to calculate the fine. In a second case, the Council is contemplating further decreasing the amount of the fine in light of Article 14(3)(e) of the delegated decision, which provides that “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” will be taken into account.⁹⁹ This possibility, also endorsed by the Court in the present case,¹⁰⁰ of course raises the question what the Council’s margin of discretion is when interpreting and applying this provision. In light of this, a further relevant question is whether the Commission has properly defined the modulating criteria in light of the “objectives and purpose” (cf. Art. 290 TFEU) of the delegation. While the (cooperative) conduct of Member States is also taken into account to determine the height of a lump sum in proceedings pursuant to Article 260(2) TFEU,¹⁰¹ the downward modulation should always keep the dissuasive effect of sanctions intact, so as to ensure that the objectives of Regulation 1173/2011 are not frustrated. These two examples show that such subsidiary pleas would allow a further scrutiny by the Court, without requiring the Court to take the heavy-handed step of invalidating a formal legislative act.

5.4. *Applying the reinforced SGP: Invoking the Charter*

The fact that the SGP has received greater teeth pursuant to the six-pack means that the stakes for Member States have also been raised. As a corollary to this, the EU legislature strengthened the Member States’ rights of defence, and the requirement that the EU institutions act impartially *vis-à-vis* the

98. The fact that Member States could have brought proceedings against the delegated act directly should not be a bar to them raising an objection of illegality. See Lenaerts, Maselis and Gutman, *op. cit. supra* note 96, pp. 448–450. The fact that the delegated act does not provide the legal basis of the Council’s decision does not impede an objection of illegality being raised either. See Joined Cases C-189, 202, 205–208 & 213/02 P, *Dansk Rørindustri e.a. v. Commission*, EU:C:2005:408, para 214.

99. The Commission has also proposed a fine being imposed on Austria; see COM(2017)93 final. On the Council’s deliberations, see Council of the EU, Doc. 7538/18, 27 Mar. 2018.

100. See para 132 of the Judgment.

101. See e.g. Case C-241/11, *Commission v. Czech Republic*, EU:C:2013:423, para 51. See also Tizzano, “Les développements récents de la procédure de manquement sur manquement” in Tizzano et al. (Eds.), *La Cour de justice de l’Union européenne sous la présidence de Vassilios Skouris (2003–2015) – Liber amicorum Vassilios Skouris* (Bruylant, 2015), p. 655; Prete, *op. cit. supra* note 92, p. 264.

Member States has become an even more important point of attention. In this light, Spain's claim that the objective impartiality of the Commission was not guaranteed was not unsurprising. However, whether Member States can invoke the corresponding Charter right remains an open question. Generally the personal scope of application of the Charter's rights does not cover entities under public law, apart from certain procedural safeguards.¹⁰² In this regard, Jarass explicitly identifies Article 41 of the Charter as a provision which Member States may indeed invoke.¹⁰³ The Court itself has not yet decided this issue, also because the present case seems to be the first in which a Member State explicitly invokes Article 41 of the Charter.¹⁰⁴ *In casu* the Court notes that it need not decide this issue, since the right of good administration in any event reflects a general principle of EU law.

5.5. *Applying the reinforced SGP: the Commission's impartiality*

As to the substance, the Court's findings fail to convince completely. After all, the Court's argument that the visits and the investigation have two different functions and come under two different frameworks can also be turned on its head as an argument *requiring* a different composition of the two teams. The Court's finding also stands in contrast with that of the Advocate General, who found that the requirement of impartiality could have been safeguarded better. However, an issue with the Advocate General's justification for the alleged lack of impartiality is that she held the restriction to be provided for by law, i.e. by the Commission's delegated decision.¹⁰⁵ This raises the question whether the requirement (under Art. 52(1) of the Charter) that limitations are provided for "by law" may be met by (formally) non-legislative acts. In order to restrictively interpret the exception in Article 52(1) of the Charter it would seem necessary to require reliance on formal legislation where this is possible.¹⁰⁶ Since a Commission delegated act always finds its legal basis in a formal legislative act, such a limitation could never be imposed pursuant to a delegated act.

Going back to the Court's ruling, its interpretation of the two stages also seems to sit uneasily with the apparent practice in which the two stages are not

102. Meyer, *Charta der Grundrechte der Europäischen Union*, 4th ed. (Nomos, 2014), Art. 51 § 35; Michel, *Droits de l'homme*, Encyclopédie Dalloz, Droit européen, 2007, refonte 2017, § 91.

