Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 18 April 2012 [1]

Case C-490/10

European Parliament
v

Council of the European Union

(Action for annulment — Choice of the dual legal basis of Article 337 TFEU and Article 187 TEAEC — Measures falling within the energy responsibilities of the European Union which are specifically governed by Article 194 TFEU and require a single legal basis (Article 194 TFEU))

I – Introduction

1. By application lodged on 12 October 2010, the European Parliament asks the Court 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 [2] (the 'contested regulation').

2. As regards the substance, it is necessary, in this case, to determine the correct legal basis for the contested regulation, the relevant provisions being, on the one hand, Article 337 of the Treaty on the Functioning of the European Union (TFEU) and Article 187 of the Treaty establishing the European Atomic Energy Community (the Euratom Treaty, or TEAEC), which are the general provisions laid down by those Treaties on the collection of information and on which the contested regulation is based, and, on the other, Article 194 TFEU, introduced by the Treaty of Lisbon and relating to the European Union's energy policy, which the Parliament seeks to have applied.

3. It is necessary to establish whether, in this case, the applicable provisions are Article 337 TFEU and Article 187 TEAEC, under which the Council acts by simple and qualified majority, respectively, or Article 194 TFEU, which requires the application of the ordinary legislative procedure and, consequently, gives the Parliament the right to take part in the measure's adoption, under the conditions laid down for the application of the ordinary legislative procedure.

II – Legal context and facts of the case

4. The collection of information on investment projects in the various energy sectors is governed by Regulation (EEC) No 1056/72 [3] of 18 May 1972, which was amended by Regulation (EEC) No 1215/76 [4] of 4May 1976 and subsequently replaced by Regulation No 736/96 of 22 April 1996. [5]

1 — Original language: Italian.
2 — OJ 2010 L 180, p. 7.
3 — OJ 1972 L 120, p. 7.
4 — OJ 1976 L 140, p. 1.
5 — OJ 1996 L 102, p. 1.

5. On 17 July 2009, the Commission submitted to the Council a proposal for a regulation intended to replace Regulation No 736/96, citing as the relevant legal bases Article 284 EC and Article 187 TEAEC.

6. On 1 December 2009, following the entry into force of the Treaty of Lisbon, the Commission adopted a Communication to the European Parliament and the Council concerning the consequences of the entry into force of the Treaty of Lisbon for ongoing interinstitutional decision-making procedures. [6]

7. In particular, the Commission set out the proposals for which the changes made by the Treaty of Lisbon also entailed a change in their legal basis which went beyond a mere change in the numbering of the articles.

8. On 2 December 2009, the Commission stated that, in its view, it was necessary merely to renumber the legal basis of the proposal for a regulation in question, which was, consequently, based on Article 337 TFEU and Article 187 TEAEC.

9. On 24 June 2010, the Council adopted the contested regulation, citing Article 337 TFEU and Article 187 TEAEC as the legal basis.

10. On 21 September 2010, the Commission adopted Regulation (EU, Euratom) No 833/2010 implementing the contested regulation, [7] in order to define the form and other technical details of the notification to the Commission of data and information on investment projects in the energy sector.

III – Forms of order sought by the parties and the procedure before the Court

11. The Parliament claims that the Court should:

— annul the contested regulation;

— order the Council to pay the costs.

12. The Council contends that the Court should:

— dismiss the action;

— order the Parliament to pay the costs.

13. The Parliament states that it has no objection to a decision of the Court whereby, if the action is upheld, the effects of the contested regulation are maintained, in accordance with the second paragraph of Article 264 TFEU. In its defence, the Council, in turn, specifically requests, in the alternative, that in the event that the contested measure should be annulled, its effects should be maintained until a new measure has been adopted.

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

15. On 5 December 2011, the Court requested the parties to clarify in writing whether, in their opinion, the differences between the procedures laid down in Article 194 TFEU and Article 187 TEAEC were such as to preclude the use of the two provisions as the joint legal basis for an act of the European Union.

6 — COM(2009) 665 final of 2 December 2009.

7 — OJ 2010 L 248, p. 36.

IV – Assessment

16. As is apparent from their respective pleadings, the main parties and the intervening parties are at variance as to the identification of the correct legal basis for the contested regulation.

17. According to the Parliament, Article 194 TFEU, introduced by the Treaty of Lisbon and relating specifically to the energy sector, should have been relied upon, it being necessary in particular to comply with Article 194(2) TFEU, which provides that, for the adoption of the measures necessary to achieve the objectives in Article 194(1) TFEU, the Parliament and the Council are to act in accordance with the ordinary legislative procedure, after consulting the Economic and Social Committee and the Committee of the Regions.

18. This is because the contested regulation was the instrument necessary for attaining the objectives of the European Union's energy policy by collecting information on investment projects concerning the infrastructure to be put in place in the energy sector.

