to 80% of project cost particularly without asset security backing – this was publicly known). The EPC Contract is via payment settlement provisions linked to the Financing IGA to a value of up-to EUR 10 billion. Several EU companies have already indicated serious interest in these Sub-Agreements.⁴⁸ In contrast, as far as we are aware, none of these, other suppliers or indeed suppliers of reactors, have filed any review procedure or complaint related to the conclusion of the EPC Contract or any other Implementation Agreement.

Violation of the procurement rules laid down in the IGA and set forth in the Procurement Policy of the EPC Contract by the Russian party may result in severe consequences. The respective provisions of the IGA have been transposed into national law. Its violation may also lead to the termination of the EPC Contract, which provides a strong incentive for the Russian party to fully comply with its provisions.

2. Fuel Supply Exemption for the NFSC

Paks II and the Euratom Supply Agency did not violate the Utilities Directive by concluding the NFSC. The NFSC as a contract for the supply of fuels for the production of energy is exempt from the Utilities Directive (Article 26 lit. b Utilities Directive). Prior to the LFN, the Commission has not raised any procurement law issues with regard to the NFSC. In the LFN, the Commission states that the "Paks project" was awarded "to the Russian party inter alia" with the signature of the NFSC (cf. LFN, p. 1). The Government of Hungary wishes to emphasize that the NFSC was co-signed by the Euratom Supply Agency and is exempt from any procurement requirements and that the Commission has at no point raised any procurement issue with regard to this contract before. In addition the NFSC is an integral part of the package in question consisting of the EPC Contract, the NFSC and the O&M Contract. As we indicated in the preamble, by concluding the NFSC, the ESA, in fact, concluded the EPC Contract, as well.

In addition, in November 2014 ESA held a workshop concerning the NFSC at which DG GROW also participated. Based on the outcome of this meeting and subsequent meetings with ESA in early 2015 the Government of Hungary agreed that the tender mechanism suggested by the Commission be introduced into the NFSC. ESA did not co-sign the first version of the NFSC, therefore the Government of Hungary appealed ESA’s decision at the Commission. Consequently the Commission was aware of and familiar with the NFSC and its contents and the fact that the Implementation Agreements are interlinked. In such circumstances it can be established that DG GROW’s recent proceeding is delayed and discriminatory.

3. Technical Exemption under Article 40(3) lit. c) of the Utilities Directive

There are potentially other considerations supporting the legality of the IGA within the EU procurement framework, for example, the technical reasons exemption provided under Article 40(3) lit. c of the Utilities Directive.

The Paks II project should comprise the design, construction, commissioning and decommissioning of two pressurized water reactors (Generation III) type plant units each generating up to a minimum of 1000 MW. The Government of Hungary intended the project to be set up as turnkey project fulfilling highest safety standards. The new units will be located next to the existing Paks NPP with its four VVER-440 reactor units V213 still in operation and shall replace these before their shutdown.

The Russian party was the sole possible supplier of these reasonably requested works and services for a fixed price and turnkey contract as commercially in the best interests of Hungary.

Hungary has legitimately determined the requirements and scope for the Project set out above. Hungary was allowed to define the type of nuclear reactor, the scope of the works and services (including inter alia design, construction, decommissioning and maintenance of the new units), the quality as turnkey project and the timing requirements as these criteria specify the needs for the effective implementation of Hungary's autonomous nuclear energy policy choice.

The [company name] nuclear technology providing company [company name] was known to not be offering or able to offer the scope sought for the EPC Contract, including the fixed-price turnkey contract nature and hence factually there were no operators from the EU or elsewhere that were technically able to respond to the technical specifications for the project including the fixed-price turnkey requirement.

In the interests of time we have not explored these considerations in detail in this response.

