JUDGMENT OF THE COURT
9 November 1995 *

In Case C-426/93,

Federal Republic of Germany, represented by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, acting as Agent, and Hans-Jörg Niemeyer, Rechtsanwalt, Brussels,

applicant,

v

Council of the European Union, represented by Jill Aussant and Klaus Borchers, Legal Advisers, acting as Agents, with an address for service in Luxembourg at the office of Bruno Eynard, Manager of the Legal Department of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

supported by

Commission of the European Communities, represented by Jürgen Grunwald, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

intervener,

* Language of the case: German.

APPLICATION for the annulment of Council Regulation (EEC) No 2186/93 of 22 July 1993 on Community coordination in drawing up business registers for statistical purposes (OJ 1993 L 196, p. 1),

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, D. A. O. Edward and G. Hirsch (Presidents of Chambers), G. F. Mancini, F. A. Schockweiler, J. C. Moitinho de Almeida (Rapporteur), P. J. G. Kapteyn, C. Gulmann, J. L. Murray, P. Jann and H. Ragnemalm, Judges,

Advocate General: F. G. Jacobs,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 15 March 1995,

after hearing the Opinion of the Advocate General at the sitting on 15 June 1995,

gives the following

Judgment

1 By application lodged at the Court Registry on 21 October 1993, the Federal Republic of Germany brought an action under the first paragraph of Article 173 of the EEC Treaty for the annulment of Council Regulation (EEC) No 2186/93 of

22 July 1993 on Community coordination in drawing up business registers for statistical purposes (OJ 1993 L 196, p. 1, 'the Regulation').

2 The Regulation, which is based on Article 213 of the EEC Treaty, requires Member States to set up for statistical purposes one or more harmonized registers with the definitions and scope specified therein (Article 1).

3 Under Article 3 the registers are to cover all enterprises carrying on economic activities contributing to gross domestic product at market prices, the legal units responsible for those enterprises and the local units dependent upon them. Certain households are excluded and the inclusion on the register of enterprises involved in the fields of agriculture and forestry, fishing and fish-farming, public administration, defence and social security is optional. The extent to which enterprises of no statistical importance to the Member States are to be included on the register is to be decided under the procedure laid down in Article 9.

4 Enterprises, legal units and local units are to be registered in accordance with the timetable set out in Annex I (Article 3(2)), that is to say, before 1 January 1996 in the case of enterprises and before 1 January 1997 in the case of legal and local units. In any event, separate registration of legal units is optional, provided that the total content of information for such units is included in the register entry for enterprises (Article 3(3)).

5 Article 4 refers to Annex II for the list of the characteristics to be included on a register. They include the name and address of the enterprise, its legal form, its

main economic activity, the size of its labour force, its net turnover (which is optional where turnover does not exceed ECU 2 million) and net assets (optional). In certain respects registers have to be updated at least once a year (Article 5(1)).

6 When the Commission so requests, after obtaining the opinion of the committee provided for in Article 9, Member States are to carry out statistical analyses of the registers and transmit the results to the Statistical Office of the European Communities (Article 6).

7 Article 7 authorizes national statistical institutes to collect for the register of enterprises, in accordance with the conditions determined by national law, information which is contained in the administrative or legal files compiled on the national territory.

8 The detailed rules for the implementation of the Regulation are to be adopted in accordance with the procedure laid down in Article 9. After obtaining the opinion of the Statistical Programme Committee set up by Decision 89/392/EEC/Euratom of 19 June 1989 (OJ 1989 L 181, p. 47), the Commission may adopt measures applicable immediately. If the measures are not in accordance with the Committee's opinion, the Council, acting by a qualified majority, may take a different decision.

9 The German Government takes issue with the Council for having taken Article 213 of the Treaty as the legal basis for the Regulation. It further considers that the Regulation infringes the principle of proportionality.

Plea alleging that the legal basis is wrong

10 The German Government argues principally that Article 213 of the Treaty cannot constitute an autonomous legal basis for a measure of the Council.