19. The Council, however, supported by the Commission and the French Republic, maintains that it was correct in selecting Article 337 TFEU and Article 187 TEAEC, which confer on the Commission, for the performance of the tasks entrusted to it, the power to collect any necessary information, following consultation of the Council alone, since the sole activity involved was that of collecting information (albeit in the context of investment in energy infrastructure, including nuclear energy).

20. The resolution of the dispute therefore calls for a detailed review of the relationships between the provisions in question, namely Article 194 TFEU, Article 337 TFEU and Article 187 TEAEC.

21. I shall first consider Articles 194 TFEU and 337 TFEU, as they form part of the same Treaty, and then compare Article 194 TFEU and Article 187 TEAEC.

A – *The relationship between Articles 194 TFEU and 337 TFEU*

22. Article 194 TFEU (the current wording of which derives from the Treaty of Lisbon) appears in Title XXI of the Treaty, concerning energy, and provides as follows:

'1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:

(a) ensure the functioning of the energy market;

(b) ensure security of energy supply in the Union;

(c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and

(d) promote the interconnection of energy networks.

2. Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions.

Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).

...'

23. Article 194 TFEU is a provision laid down specifically to regulate European Union policy in the energy sector, and constitutes the general reference provision for that policy.

24. As is apparent from Article 194(2) TFEU, measures implementing the objectives set out in Article 194(1) TFEU must be adopted in accordance with the ordinary legislative procedure.

25. That Article 194 TFEU is a general provision is, moreover, apparent from the clarification, provided in Article 194(2) TFEU, that it is 'without prejudice to the application of other provisions of the Treaties'. By ensuring the application of special rules establishing different procedures for the adoption of measures in the energy sector, that clarification means that the procedure under Article 194 TFEU must generally be applied.

26. Article 337 TFEU (which, before the entry into force of the Treaty of Lisbon, was Article 284 EC), forms part of Part Seven of the TFEU, setting out the Treaty's general and final provisions, and provides as follows:

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

27. As is also clear from its inclusion among the Treaty's general and final provisions, Article 337 TFEU is a closing provision which may be regarded as a general provision in that, unless more specific provisions apply, it recognises that the Commission has a specific power to collect the information necessary for it to perform the tasks entrusted to it by the Treaties.

28. Consequently, Article 337 TFEU must be read in strict conjunction both with the other provisions of the Treaty, since it is instrumental for the purpose of the exercise of the various competences conferred on the European Union, and with the power of the Commission to take measures in accordance with the Treaty provisions which entrust it with specific tasks.

29. As may be inferred from the expression 'in accordance with the provisions of the Treaties' in Article 337 TFEU, '[t]he right to collect information is subordinate and ancillary in the sense that the Commission is likely to perform its tasks in all those areas more effectively if it has access to accurate information'. [8]

30. The Court of Justice has held in regard to Article 213 of the EEC Treaty (which essentially corresponds now to Article 337 TFEU) that that provision may certainly be used as the independent legal basis for the adoption of an act of the Council. [9]

31. In particular, the Council has been accorded [10] the power to adopt a single legislative act regulating the Commission's power to collect information relevant to more than one sector of activity, without it being required to approve a series of legislative acts on the basis of the provisions applicable in each case.

8 — Point 23 of the Opinion of Advocate General Jacobs in Case C-426/93 *Germany* v *Council* [1995] ECR I-3723.

9 — *Germany* v *Council*, cited in footnote 8, paragraphs 18 and 19.

10 — Before the entry into force of the Lisbon Treaty and the introduction of the ordinary legislative procedure as the general reference procedure, however.

32. That is because the information collected by the Commission, with reference to a particular subject, may be relevant in more than one area and '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'. [11]

33. The difference between the two provisions at issue is that, while Article 194 TFEU is a general provision which relates solely to the energy sector and, consequently, delineates a competence which may be defined as sectoral because it relates to a single and comprehensive subject-area, Article 337 TFEU may apply whenever the Commission has competence to act under the Treaties.

34. The fact that, while they are both general in nature, the two provisions at issue are different in scope may, in practice, give rise to a conflict between them where, as in this case, a measure is designed to regulate the collection of information in the energy sector.

35. It is not possible to resolve this conflict by applying the traditional criterion for resolving contradictions between laws, according to which the special provision derogates from the general provision.

36. That criterion is applicable in the case of provisions which govern the same subject-matter, to be identified by reference to the legal interest protected, which differ from each other in that the special provision makes part of the subject-area governed by the general provision subject to different rules.

37. However, both the provisions at issue are of a general nature and have different objects, so that it is not possible to single out one that is special vis-à-vis the other.

38. The Council's argument that, because of the clause inserted into Article 194(2) TFEU to the effect that its provisions are without prejudice to the application of other provisions of the Treaties, it is possible to apply different provisions in the energy sector, including, therefore, Article 337 TFEU as a *lex specialis*, which could thus form the legal basis for the contested regulation, does not carry conviction.

