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

NOTE TO MR TOMASZ HUSAK, HEAD OF CABINET, COMMISSIONER BIEŃKOWSKA

Subject: 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

The Hungarian reply to the letter of formal notice sent on 19/11/2015 was submitted with a one-day delay, on 21/01/2016. According to the Minister of Justice Hungary, the delay was due to the late conclusion of the Council of Ministers on 20/01/2016.

In addition to a number of repeated general comments and arguments that were already put forward in previous correspondence, the Hungarian reply only presents a limited number of new arguments. They are all detailed and commented below.

1. GENERAL COMMENTS OF HUNGARY

- Hungary is extremely disappointed by the lack of engagement on the Commission's side, and apparent lack of appreciation of the facts as presented by the Hungarian authorities, including at the meeting between the Minister Lázár, and Commissioner Bieńkowska on 12 January 2016
- The Commission has not observed its duties of loyal co-operation and good administration and discriminated against Hungary. The reply stressed that the Commission has not investigated other EU nuclear projects which have not followed public tendering procedures under the EU procurement directives.
- Hungary urges DG GROW to engage fully with them and re-consider its position promptly so that they can conclude this matter and avoid further delays to the Project. Hungary highlights that this project is strongly for the benefit of the European Union as a whole since, inter alia, it reduces reliance on gas imports from third countries and it promotes economic growth.
- The Commission's actions and assurances gave rise to a legitimate expectation for Hungary that the Project, and the Implementation Agreements envisaged therein, are compliant with EU law

- The Commission's requests in the letter of formal notice are both disproportionate and too late, the Implementation Agreements have been concluded and Sub-Agreements will be concluded by NIAEP, not by Hungarian authorities.

These comments of Hungary repeatedly come back. The Commission throughout the procedure continuously provided assistance to Hungary (e.g. on 26/11/2013 and 03/06/2014 two workshops were organised by the Commission for the Hungarian authorities) and had been in regular contact with the Hungarian authorities either through exchange of letters, or meetings. DG GROW together with the Legal Service assessed the facts of the case upon several occasions. A note summarising all the contacts with the Hungarian authorities on this case has been sent separately.

The Commission's main concern (direct award) has been pointed out on multiple occasions. There is therefore no ground to state that the Commission gave legitimate expectation that the project is compliant with EU law.

The possible future award of individual contracts ("sub-agreements") for the implementation of the project to other companies by NIAEP under public procurement rules does not resolve the Commission's concerns.

According to the information available in the press, the implementation of the Project has not yet started.

2. ARGUMENTS ALREADY PRESENTED PREVIOUSLY

2.1. Public Procurement

- Assuming that the TFEU applies, the project has been carefully and specifically structured to fall within the exemption for international agreements provided by Article 22(a) of Directive 2004/17/EC ("Utilities Directive");
- "International agreement concluded in accordance with the Treaty" means that the Member State has the competence to enter into such an agreement. Hungary has a sovereign right under Article 194 of the TFEU to choose its energy mix. It is therefore entitled to conclude an agreement with a non-EU country regarding the development of a nuclear plant
- The IGA and the Financing IGA are neither public procurement contracts nor do they contain an award of a public contract. The IGA sets out "different procedural rules" within the meaning of Article 22(a) Utilities Directive for the conclusion and contains a procurement scheme for the subsequent award of the sub-agreements (downstream)
- Only sub-agreements concluded with a Rosatom state-owned and -controlled subsidiary may be directly awarded, this exemption is justified by the in-house exemption
- The TFEU does not restrict the Member States discretion in choosing its international partners and the degree of cooperation, which is not subject to any tender obligation
- The EPC Contract did not have had to be tendered since it serves legitimate imperative requirements in the general interest, and is suitable for achieving the objective which it pursues and does not go beyond what is necessary in order to attain it, it even encourages competition

The Hungarian authorities have based their communication and notifications on both Public Procurement Directives (2004/18/EC and 2004/17/EC). The Commission in the

letter of formal notice invited them to provide any relevant information and documents that may clarify this issue. Although Hungary did not submit any new documents, they now clearly only refer to the exception provided for in Article 22(a) of the Utilities Directive. In this sense a clarification was given.

