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Complaint on the grounds of breaching EU state aid rules by approving subsidies that distort competition to the Hinkley Point C nuclear power station project (Support SA.34947)

Dear Secretary General,

For and on behalf of Elektrizitätswerke Schönau Vertriebs GmbH, represented by its management, with its registered office at Friedrichstr. 53/55, 79677 Schönau/Schwarzwald, Germany, I am lodging a

Complaint on the grounds of breaching Article 107 TFEU by approving distortive state aids for the Hinkley Point C nuclear power station project (Support SA.34947)

and requesting the European Commission

to revoke its decision of 8 October 2014 regarding Support SA.34947.

I would like to kindly ask you to acknowledge receipt of this complaint and to keep me updated on any progress in this procedure.

I. Introduction

Elektrizitätswerke Schönau Vertriebs GmbH supplies electricity from renewable energy sources to about 150,000 private households, commercial and industrial enterprises on a nationwide scale. The company is thus directly competing with other energy suppliers.

The complainant is aware of the fact that this complaint addresses a decision that was recently adopted by the European Commission itself: on 8 October 2014, the European Commission decided that the granting of state subsidies by the government of the United Kingdom to the project of building and operating a new nuclear power station at Hinkley Point, Somerset, was in line with EU state aid rules.

However, this decision was adopted by the "old" European Commission, and was the subject of a heated debate. In fact, this decision is incompatible with EU state aid rules.

Furthermore, the decision of 8 October 2014 was adopted in a very close call as only 16 commissioners voted in favour whereas 15 would have been required for a majority vote. Twelve of the old commissioners voted against this project. In December 2013, the European Commission had voiced serious doubts regarding the conformity of the intended measures with applicable EU legislation; in March 2014, the Commission initiated an in-depth investigation into the compatibility of related state aids with EU rules pursuant to Article 108 (2) of the Treaty on the Functioning of the European Union (TFEU).[1]

Contrary to the statement of the then Commissioner for Competition Policy made on 8 October 2014[2], the basic elements of the agreement between the British government and the supported company have expressly remained unchanged compared to the

[1] *European Commission*, communication of 18 December 2013, C(2013) 9073 final.
[2] Cf. http://europa.eu/rapid/press-release_SPEECH-14-668_en.htm.

situation in December 2013.[3] The modifications introduced by the British government are of a minor nature. Although they might slightly improve the situation of UK consumers,[4] they do not at all alter the substance relevant to competition law with respect to other competitors on the electricity market.

From the complainant's point of view, reliance on nuclear energy is irresponsible because it is a high-risk technology. However, the complainant is bound to accept that each Member State may freely determine its energy mix, which is why it is currently not possible, from an EU law perspective, to impose a prohibition to approve the construction of new nuclear power stations on the United Kingdom. This being said, no Member State may breach EU state aid rules to implement its energy policy objectives.

The new European Commission, which has been in office since 1 November 2014, must not condone a measure that is obviously in contravention to both EU state aid rules and the liberalisation of the internal electricity market. If it did, it would approve of an unlawful decision and thus fail to act in line with European primary law right from the beginning. At the same time, it would forgo the opportunity to take a firm stance to dispel the impression that considerable political influence has been exerted on the Commission's decision of 8 October 2014.

If the decision of 8 October 2014 were upheld, it would create a precedent with respect to future state aid applications submitted by companies, and would, consequently, constitute a fundamental departure from the objective of a liberalised internal electricity market, as any case-by-case decision adopted by the European Commission obviously has a prejudicial effect and influences its further decision-making process by its very nature. Any other assumption would be far removed from real life whilst also being problematic from an equal opportunity point of view. The assurance according to which this decision would not create any precedent changes nothing in this respect.

