

**THE NEW UK NUCLEAR POWER PROGRAMME  
- A FIT FOR NUCLEAR AND A BLUEPRINT FOR ILLEGAL STATE AID?**

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## **A.      Introduction**

In 2006, the British government announced its intention to start a new programme of nuclear power plants in the UK. However, it promised that the programme would be driven by the market with competition between vendors and between different owners and it was adamant that no public subsidies would be provided. However, in 2010, it instigated a process known as Electricity Market Reform (EMR) that resulted in an acknowledgement by government that subsidies were available. Competition between vendors and between owners has failed to materialise. The result is that by December 2012, the government was in bilateral negotiations with Electricité de France (EDF) over the terms of a long-term power purchase agreement for power from the Areva European Pressurised water Reactor (EPR).

Note that the nuclear programme has spanned three governments, the Labour government led by Tony Blair (2006-08), the Labour government led by Gordon Brown (2008-10) and the coalition Conservative/Liberal Democrat government of 2010 onwards. However, policy on the nuclear programme has not been a party political issue and none of the changes in the programme can be attributed to changes in government.

## **B.      The plans 2006-10**

In November 2005, the Government of Tony Blair instituted a review of energy policy widely reported as being aimed at restarting a nuclear programme only two years after the completion of an earlier review. A key element of the proposed nuclear programme was the promise that there would be no subsidies. In 2006, well before the review was complete, the Secretary of State for Trade and Industry (the ministry then responsible for energy) was questioned by a Select Committee on the issue of subsidies:<sup>1</sup>

Q 'Do you think the Government would be prepared to consider guarantees: for example, a cap on the waste costs of new nuclear, or sharing initial planning costs, or even guaranteeing the price of the energy produced from nuclear?'

A 'I would be very surprised if we issued that kind of guarantee. The one thing I am clear about is that when we look at nuclear, we have to look at cost, safety and waste. Those are the three big issues that were around in 2003 and they are the big issues now. I expect new plant to be built and run by the private sector. There is a market here. In terms of what happened before, Sizewell B for instance had a cost overrun of around 35%, and there has been an awful lot of public money invested there. I think with everyone who comes before your committee, and I think I saw some evidence

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<sup>1</sup> <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmenvaud/584/5112304.htm>.

from the private sector, there is no expectation. First of all, and I know this is not the precise question you are asking, there is no expectation of taxpayers' money being thrown into this. It is down to the private sector. I would be very surprised, given that that is the case, if the Government was looking for guarantees, except that we want to be sure, of course, that safety continues to be dealt with as well as it is now.'

The government was also adamant that there would be competition between vendors and developers. It therefore instigated a programme in 2007 of Generic Design Assessment (GDA) under which the UK safety regulator, then the Nuclear Installations Inspectorate, subsequently renamed the Office of Nuclear Regulation (ONR), would carry out a comprehensive review of a number of designs so that a potential customer would know the only regulatory issues remaining for that design would be limited site-specific ones. Four designs entered the GDA: the EPR supplied by Areva, the AP1000 supplied by Toshiba/Westinghouse, the ESBWR supplied by Hitachi-GE and the ACR1000 supplied by AECL. This process was scheduled to be completed in July 2011.

In 2009, EDF took over the owner of most of the UK's nuclear power plants, British Energy, giving it access to the main expected sites for new nuclear power plants. To ensure competition between developers, the government auctioned land at sites of existing nuclear power plants to other potential developers. It was expected such sites would be suitable for new nuclear power plants and would see much less opposition than new sites. Three consortia were set up to develop new nuclear plants:

- NNB Genco, a joint venture (JV) between EDF (80%) and one of the main UK suppliers of gas and electricity, Centrica (20%);
- Horizon, a 50/50 JV between the two largest German utilities, EON and RWE, who already had a strong position in the UK market through their earlier take-over of the two largest UK electricity companies, Powergen and National Power respectively; and
- NuGen, a JV comprising the owner of Scottish Power, Iberdrola (37.5%), GDF Suez (37.5%) and Scottish & Southern Energy, S&SE (25%).

So all of the six major companies in the UK energy market, plus GDF Suez, were represented in these JVs. NNB Genco planned to build four reactors of the EPR design, two each at Hinkley Point and Sizewell, the first then expected on-line by 2017. Horizon also planned to build four reactors, design not specified, two each at Oldbury and Wylfa; while NuGen ac-

quired a site at Sellafield but did not specify the number and design of reactor to be built. A White Paper on nuclear power was published in January 2008. It concluded:<sup>2</sup>

'The Government believes it is in the public interest that new nuclear power stations should have a role to play in this country's future energy mix alongside other low-carbon sources; that it would be in the public interest to allow energy companies the option of investing in new nuclear power stations; and that the Government should take active steps to open up the way to the construction of new nuclear power stations. It will be for energy companies to fund, develop and build new nuclear power stations in the UK, including meeting the full costs of decommissioning and their full share of waste management costs.'

The cost calculations behind this conclusion showed that nuclear power was not as cheap as gas-fired plants but with a Carbon price of €36/tonne, it was competitive.<sup>3</sup>

### **C. Electricity Market Reform**

In February 2010, the Labour energy minister, Ed Miliband<sup>4</sup> and the energy economic regulator, Ofgem,<sup>5</sup> both stated unequivocally that the existing electricity market arrangements had to be reformed if security of supply was to be maintained and the UK's targets on reductions of greenhouse gas emissions were to be met. Gordon Brown's Labour government was replaced by a coalition government comprising the Conservatives and Liberal Democrats (previously opposed to nuclear power) in May 2010 but, despite the fact that the minister responsible for energy (Department of Energy and Climate Change, DECC), Chris Huhne, was a Liberal Democrat who had previously been outspoken in his opposition to nuclear power, there was no less governmental enthusiasm for nuclear power and the process of Electricity Market Reform foreshadowed in the February statements, noted above, was instigated in July 2010.<sup>6</sup>

In a statement to Parliament in October 2010<sup>7</sup> by Chris Huhne, the government maintained the rhetoric of no subsidies for new nuclear: 'I should like to take the opportunity to reconfirm the Government's policy that there will be no public subsidy for new nuclear power.' However, in the next sentence the government acknowledged that subsidies could be offered: 'To be clear, this means that there will be no levy, direct payment or market support for electricity

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<sup>2</sup> Department for Business, Enterprise & Regulatory Reform (2008) 'Meeting the Energy Challenge: A White Paper on Nuclear Power'. The Stationery Office, Norwich.  
<http://webarchive.nationalarchives.gov.uk/+http://www.berr.gov.uk/files/file43006.pdf> p 10.

<sup>3</sup> Idem, p 59.

<sup>4</sup> The Times 'Labour prepares to tear up 12 years of energy policy' February 1, 2010.

<sup>5</sup> <http://www.ofgem.gov.uk/Media/PressRel/Documents1/Ofgem%20-%20Discovery%20phase%2011%20Draft%20v15.pdf>.