F. Derogation of TFEU principles/free movement provisions due to legitimate interests

The IGA also complies in substance with the Treaty and, in particular, with the applicable procurement obligations of Hungary under the TFEU (contrary to LFN, p. 5 et seqq.). The Government of Hungary assumes that the Euratom Supply Agency – being bound by EU law – would after its consultation with the Commission not have co-signed an Implementation Agreement which was not compliant with the principles of non-discrimination, transparency and equal treatment.
1. EU Primary Law Procurement Principles

The principles of transparency, equal treatment and non-discrimination derived from the fundamental freedoms under the TFEU, in particular Articles 49 and 56 TFEU, do not require a tender in case of contracts awarded pursuant to Article 22 lit. a Utilities Directive.

I No Specific ECJ Case-Law in Cases of Intergovernmental Agreements

Contrary to the Commission's position that these "basic principles [are] applicable to all public procurements on the basis of the Treaty" (LFN, p. 6), the case-law of the ECJ does not support that international agreements under Article 22 lit. a Utilities Directive have to be tendered due to the general procurement principles.

ECJ case-law acknowledges for certain exemptions that the basic procurement law principles may apply to contracts which "are excluded from the scope of the Community directives in the field of public procurement". These decisions, also those referred to by the Commission in the LFN (p. 6), refer to the award of service concessions, to contracts below the thresholds for the application of the Procurement Directives and to contracts for non-priority services listed in the Procurement Directives' annexes.

Pursuant to ECJ case-law contracts excluded from the Utilities Directive are not unconditionally subject to tender obligations based on the general principles: According to Article 25 Utilities Directive, which contains a similar wording to the International Agreement Exemption, the Utilities Directive does not apply to service contracts awarded to "an entity which is itself a contracting authority [...] on the basis of an exclusive right which they enjoy pursuant to a published law, [... which is compatible with the Treaty]." Compatibility of the published national law with "the Treaty" does not require that the published law contains a transparent and non-discriminatory tender procedure open to

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potential bidders for the award of the contract. It rather means that the published law that grants the exclusive right— but not the award itself— has to comply with the provisions of EU primary law. 53

II Reference to the Treaty does not Require a Tender

The procedural rules for the award of a contract referred to in Article 22 lit. a Utilities Directive do not require the parties to the international agreement to provide for a tender or to fully mirror the EU tender requirements (contrary to LFN, p. 5 et seq.). Such interpretation would not be in line with the provision’s rationale.

There are indeed other exemptions within the Utilities Directive (Article 40(3)(c)) 54 where a tender is not required for the award of a contract and such an obligation cannot be derived from the TFEU principles either.

The Commission holds in the LFN that Article 22 lit. a Utilities Directive primarily aims at enabling Member States to award contracts in accordance with procedural rules deviating from the EU procurement laws “in order to avoid any conflict of laws between the participating countries” (LFN, p. 5). This only partially describes the effect of the International Agreement Exemption, and fails to capture its rationale.

The International Agreement Exemption enables and promotes international cooperation. The rationale of Article 22 lit. a Utilities Directive is to leave room for interstate cooperation and agreements with non-EU Member States. It leaves leeway and gives priority to procedural rules which may deviate from the requirements of the Procurement Directives and acknowledges that the non-EU Member State is not bound by EU law, including the principles of non-discrimination, transparency and equal treatment.

This rationale is founded in the TFEU, the TFEU, the EURATOM Treaty and international law, which require and aim at international cooperation of the Member States with third countries, in particular in the field of (nuclear) energy. Article 22 lit. a Utilities Directive has to be read in conjunction with these commitments of EU primary law to international cooperation by Member States with third countries. 55

53 The ECI refers in particular to Articles 103 et seq. TFEU, cf. ECI, Case C-360/96 Gemeente Arnhem [1998] ECR I-6846, para. 45.

54 Exemption from the transparency obligation for the award of contracts “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”.

