



EURÓPAI BIZOTTSÁG

főtitkárság

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Tárgy: Felszólítás – [írja be a jogsértés számát]. sz. jogsértés

A Főtitkárság kéri, hogy a mellékelt levelet szíveskedjék eljuttatni a külügyminiszternek.

a főtitkár nevében

melléklet: C(ÉV).... final

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EURÓPAI BIZOTTSÁG

Brüsszel,

[illessze be a jogsértés számát]
C(ÉV).... final

Tisztelt Külügyminiszter Úr!

I draw your attention to the concerns of the European Commission regarding the direct award of the Paks project to Rosatom by the Intergovernmental Agreements concluded between the Government of Hungary and the Government of the Russian Federation on cooperation in peaceful use of nuclear energy.

I. Facts

(1) Direct award of the Paks project

On 14 January 2014, the Government of Hungary signed an Intergovernmental Agreement with the Government of the Russian Federation (hereinafter: IGA) on cooperation in peaceful use of nuclear energy.

On 28 March 2014, Hungary and Russia signed an Intergovernmental Agreement on the extension of a state credit to Hungary for financing the construction of the nuclear power plant. The value of the project related to the designing, construction, commissioning of two new power units is 12.5 billion EUR.

Further, 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 (NFSC Contract).

These Agreements constitute the direct award of the implementation of the Paks project to the Russian Party and specifically State Atomic Energy Corporation, Rosatom as follows:

According to Article 1 of the IGA, the Parties shall cooperate in maintaining and developing the capacity of the Paks nuclear power plant (hereinafter: 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 Article 2 of the IGA, State Atomic Energy Corporation, Rosatom is appointed to ensure the implementation of the agreement. Article 5 of the IGA lists the related obligations, outlining the works, supply and services to be provided.

In addition, the IGA establishes cooperation between Hungary and the Russian Federation not only for this project but also the "designing, construction, commissioning and decommissioning of further power units which might be needed to maintain and develop the capacity of the Paks NPP" [Article 1(3)].

In the IGA Hungary and Russia each appointed a government agency as their Competent Authority (for Russia: the State Atomic Energy Corporation, Rosatom, for Hungary: the Ministry of National Development) [Article 2]. Further, the parties each designate an Authorized Organization to conclude Implementation Agreements namely, on construction work, maintenance support services as well as the supply of nuclear fuel and treatment of spent fuel [Articles 3, 8].

On 13 February 2014, the Government of Hungary notified the IGA to the Commission with reference to Article 22 point a) of Directive 2004/17/EC on coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Article 15 point a) of Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. Article 22 point a) of Directive 2004/17/EC and Article 15 point a) of Directive 2004/18/EC provide that these 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.

(2) The exchanges with the Hungarian authorities

In order to clarify the public procurement aspects of the case, the Commission services met the Hungarian authorities on 8 July 2014 and discussed the case on 12 November 2014 with the legal representatives of the Hungarian Government. On 25 June 2015 a series of questions regarding the project and the absence of a public procurement procedure were addressed to the Hungarian authorities via the 'EU Pilot' system, registered under the number 7718/15/GROW. An information meeting with the Hungarian authorities took place on 15 July 2015. The Hungarian authorities replied officially to the Commission on 2 September 2015. On 22 September 2015 a preliminary discussion took place between the Commission services and the Hungarian authorities on the replies.

According to the reply, the direct award though the IGA is in line with the conditions of Articles 22 point a) of Directive 2004/17/EC and 15 point a) of Directive 2004/18/EC on the exceptions for projects based on international agreements. Hungary is of the view that these provisions give leeway and priority to procedural rules which may deviate from the procurement requirements of the directives as well as the application of procurement law principles deriving from the Treaty on the Functioning of the European Union (hereinafter: TFEU). In this context Hungary refers to Article 211 TFEU, "*within their respective sphere of competence, the Union and the Member States shall cooperate with third countries and with the competent international organizations*". Hungary points out that the EU is based on the principle of peaceful cooperation between the EU, the Member States and third countries (Article 3 paragraph 5 of the Treaty on European Union) and within the Member States' sphere of competence the TFEU does not restrict the Member States' discretion in choosing its international partners and the degree of its cooperation with them. In addition, Hungary refers to the European Atomic Energy

Community (Euratom Treaty) regarding the financing of nuclear projects within the meaning of Article 46 paragraph (2) point e). Hungary also points out that Articles 103 and 104 of the Euratom Treaty regulate the procedure for the conclusion of agreements between the Member States and third states, and that in this context the European Commission expressed in its letter of 14 January 2014 its view that the IGA does not impede the competences of Euratom.