<sup>6</sup> <http://www.decc.gov.uk/en/content/cms/consultations/emr/emr.aspx>.

<sup>7</sup> [http://www.decc.gov.uk/en/content/cms/news/en\\_statement/en\\_statement.aspx](http://www.decc.gov.uk/en/content/cms/news/en_statement/en_statement.aspx).

supplied or capacity provided by a private sector new nuclear operator, unless similar support is also made available more widely to other types of generation.’ The current minister in charge of DECC, Ed Davey (also a Liberal Democrat) has affirmed that this statement remains government policy.<sup>8</sup>

In July 2011, the Government published a White Paper on EMR. The key elements of the reforms were stated to be:<sup>9</sup>

1. ‘a Carbon Price Floor (announced in Budget 2011) to reduce investor uncertainty, putting a fair price on carbon and providing a stronger incentive to invest in low-carbon generation now;
2. the introduction of new long-term contracts (Feed-in Tariff with Contracts for Difference) to provide stable financial incentives to invest in all forms of low-carbon electricity generation. A contract for difference approach has been chosen over a less cost-effective premium feed-in tariff;
3. an Emissions Performance Standard (EPS) set at 450g CO<sub>2</sub>/kWh to reinforce the requirement that no new coal-fired power stations are built without CCS, but also to ensure necessary short-term investment in gas can take place; and
4. a Capacity Mechanism, including demand response as well as generation, which is needed to ensure future security of electricity supply. We are seeking further views on the type of mechanism required and will report on this around the turn of the year.’

Note that the Carbon floor price will be introduced in 2013 and will rise to €36/tonne by 2020, the level at which the White Paper on nuclear power claimed it would be competitive with gas-fired generation. 2020 was then the year when the first nuclear power plant was expected on-line.

The first two provisions are expected to be most relevant to nuclear power. The third is intended to ensure new coal-fired plant is not built while the Capacity Mechanism should logically be targeted at ‘peaking’ plants, i.e., those that are required for only a few hours per year at times of peak electricity demand. Nevertheless, it is worth noting that in a recent communication from to the European Parliament, the Commission expressed serious concerns about the possible distortions introduced by capacity payments:<sup>10</sup> ‘Capacity mechanisms distort the EU-wide price signal and are also likely to favour fossil fuel generation sources over more variable renewable sources (beyond levels necessary for maintaining power systems in balance) and may therefore run counter to EU decarbonisation and resource

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<sup>8</sup> <http://www.libdemvoice.org/there-will-be-no-public-subsidy-for-nuclear-28150.html>.

<sup>9</sup> [http://www.decc.gov.uk/en/content/cms/legislation/white\\_papers/emr\\_wp\\_2011/emr\\_wp\\_2011.aspx](http://www.decc.gov.uk/en/content/cms/legislation/white_papers/emr_wp_2011/emr_wp_2011.aspx).

<sup>10</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52012DC0663:EN:NOT> p 15.

efficiency objectives.’ It is also worth noting that the UK market from 1990-2001 did provide significant payments to all forms of capacity, including base-load, at times of peak demand. The government has proposed a system of auctions to provide peak capacity but until the exact form of these auctions is specified, it cannot be assumed that capacity payments will not benefit new nuclear power plants.

## **D. Technologies**

Less than a year after GDA was started, ACR1000 was withdrawn from the process.<sup>11</sup> Hitachi-GE’s application for the ESBWR was suspended in September 2008.<sup>12</sup> The GDA process was due to be completed in July 2011, but some time before then, the UK regulatory body, the Office of Nuclear Regulation (ONR) acknowledged that it would not be able to issue a Design Acceptance Certificate (DAC) at that point. It proposed that it could issue an Interim DAC (IDAC) with a list of issues to be resolved subsequently. The Fukushima disaster delayed things for six months and in December 2011, the ONR issued IDACs for the two remaining designs, EPR and AP1000.<sup>13</sup> The AP1000 vendor, the Westinghouse division of Toshiba, stated that as they had no prospective customer for the AP1000, they would not be attempting to resolve the remaining issues and no further work on the AP1000 has been carried out by ONR since then.<sup>14</sup>

In effect, given that the only remaining developer in the near term is EDF, who are highly unlikely to choose any technology other than one supplied by Areva, this means that the objective to have competing technologies has failed and the only option is the EPR. ONR claimed the remaining 31 issues could be resolved within a year of issue of the IDAC. In December 2012, the ONR issued a DAC for the EPR.<sup>15</sup> It is therefore clear that in the short term there can be no competition between technologies except in the unlikely event that a new developer emerges hoping to build the AP1000.

## **E. Developers**

### **I. EDF**

NNB Genco owns the prime sites - in November 2012, the ONR granted NNB Genco a site license for Hinkley Point.<sup>16</sup> EDF’s commitment to nuclear power is strong and it has the full backing of the French government and NB Genco must be seen, for these purposes as driv-

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<sup>11</sup> Nuclear News ‘AECL drops out of new build process’ May 2008.

<sup>12</sup> European Daily Electricity Markets ‘Two designs left in UK’s nuke screening process, as GE-Hitachi suspends involvement’ September 2008.

<sup>13</sup> <http://www.hse.gov.uk/newreactors/regulators-issue-interim-dac-soda-gda-key-milestone.htm>.

<sup>14</sup> <http://www.prnewswire.com/news-releases/westinghouse-welcomes-interim-approval-for-ap1000-reactor-from-uk-regulators-135586383.html>.

<sup>15</sup> <http://www.hse.gov.uk/newreactors/reports/step-four/close-out/epr70475n.pdf>

<sup>16</sup> <http://www.hse.gov.uk/nuclear/hinkley-point-c/index.htm>.



en by EDF. The commitment of Centrica is much less clear. Since 2011, there have been continual reports that Centrica was, under pressure from investment analysts, considering withdrawing from NNB Genco<sup>17</sup> and speculation about Chinese partners EDF might bring in to replace Centrica. EDF's commitment to the project is seen a less strong than in the past. It has high levels of debt it needs to reduce to protect its credit rating, the poor experience of building its EPR at Flamanville (now 4 years late and about 160% over budget) may have caused doubts about EPR technology and the Fukushima disaster has left it with a large bill for upgrading its 58 reactors in France. A further blow to EDF came in January when the French government announced an Inquiry into the activities of the French nuclear industry in China, particularly an apparently secret agreement signed by EDF and its Chinese partner, CGNPC, to buy components from China rather than from Areva's French factories.<sup>18</sup> This inquiry will further hamper EDF's ability to make investment decisions and will sour relations with CGNPC making it unlikely it will take a stake in NNB Genco. In that light, an economically risky investment in UK would appear a low priority.