55 ECI, Case C-314/89 Rauh [1991] ECR I-1667, para. 17: “The Court has consistently held that where it is necessary to interpret a provision of secondary Community law, preference should as far as possible be given to the interpretation which renders the provision consistent with the Treaty and the general principles of Community law”; cf. also ECI, Case C-98/91 Herbrink [1994] ECR I-248, para. 9; Case C-61/94 Commission v Germany [1996] ECR I-4006, para. 52.
The EU is based on the principle of peaceful cooperation between the EU, the Member States and third countries (Article 3 (5) TEU).

"Within their respective sphere of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations" (Article 211 TFEU). 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 cooperation. International cooperation between States is not subject to any tender obligation (see para. 28). Following the rationale for the cooperation between public entities below the state level the ECJ has acknowledged certain exemptions from the application of the procurement directives and from any tender requirements for public-public cooperation. For example, the ECJ acknowledged this exemption for in-house awards and cooperation between public entities. This case-law has been the basis for inter alia Article 28 (4) of Directive 2014/25/EU. It follows the general concept that public procurement law shall not prevent any joint undertaking between public bodies in the pursuit of significant objectives in the public interest. This rationale also applies to the International Agreement Exemption and the Project.

The EURATOM Treaty aims at "establish[ing] with other countries and international organisations such relations as will foster progress in the peaceful use of nuclear energy" (Article 2 lit. h EURATOM Treaty). It acknowledges that Member States cooperate with third states also for financing nuclear projects (Article 46 (2) lit. e EURATOM Treaty). Articles 103 et seqq. EURATOM Treaty set forth the procedure for the conclusion of agreements between the Member States and third countries. Further provisions of the EURATOM Treaty acknowledge as well the significance of international cooperation with third countries in the field of nuclear energy (e.g. the commitment in its Preamble and Articles 1 subparagraph 2, 10, 16 (5), 64, 73, 101 et seq., 206 EURATOM Treaty). As acknowledged in the non-objection letter of the Commission of 14 January 2015 prior to conclusion of the IGA, the IGA does not impede the competences under the EURATOM Treaty.

The Commission's LFN fails to take account of this rationale and to pay due regard to its significance for the interpretation of Article 22 lit. a Utilities Directive. In particular, the

See for example ECI, Case C-458/03 Parking Brixen [2005] ECR I-8585, para. 62; Case C-159/11 di Lecce [2012], para. 31.

ECI, Case C-107/08 Teckel [1999] ECR I-8121, para. 50; Case C-26/03 Stadt Halle and RPL Lochev [2005] I-1, para. 49; Case C-324/07 Coditel Brubani [2008] ECR I-8457, para. 41.


In the preamble to the EURATOM Treaty, the Member States emphasize to conclude the Treaty with the desire "to associate other countries with their work and to cooperate with international organisations concerned with the peaceful development of atomic energy".

See generally Article 305 (2) TEC (Nice); ECI, Case C-115/08 ČEZ [2009] ECR I-10265, para. 85.
Commission does not take into account the EURATOM Treaty's emphasis on international cooperation on NPP projects.

The above is important since the EURATOM Treaty – in particular Articles 2 lit. h, 46 (2) lit. e, 103 et seq. EURATOM Treaty – implies and presupposes that EU Member States have the opportunity to jointly implement NPP projects with third countries and encourages them to do so (see paras. 46 et seq., 109). Article 22 lit. a Utilities Directive may thus not be construed as to impede the fulfilment of these objectives.

2. The procedural rules are in line with general TFEU principles

The procedural rules set out in the IGA and set forth in the procurement policy of the EPC Contract comply with the modified requirements on non-discrimination, transparency and equal treatment which are – if at all – applicable to the Project in the light of the EURATOM Treaty (see paras. 101 et seq.).

- The Implementation Agreements have to be concluded – and were concluded – between two state-owned and -controlled organizations designated by the Competent Authorities of Hungary and the Russian Federation. Applying the rationale for the preferential treatment of projects between public entities (see para. 109), such cooperation between state-owned and -controlled entities of different states under public international law also complies with the general principles of Articles 49 and 56 TFEU.