The Commission does not share this view.

II. Legal analysis

(1) The legal framework

Article 49 of the TFEU provides for the right of establishment: *'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.'*

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.'

Article 56, first indent of the TFEU provides for the freedom to provide services: *'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.'*

Pursuant to Article 2(1) of the TFEU, when the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.

Article 3 (1) (e) of the TFEU establishes that the Union has exclusive competence in the area of common commercial policy.

Article 207 (1) of the TFEU defines the scope of the common commercial policy as follows: *'The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.'*

Article 207 (3) TFEU establishes that where agreements with one or more third countries or international organisations need to be negotiated and concluded, the procedure must be conducted according to the combined provisions of Article 207 and 218.

Article 1 (2) (a) of Directive 2004/17/EC provides that: *"Supply, works and service contracts" are contracts for pecuniary interest concluded in writing between one or more of the contracting entities referred to in Article 2(2), and one or more contractors, suppliers, or service providers"*

Article 16 of the same Directive provides that: *'Save where they are ruled out by the exclusions in Articles 19 to 26 or pursuant to Article 30, concerning the pursuit of the activity in question, this Directive shall apply to contracts which have a value excluding value-added tax (VAT) estimated to be no less than the following thresholds: [...]'*

Article 22 point (a) of Directive 2004/17/EC provides that: *"This Directive shall not apply to contracts governed by different procedural rules and awarded pursuant to an international agreement concluded in accordance with the Treaty between a Member State and one or more third countries and covering supplies, works, services or design contests intended for the joint implementation or exploitation of a project by the signatory States; all agreements shall be communicated to the Commission, which may consult the Advisory Committee for Public Contracts referred to in Article 68;"*

Article 1 (2) (a) of Directive 2004/18/EC provides that *"Public contracts" are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive.'*

Article 7 of Directive 2004/18/EC provides that: *"This Directive shall apply to public contracts which are not excluded in accordance with the exceptions provided for in Articles 10 and 11 and Articles 12 to 18 and which have a value exclusive of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:"*

Article 15 point a) of Directive 2004/18/EC provides that: *"This Directive shall not apply to public contracts governed by different procedural rules and awarded pursuant to an international agreement concluded in conformity with the Treaty between a Member State and one or more third countries and covering supplies or works intended for the joint implementation or exploitation of a work by the signatory States or services intended for the joint implementation or exploitation of a project by the signatory States; all agreements shall be communicated to the Commission, which may consult the Advisory Committee for Public Contracts referred to in Article 77;"*

(2) The infringement of EU law

(a) The award of the Paks project to State Atomic Energy Corporation, Rosatom without a transparent, competitive procedure

Contracting authorities and contracting entities conferring the performance of tasks on economic operators are obliged to follow procedures and respect procedural safeguards prescribed by Directives 2004/18/EC or 2004/17/EC, provided that the value of these contracts is equal to or higher than the relevant amounts referred to in, respectively, Article 7 and Article 16 of these Directives.

In the present case, Directive 2004/17/EC is applicable if the Hungarian state is itself active in the supply of electricity to fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity (Art. 3 (3) of Directive 2004/17/EC). If this is not the case, Directive 2004/18/EC is applicable. The provisions of both Directives relevant in the present case are similar. The Hungarian authorities have based their communication and notifications on both Directives without informing the Commission, whether Hungary is active in the supply of electricity as required by Directive 2004/17/EC.

With view to the missing information, it cannot be assessed whether it is Directive 2004/18/EC or Directive 2004/17/EC should have been applied. For this reason, the Commission invites the Hungarian authorities to provide any relevant information and documents that may clarify this issue.

According to the provisions of Article 28, 35 and 58 of Directive 2004/18/EC, public contracts or public works concessions exceeding the threshold value (as specified in Article 7 and 56 of the Directive) shall be advertised in the Official Journal of the European Union (OJEU) and awarded following one of the procedures provided for in the Directive (in principle, open or restricted procedure). Similarly, according to the provisions of Article 1 (9), 40, 41 and 42 of Directive 2004/17/EC, contracts exceeding the threshold value (as specified in Article 16 of the Directive) shall be advertised in the OJEU and awarded following one of the procedures provided for in the Directive (in principle, open or restricted procedures or negotiated procedure with a prior publication of a notice).

In the case of the Paks project, with an estimated project value of EUR 12.5 billion for the designing, construction, commissioning of the two new power units alone, the threshold values are exceeded.

