

EN



EUROPEAN COMMISSION
DG Competition

Case M.7850 - EDF / CGN / NNB GROUP OF COMPANIES

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERCER PROCEDURE**

Article 6(1)(b) NON-OPPOSITION
Date: 10/03/2016

***In electronic form on the EUR-Lex website under document
number 32016M7850***



EUROPEAN COMMISSION

Brussels, 10.03.2016
C(2016) 1596 final

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE

To the notifying parties:

Dear Sir/Madam,

**Subject: Case M.7850 - EDF / CGN / NNB Group of companies
Commission decision pursuant to Article 6(1)(b) of Council Regulation
No 139/2004¹ and Article 57 of the Agreement on the European Economic
Area²**

(1) On 4 February 2016, the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which **Electricité de France S.A. ("EDF", of France)** and **China General Nuclear Power Corporation ("CGN", of China)** will acquire joint control over:

- NNB Holding Company (HPC) Limited ("HPC Holding") and NNB Generation Company (HPC) Limited ("HPC GenCo", which together with "HPC Holding" is referred to as "NNB HPC") within the meaning of Article 3(1)(b) of the Merger Regulation, and;

¹ OJ L 24, 29.1.2004, p. 1 ('the Merger Regulation'). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this decision.

² OJ L 1, 3.1.1994, p.3 ("the EEA Agreement").

- NNB Holding Company (SZC) Limited ("SZC Holding") and NNB Generation Company (SZC) Limited ("SZC GenCo", which together with "SZC Holding" is referred to as "NNB SZC"), NNB Holding Company (BRB) Limited ("BRB Holding") and NNB Generation Company (BRB) Limited ("BRB GenCo", which together with "BRB Holding" is referred to as "NNB BRB") within the meaning of Article 3(4) of the Merger Regulation.³

- (2) NNB HPC, NNB SZC and NNB BRB are designated hereinafter as "NNB Companies", and EDF and CGN as the "Parties".

1. THE PARTIES

- (3) **EDF** is the parent company of the EDF group. The EDF group is mainly active on electricity markets in France, the United Kingdom ("UK") and elsewhere abroad, particularly in (i) generation and wholesale supply of electricity (including trading), (ii) transmission, (iii) distribution and (iv) retail supply of electricity. In the UK, the EDF group is active in electricity generation and the supply of electricity and gas, as well as in energy-related services and in energy trading. As part of its electricity generation activities, the EDF group operates eight nuclear power stations, three thermal power stations, a combined heat and power scheme and onshore and offshore renewable assets in Great Britain. It also operates 19 nuclear plants in France.

- (4) **CGN** is a Chinese company active in the development, construction and operation of nuclear power plants and renewable energy plants. It is active primarily in China, but has some investments abroad (e.g. 80% share acquired from EDF in three wind farms in the UK, a plan to invest in two new nuclear reactors in Romania and a recent investment of EUR 1 bn in a French SME active in solar energy⁴). CGN is 90% owned by the Central Chinese Assets Supervision and Administrative Commission ("Central SASAC") and 10% owned by the People's Government of Guangdong Province ("Local Guangdong SASAC").

- (5) **NNB Companies** consists of three holding companies (HPC Holding, SZC Holding and BRB Holding), incorporated for the purposes of investing into the three limited companies (HPC GenCo, SZC GenCo and BRB GenCo) responsible for the design, development, construction, testing, commissioning, operation (including sale of electricity generated), maintenance and eventual decommissioning of a newly built nuclear power plant respectively at Hinkley Point, Sizewell and Bradwell, subject to a final investment decision being taken. NNB HPC will be responsible for Hinkley Point, NNB SZC for Sizewell and NNB BRB for Bradwell. The Hinkley and Sizewell sites will use Areva's reactor technology (EPR). The Bradwell site will use CGN's Hualong reactor technology. That technology has been developed in China and needs approval in the UK ("UK Hualong reactor technology"). As part of the Transaction, EDF will support CGN in having the Hualong reactor technology approved by the UK regulators.

2. THE OPERATION

- (6) EDF and CGN intend to enter into a strategic partnership in relation to the development and, assuming a final investment decision is taken, the construction and

³ Publication in the Official Journal of the European Union No C 58, 13.02.2016, p. 41.