## **II. Horizon**

In March 2012, EON and RWE announced they were seeking to sell their stakes in Horizon. Several buyers were mooted but in November 2012, Horizon was sold to the reactor vendor Hitachi-GE.<sup>19</sup> The sale figure was reported to be £700m<sup>20</sup> but it is likely this figure is contingent on a number of factors. Hitachi-GE's technology is the Advance Boiling Water Reactor (ABWR). The UK safety authorities have little experience of assessing boiling water reactors and so it seems highly unlikely getting a DAC would take less than the 5-6 years it took the EPR, so it seems unlikely an order for an ABWR could be placed before about 2020.

## **III. NuGen**

The NuGen joint venture was always the least committed of the three consortia. S&SE announced its withdrawal from the consortium in September 2011<sup>21</sup>, leaving the other two members to increase their stake to 50%. In autumn 2012, it was widely rumoured that Iberdrola was also considering withdrawal from NuGen.<sup>22</sup> The assumption must therefore be that NuGen is not likely to proceed with new build in the near future.

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<sup>17</sup> Daily Telegraph 'EDF-Centrica to win site licence for nuclear plant' November 26, 2012.

<sup>18</sup> La Tribune 'Nucléaire franco-chinois: les clés pour comprendre le double jeu d'EDF' December 31, 2012

<sup>19</sup> <http://www.horizonnuclearpower.com/files/downloads/Horizon%20Completion%20Release%20%28National%29.pdf>.

<sup>20</sup> Independent 'Hitachi signs '100-year commitment' to boost UK's nuclear expansion plans' October 30, 2012.

<sup>21</sup> [http://www.nugeneration.com/download/GDF\\_SUEZ\\_IBERDROLA%20release.pdf](http://www.nugeneration.com/download/GDF_SUEZ_IBERDROLA%20release.pdf).

<sup>22</sup> Utility Week 'Iberdrola cooling on UK nuclear?' October 5, 2012.

## **F. Negotiations between government and EDF**

With NuGen and Horizon not in a position to proceed, there can be no competition between developers in the short to medium term and the government has opened bilateral talks with EDF on the terms of a long-term CfD for the first station, Hinkley Point. The CfD and FiT framework to be set up under EMR provided a framework under which negotiations were able to start between the Government and NNB Genco. The Feed-in Tariff (FiT) arrangements provided certainty that all the output of any nuclear plant would be sold, while the Contract for Differences (CfD) provided predictability on the income per unit sold. CfDs have been widely in the UK used to hedge fossil fuel plants against unpredictability in the generation market since 1990. In fact, the vast majority of new capacity in the UK has been covered by long-term CfDs so that the investment risk from unpredictable market prices was removed. Under a CfD, the selling price is partly fixed but with 'escalators' to cover general inflation and allow fossil fuel price increases to be passed on to consumers. The 'differences' element is simply a device for reimbursing any difference between the market price and the sale price. So if the market price is less than the contract price, the plant owner will receive the market price from the market and any difference between the contract price and the market price will be paid to or from the plant owner ultimately by consumers.

Negotiations will focus on two elements, the 'strike price', which is the basic price paid. This has to be high enough to cover the full expected costs of building and operating the nuclear plant and much of the publicity has included speculation on what the price will be with estimates varying from £100-165/MWh.<sup>23</sup> However, of at least as much concern to NNB Genco and its financiers are the escalators. It might be expected that the strike price would be indexed to general inflation so the real value of the income from the plant was protected, but this does not cover the economic risk. If construction costs escalate, or reliability is poorer than assumed, or operations & maintenance costs are higher than forecast, the costs will be higher than expected and if these costs cannot be recovered from consumers, the viability of NNB Genco would be in doubt. Note that it is not clear how far EDF would back NNB Genco if it did get into financial difficulties. If it was allowed to fail as happened when British Energy went bankrupt in 2002, British taxpayers could again be called upon to provide subsidies to allow the plants to continue to operate. Whether the detailed conditions of the CfDs will be made public is doubtful even though it would be a contract signed by a public body underwritten by taxpayers and electricity consumers. It is likely that the government and NNB Genco would argue the details were commercially sensitive and should not be made public. There has also been no decision on the duration of the CfD although it is implausible it would be less than 20 years.

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<sup>23</sup> See Independent, October 29, 2012, Financial Times, July 24, 2012 and Daily Telegraph August 13, 2012.

Negotiations will hinge on whether a contract can be agreed that passes enough of the economic risk of a nuclear power plant on to consumers to satisfy financiers that their loans were secure enough but not so much that the government, especially the Treasury, will be unwilling to agree to the terms because they placed too much risk on taxpayers. The Energy Minister, John Hayes, told a Parliamentary Select Committee in November 2012 that government was prepared to walk away from negotiations if the terms were too risky.<sup>24</sup> Up to December 2012, EDF and the UK government were claiming agreement could be reached before end December 2012 but EDF has now acknowledged this will not be the case and has not specified a new target date.<sup>25</sup>

The political reality may be that the government has invested more than six years of government cash, resources and credibility into getting a nuclear programme going and admitting that that time had been wasted would be politically very hard to swallow. By contrast, EDF has invested a limited amount of money in UK, it has more urgent calls for its resources in its home market and if talks break down, it can blame lack of commitment on behalf of the UK government.

## G. The Energy Bill

In November 2012, the government published its Energy Bill based on the consultation paper.<sup>26</sup> It clarified one issue not previously specified, the nature of the agency that would contract for new low-carbon power. The government's publicity on the Bill stated: 'Government will establish a new body to act as a single counterparty to the CfDs with eligible generators. The counterparty will have levy-raising powers to enable it to raise funds from suppliers to meet its costs, including payments to generators.'<sup>27</sup> The counterparty appears to be a 'single buyer' as allowed under the first Electricity market liberalisation Directive (EC/96/92) which defined a Single Buyer as [emphasis added]: '[The single buyer] is responsible for the unified management of the transmission system **and/or for centralised electricity purchasing and selling.**' The Single Buyer option was withdrawn when the Directive was revised in 2003 under 2003/EC/54 and is no longer an option.

When the government announced the Bill, much of the publicity concerned the lack of targets for Carbon reduction and a budget for the new 'counterparty' beyond 2020. These will only be set in 2016, after the next general election. The budget for low-carbon generation was £2.35bn in 2012/13 and the government stated it would rise to £7.6bn (in 2012 money) in 2020/21. It has been reported that start of construction at Hinkley Point (first structural con-

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<sup>24</sup> Daily Telegraph 'Britain would 'walk away' from nuclear talks' November 7, 2012.

<sup>25</sup> Daily Telegraph 'Investment decision on Hinkley Point new nuclear plant may be delayed until 2013, EDF admits' December 13, 2012

<sup>26</sup> [http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0100/cbill\\_2012-20130100\\_en\\_1.htm](http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0100/cbill_2012-20130100_en_1.htm).

