



## Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

6 September 2012\*

(Action for annulment — Regulation (EU, Euratom) No 617/2010 — Notification to the Commission of investment projects in energy infrastructure within the European Union — Choice of legal basis — Article 337 TFEU and Article 187 EA — Article 194 TFEU)

In Case C-490/10,

ACTION for annulment under Article 263 TFEU, brought on 8 October 2010,

**European Parliament**, represented by M. Gómez-Leal, J. Rodrigues and L. Visaggio, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Council of the European Union**, represented by M. Simm and A. Lo Monaco, acting as Agents,

defendant,

supported by:

**French Republic**, represented by G. de Bergues and A. Adam, acting as Agents,

**European Commission**, represented by P. Oliver and O. Beynet, acting as Agents, with an address for service in Luxembourg,

interveners,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, U. Löhmus, A. Rosas, A. Ó Caoimh (Rapporteur) and C.G. Fernlund, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 18 April 2012,

\* Language of the case: French.

gives the following

### Judgment

- 1 By its action, the European Parliament asks the Court of Justice, first, to annul Council Regulation (EU, Euratom) No 617/2010 of 24 June 2010 concerning the notification to the Commission of investment projects in energy infrastructure within the European Union and repealing Regulation (EC) No 736/96 (OJ 2010 L 180, p. 7; the ‘contested regulation’), and, second, in the event that the Court annuls that regulation, to order that its effects be maintained until a new regulation has been adopted.

### Legal context

- 2 Recitals 1 to 5, 7, 8, 11 and 15 in the preamble to the contested regulation are worded as follows:
  - ‘(1) Obtaining an overall picture of the development of investment in energy infrastructure in the Union is essential for the Commission to perform its tasks in the field of energy. The availability of regular and up-to-date data and information should enable the Commission to make the necessary comparisons, evaluations or to propose relevant measures based on appropriate figures and analysis, in particular concerning the future energy supply-demand balance.
  - (2) The energy landscape within and outside the Union has changed significantly in recent years and makes investment in energy infrastructure a crucial issue for securing the Union’s energy supply, for the functioning of the internal market and for the transition towards a low-carbon energy system the Union has begun.
  - (3) The new energy context requires significant investment in all kinds of infrastructure in all energy sectors as well as the development of new types of infrastructure and new technologies to be taken up by the market. The liberalisation of the energy sector and the further integration of the internal market give a more prominent role to economic operators for investment. At the same time, new policy requirements such as targets affecting the fuel mix will alter Member States’ policies towards new and/or modernised energy infrastructure.
  - (4) In this context, greater attention should be paid to investment in energy infrastructure in the Union, in particular with a view to anticipating problems, promoting best practices and establishing greater transparency on the future development of the Union’s energy system.
  - (5) The Commission and in particular its Market Observatory for Energy should therefore have at its disposal accurate data and information on investment projects, including decommissioning, in the most significant components of the energy system of the Union.
- ...
- (7) Pursuant to Articles 41 and 42 [EA], undertakings are under an obligation to notify their investment projects. It is necessary to supplement such information with, in particular, a regular reporting on the implementation of investment projects. Such additional reporting is without prejudice to Articles 41 to 44 [EA].
- (8) In order for the Commission to have a consistent view of the future developments of the Union’s energy system as a whole, a harmonised reporting framework for investment projects based on updated categories for official data and information to be transmitted by the Member States is necessary.

...

(11) With a view to avoiding disproportionate administrative burdens and to minimise costs to Member States and undertakings in particular for small and medium[-sized] enterprises, this Regulation should give the possibility to exempt Member States and undertakings from reporting obligations provided that equivalent information is supplied to the Commission pursuant to energy sector-specific legal acts, adopted by the institutions of the Union, aiming at achieving the objectives of competitive energy markets in the Union, of sustainability of the energy system of the Union and of the security of energy supply to the Union. Any duplication of reporting requirements specified in the third internal market package for electricity and natural gas should therefore be avoided.

...

(15) The Commission and in particular its Market Observatory for Energy should provide a regular and cross-sector analysis of the structural evolution and perspectives of the Union energy system and, where appropriate, more focused analysis on certain aspects of this energy system. This analysis should in particular contribute to identifying possible infrastructure and investment gaps in view of an energy supply and demand balance. The analysis should also form a contribution to a discussion at Union level about energy infrastructures and should therefore be forwarded to the European Parliament, the Council and the European Economic and Social Committee and made available to interested parties.'

3 Article 1 of the contested regulation, entitled 'Subject-matter and scope', provides:

'1. This Regulation establishes a common framework for the notification to the Commission of data and information on investment projects in energy infrastructure in the oil, natural gas, electricity, including electricity from renewable sources, and biofuel sectors, and on investment projects related to the capture and storage of carbon dioxide produced by these sectors.

2. This Regulation shall apply to investment projects of the types listed in the Annex on which construction or decommissioning work has started or on which a final investment decision has been taken.

...'

