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*Committee on Legal Affairs
The Chair*

29.1.2010

Mr Herbert Reul
Chair
Committee on Industry, Research and Energy
BRUSSELS

Subject: Opinion on the legal basis of 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)0361 – C7-0125/2009 – 2009/0106(CNS))

Dear Mr Reul,

By letter of 12 January 2010 you asked the Committee on Legal Affairs pursuant to Rule 37(2) to consider the legal basis of the above Commission proposal.

Whereas the Commission has suggested¹ that the post-Lisbon legal bases should be Article 337 TFEU together with Article 187 Euratom (which correspond exactly to the pre-Lisbon legal bases originally proposed: Article 284 EC and Article 187 Euratom), the Industry Committee's rapporteur and other members have tabled an amendment seeking to use the new legal basis afforded by the Lisbon Treaty of Article 194(2) TFEU in place of Article 337 TFEU.

The committee considered this question at its meeting of 28 January 2010.

Articles 337 TFEU and 187 Euratom are identical, providing as follows:

"The Commission may, within the limits and under conditions laid down by the

¹ In its communication, "Consequences of the entry into force of the Treaty of Lisbon for ongoing interinstitutional decision-making procedures" (COM (2009) 665).

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."

Those two articles¹ were used as the legal basis for 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 sectors². The proposal for a regulation under consideration would repeal that regulation with a view to achieving its objectives more efficiently. Indeed in its explanatory memorandum the Commission asserts that Regulation No 736/96 is *"no longer enforced consistently and geared to the most recent evolutions of the energy sector"*. It would appear, however, that the proposal for a regulation is viewed as a continuation of Regulation No 736/96 since it sets out to *"revise and to further strengthen the system laid down"* by that instrument. It would seem that it is for this reason that the Commission is proposing to maintain the same legal basis.

The Lisbon Treaty, now in force, has a specific title (Title XXI) on Energy, in which Article 194 provides as follows:

Article 194

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).

3. By way of derogation from paragraph 2, the Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament, establish the measures referred to therein when they are primarily of a fiscal nature.

Recourse to Article 194 as the legal basis for the proposed regulation could prove justified in so far as the instrument concerns *"the notification to the Commission of investment projects in energy infrastructure"*.

¹ In fact, at that time Article 284 EC was numbered 213.

² OJ L 102, 25.4.1996, p. 1.

Point XVI of Annex VII to the Rules of Procedure provides that the terms of reference of the Committee for Legal Affairs include "*the interpretation and application of European law, compliance of European Union acts with primary law, notably the choice of legal bases ...*". Accordingly, in order to act in accordance with its terms of reference when consulted on a question of legal basis, the committee is under a duty to determine the appropriate legal basis in the light of the Treaties without its choice being limited to the bases proposed by the Commission and the competent committee.

In this case, it appears from perusal of the Treaty on the functioning of the European Union that the provisions contained in Title XVI on trans-European networks could also be applicable. Indeed, Article 170 provides that "*the Union shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures*".

Consequently, the committee has to determine on which of these three legal bases the proposed regulation ought to be adopted. Each of the three articles in question has a link with the proposed regulation. Article 337¹ is concerned with the **collection of information** by the Commission (in this case, information about energy infrastructure investment projects). Article 194 is concerned with **energy policy** and Article 170 with **infrastructures**, in particular in the field of energy.

In spite of a recent judgment of the Court of Justice² in which it was held that it was possible to combine two legal bases involving different procedures, it should be considered that recourse to such dual legal bases should be exceptional, since the established view of the Court is that a combination of legal bases with incompatible procedures is not possible³. Accordingly, in a 2006 judgment⁴, the Court considered that "*recourse to a dual legal basis is not possible where the procedures laid down for each legal basis are incompatible with each other or where the use of two legal bases is liable to undermine the rights of the Parliament*".

In the case of Article 337, the Council acts on a Commission proposal after consulting Parliament. In contrast, both Articles 194 and 170 provide for recourse to the ordinary legislative procedure, that is to say, co-decision. Consequently, legally, whilst Articles 194 and 170 could be used in combination, Article 337 could not be combined with either of those articles.

I - Rejection of Article 337

According to the case-law, the choice of legal basis for a measure "*may not depend simply on an institution's conviction*"⁵ but "*must be based on objective factors which are amenable to judicial review Those factors include in particular the aim and content of the measure*"⁶.

¹ Formerly Article 284 EC.

