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Cc:

Mr Zsombor Nagy
Contact person.
Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs
Via email: zsombor.nagy@ec.europa.eu

4 September 2016

RE: Your letter of 8 August 2016, concerning our complaint regarding possible EU law infringements by the Hungarian government in connection with the funding and construction of two nuclear reactors at the Paks Nuclear Power Plant (NPP).[1]

Dear Mr Muylle,

Thank you for your letter by which you inform us that the Commission does not consider it opportune to pursue the infringement procedure concerning the compatibility of the Paks II Nuclear Power Plant project with EU public procurement rules.

We welcome the opportunity to present new information regarding the case at issue. We would like to invite you to consider the following points.

I. Hungary had initially foreseen to launch a tender procedure and it considered other designs besides the VVER1200/AES2006 (the "VVER"). There is no evidence that the subsequent decision not to launch a tender was due to technical reasons.

1. In your letter, you explain that Hungary would be entitled to rely on Article 40(3)(c) of Directive 2004/17/EC, which states that 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*" (emphasis added).
2. According to your letter, Hungary has put forward (and the Commission has said that it intends to accept) the claim that the VVER is the only technology choice that meets all the Hungarian technical requirements to ensure the country's security of electricity supply.
3. However, Hungary's claims in relation to the applicability of Article 40(3)(c) are contradicted by the steps taken by the Hungarian Government prior to its decision to conclude the

[1] References: NIF 2015/4231, Ares(2016)4199363, Grow.G.2(2016) 4591318.

intergovernmental agreement with Russia on 14 January 2014[2], which resulted in the decision not to launch a public procurement procedure as required by EU law.

4. Indeed, the Hungarian authorities had initially expressed their intention to launch a tender procedure, in view of allowing the participation of all possible suppliers. In 2012, they had adopted a decree requesting the state-owned utility MVM to launch a tender in view of increasing the generation capacity at the Paks NPP.[3]

5. In fact, the intention to proceed with an open and transparent procedure was confirmed by the Hungarian authorities, as late as November 2013.[4] There is no evidence (or even a public claim) that the decision to award the contract for the supply of the new NPP directly to Rosatom (instead than resorting to a tender procedure as initially planned) was justified by the need of meeting technical requirements that are exclusive to Hungary.

6. Contrary to Hungary's claims, the preparatory documents for the prospected tender (including technical documentation and the documents related to the environmental impact assessments from December 2012) listed not only the VVER, but also other designs (EPR, AP1000, APR1400, ATMEA) as eligible. In fact, the Hungarian authorities only required the use of Pressurised Water Reactor (PWR) technology.[5] This appears to be radically incompatible with the claim that other reactor designs would not have met the technical requirements applicable in Hungary.

7. For a different account of the context in which the Hungarian Government decided not to follow EU public procurement rules, it is interesting to consider the press reports, published around the date of the intergovernmental agreement (14 January 2014). In particular, according to The Voice of Russia, "*France's Areva and US electric company Westinghouse along with Japanese and South Korean power suppliers had previously expressed interest in bidding for a contract of the Hungarian plant's expansion".* However, *"Russia's Rosatom was the only potential bidder willing to offer pre-financing*".[6] Thus, it appears that Hungary's

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[2]Agreement between the Government of the Russian Federation and the Government of Hungary on cooperation on peaceful use of nuclear energy concluded on 14 January 2014 ratified in Hungary by Act II of 2014 of the Hungarian Parliament (2014. évi II. törvény a Magyarország Kormánya és az Oroszországi Föderáció Kormánya közötti nukleáris energia békés célú felhasználása terén folytatandó együttműködésről szóló Egyezmény kihirdetéséről).

[3]Section 9 of Government decree Nr. 1194/2012 (VI. 18):
"The Government calls upon the Minister responsible for the state assets - in accordance with the manner and decision taken on the proposal in section 6 – to ensure that the investor announces the international call" (our translation). The deadline was set on 31 December 2012.
http://www.njt.hu/cgi_bin/njt_doc.cgi?docid=150225

[4] E.g. state secretary of Ministry of National Development Pál Kovács (10.10.2012), stating that the tender is expected to be announced by the end of the year or the beginning of next year.
http://hvg.hu/gazdasag/20121010_Az_ev_vegen_kiirhatjak_a_paksi_bovites_te
Zsuzsanna Németh, Minister of National Development confirmed that an international tender will be announced in the case of the new units of the Paks NPP (11.03.2013)
http://privatbankar.hu/kkv/cafolta-a-fejlesztesi-miniszter-hogy-megvennek-a-vodafone-t-255906
Further statements of state and MVM officials (in English):
http://www.budapesttelegraph.com/news/655/history_of_paks_nuclear_power_plant_%E2%80%93_controversy_on_who_said_what_and_when

[5]Scoping documentation (See section 2.4, in English) (12.2012)
http://www.mvmpaks2.hu/hu/Dokumentumtarolo/EKD-ENG.pdf
Others, just for example:
Study on cooling solutions (Section 2.2, in Hungarian) (05.2011)
http://pakskontroll.hu/sites/default/files/documents/geaegi_hutes01.pdf
Feasibility study (Section 5.2 – list of applicable designs; in Hungarian) (04.2008)
http://energiakontrollprogram.hu/sites/energiakontrollprogram.hu/files/9_megvalosithatosagi_tanulmany_-_2_resz.pdf

[6] http://sputniknews.com/voiceofrussia/news/2014_01_14/Russia-Hungary-sign-agreement-on-construction-of-two-units-at-Paks-Nuclear-Power-Plant-3623/

decision to award the Paks contract to Rosatom was not taken due to technical or safety reasons, but because the Russian government was willing to support Rosatom via the offer of an intergovernmental loan. The latter is clearly is not a circumstance that would trigger the application of Article 40(3)(c) of Directive 2004/17/EC.