<sup>27</sup> [http://www.decc.gov.uk/en/content/cms/news/pn12\\_0146/pn12\\_0146.aspx](http://www.decc.gov.uk/en/content/cms/news/pn12_0146/pn12_0146.aspx).

crete)<sup>28</sup> has been delayed to mid-2015 so there is no realistic chance of any nuclear generation in the period up to 2020/21. However, if we assume that the strike price is £140/MWh, the annual cost of a contract, per reactor would be about £1.67bn.<sup>29</sup> The budget of the counterparty would therefore have to grow at a substantially faster rate than the rate from 2012/13 to 2020/21 (about £600m per year) just to finance the nuclear CfDs, leaving concern that there would be no funds left for new renewables.

The negotiations between government and EDF have pre-empted the Energy Bill and the conclusion of negotiations between EDF and the government is expected to come well in mid-2013 before the Bill receives Royal Assent in late 2013. A 'counterparty' for any CfD agreed for Hinkley Point would be determined separately in a side agreement with EDF and Centrica. The government proposes to offer a Final Investment Decision (FID) Enabling process under which developers can enter into effectively an early CfD with the Secretary of State. These early CfDs are called Investment Contracts. These contracts can be transferred to the CfD Counterparty once the CFD regime has been fully implemented and the Counterparty or other entity (see below) has been established.<sup>30</sup>

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<sup>28</sup> New Civil Engineer 'Hinkley nuclear plant faces two year delay' November 28, 2012.

<sup>29</sup> Assuming a capacity of 1600MW and a load factor of 85%.

<sup>30</sup> <http://www.nortonrose.com/knowledge/publications/73337/fid-enabling-process-and-investment-contracts-an-update-on-key-aspects>

<b>Part 2 (CfD)</b>	<b>Legal analysis of the proposed Contracts for Difference scheme (<i>Dörte Fouquet</i>)</b>
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## **A. Legal framework for Contracts for Difference**

This section provides an overview of the legal and institutional framework underpinning the CfD scheme and sets out the key design features of the scheme.

Chapter II of the Energy Bill as proposed by the government will establish the legal framework for the implementation and operation of the CfD scheme. In a nutshell, the provisions contained therein allow for (long-term) contractual arrangements which are triggered and controlled by the state respectively a state agency, and which would prioritize especially the purchasing of nuclear power as one of the so-called “low-carbon” technologies supported by the scheme, in order to increase investment security in new nuclear capacity and offer a specific rate of return above market conditions. The CfD scheme is one in which the CfD is an instrument created by statute, which sets out obligations on a number of parties. On one side is the generator, who has applied for a CfD. On the other side are all licensed suppliers, who will have obligations imposed upon them (which are similar to how the Renewables Obligation operates)<sup>31</sup>. The principal obligation on suppliers is to make payments on the basis of the difference between a reference price and a strike price. Other obligations will facilitate the administration of this. In addition, for some large, baseload low-carbon generation, the CfD may need to contain obligations on the generator to provide a specified level of service over a particular timeframe, to ensure that public policy aims can be met.

Once a CfD has been issued it will effectively require suppliers to meet their share of the obligations to the generator as set out under the CfD terms (or receive payments should the generator be ‘paying back’ due to the market price for electricity being higher than the CfD strike price). Each supplier’s share of the obligations will be determined by their market share, defined by metered use. This will enable costs of the mechanism to be passed through to consumers. Payments under the CfD will be administered by a so-called CfD counterparty body.

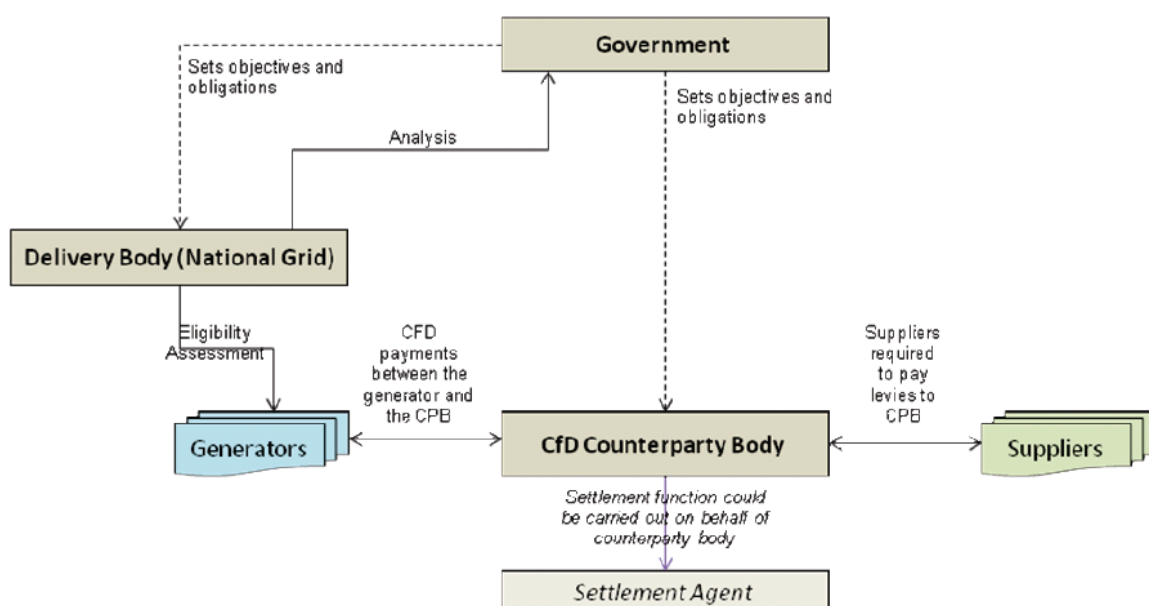
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<sup>31</sup> The support scheme for renewables will not be subject to this assessment. Suffice it to say, that even if designed as State aid measures, they regularly pass the European Commission’s compatibility assessment and there are, with the General Block Exemption Regulation and the Guidelines for Environmental Protection, specific instruments to allow for support for renewable energy. (See below: Part 2B.III.1)

The role of the State in the CfD scheme can be summarized as follows (see also diagram below)<sup>32</sup>:

- The Secretary of State is to designate a company or a public authority to act as the counterparty (**'the CfD counterparty'**) to each CfD (and establish the duties of that counterparty).
- The Secretary of State and 'the System Operator' (National Grid acting as the delivery body) is to issue a direction to the CfD counterparty to enter into a CfD contract with eligible generators.
- The Secretary of State is required to provide for an obligation on electricity suppliers (**'the supplier obligation'**) to make payments to the CfD counterparty so that it can make payments to generators under CfD contracts.
- The Secretary of State will be assigned with the power to set maximum costs and targets relating to CfDs, for example to prevent the issuing of further CfDs where these costs may be breached.

Figure 1: Key institutional and legislative framework



Source: Department of Energy & Climate Change.

<sup>32</sup> Department of Energy & Climate Change, Annex A – Feed-in Tariff with Contracts for Difference: Operational Framework, November 2012, online available at <http://www.decc.gov.uk/assets/decc/11/policy-legislation/Energy%20Bill%202012/7077-electricity-market-reform-annex-a.pdf>.