103. Jarass, *Charta der Grundrechte der EU*, 3rd ed. (Beck, 2016), Art. 51 § 55–56.

104. Implicitly, see Case C-552/15, *Commission v. Ireland*, EU:C:2017:698, para 23.

105. Opinion, para 106.

106. For a discussion, see Peers and Prechal, "Article 52", in Peers, Hervey, Kenner and Ward (Eds.), *The EU Charter of Fundamental Rights – A Commentary* (Hart Publishing, 2014), pp. 1470–1473.

demarcated clearly from each other, the boundary between the two being quite fluid (cf. below). It indeed appears that the Commission has significant discretion in how it goes about investigating possible misrepresentations. In this regard, the Advocate General even stressed that there needs to be serious suspicion before the Commission initiates an investigation. To this end it needs to build a case by gathering information during dialogue and methodological visits. However, there does not seem to be any limit to how much information the Commission can gather under the framework of Regulation 479/2009 before it is required to commence a formal investigation (or decide that there are no or insufficient grounds for suspicion) under Regulation 1173/2011. In addition, the Court has confirmed that there is no obligation on the Commission to organize a methodological visit before initiating the formal investigation.¹⁰⁷

One may wonder therefore whether it would not have been advisable for the Court to find that the visits and investigation are actually part of one continuous procedure, where the screws are progressively put on. After all, the Court's finding in paragraph 101 (the simple overlap as such cannot amount to a breach of the requirement of objective impartiality) now seems rather blunt, especially when compared to how the rights of defence for private parties in other areas of EU law are safeguarded. To ensure the impartiality of proceedings in competition law, an independent Hearing Officer (whose powers and independence have subsequently only been strengthened) was instated in 1982,¹⁰⁸ followed by an independent Hearing Officer being introduced to anti-dumping procedures in 2007. More recently, the European Securities and Markets Authority, an EU agency, has been empowered to enforce EU law *vis-à-vis* credit rating agencies and trade repositories. The EU legislature has thereby worked out the relevant procedures in such a way that within ESMA different and wholly separate units are responsible for (i) monitoring market players, (ii) investigating suspect cases and (iii) sanctioning those where infringements were found.¹⁰⁹ Presenting the visits and investigation in the SGP context as one ongoing procedure might then alleviate impartiality concerns, since it would show that the groundwork is done by Eurostat acting upon instructions by the Commission which *as a*

107. The Commission's report on the manipulation of statistics by Austria does not refer to a methodological visit prior to the initiation of the formal investigation either. See COM(2017)94 final, at 9–11.

108. See Williams, "The current role of the Hearing Officer: Another step change" in Edward, MacLennan, Komninos (Eds.), *Ian S. Forrester: A Scot without Borders – Liber Amicorum*, Vol. II (Institute of Competition Law, 2015), pp. 405–420.

109. See van Rijsbergen and Foster, "Rating ESMA's accountability: 'AAA' status", in Scholten and Luchtman (Eds.), *Law Enforcement by EU Authorities – Implications for Political and Judicial Accountability* (Edward Elgar, 2017), pp. 57–60.

college decides to initiate the investigation and recommend a fine. The actual imposition of the fine is then a responsibility of a third body, the Council. Indeed, it should be stressed that the present situation is fundamentally different from competition cases (where a Hearing Officer was found to be required) since under Regulations 479/2009 and 1173/2011, the Commission does *not* at the same time act as an investigator, prosecutor and first instance decision-maker. In addition, as the Advocate General noted, Member States are not fully comparable to private individuals, since they are under a duty of loyal cooperation.

5.6. *Applying the reinforced SGP: The blurred line between Regulations 479/2009 and 1173/2011*

In light of the Court's decision, the Commission's discretion as to how long information may be gathered during visits and when to initiate a formal investigation may be problematic since it leaves the applicability of Regulation 1173/2011 and the explicit requirements on the rights of defence laid down in Delegated Decision 2012/678 in the hands of the Commission. As long as the formal investigation is not initiated, the procedure is governed by Regulation 479/2009, which lays down a more permissive standard as regards the rights of defence. Indeed, the Court *in casu* noted that Spain had had the opportunity to comment on the Commission's provisional findings (as required under Regulation 479/2009) and that it was informed beforehand on the purpose of Eurostat's visits. However, Delegated Decision 2012/678 provides for a more generous protection by also foreseeing access to the file and the right to legal representation.¹¹⁰

5.7. *Applying the reinforced SGP: Retroactivity*

The present case was also important to determine whether this part of the reinforced SGP has indeed resulted in greater deterrence. Fortunately, the Court applied an *effet utile* interpretation of some of the provisions at issue. This was clear in the interpretation of the reference amount of the fine, where the Court took account of the need for the sanction to have dissuasive effect.¹¹¹ It also played a role when the Court assessed Spain's plea to the effect that the sanction was invalid insofar as it applied retroactively. Indeed, the misrepresented data spanned a period dating back to 2008, i.e. well before the entry into force of Regulation 1173/2011. This problem is reminiscent of the Court's case law in competition matters in which it found that the

110. See Arts. 10 and 12 of Delegated Decision 2012/678.

111. Judgment, para 161.

Commission could rely on its 1998 Guidelines to calculate fines for anti-competitive behaviour dating before 1998.¹¹² In those cases however, the Commission's guidelines remained within the limits set by (then) Regulation 17 which did of course already foresee the imposition of fines.¹¹³ That reasoning could therefore not be transposed to the present case. Taking a very formal approach, albeit wholly justified in light of the *effet utile* of the Regulation, the Court and the Advocate General found that the conduct which is sanctioned is not the collection of the data as such but only the actual communication of the data to the Commission. Since the communication occurred in 2012, the principle of non-retroactivity of sanctions was respected.