4 Article 2 of the regulation, entitled 'Definitions', states, inter alia, that for the purpose of the regulation, the following definition shall apply:

'(10) "energy sources"; means:

- (i) primary energy sources, such as oil, natural gas or coal;
- (ii) transformed energy sources, such as electricity;
- (iii) renewable energy sources including hydroelectricity, biomass, biogas, wind, solar, tidal, wave and geothermal energy; and
- (iv) energy products, such as refined oil products and biofuels'.

5 Article 3 of the regulation, entitled 'Notification of data', provides:

'1. While keeping the collection and reporting burden proportionate, Member States or the entities to which they delegate this task shall compile all data and information specified in this Regulation from 1 January 2011 and from then onwards every two years.

They shall notify the data and relevant project information specified in this Regulation to the Commission in 2011, that year being the first reporting year, and from then onwards every two years.

...

...

2. Member States or their delegated entities are exempted from the obligations set out in paragraph 1, provided that, and to the extent that, pursuant to energy sector-specific Union law or the Euratom Treaty:

- (a) the concerned Member State or its delegated entity has already notified to the Commission data or information equivalent to the requirements of this Regulation and has indicated the date of the notification and the specific legal act concerned; or
- (b) a specific body is entrusted with the preparation of a multiannual investment plan in energy infrastructure at Union level and compiles to this end data and information equivalent to the requirements of this Regulation. In this case and for the purposes of this Regulation, the specific body shall notify all the relevant data and information to the Commission.'

6 Under Article 4 of the same regulation, entitled 'Data sources':

'The undertakings concerned shall notify the data or information referred to in Article 3 to the Member States, or their delegated entities, in whose territory they are planning to carry out investment projects before 1 June of each reporting year. ...

The first paragraph shall not apply to undertakings where the Member State concerned decides to use other means of supplying the Commission with the data or information referred to in Article 3.'

7 Article 5 of the contested regulation, entitled 'Content of the notification', states:

'1. With regard to investment projects of the types listed in the Annex, the notification provided for in Article 3 shall indicate, where appropriate:

- (a) the volume of the capacities planned or under construction;
- (b) the type and main characteristics of infrastructure or capacities planned or under construction, including the location of cross-border transmission projects, if applicable;
- (c) the probable year of commissioning;
- (d) the type of energy sources used;
- (e) the installations capable of responding to security of supply crises, such as equipment enabling reverse flows or fuel switching; and
- (f) the equipment of carbon capture systems or retrofitting mechanisms for carbon capture and storage.

2. With regard to any proposed decommissioning of capacities, the notification provided for in Article 3 shall indicate:

- (a) the character and the capacity of the infrastructure concerned; and
- (b) the probable year of decommissioning.

3. Any notification under Article 3 shall include where appropriate the total volume of installed production, transmission and storage capacities which are in place at the beginning of the reporting year concerned or whose operation is interrupted for a period exceeding three years.

Member States, their delegated entities or the specific body referred to in Article 3(2)(b) may add to their notifications relevant comments, such as comments on delays or obstacles to the implementation of investment projects.'

8 Article 6 of the regulation, entitled 'Quality and publicity of data', states:

'1. Member States, their delegated entities or, where appropriate, the specific bodies shall aim to ensure the quality, relevance, accuracy, clarity, timeliness and coherence of data and information they notify to the Commission.

In case of specific bodies, the data and information notified may be accompanied by appropriate comments from Member States.

2. The Commission may publish data and information forwarded pursuant to this Regulation, in particular in analyses referred to in Article 10(3), provided that the data and information are published in an aggregated form and that no details concerning individual undertakings and installations are disclosed or can be inferred.

3. Member States, the Commission, or their delegated entities shall each preserve the confidentiality of commercially sensitive data or information in their possession.'

9 Article 7 of the contested regulation provides that the Commission shall adopt, by 31 October 2010, the provisions necessary for the implementation of the regulation, concerning the form and other technical details of the notification of data and information referred to in Articles 3 and 5 thereof.

10 Under Article 8 of the contested regulation, entitled 'Data processing':

'The Commission shall be responsible for developing, hosting, managing and maintaining the IT resources needed to receive, store and carry out any processing of the data or information on energy infrastructure notified to the Commission pursuant to this Regulation.'

11 Article 9 of the regulation, entitled 'Protection of individuals with regard to the processing of data', provides:

'This Regulation is without prejudice to Union law and, in particular, does not alter Member States' obligations with regard to the processing of personal data, as laid down by Directive 95/46/EC, or the obligations incumbent upon the Union's institutions and bodies under Regulation (EC) No 45/2001 with regard to the processing of personal data by them in the course of their duties.'

12 Article 10 of that regulation, entitled 'Monitoring and reporting', provides in paragraph 1 thereof:

'On the basis of data and information forwarded and, if appropriate, of any other data sources including data purchased by the Commission, and taking into account relevant analyses such as the multiannual network development plans for gas and for electricity, the Commission shall forward to the European Parliament, to the Council and to the European Economic and Social Committee and shall publish every two years a cross-sector analysis of the structural evolution and perspectives of the energy system of the Union. This analysis shall aim in particular at:

(a) identifying potential future gaps between energy demand and supply that are of significance from an energy policy perspective of the Union;

- (b) identifying investment obstacles and promoting best practices to address them; and
- (c) increasing transparency for market participants and potential market entrants.

