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M E M O R A N D U M

Re: State aid to the Hinckley Point C new nuclear power station – violation of Article 8 (1) of Directive 2009/72/EC – incompatibility with the internal market.

With this submission, Greenpeace provides additional comments on the draft state aid measure that the UK notified in October 2013, in view of funding the construction and the operation of a new nuclear power station at Hinckley Point.

On 7 April 2014, Greenpeace filed a response to the Commission consultation, highlighting several grounds of the incompatibility of the notified measure with the internal market. Greenpeace maintains in particular that state aid to the construction and operation of new nuclear plants violates the environmental principles enshrined in Article 191 TFEU, without contributing to a common interest objective. Below we focus exclusively on the violation of Article 8 (1) of Directive 2009/72/EC and on its legal consequences.

Executive summary

On 22 October 2013, the UK notified a draft state aid measure (the aid measure), aimed at supporting the construction and operation of a new nuclear power plant at Hinkley Point (HPC). The aid measure consists of an Investment Contract, with ancillary agreements, to be concluded with the private company that will build and operate HPC (NNBG), and of a credit guarantee that the UK Treasury will provide to the same company.

On 18 December 2013, the European Commission communicated its decision to open an investigation based on Article 108 (3) TFEU (the Decision) to the UK.[1] The Commission raised a number of doubts on the compatibility of the aid measure with the internal market.

The Decision points out, among others, that the UK selected the recipient of the aid without running a tender procedure.[2] In this regard, the Commission considers that the aid measure might be in violation of Article 8 (1) of Directive 2009/72/EC (the Electricity Directive).[3] This provision requires member states to run tenders when they intervene to support the construction of new generation capacity for reasons of security of supply.[4]

In Greenpeace's view, the UK's failure to run a tender for the Investment Contract not only violates the internal energy market rules but, as a consequence, determines also the incompatibility of the

[1] C (2013) 9073 final of 18 December 2013, "State aid SA. 34947 (2013/C) – United Kingdom – Investment Contract (early Contract for Difference) for the Hinkley Point C New Nuclear Power Station".
[2] Decision, paragraph 22. At paragraph 220, "(*t)he UK government admits that no public tender has been used to select the beneficiary. In addition, the terms of the agreement with the beneficiary have been reached through private negotiation*".
[3] Idem, paragraph 330.
[4] Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ L 211 of 14 August 2009, page 55. Member states can also use equivalent procedures in terms of transparency and non-discrimination.

notified aid with the internal market: indeed, in accordance with the case law of the EU Court of Justice (the CJEU), the Commission cannot declare an aid to be compatible with the internal market, if certain conditions of it contravene other provisions of the Treaty.

In the specific case, the aid measure breaches a provision of the Electricity Directive ensuring, in accordance with Articles 34, 49 and 56 TFEU,[5] the undistorted functioning of the internal electricity market, as well as transparency and non-discrimination.

This memorandum is structured as follows:

- Paragraph 1 analyses Article 8 (1) of the Electricity Directive;
- Paragraph 2 identifies the aspects of the aid measure in violation of Article 8;
- Paragraph 3 explains, on the basis of the CJEU case law, why the violation of Article 8 (1) determines the incompatibility of the aid measure with the internal market;
- Paragraph 4 rebuts the arguments put forward by the UK to justify the violation of Article 8 (1).

1. Article 8 (1) of the Electricity Directive: the tendering obligation

In accordance with Article 8 (1) of the Electricity Directive, "*Member States shall ensure the possibility, in the interests of security of supply, of providing for new capacity or energy efficiency/demand-side management measures through a tendering procedure or any procedure equivalent in terms of transparency and non-discrimination, on the basis of published criteria*." (Emphasis added).

This provision allows (and requires) member states to intervene in the electricity generation market, when the market itself fails to ensure security of supply, an objective of the EU energy policy expressly mentioned in Article 194 (1) (b) TFEU.