11 First, it is clear from the very wording of Article 213 that it is applicable only in conjunction with other provisions, since it confers on the Commission the right to collect information only 'for the performance of the tasks entrusted to it'. In addition, Article 213 does not lay down any procedural rule binding on the Council when it lays down the limits and conditions governing the Commission's right to collect information, but merely requires the Council to act 'in accordance with the provisions of this Treaty'. The absence of procedural rules confirms the dependence of Article 213 upon other Treaty provisions which, for their part, embody procedural rules.

12 Secondly, the function of Article 213 is to establish that, where it adopts a measure on the basis of the various enabling provisions of the Treaty, the Council may take complementary measures so as to enable the Commission to obtain the information which it needs. Those measures must also be based on the enabling provision constituting the legal basis of the measure itself. The German Government takes the view that the Council itself followed this reasoning when it adopted the Commission work programme concerning an experimental project for gathering, coordinating and ensuring the consistency of information on the state of the environment and natural resources in the Community. Indeed, it based Decision 85/338/EEC of 27 June 1985 (OJ 1985 L 176, p. 14) on Article 235 of the EEC Treaty. Subsequently, it based Decision 90/150/EEC of 22 March 1990 (OJ 1990 L 81, p. 38) amending Decision 85/338, which it adopted after the Single European Act entered into force, on Article 130s. In so far as the collection and provision of

information constitute essential components of that legislation, the Council would have availed itself of Article 213 had it regarded that provision as an enabling legal basis.

13 Thirdly, the argument that Article 213 does not empower the Council to legislate is borne out by comparing that article with other enabling provisions of the Treaty. The common feature of the provisions authorizing the adoption of substantive rules, such as Articles 49, 57, 63(2), 69, 87 or 100a, is that they require the institutions to collaborate to that end. Consequently, their structure is broadly comparable and they embody similar procedural rules under which the Council acts on a proposal from the Commission, usually after consulting the Economic and Social Committee, and after consulting or cooperating with the European Parliament. Consequently, there are particularly close links between the Commission and the Council, even in the case of the enabling provisions constituting an exception to the Commission's exclusive right of initiative, such as Articles 126 and 153 of the Treaty, under which the Council may legislate only after receiving the opinion of the Commission. In contrast, Article 213 does not provide for a right of proposal on the part of the Commission or for the consultation or cooperation of the European Parliament or for the involvement of the Economic and Social Committee.

14 Fourthly, the German Government argues that the position of Article 213 in the scheme of the Treaty also indicates that it does not confer legislative competence on the Council. Article 213 is found in the part of the Treaty entitled 'General and Final Provisions' which, apart from Article 235, contains only rules intended to complement the other provisions of the Treaty, whereas the enabling provisions always relate directly to a specific objective.

15 That argument cannot be accepted.

16 Article 213 of the Treaty provides as follows:

'The Commission may, within the limits and under conditions laid down by the Council in accordance with the provisions of this Treaty, collect any information and carry out any checks required for the performance of the tasks entrusted to it.'

17 As the Council has observed, the stipulation that it has to act 'in accordance with the provisions of this Treaty' refers in particular to Article 189 of the EEC Treaty, which lists the various acts which the Council and the Commission may adopt in order to carry out their tasks under the Treaty. Such acts include regulations.

18 Next, the absence of any rule on voting in Article 213 does not mean that an act of the Council may not be based on that provision. As the Commission has observed, Article 148(1) of the Treaty, which provides that 'save as otherwise provided in this Treaty, the Council shall act by a majority of its members', would be otiose if the absence of a specific rule on voting in a Treaty provision meant that it could not be used as the legal basis for an act of the Council. That conclusion is not invalidated by the fact that Article 213 does not provide for a right of initiative on the part of the Commission or for the involvement of the European Parliament or the Economic and Social Committee. As the Council rightly argued, it is undisputed that other provisions of the Treaty, such as Article 217, may be used as the legal basis for the adoption of an act of the Council even though they do not provide for the participation of other institutions in the decision-making process.