⁴ <http://fr.reuters.com/article/businessNews/idFRKBN0TS20W20151209> (Accessed on 4 March 2016).

operation of three nuclear power plants at Hinkley Point, Sizewell and Bradwell. For this purpose, CGN will acquire joint control over NNB Companies, currently solely owned by EDF (the "Transaction").

- (7) EDF and CGN will also establish a joint venture ("GDA JVCo") which will be owned 33.5% by EDF and 66.5% by CGN. It will be responsible for the day-to-day management and coordination of the General Design Assessment ("GDA") process necessary for UK Hualong reactor technology to be qualified for operation in the UK. [IP arrangements]⁵.
- (8) One of the principal objectives for EDF to enter into the Transaction is to share financial investment with CGN in HPC, SZC and BRB.^{6,7} EDF also submits that it intends to gain industrial cooperation and project experience.
- (9) [CGN's rationale for the transaction]. Through this transaction CGN wishes to obtain experience in the UK nuclear sector and to obtain approval of its Hualong reactor technology, [CGN's rationale for the transaction].

3. THE CONCENTRATION

3.1. Joint control

- (10) The legal entities constituting NNB HPC⁸, NNB SZC⁹ and NNB BRB¹⁰ are currently owned by EDF. NNB HPC was originally established as a joint venture between wholly owned subsidiaries of EDF (80%) and Centrica plc ("Centrica", 20%). In February 2013, Centrica decided to pull out of the joint venture. Through the Transaction, CGN will acquire shares in each of NNB HPC, NNB SZC and NNB BRB.
- (11) NNB HPC will be owned by EDF (66.5%) and CGN (33.5%). EDF will keep the majority of shares and of voting rights in the joint venture and therefore have control over NNB HPC. CGN will have a veto right over [veto rights]. CGN's veto rights will confer it decisive influence over strategic decisions of NNB HPC. EDF and CGN will therefore have joint control over NNB HPC together with EDF.

⁵ The UK Hualong Technology will consist of [IP arrangements]. (Source: Parties' response to RFI #10, Question 4 and 5).

⁶ HPC means Hinkley Point C new nuclear power station, SZC means Sizewell C new nuclear power station and BRB means Bradwell B new nuclear power station.

⁷ The project costs for HPC are expected to be EUR [cost details] billion compared to EDF's market capitalisation which is currently around EUR 33 billion, and the project costs for the other two plants are likely to be [cost details].

⁸ HPC Holdco and HPC GenCo were incorporated on 17 June 2009. At the end of November 2015 HPC GenCo had a headcount of [number of employees] employees, secondees and embedded contractors.

⁹ SZC Holdco and SZC GenCo were incorporated on 28 October 2014. As at November 2015 SZC GenCo had a headcount of [number of employees], which would be expected to increase significantly as the SZC project moves closer to a final investment decision.

¹⁰ The original BRB project companies, BRB Holdco and BRB GenCo were incorporated on 28 October 2014. On completion, these companies will be replaced by Bradwell Power Generation Company Limited and Bradwell Power Holding Company Limited which were incorporated on 7 January 2016. BRB which is at an early stage [number of employees].

- (12) NNB SZC will be owned by EDF (80%) and CGN (20%). EDF will own the majority of shares and of voting rights and therefore have control over NNB SZC. CGN will [veto rights]. EDF and CGN will therefore have joint control over NNB SZC.
- (13) NNB BRB will be owned by EDF (33.5%) and CGN (66.5%). CGN will own the majority of shares and of voting rights and therefore have control over NNB BRB. [veto rights]. EDF and CGN will therefore have joint control over NNB BRB.