However, public intervention for the provision of new capacity (or energy efficiency/demand-side management measures) is subject to strict substantive and procedural requirements.

As regards the substance, it must be noted that under the current EU framework, the construction of generating capacity is in principle left to the initiative of market operators and subject only to authorisation procedures, defined and carried out at national level on the basis of Article 7 of the Electricity Directive.

Member states play a "passive role" in this context, limited to verifying that applicants for authorisation meet the prescribed requirements. However, they can depart from the Article 7 regime, and intervene in the internal energy market, but "*only where, on the basis of the authorisation procedure, the generating capacity to be built or the energy efficiency/demand-side management measures to be taken are insufficient to ensure security of supply*".[6]

[5] Protecting, respectively, free movement of goods, persons and services in the EU.

[6] In accordance with Article 4 of the Electricity Directive, "*Member States shall ensure the monitoring of security of supply issues*." The same provision specifies that "*Such monitoring shall, in particular, cover the balance of supply and demand on the national market, the level of expected future demand and envisaged additional capacity being planned or under construction, and the quality and level of maintenance of the networks, as well as measures to cover peak demand and to deal with shortfalls of one or more suppliers*". It is also added that "*The competent authorities shall publish every two years, by 31 July, a report outlining the findings resulting from the monitoring of those issues, as well as any measures taken or envisaged to address them and shall forward that report to the Commission forthwith*." The provision indicates that Member States are under the obligation of monitoring security of supply and must keep the Commission informed of the situation in their national markets and of the initiative they intend to adopt in view of addressing potential issues. Market intervention should, as a matter of principle, take place in the framework of these monitoring and information procedures.

Concerning the procedure, Article 8 (3) of the Electricity Directive lists the obligations that member states must fulfil when they act on the basis of Article 8 (1):

- Details of the tendering procedure for means of generating capacity and energy efficiency/demand-side management measures must be published in the EU Official Journal at least six months prior to the closing date for tenders;
- The tender specifications must be made available to any interested undertaking established in the territory of a member state so that it has sufficient time in which to submit a tender;
- With a view to ensuring transparency and non-discrimination, the tender specifications shall contain a detailed description of the contract specifications and of the procedure to be followed by all tenderers, and an exhaustive list of criteria governing the selection of tenderers and the award of the contract, including incentives, such as subsidies, which are covered by the tender.
- In invitations to tender for the requisite generating capacity, consideration must also be given to electricity supply offers with long-term guarantees from existing generating units, provided that additional requirements can be met in this way.

There are no exceptions to the tendering rules: under Article 44, the Commission can authorise Member States to derogate from the provision of Chapter III of the Directive for the refurbishing, upgrading and expanding of existing capacity of micro isolated systems. However, the construction of new capacity under Article 8 is excluded from the very limited scope of article 44.[7] Tenders must be used to procure new generation capacity, irrespective of the size of the micro isolated system to which it pertains.

A fortiori, it must be ruled out categorically that Member States may unilaterally deviate from Article 8, for the construction of new conventional capacity in a system that is neither "micro" or "isolated".

2. The aid measure violates Article 8 of the Electricity Directive

The following results from the Commission Decision:

1. The UK has negotiated, and aims at concluding, an investment agreement with NNBG for the construction of a nuclear power plant at Hinkley Point C (HPC);
2. This investment agreement is clearly aimed at the construction of new generation capacity in the UK, corresponding to about 7 per cent of Great Britain's electricity demand as forecast in the 2020s;[8]
3. The UK has, on 15 December 2011, invited prospective investors to enter in discussion with a view to investing in "Contracts for Difference" (CfDs) for low-carbon electricity generation. The UK confirmed that this invitation to discuss did not consist in a formal tender in particular in relation to prospective investors interested in negotiating CfDs. The UK considered that a tender would not be appropriate as there was not sufficient competitive pressure to make it effective. The UK also linked this position to the timeframe chosen to bring forward investments in new nuclear energy;[9]
4. Following NNBG's submission to the Expression of Interest, the UK government has been in discussion with NNBG on an Investment Contract for the HPC project. Formal negotiations on the terms of the Investment Contract commenced in February 2013;[10]

[7] Commission Decision 2014/536/EU of 14 August 2014 granting the Hellenic Republic derogation from certain provisions of Directive 2009/72/EC of the European Parliament and of the Council, in OJ L 248 of 22 August 2014, page 12, paragraphs 63 and 64.
[8] Commission Decision, paragraph 24.
[9] Idem, paragraph 22.
[10] Id., paragraph 63.

