

Greenpeace has submitted its official comment on Hungary's planned expansion of the Paks nuclear power plant to the European Commission Directorate-General Competition. It said that if the project is found to be carried out from state aid, it would not be compatible with EU law and restrict competition both on the Hungarian and the EU electricity market. Considering this Paks 2 would hinder energy efficiency investments and the spread of renewable energy sources, Greenpeace claims.

About the project

On 14 January 2014, Russia and Hungary concluded an intergovernmental agreement (IGA) on a nuclear programme. The IGA foresees cooperation between the two countries in the further development of the Paks nuclear power plant, including the development of the Paks II project.

Pursuant to the IGA, both Russia and Hungary have designated one state-owned and state-controlled organisation which is financially and technically capable to fulfil its obligations as contractor/owner in relation to the project.

Russia has appointed Joint-Stock Company Nizhny Novgorod Engineering Company Atomenergoproekt (JSC NIAEP) to construct and Hungary has appointed the company Paks II to own and operate the two power units foreseen by the project.

On 9 December 2014, JSC NIAEP and Paks II concluded the Engineering, Procurement and Construction (EPC) contract for the two new nuclear reactors.

Infringement procedure opened

On 19 November 2015, the EU executive launched an infringement procedure against Hungary concerning the implementation of the Paks II nuclear power plant project.

"Following exchanges of information with the Hungarian authorities and a thorough assessment of the terms of the award, the Commission still has concerns regarding the compatibility of the project with EU public procurement rules," it said.

On 23 November 2015, the European Commission opened an in-depth state aid investigation into Hungary's plans to provide financing for the construction of two new nuclear reactors in Paks.

"The Commission will in particular assess whether a private investor would have financed the project on similar terms or whether Hungary's investment constitutes state aid. If the project is found to involve state aid, the Commission will investigate whether as planned it would lead to distortions of competition in particular on the Hungarian energy market."

In a letter to Hungarian authorities the EC said it "has come to the preliminary conclusion that there are doubts that the development of two new nuclear reactors in Hungary that are fully financed by the Hungarian State during construction for the benefit of the entity Paks

II, that will own and operate them, does not entail State aid within the meaning of Art 107(1) TFEU.”

It also said it did not have sufficient elements to conclude whether the aid is necessary. Greenpeace considers that, if found to be State aid, such measure would not be compatible with Article 107(3)(c) TFEU and, therefore, should not be authorised.

EC should call it off

“In our view, Paks 2 is not viable in an economic sense, as it may be executed only from state aid. We expect the European Commission to order Hungary to call off the project,” said András Perger, energy expert of Greenpeace in Hungary.

Greenpeace argues that once Paks 2 is online market players and consumers will both become dependent on the Hungarian state. The nuclear expansion project would substantially increase the share of the state on the local electricity market that would give the government the opportunity to abuse its dominant position and restrict EU power trade. Greenpeace’s comments examine the following aspects of the notified measure:

- the failure to identify an objective of common interest,
- the incompatibility with EU law due to the violation of Article 8 of Directive 2009/72/EC (the Electricity Directive),
- the incompatibility with EU law due to the violation of the EU Public Procurement Directives, and,
- the impact of the aid on competition in the Hungarian electricity market.

The EC notes that Hungary has not put forward any compatibility argument for the notified measure, including those related to the objective of common interest that the said measure must pursue in accordance with Article 107(3)(c) TFEU.

Although the Commission admits that Hungary’s claim that Paks 2 “contributes to a certain extent to ensure security of supply” might be substantiated, Greenpeace argues that “EU law requires Member States to comply with a precise set of substantive and procedural rules, detailed in the Electricity Directive, in order to prevent gaps in generation capacity. Hungary has adopted the notified measure in violation of these rules. As a consequence, the notified measure is incompatible with the Treaty.”

Although the Commission concludes that “the measure envisaged by Hungary aimed at promoting nuclear energy could, therefore, be viewed as pursuing an objective of common interest”, Greenpeace rejects this conclusion.

“[...] the provisions of the Euratom Treaty to which the Commission refers do not provide for a sufficient legal basis to justify the authorisation of State aid in support of the construction of new nuclear installations,” it said.

It cited Article 2(c) Euratom clearly indicating that “the establishment of basic installations for the development of nuclear energy” should be achieved consistently with the functioning of a competitive market, in particular by “ventures on the part of undertakings”, not via the direct intervention by the State.

“Furthermore, the said provision does not refer, as the Commission seems to interpret it, to “plants for the production of nuclear energy” but to “basic installations” for the development of this energy source.”