The Energy Bill and the associated regulations will establish the institutional framework (illustrated in the diagram above) that will give effect to the CfD. The key features of this framework are:

- The System Operator will:
  - administer the Government decisions on CfD strike prices and the amount of low-carbon generation for which to contract in a given period; and
  - run the CfD application system and determine an applicant's eligibility to receive a CfD (or otherwise) against set criteria.
- The CfD counterparty will:
  - enter into contracts with eligible generators which contain obligations on both parties to make payments; and
  - administer the payment scheme, including the collection of the supplier obligation. The CfD counterparty may administer the flow of monies to electricity suppliers to CfD generators and vice versa itself or may use a 'settlement agent'.

The CfD scheme envisaged by Chapter II of the Energy Bill raises a number of legal questions, including:

- Compatibility with European State aid rules (Articles 107 et seq. of the Treaty on the Functioning of the European Union, TFEU)
- Compatibility with Directive 2009/72/EC of the European Parliament and the Council of 13 July 2009 concerning common rules of the internal market in electricity<sup>33</sup>, in particular with regard to possible discriminations of new market entrants and renewable technologies, e.g. distributed generation capacity from renewable sources
- Compatibility with Directive 2009/28/EC the European Parliament and the Council of 23 April 2009 on the promotion of the use of energy produced from renewable sources<sup>34</sup>, in particular the possible discrimination of renewable energy technologies vis-à-vis the promotion of nuclear energy

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<sup>33</sup> OJ L 211, 14.8.2009, p. 55.

<sup>34</sup> OJ L 140, 5.6.2009, p. 16.

- Compatibility with Internal market and public procurement rules, in particular with regard to the questionable economic viability of the only partner left from the nuclear side, EDF.<sup>35</sup>

In the following section, the CfD scheme will be analyzed in the wider context of the European State aid rules.

## **B. Legal analysis in the context of European State aid rules**

### **I. Overview**

The basic prohibition on the grant of State aid is contained in Article 107(1) TFEU. That article also defines the concept of State aid. It states:

Save as otherwise provided in the Treaties, 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.

The jurisprudence of the European Courts has not yet provided a consistent and comprehensive interpretation of the conditions for State aid under Article 107(1) TFEU (ex Article 87(1) EC Treaty). While the Court's definition of aid is often based on the actual wording of the provision, in practice the Court has not adhered rigidly to that formulation. In particular, it is by now well established that the criterion of 'granted by a Member State or through State resources' are not alternative; it is necessary to show *both* that the measure is a 'State measure' *and* that it has been granted through State resources. The cumulative result of the Court's interpretation of Article 107 TFEU, therefore, is that in order to fall within that provision a measure must satisfy the following **four criteria**<sup>36</sup>:

1. there must be aid in the sense of a benefit or advantage;
2. which is granted by the State and through State resources;

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<sup>35</sup> EDF has been downgraded in 2012 by S&P (from AA-/A-1+ to A+/A-1) and the reason why S&P is still optimistic about EDF is not a reason in line with procurement rules on economic viability since S&P sees the only viability of EDF in its link to the French State: "We consider EDF to be a government-related entity (GRE). In accordance with our methodologies for rating GREs and nonsovereign issuers in the European Economic and Monetary Union (EMU or eurozone), the downgrade of France automatically results in a similar rating action on EDF. The ratings on EDF continue to reflect our assessment of its stand-alone credit profile (SACP) at 'a', and our opinion that there is a "high" likelihood that the French government would provide timely and sufficient extraordinary support to EDF in the event of financial distress. See: Standard & Poors, RatingsDirect on the Global Credit Portal, January 18, 2012

<sup>36</sup> *Bacon*, in Bacon, European Community Law of State Aid, 2009, para 2.02.



3. which favours certain undertakings or the production of certain goods (selectivity);  
and
4. which is liable to distort competition and affect trade between Member States.

State aid satisfying the four criteria is unlawful and prohibited unless one of the derogations contained in Article 107(2) and (3) TFEU applies. Unlawful State aid cannot be granted or, if the respective Member State has already granted the aid, must be recovered.<sup>37</sup>

The before-mentioned criteria will be considered in the following section. Possible derogations will be considered below in section C.

## **II. Existence of State aid**

### **1. Benefit or advantage**

For the proposed CfD scheme to be (unlawful) State aid, the scheme must confer a benefit or advantage in undertakings, namely producers of electricity from nuclear energy (hereafter: 'nuclear generators'). In assessing whether a benefit or advantage is granted, the European Courts consider whether an undertaking obtains an economic advantage which it would not have received under 'normal market conditions'.<sup>38</sup> The rationale for the aid is not relevant at this stage<sup>39</sup>, and substance not form is the criterion to define whether a measure constitutes aid.

The proposed CfD scheme confers an advantage on generators of low-carbon electricity, including nuclear generators, by stabilising revenues for such generators at a fixed price level known as the strike price. Generators will receive revenue from selling their electricity into the market as usual. However, when the market reference price is below the strike price they will also receive a top-up payment from suppliers for the additional amount. As this additional amount is per definition above the market price, the price cannot be considered to be paid under market conditions, meaning that this would constitute an economic advantage in the sense of Article 107(1) TFEU. These characteristics further mean that nuclear generators will benefit from greater certainty and stability of revenues as their exposure to volatile wholesale prices is removed as result of the CfD scheme. In the absence of this unmarketlike advantage a private investor is likely not to invest in the inception, construction and commissioning of nuclear power plants.

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<sup>37</sup> Case C-277/00 *Germany v Commission* [2004] ECR I-3925, paras 74-76.

<sup>38</sup> Case C-39/94 *SFEI v La Poste* [1996] ECR I-3547, para 60; Case T-46/97 *SIC v Commission* [2000] ECR II-2125, para 78.

<sup>39</sup> Case C-251/07 *France v Commission* {[1999] ECR I-6639.

**The CfD scheme with its stable and above-market price revenue stream amounts to an advantage within the meaning of Article 107(1) TFEU that the UK governments intends to confer on nuclear generators.**

## 2. State resources and imputability

A second condition for the application of Article 107(1) TFEU is that the aid is ‘granted by a State or through State resources’. Following *PreussenElektra*, it is clear that notwithstanding the wording of Article 107(1) TFEU the condition that the grant is by the State and that the grant is through State resources are to be interpreted cumulatively, rather than alternatively.<sup>40</sup> It is therefore necessary to show *both* that aid involves State resources *and* that it is imputable to the State. The State resources criterion is satisfied where aid results from government funds or assets or from a levy system (e.g. environmental tax) which is intended to regulate the conduct of undertakings. The imputability criterion is satisfied if the aid is attributable<sup>41</sup> to the State, i.e. where it results from acts of the State or public authorities.

Taking due account of the judgment of the European Court in *Essent*<sup>42</sup> and the Commission’s Decisions in *Österreichisches Ökostromgesetz*<sup>43</sup> there are compelling grounds to conclude that the CfD scheme involves State resources and that the aid is imputable to the State.