As time progresses the relevance of the issue of the possible retroactive application of Regulation 1173/2011 will disappear, but today it evidently still is problematic. This is illustrated by the second, still ongoing, case in which the Commission recommended to the Council to impose a fine.¹¹⁴ In its report on misrepresentation by Austria, the Commission noted that in its scrutiny it had "included facts which occurred before the entry into force of Regulation (EU) No 1173/2011 on 13 December 2011. In that regard, it should be kept in mind that misrepresentation of EDP data was equally unlawful [under] Regulation 479/2009."¹¹⁵ At the same time the Commission remarkably stressed that "for the purpose of applying the special regime of sanction laid down in Article 8 of Regulation (EU) No 1173/2011, the *primary aim* of the investigation has been to examine whether that misrepresentation of data took place after the entry into force of the latter Regulation."¹¹⁶

6. Concluding remarks

The present Grand Chamber decision is important on a number of accounts. The Court has made an important clarification of the scope of Article 291 TFEU, effectively further contributing to the deconstruction of the Treaty of Lisbon's reform in this area.

The Court further imposed a reading of Regulation 1173/2011 and Delegated Decision 2012/678 that allows for an effective and deterrent mechanism to ensure the communication of proper statistics by the Member States in the SGP, although it remains to be seen how the Commission will

112. See Case C-501/11 P, *Schindler Holding Ltd e.a. v. Commission*, EU:C:2013:522, para 75.

113. Joined Cases C-189, 202, 205–208 & 213/02 P, *Dansk Rørindustri*, para 227.

114. See *supra* note 99.

115. COM(2017)94 final, para 17.

116. *Ibid.*, para 18 (emphasis added).

exercise its powers under Regulations 479/2009 and 1173/2011. The fact that the ultimate imposition of a fine depends on the Member States in Council, voting under the ordinary QMV rules, will probably restrain the Commission from seeking out the limits of its powers in this respect.

On the issue of impartiality, the Advocate General's approach appeared more useful as a precedent to ensure an effective EU administration, compared to the Court's solution. An important element in the reasoning of the Advocate General was the need to take into account the fact that the Commission's human resources are limited. If the Court had followed the Advocate General's suggestion this would have *inter alia* helped buttress the ongoing development whereby enforcement powers are increasingly entrusted to EU bodies smaller than the Commission.¹¹⁷

Finally, a word seems in place on an issue that only figured incidentally in the Advocate General's Opinion but which goes to the heart of the democratic life of our Union. The repercussions of the opaque trilogues indeed also reverberated in this case whereby Advocate General Kokott scathingly observed that "[t]he conditions governing the imposition of a sanction were not contained in the original Commission proposal but appeared for the first time — already in the wording that would become final but lacking any further explanation — in the draft Council Regulation of 16 June 2011. They were reproduced in that form, again without commentary, in the Parliament's observations on that proposal, even though the Rapporteur's draft had been silent on the matter."¹¹⁸ This was not the first time,¹¹⁹ and it will not be the last, that the Court is confronted with the trilogues. Figures for the Parliamentary term of 2009–2014 show that 90 percent of the co-decision procedures are finalized already in first reading,¹²⁰ a feat that is only possible because the institutions make informal deals through the trilogues. While they may therefore be very effective, they are completely opaque to the EU citizen and nullify the accountability of actors involved. This also motivated the EU Ombudsman to start an own-initiative requirement on the transparency of trilogues in 2015.¹²¹ Recently, the General Court has also ruled that the institutions must give access to the so called four column tables which present the positions of the institutions and the compromise reached in the trilogues,

117. See Scholten and Luchtman, *op. cit. supra* note 109.

118. Opinion, para 132.

119. See especially the critical Opinion of A.G. Jääskinen in Case C-409/13, *Council v. Commission*, EU:C:2014:2470.

120. Roederer-Rynning and Greenwood, "The culture of trilogues", 22 *Journal of European Public Policy* (2015), 1148–1165, at 1148.

121. Decision of the European Ombudsman of 12 July 2016 setting out proposals following her strategic inquiry OI/8/2015/JAS concerning the transparency of trilogues.

when requested to do so by citizens.¹²² The pressure to repatriate legislative decision-making from back-room dealings is thus mounting.¹²³ In their Inter-institutional agreement on Better Law-Making, the institutions agreed to set up a dedicated joint database on the state of play of legislative files.¹²⁴ As of yet, that database has not been set up yet,¹²⁵ but depending on its content it may finally re-introduce the necessary transparency and accountability to the EU's legislative process.

Merijn Chamon*

122. See Case T-540/15, *Emilio De Capitani v. Parliament*, EU:T:2018:167.

123. See generally, D. Curtin and P. Leino, "In search of transparency for EU law-making: Trilogues on the cusp of dawn", 54 CML Rev. 1673–1712.

124. See Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, O.J. 2016, L 123/1, para 39.

125. Draft report of the Committees on Legal Affairs and on Constitutional Affairs on the interpretation and implementation of the Interinstitutional Agreement on Better Law-Making, 23 Jan. 2018, 2016/2018 (INI).

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