² Judgment of 3 September 2009 in Case C-166/07 *Parliament v. Council*, not yet reported in the ECR.

³ See, for instance, Case C-164/97 *Parliament v. Council* [1999] ECR I-1139, at para. 14..

⁴ Case C-178/03 *Commission v. Parliament and Council* [2006] ECR I-107, at para. 57.

⁵ Case 45/86 *Commission v. Council ("Generalised Tariff Preferences")* [1987] ECR 1493, at para. 11.

⁶ Case C-300/89 *Commission v. Council ("Titanium Dioxide")* [1991] ECR I-2867, at para. 10.

1. - Consideration of the content of the proposed measure

As far as the content is concerned, it appears absolutely clear that the notification of information (relating to infrastructure investment projects) is the key element of the proposal, in the light of both the titles of the articles and their content.

Accordingly, Article 3 is entitled, **Notification of data**, Article 4, **Data sources**, Article 6, **Quality and publicity of data**, Article 8, **Data processing**, and Article 9, **Protection of individuals with regards to the processing of data**.

The content of those articles is focused on the collection of information as provided for in Article 337. Article 1 specifies that the object of the regulation is to establish "*a common framework for the notification to the Commission of data and information*". Article 3 provides that the data and information specified in the regulation are to be compiled from the beginning of 2010 and from then onwards every two years. Article 4 makes it clear that the Member State are to get the undertakings concerned to supply the data, unless they decide to use other means of obtaining them. Article 5 lists the type of data to be provided about investment projects, such as "*the probable date of commissioning*". Article 6 requires Member States to ensure the quality, relevance, accuracy, clarity, timeliness and coherence of data and information they notify to the Commission. Mention is also made of the possibility for the Commission to publish the data and Member States' obligation to "*preserve the confidentiality of commercially sensitive data or information*". Articles 7 and 8 authorise the Commission to adopt implementing measures and make the Commission responsible for developing the IT resources needed to receive, store and carry out any processing of the data. Article 9 deals with the processing of personal data.

However, the question of energy is also to be found in the content of the proposed regulation. Article 3 specifies that the obligation to report data does not apply where the data has already been notified "*pursuant to EC energy sector-specific legislation*". Moreover, it clearly emerges from Article 5 that the proposed regulation has to do with the energy sector: it refers, for instance, to "*the type of energy sources used*", "*the technologies of interest for security of supply purposes*" and "*the equipment of carbon capture systems*". Lastly, Article 10, Monitoring and reporting, makes it clear what the collection of this information is all about: the idea is to enable the Commission to carry out "*a cross-sector analysis of the structural evolution and perspectives of the EU energy system*". As appears from the formulation of this article, the data constitute merely the necessary means of achieving the Commission's objective, since it is "*on the basis of this data and information*" that the Commission will be able to identify "*potential future gaps of energy demand and supply*", "*investment obstacles and [promote] best practices to address them*" and increase "*transparency for market participants*". These articles correspond to recitals 1 to 5 and recital 15, which establish the framework within which the collection of information is to take place, namely "*the introduction of a common energy policy*".

2. Consideration of the aim of the proposed measure

(a) In the light of the enacting terms

It appears from Article 10 of the proposed regulation that its purpose is to enable the

Commission to:

- (a) identify potential future gaps in energy demand and supply;
- (b) identify investment obstacles and promote best practices to address them;
- (c) increase transparency for market participants.

Those aims are assuredly connected with those set out in Article 194 TFEU, since it provides that Union policy on energy has to "*ensure the functioning of the energy market*" (see (b) and (c)). Article 194 further provides that Union policy is to "*ensure security of energy supply in the Union*", which point (a) is obviously designed to promote.

(b) *In the light of the preamble*

The recitals set out the reasons, the justification, for the proposed act. The first of them refers to the "*introduction of a common energy policy*". The introduction of such a policy is a long-term project which remained for long a pipe dream¹ and did not become a reality until the introduction of the new Title XXI in the TFEU as a result of the Lisbon Treaty. Accordingly, recital 1 recalls that the introduction of a common energy policy is "*an objective which the Community has set itself*". For its part, recital 2 makes a direct connection between energy policy and the proposed regulation by stating that "*[o]btaining an overall picture of the development of investment in energy infrastructure in the Community is one feature of such a policy*". It can therefore be said that the first two recitals situate the proposed regulation in the field of the common energy policy.

