

# Legal Opinion

by EMLA



**on the possible financing scheme of the Plomin C Coal-fired Power Plant (Croatia) and its compatibility with the state aid and public procurement rules of the European Union**

Public Summary

22/04/2014



## Legal Opinion

by EMLA

### on the possible financing scheme of the Plomin C Coal-fired Power Plant (Croatia) and its compatibility with the state aid and public procurement rules of the European Union

Public Summary

22/04/2014

The present legal opinion was prepared by legal experts working in the staff of the **Environmental Management and Law Association**<sup>1</sup> (EMLA) upon a request from **Zelena Akcija - Friends of the Earth Croatia**<sup>2</sup> (ZA). The opinion is based on publicly available information as well as information provided by ZA to EMLA during the preparation of the document.

## Background

The Croatian Electricity Company **Hrvatska Elektroprivreda d.d.** (HEP) is planning the expansion of the already existing so-called Plomin A and Plomin B<sup>3</sup> CPP complex with a third CPP to be named Plomin C.

**Plomin A** exists since 1969 while **Plomin B** exists since 2000. The capacity of Plomin A is 120 MW while the capacity of Plomin B is 210 MW<sup>4</sup>. The planned **Plomin C** plant would introduce an additional 500 MW electricity generating capacity by 2019<sup>5</sup>.

HEP states that Croatia needs the Plomin C CPP **to replace imported electricity and to secure electricity supply stability** in the county. In order to attract investors, HEP announced a tender process and promised that it will enter into a long-term Power Purchase Agreement (PPA) with the winner of the tender for a certain percentage of the electricity produced by Plomin C.

We believe that this solution would be against EU law, against the freedom of competition and would mean illegal state aid provided by the Croatian State through HEP to the tender winner company.

---

1 [www.emla.hu](http://www.emla.hu)

2 [www.zelena-akcija.hr](http://www.zelena-akcija.hr)

3 Often referred to elsewhere as Plomin 1 and 2

4 <http://www.hep.hr/proizvodnja/osnovni/termoelektrane/plomin.aspx>

5 [http://en.wikipedia.org/wiki/Plomin\\_Power\\_Station](http://en.wikipedia.org/wiki/Plomin_Power_Station)

## Legal opinion

First of all, state aid provided to economic actors is illegal as such in the EU. Nevertheless, on the one hand a questioned economic transaction has to be considered state aid also in the context of the EU law, and even if it is the case, that particular aid can still be allowed in certain circumstances. How can we characterize then the concept of the PPA planned by HEP?

As a matter of fact, HEP is fully state-owned, and by tendering for the construction of Plomin C, it is implementing state policy. In addition, it uses its funds in a way constituting a state action; therefore its actions are de facto state actions. If HEP makes the aforementioned contract (called PPA) with the tender winner company, that company will get a significant guarantee that its electricity production will not remain unsold. Thus it will enjoy a comparative advantage over those electricity producing companies that have not concluded such contracts. This advantage will be applied selectively, only for the winner of the Plomin C tender. We can also be assured that this will have the potential of distorting competition and trade between EU Member States. This is because the minimum guaranteed purchase of electricity from a company by HEP will surely restrict actual or potential imports of electricity, also because the explicit purpose of Plomin C is to restrict electricity import into Croatia – that is, to affect trade between Member States.

What we just did in the foregoing paragraph was that we have established from a positive angle that the planned PPA to be made by HEP fulfills the criteria of illegal state aid. But in addition, we also have to examine from a negative angle whether there can be any exception made, i.e. can such measures still be allowed in certain circumstances?

Well, first and foremost, the planned PPA will not fall under any exception that the European Union Treaty to which Croatia has also acceded contains, amongst others state aid provided for social purposes or given for remedying the consequences of a natural disaster, for cultural heritage protection, etc. Neither is there an individual decision of the Council of the EU freeing the foregoing PPA from general EU law obligations and there will not ever be one certainly.

Besides these simple criteria, EU law worked out different conditions within which an otherwise illegal state aid can still be allowed, therefore the question is whether the Plomin C PPA can be covered by any of those.

One such set of conditions requires that the investment aid provided to the new power plant has to result in a higher reduction of greenhouse gas emissions than would occur without the aid. This is not proven yet, and we seriously doubt it can ever be. Zelena Akcija thinks that based on these criteria, the planned PPA is still illegal state aid.