On the basis of this data and information, the Commission may also provide any specific analysis deemed necessary or appropriate.’

13 Pursuant to Article 13 of the contested regulation, it entered into force on the 20th day following its publication in the *Official Journal of the European Union*, which took place on 15 July 2010.

14 The annex to that regulation, entitled ‘Investment projects’, states, inter alia:

‘3. Electricity

3.1. Production

— Thermal and nuclear power stations (generators with a capacity of 100 MWe or more),

...’

### **Background to the dispute**

15 On 17 July 2009, the Commission submitted to the Council a proposal for a regulation intended to replace Council Regulation (EC) No 736/96 of 22 April 1996 on notifying the Commission of investment projects of interest to the Community in the petroleum, natural gas and electricity sectors (OJ 1996 L 102, p. 1). That proposal was based on Article 284 EC and Article 187 EA. Even though those provisions do not provide for any involvement by the Parliament in the decision-making process, the Council decided to consult it, as it had done when adopting Regulation No 736/96.

16 Following the entry into force of the Treaty of Lisbon on 1 December 2009, the Chairman of the Committee on Industry, Research and Energy of the Parliament, by letter of 8 December 2009, invited the Member of the Commission responsible for the field of energy to re-examine the choice of the legal basis for that proposal, so that it would henceforward be based on Article 194 TFEU. The Member replied that Article 284 EC, which became Article 337 TFEU, and Article 187 EA still constituted the legal basis to be chosen on the subject of communication of information since they were not affected by the Treaty of Lisbon.

17 On 25 February 2010, the Parliament adopted a resolution setting out its opinion in respect of that proposal, Amendment 1 of which sought to substitute Article 194(1) and (2) TFEU for Article 337 TFEU and Article 187 EA as a legal basis.

18 The Council did not amend the proposal for a regulation on that point and, on 24 June 2010, adopted the contested regulation on the basis of Article 337 TFEU and Article 187 EA.

19 Considering that the contested regulation should have been adopted solely on the basis of Article 194(1) and (2) TFEU, the Parliament brought this action for annulment.

### **Forms of order sought**

20 The Parliament claims that the Court should:

— annul the contested regulation; and



— order the Council to pay the costs.

21 The Council contends that the Court should:

— dismiss the action; and

— order the Parliament to pay the costs.

22 By order of the President of the Court of 5 April 2011, the French Republic and the Commission were granted leave to intervene in support of the form of order sought by the Council.

## **The action**

### *Arguments of the parties*

23 The Parliament raises a single plea of annulment, alleging the incorrect legal basis had been chosen for the contested regulation, in so far as it was erroneously adopted on the basis of Article 337 TFEU, while the European Union legislator has the necessary powers for that purpose under Article 194(2) TFEU. That error must lead to the annulment of the regulation, since the Parliament was only able to participate in its adoption through a mere consultation, whereas, under Article 194(2) TFEU, the ordinary legislative procedure should have been followed.

24 According to the Parliament, the main aim of the contested regulation is to contribute to achievement of the objectives of the European Union policy on energy, set out in Article 194(1) TFEU, particularly as regards the security of energy supply.

25 As for the content of the contested regulation, the Parliament claims that it is apparent from Article 10(1) thereof that the Commission is responsible, on the basis of information forwarded in accordance with that regulation, for drawing up periodically a cross-sector analysis of the structural evolution and perspectives of the energy system of the European Union with a view, in particular, to identifying potential future gaps between energy demand and supply that are of significance for a European Union energy policy and increasing transparency for market participants and potential entrants. However, the functioning of that market, the security of energy supplies and energy efficiency are among the objectives mentioned in Article 194(1) TFEU. The collection of information organised by that regulation is only a tool for the achievement of those objectives.

26 The Parliament does not dispute the fact that it is possible to use Article 337 TFEU as a general legal basis as regards measures relating to the collection of information. However, referring to the judgments in Joined Cases 188/80 to 190/80 *France and Others v Commission* [1982] ECR 2545 and Case C-426/93 *Germany v Council* [1995] ECR I-3723, it claims that, when such collection responds specifically to the aims of one of the policies of the European Union, such a general basis should give way to the specific basis corresponding to those aims.

27 In any event, even if Article 337 TFEU could legitimately be used in the present case in the same way as Article 194(2) TFEU, the Parliament, relying on the judgment in Case C-300/89 *Commission v Council* [1991] ECR I-2867, paragraph 20, is of the opinion that, in accordance with the case-law of the Court of Justice, the specific legal basis should be preferred over the general legal basis, since it involves the Parliament more closely in the adoption of the act concerned.

28 As regards recourse to Article 187 EA as an additional basis, the Parliament claims that such recourse is not necessary. Unlike Article 40 EA, the mechanism for collecting information established by the contested regulation does not fall within the scope of the objective of promoting or coordinating

investments in the nuclear field. Thus, in accordance with Article 3(2) of that regulation, the notification of data on the nuclear sector is only necessary where those data have not already been submitted to the Commission under the EAEC Treaty. That regulation does not therefore relate to the adoption of measures specifically concerning the development of the nuclear sector.