On this basis, the new European Commission can, and must, reverse the decision adopted on 8 October 2014 and revoke the related approval. Neither the British government nor the supported company are in a position to claim protection of

[3] *Electricité de France* (*EdF)*, press release of 8 October 2014, http://finance.edf.com/fichiers/fckeditor/commun/Presse/communiques/EDF/2014/cp_EDF_20141008_vdef.pdf.
[4] *EdF*, press release of 8 October 2014.

vested rights or to rely on the doctrine of legitimate expectations because either party should be aware of the substantive unlawfulness of the decision, all the more so since Austria, among other parties, announced its determination to bring this matter to the European Court of Justice (ECJ) immediately after the decision was adopted by the Commission on 8 October 2014.

Having regard to the above considerations, the complaint is substantiated as follows:

II. Matter at Issue

a) Various state guarantees in favour of Électricité de France

On 8 October 2014, the European Commission decided that the subsidies the United Kingdom intended to grant to the construction and operation of a new nuclear power station at Hinkley Point, Somerset, were in line with EU state aid rules (Support SA.34947).[5] By way of a private-law agreement with the British government, the investor, NNBG, a subsidiary of Électricité de France (EdF), the electricity supplier, was to be given credit guarantees and support to ensure stable revenues.

More specifically, the United Kingdom intends to issue a state guarantee to EdF to cover any debt the company acquires from the financial markets for the purpose of building the power station.[6] Total construction cost of the nuclear power station is estimated at about €31.2 billion whereas the project is said to require debt financing in the amount of around €21.6 billion.

Furthermore, the United Kingdom plans to introduce a price support mechanism in favour of EdF in the form of a so-called "Contract for Difference" (CfD) that would guarantee stable revenues to EdF of about 11 eurocents per kilowatt hour during a period of 35 years.[7] This price will be adjusted for inflation. Assuming a moderate 2% inflation rate, the initial remuneration and the guaranteed adjustment for inflation would result in a price of about 35 eurocents per kilowatt hour at the end of the 35-year term of the contract.[8]

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[5] *European Commission*, press release of 8 October 2014, IP/14/1093. The official decision of the Commission is not (yet) publicly available, cf. http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_34947, accessed 28 November 2014.
[6] See above, footnote 5.
[7] See above, footnote 5.
[8] See also Financial Times of 8 October 2014, Brussels backs Hinkley Point C as cost forecasts soar.

If market circumstances require an output reduction or shutdown of the nuclear power station, the UK government would additionally compensate EdF for lost profits.[9]

Finally, the United Kingdom and EdF have allegedly agreed upon certain "safeguards" of the project against certain legal or regulatory changes.[10] There is no specific information available in the public domain regarding this arrangement. However, the then Commissioner for Competition Policy said on 8 October 2014 that companies constructing nuclear power stations were to be protected against political risks because future governments might change their mind regarding the necessity of nuclear energy use.[11] This stance implies a "protection" granted to EdF against any future nuclear phase-out or operational restrictions, thus depriving future governments of their freedom to act and make decisions.

b) Modifications compared to the original plans of the British government

The original plans of the United Kingdom have been slightly modified only with respect to the fee that EdF would have to pay for the credit guarantees, which was raised compared to the situation in December 2013. Furthermore, EdF should transfer a higher share of project gains to the British government according to the modified provisions.[12] However, the basic principle of the state aid to be granted to EdF by the United Kingdom and its key parameters have remained unchanged compared to the original plans, which EdF expressly confirmed.[13]

What remains at issue are the credit guarantees in the double-digit billion range to be given by the British government, which are particularly relevant from a competition law point of view, as well as the guarantee of fixed, inflation-adjusted electricity purchase prices significantly above market levels agreed upon for a period of 35 years.

At the same time, this means that the original criticism voiced by the European Commission continues to be valid to its full extent. No factual basis has ever existed for the changed assessment by the European Commission communicated on 8 October 2014.

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[9] Energie & Management of 4 November 2013, http://www.energie-und-management.de/?id=84&no_cache=1&terminID=101962.
[10] *EdF*, press release of 8 October 2014.
[11] Cf. *Anschober/Leidenmühler*, press release of 9 October 2014.
[12] *European Commission*, press release of 8 October 2014.
[13] Expressly confirmed by *EdF*, press release of 8 October 2014.