The second set of conditions requires that state aid be given for energy saving and production of renewable energy. Plomin C will clearly not be an energy saving investment, nor will it use renewable energy, so again, by these criteria the related PPA will be illegal state aid.

A third set of conditions would allow the planned PPA be exempted from the prohibition of state aid if it were given for high-efficiency cogeneration but Plomin C will clearly not be a cogeneration facility.

As we could see, there are a number of conditions meeting of which may free a measure from being called illegal state aid, but the PPA planned by HEP cannot meet any of these. If no general conditions set by EU law are met, is there still a chance for HEP to get an individual permission from the EU and go ahead with its plans?

One chance is if this exception is decided by a unanimous decision by the EU Council in justified exceptional circumstances. However, we see not one single such circumstance, therefore this scenario can be surely discarded.

Another chance is that HEP proves the presence of a well-defined objective of common interest. But realistically, it is not possible to convince the Commission that the prevention of import of electricity into Croatia is in line with the logic of the Common Market in a liberalized energy market. The prevention of import is clearly not a common interest. Decarbonization is a common interest but Plomin C, being a coal-fired power plant physically cannot achieve this goal.

Therefore the last and only chance of HEP to get a green light from the EU for its plans is to prove that they meet every single one of the below criteria together, worked out by the Court of Justice of the EU in 2003 in one of its judgments. What are these criteria and can Plomin C meet all of them at the same time?

Firstly, Plomin C needs to have a so-called public service obligation clearly defined. This can be for instance the security of electricity supply in Croatia, but only if the generators would use coal mined in Croatia; however, Croatia has no active coal mines, therefore this condition is impossible to be fulfilled. Even the Environmental Impact Study of Plomin C admits that coal will be imported for Plomin C. As a matter of fact, a normal power plant connected to the network does not mean it performs a public service obligation. Not even its contribution to the security of electricity supply means a public service obligation, because in a way all the generators in the system contribute to the security of supply to some extent. Also the service to be provided by Plomin C is difficult to distinguish from other generators of baseload electricity which is normally provided by the market without any state aid. Consequently, the planned PPA will not be possible to free from the illegal state aid prohibition.

Secondly, if the parameters for calculating the terms of the PPA are objective and transparent, the measure may be exempted from being called illegal. The simple existence of parameters is not enough, and in fact nobody except HEP is in the position yet to verify that the negotiated parameters between HEP and the tender winner will be established in an objective and transparent manner.

Thirdly, the compensation provided by the PPA cannot exceed what is necessary to cover all or part of the costs entailed by performing the aforementioned public service obligation (if it exists at all). It is again impossible to determine at this stage whether Plomin C will be overcompensated or not, however, if the guaranteed price for the electricity is not taking into

account future developments in the electricity market or the contract is concluded for a very long period, and there are no provisions on the gradual reduction of the aid, then it is almost certainly exceeding the necessary level, therefore it is surely illegal state aid.

Fourthly, HEP should be able to prove that there is no discrimination in concluding the PPA with the tender winner, however, given that only one company will be awarded the PPA, it can be seriously doubted that there will be no discrimination.

Fifthly, the aid can be allowed only if development of trade in the EU is not affected to an extent contrary to the interests of the Union. In the present case, the shift of commercial risk to HEP, the long period of the contract and its unusual nature relating to a coal fired power plant in the current market conditions suggest that the PPA will affect trade in a way that is not in line with the interests of the Union.

It seems by now that no matter which conditions we look at, the PPA planned by HEP will always be regarded as illegal state aid. But was not there any chance for Croatia to act differently? As a bottom line, all the above rules on state aid apply to all Member States of the EU unless they, at the time of their accession to the Union, have declared derogation. Did Croatia ask for derogation in such matters? Well, the Act of Accession of Croatia does not contain any reference to exempting the energy market, the energy production or the electricity generation from the general EU requirements with special regard to state aid rules.

## Conclusion

After examining in detail whether the planned PPA can be regarded illegal state aid, whether it can be generally exempted from the prohibition of EU law of such state aid measures, and whether it can be individually (either by the Council of the EU or the European Commission) be freed from this ban, we may conclude with certainty that this plan of the HEP, i.e. to conclude a long term power purchase agreement with the winner of the tender for the construction of Plomin C will be against EU law and will not be accepted by the EU institutions.

As such, this seriously questions the feasibility of the entire Plomin C investment, not just from an environmental point of view as demonstrated by Zelena Akcija beforehand, but by now also from a competition point of view.

E M L A