- 29 In any event, even if recourse to Article 187 EA is dictated by the aim of the contested regulation and its content, the Parliament takes the view that concurrent recourse to Article 187 EA and Article 194(2) TFEU is possible, since those provisions are not incompatible at procedural level. According to the judgment in Case C-155/07 *Parliament v Council* [2008] ECR I-8103, paragraph 79, the ordinary legislative procedure is then applicable, since Article 194(2) TFEU provides for greater participation by the Parliament. The Council's error on that point thus gives rise to a purely formal irregularity in so far as it does not affect the choice of the applicable decision-making procedure.
- 30 Finally, the Parliament states that it has no objection, if the Court annuls the contested regulation, to it maintaining the effects of that regulation, in accordance with the second paragraph of Article 264 TFEU, since it does not disagree with the aim of the regulation or with the means envisaged for that purpose, considered as a whole.
- 31 The Council, supported by the French Republic and the Commission, disputes the claim that the aim of the contested regulation is the achievement of the objectives of the European Union policy on energy. Article 1(1) thereof provides that the aim of the regulation is to establish a common framework for the notification to the Commission of data and information on investment projects in energy infrastructure. The aim of that regulation is thus to allow the Commission to have regularly updated data available to it to complete its tasks, in so far as the possession of reliable information is essential to that end. The Parliament is confusing, in that regard, the aim of the contested regulation with the objective which will be pursued at a later stage by the measures which will eventually be proposed by the Commission on the basis of the analysis of the information collected. The aim of those future proposals does not constitute an objective factor for the purposes of the choice of the legal basis for that regulation.
- 32 The Commission points out that, in that respect, the collection of information on investment projects in energy infrastructure cannot contribute directly to the achievement of energy policy objectives and to security of supply in the European Union. To do that, much more extensive measures than a mere collection of information would be necessary, such as, inter alia, the organisation of investments in certain infrastructure, the creation of sources of funding or the establishment of an incentive-based framework for those investments.
- 33 As regards the content of the contested regulation, the Council is of the opinion that it is apparent from Articles 3 to 10 thereof that the notification of information is the only element in it, since that regulation lays down the obligation of Member States and undertakings to compile the data required and to transmit them to the Commission in aggregated form. In particular, Article 10 of that regulation defines the specific tasks attributed to the Commission and the terms of use and diffusion of those data.
- 34 According to the Council, recourse to Article 337 TFEU requires that three elements are fulfilled, namely, the obligation to communicate information to the Commission, the imposition of limits and conditions by the Council and the necessity of the information for the purposes of the performance of the tasks entrusted to the Commission. In the light of Articles 3 and 4 of the contested regulation, the first of those elements is clearly present. The second is also present because, in Articles 5 to 9 thereof, the regulation imposes limits as regards the type of information concerned and the publicity and the treatment of the data, whereas Article 10 of that regulation defines the specific tasks assigned to the Commission and the conditions of use and dissemination of the data by it. The Council adds that the information that the Commission may seek must be necessary for the performance of its tasks, which are laid out specifically in Article 10 of that regulation and, in more general terms, in Article 17 TEU.



- 35 The Council points out that the Court has already held, in paragraph 19 of *Germany v Council*, that Article 337 TFEU is the correct legal basis for the collection of information by the Commission since that provision grants it a general competence to collect any information needed for the performance of its tasks.
- 36 The Council and the French Republic challenge the argument that Article 337 TFEU must be set aside when the collection of information affects one of the European Union policies. The fact that an act concerns the energy sector is not sufficient to render Article 194 TFEU applicable. Accordingly, in the present case, even though the contested regulation concerns the energy sector, the fact remains that its impact on the European Union energy policy is only indirect and incidental to the principal aim of that regulation.
- 37 According to the Council, the French Republic and the Commission, the interpretation suggested by the Parliament has the effect of negating the practical effect of Article 337 TFEU since, under the principle of conferred powers, that provision can only apply where there is European Union competence.
- 38 The Council points out that the possibility that other provisions of the Treaty on the Functioning of the European Union (TFEU) may continue to apply in the energy sector, notwithstanding the introduction in that treaty of a legal basis relating to the energy policy, is provided for in Article 194 TFEU itself, which is applied 'without prejudice to the application of other provisions of the Treaties'. That applies, not only to Article 337 TFEU concerning the collection of information by the Commission, but also, inter alia, to Article 122 TFEU which authorises the Council to adopt appropriate measures in the case of a crisis in the supply of products in the energy sector, as well as to Article 170 TFEU concerning the development of trans-European networks in the energy infrastructure sectors, and to Article 338 TFEU on statistics.
- 39 The Council, the French Republic and the Commission consider that Articles 337 TFEU and 338 TFEU, which are among the general and final provisions of the TFEU, have a general character, in so far as they apply to all areas of European Union competence. Those provisions must, consequently, be considered as more specific as regards their objectives, since they relate to the establishment of statistics and the right of the Commission to collect information respectively, as opposed to all other provisions of that treaty relating to a sectoral policy. The Parliament's interpretation of the judgment in *Germany v Council* is therefore incorrect.
- 40 The Council and the Commission point out, in that respect, that, if the data collected under the contested regulation concern energy infrastructure, they may be used by the Commission, in accordance with Article 10(1) thereof, not only in the context of the energy policy but also for the benefit of all policies, such as the development of trans-European networks in the areas of energy infrastructure, competition, the freedom of establishment, the freedom to provide services or the free movement of capital.
- 41 The Council, supported on this point by the French Republic and the Commission, considers that recourse to Article 187 EA as the additional legal basis for the contested regulation is also justified, since nuclear power stations are within the field of application of that regulation. If Article 41 EA obliges undertakings to communicate their projects to the Commission to enable it to evaluate each project individually, Article 187 EA is the legal basis granting the Commission power to seek information which it considers necessary for the performance of its tasks. However, the procedures laid down in Article 337 TFEU and Article 187 EA are compatible with each other and the concurrent application of both provisions does not adversely affect the Parliament's prerogatives.
- 42 The Council adds that the more or less important participation of an institution in the formation of a measure cannot determine the choice of legal basis, which must be based exclusively on the purpose and the content of that measure. The procedure followed to rule on a given measure is the result of the legal basis chosen and not the reverse.