In the *Essent* case, SEP, an undertaking owned by a number of Dutch electricity generating companies, had been entrusted by the State with a public service obligation to collect revenues from a surcharge imposed on the users of the electricity grid. The law allowed SEP to use the revenues of the surcharge only for the purpose set out in the law, that is to say in order to defray stranded costs incurred by the electricity undertakings in the context of the liberalisation of the electricity market.

The Court of Justice found that the surcharge collected by SEP constituted a State resource, because the following conditions were met<sup>44</sup>: Firstly, the surcharge was a charge imposed upon private entities by an act of public authority. Secondly, the State had given SEP the task of operating an economic service of general interest, namely the task of collecting the charge. Finally, SEP was not entitled to use the proceeds from the charge for purposes other than those provided for by the law, and it was strictly monitored in carrying out its task.

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<sup>40</sup> Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paras 58-62.

<sup>41</sup> Case C-482/99 *France v Commission (Stardust Marine)* [2002] ECR I-4397, para 24.

<sup>42</sup> Case C-206/99 *Essent* [2008] ECR I-5497.

<sup>43</sup> Commission Decision of 4 July 2006, No C 2006/2955 and Commission Decision of 8 March 2011, No C 24/2009.

<sup>44</sup> Case C-206/99 *Essent* [2008] ECR I-5497, paras 47-69.

Drawing on the *Essent* judgment, the Commission in *Österreichisches Ökostromgesetz* concluded that funds from feed-in tariffs channelled through the OeMAG Abwicklungsstelle für Ökostrom (OeMAG) were controlled by the State and that the measure was imputable to the State even though OeMAG had passed from public to private ownership.<sup>45</sup> In this case, OeMAG paid a feed-in tariff to the producers of green electricity and recovered the costs via two channels. Firstly, Austrian electricity consumers were obliged to pay a fixed lump sum to OeMAG. Secondly, electricity distributors were obliged to purchase a certain amount of green electricity from OeMAG on the basis of a levy. The electricity distributors were then in principle free as to how they recover their costs from their consumers. In its decisions, the European Commission distinguished the case from *PreussenElektra* where the Court of Justice found that the case concerned the relations between private undertakings, without the involvement of any intermediate body.

The CfD scheme envisaged by the Energy Bill shares the characteristics of the Austrian OeMAG and should therefore be considered as involving State resources and as a measure that is imputable to the State.

In line with *Essent* and *Österreichisches Ökostromgesetz* the **money collected by the CfD counterparty constitutes a charge**. Section 5(1) of the Energy Bill foresees the adoption of a regulation that makes provision for electricity suppliers to pay the CfD counterparty for the purpose of enabling the counterparty to make payments under CfDs. This supplier obligation is used by the counterparty to make top-up payments to (nuclear) generators in cases where the market reference price is below the strike price. The latter is set by the Government (and administered by the System Operator). In contrast to *PreussenElektra* the charge is not paid to other market players engaged in ordinary commercial transactions. Instead payments are made to a body that has the specific task of collecting and distributing these funds solely for purposes in the public interest.

Comparable to the facts in *Österreichisches Ökostromgesetz*, electricity suppliers will generally be free to pass that charge on to electricity consumers, and from an economic point of view it can be assumed that they will normally do so. That does not mean, however, that only flows of money between individuals are involved. On the contrary, **the CfD counterparty is to collect and administer the charge and respective flows of money from suppliers to CfD generators**.<sup>46</sup> It is envisaged that payments from suppliers have to be used by the CfD counterparty for purposes stipulated by law (i.e. the Energy Bill and future regulations), and the State will exercise strict control over their use. More precisely, the UK government intends that the money collected from suppliers (and, ultimately, from consumers) is allocated

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<sup>45</sup> Compare Decision of 4 July 2006, No C 2006/2955 and Commission Decision of 8 March 2011, No C 24/2009.

<sup>46</sup> Department of Energy & Climate Change, Annex A – Feed-in Tariff with Contracts for Difference: Operational Framework, November 2012, p. 11.

to a fund-like facility under the auspices of the CfD counterparty. This money can then be used only for the purpose of making payments to (nuclear) generators. The resources will be controlled by the State because the State regulates the way payments are to be made and has the power to set maximum costs and targets relating to CfDs. The CfD counterparty has no discretionary power as to the implementation of the decisive elements of the scheme such as modalities of the amount of money to be paid to generators. This entirely regulated use of money channelled through the CfD counterparty amounts to State resources. The measure is also attributable to the State since the CfD scheme and, in particular, the CfD counterparty is established and controlled by the State.<sup>47</sup>

**The CfD scheme involves State resources and the measure is imputable to a State within the meaning of Article 107(1) TFEU.**

### **3. Favouring certain undertakings (selectivity)**

Pursuant to Article 107(1) TFEU, the CfD scheme must be selective, i.e. it must produce advantages exclusively for certain undertakings or certain sectors of activity.<sup>48</sup> The reference in Article 107(1) TFEU to ‘favouring ... the production of certain goods’ makes clear that aid specific to specific sectors is to be regarded as selective. For example, in *Adria-Wien Pipeline* it was held that a rebate on energy taxes for undertakings in the manufacturing sector was a selective measure, notwithstanding the high number of eligible undertakings, and the diversity and size of the sectors to which those undertakings belong.<sup>49</sup> In the same vein, the Commission has repeatedly emphasized that measures that favour only producers of green electricity are selective.<sup>50</sup>

The CfD scheme envisaged in the Energy Bill will only apply low-carbon generators, including nuclear generators. Electricity producers with coal-fired power plants, for instance, will not participate in the scheme. Hence, the CfD scheme will apply to a limited number of undertakings and not the (energy) industry as a whole. The CfD scheme therefore is a selective measure within the meaning of Article 107(1) TFEU.

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<sup>47</sup> In this regard, it is noteworthy, that for the time before the CfD scheme is in place, the bill foresees in the possibility for specific investment contracts, which would essentially have the same features as the CfDs it seems, but would be concluded directly with the government, and apparently, until their transfer to the CfD counterparty, paid directly from State budget.

<sup>48</sup> Case T-55/99 *CETM v Commission* [2000] ECR II-3207, para 39; Case T-210/02 *British Aggregates v Commission* [2006] ECR II-2789, para 105.

<sup>49</sup> Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365, para 48.

<sup>50</sup> See, for example, the assessment in the context of *Österreichisches Ökostromgesetz*, C(2009) 3548, para 36.

#### 4. Distortion of competition and effect on inter-state trade

The final requirement under Article 107(1) TFEU is that the measure should be liable to distort competition and affect trade between Member States. The test for a distortion of competition is whether the aid strengthens the position of an undertaking in relation to its competitors.<sup>51</sup> From the case-law it is clear that the strengthening of a competitive position is assessed by reference to the advantage given to the beneficiary, the crucial question being whether that undertaking's financial position as a whole is improved by the aid.<sup>52</sup> Through the CfD scheme low-carbon producers, including nuclear generators, will receive additional revenues that will place them in a financially more advantageous position. They will, as a result, enjoy a competitive advantage in the sense that they can sell their energy at the normal market price.