Nor has the situation changed with respect to any alleged market failure, contrary to the statement of the then Commissioner for Competition Policy made on 8 October 2014[14]. To "prove" a "specific market failure in the energy sector", the Commissioner referred to the risks associated with nuclear technology that prompted financial markets to refrain from providing credit, which include long construction times, high capital costs and long service lives. Yet these risks have long been known. What is more, they do not prove any market failure but, conversely, a failure of nuclear technology in terms of its competitiveness.

c) Subsidisation of a state-controlled company

EdF is an electricity company controlled by the French state, and the second-largest power generation business worldwide. In 2008, EdF acquired the UK nuclear power station operator British Energy. In March 2013, the UK authorities gave their planning consent to EdF for the construction of the Hinkley Point C nuclear power station.

The proposed nuclear power station is to be equipped with two reactors with a total output of about 3.3 GW. According to EdF, the reactors were originally scheduled to come on-line in 2023. On 8 October 2014, however, the then Commissioner for Competition Policy mentioned an extended construction period of ten years,[15] which means that the originally envisaged commencement of operations in 2023 appears to have become outdated by now.

III. Assessment of Legal Situation

The credit and price guarantees agreed upon between the United Kingdom and EdF constitute state aids within the meaning of Article 107 (1) TFEU; they are incompatible with the internal market. They strongly distort competition, promote a high-risk technology and are not permissible even in an exceptional case. The conditions stipulated in Article 107 (3) (c) TFEU are not fulfilled.

The following paragraphs assess the legal situation in more detail.

[14] Cf. http://europa.eu/rapid/press-release_SPEECH-14-668_en.htm.
[15] Cf. http://europa.eu/rapid/press-release_SPEECH-14-668_en.htm.

1. State aids within the meaning of Article 107 (1) TFEU

Article 107 (1) TFEU stipulates that "… any aid granted by a Member State or through State Resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."

Pursuant to ECJ case law, any state measure is exempt of the definition of state aid included in Article 107 (1) TFEU only if and to the extent such measure is to be considered as a compensation for services provided by the companies to which it is granted in order for them to fulfil public service obligations, which is why such companies do not benefit financially, and the state measure referred to above does not favour them in comparison to their competitors (so-called Altmark criteria).[16]

These criteria are obviously not fulfilled in the case at hand, which is not about providing a public service with which EDF – as the supported company – would be entrusted:

As such, neither the supply of electricity nor the expansion of nuclear power capacity constitute a public service since they are no key responsibilities of the state. At least since the liberalisation of the internal electricity market, power generation has been a common commercial activity subject to market competition. In this setting, nuclear energy is competing with all other power generation technologies on the liberalised internal electricity market.

If at all, a key state responsibility could be assumed if security of supply needs to be ensured in the event of sudden shortage, which is obviously not what the present case is about. The matter at issue involves the subsidisation of nuclear energy far into the future, rather than closing a sudden supply gap.

Unlike in the renewable energy sector for which the European Commission has recently defined a new expansion target to reach a share of at least 27% by 2030, there is no EU-wide expansion target for nuclear power. Furthermore, the Altmark criteria require additional electricity capacity to be subject to a targeted bidding procedure that corresponds to the principle of security of supply. Yet there has not been any bidding procedure in the present case.

[16] ECJ, Judgment of 24 July 2003, Case C-280/00, marginal ref. 87 et seq. (Altmark).

Rather, EdF should be put at a selective advantage by credit and price guarantees, as well as by the other agreements referred to above under Paragraph II., given by the British government. Not only does this arrangement put the company in a favourable position compared to its competitors, it also creates an almost risk-free environment. The measures envisaged by the United Kingdom to favour EdF constitute an economic benefit that EdF would never enjoy under normal market conditions.[17] These measures are thus to be categorised as state aid within the meaning of Article 107 (1) TFEU.