39. In fact, that clause refers only to provisions which introduce rules different from those laid down in Article 194(2) TFEU, in so far as they are intended to govern specific areas of the energy sector or, in any event, different sectors which may, however, have significant links with the energy sector, so that it is not possible to distinguish easily between the respective areas in question, [12] a situation which does not arise in this case. [13]

40. Since there is no special provision in this case, it is necessary to identify the correct legal basis for the contested regulation, taking into account, in accordance with the case-law of the Court of Justice, the objective factors which are amenable to judicial review, including in particular the aim and content of the measure. [14]

11 — *Germany* v *Council*, cited in footnote 8, paragraph 19, as well as point 24 of the Opinion in that case.

12 — Article 192(2)(c) TFEU, for instance, concerning the environment, which is expressly referred to by Article 194(2) TFEU and permits the adoption of measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply. Moreover, precisely because it derogates from Article 194(2) TFEU, it is significant that that provision requires compliance with a special legislative procedure (the Council acting unanimously after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions), which is far more complex than the procedure under Article 337 TFEU.

13 — The Council also cites as special provisions derogating from the system under Article 194 TFEU Articles 122 and 170 TFEU. In the cases in question, however, the non-application of Article 194 TFEU derives from the difference in the subject-areas governed by those provisions, given that Article 122 TFEU concerns economic policy and governs the power of the Council to adopt measures appropriate to the economic situation, if severe difficulties arise in the supply of certain products, notably in the area of energy, while Article 170 TFEU concerns the sector of the trans-European networks and the contribution of the European Union to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures.

14 — See, for example, Case C-300/89 *Commission* v *Council* [1991] ECR I-2867, paragraph 10; Case C-338/01 *Commission* v *Council* [2004] ECR I-4829, paragraph 54; Case C-155/07 *Parliament* v *Council* [2008] ECR I-8103, paragraph 34; and Case C-166/07 *Parliament* v *Council* [2009] ECR I-7135, paragraph 42.

41. It is clear from the Court's case-law that if a measure is designed to pursue a twofold purpose or has a twofold component, and if one of these is identifiable as the main or predominant purpose or component, the act must be based on the legal basis required by that main or predominant purpose or component. [15]

42. Only a measure which simultaneously pursues several objectives that are indissociably linked, without one being secondary and indirect in relation to the other, may be founded on the various corresponding legal bases. [16]

43. In this case, it must be borne in mind, first, that, according to Article 194(2) TFEU, the Parliament and the Council are to act in accordance with the ordinary legislative procedure when they are required to establish the *measures necessary to achieve the objectives* in paragraph (1) of that provision, that is to say the objectives of the European Union's energy policy.

44. Article 337 TFEU is different, however, because it refers to the general activity, on the part of the Commission, of collecting information and carrying out any checks required for the performance of the tasks entrusted to it, without requiring that any measures which may be adopted by the Council acting by simple majority are necessary for the purpose of achieving the objectives of a given European Union policy.

45. Therefore, the contested regulation falls within the scope of Article 194 TFEU if, because of its content and the aims pursued, that provision may be regarded as one of 'the measures necessary to achieve the objectives in paragraph 1' of Article 194 TFEU, [17] that is to say a measure that is instrumental for the purpose of the European Union's energy policy and the achievement of that policy's objectives.

46. On the contrary, the correct legal basis for the contested regulation will be Article 337 TFEU, if the activity of collecting information cannot be directly linked to the attainment of the objectives of the European Union's energy policy and, consequently, cannot be classified as a measure necessary for the achievement of those objectives.

47. It is therefore necessary to assess, by analysing the text of the contested regulation, in particular the title and the articles it contains, whether the collection and notification of the information in question is or is not necessary for and closely linked with the achievement of the objectives referred to in Article 194(1) TFEU.

48. I should first point out that there are articles in the contested regulation which cannot, objectively, be regarded as relevant to the objectives of the European Union's energy policy and are not, therefore, necessary for its implementation.

49. The provisions in question are Article 4, which indicates the sources of the information to be notified to the States concerned (the undertakings), Article 7, concerning the time-limits for adopting the provisions implementing the contested regulation, Article 8, which concerns data processing, and Article 9, which deals with the protection of individuals as regards the processing of personal data.

15 — See, in particular, Case C-36/98 *Spain* v *Council* [2001] ECR I-779, paragraph 59; Case C-211/01 *Commission* v *Council* [2003] ECR I-8913, paragraph 39; Case C-338/01, cited in footnote 14, paragraph 55; Case C-178/03 *Commission* v *Parliament and Council* [2006] ECR I-107, paragraph 42; and Case C-411/06 *Commission* v *Parliament and Council* [2009] ECR I-7585, paragraph 46.

16 — Ex plurimis, Case C-336/00 *Huber* [2002] ECR I-7699, paragraph 31; Case C-281/01 *Commission* v *Council* [2002] ECR I-12049, paragraph 35; and Case C-211/01, cited in footnote 15, paragraph 40.