3.2. A single concentration

- (14) According to Recital 20 of the Merger Regulation, it is appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time.
- (15) Paragraphs 44 and 45 of the Jurisdictional Notice¹¹ provide that "*several transactions can be treated as a single concentration [...] only [...] if the result is that control of one or more undertakings is acquired by the same person(s) or undertaking(s)*" and "*if those [transactions] are inter-conditional*".
- (16) EDF and CGN will have joint control over each of NNB HPC, NNB SZC and NNB BRB. Moreover, there is inter-conditionality between the different phases of the Transaction as the Parties are concluding a number of overarching agreements that govern the Transaction as a whole.¹²
- (17) As regards the "*simultaneous conclusion of the relevant agreements*",¹³ the Strategic Investment Agreement was signed on 21 October 2015, and the heads of terms for all the different phases of the Transaction were annexed to that agreement. Likewise, each of the SPAs will be inter-conditional and are expected to be signed at the same time.
- (18) While the Transaction will involve multiple agreements and multiple legal entities (for each of the power plants involved, as well as the GDA process), the transactions leading to EDF and CGN having joint control over NNB HPC, NNB SZC and NNB BRB are unitary in nature.
- (19) In order to conclude on the unitary nature of several transactions, the Jurisdictional Notice provides that it is necessary to ascertain whether "*those transactions are interdependent, in such a way that one transaction would not have been carried out*

¹¹ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ C 95, 16.4.2008, p. 1).

¹² (1) The Strategic Investment Agreement, which sets out the parameters of the strategic partnership and the other specific agreements that the Parties will sign, and to which the heads of terms of the shareholders' agreements relating to each of NNB HPC, NNB SZC and NNB BRB are annexed (Annexes 3 and 3(1) to 3(4) to the Form CO); (2) the Framework Agreement, governing the interdependence of the projects, as well [agreements between the parties] (the key substantive terms of the Framework Agreement are provided in Annex 3(6) to the Form CO "Exclusivity Principles Paper" and Annex 3(9) to the Form CO BRB Land Amendments Agreement); and (3) the Industrial Cooperation Agreement (Annex 3(5) to the Form CO), providing a framework for the cooperation of the Parties across the Transaction in relation to areas such as [agreements between the parties].

¹³ Jurisdictional Notice, paragraph 43.

without the other and therefore constitute a single concentration".¹⁴ It also indicates that "[s]uch conditionality is normally demonstrated if the transactions are linked *de jure*, *i.e. the agreements themselves are linked by mutual conditionality*".¹⁵

(20) The Strategic Investment Agreement signed by the Parties provides that "*the parties now wish to conclude negotiations for creating a comprehensive strategic partnership for the development of a fully defined new build nuclear programme in the UK comprising [...] (a) the construction, commissioning, ownership, operation, maintenance and eventual decommissioning of the Hinkley Point C ("HPC") nuclear power plant using two EPR reactors [...]; (b) the development phase of the Sizewell C ("SZC") nuclear power plant using [number of reactors] EPR reactors [...]; (c) the development phase of the Bradwell B ("BRB") nuclear power plant intended to use two UK-adapted Hualong reactors [...]; (d) a joint venture [...] for the adaptation of the Hualong technology to meet UK regulatory requirements and achieve successful completion of the generic design approval ("GDA") process and to [IP arrangements]; and (e) an industrial co-operation agreement ("ICA"), to be entered into between EDF (or its nominated Affiliate(s)) and [GNI] (or its nominated Affiliate(s)) which provides a [procurement strategy]. The ICA sets up a framework for the co-operation of the parties across the projects in relation to areas such as [commercial strategy]*".¹⁶ The BRB Land Amendments to Framework Agreement also indicates that "*in addition to the development of EPRs at Hinkley Point C and Sizewell C, the parties acknowledge a common priority of successful development in the UK of a UK Hualong Project [commercial strategy]*".¹⁷ The three transactions are therefore linked *de jure*.

(21) For the same reasons, the creation of the GDA JVCo is a transaction that must be considered as part of the same concentration as the acquisition of joint control over the NNB Companies. The Strategic Investment Agreement specifically mentions the GDA process as part of the Parties' new build nuclear programme in the UK and underlines [commercial strategy].¹⁸ The cooperation between EDF and CGN through GDA JVCo for the sole purpose of completing the GDA approval process is therefore interdependent *de jure* with the transactions leading EDF and CGN to have joint control over NNB Companies and is part of the Transaction. For the sake of clarity, while the Parties indicate that the cooperation in relation to the GDA process is an inherent part of Transaction,¹⁹ the Commission considers that the creation of GDA JVCo and related agreements are part of the Transaction, since the overall cooperation in relation to the GDA process will be an ongoing process.

(22) In addition, the Parties intend to enter into a number of exclusivity and cooperation arrangements that are analysed in Section 7 below concerning ancillary restrictions.

(23) For all these reasons the various transactions described above are so closely connected that they must be all considered as forming one single transaction.