19 Moreover, the expression 'for the performance of the tasks entrusted to it' in Article 213 shows that that provision vests in the Commission general competence to

collect any information needed to that end, with the result that, contrary to the view expressed by the German Government, the Council is not obliged to base such acts on the various Treaty provisions which confer specific tasks on the Commission. Furthermore, as the Advocate General points out in point 24 of his Opinion, it would be illogical, to say the least, for the Council to be obliged to adopt a series of measures relating to the collection of information in accordance with differing procedural rules, especially since some types of information cover several of the Commission's fields of activity.

20 In addition, it is also because of the general nature of the Commission's power with regard to the collection of information that Article 213 appears in Part Six of the Treaty entitled 'General and final provisions' and it is uncontested that Part Six contains other provisions which confer legislative competence.

21 As for the argument based on the Council's previous practice, suffice it to say that a mere practice on the part of the Council cannot derogate from the rules laid down in the Treaty and cannot therefore create a precedent binding on the institutions (see, for example, the judgment in Case 68/86 *United Kingdom* v *Council* [1988] ECR 855, paragraph 24).

22 It follows from the foregoing that Article 213 alone may be used as the legal basis for the adoption of an act of the Council.

23 In the alternative, the German Government argues that, even if Article 213 could constitute an autonomous legal basis for an act of the Council, the contested regulation should not have been based on that provision. Article 213 merely authorizes the Council to lay down the limits and conditions subject to which the Commis-

sion is to collect information contained in existing business registers in the Member States, that is to say, to adopt provisions directly regulating the collection of information by the Commission and provisions enabling it to do so. In contrast, the creation of registers in the initial stage preceding the collection of information, together with the harmonization of existing registers, is not covered by Article 213. However, those are precisely the main objectives of the Regulation.

24 In this regard, the German Government observes that, according to the first and tenth recitals in the preamble, the Regulation proposes to standardize the content of the registers by means of common definitions and by harmonizing the basic units in order to achieve comparability of information. Moreover, it is clear from its very title, 'Community coordination' in drawing up business registers ..., that the priority aim of the Regulation is not the acquisition of information by the Commission but the approximation of existing registers and/or the creation of new structures. Likewise, the substantive rules are chiefly concerned with organization of the registers to be created or harmonized (Articles 1 to 5) with a view to enabling the Commission to collect the desired information at a later stage. Whilst, in parallel, some recitals in the preamble to the Regulation mention some matters relating to the communication of statistical data, in fact the Regulation contains only one provision on the collection of information by the Commission, namely Article 6, which gives it the right to request the Member States to carry out statistical analyses of the registers and transmit the results to the Statistical Office of the European Communities.

25 The German Government adds that it is consistent with the Council's practice to date for acts going beyond requesting information not, or at least not solely, to be based on Article 213. Accordingly, the Council based itself both on Article 235 and Article 213 when it adopted Council Decision 81/971/EEC of 3 December 1981 establishing a Community information system for the control and reduction of pollution caused by hydrocarbons discharged at sea (OJ 1981 L 355, p. 52), which did not only legislate for the request of information by the Commission but also provided for the establishment of new structures.

26 Lastly, the German Government submits that, in so far as the primary aim of a legal act is normally set forth in the first recital in the preamble, it must be held that the primary objective of the Regulation is to assist the establishment and functioning of the Single Market and the standardization of business statistics; a regulation which refers to the establishment or functioning of the Single Market falls *ipso facto* within the field of application of Article 100a of the Treaty.

27 This argument must also be rejected.

28 First, there is nothing in the wording of Article 213 of the Treaty to support the interpretation that that provision authorizes the Commission only to collect information already contained in existing registers in the Member States. As the Council has observed, that restrictive interpretation would render the collection of comparable data by the Commission nugatory or at least would reduce it to the lowest common denominator, thereby making it impossible for the Commission to carry out its task.

29 Next, in accordance with well-established case-law (see, in particular, the judgment in Case C-155/91 *Commission* v *Council* [1993] ECR I-939, paragraph 7), in the context of the organization of the powers of the Community, the choice of a legal basis for a measure must be based on objective factors which are amenable to judicial review. Those factors include, in particular, the aim and content of the measure.