17 — Which, according to Article 194(1) TFEU are to ensure the functioning of the energy market and security of energy supply in the Union, as well as to promote energy efficiency and energy saving and the development of new and renewable forms of energy and the interconnection of energy networks.

50. Those provisions must be regarded as typical of a regulation concerning the collection of information, given that their purpose is to identify the persons who are required to notify the information and the body responsible for processing the relevant data (the Commission), as well as the arrangements for protecting data relating to individuals and the time-limits for adopting the implementing provisions concerning the form and other technical characteristics of the form of communication in question.

51. However, the title and subsequent other provisions of the contested regulation are closely linked to the European Union's energy policy and do not relate to the simple activity of collecting general information.

52. To begin with, the title refers explicitly to investment projects in energy infrastructure within the European Union, which are essential for ensuring the functioning and security of the European Union's energy supply.

53. Article 1 then refers to the notification of data and information on projects for investment in infrastructure in almost all energy sectors, a requirement which can only be explained by the need to engage in large-scale planning in order to ensure the proper functioning of the energy market, the security of the European Union's energy supply and the development of new and renewable forms of energy.

54. Article 2 goes on to provide definitions which are clearly linked to the need to attain the objectives set out in Article 1, particularly where it refers to the specific body entrusted with the preparation and adoption of Union-wide multi-annual network development and investment plans in energy infrastructure.

55. Article 3 also makes clear that the data in question are to be notified in aggregated form, except for data relating to crossborder transmission projects, and thus shows that the data are to be used in connection with complex planning activity of the kind mentioned above, which goes beyond the mere collection of general and non-aggregated information, as is also apparent from the reference to the specific body in Article 2.

56. Article 5, moreover, defines, comprehensively and in detail, the content of the notification of the relevant information. The most rational explanation for the need to obtain extremely complex data and even relevant comments on delays in or obstacles to the implementation of investment projects thus evinced by Article 5 is the need to achieve the objectives set out in Article 194(1) TFEU.

57. Article 6 deals with the quality of the activity of collecting and notifying information and, as a result of the references it contains to the comments of the Member States, the publication of data in an aggregated form and the analyses referred to in Article 10(3), suggests activities which are too complex to relate merely to the straightforward collection of general information but are, in fact, part of a more structured planning process which is geared to achieving the objectives of the European Union's energy policy.

58. Lastly, Article 10 establishes that, on the basis of the data and information received and, if appropriate, of any other data sources, the Commission is to forward to the European Parliament, to the Council and to the European Economic and Social Committee – and publish every two years – a cross-sector analysis of the structural evolution and perspectives of the energy system of the European Union, which aims 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.

59. By providing for the compilation of the cross-sector analysis of the structural evolution and perspectives of the European Union's energy system referred to above, Article 10 denotes a complex mechanism for re-processing the information in question, which must be regarded as going beyond the simple activity of data-collection and as being introduced in order to achieve objectives that serve to ensure the functioning of the energy market.

60. An assessment of all the provisions of the contested regulation referred to above, conducted in the light of its title and by comparing and weighing those provisions against each other, discloses that the content of the contested measure does not denote a general activity involving the straightforward collection of information, but one that is necessary for the attainment of the objectives of the European Union's energy policy.

61. Indeed, because of their extremely technical nature, Articles 4, 7, 8 and 9, which cannot be linked directly to energy policy and in fact concern the straightforward activity of collecting information, perform a secondary and ancillary role in the scheme of the regulation.

62. Those provisions do not specifically characterise the contested regulation, as they may be regarded as provisions typical of any measure concerning the collection of information.

63. On the other hand, the other provisions considered (Articles 1, 2, 3, 5, 6 and 10) and the title of the contested regulation may be characterised as constituting the essential elements of the regulation, since they define its main characteristic, that is to say the requirement that a range of complex activities, involving collection, notification and analysis, be conducted, which are clearly linked to a structured process of planning in almost all areas and sectors of the European Union's energy policy and are designed to achieve the objectives set out in Article 194(1) TFEU.

64. It follows that, in assessing the contested regulation in order to identify its correct legal basis, it is necessary, after weighing up its constituent elements, as mentioned above, to give precedence to the part of the regulation (the title and Articles 1, 2, 3, 5, 6 and 10) which clearly characterises it in relation to any other measures concerning the collection of information, in that it specifically defines its subject-matter (information relating to investment in energy infrastructure) and makes it an instrument necessary for the attainment of the objectives of a sectoral policy of the European Union such as energy policy.

65. The other provisions referred to (Articles 4, 7, 8 and 9) are less significant because, being highly technical, they do not have a defining character and do not make it possible to identify a link with a specific European Union policy, and may be found in any regulation concerning the collection of information.

66. The considerations set out above, in particular those set out in point 64 are, moreover, borne out by an analysis of the recitals which precede the operative part of the contested regulation.

