Austria against Euratom? Or when to open a Pandora’s box

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On July 6, Austria has gone to Court over EU funding for a nuclear power plant in Britain. According to the Austrian public media, Austria argues that nuclear power is a bad policy choice, inherently unsafe and not future-worthy. The case argued before the Court will likely be more about competition policy, and about whether the specific deal distorts the EU-market for electricity; however, it is worthwhile to look into the more fundamental aspects of this case.

With this I do not refer to the (dis)merits of nuclear energy, although I should not hide that I am personally not a fan of nuclear power plants, and more with Austria than with the UK on this one. Instead, I want to bring in the constitutional issues of EU law, namely the relationship between Euratom and EU law.

Apparently forgotten by many but the nerdiest EU law enthusiasts, Euratom lives the long (and quiet) life of those suspected dead already. While it is common knowledge that with the Lisbon Treaty, the EU succeeded the EC, it is not true that thereby the European Communities were done with. Instead, Euratom has, at least formally, preserved a life of its own until this day: It still is its own European Community. The situation raises many issues on the law of personality, the interplay between international law principles (on personality) and EU law as well as institutional practice (Euratom is part of DG energy – thus does not even have its own Commissioner). However, dealing with these issues might have to wait until I can summon the time to do them justice in a proper article.

In any case it is important to remember that Euratom was created to further the civil use of nuclear energy (See its Article 1), and to make the peaceful exploitation of the immense powers stored in the atomic nucleus possible. Thus, it is explicitly the purpose of Euratom to help the member states have nuclear power plants (at least if they want them).

So, how should the EU react to assertions that nuclear power is not actually a good things, and that the EU should not fund power plants?

It is important to note that the EU is not bound by the goals of Euratom – formally. Whereas the Treaty of Maastricht contained a formal link between the EU and the Communities, this link does not appear anywhere in the new EU Treaties. If we follow the logic created by the two simply being separate legal
persons, the EU could indeed condemn the use of nuclear energy for all the reasons that the Austrian
government cites and not bother that this might contradict the Euratom Treaty. However, this would be to
disregard the historical basis of EU law, which linked the goals of the Communities closely with the goals of
the EU (and a provision in the Euratom Treaties, that EU law must not contradict it: Article 106a (3) Euratom
Treaty). Moreover, even though formally separate, the EU’s personnel and institutions are not separate from
that of Euratom – and even pieces of legislation can be adopted pursuant to both Treaties at the same time.
It does not appear wise or realistic – even for a lawyer – to rely on the formal separation under these
conditions.

It has been noted that leaving Euratom out of the reform efforts around the European Convention and later
Lisbon was questionable, and that a real debate about Euratom’s future is still to come. General knowledge
has it that the drafter of the Convention wanted to avoid exactly that debate – and the bad publicity it might
generate. However, it seems this is a debate that cannot eternally be avoided.

It will be interesting to read the Court case with the questions on Euratom – EU relations and Euratom’s
future in mind – once it comes out. Even though it will on its face probably not involve any of the issues of
EU- Euratom relations, I cannot but suspect that the view on these underlying issues will inform how easy or
hard justices will find it to put obstacles in the way of building the first nuclear power plant in Britain since
two decades.