

2015/4232	Plainte	HONGRIE	Service responsable : GROW/GS/02
Services associés : ENERX/X00; SGEN/X00; COMP/X00; SJUR/X00			
A Paks Atomerőmű felújítása és új reaktorok építése - The refurbishment of the Paks Nuclear Power Plant and construction of new reactors			

Basés juridiques : Directive: 32004/L0017; Directive: 32004/L0018	Financement communautaire : N
Stade : Mauvaise application - Directives	
Procédures en relation : dossier père -> ; dossiers fils ->	

Fait incriminé :
By directly awarding the implementation of the project to build new reactors and refurbish the existing reactors of the Paks Nuclear Power Plant through an Intergovernmental Agreement to a Russian entity Hungary has failed to apply correctly the applicable European Public Procurement rules.

Mise en demeure 258 (ex226) :	Mise en demeure 260 (ex228) :
Décision :	Décision :
Envoi :	Envoi :
Réponse :	Réponse :
Mise en demeure complémentaire 258 (ex226) :	Mise en demeure complémentaire 260 (ex228) :
Décision :	Décision :
Envoi :	Envoi :
Réponse :	Réponse :
Avis motivé 258 (ex226) :	Avis motivé ex228 :
Décision :	Décision :
Envoi :	Envoi :
Réponse :	Réponse :
Avis motivé complémentaire 258 (ex226) :	Saisine 260 (ex228) :
Décision :	Décision :
Envoi :	Envoi :
Réponse :	Réponse :
Saisine 258 (ex226) :	
Décision :	
Dépot décision :	
Réf Aff :	
D Arrêt :	

Origine plainte (2 dern.) :	Correspondance avec l'état membre (2 dern. évén.) :
13/02/2015:Plainte - Envoi lettre CHAP(2014)03893/D/003	
10/12/2014:Plainte - Accusé de réception:CHAP(2014)03893/D/002	

Historique des décisions (6 dernières décisions) :

Etat des consultations :					
MD258(ex226)	MDC258(ex226)	AM258(ex226)	AMC258(ex226)	MD260(ex228)	MDC260(ex228)
DG -> SJ					
SJ -> DG					
DG -> SG					

DOCUMENT INTERNE

Etat du dossier au 24/08/2016

Jr. Rs.: [REDACTED]

Eq.Jr.: [REDACTED]

Réf.: ARES(2016)4766068 - 24/08/2016

Resp. Int.: VRL

Resp. Ext.: [REDACTED]

I. FACTS
On 14/12/2014, the Government of Hungary (HU) signed an Intergovernmental Agreement (IGA) with the Government of the Russian Federation on cooperation in peaceful use of nuclear energy.
On 28/3/2014, HU and Russia signed an IGA on the extension of a state credit to Hungary for financing the construction of the nuclear power plant Paks II. The value of the project related to the designing, construction, commissioning of two new power units is 12.5 billion EUR. According to Article 1 of the IGA, the Parties shall cooperate in maintaining and developing the capacity of the Paks nuclear power plant (Paks NPP), including the design and construction of two new power units. The Parties also cooperate in supporting modernization, reconstruction and decommissioning of the operating power units in several spheres. According to Art. 2 of the IGA, State Atomic Energy Corporation, Rosatom is appointed to ensure the implementation of the agreement. Art. 5 of the IGA lists the related obligations, outlining the works, supply and services to be provided.
Three Implementing Agreements have been signed in December 2014 on (1) engineering, procurement and construction (EPC Contract); (2) support for the operation and maintenance of the Paks II nuclear power plant (O&M Support Contract); (3) nuclear fuel supply (NFS-C Contract). The implementation of the project has not started yet. Preparatory works will start in 2017. The project is supposed to be completed by 2026.

II. CONTACTS/CORRESPONDENCE WITH THE MEMBER STATE
On 13/2/2014, HU notified the IGA to the COM under Art. 22 point a) of Directive 2004/17/EC and Art. 15 point a) of Directive 2004/18/EC. Those articles provide that the Directives shall not apply to the award of contracts governed by different procedural rules and awarded pursuant to an international agreement concluded in conformity with the Treaty for the joint implementation or exploitation of a project. HU maintains that the IGA is excluded from the public procurement directives and a direct award as foreseen in the IGA is compatible with EU law.
On the Public Procurement aspects of the case, the COM services met the HU authorities twice in 2014. On 25/6/2015 a series of questions were addressed to HU via E.U Pilot (7718/15/GROW). Additional meetings were held and HU replied officially on 2/9/2015.