67. First, it should be pointed out that recitals 1, 5 and 15 state, in essence, that the information in question must be collected to enable the Commission to perform its tasks in the energy sector and to draw up proposals concerning the future energy supply–demand balance, inter alia by identifying possible infrastructure and investment gaps, thereby making it clear that the contested regulation is designed to ensure the proper functioning of the energy market.

68. Furthermore, considered as a whole, recitals 2, 3 and 4 make clear the need to ensure the functioning of the energy market and security of energy supply within the European Union, as well as the promotion of energy saving, energy efficiency and the development of new and renewable forms of energy, all of which are objectives of the European Union's energy policy, as set out in Article 194(1) TFEU.

69. This therefore confirms that the aim of the contested regulation is to achieve the objectives of the European Union's energy policy and is not related to the general activity of simply collecting information.

70. With reference to the considerations set out above, I cannot agree with the contention of the Council (supported by the French Republic) that there can be no link between the contested regulation and the objectives set out in Article 194(1) TFEU because the sole subject-matter of the regulation is, in any event, the notification of information, as may be inferred from the fact that Articles 1 and 3 to 9 [18] concern only aspects relating to the forwarding of data.

71. In addition to the points made above, I would observe that an analysis of the articles cannot be based solely on a formal reading, considering them in isolation, but must entail an overall and coordinated assessment.

72. The subject-matter of the contested regulation is not the general collection of information but the collection of information of a particular kind, such as information on investment in energy infrastructure, which falls within a sector (the energy sector) that is specifically covered by the Treaties.

73. However, the Council's argument fails to take account of the true nature of the information at issue, in particular the specific content of that information, and focuses only on the formal and undisputed aspect of the physical notification of data and not its importance in relation to the European Union's energy policy.

74. The Council also submits that an analysis of Article 10 of the contested regulation discloses the specific objectives assigned to the Commission and the conditions governing the use and dissemination of the data itself, such as, in particular, the processing of the information received and the preparation of analyses on the evolution of and perspectives for investment in energy infrastructure.

75. According to the Council, those objectives may be more generally inferred from Article 17 TEU, under which the Commission is to promote the general interest of the European Union, submit proposals, ensure the application of the Treaties and oversee the application of the Treaties and of measures adopted by the Institutions.

76. According to the Council, therefore, the aim of the contested regulation is to enable the Commission to have regular access to up-to-date data, by establishing a uniform system for the collection and transmission of such data in order to achieve its objectives 'in so far as the possession of reliable information is essential for the purpose of enabling the Commission to perform its tasks'. [19]

77. On that point, I would reiterate the need for a comprehensive analysis of the text of the contested regulation: not just a formal analysis but one that makes it possible to identify the actual purpose of the regulation by carrying out a coordinated assessment of the provisions and recitals and of the nature of the information involved.

78. On the basis of that assessment, as already set out above, the purpose of obtaining the information in question is clearly linked to the objectives set out in Article 194(1) TFEU, and cannot be generally linked to Article 17 TEU.

79. Consequently, in the light of both the content and the purpose of the contested regulation, as may be inferred from an analysis of the title, articles and preamble, the contested measure constitutes a *measure necessary* for the attainment of the objectives of the European Union's energy policy, as best defined in Article 194(1) TFEU.

18 — The French Republic also cites recitals 1, 5, 6, 7, 8, 9, 10, 12, 13 and 14.

19 — See paragraph 17 of the first pleading lodged by the Council.

80. That is clear from the fact that the subject-matter of the regulation is the acquisition not of general information, but of data and information which are specific in that they relate to energy infrastructure and which, precisely because of their specific nature, render the activity of collecting data and information – contrary to the Commission's submissions in its pleadings – a *prerequisite* for carrying out all of the subsequent more complex measures that are necessary for the attainment of the objectives set out in Article 194(1) TFEU and the practical implementation of the European Union's energy policy, which, therefore, constitutes the purpose of the contested regulation.

81. The Council itself implicitly recognises the specific nature of the information in question and its link with Article 194 TFEU when it states that the information is necessary in the context of a policy provided for under the Treaty and that the contested regulation is linked to a European Union policy, in this case its energy policy. [20]

82. Contrary to what the Council then submits, the need for that information in the context of energy policy does not constitute 'an *essential condition* for the application of Article 337', [21] but, on the contrary, as already observed in points 43 to 47 of this Opinion, corresponds to the requirement laid down in Article 194(2) TFEU for the adoption, by means of the ordinary legislative procedure, of the measures designed to achieve the objectives set out in Article 194(1) TFEU. [22]

83. Further weight is added to the considerations set out above as a result of the fact that, if the Council's argument were accepted, the role of the Parliament in the European Union's legislative process would be curtailed, which is at odds with the importance attached to its participation by the Court's case-law, [23] and, in addition, no account would be taken of the most recent developments in the European Union whereby the Treaty of Lisbon identified as the ordinary legislative procedure the procedure under Article 194(2) TFEU, which provides that the Parliament is to have the right to participate fully in the legislative process, and definitively limited those cases (as in Article 337 TFEU) in which the Council adopts regulations acting by a simple majority.