Even the European Commission itself has arrived at the same conclusions. In relation to the matter at issue, it stated the following in its communication of 18 December 2013:[18]

> *"(162) On the basis of the arguments set out in Sections … and of the information provided to the Commission, the 'Altmark' criteria do not seem to be fulfilled for the notified measure. Therefore the Commission cannot exclude that the Investment Contract will provide NNBG with a selective advantage.*
>
> *…*
>
> *(188) Both the Investment Contract and the credit guarantee have the potential to distort competition and affect trade between Member States. The Commission notes in this respect that the generation and supply of electrical power is liberalised. As in this case the notified measures will enable the development of a large level of capacity which might otherwise have been the object of private investment by other market operators using alternative technologies, from either the UK or from other Member States, the notified measures can affect trade between Member States and distort competition.*
>
> *(189) The Commission therefore concludes, at this stage, that the Investment Contract and the credit guarantee involve State aid within the meaning of Art 107(1) TFEU."*

According to its press release published on 8 October 2014, the European Commission also upholds its correct position that the related measures constitute

[17] Cf. ECJ, Judgment of 11 July 1996, Case C-39/94, and Judgment of 29 April 1999, Case C-342/96.
[18] See above, footnote 1.

state aid within the meaning of Article 107 (1) TFEU that have a distortive effect on competition.[19]

2. No exceptional internal market compatibility pursuant to Article 107 (3) (c) TFEU

State aids that guarantee secure revenues and profitability are generally incompatible with EU state aid rules according to ECJ case law.[20] Nor are the disputed state aids justified as an exception pursuant to Article 107 (3) (c) TFEU, contrary to the position of the European Commission communicated on 8 October 2014.

Article 107 (3) (c) TFEU stipulates that, in exceptional cases, "aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest" may be considered to be compatible with the internal market. These conditions are not fulfilled in the present case.

The expansion of nuclear power capacity is neither a common objective, nor is it a common interest of the EU. Nor does the case at hand relate to ensuring security of supply. Furthermore, it is not about rectifying market failure. On the contrary, the planned measures strongly distort competition and counteract the common EU objective of liberalising the internal electricity market. This argument holds true even if credit and price guarantees are assessed independently of each other. It is even more valid for the combination of these two subsidies and the other benefits granted to EdF (see above):

a) Expansion of nuclear energy is no "common interest"

The expansion of nuclear energy capacity is no common objective and is not in the common interest of the European Union. If at all, it is an objective pursued by individual Member States. Whereas the common interest in expanding renewables has recently been reiterated by agreeing upon an EU-wide expansion target of at

[19] The press release published by the European Commission on 8 October 2014 (footnote 5) includes the following, among other statements: "… the combination of the following modifications minimises the distortive effects of the support measure …" This means that even the European Commission itself does not contest the distortive effects of the state aid.

[20] See e.g. ECJ, Judgment of 15 May 1997, Case C-278/95, ECR I-2507, marginal ref. 18; Judgment of 5 October 2000, Case C-288/96, ECR I-8237.

least 27% by 2030,[21] there is no expressly agreed target for nuclear energy. Nor does the Euratom Treaty include any provision regarding an EU-wide expansion target.

Rather, a number of member states – Austria, Belgium, Denmark, Germany, Italy, Ireland, Latvia and Luxembourg – have either never embarked upon using nuclear energy (whilst excluding it for the future) or agreed upon a binding nuclear phase-out plan. And there are good reasons for this move:

Even 28 years after the nuclear accident at Chernobyl, Belarus, the Ukraine and western Russia are still heavily struggling to cope with the impact of the reactor blow-up. Back then, 350,000 people had to leave their homes forever as a result of this disaster. The blocked, radiation-contaminated area continues to be uninhabitable to the present day. About 160,000 people were evacuated from the nuclear disaster area around the blown-up Fukushima nuclear power station in Japan after the tsunami and three consecutive nuclear meltdowns. It remains to be seen how many of these people will ever be able to return to their homes. In autumn 2013, the European Union estimated the cost of the Fukushima accident at €187 billion. Yet the impact of this triple meltdown turned out to be relatively "moderate". In the first few days after the disaster, the Japanese government had reason to believe, at some point, that it would no longer be possible to live in the Greater Tokyo area. In this case, the very existence of the Japanese state would have been at risk.[22] Since this accident occurred in Japan, which is considered to be a high-tech nation, it should by now be undisputed that such a severe accident may happen anywhere, at any time. In this respect, it is irrelevant that tsunamis or earthquakes occur much less frequently in Europe than in Japan. Experience in the nuclear age has shown that severe accidents at nuclear power stations each follow their own pattern. The only thing they have in common is that they are unpredictable. According to publicly available information, Europe last narrowly escaped such a disaster in July 2006 when Block 1 of the Forsmark nuclear power station in Sweden came extremely close to a meltdown.[23]

Yet the use of nuclear energy is also uncontrollable with respect to its associated proliferation risks, which applies to an even greater extent at a time when terrorists

[21] Cf. http://www.bundesregierung.de/Content/DE/Artikel/2014/10/2014-10-24-er-klimaziele.html.
[22] *Naoto Kan*, http://www.arte.tv/de/naoto-kan-der-japanische-ex-premierminister-auf-dem-altar-der-kernenergie-geopfert/6391576,CmC=6442686.html.
[23] Instead of many other sources, see *Rosenkranz*, Energiewende 2.0, 2014, pp. 17 and other references

are expanding their activities to an international scale. Finally, the issue of safe disposal and storage of highly radioactive waste is still unresolved.

Unlike for renewables, the EU has not agreed upon a common expansion target for nuclear energy. What is more, the expansion of nuclear energy capacity may not be exempted from the prohibition to grant state aid. Regulation (EC) No. 800/2008[24] contains an exhaustive list of state aids in favour of environmental protection that are exempt from the notification requirement. State price guarantees in the form of contracts for difference granted to nuclear power station operators do not fall under any of these environment-related aid categories exhaustively listed in the regulation. Furthermore, the expansion of nuclear energy capacity has expressly been excluded from the new EU energy and environmental state aid guidelines adopted in spring this year.

Any attempt of the British government to base its argument on the common EU objectives for decarbonisation and security of supply is thus invalid.

For, on the one hand, the use of nuclear technology is neither carbon-free nor can it be considered a low-carbon generation method from a holistic point of view.[25] In addition, the European Commission arrived at the following conclusions in December 2013:[26]

> *"(240) The Commission notes that while Art 191 TFEU establishes that the preservation, improvement and protection of the environment must be regarded as objectives of EU policy, it is unclear whether such objective can be immediately applicable to low-carbon generation as defined by the UK. In particular, while certain generation technologies emit less carbon emissions, their impact on the environment might nonetheless be considered substantial. This seems to be particularly true of nuclear generation, due to the need to manage and store radioactive waste for very long periods of time, and the potential for accidents.*
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> *(241) In this case, it is difficult to assess the trade-off between two potential common EU objectives, namely preserving the environment through the*

[24] Commission Regulation (EC) No. 800/2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General Block Exemption Regulation). OJ L 214, p. 3.
[25] See, for example, *Sovacool*, Valuing the greenhouse gas emissions from nuclear: A critical survey, Energy Policy 2008, 2940-.
[26] *European Commission*, communication of 18 December 2013, see above, footnote 1.

pursuit of low-carbon electricity generation while potentially increasing risks to the environment through the use of nuclear technology."

There is nothing to add to this statement.

Nor may the United Kingdom refer to the principle of ensuring security of supply. The matter at issue is the subsidisation of nuclear energy far into the future, sometime after the year of 2023. This is why the conclusions of the European Commission made in December 2013 continue to be valid in this respect, too:[27]

"(262) First, the UK points out that a generation adequacy problem is forecast to take place by Ofgem before 2020, referring to the fact that capacity margins fall under a 'business as usual' scenario based on Ofgem's Electricity Capacity Assessment Report.[59] It is therefore unclear how a measure which is expected to support generation becoming operational only after 2020 can remedy, or address, a generation adequacy problem taking place before.