5. Both the selection of the undertaking and the definition of the terms to be used in the Investment Contract have been based on bilateral negotiations between the UK government and NNBG. The negotiation focused in particular on the terms of the agreement which would have been acceptable to the parties, including the level of the strike price and the duration of the contract;[11]
6. The UK government and EDF announced on 22 October 2013 that they had reached an agreement on the key commercial terms of the Investment Contract, including the Strike Price, the rate of return and the duration of the contract. The notification of the draft state aid measure followed the conclusion of the above agreement.[12]

It is clear that, by negotiating and agreeing on an Investment Contract with NNBG, for the construction of new generation capacity, the UK has departed from the authorisation procedure set out in Article 7. This provision does not foresee or allow any intervention on the public authorities going beyond:

(a) The definition of the criteria for access to the generation market, which must be determined taking into account the elements listed in Article 7 (2);
(b) The creation of specific procedures for small decentralised and/or distributed generation;
(c) The inclusion, where appropriate, of the construction of new generation capacity within the scope of land use permit procedures, and/or,
(d) The communication and application of the procedural rules to applicants (including providing access to remedy in case of authorisation refusals).

Consequently, the Investment Contract that the UK intends to conclude with NNBG falls within the scope of Article 8, particularly to the extent that it foresees "*incentives, such as subsidies*".

Accordingly, the UK should have followed a transparent and non-discriminatory tender (or equivalent) procedure in view of selecting the contractor for the capacity generation to be build, and ensured the observance of the relevant publication requirements.

Two legal consequences are attached to the UK's failure to comply with Article 8: first, the UK may not execute the Investment Contract without infringing the Electricity Directive, which ensures the good functioning of the internal energy market.

Second, as it will be explained below, the aid in the Investment Contract cannot be validly authorised, since it is incompatible with the internal market: the selection of the beneficiary of the aid and the negotiation of its terms breach the transparency, non-discrimination and proportionality principles, thereby affecting trading conditions and competition in the Union to an extent that is contrary to the common interest.

3. The violation of Article 8 of the Electricity Directive determines the incompatibility of the aid measure with the internal market

According to a long standing jurisprudence of the CJEU, "*it is clear from the general scheme of the Treaty that the procedure under Article [108 TFEU] must never produce a result which is contrary to the specific provisions of the Treaty. State aid, certain conditions of which contravene other provisions of the Treaty, cannot therefore be declared by the Commission to be compatible with the common market.*"[13]

[11] Id., paragraph 64.
[12] Id., paragraph 67.
[13] Judgement of the Court of 29 September 2000, Case C-156/98, *Germany v. Commission*, ECR [2000] I-6882, para. 78. See also: Judgement of the Court of 3 May 2001, Case C-204/97, *Portugal v.Commission*, ECR [2001] I-3204, paragraph 41, and,

The obligation on the part of the Commission to ensure that Articles 107 and 108 TFEU are applied consistently with other provisions of the Treaty is all the more necessary where those other provisions also pursue the objective of undistorted competition in the internal market.[14]

The above principle apply when "*those aspects of aid which contravene specific provisions of the Treaty other than Articles [107] and [108] may be so indissolubly linked to the object of the aid that it is impossible to evaluate them separately (…). Specifically, the Court has held that, where this is so, the effects of those aspects on the compatibility or incompatibility of the aid as a whole must be assessed by means of the procedure under Article [108] of the Treaty. The position is different, however, if it is possible when an aid programme is being analysed to separate those conditions or factors which, even though they form part of the programme, may be regarded as not being necessary for the attainment of its object or for its proper functioning*." [15]