III. LEGAL ASSESSMENT
The award of contracts for the refurbishment and construction of the Paks NPP is subject to the rules of the Public Procurement Directives 2004/17/EC. It falls within its material scope and exceeds the threshold for its application. HU having notified the project under both PP directives has in the meantime specified that Directive 2004/17/EC applies.
By directly awarding the implementation of the project to a Russian entity HU has not applied the provisions of the directive. The Commission services consider that the project is not exempted according to Art. 22 point a) Directive 2004/17/EC.
a) a direct award does not constitute different procedural rules. The exemption presupposes that some procedural rules have been applied by the contracting entity. A direct award through a dedicated agreement without having followed any kind of specific procurement procedure does not fulfil this requirement.
b) the IGA is also not concluded in conformity with the Treaty for the following reasons: Any public procurement has to respect the basic principles of transparency, equal treatment and non-discrimination. A direct award does not respect these principles. In addition, the conclusion of an IGA opening the market to a specific economic operator from a third country, while closing it to any other economic operator falls within the exclusive competence of the EU under Art. 207 TFEU.
The direct award can also not be justified through a reference to the Euratom Treaty. The compliance of the project with Art. 103 and 41 of the Euratom Treaty does not include a compliance with public procurement rules under the TFEU.

IV. CONCLUSION/PROPOSAL
The Commission services concluded that HU had not respected its obligations under Directive 2004/17/EC and the TFEU by directly awarding the implementation of the Paks II NPP to a Russian entity. A letter of formal notice has been sent on 20/11/2015. The associated services had been consulted on 9/11/2015 by Ares(2015)4966089 and had agreed. Following the answer of the HU authorities of 21/01/2016 several technical meetings have been held and documentation provided. After assessment, the Commission services consider that the contract could be awarded directly to the contractor for technical reasons (art. 40(3)(c) of Directive 2004/17/EC) justified for the core parts of the project. To reach a satisfactory global solution, Hungary has committed in writing to tender transparently and respecting the basic principles of equal treatment and non-discrimination most of the other parts of the project. Under these conditions, the Commission services do not consider opportune to pursue the infringement and propose closure of the case. A pre-closure letter has been sent on 8/8/2016 to the complainant, the associated services and the LS have been consulted by on 24/8/2016 (ARES (2016)5253836) and have given their approval on XXX.

Prop. du service responsable :	24/08/2016:Classement:
Prop. des chefs de cabinet :	
Prop. décision de la Commission :	
Position du service juridique :	
Document révisé par :	In 24/08/2016 16:43 certain information not mentioned above in English version

2015/4231

Infraction constatée

HONGRIE

Service responsable : GROW/G/02

Services associés : TRAD/X/00; COMP/X/00; SGEN/X/00; SJUR/X/00; ENER/X/00

A Paks Alomerőmű felújítása és új reaktorok építése - The refurbishment of the Paks Nuclear Power Plant and construction of new reactors

Bases juridiques : Directive 32004/L0017; Directive 32004/L0018

Stade : Mauvaise application - Directives

Financement communautaire : N

Procédures en relation : dossier père -> ; dossiers fils ->

Fait incriminé :

By directly awarding the implementation of the project to build new reactors and refurbish the existing reactors of the Paks Nuclear Power Plant through an Intergovernmental Agreement to a Russian entity Hungary has failed to apply correctly the applicable European Public Procurement rules.

Mise en demeure 258 (ex226) :

Décision : 19/11/2015;E/2015/8129; C(2015)8164

Envoi : 20/11/2015;SG(2015)D/13441;C(2015)8164

Réponse : 26/01/2016;Ares(2016)420832

Mise en demeure complémentaire 258 (ex226) :

Décision :

Envoi :

Réponse :

Mise en demeure 260 (ex228) :

Décision :

Envoi :

Réponse :

Mise en demeure complémentaire 260 (ex228) :

Décision :

Envoi :

Réponse :

Avis motivé 258 (ex226) :

Décision :

Envoi :

Réponse :

Avis motivé ex228 :

Décision :

Envoi :

Réponse :

Avis motivé complémentaire 258 (ex226) :

Décision :

Envoi :

Réponse :

Saisine 260 (ex228) :

Décision :

Dépôt décision :

Réf Aff. :

D Arrêt :

Saisine 258 (ex226) :

Décision :

Dépôt décision :

Réf Aff. :

D Arrêt :

Origine plainte (2 dem.) :

13/08/2014:Plainte communication SG-EUP LOT-DOC-2015-6143

05/06/2014:Plainte communication SG-EUP LOT-DOC-2015-6142

Correspondance avec l'état membre (2 dem. éven.) :

02/09/2015 EM - Communication SG-EUP LOT-DOC-2015-8590

28/06/2015 EM - Envoi lettre SG-EUP LOT-DOC-2015-621

Historique des décisions (6 dernières décisions) :

19/11/2015;E/2015/8129; C(2015)8164 Mise en demeure 258(ex226);

Etat des consultations :

MD258(ex226)

MDC258(ex226)

AM258(ex226)

MD260(ex228)

MDC260(ex228)

