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Prof. Dr. Michael Geistlinger's Comments on the Opinion of the Advocate General in the Case C-594/18 P Austria v Commission

Plattform gegen Atomgefahren Salzburg (PLAGE) and NOAH Friends of the Earth Denmark have asked Prof. Dr. Michael Geistlinger from Salzburg University for a comment on the opinion of the Advocate General in the case C-594/18 P Austria v Commission¹. Prof. Geistlinger is an expert in international and constitutional law and has been dealing with Euratom issues since the 1980s. Among others, he is the author of the Treaty on Renewable Energies, Energy Efficiency and Energy Saving².

ABSTRACT:

*Prof. Geistlinger rejects the Advocate General's recommendations and concludes that the Austrian Government is well advised not to accept his reasoning, **but take the results of the Treaty of Lisbon negotiations as they were before being edited and truncated by the European Commission, and convince the European Court of Justice (ECJ) accordingly. Quite obviously, the Austrian government did not question with all required insistence why and with which legitimation the reference to articles 190 - 201b and, in particular to art 191 TFEU, was eliminated by the EU Commission when promulgating the Treaties in the Official Journal.***

No compromise could be achieved at that moment whether to abolish Euratom and subject nuclear energy to the Treaty on Functioning of European Union's (TFEU) energy regime. The legal result of this failed political compromise was that the common roof between the former European Community and Euratom, which was the European Union, fell apart. EC and EU were merged, whereas Euratom remained an international organisation of its own, linked to the EU just by being administered by the same organs, and being bound by only those provisions of the Treaty on European Union (TEU) and the TFEU that are explicitly referred to by the Euratom Treaty.

¹ Link to the Advocate General's opinion: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62018CC0594>

Press release: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200057en.pdf>

² Link to the Treaty on Renewable Energies, Energy Efficiency and Energy Saving: <https://noah.dk/node/1392>

The following is a quick, unofficial opinion on the Advocate General's statement:

"The opinion of the Advocate General Hogan is no surprise for me and was, unfortunately, to be expected. However, there is still a decision of the ECJ to come and a very tiny chance that the ECJ will not follow the opinion of the Advocate General. I see a certain inconsistency in the arguments used by the Advocate General:

According to the Advocate General, there is nothing in the Euratom Treaty dealing with the issue of State aid and he deems it appropriate that rules contained in the TFEU concerning competition and State aid should apply to the nuclear energy sector when the Euratom Treaty does not contain specific rules.

He furthermore finds that *"the development of nuclear power is, as reflected in the Euratom Treaty, a clearly defined objective of EU law, and that objective cannot be subordinated to other objectives of EU law, such as the protection of the environment."*

However, this opinion is even more misleading and unjustified under Euratom, EU and general international law than the decision of the General Court was before. Even if the ECJ is known to follow the opinions of the Advocate General most of the time, blatant inconsistencies in his opinion could make it difficult for the ECJ to decide against Austria in the case at hand.

Emphasis shall be laid on para 31 of the Opinion, where the Advocate General deals with the third part of Austria's plea in law, which he summarizes as follows: "In the third part of its first plea in law, the Republic of Austria criticises the General Court's reliance on Article 106a of the Euratom Treaty when it [i.e. the General Court] applied Article 107 TFEU, on the basis that the Euratom Treaty does not contain any rules dealing with State aid. Given that the General Court applied Article 107(3)(c) TFEU to a situation governed by the Euratom Treaty, it [i.e. the General Court] should also have taken into consideration other provisions of EU law outside the Euratom Treaty. The provisions in question are those on the protection of the environment — which encompasses the protection of health — namely Article 37 of the Charter of Fundamental Rights of the European Union ('the Charter') and Article 11 TFEU and, more specifically, *'in the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment ... [the promotion] of energy efficiency and energy saving and the development of new and renewable forms of energy'*, as specifically singled out as aims of the Union policy on energy in Article 194(1)(c) TFEU. It [Austria's plea] also points to the fact that the General Court did not take those objectives into account, something which it maintains runs counter to the precautionary principle, the 'polluter pays' principle and the principle of sustainability. In that respect, the Republic of Austria challenges paragraph 516 of the judgment under appeal."

The Advocate General assesses this reasoning by undertaking a "closer look at the relationship between the Euratom Treaty and the TEU as well as the TFEU and, in particular, the scope and significance of Article 106a(3) of the Euratom Treaty and the second subparagraph of Article 194(2) TFEU." in paras 33 ff of his Opinion.

He holds in para 34 of his Opinion that the "wording of Article 106a(3) of the Euratom Treaty makes it clear that the Euratom Treaty stands on an equal footing with the TEU and the TFEU as primary law. It states that provisions of the TEU and the TFEU may not be applied in the sphere of the Euratom Treaty, in so far as those provisions derogate from the provisions of the Euratom Treaty. As the General Court put it: *'Consequently, the provisions of the Euratom Treaty constitute special rules in relation to the provisions of the [TFEU] and therefore derogate from the latter provisions in the event of any conflict'*."

