



## EUROPEAN COMMISSION

Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs  
Director-General

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*Commission Internal*

### NOTE TO MR TOMASZ HUSAK, HEAD OF CABINET, COMMISSIONER BIENKOWSKA

**Subject: Follow-up to the note (Ref. Ares(2016)710709) on the assessment of the Hungarian reply of 21/01/2016 to the letter of formal notice dated 19/11/2015 – NIF 2015/4231 - Paks II nuclear power plant project**

#### 1. THE HUNGARIAN REPLY OF 21/01/2016 AND THE MEETING OF 12/02/2016

Hungary continued to present a number of general comments and arguments from previous correspondence:

- The general comments focused on the conduct of the Commission throughout the procedure (i.e. alleged lack of engagement, lack of appreciation of the facts, disregard of loyal co-operation and good administration, discrimination against Hungary).
- The arguments already presented related to four issues, i. Exemption from public procurement rules for international agreements (Article 22(a) of Directive 2004/17/EC ("Utilities Directive")), ii. The compatibility of the IGA with the Common Commercial Policy (the IGA is not an international trade agreement within the meaning of the CCP and it relates to one single project and does not regulate access to the Hungarian or EU procurement markets), iii. EURATOM Treaty as *lex specialis* for the whole project, and iv. the opening of sub-contracts to competition by the Russian party (Hungary claims that it can directly award the whole project to Russia, if the Russian party then tenders out subcontracts).

These comments and arguments were already addressed in previous correspondence and in the note to the Cabinet (Ares(2016)710709).

In addition, Hungary put forward in detail especially the following new argument: For technical reasons only Russia could execute the contract. Therefore Hungary had to contract directly with Russia (exemption from the Utilities Directive under Article 40(3) c). This argument is mainly based on two separate considerations:

- According to Hungary the refurbishment of Paks I can only be executed by Russia and Hungary is free to bundle the refurbishment with the construction of the new reactors (Paks II) in one contract and, therefore, award the whole project directly to Russia.
- The Euratom Supply Agency ("ESA") has co-signed a Nuclear Fuel Supply Contract (NFSC) for specific fuel rods, which can exclusively be used in a reactor of Russian technology. The signature of the NFSC had as a consequence that only Russia could build the NPP, in which this fuel can be used (NB: the IGA directly awarding the project to Russia was signed approx. 1,5 years before the NFSC).

## 2. VIDEO CONFERENCE WITH DG ENER ON THE PAKS PROJECT

On 17/02/2016 DG GROW discussed the factual basis for the above new arguments with DG ENER:

- On the refurbishment of Paks I, it is likely that indeed only Russia can execute the works. But Paks I uses VVER 440 type reactors which work with different fuel rods, thus are not compatible with the fuel rods of Paks II (VVER 1200 type reactor). Technically VVER 440 and VVER 1200 are different generations with only little technical overlap. The main technical reason for bundling the contracts would be the possibility to keep the Russian-trained engineers. Paks I and Paks II could technically easily be two separate projects.
- Concerning the NFSC, DG ENER stressed that ESA is only responsible for the Common Supply Policy under EURATOM; it has no competence to agree to a project on all EU law aspects. Factually, the fuel procured with the NFSC can indeed only be used in the Russian VVER 1200 reactors.
- The part of the NPP that can technically only be executed by the Russian party are the reactors themselves (estimated at up to 15% of the value of the whole project). Any general contractor of an NPP project would subcontract all other works and go to the market in this respect.

## 3. FOLLOW-UP – POSSIBLE NEXT STEPS

On the basis of the Hungarian reply and the additional information gathered, four options can be proposed for political consideration:

- 1) Send a Reasoned opinion to Hungary: The main argument remains that the whole project was directly awarded through the IGA signed in December 2013, in contravention of the Utilities Directive. The NFSC was signed only in 2015 and therefore cannot justify the previous direct award. Hungary's new arguments rely on exemptions, which have to be interpreted strictly.
- 2) Accept the new argument of technical exclusivity for the whole project: The existing reactors, Paks I, can indeed apparently only be refurbished by Russia; this does not in itself entail that Hungary was justified in bundling the refurbishment of Paks I and the construction of Paks II into one direct award. The directive does not allow designing procurements in order to circumvent its rules. However, if Hungary provided additional technical evidence to justify dependence between Paks I and Paks II, the argument of technical exclusivity would have to be further assessed. The option does not present the risks of the next solution; it can, however, contribute to a precedent of an overly lenient interpretation of the exception of technical exclusivity. To mitigate this risk Hungary could be requested to renegotiate the IGA limiting the

direct award to the refurbishment of Paks I and the construction of the reactors of Paks II.

- 3) Accept the opening of the sub-contracts to competition as sufficient: This option opens part of the project to competition, but it does not remove the concerns related to the direct award of the whole project to Russia and endangers the basis of a public procurement policy based on transparency and equal treatment. This danger is even higher in view of several other projects to be awarded directly by MS to a third country. In addition, the procurement rules in the IGA and the implementing agreement provide only that the Russian party shall engage subcontractors, without an obligation to subcontract a certain proportion of the works. The detailed procurement rules also differ substantially from our directives and the principles of the TFEU<sup>1</sup>. We would recommend not pursuing this option.
- 4) Combine options 2 and 3 in a global political solution: The direct award on the grounds of technical exclusivity (option 2) could be accepted. Direct provision by the Russian party would only be accepted where technically necessary (reactors); all other contracts have to be subcontracted (option 3). It would also be opportune to require that the subcontracts are tendered in full compliance with the rules of the PP directives. The exact extent of the "technical exclusivity" would have to be determined in consultation and agreement with Hungary.

We would be grateful to receive your feedback on the options presented to you.

*(e-signed)*  
Lowri Evans

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<sup>1</sup> E.g. the Russian party can directly award contracts to any subsidiary in which it owns at least 95% of the shares. Thresholds for publication are higher than under the directives; publication in TED is not compulsory; deadlines are different; and the procurements also have to respect Russian law, not only European/Hungarian law.