By awarding the Paks project directly to the State Atomic Energy Corporation, Rosatom Hungary has not complied with the obligations under Articles 28, 35 and 58 of Directive 2004/18/EC or under Articles 1 (9), 40, 41 and 42 of Directive 2004/17/EC.

(b) No exemption of the award from the application of Directive 2004/17/EC or Directive 2004/18/EC through the "international agreement exemption" within the meaning of Article 22 point a) of Directive 2004/17/EC and Article 15 point a) of Directive 2004/18/EC

The award is not excluded from the application of Directive 2004/17/EC or Directive 2004/18/EC. In particular, the exemption for contracts awarded pursuant to international rules does not apply (Article 22 point a) of Directive 2004/17/EC and Article 15 point a) of Directive 2004/18/EC).

Article 22 point a) of Directive 2004/17/EC and Article 15 point a) of Directive 2004/18/EC provide that these Directives shall not apply to the award of contracts (i) governed by different procedural rules and (ii) awarded pursuant to an international agreement concluded in conformity with the Treaty for the joint implementation or exploitation of a project.

The aim of these provisions is to make it possible for Member States to award public contracts in accordance with different procedural rules than the ones contained in the Union directives on public procurement, where this is necessary to implement or exploit a joint project.

(i) No different procedural rules

However, a direct award in an international agreement does not constitute the application of "different procedural rules" within the meaning of Article 22 point a) of Directive 2004/17/EC and Article 15 point a) of Directive 2004/18/EC. 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.

(ii) IGA not concluded in conformity with the TFEU

- ~~• No compliance of the IGA with the basic principles of the TFEU concerning public procurement.~~

First, a procurement through an IGA can only be exempted from the application of Directive 2004/17/EC or Directive 2004/18/EC, if the IGA itself is concluded in accordance with the Treaty. While acknowledging the possibility of the application of different procedural rules from those laid down in secondary legislation, Article 22 point a) of Directive 2004/17/EC and Article 15 point a) of Directive 2004/18/EC maintain the principle that the obligations under primary law have to be fulfilled.

Indeed, according to the case-law of the Court of Justice, obligations imposed by an international agreement cannot have the effect of prejudging the principles of the Treaty. Therefore, awards through international agreements must not derogate from the principles of non-discrimination, equal treatment and transparency, the basic principles applicable to all public procurements on the basis of the Treaty. These principles derive from Articles 49 and 56 of the TFEU, as interpreted by the Court of Justice [Case C-324/98, *Telaustria*, paragraphs 60-62.; Case C-64/08, *Engelmann*, paragraph 58]. The direct award of a project as described in the IGA is not compatible with these principles.

For this reason, the Commission is of the view that the IGA is not concluded in conformity with the Treaty, and can therefore not be the basis of the exemption of an award from the application of the public procurement Directives through Article 22 point a) of Directive 2004/17/EC or Directive 2004/18/EC through Article 15 point a).

- ~~• The IGA has not been concluded in conformity with the Treaty because it impinges on the Union's exclusive competence under Article 207 of the TFEU to conduct a common commercial policy covering external public procurement~~

Second, the conclusion of the IGA is in breach of the Union's exclusive competence to conduct a Common Commercial Policy which covers access to the public procurement markets of the Union and of third countries. Also for this reason the IGA cannot be considered an international agreement concluded in conformity with the Treaty, as required for application of an exemption from Directive 2004/17/EC or Directive 2004/18/EC.

As as the Union has exclusive competence in the Common Commercial Policy area, (Article 3 (1) (e) TFEU), only the Union can adopt legally binding acts, including the conclusion of international trade agreements, in that area (Article 2(1) TFEU). In view of the scope of the Common Commercial Policy defined by Article 207 TFEU, only the Union can conclude international agreements to open its procurement market and, conversely, only the Union can regulate with the aim of closing the market vis-à-vis third countries in respect of which it is not bound by relevant international commitments.

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The Court of Justice ruled that a Union act falls within the scope of the Common Commercial Policy "if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade in the products concerned". Furthermore, it follows from the judgment of the Court of Justice in Case C-360/93² that the Union's competence in the Common Commercial Policy area covers the conclusion of agreements on the reciprocal opening of public procurement markets for goods and for trans frontier services. After the inclusion of the other modes of trade in services in the scope of the Common Commercial Policy (by the Treaties of Nice and Lisbon) it must be concluded that the reciprocal opening of public procurement markets for other modes of the supply of services is also covered by the Union's exclusive competence under Article 207 TFEU.

Comment [A1]: The IGA at issue does not concern a "reciprocal" opening of procurement markets.