- 43 In the alternative, the Council asks that, on the assumption that the Court decides to annul the contested regulation, its effects be maintained until the adoption of a new measure.

### *Findings of the Court*

- 44 According to settled case-law, the choice of the legal basis for a European Union measure must be based on objective factors amenable to judicial review, which include the aim and content of that measure and not on the legal basis used for the adoption of other European Union measures which might, in certain cases, display similar characteristics. In addition, where the Treaty contains a more specific provision that is capable of constituting the legal basis for the measure in question, the measure must be founded on that provision (*Parliament v Council*, paragraph 34 and the case-law cited).
- 45 If examination of a measure reveals that it pursues two aims or that it has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant aim or component (*Parliament v Council*, paragraph 35 and the case-law cited).
- 46 With regard to a measure that simultaneously pursues a number of objectives, or that has several components, which are inseparably linked without one being incidental to the other, the Court has held that, where various provisions of the Treaty are therefore applicable, such a measure will have to be founded, exceptionally, on the various corresponding legal bases (*Parliament v Council*, paragraph 36 and the case-law cited).
- 47 None the less, the Court has previously held that recourse to a dual legal basis is not possible where the procedures laid down for each legal basis are incompatible with each other (*Parliament v Council*, paragraph 37 and the case-law cited).
- 48 In order to determine the merits of the present action, it is therefore necessary to examine, first, the aim and content of the contested regulation in order to determine, second, whether that regulation may be properly based, as the Council, the French Republic and the Commission claim, on Article 337 TFEU instead of Article 194(2) TFEU which was advanced by the Parliament as the appropriate legal basis, and then to examine, third, whether recourse to Article 187 EA as an additional basis is also required, which the Parliament further disputes.

### The aim of the contested regulation

- 49 Recital 1 in the preamble to the contested regulation states that it aims to provide the Commission with specific information concerning the development of investment in energy infrastructure in the European Union so that it may perform the tasks entrusted to it in the field of energy, by adopting relevant measures concerning the future energy supply-demand balance.
- 50 Recitals 2 to 5 and 8 to 15 in the preamble to the contested regulation state, in that respect, that the objective pursued by that regulation is, accordingly, to allow the Commission to furnish an analysis of the structural evolution and the perspectives of the whole energy system of the European Union in order to, inter alia, identify possible infrastructure and investment gaps in view of a supply and demand balance and, consequently, to guarantee the functioning of the internal market and its further integration, to securing the European Union's energy supply, inter alia, by establishing greater transparency on the future development of the European Union's energy system, as well as promoting energy efficiency and energy saving, in particular by assuring the transition towards a low-carbon energy system and the development of new technologies.

- 51 In addition, in the explanatory memorandum of the contested regulation, in the Proposal for a Council Regulation concerning the notification to the Commission of investment projects in energy infrastructure within the European Community and repealing Regulation (EC) No 736/96 (COM(2009) 361 final), the Commission points out, as regards the grounds for and the objectives of its proposal, that it falls within the scope of the new energy policy aiming, inter alia, at securing supply and mitigating climate change.
- 52 It follows that, if, as the Council, the French Republic and the Commission claim, the contested regulation has the aim of collection of information, that aim is introduced by the regulation so that the European Union may achieve certain objectives which were assigned to it in the energy sector.