(263) Also, in terms of diversity of supply, the Commission notes that such diversity would seem to be, again, ensured also in a 'business as usual' scenario and without the introduction of CfDs for nuclear energy. The question would therefore seem to become one of how quickly such diversity should be achieved, rather than whether it is achieved at all."

b) No market failure

On 18 December 2013, the European Commission had seriously doubted the presence of any market failure. Amongst other arguments, the Commission justified this opinion by the fact that nuclear energy was characterised by extremely high fixed costs and by very long time periods during which such costs need to be amortised, which is why investors considered the financial risks of such projects to be too high to decide in favour of any such investment.[28] The Commission also considered other factors such as the low-probability catastrophic risk of nuclear accidents, the cost of plant decommissioning, the management and disposal of spent fuel and nuclear waste, and liability insurance risks.[29]

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[27] *European Commission*, communication of 18 December 2013, see above, footnote 1.

[28] *European Commission*, see above, footnote 1, marginal ref. 276.

[29] *European Commission*, see above, footnote 1, marginal ref. 283 et seq.

Furthermore, the Commission had arrived at a clear position even for the highly unlikely case of a specific market failure in the field of electricity generation:[30]

> *"(269) The existence of certain market failures in electricity generation is not sufficient to justify state intervention to support nuclear generation."*

It is quite astonishing that the then Commissioner for Competition Policy arrived at a diametrically opposed conclusion on 8 October 2014: according to him, the UK authorities had convincingly demonstrated that there was a market failure that required state aid. He claimed that there was a specific market failure in the energy sector that was only applicable to nuclear energy. He was of the opinion that the risks associated with this technology, such as long construction times, high capital costs and long periods of service until operation becomes profitable, prompted the financial markets to refrain from providing funds.[31]

In reality, there is no market failure. Nuclear technology has been utilised for decades on a worldwide scale. This source of energy has been used to generate electricity for 60 years, and has been heavily subsidised in the past. If subsidies were still required to build and operate nuclear power stations, this would mean that this technology continues to be commercially unviable even after decades of subsidisation. Prime generation costs of nuclear power stations currently range from €70-€110/MWh, i.e. significantly above the market price of electricity. However, this figure still largely excludes external costs incurred by the liability for incidents and accidents as well as environmental pollution, decommissioning of nuclear power stations, and nuclear waste disposal.

In turn, this means that the subsidies approved on 8 October 2014 would support nuclear energy not to reach market maturity but to artificially keep this type of generation on the market despite its lack of competitiveness. Rather than rectifying market failure, this measure would have the opposite effect of distorting competition, which is obviously in contravention of a liberalised internal electricity market, and thus incompatible with the provisions of Article 107 (3) (c) TFEU. The reasons cited by the former Commissioner for Competition Policy do not prove market failure but, conversely, a technology failure of nuclear energy in respect of its competitiveness.

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[30] *European Commission*, see above, footnote 1.
[31] Cf. http://europa.eu/rapid/press-release_SPEECH-14-668_en.htm.

Furthermore, this assessment is not changed by the fact that the nuclear power station proposed by EdF uses an EPR-type reactor; not a single reactor of this type has been put into service yet worldwide. Like any other technology, nuclear technology is inherently subject to continuous improvements and modifications. What is more, the state of the art in nuclear technology necessitates the continuous application of best available practices and processes on the basis of the current state of research and engineering.