- The Sub-Agreements required for fulfilling the Implementation Agreements have to be awarded respecting the principles of transparency, equal treatment and non-discrimination. They are thus awarded in compliance with the basic requirements relating to these principles which may – if at all – be applicable under Article 22 lit. a Utilities Directive. Only Sub-Agreements concluded with a Rosatom state-owned and -controlled subsidiary may be directly awarded. This exemption is justified by applying the rationale of the in-house exemption established by the Teckel case-law of the ECI and the rationale of the exemptions for contract awards to affiliated companies (cf. Article 23 Utilities Directive). Furthermore, the Russian Authorized Organization as such is not subject to the EU procurement requirements, including those set out in the case-law of the ECI.

3. Alternative Consideration: Derogation for legitimate general interest

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61 ECI, Case C-107/98 Teckel [1999] I-08121; Commission Staff Working Paper concerning the application of EU public procurement law to relations between contracting authorities ('public-public cooperation'), SEC (2011) 1169 final, p. 6 et seq.
Even if hypothetically it was the case that the requirements of the public procurement rules would—contrary to the Government of Hungary’s opinion (see paras. 100 et seqq.)—fully apply, the EPC Contract did not have had to be tendered. The European Commission fails to consider that the fundamental freedoms—as basis for the procurement principles under EU primary law—and the case-law of the ECJ provide for exemptions from tender requirements.

The ECJ allows exemptions from the tender requirements derived from the principles of transparency and non-discrimination, and in particular if they serve legitimate imperative requirements in the general interest and are “suitable for achieving the objective which they pursue and do not go beyond what is necessary in order to attain it.”

I Legitimate General Interest in Compliance with the Treaty

The IGA and the Implementation Agreements concluded under the IGA serve legitimate imperative requirements in compliance with the Treaty, i.e. the realization of an energy infrastructure project indispensable for securing energy supply of the Hungarian, indeed European economy and private households.

NPP Paks II shall sustain the capacity of the existing reactors of the NPP in Paks supplying 36% of the Hungarian electricity consumption (in 2013) and about 50% of the domestically generated electricity (in 2014) as the lifetime of the existing power units will end gradually until 2036. The energy security, especially for some eastern Member States, has to be improved. In particular, Hungary as net electricity importer needs additional capacities. After Luxembourg and Lithuania, Hungary is the third most dependent Member State on energy imports in the European Union even prior to the retirement of the existing nuclear power facilities. “Increasing the use of [...] nuclear energy” contributes to the objective of strengthening the indigenous energy production within the EU. Nuclear energy remains a “key source of low carbon electricity

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63 ECI, Case C-243/01 Gambelli and Others [2003] ECR I-13031, para. 65; Case C-64/08 Engelmann [2010] ECR I-8219, paras. 51, 57; Case C-221/12 Belgacom [2013], para. 38.
66 See e.g. Hungary, Communication to the European Commission dated 18 February 2015, p. 4 et seqq. sub. reply 2 with the references cited therein.
NPPs contribute to "lower system costs and electricity prices" and "nuclear energy will remain in the EU power generation mix". The European Commission has already envisaged that the fulfilment of these objectives requires the expanding and replacement of existing nuclear capacities. "Decarbonising the European economy without nuclear would significantly increase total costs and jeopardise security of energy supply." Paks II is a capacity maintenance project for the design and construction of two new NPP units at the site of the NPP in Paks.