30 As for the Regulation's aim, the first recital in the preamble states that 'the Single Market increases the need to improve statistical comparability in order to meet Community requirements' and that 'in order to achieve that improvement, common definitions and descriptions have to be adopted for enterprises and other rel-

evant statistical units to be covered'. According to the third recital, 'there is a growing need for information on the structure of enterprises, a need which current Community statistics are not able to meet' whilst, according to the fourth, 'business registers for statistical purposes are a necessary tool in keeping track of the structural changes in the economy brought about by such operations as joint ventures, partnerships, buy-outs, mergers and takeovers'.

31 As for the content of the Regulation, whilst most of its provisions are concerned with establishing harmonized registers, the aim of that harmonization is to enable the Commission subsequently to collect reliable information in accordance with Article 6 of the Regulation with a view to the performance of the various specific tasks conferred on it by the Treaty.

32 As the Advocate General observes in points 37 and 38 of his Opinion, the Commission's tasks which will be facilitated by statistics compiled in accordance with uniform criteria may be inferred in particular from the nature of the information to be entered on the registers, under the terms of Annex II to the Regulation. Thus, information such as how many undertakings are active in a particular sector of the economy, what share of the market is held by particular undertakings and how many persons are employed in a particular sector of the economy will assist the Commission in the performance of many of the specific tasks entrusted to it in various fields, such as, for example, the environment, industry and social policy, which go considerably beyond the mere functioning of the Common Market.

33 It is clear from the factors set out above that, according to its aim and content, the main purpose of the Regulation is to establish business registers with a view to enabling the Commission efficiently to collect the information necessary for the performance of the various tasks entrusted to it by the Treaty. Whilst it cannot be denied that the Regulation will also have effects on the establishment and function-

ing of the internal market, those effects are merely ancillary to the main aim described above, with the result that, contrary to the view of the German Government, Article 100a of the EEC Treaty cannot constitute the proper legal basis for the adoption of the Regulation. As the Court has already held, the mere fact that an act may affect the establishment or functioning of the internal market is not sufficient to justify using that provision as the basis for the act (see, in particular, the judgment in *Commission* v *Council*, cited above, paragraphs 18 and 19).

34 As for the argument based on the Council's previous practice, suffice it to refer to the case-law cited in paragraph 21 of this judgment to the effect that a mere practice on the part of the Council cannot derogate from the rules laid down in the Treaty and cannot therefore create a precedent binding on the institutions.

35 Accordingly, the Court holds that the Regulation was validly adopted on the basis of Article 213 of the Treaty alone. The plea alleging that the legal basis is wrong must therefore be rejected.

Plea alleging infringement of the principle of proportionality

36 According to the German Government, the Regulation infringes the principle of proportionality in two respects.

37 First, Article 2(1)(a) and Article 3 of the Regulation, together with Annex II, list a series of data having to be registered which are not necessary in order to achieve the aims set out in the preamble.

38 According to the German Government, this is true in the first place of the obligation to register 'legal units' and various data relating to them. According to Council Regulation (EEC) No 696/93 of 15 March 1993 on the statistical units for the observation and analysis of the production system in the Community (OJ 1993 L 76, p. 1), to which Article 2 of the Regulation refers in order to define that expression, monitoring and analysing the Community economy are to be based on 'statistical units' set out in the list in Section I of the annex to Regulation No 696/93, which does not mention 'legal units', these being simply one of the three criteria for the definition of 'statistical units'. Inasmuch as 'legal units' do not exist as statistical units within the meaning of Regulation No 696/93, there is no necessity to collect specific information about them.

39 The German Government adds that, even on the assumption that 'legal units' constitute a manner of identifying the statistical unit 'enterprise', it is unnecessary to record them independently and separately. It would be sufficient for the Regulation to have indicated the data to be registered for each enterprise and to have left the Member States free to group that data together as they thought fit, where appropriate with the assistance of certain indications with regard to legal units.

40 According to the German Government, neither is it necessary to record in the registers as criteria for the size of an enterprise the turnover and the size of the workforce. Statistically, stating the number of persons employed is amply sufficient since it clearly reflects the economic importance and size of an enterprise. In addition, in some economic sectors, such as banking and insurance, turnover is a characteristic of debatable statistical value.