The Commission thoroughly analysed Hungary's reference to the above exemption. The letter of formal notice already gave exact justification why the exemption for contracts awarded pursuant to international rules does not apply in the present case. As emphasized in the previous correspondence, the possible future subcontracting does not and will not solve the problem of the direct award.

Regarding international cooperation, and the reference to the general interest, these issues were examined as well previously and were found unfounded. A clear distinction was made between public procurement and international cooperation, the latter being outside the scope of public procurement.

2.2. Common Commercial Policy ("CCP")

- Article 207 of the TFEU covers only contracts of a general nature; the case-law of the ECJ requires an act to relate "specifically" to international trade, but the NPP Paks II Project has only certain vague, indirect and incidental effects on international trade; the IGA is not an international trade agreement within the meaning of the CCP
- the IGA relates to one single project and does not regulate access to the Hungarian or EU procurement markets

The letter of formal notice already addresses Hungary's reference to the Common Commercial Policy and concludes that the conclusion of the IGA impinges on the Union's exclusive competence under Article 207 of the TFEU. This view of DG GROW is also supported by the Legal Service in their note of 06/05/2014.

2.3. EURATOM Treaty

- The IGA and the Implementation Agreements fall within the scope of the EURATOM Treaty which contains procedural rules for new investment projects, has exhaustive character and it being "lex specialis" precludes the application of the TFEU, the Utilities Directive and the general principles of the Treaty
- Certain other aspects (the award of subcontracts) of the Project might not be within the scope of the EURATOM Treaty, but are ancillary to the main purpose of the project and will according to the IGA and the EPC contract in any event be subject to tendering procedures in accordance with the TFEU principles and the Procurement Directives
- The Commission raised no objections to the IGA within the EURATOM framework

The EURATOM aspect of the case was also analysed and addressed both during the procedure and in the letter of formal notice. The Commission pointed out to the fact that the direct award can also not be justified through a reference to the Euratom Treaty. 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 a whole.

3. NEW ARGUMENTS PUT FORWARD BY HUNGARY

- The [REDACTED] nuclear technology supplier [REDACTED] was not offering, or able to submit a bid for the project. The same is true of [REDACTED] providers. There were therefore no operators from the EU or elsewhere that were foreclosed from access to the Hungarian market or the project.
- Technical exemption under Article 40(3) c) of the Utilities Directive also applies as the Russian party was the sole possible supplier of these reasonably requested works and services for a fixed price and turnkey contract
- By concluding the Nuclear Fuel Supply Contract, the Euratom Supply Agency ("ESA") in fact approved the EPC Contract, as well, and would not have co-signed an Implementation Agreement which was not compliant with the principles of non-discrimination, transparency and equal treatment

According to Article 40(3) c) of the Utilities Directive contracting entities may use a procedure without prior call for competition when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may be executed only by a particular economic operator. This provision provides an exemption from the normal procurement procedures and the obligation to use a call for competition in exceptional cases.

Hungary's reference to the technical exemption under Article 40(3) c) of the Utilities Directive is unfounded since its application requires that "the contract may be executed only by a particular economic operator", which Hungary did not prove in this case. On the contrary by referring to [REDACTED] nuclear technology [REDACTED] providers, Hungary clearly demonstrated that there are other competitors on the market, not only Rosatom. It would have been possible to launch an open and transparent procurement procedure, even if it had had the result at the end that [REDACTED] would not have been able to make the same or a similar offer.

The fact that the Euratom Supply Agency concluded the Nuclear Fuel Supply Contract does not mean, or have the consequence, that it concluded the EPC Contract; such a conclusion does not have any legal bases, since the two contracts are different in nature. The fuel contract falls under the EURATOM Treaty, whilst the EPC Contract goes beyond it, which means that the provisions of the TFEU apply to it. The fact that the fuel contract is in compliance with the Euratom Treaty does not mean that the project as a whole is compatible with EU law.

4. FOLLOW-UP – POSSIBLE NEXT STEPS

Following the Hungarian reply, and taking into consideration the fact that the reply does present new elements which could change the appreciation of the letter of formal notice, would appear to be that we start preparing a reasoned opinion. Alternatively, we could consider to pursue bilateral negotiation with Hungary first, in which case we would need to discuss the possible scope of such negotiations.

(e-signed)
Lowri Evans