84. The other arguments advanced by the Council, the Commission and the French Republic cannot invalidate the conclusions I have already reached on the basis of the content and purpose of the contested regulation.

85. In their pleadings, they contend that in this particular case, although linked to the energy sector, the contested regulation has an effect on energy policy that is indirect and ancillary to its main purpose, representing only the policy context, and that one of the reasons for this is that, in order to achieve the objectives of energy policy directly, measures far more extensive than the mere collection of information are required.

86. I do not share that argument because, once it has been established, for the reasons set out above, that there is a clear and necessary link between the legislation at issue and the objectives of the European Union's energy policy, as set out in Article 194(1) TFEU, and the provision of energy infrastructure, it cannot be accepted that the impact of the contested regulation on energy policy is merely indirect and secondary.

87. Equally untenable is the contention that Article 337 TFEU would be deprived of all effect, were it not possible to employ it as the legal basis for measures adopted for the collection of information in all circumstances involving a sectoral policy of the European Union.

20 — See the first section of paragraph 29 of the first pleading lodged by the Council.

21 — Again, see the final section of paragraph 29 of the first pleading lodged by the Council.

22 — Article 194(2) TFEU provides that: '[w]ithout prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the *measures necessary* to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions'.

23 — The Court has made clear that, where provided for, the actual participation of the Parliament in the procedure for adopting acts reflects, at Community level, the fundamental democratic principle that peoples should take part in the exercise of power through the intermediary of a representative assembly, as that participation represents an essential factor in the institutional balance intended by the Treaty: Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333, paragraph 33.

88. Article 337 TFEU can certainly continue to be applied as the sole legal basis, except in those cases expressly governed by provisions which, as in this case, provide that the ordinary legislative procedure is to be used or, in any event, special procedures, but it cannot be used for the adoption of measures in a sector which is fully and generally governed by Treaty provisions that derogate from the procedure laid down in Article 337 TFEU.

89. Contrary to the contentions of the Council and Commission, the Commission's power freely to make use of information which was in any event legitimately obtained also for the purpose of accomplishing tasks (laid down in the Treaties) relating to policies other than the policies for which that information was obtained is not at issue in this case, but rather the obligation to adopt measures regulating that power to obtain information on the correct legal basis and, above all, in accordance with the procedure laid down by the Treaties, where matters subject to comprehensive sectoral rules are concerned.

90. Nor do I share the argument that Article 337 TFEU is a sufficient legal basis for the contested regulation because the immediately following provision of that Treaty, namely Article 338 TFEU, which concerns measures to be adopted for the production of statistics where necessary for the performance of the activities of the European Union, is the appropriate legal basis for the production of such statistics in all sectors, including the energy sector.

91. According to that approach, since it forms part of the general and final provisions of the Treaty, Article 338 TFEU is general in scope and thus applicable in all areas of European Union competence, and the same conclusion should be arrived at with regard to Article 337 TFEU, since it also forms part of the general and final provisions of the Treaty and has the same general scope.

92. Setting aside the fact that Article 338 TFEU is not relevant to this case, it is first necessary to confirm the considerations set out above to the effect that, when a matter is subject to comprehensive sectoral rules under the Treaties, the provisions relating to that matter constitute, in principle, the correct legal basis for the measures governing the matter, which must be adopted in accordance with the procedure laid down by those provisions, where that procedure is specified.

93. Furthermore, unlike Article 337 TFEU,[24] Article 338 TFEU requires the application of the ordinary legislative procedure, as does Article 194(2) TFEU.[25]

94. It follows that, for statistics on energy, Article 194 TFEU will be the correct legal basis, possibly in conjunction with Article 338 TFEU, given that the procedure to be observed for the adoption of measures is identical and, consequently, there is no discernible prejudice to Parliament's position.

95. Unlike Article 338 TFEU, however, as far as Article 337 TFEU is concerned, there could be no question of even the possibility of relying on it as the joint legal basis with Article 194 TFEU because, according to the Court's case-law, that approach would not be feasible where, as in this case, the two legal bases are incompatible[26] and, in any event, their joint use would be liable to undermine the rights of the Parliament[27] (which has not been permitted to make use of its right to participate fully in the exercise of a legislative function).

24 — Sensibly, bearing in mind that the preparation of statistics is a far more complicated process than that of collecting information, which usually in fact constitutes the prerequisite for the former.

25 — In support of its argument, the French Republic states that Article 338 TFEU was cited by the Commission as the legal basis for its Proposal for a Regulation of the European Parliament and of the Council on European environmental economic accounts (COM(2010) 132 final of 9 April 2010), in place of Article 192(1) TFEU, without the Parliament raising any objection. That consideration is irrelevant because, if the correct procedure had in any event been adopted, the Parliament would not have a real interest in bringing an action.