More specifically, the following recitals set out to show how the collection of data on investment projects will enable certain specific objectives of the Union's policy with regard to energy to be achieved, notably "*securing the Community's energy supply*" (recital 3) and the proper functioning of the energy markets through "*greater transparency*" (recital 5). In addition, recital 3 states that an overall view of energy infrastructure investment is also essential for "*the transition towards a low carbon energy system*". It is noted that Article 194 mentions that energy policy has to have regard to environmental policy and accordingly must help to "*promote energy efficiency and energy saving and the development of new and renewable forms of energy*".

Lastly, recital 6 states that the data is to be at the disposal of the Commission and "*in particular the Market Observatory for Energy*", which shows that their collection is indissociably linked to the matter to which they relate, namely energy. That link between the collection of data and their aim is emphasised in the Legislative Financial Statement annexed to the proposal. Point 5.2 of that statement points out that the regulation "*creates a new framework **combining reporting and monitoring** (analysis) of investment projects in EU energy infrastructure*".

This analysis of the preamble of the proposal for a regulation in terms of its aims leads one to the conclusion that it is directly connected with the Union's energy policy.

¹ See Yves Petit, "A la recherche de la politique européenne de l'énergie", *Revue trimestrielle de droit européen*, Paris, Dalloz, 2006, v. 42, n. 4, at pp. 593-620.

(c) Aims emerging from the documents annexed to the proposal

It is clear, both from commentaries in the *doctrine* and from the various documents of the institutions, that today energy policy is an essential objective of the Union and can no longer be conducted in a haphazard manner in each Member State. The communication of information in this area contributes towards the establishment of a common energy policy and towards a rapprochement of the Member States in this area. The communication of information is needed for the purposes of this new policy. In this sense, it appears necessary, with a view to consistency, that the regulation creating a “means of action” is attached to Article 194, which gives the Union the power to act in order to attain the various aims which it has set for itself in the sphere of energy.

The explanatory memorandum only confirms the impression that the regulation should be situated within the framework of energy policy. It makes it clear that the context is the “*new energy policy*” and that “*This proposal is consistent with the objectives of the Union [and] consistent with the climate and energy policy*”. In this context, the Commission also mentions the European Council Action Plan 2007-09 on Energy Policy for Europe. That plan already envisaged, for the purposes of realising that new policy, the identification of investment required to satisfy EU strategic needs and a re-examination of supply infrastructures, in which the proposed regulation will play a full part.

II. Conclusion

It is now necessary to establish a priority between the two thrusts of the proposal for a regulation, depending on whether it is considered from the point of view of its content (collection of information) or from that of its aims (energy market and energy security).

In the first place, it should be observed that Article 337 is to be found in Part Seven of the TFEU “General and Final Provisions”. It may be considered to be akin to Article 352 in so far as it is a species of “flexibility clause”¹ and may only be used in order to make up for the absence of powers of action conferred expressly or implicitly on the Community institutions by specific provisions of the TFEU in so far as such powers appear nevertheless to be necessary in order that the Community may exercise its functions with a view to attaining one of the aims set by that treaty. In this case, although Article 337 mentions the collection of information and Article 194 does not, it appears nevertheless that the collection of information is included among the Union attributions enshrined in Article 194 in so far as that information helps to achieve the objectives that the Union has set itself in connection with energy policy.

Next, having regard to the fact that Article 337 is among the “general and final provisions”, it is possible to rely on the principle *lex specialis derogat*², that is to say that a specific rule prevails over a general one.

¹ See in this connection the commentary on Article 284 EC by Böse – EU Kommentar – point V, at p. 2048.

² See Bertrand Peter, “La base juridique des actes en droit communautaire”, *Revue du marché commun et de l'union européenne*, 1991, Editions techniques et économiques, No 378, May 1994, p. 335.