DG -> SJ

SJ -> DG

DG -> SG

DOCUMENT INTERNE

Eial du dossier au 24/08/2016	Jr. Rs. :	Eq. Jr. :	Resp. Int. VRL :	Resp. Ext. :
I. FACTS On 14/12/2014, the Government of Hungary (HU) signed an Intergovernmental Agreement (IGA) with the Government of the Russian Federation on cooperation in peaceful use of nuclear energy. On 28/3/2014, HU and Russia signed an IGA on the extension of a state credit to Hungary for financing the construction of the nuclear power plant Paks II. The value of the project related to the designing, construction, commissioning of two new power units is 12.5 billion EUR. According to Article 1 of the IGA, the Parties shall cooperate in maintaining and developing the capacity of the Paks nuclear power plant (Paks NPP), including the design and construction of two new power units. The Parties also cooperate in supporting modernization, reconstruction and decommissioning of the operating power units in several spheres. According to Art. 2 of the IGA, State Atomic Energy Corporation, Rosatom is appointed to ensure the implementation of the agreement. Art. 5 of the IGA lists the related obligations, outlining the works, supply and services to be provided. Three Implementing Agreements have been signed in December 2014 on (1) engineering, procurement and construction (EPC Contract), (2) support for the operation and maintenance of the Paks II nuclear power plant (O&M Support Contract), (3) nuclear fuel supply (NFS-C Contract). The implementation of the project has not started yet. Preparatory works will start in 2017. The project is supposed to be completed by 2026.				
II. CONTACTS/CORRESPONDENCE WITH THE MEMBER STATE On 13/2/2014, HU notified the IGA to the COM under Art. 22 point a) of Directive 2004/17/EC and Art. 15 point a) of Directive 2004/18/EC. Those articles provide that the Directives shall not apply to the award of contracts governed by different procedural rules and awarded pursuant to an international agreement concluded in conformity with the Treaty for the joint implementation or exploitation of a project. HU maintains that the IGA is excluded from the public procurement directives and a direct award as foreseen in the IGA is compatible with EU law. On the Public Procurement aspects of the case, the COM services met the HU authorities twice in 2014. On 25/6/2015 a series of questions were addressed to HU via EU Pilot (7718/15/GROW). Additional meetings were held and HU replied officially on 2/9/2015.				
III. LEGAL ASSESSMENT The award of contracts for the refurbishment and construction of the Paks NPP is subject to the rules of the Public Procurement Directives 2004/17/EC. It falls within its material scope and exceeds the threshold for its application. HU having notified the project under both PP directives has in the meantime specified that Directive 2004/17/EC applies. By directly awarding the implementation of the project to a Russian entity HU has not applied the provisions of the directive. The Commission services consider that the project is not exempted according to Art. 22 point a) Directive 2004/17/EC. a) a direct award does not constitute different procedural rules. The exemption presupposes that some procedural rules have been applied by the contracting entity. A direct award through a dedicated agreement without having followed any kind of specific procurement procedure does not fulfil this requirement. b) the IGA is also not concluded in conformity with the Treaty for the following reasons: Any public procurement has to respect the basic principles of transparency, equal treatment and non-discrimination. A direct award does not respect these principles. In addition, the conclusion of an IGA opening the market to a specific economic operator from a third country, while closing it to any other economic operator falls within the exclusive competence of the EU under Art. 207 TFEU. The direct award can also not be justified through a reference to the Euratom Treaty. The compliance of the project with Art. 103 and 41 of the Euratom Treaty does not include a compliance with public procurement rules under the TFEU.				
IV. CONCLUSION/PROPOSAL The Commission services concluded that HU had not respected its obligations under Directive 2004/17/EC and the TFEU by directly awarding the implementation of the Paks II NPP to a Russian entity. A letter of formal notice has been sent on 20/11/2015. The associated services had been consulted on 9/11/2015 by Ares(2015)4966089 and had agreed. Following the answer of the HU authorities of 21/01/2016 several technical meetings have been held and documentation provided. After assessment, the Commission services consider the claim that the contract could be awarded directly to the contractor for technical reasons (art. 40(3)(c) of Directive 2004/17/EC) justified for the core parts of the project. To reach a satisfactory global solution, Hungary has committed in writing to tender transparently and respecting the basic principles of equal treatment and non-discrimination most of the other parts of the project. Under these conditions, the Commission services do not consider opportune to pursue the infringement and propose closure of the case. A pre-closure letter has been sent on 8/8/2016 to the complainant, the associated services and the LS have been consulted by on 24/8/2016 (ARES (2016)5255856) and have given their approval on XXX.				
Prop. du service responsable :	23/08/2016:Classement:			
Prop. des chefs de cabinet :				
Prop. décision de la Commission :				
Position du service juridique :				
Document révisé par : In 21/09/2016 16:37 with information not corrected, done in future phase				