26 — The two provisions provide for two totally different procedures, given that, under Article 194 TFEU, the ordinary legislative procedure is to be applied, which accords the Parliament the right to participate fully in the exercise of the legislative function and requires the Council to act by qualified majority, whereas, under Article 337 TFEU, the Council is to act by a simple majority and the Parliament is not involved.

27 — Case C-300/89, cited in footnote 14, paragraphs 17 to 21, and Case C-178/03, cited in footnote 15, paragraph 57.

96. In conclusion, therefore, as regards the relationship between Article 194 TFEU and Article 337 TFEU, I propose that the Court should grant the application and annul the contested regulation.

B – *The relationship between Article 194 TFEU and Article 187 TEAEC*

97. Article 187 TEAEC forms part of Title V of that Treaty, which contains the relevant general provisions, and provides as follows:

'The Commission may, within the limits and under the 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.'

98. As regards the relationship between Article 187 TEAEC and Article 194 TFEU, I would first draw attention to the considerations set out above with regard to Article 337 TFEU.

99. It should, moreover, be added that the Euratom Treaty contains a number of special provisions on energy which are covered by the clause preserving the application of other Treaty provisions in Article 194(2) TFEU and which, consequently, derogate from that provision only in so far as concerns the nuclear sector.

100. In particular, Article 41 TEAEC, together with Articles 42 TEAEC to 44 TEAEC, which lay down the procedure in relation to Article 41 TEAEC, governs, in so far as is material to this case, the communication of 'investment projects relating to new installations and also to replacements or conversions which fulfil the criteria as to type and size laid down by the Council on a proposal from the Commission …'

101. According to Article 40 TEAEC, the purpose of that communication is to stimulate action by persons and undertakings and to facilitate coordinated development of their investment in the nuclear field, and, for that reason, the Commission is to publish periodically illustrative programmes indicating, in particular, nuclear energy production targets and all the types of investment required for their attainment.

102. In view of their special nature in relation to Article 194(2) TFEU, the abovementioned provisions of the Euratom Treaty may constitute, in the sector to which they apply,[28] the legal basis for the adoption of regulations concerning the acquisition of the information in question.

103. Article 187 TEAEC could possibly be cited as a further and supplementary legal basis, without giving rise to problems of a procedural nature,[29] in view of the fact that, under Article 41 TEAEC, the Council acts by a qualified majority.

104. It is not possible to accept the argument put forward by the Council, the Commission and the French Republic to the effect that Article 187 TEAEC is the general provision on which any activity by the Commission involving the collection of information for the purpose of achieving the objectives set in the Euratom Treaty should be based.

105. According to that approach, Articles 40 TEAEC to 44 TEAEC would be more restricted in scope than Article 187 TEAEC, given that, on the basis of the former provisions, the undertaking concerned would be required to communicate information concerning an individual project once only in the initial phase.

28 — They concern the same subject-area, that is to say energy, but a particular sector thereof, namely the nuclear sector, so that in this case the rule that the special law derogates from the general law applies.

29 — In the case of Article 187 TEAEC, the Council acts by a qualified majority, pursuant to Article 16(3) TFEU which, in turn, is applicable since it is referred to in Article 106a(1) TEAEC.

106. Article 187 TEAEC should be used, on account of its more extensive scope vis-à-vis Articles 40 TEAEC to 44 TEAEC, where, as in this case, not only private undertakings but also the Member States are required regularly to transmit aggregated data, with a view not only to the coordinated development of investments in the nuclear sector, but also to the use of the data for any analysis which the Commission considers necessary or appropriate in connection with the tasks entrusted to it.

107. On that point, it should be emphasised that Article 187 TEAEC is a provision which, like Article 337 TFEU,[30] is necessarily linked to the provisions of the Treaties which entrust specific tasks to the Commission.

108. Consequently, Article 187 TEAEC may be used as the legal basis for measures adopted in relation to the collection of information concerning investment in infrastructure in the nuclear energy sector, in place of Article 194 TFEU, only if it can be linked to provisions of the Euratom Treaty which derogate from Article 194 TFEU in accordance with the clause preserving the application of other Treaty provisions in Article 194(2) TFEU, such as Articles 40 TEAEC to 44 TEAEC.

109. On the other hand, since Article 187 TEAEC does not constitute a special provision in relation to Article 194 TFEU, it is not possible to derogate directly from the latter provision, so that, in so far as this case falls outside the scope of Articles 40 TEAEC to 44 TEAEC, Article 194 TFEU will remain the correct legal basis for the regulation.