It is also very likely that the CfD scheme has an effect on inter-state trade. This condition of Article 107(1) TFEU is met if the aid strengthens the financial position of an undertaking as compared to others within the EU.<sup>53</sup> It is not necessary to prove that trade will be affected. It is sufficient to show that trade might be affected.<sup>54</sup> The CfD scheme will have the likely effect that nuclear generators, namely EDF – an undertaking that is certainly carrying out cross-border activities – will be put in an advantageous position vis-à-vis generators from other Member States as the latter will not benefit from the scheme. As the European energy markets have been liberalized at European level and are supposed to grow together to an internal energy market, inter-State trade effects cannot be ruled out. And even without any cross-border electricity trading, the scheme may deter multinational undertakings that are not eligible for support under the CfD scheme from getting engaged on the UK market. The CfD scheme will have direct effects on the UK wholesale energy market. As this market forms part of the North-Western Regional Market, the CfD scheme's repercussions extend beyond national borders.

#### 5. Summary

The legal analysis of the CfD scheme has shown that the proposed CfD scheme would constitute State aid within the meaning of Article 107(1) TFEU. In particular, the money collected by the CfD counterparty constitutes a charge and thus a State resource. As such, the measure would have to be notified and cleared by the European Commission, according to Article 108 TFEU. In the absence of a derogation (see below), the CfD scheme would - if not noti-

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<sup>51</sup> Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, para 11; Cases C-182 and 217/03 *Belgium and Forum 187 v Commission* [2006] ECR I-5479, para 131.

<sup>52</sup> Cases 62 and 72/87 *Exécutif Régional Wallon v Commission* [1988] ECR 1573, opinion of AG Lenz, para 20, and judgment paras 14-15; Case T-14/96 *Bretagne Angleterre Irlande (BAI) v Commission* [1999] ECR II-139, para 78.

<sup>53</sup> Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, para 11; Cases T-81, 82 and 83/07 *Maas v Commission* [2009] ECR II-2411.

<sup>54</sup> Case C-310/99 *Italy v Commission* [2002] ECR I-2289, paras 84-86.

fied - be unlawful under Article 107(1) TFEU. However, even if notified, questions arise as to whether the aid can be justified under the current and future regimes for justification. Such will be discussed in the following.

### **III. Possible derogations**

#### **1. Current regime**

Certain State aid measures can be justified, and may get clearance from the European Commission in the sense that it issues a positive opinion and declares the measure compatible with the internal market. Normally all State aid measures have to be notified to the European Commission that enjoys the power to give clearance. National courts may find that there is State aid, and even order recovery but the ultimate decision rests with the European Commission.<sup>55</sup>

In the field of renewable energy two instruments exist that usually allow for support for renewables to get clearance by the European Commission: the General Block Exemption Regulation<sup>56</sup>, exempting certain types of investment aid even from the notification obligation, and the Guidelines for Environmental Aid<sup>57</sup>.

For nuclear power no such instruments exist. Accordingly, under the current regime the State aid in the context of the CfD scheme would have to be notified to the Commission and the European Commission would have to assess whether it can be “cleared” as being compatible with the internal market.

In line with the criteria for State aid authorisation used by the European Commission it seems difficult that the Commission would, respectively could, give such clearance starting with the uncertainty around the calculations of the strike price and thus about the amount of State aid that would be paid to nuclear generators. In order for State aid to be justifiable it would need to be aimed at a common interest and the appropriate instrument, have an incentive effect and be proportionate to the objective.<sup>58</sup> This – among others - requires the scheme to be transparent and based on actual costs, so as to avoid overcompensation. While State aid for renewable energy regularly passes this test, it appears unlikely that the CfD for nuclear

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<sup>55</sup> Case C-34 and 38/01 *Enirisorse* [2003] ECR I-1425.

<sup>56</sup> Commission Regulation 800/2008/EC, Official Journal L 214/3.

<sup>57</sup> European Commission, [Community guidelines on state aid for environmental protection](#), Official Journal C 82, 1.4.2008, p.1-33

<sup>58</sup> European Commission, [Community guidelines on state aid for environmental protection](#), Official Journal C 82 ,01.04.2008, p.1-33, par. 16.

would do so as well. The CfD State aid measure would thus not be in line with the current regime and unlawful under EU State aid law.

### *Eligible costs*

Without the information about the costs being properly disclosed and explained, which may not be the case here,<sup>59</sup> the aid should not get clearance, as its distorting effects on the market cannot be properly assessed.<sup>60</sup> In this cost calculation, a clear evaluation needs to be given on the whole cost incurred by the State: not only on the strike price but considering further cost factors, such as waste disposal and safeguarding costs after end of operation or end of the used uranium batch. This type of electricity generation requires massive investment sums as well as long-term insurance sums. An accurate calculation would show that nuclear energy is not as 'cheap' as claimed. On the contrary, considering all the costs involved prior to the electricity generation (for the import of nuclear material and the construction of plants), the disposal of nuclear waste and the necessary insurance sums to cover the costs in case of a nuclear disaster, nuclear energy would be by far the most expensive technology. Financing risks for EPR reactors are extremely high as shown in the construction disasters in *Flamanville* (France) and *Olkiluoto* (Finland). Furthermore, it is worth mentioning that only in a few European Member States national laws oblige nuclear power plant operators to arrange for an adequate insurance that covers all the costs in case of a nuclear disaster. In other words, at least in some Member States (such as the United Kingdom) there are still no appropriate safeguards to ensure a full internalization of external costs. **All in all, a thorough cost assessment would reveal that nuclear generator could not (and should not) benefit from State support, as the cost calculations are unclear and not transparent.**

The evaluation would also need to compare the overall increase per kWh price of this technology versus other technologies available on the market such as gas fired power plants and renewable energies. The evaluation has to examine if nuclear technology can still have the status of an infant technology, i.e. a new technology which needs support to enter the market. Although sometimes argued differently, new nuclear power plants do not constitute an infant technology similar to 'green technologies' that may be eligible for State support as long as there is no market maturity. On the contrary, even if new generation-type reactors are used, the process of generating energy would essentially remain the same. It is comparable

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<sup>59</sup> The talks between EDF and the UK government have so far been pretty much behind closed doors, and the information leaking to the public was very confusing. Further, the DECC states that when the government negotiates investment contracts, prior to having set up the CfD counterparty, then it may refuse disclosing sensitive information disclosure of which may damage economical interests.