II. The VVER reactor design does not, as such, meet EU or Hungary's nuclear safety requirements.

8. The precedent of the Hanhikivi NPP (Finland) shows that the VVER design does not, without extensive modifications, comply with EU rules. It requires substantial improvements in order to obtain regulatory approval.[7] Taking this into account, it seems difficult to understand how a reactor design, which is not acceptable to other EU regulatory authorities without modifications, could be deemed to be the only one to satisfy Hungary's standards (to the point of justifying the application of the exception set out in Article 40(3)(c)).
9. In fact, the VVER fails also to meet the Hungarian nuclear safety requirements: according to a statement by Mr Attila Aszódi, government commissioner for Paks II, modifications of the VVER reactor design were required in view of the reactor's approval in Hungary.[8]

III. In light of its history of delays, the VVER reactor cannot be considered as a reliable solution to security of supply issues.

10. The argument that the construction of two VVER reactors is the only technically acceptable solution to ensure Hungary's security of supply is also questionable. The following should be noted:

- The first VVER1200/AES2006 reactor was connected to the grid as recently as 5 August 2016, in Novovorenezh (Russia). The completion of this reactor was delayed by four-year.[9]
- The construction of the two VVER reactors at the Leningrad II NPP (Russia) is behind schedule by over twice the estimated time for construction.[10]
- The construction of the first VVER reactor in Belarus is also facing severe delays due to construction accidents: the most recent happened in July 2016, when the reactor pressure vessel fell down by several meters at the construction site.[11]
- The Hanhikivi NPP project in Finland, on which the Paks II project is modelled, is facing delays due to difficult communication between Rosatom, the plant operator

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See also: http://www.reuters.com/article/us-russia-europe-hungary-specialreport-idUSKBN0MQ0MP20150330

[7] The initial report of the Finnish regulator (STUK) indicates that the VVER design significantly falls short of EU safety regquirements: https://www.stuk.fi/documents/88234/254201/alustava-turvallisuus-arvio-fennovoiman-ydinvoimalaitoshankkeesta-en.pdf/b17b7a5f-0e6d-43fc-be50-cd921e0e769f. A summary of STUK's remarks can be found at page 28 of the following document: http://www.umweltbundesamt.at/fileadmin/site/publikationen/REP0447.pdf

[8] http://paksihirnok.hu/2016/07/22/szinte-parhuzamosan-epul-majd-a-ket-uj-paksi-blokk/

[9] Novovorenezh II unit 1 was originally expected to start operating in 2012: http://www.world-nuclear-news.org/NN-Construction_starts_at_second_Novovoronezh_II_unit-1407094.html, http://de.sputniknews.com/wirtschaft/20070615/67304369.html

[10] See for instance the 2014 final report of the Czech envoy for nuclear power, Vaclav Bartuska – Czech original available from Greenpeace on request; English translation accessible on: http://www.greenpeace.org/international/Global/international/briefings/nuclear/2014/Report-on-Temelin-3and4-for-Czech-government.pdf

[11] See among others: http://www.powermag.com/construction-halted-on-belarus-nuclear-plant-after-workers-drop-reactor-vessel/

(Fennovoima) and the Finnish regulator (STUK). As mentioned above (point 8), STUK has demanded many adjustments to the VVER design to meet Finnish regulations.

11. In light of these negative precedents, it does not seem plausible that a Member State claiming to be facing security of supply issues would decide to rely solely on the construction of two VVER reactors, without exploring whether other safer and more cost-effective supply options are available.
12. In any case, if Hungary was effectively aiming to address a security of supply problem, it would have had to comply with the procedural and substantive requirements set out in Article 8 of Directive 2009/72/EC. This means Hungary should have launched a transparent and non-discriminatory tender, based on published criteria, in order to select the operator(s) in charge of supplying the required new generation capacity (or demand-side mechanisms or a combination of both).
13. It should be noted, in this respect, that Article 8 of Directive 2009/72/EC does not foresee exceptions like those set out in Article 40(3)(c) of Directive 2004/17/EC. Hungary should have designed a selection procedure, allowing for different solutions to address the prospected security of supply problem, including the aggregated offer of generation capacity or demand side measures by several operators.
14. Instead, Hungary arbitrarily decided that only a generation infrastructure of the size of Paks II would have been suitable to guarantee security of supply (thereby violating Article 8 of Directive 2009/72/EC) and subsequently awarded the construction of such generation infrastructure to a single entity, without previously running a public procurement procedure (thereby violating Directive 2004/17/EC).

IV. Conclusions

15. In light of the arguments presented above, we respectfully ask the Commission to reject Hungary's claims based on Article 40(3)(c) of Directive 2004/17/EC and to continue the ongoing infringement procedure.

Sincerely,

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