#### The content of the contested regulation

- 53 It must be noted from the outset that several provisions of the contested regulation, taken in isolation, do not appear, in themselves, to be linked to the carrying-out of the objectives of the European Union policy on energy.
- 54 That is the case for Article 4 of the contested regulation, which merely identifies the source of the data to be notified to the Commission, namely undertakings planning to carry out investment projects in energy infrastructure, as well as Articles 8 and 9 of that regulation which concern, respectively, data processing by the Commission and the protection of individuals with regard to the processing of data. It is the same for Article 7 of that regulation which relates to the adoption by the Commission of measures necessary for the implementation of that regulation. Such general provisions are capable of being integrated into every European Union measure laying down a system for the collection of information.
- 55 However it must be stated that the content of other provisions of the contested regulation relate closely to the European Union energy policy.
- 56 Accordingly, it is apparent from Article 1 of the contested regulation, read in conjunction with the definitions set out in Article 2 thereof, that it provides for the implementation of a common framework for the notification to the Commission of data and information on investment projects in infrastructure concerning practically all energy sectors, including electricity from renewable sources and biofuels, which suggests that the regulation aims to ensure the functioning of the energy market, the security of the European Union's energy supply and the development of new and renewable energies.
- 57 Likewise, Article 3(1) of the contested regulation states that, except for cross-border transmission projects, the data and relevant information relating to the investment projects must be notified in aggregated form, which implies that the information is directed to a planning process aimed at ensuring an energy supply-demand balance in the European Union. That interpretation is supported by Article 3(2), since, in order to avoid, as is apparent from recital 11 in the preamble to the regulation, any duplication of measures relating to the internal market for natural gas and electricity, it exempts Member States from that obligation to collect information when a body entrusted, under European Union law, with the preparation of a multiannual investment plan has already compiled information equivalent to the requirements of that regulation.
- 58 Furthermore, under Article 5(1) of the contested regulation, Member States are required to furnish precise and detailed information concerning their investment projects in the energy sector, inter alia, the volume, the type and the main characteristics of capacities planned or under construction, the probable year of commissioning, the type of energy sources used and the installations capable of responding to security of supply crises. In addition, Article 5(3) invites Member States to add to their

notifications relevant comments, such as comments on delays or obstacles to the implementation of investment projects. It must be stated that those obligations aim to secure the European Union's energy supply.

- 59 Finally and especially, Article 10(1) of the contested regulation provides that the Commission must publish every two years, on the basis of the information notified and, if appropriate, of any other data sources, a cross-sector analysis of the structural evolution and perspectives of the energy system of the European Union, which aims, in particular, at identifying potential future gaps between energy demand and supply that are of significance for the energy policy of the European Union and at increasing transparency for market participants and potential market entrants. In accordance with Article 6(2) of the regulation, in the context of that analysis, the Commission may publish data and information forwarded to it in aggregated form if it ensures that no details concerning individual undertakings and installations are disclosed or can be inferred. Those provisions also show that the collection of information introduced by that regulation was conceived in the aim of achieving a planning activity to ensure the proper functioning of the energy market and the security of the European Union's energy supply.
- 60 It must be stated that those provisions, examined in paragraphs 56 to 59 of this judgment, define the essential elements of the contested regulation since they determine the precise scope and content of the obligation to collect information, whereas Article 4 and Articles 7 to 9 of the regulation, which govern certain technical aspects and are more general in relation to that collection, have a more ancillary character.
- 61 In those circumstances, it should be concluded that the content of the contested regulation reveals that it relates essentially to the implementation of a system for the collection of information relating to investment projects in energy infrastructure designed to allow the European Union to achieve the objectives laid down in the energy sector, in particular as regards the functioning of the internal energy market, the security of the European Union's energy supply and the development of new and renewable energies.

Recourse to the appropriate legal basis under the TFEU

- 62 Article 337 TFEU, which is in Part Seven of the TFEU, entitled 'General and final provisions', provides that 'the Commission, may ..., collect any information and carry out any checks required' for 'the performance of the tasks entrusted to it'. In the context of that provision, the Council acts by a simple majority without consulting the Parliament, even if, in this case, such a consultation was organised.
- 63 As the Court has already held, that provision gives the Commission general competence to collect any information needed for the achievement of the tasks which have been entrusted to it by the TFEU, so that the Council is not obliged to base acts relating to that activity on the various Treaty provisions which confer specific tasks on the Commission (see, to that effect, *Germany v Council*, paragraphs 19 and 20).
- 64 Article 337 TFEU thus forms the legal basis for the acts concerning the general activity of collecting information carried out by the Commission, without requiring that such collection be necessary for the purpose of achieving the objectives of a given European Union policy.
- 65 Article 194 TFEU, which is in Part Three of the TFEU, entitled 'Union policies and internal actions', and which alone constitutes Title XXI, headed 'Energy', provides in paragraph 1, that, in the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, European Union policy on energy is to aim, in a spirit of solidarity between Member States, to ensure the functioning of the energy market, ensure security of energy supply in the European Union, promote energy efficiency and energy saving and the development of



new and renewable forms of energy and promote the interconnection of energy networks. Under the first subparagraph of Article 194(2) TFEU '[w]ithout prejudice to the application of other provisions of the Treaties', the Parliament and the Council are to establish the measures necessary to achieve those objectives by acting in accordance with the ordinary legislative procedure provided for in Article 294 TFEU, in the context of which the Parliament participates fully in the procedure.