¹⁴ Paragraph 38.

¹⁵ Paragraph 43.

¹⁶ Annex 3 to the Form CO, page 4, recital (E).

¹⁷ Annex 3(9) to the Form CO, page 2.

¹⁸ Annex 3 to the Form CO, page 4, recitals (E) and (F).

¹⁹ Form CO, paragraph 73.

3.3. Full functionality

(24) NNB HPC can be considered as a business with a market presence within the meaning of paragraph 24 of the Jurisdictional Notice as it is already active on the market through the implementation of the HPC project, such as the construction process, HR, compliance with nuclear safety protocols, and so on. However, this is not the case for NNB SZC and NNB BRB which are newly created full-function joint ventures to which the parties contribute assets which they previously owned individually in line with paragraph 92 to the Jurisdictional Notice.

(25) The acquisition of joint control over NNB HPC by CGN therefore constitutes an acquisition of an undertaking within the meaning of Article 3(1)(b) of the Merger Regulation. The creation of NNB SZC and NNB BRB constitutes the creation of joint ventures performing on a lasting basis all the functions of autonomous economic entities (so called full-function joint ventures) within the meaning of Article 3(4) of the Merger Regulation. The operational organisation of the three NNB Companies is similar. The full-functionality criteria analysed below therefore apply to each of them:

- **Sufficient resources to operate independently on a market (paragraph 94 of the Jurisdictional Notice):** NNB Companies will be active in the market for the generation and wholesale supply of electricity in Great Britain, have their own employees, management team dedicated to their respective day-to-day operations and access to sufficient finances to undertake the development phase and, subject to a final investment decision to be made, to construct and operate the HPC, SZC and BRB nuclear power plants.
- **Activities beyond one specific function for the parents (paragraphs 95-96 of the Jurisdictional Notice):** NNB Companies will be active in the market for the generation and wholesale supply of electricity in Great Britain and therefore will be engaged in activities beyond providing one specific function for their parents.
- **Sale / purchase relations with the parents (paragraphs 98-102 of the Jurisdictional Notice):**
 - In order to participate in the market for electricity generation and wholesale supply, NNB Companies will need to appoint a service provider to take the power from their nuclear plants to market. NNB HPC will enter into an agreement with EDF Energy Plc ("EDF Energy") to provide this service on commercial terms, [procurement strategy].

HPC GenCo will pay fees to EDF Energy for its services and retain full control of the market strategy relating to the wholesale trading of electricity generated at HPC. It will therefore retain the risk associated with its activities in the generation and wholesale supply of electricity in line with the Jurisdictional Notice.²⁰

²⁰ Paragraph 95 of the Jurisdictional Notice explains in particular that "*the fact that a joint venture makes use of the distribution network or outlet of one or more of its parent companies normally will not disqualify it as "full-function" as long as the parent companies are acting only as agents of the joint venture*".

- In relation to purchases, whilst some inputs involved in the development, design and construction of HPC, SZC and BRB may be sourced from EDF and CGN, other inputs will be purchased from the large range of contractors and suppliers that have been and will be selected to provide equipment and construction / operational services.
- **Operation on a lasting basis (paragraphs 103-105 of the Jurisdictional Notice):** NNB Companies will not only construct the HPC, SZC and BRB nuclear power plants but will also be responsible for operating these plants for a period of up to 60 years or more.
- (26) It follows from the above that the NNB Companies will meet each of the four criteria considered above. Therefore, the joint ventures are being assessed by the Commission as a single concentration that meets the full-function criterion of Article 3(4) of the Merger Regulation.
- (27) On the other hand, GDA JVCo which will be established in order to complete the GDA approval process for the UK Hualong technology does not appear to be a full-function joint venture and the Parties do not claim that this is the case. This is because GDA JVCo is established in order to complete the GDA approval process for the UK Hualong technology. In addition, once the GDA process will be completed, [IP arrangements]. As such, GDA JVCo will not have activities beyond a single function for its parents and will not have its own access to, or presence on, the market. In addition, it will only rely on secondees from its parents. GDA JVCo therefore does not fulfil the full-functionality criteria set out in the Jurisdictional Notice.²¹
- (28) In any case, for the reasons already explained above, even if the GDA JVCo is not a full-function joint venture, this transaction will be assessed as being part of the same concentration as the acquisition of joint control over the NNB Companies.