The Advocate General draws from that the conclusion in para 35 of his Opinion that this "means that if a particular issue has been specially dealt with by a provision of the Euratom Treaty, then there is no room for the application of the TEU or the TFEU in so far as they provide to the contrary." and reasons in para 36 that the "question of what happens if a question is not dealt with in the Euratom Treaty is, perhaps, not quite as straightforward. As Advocate General Szpunar pointed out in his Opinion in *Kernkraftwerke Lippe-Ems*, *'there are two ways of looking at the relationship between those Treaties. One either takes the view that the Euratom Treaty deals exhaustively with all questions pertaining to the area of nuclear power, leaving no room at all for the application of either the TEU or the TFEU. The other approach is to say that the TEU and the TFEU apply in all areas covered by EU law which are not dealt with in the Euratom Treaty.'*"

The Advocate General finds in para 37 that given "that the Euratom Treaty is only a sectoral treaty aimed at furthering research, development and investment in the nuclear industry, whereas the TEU and the TFEU have much more far-reaching aims and, given the Union's extensive competences in a wide range of areas and sectors, it seems appropriate to apply the rules of the TFEU whenever the Euratom Treaty does not contain more specific rules. It would be odd if, for example, the provisions of Article 157(1) TFEU relating to equal pay were not to apply to employees working in the nuclear energy sector. This, in any event, is the approach which is also reflected in the case-law of this Court."

Finally Advocate General Hogan draws the conclusion in para 38 of his Opinion "that the provisions of the Euratom Treaty have to be considered as *leges speciales* in respect of the provisions of the TFEU which do not preclude the application of provisions of the TFEU if the Euratom Treaty does not have any special or specific rules in that area. Any other conclusion would mean in effect that the production of nuclear power was not governed by any of the general rules governing the internal market. In the present case, it is clear that the Euratom Treaty does not contain special rules regarding State aid. It follows, therefore, that the provisions of Articles 107, 108 and 109 TFEU apply to aid granted by Member States in the field of nuclear energy."

The Austrian Government is well advised not to accept this reasoning, as supposed by the Advocate General, but take the results of the Treaty of Lisbon negotiations as they were and convince the ECJ accordingly. No compromise could be achieved at that moment whether to abolish Euratom and subject nuclear energy to the TFEU energy regime. The legal result of this failed political compromise was that the common roof between the former EC and Euratom, which was the EU, fell apart. EC and EU were merged, whereas Euratom remained an international organisation of its own, linked to the EU just by being administered by the same organs, and being bound by only those provisions of the EU Treaty and the TFEU which explicitly have been declared applicable by the Euratom Treaty in its original version and by the Protocol No 2 AMENDING THE TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY and attached to the Treaty of Lisbon.

The crucial provision emanating from this Protocol is, in fact, article 106a(1) Euratom Treaty. The text of this provision is clear. It was submitted to ratification by the national parliaments, including Austria's parliament, as follows: "

APPLICATION OF CERTAIN PROVISIONS OF THE TREATY ON EUROPEAN UNION AND OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

Article 106a

1. Article 7, Articles 9 to 9 F, Article 48(2) to (5), and Articles 49 and 49 A of the Treaty on European Union, Article 16 A, Articles 190 to 201b, Articles 204 to 211a, Article 213, Articles 215 to 236, Articles 238, 239 and 240, Articles 241 to 245, Articles 246 to 262, Articles 268 to 277, Articles 279 to 280 and Articles 283, 290 and 292 of the Treaty on the Functioning of the European Union, and the Protocol on Transitional Provisions, shall apply to this Treaty.

..."

Article 106a(1) expressly enumerates those provisions of the EU Treaty and of the TFEU that shall be applicable to Euratom. Any article of the EU treaty and of the TFEU not mentioned in article 106a of the Euratom Treaty or in any other place of the Euratom Treaty is not applicable. It is not part of the own legal order of Euratom. Maybe that Austria did not emphasize clearly enough so far, that the European Commission when promulgating article 106a without approval by the national parliaments, including Austria's, eliminated a couple of these applicable provisions. One could call this action a betrayal of the national parliaments and Austria might well refer to the fact that articles 190 to 201b TFEU were included in this order of application. Of particular importance is that this list, thus, also contained article 191(1) and (2) TFEU which reads as follows:

"1. Union policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment,*
- protecting human health,*
- prudent and rational utilisation of natural resources,*
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.*

2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

..."

Advocate General Szpunar in his opinion in Kernkraftwerke Lippe-Ems was correct with his first option of *"looking at the relationship between those Treaties. One ... takes the view that the Euratom Treaty deals exhaustively with all questions pertaining to the area of nuclear power, leaving no room at all for the application of either the TEU or the TFEU."*

One would need to add, however, to his opinion: *"with the exception of those provisions of the TEU and TFEU which are explicitly referred to by the Euratom Treaty"*. Obviously, the Austrian government did not follow up clearly enough with questioning why and with which legitimation the reference to articles 190 - 201b and, in particular to art 191 TFEU, was eliminated by the EU Commission when promulgating the Treaties in the Official Journal.

Advocate General Hogan is wrong when calling the Euratom Treaty a "sectoral treaty" and describing the relationship between the Euratom Treaty and the TFEU as *lex specialis*. The Euratom Treaty is laying down the legal order for the use of nuclear energy and the *lex specialis* rule is applicable only in case of a norm conflict within the same legal order. Euratom has its own legal order distinct from that of the TEU and the TFEU."

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