- 66 Article 194 TFEU, introduced by the Treaty of Lisbon, therefore inserted into the TFEU an express legal basis for the European Union policy on energy. As is apparent from its wording, in particular that of Article 194(2) TFEU, that provision constitutes the legal basis for European Union acts which are 'necessary' to achieve the objectives assigned to that policy by Article 194(1) TFEU.
- 67 Such a provision constitutes the legal basis intended to apply to all acts adopted by the European Union in the energy sector which are such as to allow the implementation of those objectives, subject to, as can be deduced from the terms '[w]ithout prejudice to the application of other provisions of the Treaties' at the beginning of Article 194(2) TFEU, the more specific provisions laid down by the TFEU on energy. As the Council noted, Articles 122 TFEU and 170 TFEU are inter alia covered, concerning severe difficulties arising in the supply of energy products and trans-European networks respectively, as well as the competences that the European Union has under other provisions of the Treaty, even if the measures at issue also pursue one of the objectives of the energy policy stated in Article 194(1) TFEU.
- 68 It follows that, to determine whether the legal basis for a European Union act having the aim, as in the present case, of the collection of information in the energy sector is Article 337 TFEU or Article 194(2) TFEU, it must be examined whether that act, as regards its aim and content, may be considered necessary to achieve the objectives specifically assigned to the European Union policy on energy by Article 194(1) TFEU. If so, since the collection of information may be treated in the same way as a component of that policy, the European Union act which adopts it must be based on Article 194(2) TFEU. A European Union act cannot therefore come under Article 337 TFEU solely because it adopts a system of collection of information (see, by analogy, *Commission v Council*, paragraph 22).
- 69 In the present case, it is apparent from paragraphs 49 and 61 of this judgment that the aim and content of the contested regulation relate closely to the objectives of the European Union policy on energy stated specifically in Article 194(1) TFEU.
- 70 Contrary to what the Council, the French Republic and the Commission claim, it cannot be held that the contested regulation only has an indirect and incidental impact on the European Union energy policy and that it is only the 'background' to it on the ground that the achievement of the objectives of that energy policy requires the implementation of more important measures than the mere collection of information.
- 71 The system of collection of information introduced by the contested regulation does not apply to general information but to specific data and information relating to the energy infrastructure of the European Union, in order to enable the Commission to identify potential gaps between the demand and supply of energy products in the European Union.
- 72 The collection of information also appears to be a prerequisite to the adoption by the European Union of appropriate measures to ensure the functioning of the internal energy market, the security of supply of energy products, the promotion of energy efficiency and the development of new and renewable forms of energy.
- 73 It follows that the collection of information introduced by the contested regulation can only be justified by an objective consistent with achieving some of the specific tasks entrusted to the European Union by Article 194(1) TFEU, concerning the energy policy (see, by analogy, Case C-533/03 *Commission v Council* [2006] ECR I-1025, paragraph 52).

- 74 In those circumstances, the collection of information established by the contested regulation may be considered to be contributing directly to the achievement of the objectives of the European Union policy on energy, as defined in Article 194(1) TFEU, and, consequently, as constituting, as recital 8 in the preamble to the regulation indeed states, a ‘necessary’ instrument for the achievement of the objectives within the meaning of Article 194(2) TFEU.
- 75 In that regard, it is irrelevant, contrary to what the Council and the Commission claim, that the information collected pursuant to the contested regulation may be used, under the second subparagraph of Article 10(1) thereof, for purposes other than the energy policy. Even if the Commission could use the information collected under that regulation for purposes other than the energy policy as defined in Article 194(1) TFEU, it remains the case that, as is apparent from paragraphs 49 to 61 of this judgment, the aim and content of the regulation fall within that policy.
- 76 Similarly, the distinction drawn by the Council and the French Republic between the immediate aim of the contested regulation, which concerns the collection of information, and its subsequent objective, which may be pursued as a result of the information also obtained by the Commission, cannot be upheld. The foregoing examination shows to the requisite legal standard that the collection of information established by the regulation is intended to allow the Commission to achieve the specific objectives of the European Union policy on energy set out in Article 194(1) TFEU. It follows that, in the context of that regulation, that collection and the objective pursued by it are intrinsically and indissociably linked.
- 77 Furthermore, contrary to what the Council, the French Republic and the Commission claim, it does not result from the foregoing analysis that Article 337 TFEU ceases, in all circumstances, to be a valid legal basis for European Union acts having the aim of implementing a system for the collection of information in the context of a sectoral policy of the European Union, rendering that provision meaningless. As is clear from paragraphs 65 to 68 of this judgment, recourse to that provision is required, *inter alia*, if the contested regulation cannot be considered to be necessary for the achievement of the specific objectives stated in Article 194(1) TFEU as regards the European Union policy on energy.
- 78 Finally, in order to justify their interpretation of Article 337 TFEU, the Council and the Commission cannot rely either on Article 338 TFEU, which concerns measures to be adopted for the production of statistics. Even though that provision is included, like Article 337 TFEU, in Part Seven of the TFEU, entitled ‘General and final provisions’, it does not constitute the legal basis for the contested regulation and it cannot influence the examination of the merits of the present action. Whatever the scope of Article 338 TFEU, it cannot affect the scope of Articles 337 TFEU and 194 TFEU as is evident from the wording of those provisions.
- 79 Therefore, it must be held that the contested regulation falls under Article 194 TFEU, and not Article 337 TFEU, since it constitutes a necessary means for the achievement of the objectives set out in Article 194(1) TFEU. Consequently, that regulation should have been adopted on the basis of Article 194(2) TFEU.