4. EU DIMENSION

4.1. Calculation of turnover of State-owned enterprise

- (29) In order to assess whether the Transaction has an EU dimension, it is necessary to determine which turnover should be attributed to CGN, given that it is a State-owned enterprise and that the majority of its shares are held by Central SASAC (the commission administering Chinese SOEs that are supervised by the central Chinese government).

Legal basis

- (30) According to Article 5(4) read in conjunction with Recital 22 of the Merger Regulation and the Jurisdictional Notice²², two State-owned enterprises ("SOE") will not be considered to be under the same controlling undertaking provided they have a power of decision independent from each other and independent of the State concerned. The Commission's precedents provide for the relevant criteria in order to assess whether two SOEs have an independent power of decision independent include:

²¹ Paragraphs 94-106.

²² Paragraphs 52-53, 153 and 194 of the Jurisdictional Notice.

- (i) the SOE's autonomy from the State in deciding strategy, business plan and budget;
 - (ii) the possibility for the State to coordinate commercial conduct by imposing or facilitating coordination.²³
- (31) When assessing the second criterion the Commission considered factors such as the degree of interlocking directorships or the existence of safeguards to prevent sharing of commercially sensitive information between SOEs.²⁴
- (32) These principles have been applied to Chinese SOEs most recently in 2015 in Case COMP/M.7643 - *CNRC/Pirelli* where the Commission noted that "*the first step consists of identifying whether or not the SOEs have independent decision-making power*" and that "*factors previously taken into account included 'the degree of interlocking directorships or the existence of adequate safeguards ensuring that commercially sensitive information is not shared between such undertakings'*".²⁵

Parties' view

- (33) The Parties submit that CGN is independent from Central SASAC and that the Transaction is therefore not notifiable under the Merger Regulation as CGN has a turnover of EUR [turnover] in the EEA which is below the EUR 250 million threshold.
- (34) First, Article 6 of the Law of the People's Republic of China on the State-Owned Assets of Enterprises of 2008 ("PRC law on SOEs") specifies that the government shall perform the contributor's function "*based on the principles of separation of government bodies and enterprises, separation of the administrative functions of public affairs and the functions of the state-owned assets contributor, and non-intervention in the legitimate and independent business operations of enterprises.*"
- (35) Second, Central SASAC [CGN's ownership and management structure] would not determine CGN's strategic commercial behaviour [CGN's management structure]. As regards appointment and removal of management, the Articles of Association of CGN ("CGN Articles") only provide that Central SASAC can remove directors that it originally appointed to the shareholders' meeting (i.e. seven out of nine directors) if a director acts improperly or in violation of the laws and/or CGN Articles. [CGN's management of financing means].
- (36) Third, CGN would not have any interlocking directorships with Central SASAC. It would have an internal confidentiality policy which precludes any exchange of confidential information with any other SOE, therefore there would be no coordination with other Chinese SOEs controlled by Central SASAC.

Commission's assessment

- (37) Article 6 of PRC law on SOEs, to which the Parties refer, provides a very broad wording of the general principle of separation of government bodies and enterprises and

²³ See for example Case COMP/M.5549 – EDF/Segebel, paragraph 92.

²⁴ See for example Case COMP/M.7643 – CNRC/Pirelli, paragraphs 8 et seq; Case COMP/M.6113 – DSM/SINOCHEM/JV, paragraphs 10-13; Case COMP/M.5549 – EDF/Segebel, paragraph 93.

²⁵ Paragraphs 8 et seq.

non-intervention in business operations. There are however a number of provisions in the PRC law on SOEs and the Interim Measures for the Supervision and Administration of the Investments by Central Enterprises released in May 2003 ("Interim Measures on Supervision") which support the fact that Central SASAC has influence on CGN's major decision making and therefore CGN does not enjoy autonomy from the State in deciding major matters like strategy, business plan or budget.