Whilst the main object of the IGA is limited to a specific project and the IGA does not have the ambition of regulating access to Hungary's or the Union's procurement markets in general, through the IGA at issue Hungary committed to open a substantial section of its public procurement market to one third country and, by necessary implication, close the same section of the public procurement market to operators from all other third countries and the EU.

Although even one precisely defined project in itself can breach the exclusive competence of the Union to grant access to its procurement market, it should be added, that the IGA also contains provisions on future, not yet specified, purchases. Notably, the IGA on the Paks nuclear power plant provides, in Article 1(3), that the "Parties shall cooperate in designing, construction, commissioning and decommissioning of further power units". This cooperation may lead to the conclusion of other long-term procurement contracts without open tenders.

Since the IGA grants Russia access to a section of Hungary's and the Union's public procurement markets to the exclusion of goods and services from other third countries (and the Union), its conclusion cannot be deemed in conformity with the Treaty, as it impinges on the Union's exclusive competence under Article 207 of the TFEU. Therefore, the exception provided for in Article 22 point a) of Directive 2004/17/EC or Article 15 point a) of Directive 2004/18/EC cannot apply.

(c) No justification of the direct award through the Euratom Treaty

¹ See Cases C-347/03, *ERSA*, paragraph 75 and C-411/06, *Commission v. European Parliament and Council*, paragraph 71.

² Case C-360/93, *European Parliament v. Council*.

The direct award can also not be justified through a reference to the Euratom Treaty. According to Article 106 a, par. 3 of the Euratom Treaty, "3. *The provisions of the Treaty on European Union and of the Treaty on the Functioning of the European Union shall not derogate from the provisions of this Treaty*". That means that the Euratom Treaty is "lex specialis" to the other treaties that apply when there is no specific provision in the Euratom Treaty. In the case of public procurement, there are no general rules in the Euratom Treaty, so the provisions of the TFEU continue to apply for the award of contracts in the field of nuclear energy, with the exception of nuclear materials within the scope of Chapter 6 of the Euratom Treaty. Those provisions do not apply to the construction of a nuclear power plant.

In this sense, President José Manuel Durão Barroso stressed already in a letter addressed to the Hungarian Prime Minister, dated February 7, 2014, in the context of Article 103 of the Euratom Treaty, the necessity to comply with public procurement rules.

For the Paks project the Commission has also delivered a decision following the notification of the project as investment project under Article 41 of the Euratom Treaty, which states that it is delivered "*without prejudice to any additional assessments to be carried out under the Treaty on the Functioning of the European Union and the obligations stemming from it and from secondary legislation of the project being compatible with other EU law*" (decision C(2015) 6222 of 4 September 2015).

Consequently, the fact that the Commission has not raised objections under the Euratom Treaty to the conclusion of the IGA does not mean that the project is compatible with EU law as whole.

Article 46 (2) e) of the Euratom Treaty on the possible participation by a third State in the financing or management of a Joint Undertaking can also not justify the direct award, contrary to the position expressed by the Hungarian authorities in their reply to the EU-Pilot questions. Chapter 5 of the Euratom Treaty, including Article 46, describes the rules specifically on Joint Undertakings established by a Council decision thus the rules in this Chapter cannot be interpreted as having a general effect on all nuclear projects.

III. Conclusion

In light of the above, without prejudice to the assessment of compliance with other areas covered by EU law, in particular in the field of energy and competition policy, the European Commission submits that Hungary, by directly awarding the contract for the refurbishment/extension of the Paks NPP in the international agreement with the Russian Federation without fulfilling the conditions set out in Article 22 point a) of Directive 2004/17/EC or Article 15 point a) of Directive 2004/18/EC, read in conjunction with Articles 49 and 56 of the TFEU, as well as with Articles 2(1), 3(1)(e) and 207 of the TFEU, has failed to fulfil its obligations arising under Articles 28, 35 and 58 of Directive 2004/18/EC or under Articles 1 (9), 40, 41 and 42 of Directive 2004/17/EC.

The Commission invites your government to submit its observations on the foregoing within two months of the receipt of this letter in accordance with Article 258 of the TFEU. After examining these observations or if no observations have been submitted within the prescribed time-limit, the Commission may, if appropriate, issue a reasoned opinion as provided for in the same article.

Given the serious nature of the potential infringements of EU law and the eventual consequences, the Commission calls on your government to avoid further complicating the situation and in light of the principle of sincere cooperation [Article 4(3) of the Treaty on European Union] to suspend all further award procedures related to the Paks project and to refrain from concluding contracts that – in light of the reasoning presented in the current letter – should be awarded in line with EU law.

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