This case law is relevant in the present case:

(1) The notified aid measure has aspects that contravene other provisions of the Treaty

As previously explained, should the Commission authorise the aid measure, the UK would inevitably violate Article 8 of the Electricity Directive (which is based on Articles 53, 62 and 115 TFEU), since it has not followed a transparent and non-discriminatory tender (or equivalent) procedure to select the recipient and has defined the conditions of the aid on the basis of the negotiations with NNBG.

(2) Those other provisions also pursue the objective of undistorted competition in the internal market

The objective of the Electricity Directive is the creation of a fully operational internal electricity market.[16] From a general standpoint, it ensures the full application of the internal market principles (including undistorted competition) to electricity generation in the EU. Aid granted in this sector must therefore not contradict the Directive's provisions.

In the specific case, the tendering rules of Article 8 guarantee that all market operators enjoy equal opportunities to access a member state's market. They mitigate the restrictions that are inherent in public interventions for the provision of new generation capacity, by replacing competition in the market with competition for the market, based on non-discriminatory and transparent conditions.

There is no doubt that, by selecting the contractor (and the recipient of the aid) without complying with the procedural requirements set out in Article 8, the UK has precluded all other EU operators from contending a significant share (7%) of its national generation market, violating the transparency and non-discrimination principles.

It is also clear, in this context and for the reasons explained above, that the required publication "*of an exhaustive list of criteria governing the selection of tenderers and the award of the contract, including incentives, such as subsidies*" is a condition of compatibility for such incentives with the internal market.

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recently, Order of the President of the General Court of 17 February 2011, Case T-520/11, *Comunidad Autónoma de Galicia v. Commission*, paragraph 54.

[14] Judgment of the General Court of 9 September 2010, Case T-359/04, *British Aggregates Associations v. Commission,* ECR [2010] II-4227, paragraph 91.

[15] Judgment of the Court of First Instance of 31 January 2001, Joined cases T-197/97 and T-198/97, *Weyl Beef Products and others* v *Commission*, ECR [2001], II-303, paragraphs 76 and 77. See also, Judgment of the Court of 22 March 1977, Case 74/76, *Iannelli v Meroni*, ECR [1977] 557, paragraph 14.

[16] Electricity Directive, Recital 62.

(3) The aspect of aid which contravenes the Electricity Directive (and Articles 53, 62 and 115 TFEU) is indissolubly linked to the object of the notified aid (the construction and operation of HPC by NNBG) and it is necessary for its attainment.

The aid measure has the stated objective of supporting a specific undertaking (NNBG) in the construction and functioning of a specifically identified infrastructure (HPC).

It is also unquestionable that the UK has designed the aid measure in view of achieving that objective. The main parameters of the said measure, which result from the negotiations between the UK and NNBG, have also been fixed in view of that purpose.[17]

In particular:

1. The UK has set the level of the "strike price" (i.e. the remuneration for unit of energy sold to the market), the rate of return and the duration of the contract, which are the main economic elements of the Investment Agreement, on the basis of the negotiations with NNBG;
2. The duration of the contract has been determined taking into account NNBG's debt-financing needs, the level of the "strike price", as well as the company's obligation to set aside funds for the decommissioning of the plant on the basis of a Funded Decommissioning Programme, which, however, has not been approved yet;
3. The UK and NNBG have also directly negotiated the commissioning window (i.e. the time available to NNBG to complete the construction of the plant and put it online), which has a potential impact on the economic contents of the investment agreement.[18]
4. At the time of the notification, the UK and NNBG were negotiating the terms of the credit guarantee which, as the Commission indicates, may contain elements of aid, particularly linked to the fact that it would be drawn before equity and that its price was going to be determined in a way inconsistent with the market approach.