(38) According to the PRC law on SOEs:

- Central SASAC "*appoint[s] and remove[s] the president, vice-presidents, person in charge of finance and other senior managers [...] the chairman and vice-chairmen of the board of directors, directors, chairman of the board of supervisors, and supervisors of a wholly state-owned company*" and "*propose[s] the director and supervisor candidates to the shareholders' meeting*";²⁶
- Central SASAC conducts "*annual and office term assessments of the enterprise managers appointed by it, and decides the rewards and punishments to the enterprise managers according to the assessment results*";²⁷
- The functions performed by Central SASAC concern "*large-sized state-invested enterprises that have bearings on the national economic lifeline and state security determined by the State Council and the state-invested enterprises in such fields as important infrastructures and natural resources*".²⁸

(39) According to the Interim Measures on Supervision:

- SOEs that report to Central SASAC should "*submit their annual investment plan*" to Central SASAC;²⁹
- Where an enterprise "*superadds any project beyond the annual investment plans, it shall report the relevant information to the SASAC in time*" and the Central SASAC shall "*implement the administration*" of the investment activity of that enterprise;³⁰
- Central SASAC shall "*supervise and administrate the investment activities of these enterprises, and guide them to establish and improve the procedures of investment decision-making and management systems*".³¹

(40) In addition, Article 12 of the PRC law on SOEs provides that "*a body performing the contributor's functions on behalf of the [...] government [i.e. Central SASAC] shall enjoy the return on assets, participation in major decision making, selection of managers and other contributors' rights*", which undermines, if not contradicts, the

²⁶ PRC law on SOEs, Article 22.

²⁷ *Ibid*, Article 27.

²⁸ *Ibid*, Article 4.

²⁹ Interim Measures on Supervision, Article 8.

³⁰ *Ibid*, Article 10.

³¹ *Ibid*, Article 4.

argument made by the parties related to the non-intervention of the State in business operations. Although strategic decisions are prepared by the management, Central SASAC has an influence on CGN's major decision making by reviewing the business and appointing CGN's senior management.

- (41) Moreover, as stated in Case COMP/M.6113 - *DSM/Sinochem/JV*, the core legislation itself and the associated information outlined on Central SASAC's website contain a number of provisions which can be read as suggesting that Central SASAC does in practice have certain powers to involve itself in SOEs' commercial behaviour in a strategic manner, among others the right to approve mergers or of strategic investment decisions.³²
- (42) In light of the above, Central SASAC participates in major decision making, in the selection and supervision of senior management of SOEs and can interfere with strategic investment decisions. The Commission considers that the absence, according to the Parties, of cross-directorships between CGN on the one hand and Central SASAC or other Chinese SOEs on the other hand does not necessarily imply that CGN has a power of decision independent of Central SASAC. The absence of cross-directorships with other SOEs and the existence of confidentiality provisions do not preclude Central SASAC from influencing CGN's commercial strategy in light of the different powers mentioned above.
- (43) In addition, the particular case at hand concerns the energy sector and in particular the nuclear industry. PRC Law on SOEs provides that "*The state shall take measures to promote the centralization of state-owned capital to the important industries and key fields that have bearings on the national economic lifeline and state security, optimize the layout and structure of the state-owned economy, promote the reform and development of state-owned enterprises, improve the overall quality of the state-owned economy, and strengthen the control force and influence of the state-owned economy*".³³ CGN is active in the energy sector (both nuclear and renewable energies) which is an important industry that has bearings on the national economic lifeline and state security.
- (44) A number of other elements show that the Chinese State via Central SASAC has the power to influence coordination between companies active in the energy industry and in the nuclear industry in particular. In January 2014, CGN, China National Nuclear Cooperation ("CNNC", another Chinese SOE controlled by Central SASAC), SNPTC (State Nuclear Power Technology Corporation) and a number of supporting entities formed the China Nuclear Industry Alliance. According to the World Nuclear Association,³⁴ the creation of the China Nuclear Industry Alliance was "*directed by the*

³² E.g. "SASAC guides and pushes forward the reform and restructuring of state-owned enterprises, advances the establishment of modern enterprise system in SOEs, improves corporate governance, and propels the strategic adjustment of the layout and structure of the state economy" and "SASAC is responsible for the fundamental management of the state-owned assets of enterprises, works out draft laws and regulations on the management of the state-owned assets, establishes related rules and regulations and directs and supervises the management work of local state-owned assets according to law", both at <http://en.sasac.gov.cn/n1408028/n1408521/index.html> (Accessed on 9 March 2016).

³³ PRC law on SOEs, Article 7.