110. In this particular case, the requirement to notify the information in question is, in fact, broader in scope than that under Articles 40 TEAEC to 44 TEAEC because it is addressed to the Member States (whose undertakings must communicate the information), is ongoing in nature and, for the most part, relates to aggregated data, not individual projects.[31]

111. This makes it clear that the information in question is not designed simply to inform the Commission of individual projects of specific undertakings for investment in the nuclear sector,[32] but may be used for the acquisition of more complex data that will serve to achieve the energy policy objectives under Article 194(1) TFEU, so that that provision is the most appropriate legal basis.

112. Moreover, even if it were accepted that the contested regulation has a dual component, the part of the regulation which may have as its legal basis, within the limits set out above, Articles 40 TEAEC to 44 TEAEC (to which Article 187 TEAEC could be added) is not the main or predominant component in relation to the part that can be linked to Article 194 TFEU.

113. It follows that the contested regulation must, in any event, in the light of the Court's case-law cited in footnote 15 of this Opinion, still be based on Article 194 TFEU, which is the legal basis required by its purpose or its main or predominant component.

114. Finally, I would point out that the Court put a question to the parties[33] concerning the possibility of using both Article 194 TFEU and Article 187 TEAEC as the joint legal bases for the contested regulation, if the procedures laid down in those provisions were to be deemed compatible, notwithstanding their differences.

30 — On that point, see points 27 to 29 of this Opinion.

31 — As is apparent from Article 3(1) of the contested regulation, according to which: '... Member States or the entities to which they delegate this task to 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. This notification shall be made in aggregated form, except for data and relevant information relating to crossborder transmission projects ...'.

32 — The annex to the contested regulation expressly mentions thermal and nuclear power stations in section 3.1 as the type of the investment project concerned.

33 — See point 15 of this Opinion.

115. In that regard, I would observe that the question whether the two provisions are compatible is of no consequence, if Article 194 TFEU is regarded as the only provision that can be applied on the basis of the considerations set out thus far.

116. If, however, it were to be claimed that the contested regulation has a dual component or a dual purpose and that it is not possible to isolate the predominant component or purpose,[34] then even if the procedures in question were in the abstract compatible (the view taken by the Parliament, the Council and the French Republic in their responses, but not by the Commission),[35] in this particular case the procedure under Article 194 TFEU would, in any event, have had to have been followed, given that Article 187 TEAEC makes no provision for the Parliament's participation.

117. In the light of all the foregoing, the Council was not empowered to adopt the contested regulation using, as the legal bases, Article 337 TFEU and Article 187 TEAEC, in place of Article 194 TFEU, and without complying with the procedure laid down in Article 194 TFEU.

118. In its defence, the Council has requested that, in the event that the contested measure is annulled, its effects should be maintained until a new measure has been adopted. The Parliament has not objected to the granting of that request.

119. Article 264(2) TFEU, which is also applicable in the context of the Euratom Treaty since Article 106a(1) TEAEC refers to it, provides that the Court, if it considers it necessary, is to state which of the effects of the act which it has declared void are to be considered as definitive.

120. In this case, I would point out that the information in question is instrumental in the implementation of investment projects in energy infrastructure and is necessary for the purpose of implementing the European Union's energy policy. In particular, it is essential for the effective multi-annual planning of the measures to be undertaken.

121. Moreover, although it seeks the annulment of the contested regulation, the Parliament itself has not objected to the Council's request (which also has the support of the Commission), stating that it is not opposed to the aim of the contested measure or the instruments selected for that purpose, considered as a whole.

122. I therefore consider that, given the importance of the European Union policy concerned and the fact that the parties' arguments essentially relate only to the choice of procedure for adopting the contested regulation, there are valid grounds on which the Court may order that the effects of the regulation be maintained until a new regulation has been adopted.

123. I therefore propose that the Court should grant the application and annul the contested regulation, maintaining its effects until a new regulation has been adopted.

V – Costs

124. I consider that, as the unsuccessful party, the Council should be ordered to pay the costs, in accordance with Article 69(2) of the Rules of Procedure, as applied for by the Parliament.

125. Pursuant to Article 69(4) of the Rules of Procedure, the French Republic and the European Commission are to bear their own costs.

34 — The only circumstance in which a dual legal basis could in theory exist and an issue of the compatibility of the procedures would thus arise.

35 — The Council acts by a qualified majority both in the context of the ordinary legislative procedure under Article 194 TFEU and in the case of Article 187 TEAEC. The main difference between the two procedures is that only Article 194 TFEU provides for the participation of the Parliament. In theory, therefore, from a purely formal and procedural perspective, and without taking into consideration the nature of the measures adopted, it cannot be entirely ruled out that the procedures are compatible.

VI – Conclusions

126. In the light of the foregoing considerations, I propose that the Court should rule as follows:

(1) 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 is annulled.

(2) The effects of Regulation No 617/2010 are maintained until the entry into force of a new regulation adopted on an appropriate legal basis.

(3) The Council of the European Union is ordered to pay the costs.

(4) The European Commission and the French Republic are ordered to bear their own costs.