Lastly, in case any doubt remains, a pertinent argument can be derived from the Court's judgment in Case C-176/03 *Commission and Parliament v. Council*¹. In that judgment, the Court had to rule on the proper legal basis for a Council framework decision on the protection of the environment through criminal law. Whereas the Council had based the instrument on articles on judicial cooperation in criminal matters coming under the third pillar, the Commission, supported by the European Parliament, contested the legal basis on the ground that the matter fell within Community competence. The Commission argued that "*The harmonisation of national criminal laws, in particular of the constituent elements of environmental offences to which criminal penalties attach, is designed to be an aid to the Community policy in question*"². The Court first pointed out that protection of the environment constituted one of the essential objectives of the Community³ and that action in that sphere inevitably implied the involvement of the Community institutions in areas such as energy policy or fiscal policy. Then, after establishing that the content of the framework decision principally related to criminal law, the Court held nevertheless that:

*"[this] finding does not prevent the Community legislature, when the application of ... criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective."*⁴

It therefore appears that where measures are essential for attaining a particular objective, the Court will choose the legal basis relating to that objective, therefore giving preference to a more remote aim (protection of the environment) over a more immediate one (harmonisation of criminal law).⁵

In the instant case, therefore, having established that it appears from the proposal for a regulation that the collection of information is essential for creating an overall view of the energy market and hence for the attainment of the objectives set by the Treaty in Article 194, it may be concluded that the legal basis for energy (namely that article) should prevail over Article 337, *a fortiori* since it is not a question of causing a specific title to prevail over another, but a provision located in a specific title over a general and final provision.

Having established that the relationship to energy prevails, it is necessary also to consider whether the specific nature of the area to which the notification of information relates, namely "*investment projects in energy infrastructure*", does not necessitate recourse to a more specific legal basis, that is to say, Articles 170 and 171 TFUE on trans-European networks. According to Article 170, the Union must "*contribute to the establishment and development of trans-European networks*" in particular in the area of energy infrastructures. In order to achieve that objective, the Union may "*support projects of common interest supported by Member States*" (Article 171, third indent) and shall establish "*a series of guidelines covering the objectives, priorities and broad lines of measures envisaged in the sphere of trans-*

¹ [2005] ECR I-7879.

² *Ibid.*, para. 19.

³ *Ibid.*, para. 41.

⁴ *Ibid.*, at para. 48.

⁵ See Hubert Haenel – *Communication sur les propositions de directives établissant des sanctions pénales – Sénat* (France), meeting of 17 July 2007.

European networks” (Article 171, first indent). This could cover the collection, analysis and notification of information.

However, the main questions dealt with under the title on trans-European networks are interoperability and Commission support for common projects. In contrast, under the proposal for a regulation under consideration, the Commission is to collect information about national infrastructure projects in order that it may have a better picture of the whole of the European energy market. The collection of information provided for in the proposed regulation goes beyond the “trans-European” since it covers all investments, including national investments, whereas the existing regulation covers, for instance, only trans-frontier gas networks¹.

Obviously, it is possible that the Commission will act specifically in the field of trans-European networks following its analysis of the data collected. However, its aim is not to act at the level of trans-European networks, but only to evaluate in the light of energy investment projects what action the Union should take in order to overcome any difficulties. Accordingly, it is mentioned in the explanatory memorandum that the regulation is consistent with the objectives of the Union, namely “the establishment of an internal market” and “the sustainable development of Europe based on balanced economic growth and price stability. The proposal is also consistent with the climate and energy policy, one of the pillars of which is the security of energy supply”. In addition, recital 1 refers to a common energy policy and recital 2 explains that obtaining an overall picture of the development of investment in energy infrastructure in the Community is one feature of such a policy. Consequently, it appears that, although the proposed regulation applies to specifically to energy infrastructures, it is to be situated in the context of the common energy policy envisaged in Article 194 TFEU. That article covers all the aspects of the proposed regulation by taking in both the “interconnection of energy networks” and the energy market, security and energy efficiency.

III. Recommendation

At its meeting of 28 January 2010 the Committee on Legal Affairs accordingly decided, unanimously, by 19 votes in favour with no abstentions², to recommend as follows: 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 should be adopted on the basis of Article 194 of the Treaty on the functioning of the European Union.

¹ See the Impact Assessment, SEC (2009) 971 final, at p. 6.

² The following were present for the final vote: Klaus-Heiner Lehne (Chair), Sebastian Valentin Bodu (Vice-Chair), Evelyn Regner (Vice-Chair), Marielle Gallo, Lidia Joanna Geringer de Oedenberg, Antonio Masip Hidalgo, Bernhard Rapkay, Alexandra Thein, Diana Wallis, Cecilia Wikström, Christian Engström, Zbigniew Ziobro, Jiří Maštálka, Francesco Enrico Speroni, Piotr Borys, Vytautas Landsbergis, Kurt Lechner (Rapporteur), Arlene McCarthy, Sajjad Karim.

Yours sincerely,

Klaus-Heiner Lehne