The EPR is merely the result of further developing known predecessors of the pressurised water reactor type, rather than a new technology. More specifically, the EPR is a pressurised water reactor with four primary cycles whose major components were taken from the N4 and Konvoi series, and were subsequently modified. For example, the pressure vessel stems from the Konvoi series whereas the steam generators and coolant pumps were first used in the French reactors of the N4 series.[32] EdF itself stresses:

> *„Héritier des réacteurs français N4 (Chooz et Civaux) et allemands KONVOI, l'EPR s'inscrit dans la continuité des techniques existantes.“*[33]
>
> *[“As the successor to the French N4 reactors (Chooz and Civaux) and to the German KONVOI series, the EPR continues to rely on existing technologies.”]*

In 2005 and 2007, construction of another two EPR-type reactors commenced at Olkiluoto, Finland, and Flamanville, France. In 2009 and 2010, construction of an additional two EPR reactors started in Taishan, China. The European Commission shares the above opinion:[34]

> *“(42) It is intended that the UK fleet of EPRs will use the same technology as the rest of the EDF Group international EPR fleet. The nuclear plants under construction in Flamanville, France and Taishan, China will be used as the base design.”*

The Commission also confirms that this technology is not competitive:[35]

[32] Cf. http://de.wikipedia.org/wiki/Areva_EPR#Technik.
[33] Cf. EdF, http://energie.edf.com/nucleaire/carte-des-centrales-nucleaires/la-technologie-epr-48325.html
[34] See above, footnote 1.
[35] See above, footnote 1.

"(25) The first two projects, Olkiluoto in Finland and Flamanville in France, the construction of which started in 2005 and 2007 respectively, have faced construction delays and cost overruns."

Commissioning of the Olkiluoto EPR was originally scheduled for 2009, combined with a cost estimate of €3 billion. Currently, the earliest possible commissioning date is scheduled for the end of 2018 whereas costs have soared to €8.5 billion. Actual construction costs are likely to be even higher. Commissioning of the Flamanville nuclear power station was originally scheduled for 2012, associated with total construction costs of €3.3 billion. This EPR is yet another example of an enormous construction cost increase to about €8.5 billion. It will come on-line not before 2016 or 2017.

Furthermore, the European Commission adopted the following position in the course of liberalising the internal electricity market:

"Under these circumstances, the Commission considers that it is not feasible to assign quantitative production or investment targets to the nuclear industry beyond the year 2000, noting, in addition, that the Union's objective today is to let the market rules play their role."[36]

Also, the current nuclear programme of the European Union published in 2007/2008 states:

"It is important to ensure in the EU that nuclear energy projects do no benefit from any State subsidy."[37]

Having regard to the above assessment, there are no grounds whatsoever on which to assume or justify market failure.

The United Kingdom shared this position until recently. In January 2008, the British government requested industry to prepare plans for nuclear capacity expansion whilst explicitly excluding any state funding of construction, operation or disposal. Former UK Business Secretary, John Hutton, stated:

"It is a matter for the power companies to bring forward proposals on the basis that there will be no public subsidies. Public funds would only be

[36] *European Commission*, Nuclear Programme 1996, COM(96) 339 final.
[37] *European Commission*, Communication from the Commission to the Council and the European Parliament: "Nuclear Illustrative Programme" - COM(2007) 565 final.

provided in the very unlikely circumstances of an emergency at a nuclear plant."[38]

Being fully aware of this statement, EdF announced the construction of four nuclear power stations in the United Kingdom, among them Hinkley Point C. Should EdF have arrived at new conclusions regarding the risks and profitability of the Hinkley Point C nuclear power station, any such new situation would be part of its ordinary business risk, and would thus hardly justify backing of this risk by the state, even more so in a liberalised electricity market.

c) Distortion of competition and challenge to internal electricity market

The European Commission itself has arrived at the right conclusions regarding the strongly distortive effect on competition that would inevitably be associated with the measures proposed by the United Kingdom to subsidise EdF. EdF would be almost completely relieved of any business risk. In its communication of 18 December 2013, the European Commission stated in this regard:[39]

"(324) In particular, the CfD seems to provide the utmost certainty of a stable revenue stream, under rather lenient conditions – i.e. that the beneficiary carries out its normal activities as a producer of electricity and sells this electricity into the market. In other words, the CfD is conceived to entirely eliminate market risks from the commercial activity of electricity generation, for a period of time, the initial 35 years of operations of the plant. Such a period of time, moreover, would most likely be regarded as the most relevant one to a private investor when considering investment in a plant, and to providers of financing when assessing how risky the activity is, given that what happens in the post-CfD period is significantly less risky and far enough away in time not to be likely to be of particular concern.