The Project is required for the development of the Hungarian energy infrastructure and results in positive and sustainable effects for the social, economic and technological progress of the country in line with EU policy objectives, in particular in the current low growth environment. Nuclear new build are major projects that can stimulate huge activity from local economies throughout the life of a power plant, from development through to construction, operations and decommissioning. Paks II is expected to directly and indirectly create thousands of high paying permanent jobs in the local economy, but also stimulate employment in the EU as a whole. The positive multiplier effect on the economy of NPP projects is well documented and can be similarly expected in the case of Hungary. The EU "shall work for the sustainable development of Europe based on balanced economic growth [...] aiming at full employment and social progress" (Article 3 (3) TEU). It shall also "promote scientific and technological advance." (Article 3 (3) TEU), in particular "research and [...] dissemination of technical information" in the field of nuclear energy (Article 2 lit. a EURATOM Treaty). As the Project is located in the region of Dél-Dunántúl (HU 23) it will further stimulate economic development in one of Hungary's most disadvantaged regions. It will also enhance growth in the EU as a whole, will create employment for highly-skilled people in a knowledge- and technology-intensive sector, will benefit from the latest nuclear technology (see e.g. Articles 1 (4), (5), 5 no. 17, 6 no. 24 et seq. IGA) and guarantee the security of energy supply of Hungary (see above).

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74 Cf. also European Commission, Views in accordance with Article 43 of the Euratom Treaty of 4 September 2013 concerning the "PAKS-II nuclear power project", Hungary, para. 3.
75 According to Eurelectric the nuclear industry is estimated to currently provide around 400,000 to 500,000 jobs in the European Union, directly and indirectly, with additional jobs being created for life-time extensions or new build programmes.
II Suitability of the Measure to Achieve Legitimate General Interests

In accordance with the IGA the Russian Authorized Organization will be and has been designated as party to the Implementation Agreements. The cooperation with the Russian Federation enables the Project's realization (see for further details paras. 120 et seqq.).

The measure is, therefore, suitable to achieve the legitimate general interests set out above.

III Measure Does Not Go Beyond what is Necessary in order to Achieve that Objective

The measure does not go beyond what is necessary for the achievement of that objective. The deviations from the basic procurement principles are limited to a minimum and enable the cooperation between Hungary and Russia which is indispensable for the realization of the Project.

The exemption from the procurement principles is strictly limited to the Implementation Agreements between the designated Authorized Organisations which serve to implement and are part of the international cooperation.

A significant volume of the Sub-Agreements is envisaged to be tendered by NIAEP (see for details para. 90). The Government of Hungary has thus achieved that the exemption from basic procurement law principles is restricted to the necessary extent. The IGA even encourages competition including participation of EU companies and – as further set out in the procurement policy of the EPC Contract – extends procurement requirements to NIAEP which is otherwise not bound by EU procurement laws. This solution will give European companies opportunities to participate in tender procedures for Sub-Agreements.

G. Other Considerations / Conclusions

In the LFN the Commission has added a request on further award procedures related to the Project and conclusion of further contracts pursuant to the procedural rules under the IGA (LFN, p. 7). The Government of Hungary understands that this request is legally not binding. Furthermore, the Commission has had ample time to consider the matter prior to the conclusion of the agreements in question; hence, this request is in any event both disproportionate and too late. Further, the Government of Hungary wishes to remind the Commission that the Implementation Agreements have been concluded and Sub-Agreements will be concluded by NIAEP, not by Hungarian authorities.

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78 Article 8 of Council Directive 92/13/EC of 08 February 1992 establishes a corrective mechanism if the European Commission considers a serious infringement of procurement law, but this procedure only applies prior to the conclusion of the contract and does not include any powers to suspend the implementation of a Project.
The Government of Hungary also emphasizes that, as already stated, the Commission has been carefully informed of this matter since prior to signing the IGA, and has approved relevant elements of the project under the EURATOM Treaty, including the fuel agreement which is an integral part of the project as a whole. Given the delay on the Commission’s part, and the approvals already given, the Government of Hungary would wish once more to express its disappointment regarding the way in which this matter has been handled by the Commission and the apparently discriminatory approach the Commission appears to have adopted.

Nonetheless, as before, Hungary will continue the discussions with the Commission in good loyal partnership, assuming that Hungary, Hungarian state-owned companies and the Project will not be treated less favourable than other nuclear energy projects in other EU Member State.

Yours sincerely,