On Hungary’s violation of Article 8 of the Electricity Directive

Greenpeace has pointed out that Member States cannot (as Hungary intends to do) simply decide to subsidise the construction of a nuclear power plant.

On the contrary, they must launch open, transparent and non-discriminatory tendering procedures, in accordance with the requirements listed in Article 8(3) of the Electricity Directive. In particular:

Details of the tendering procedure for means of generating capacity and energy efficiency/demand-side management measures must be published in the EU Official Journal at least six months prior to the closing date for tenders;

-The tender specifications must be made available to any interested undertaking established in the territory of a Member State so that it has sufficient time in which to submit a tender;

-With a view to ensuring transparency and non-discrimination, the tender specifications shall contain a detailed description of the contract specifications and of the procedure to be followed by all tenderers, and an exhaustive list of criteria governing the selection of tenderers and the award of the contract;

-In invitations to tender for the requisite generating capacity, consideration must also be given to electricity supply offers with long-term guarantees from existing generating units, provided that additional requirements can be met in this way;

-Most importantly, the tender specifications must contain a description of any incentives, such as subsidies, which are covered by the tender.

In view of Greenpeace, the following ensues from the text of Article 8 of the Electricity Directive:

-Any incentive (including State aid in the form of debt or equity) for the construction of new generation capacity must be given only when it is demonstrated that the authorisation procedure under Article 7 does not guarantee security of supply;

-Any of the above incentives must be allocated following a procedure compliant with the Article 8 requirements;

-Compliance with the Article 8 requirements, aimed at ensuring transparent, non-

discriminatory and undistorted access to the generation market of a Member State, is a condition for the compatibility of State Aid to the construction of new generation capacity. “There is no doubt that, by selecting the contractor (and therefore the recipient of the aid) without complying with the procedural requirements set out in Article 8, Hungary has precluded all other EU operators from competing for a very relevant share of its national generation market, violating the transparency and non-discrimination principles,” Greenpeace added.

On the violation of the EU Public Procurement Directives

“Hungary’s failure to comply with EU public procurement law has the effect of determining the incompatibility of the notified measure with the internal market.”

As the Commission clarified, “Russia undertook to provide Hungary with a state loan to finance the development of the Paks NPP. This loan is governed by a Financing Intergovernmental Agreement (the Financing IGA) and provides a revolving credit facility of EUR 10 billion which is limited to be used solely for the designing, construction and commissioning of power units 5 and 6. Hungary will directly finance the investments of Paks II necessary for the designing, construction and commissioning of power units 5 and 6 as set out by the Financing IGA.”

“In other words, Hungary has never had the option of implementing the notified measure while complying with the EU Public Procurement Directives. Had it decided to do so, opening the possibility that an undertaking different from JSC NIAEP be awarded with the EPC contract, it would have lost the state loan made available by Russia through the Financing IGA,” Greenpeace said.

“This means that the violation of above mentioned Directives is not only indissolubly linked to the aid, but to Paks II: worse still, the violation is an essential requirement for the implementation of the measure. Consequently, the Commission cannot declare the notified measure compatible with the internal market, given that a positive decision would be equivalent to authorising a Member State to deliberately violate EU law.”

On the impact on competition in the Hungarian market for electricity generation

Under EU law state aid can be authorised only if it does not adversely affect trading conditions to an extent that is contrary to the common interest. In its letter, the Commission observed that the notified measure “may restrict competition and affect trade in a number of areas.”

In its preliminary assessment of the Hungarian electricity market, the Commission pointed out that “the State retains a dominant position in the sector through the state-owned vertically integrated energy company MVM Group”, and that “as a generator, MVM Group

has a significant market presence, due to its main generation asset, Paks NPP which provided 53.6% of domestically generated electricity.”

It also acknowledged that “the MVM Group also plays a significant role in the total gross energy consumption due to its subsidiary Paks NPP” and noted that Paks II “will represent at least one third of expected demand in 2030” and that “the electricity generation by Paks I and Paks II at the same time, throughout its duration is likely to satisfy an even greater portion of the market demand.”

Given these premises, Greenpeace submits that the Commission cannot authorise the aid without a thorough assessment of the effects of the notified measure on the Hungarian and EU electricity market, including:

- The foreseeable evolution of the Hungarian State’s position on the market in the period that will follow the start of Paks II operation;
 - The risks that the Hungarian State may reinforce and abuse its dominant position, against consumers and/or competitors, on the national electricity market;
 - Possible crowding-out effects on investments in Hungary (particularly in renewables and energy efficiency);
- Possible obstacles to the intra-EU trade in electricity.

source: portfolio.hu