(325) As such, the CfD is an instrument which can be regarded as effective in ensuring that investment takes place. It de facto eliminates any price risk that the beneficiary might face, at least during its provision.

(326) The Commission believes that such an instrument is capable of severely distorting market dynamics, precisely because it shields the beneficiary from

[38] http://news.bbc.co.uk/2/hi/uk_news/politics/7179579.stm.
[39] See above, footnote 1.

risks which other market operators need to face. If the CfD is provided together with a credit guarantee, in addition to a compensation for political risk and the indexation of the cash flows to the consumer price index, as the UK intends to do, it can be safely concluded that the activity undertaken by the beneficiary, NNBG, is not far from being risk-free at the level of operations. NNBG is left with some of the construction risk, but as noted above it appears to have a […]-year window to complete construction, hence the risk can be considered, if not limited, at least relatively mitigated by this time window, even if the second […]-year period might entail a shortening of the CfD duration according to the terms of the preliminary agreement."

This assessment continues to be valid; it is expressly *not* addressed by the modifications introduced by the British government (see above).

If, in addition, any and all external costs of nuclear energy were internalised, and if any and all past Euratom subsidies were included in the calculation of the costs, this would highlight the fact that nuclear energy is one of the most expensive power generation technologies that also burdens future generations. Nor does the expansion of nuclear capacity have any noticeable, let alone positive, effect on the competitiveness of the European Union. Rather, about 7% of the electricity demand of the United Kingdom would be "blocked" for more cost-effective alternatives such as highly efficient gas-fired power stations and renewable energy sources.[40]

Due to the merit-order effect, the price guarantee given for the purchase of nuclear power from EdF reduces the revenues generated by selling electricity from renewable sources on the market, whereas the cost of generating electricity from renewables remains the same, which puts the complainant at a direct disadvantage, among other involved parties.

Evidence: Expert opinion.

Contrary to statements of the former Commissioner for Competition Policy, currently implemented state aids for renewable energies are not at all "much higher" than the subsidies for the Hinkley Point C nuclear power station approved on 8 October 2014. On the contrary, the feed-in tariff for medium-sized photovoltaic systems in Germany

[40] See also *Fouquet*, Gutachten im Auftrag des österreichischen Ministeriums für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft, Erarbeitung eines Antwortkatalogs im Hauptprüfverfahren der Europäischen Kommission, April 2014.

currently amounts to slightly under 11 eurocents per kilowatt hour. This tariff is not adjusted for inflation and paid for a period of only 20 years. Small onshore wind power systems attract a feed-in tariff of less than 9 eurocents per kilowatt hour whereas larger wind power installations do not receive fixed feed-in tariffs anymore and need to sell generated electricity directly on the market.

Furthermore, the new EU energy and environmental state aid guidelines adopted in spring this year require a gradual transition to competitive bidding. The then Commissioner for Competition Policy said at this point:

> *"It is time for renewables to join the market. The new guidelines provide a framework for designing more efficient public support measures that reflect market conditions, in a gradual and pragmatic way. Europe should meet its ambitious energy and climate targets at the least possible cost for taxpayers and without undue distortions of competition in the Single Market. This will contribute to making energy more affordable for European citizens and companies."*[41]

If this were indeed the case, these considerations and requirements would also apply to any nuclear power capacity expansion, which, unlike the increase in the share of renewables, is (a) not a common EU objective whilst being (b) a mature technology for which (c) no binding expansion target has been agreed upon and (d) the applicable group exemption regulation does not include an exemption from the prohibition of state aids and that (e) has been expressly excluded from the new energy and environmental state aid guidelines of the EU. The decision adopted on 8 October 2014 negates the EU's own principles regarding nuclear capacity expansion whilst disregarding the requirements provided for in Article 107 (3) (c) TFEU.

Yours sincerely,

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[41] Cf. http://europa.eu/rapid/press-release_IP-14-400_en.htm.