Taking this into account, it cannot be realistically claimed that the concrete content of the aid measure does not reflect the outcomes of the negotiations between the UK and NNBG, and that it is independent from the selection of this undertaking in violation of the tendering rules.

On the contrary, it should be presumed that the aid measure would have been very different from the one currently under scrutiny, had the UK complied with Article 8 and the Treaty provisions upon which it is based.

- On the general approach, i.e. the choice of subsidising a single infrastructure based on one technology, the Commission has pointed out that "*tendering for low-carbon generation sources in a technologically neutral [way] does not appear to have been considered as a realistic alternative. While it is likely that some technologies have higher costs, such as for example offshore wind, alternatives such as large scale biomass could conceivably have competed against nuclear in a tender rather than relying on a government-led negotiation*".[19]

- Regarding the economic content of the aid, the Commission has indicated that the conditions of the credit guarantee and the parameters of the investment contract and CfD (level of strike

[17] The Commission notes, at paragraph 222 of the Decision, "*that the Investment Contract seems to be tailor made for NNBG. The UK has acknowledged that it will contain specificities that other CFDs will not necessarily contain*".
[18] Should NNBG incur in delay after the end of the window, the duration of the agreement would be shortened for the corresponding time (e.g. a delay of two years would shorten the duration of the contract by two years), thereby limiting the amount of the aid available.
[19] Commission Decision, paragraph 330.

price and duration), whether taken into account individually or in combination, may result in overcompensation or windfall profits for NNBG. Indisputably, this is the outcome of the UK's decision to negotiate directly with NNBG, bypassing the launch of a tender procedure. Indeed, by creating a competitive mechanism for the allocation of contracts for the construction of new capacity, Article 8 precisely aims at limiting public incentives to the minimum necessary, rewarding the most efficient operators and mitigating the risk of overcompensation that is, instead, inherent in the notified measure.

Being in breach of imperative EU law obligations, the UK should not be admitted to argue that the level of aid in the Investment Contract is the lowest possible (or as low as the level that would have resulted from a transparent and competitive procedure).

Furthermore, we stress that even if the aid measure were to be modified in the course of the Commission's investigation, to reduce its global amount, its discriminatory nature cannot be redressed.

Finally, we warn that accepting the UK's method would call into question the system set out in the Electricity Directive for public intervention in support of new generation capacity. In turn, this would legitimise an approach "*à la carte*" to compliance with the internal energy market rules, which will lead to a substantial roll-back of the liberalisation process (which is yet to be achieved).

4. Irrelevance of UK's justifications for not complying with Article 8 (1)

For the sake of completeness, it is useful to discuss and rebut the arguments that the UK uses to justify its failure to run a tender procedure.

(1) *A tender would have not been appropriate as there was not sufficient competitive pressure to make it effective. The UK links this position also to the timeframe chosen to bring forward investment in new nuclear energy.*[20]

Article 8 allows member states to choose the most appropriate procedure, in the light of the concrete market conditions, to select the beneficiary of national measures supporting new capacity. If member states deem that tenders are not the appropriate solution, they are allowed to use a different procedure, if "*equivalent in terms of transparency and non-discrimination*". However, member states cannot disregard Article 8 in its entirety, as the UK did.

As the Commission's own practice shows, the UK's argument on incompatibility of tendering with the timeframe chosen for the investment is equally irrelevant: a recent decision on Greece confirmed that Article 8 cannot be derogated.

Significantly, the Greek government had put forward that it could not run a tender for the expansion of existing generation capacity "*because such a procedure is time-consuming and not suited to the urgent nature of emergency situations*".[21]

The Commission rejected this argument without even discussing it. It is simply unimaginable that it could accept it in the case of HPC.