<sup>60</sup> European Commission, [Community guidelines on state aid for environmental protection](#), Official Journal C 82, 1.4.2008, p.1-33, paras 30-31.

to the construction of new coal-fired power plants that merely have higher efficiency ratings due to technological improvements. In this case, no one would argue that it is a new or infant technology that needs support by the State. It simply is 'new wine in old wineskins'. The same holds true for new generation-type reactors. On the innovative aspect and with regard to the need of support for a successful market introduction, they are not comparable to, e.g., new electricity storage systems and large-scale renewable generators. **EPR is a specific technology, but not a new invention as it all remains within the nuclear classics reactor technology.**

#### *Necessity of the Aid*

The necessity and proportionality of the CfD scheme depends decisively on the strike price. As mentioned above, there is a lot of uncertainty about the calculations, and different numbers have leaked. Suffice it to say that in view of the on-going negotiations between the UK government and EdF there are indications that the strike price will be set at a level that allows EdF to make unreasonable profits. Thus, State support would not be limited to the amount strictly necessary.

#### *Proportionality of the Aid and non-discrimination*

Account has also to be taken of the fact that nuclear power plants are designed to supply big amounts of MW, usually not less than 1000 MW. Supporting such a technology has a direct negative effect on the other electricity generating technologies and the grid system. All these negative effects have to be taken into proper account, when assessing the compatibility of the measure in order to ensure that aid is indeed proportionate to the objective pursued and that it does not impede more with the liberalised energy market than strictly necessary.

#### *No effect on competition and trade contrary to the common interest*

Finally, any consideration of the CfD scheme under EU State aid rules needs to take account of the overall distorting effects on competition and trade. The CfD scheme is likely to favour only a limited number of undertakings, perhaps only one, namely EdF. By doing so, a *de facto* monopoly situation would be created and strengthened via the grant of State aid.

## **2. Possible future exemptions**

Currently the European Commission is seeking to adopt a **new block exemption regulation** covering the energy sector as well as **new guidelines** setting out the Commission's policies regarding the energy sector in the frame of Article 107(3) TFEU.



The **General Block Exemption Regulation** is based on Article 1 Regulation 994/98/EC, which allows the Commission exempt certain categories of aid from the notification requirement applicable to all State aid measures of Article 108(3) TFEU. Those categories refer, among others, to environmental protection. Thus the General Block Exemption Regulation does not, for example, provide for a general exemption in the field of energy, or an exemption to ensure security of supply. However, with all the detrimental effects of nuclear power generation to the environment<sup>61</sup>, an exemption in favour of nuclear energy can certainly not fall under the environmental protection exemption. In addition to that, the current Regulation 994/98/EC, which is the basis of the General Block Exemption Regulation, is not in line with current EU Law as the comitology procedure has been changed. The comitology procedure contained in Regulation 994/98/EC disregards the importance of regulations concerning the energy sector as the procedure foreseen therein is the advisory procedure, which only requires the European Commission 'to take utmost account' of the conclusions drawn from the discussions with the Council. In contrast to that, Article 2 Regulation 182/2011/EU<sup>62</sup> declares the examination procedure applicable in such cases, which would allow the Council to reject the European Commission's proposal.

Accordingly, the **European Commission** – currently and without a new regulation granting it this competence and the adequate comitology procedure – **lacks the competence to exempt State aid to nuclear power from the notification requirement.**<sup>63</sup>

In that context it is to be stressed that **new block exemption regulations could not cover “energy” as such, either.** Pursuant to Article 194 TFEU which was introduced by the Lisbon Treaty, energy policies fall within the competence of the European Parliament and the Council. The European Commission's competence has therefore to be limited to exclusively competition relevant questions which may not touch energy policy. Otherwise the European

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<sup>61</sup> Such as the unsolved waste problem, questions of leakage and nuclear safety in general, especially after Fukushima. Further, even the low-carbon argument of the UK is to be seriously questioned, as nuclear power generation emits 9 to 25 times more carbon as wind power generation during its life-cycle.

<sup>62</sup> Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, Official Journal, L 55/13, 28.2.2011.

<sup>63</sup> Further, as since the adoption of the current Regulation 994/98/EC, the rules in the Treaty and implementing legislation have changed, a new regulation giving competence to the European Commission would have to foresee scrutiny for the European Parliament on the Commission's doings according to the New Regulation 182/2011/EU of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers. So, for such a Block Exemption for energy, first a new regulation conferring competence to the Commission would need to be adopted, and secondly, different procedures with more say for the European Parliament would have to be followed. (Compare the very limited procedure in Art. 8 of Regulation 994/98/EC with the rights of the Council and the Parliament in Art 11 of Regulation 182/2011/EU.)

Commission would exceed its competence and adopt regulations that are not in line with the separation of powers in the Treaty.

The current **Guidelines for Environmental protection** are under review as well. However, due to above-mentioned reasons nuclear power is unlikely to fall into them either. However, the European Commission may issue self-binding guidelines for nuclear power generation, setting out under which conditions they would consider State aid to be compatible with the Treaty. The European Commission would be bound by such guidelines in the field of supervision of State aid, provided that they do not depart from the rules in the Treaty and – in the case of guidelines adopted under Article 108(1) TFEU – are accepted by the Member States. This principle is based, in particular, on the protection of legitimate expectations and legal certainty. Still, the State aid would have to be assessed and it would – based on what the European Commission currently looks at when assessing State aid - need to be aimed at a common interest, it needs to be the appropriate instrument, have an incentive effect and be proportionate to the objective.<sup>64</sup> Once the European Commission has set out its policy in published guidelines, aid beneficiaries will in principle be justified in expecting that that policy will be adhered to. Failure to do so may result in the annulment of a Commission decision.<sup>65</sup> Based on what has been said above on the **problems with the calculations of the costs for nuclear power and the more general question of whether nuclear power could be a common interest, it seems unlikely that the envisioned CfDs for nuclear energy would pass any kind of test according to future guidelines to be adopted by the European Commission.**

### 3. Summary

Neither under the current exemption nor under possible future exemptions could the CfD scheme for nuclear generators be declared compatible with European State aid rules.

## IV. Conclusion

The legal analysis has shown that the proposed CfD scheme would constitute State aid within the meaning of Article 107(1) TFEU. In particular, the money collected by the CfD counterparty would constitute a charge and thus a State resource. As such, and without any instrument similar to the current General Block Exemption Regulation, which does not include nu-

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<sup>64</sup> Compare: European Commission, [Community guidelines on state aid for environmental protection](#), Official Journal C 82 , 1.4.2008, p.1-33, part. 16. The common interest by itself may be difficult to argue, as there are questions about the (disclosure of) the costs, this might be an additional obstacle.

<sup>65</sup> Case T-73/98 *Prayon Rupel v. Commission* [2001] ECR-II – 867.

clear power, the scheme would thus have to be notified to the European Commission and the Commission would have to issue a decision about its compatibility before the support could start. However, neither under the current framework for the assessment of the compatibility of State aid with the internal market nor under possible future frameworks could the CfD scheme for nuclear generators be declared compatible with European State aid rules.