41 That argument cannot be accepted.

42 According to the Court's case-law, in order to establish whether a provision of Community law complies with the principle of proportionality, it must be ascer-

tained whether the means which it employs are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary to achieve it (see, for example, the judgment in Joined Cases 279/84, 280/84, 285/84 and 286/84 *Walter Rau Lebensmittelwerke and Others* v *Commission* [1987] ECR 1069, paragraph 34).

43 Whilst admittedly the legal unit is not amongst the eight 'statistical units of the production system' listed in Section I of the annex to Regulation No 696/93, it does not necessarily follow that it is not statistically relevant.

44 As the Commission has observed, the legal unit constitutes a determinative factor in the definition set out in the annex to Regulation No 696/93 of the statistical unit 'enterprise' as 'the smallest combination of legal units that is an organizational unit producing goods or services, which benefits from a certain degree of autonomy in decision-making, especially for the allocation of its current resources' (Section III, Part A). Consequently, contrary to the German Government's argument, the coverage of legal units by the registers may be regarded as necessary for attaining the objective of setting up registers designed to reflect the structure of enterprises (third recital in the preamble) and structural changes in the economy brought about by such operations as joint ventures, partnerships, buy-outs, mergers and takeovers (fourth recital). In addition, under Article 3(3) of the Regulation, separate registration of legal units is optional, provided that the total content of information for such units is included in the register entry for enterprises.

45 As for the need to enter turnover on the register as a criterion for the size of an enterprise, suffice it to say that, apart from the fact that its entry on the register is optional where turnover does not exceed ECU 2 million, it unquestionably enables

the reliability of estimates to be increased, whilst stating the number of persons employed does not necessarily reflect the economic importance and size of an enterprise.

46 Secondly, the German Government argues that the Regulation does not take sufficient account of the financial consequences for the Member States of the harmonization and/or establishment of registers in order to achieve the aim of obtaining consistent Community statistics. The money and time put into establishing and periodically updating registers in the various Member States are disproportionate to the aim pursued by the Regulation and the potential advantages of establishing registers.

47 In support of its argument, the German Government refers to a 'study carried out by the Statistisches Bundesamt (German Statistical Office) on the feasibility of establishing and maintaining for statistical purposes detailed, harmonized business registers in the Federal Republic', from which it appears that the cost of establishing a business register — which was calculated on a 1977 basis — is extremely high and that 75% of the cost would be accounted for by staff costs.

48 The German Government's argument cannot be accepted.

49 The German Government has not proved the relevance of the aforementioned study — which was carried out on the basis of data compiled in 1977 in certain sectors of the economy — to the implementation of the contested regulation, whereas among other things progress in informatics will enable a considerable reduction to be achieved in the staff costs involved in the establishment and updating of the business registers covered by the Regulation. Moreover, as the Council has rightly observed, since Article 7 of the Regulation authorizes each national sta-

tistical institute to collect for statistical purposes information covered by the Regulation which is contained in the administrative or legal files compiled on its national territory, this will also enable a major reduction to be made in the cost of setting up the new registers.

50 Lastly, the German Government has not succeeded in showing that the costs connected with the creation and updating of the business registers are manifestly disproportionate to the advantages to the Community of the availability of reliable statistical data with a view to the attainment of the various objectives entrusted to it by the Treaty.

51 The plea alleging infringement of the principle of proportionality must therefore be rejected.

52 Since none of the pleas put forward by the German Government has been successful, the application as a whole must be dismissed.

Costs

53 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council applied for costs and the Federal Republic of Germany has been unsuccessful, it must be ordered to pay the costs. Under the first subparagraph of Article 69(4), the Commission of the European Communities, which intervened in the proceedings, must bear its own costs.

On those grounds,

THE COURT

hereby:

1. **Dismisses the application;**

2. **Orders the Federal Republic of Germany to pay the costs;**

3. **Orders the Commission of the European Communities to bear its own costs.**

Rodríguez Iglesias Edward Hirsch

Mancini Schockweiler Moitinho de Almeida

Kapteyn Gulmann Murray

Jann Ragnemalm

Delivered in open court in Luxembourg on 9 November 1995.

R. Grass G. C. Rodríguez Iglesias

Registrar President