(2) *The negotiating process allowed the UK to maintain a competitive tension in setting the terms of the agreement, by making use of various benchmarks and comparisons which enables it to*

[20] Decision, paragraph 22.
[21] Commission Decision 2014/536/EU, paragraph 28.

identify acceptable values for the key terms of the agreement. The UK authorities have consistently claimed that they were not prepared to offer an Investment Contract at any price.[22] *The UK government made use of expert external technical and financial advisers, to provide "a final recommendation on whether it would be reasonable for the Secretary of State to conclude that NNBG's return on its investment in the HPC project is reasonable from a financial point of view".*

The purpose of a tender procedure is twofold: first it allows all interested undertakings to compete for of a new generation project and for public support measures (providing for equal treatment and transparency). Second, it ensures that incentives are allocated in the most efficient way, limiting state aid to the minimum indispensable amount.

By its own admission, the UK has ignored the legal requirements of non-discrimination, transparency and proportionality and agreed on the Investment Contract, on the basis of its "reasonableness". In doing so, the UK government might have obtained a result that it (and NNBG) consider reasonable, but has disregarded the economic rights of EU electricity operators and the good functioning of the internal energy market.

(3) *There is no selectivity on the number of possible economic operators that can enter into an Investment Contract other than those resulting from the limited number of sites available for the construction of nuclear power stations. The system remains open to all potential interested parties. Therefore, there is no violation of the non-discrimination principle.*[23]

This argument is fully contradicted by the fact that the aid to HPC is an individual measure, and it has been tailored upon a specific project.

In addition, the UK seems to imply that the aid measure is a "support scheme" for the construction of new nuclear plants in its territory. We underline, in this regard, that EU law does not foresee horizontal support schemes for the construction of conventional capacity.

As we have mentioned, the construction of new capacity is, in principle, subject only to authorisations, based on Article 7 of the Electricity Directive. In this context, national authorities play a "passive role", which consists in defining the requirements that applicants must fulfil and to verifying that these are concretely met, before accepting applications for the construction of new capacity.

The Electricity Directive does not allow member states to attach subsidies or other incentives to authorisations under Article 7: this would have the effect of distorting investments patterns within the EU, jeopardising the achievement of the internal energy market.

If public intervention is necessary, member states can provide incentives and subsidies. However, they must do so after having identified the capacity to be built and tenders must be used to allocate the incentives.

On the other hand, support schemes are admitted for renewables, based on the provisions of Directive 2009/27/EC.[24] The CJEU has recently clarified that possible restrictions to free movement of goods, which may derive from such national support schemes, are justified by the objective of promoting renewable energy sources, in view of fighting climate change and protecting the health and

[22] Decision, paragraph 65.
[23] Decision, paragraph 217.
[24] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable, OJ L 140 of 5 June 2009, page. 16 (see, in particular, article 3).

life of humans, animals and plants.[25] Needless to say, this reasoning does not apply to conventional energy sources.

Therefore, the UK's argument that the Investment Contract is not selective cannot be accepted, as it is based on an incorrect interpretation of the EU framework in place.

5. Concluding remarks

As discussed above, by failing to run an open and non-discriminatory tender procedure, the UK has manifestly breached its obligations under Article 8 of the Electricity Directive.

The violation of the Directive, whose purpose is to promote competition in the EU electricity market, is indissolubly liked to the aid measure as this was notified; the identity of the recipient of the aid and the main economic conditions thereof are all direct consequences of the absence of a tender procedure.

Therefore, the breach of Article 8 qualifies the aid to HPC as incompatible with the internal market.

Greenpeace warns against the consequences of authorising an aid that has been granted in violation of the internal energy market rules and asks the Commission to firmly enforce the Electricity Directive, also in the context of state aid control.

The Electricity Directive is designed to encourage member states to pursue interconnection and demand-side measures, instead of subsidising generators. An approach to state aid rewarding infringements, instead of sanctioning them, would defeat the purpose of the Directive and jeopardise the achievement of the internal energy market.

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[25] Judgment of the Court of 1 July 2014, Case C-573/12, Ålands Vindkraft AB, paragraph 76 and ss.