#### Recourse to Article 187 EA as an additional basis for the contested regulation

- 80 Article 187 EA, which is set out under Title V of the EAEC Treaty, entitled ‘General provisions’, provides that the Commission may collect any information and carry out any checks required for the performance of the tasks entrusted to it by that treaty. In the context of that provision, the Council acts, under Article 106a(1) EA and Article 16(3) TEU, by a qualified majority without consultation with the Parliament, even if, in the present case, such a consultation was organised.



- 81 In the light of the similarity of the wording of Article 337 TFEU and Article 187 EA as regards their material scope, the latter provision must be considered, for the reasons set out in paragraphs 62 to 64 of this judgment, to be a general legal basis for the acts concerning the general activity of collecting information carried out by the Commission for the purpose of completing the tasks entrusted to it by the EAEC Treaty.
- 82 However, in the present case, whilst it is true that, as is apparent from Article 1 of the contested regulation, read in conjunction with point 3.1 of the annex thereto, that regulation also covers the notification to the Commission of investment projects in certain nuclear infrastructures, the fact remains that, for the reasons set out in paragraphs 49 to 61 of this judgment, that regulation, as regards its aim and content, concerns the implementation, not of European Union policy in the specific sector of nuclear energy as defined by the EAEC Treaty, but of the European Union policy on energy in general.
- 83 The information relating to the nuclear infrastructure is thus only a component of all the relevant information concerning the energy system of the European Union as a whole which the Commission must possess in order, pursuant to recital 8 in the preamble to the contested regulation, to carry out an overall assessment of energy demand and supply with the aim, inter alia, of guaranteeing security of energy supply in the European Union.
- 84 In that respect, it must therefore be noted that the contested regulation, as is apparent from recital 7 in the preamble thereto, does not fall within the scope of the objective of promoting or coordinating investments in the nuclear field provided for in Articles 40 EA to 44 EA, which specifically relate to the communication by undertakings engaged in the nuclear sector of all individual investment projects in that field relating to new installations and also to all replacements or conversions of a certain size. By contrast, the contested regulation concerns the notification by all Member States of the aggregated data and information relating to all investment projects in energy infrastructure.
- 85 It follows that the contested regulation does not fall under Article 187 EA.
- 86 Accordingly, it is appropriate to find that the contested regulation, in so far as it was based on Article 187 EA, was adopted on an incorrect legal basis and it should have been based solely on Article 194(2) TFEU.
- 87 In the light of all the foregoing considerations, the contested regulation must be annulled in so far as it was based on Article 337 TFEU and Article 187 EA.

### **The application to maintain the effects of the contested regulation**

- 88 The Parliament, supported in this respect by the Council, requests the Court, should it annul the contested regulation, to maintain the effects of that regulation, until a new regulation has been adopted.
- 89 In that regard, it must be borne in mind that, under the second paragraph of Article 264 TFEU, the Court may, if it considers it necessary to do so, state which of the effects of the regulation that it has declared void are to be considered as definitive.
- 90 In this case, it must be noted that, pursuant to Article 13 thereof, the contested regulation entered into force on the 20th day following its publication in the *Official Journal of the European Union*, which took place on 15 July 2010.

- 91 It must be acknowledged that the annulment of the contested regulation without maintaining its effects would be likely to have negative consequences on the achievement of the European Union policy on energy, since that regulation, in so far as it ensures the collection of information necessary for the achievement of the objectives of that policy, constitutes a necessary prerequisite to the adoption by the European Union institutions of all appropriate measures for that purpose. However, although the Parliament seeks the annulment of that regulation on the ground that an incorrect legal basis was used for it, it does not dispute the aim or content thereof.
- 92 In those circumstances, it must be held that there are important grounds of legal certainty justifying the grant by the Court of the parties' request for the effects of the contested regulation to be maintained.
- 93 Accordingly, the effects of the contested regulation must be maintained until the entry into force, within a reasonable period, of a new regulation adopted on the appropriate legal basis, namely Article 194(2) TFEU.

### **Costs**

- 94 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 Parliament has applied for costs and the Council has been unsuccessful, the Council must be ordered to pay the costs. The French Republic and the Commission, which intervened in support of the form of order sought by the Council, must be ordered, in accordance with the first subparagraph of Article 69(4) of the Rules of Procedure, to bear their own costs.

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

1. **Annuls Council Regulation (EU, Euratom) No 617/2010 of 24 June 2010 concerning the notification to the Commission of investment projects in energy infrastructure within the European Union and repealing Regulation (EC) No 736/96;**
2. **Maintains the effects of Regulation No 617/2010 until the entry into force, within a reasonable period, of a new regulation adopted on the appropriate legal basis, namely Article 194(2) TFEU;**
3. **Orders the Council of the European Union to pay the costs except those of the French Republic and the European Commission;**
4. **Orders the French Republic and the European Commission to bear their own costs.**

[Signatures]