³⁴ The World Nuclear Association is the international organisation that promotes nuclear energy. It counts as members a large number of nuclear players (including EDF, CGN's subsidiaries and CNNC).

[Chinese] government to achieve some synergy" and is "designed to eliminate detrimental or unseemly competition in export markets".³⁵

(45) Additional elements support the fact that Central SASAC can impose or facilitate coordination between SOEs. The Term Sheet for Industrial Cooperation Agreement between EDF and CGN provides for example that:³⁶

- [procurement strategy];
- [procurement strategy]

(46) Although [procurement strategy] supply chains are also mentioned, such companies are [procurement strategy] and therefore the possibilities for coordination as a single economic entity would be more limited.

(47) CGN and CNNC also signed in 2015 an agreement to create a JV for the continued development and marketing of the Hualong One technology in China and abroad that they developed together.³⁷ The Board Meeting Minutes of HPC dated 28 October 2015 also provide that "[investment strategy]".³⁸

(48) In light of the above, Central SASAC can impose or facilitate coordination between SOEs in the energy industry.

(49) In view of the fact that Central SASAC can interfere with strategic investment decisions and can impose or facilitate coordination between SOEs at least with regard to SOEs active in the energy industry, the Commission concludes in the case at hand that CGN and other Chinese SOEs in that industry should not be deemed to have an independent power of decision from Central SASAC. The turnover of all companies controlled by Central SASAC that are active in the energy industry should therefore be aggregated.

(50) The question whether Local SASACs (such as Local Guangdong SASAC) shall be considered as forming a single entity with CGN can be left open, as the turnovers of Chinese SOEs controlled by Central SASAC meet the thresholds of the Merger Regulation irrespective of the assessment of this point.

4.2. EU thresholds

(51) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million³⁹ (EDF: EUR 72 874 million; CGN: EUR [turnover] million⁴⁰). On the basis of the assessment in section 4.1. above, each of them has an EU-wide turnover in excess of EUR 250 million (EDF: EUR [turnover] million; CGN and Central SASAC's turnover through Chinese SOEs active in the energy sector: more than

³⁵ <http://www.world-nuclear.org/info/Country-Profiles/Countries-A-F/Appendices/Nuclear-Power-in-China-Appendix-1--Government-Structure-and-Ownership/> (Accessed on 29 February 2016)

³⁶ Annex 3(5) to the Form CO.

³⁷ <http://www.world-nuclear-news.org/C-Chinese-firms-join-forces-to-market-Hualong-One-abroad-31121502.html> (Accessed on 29 February 2016)

³⁸ Annex 10(10) to the Form CO, "NNB GenCo Board Meeting Minutes", dated 28 October 2015, page 2, point 4.

³⁹ Turnover calculated in accordance with Article 5 of the Merger Regulation.

⁴⁰ The worldwide threshold is met without the need to consider other SOEs than CGN.

EUR 250 million on the basis of the combined turnover of CGN and ChemChina⁴¹), but they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State, as EDF does not achieve two-thirds of its aggregate EU-wide turnover in any Member State. The notified operation therefore has an EU dimension.

5. RELEVANT MARKETS

(52) Only three affected markets⁴² arise from the Transaction: (i) the market for generation and wholesale supply of electricity in Great Britain (horizontal overlap), (ii) the market for sites considered suitable for building new nuclear power stations (vertical relationship), and (iii) the market for design and manufacture of nuclear islands when adopting a possible market definition: the global market for pressurised water reactors ("PWR") excluding countries subject to export restrictions and countries exclusively supplied by national suppliers (vertical relationship).

(53) For the sake of completeness, the Commission will also mention the other relevant markets since the Transaction gives also rise to a number of vertical relationships:

- Between the following upstream markets where Chinese SOEs⁴³ are active: markets for (i) design and manufacture of conventional islands, (ii) (a) supply of safety-related instrumentation and control systems ("I&C") and (b) supply of operational I&C systems, (iii) services and equipment to existing nuclear islands, (iv) construction services, (v) mining and supply of uranium, (vi) supply of enriched uranium, (vii) manufacture and supply of nuclear fuel assemblies for light water reactors; and the following downstream market: the market for generation and wholesale supply of electricity in Great Britain where NNB Companies will be active;
- Between the following upstream market: the market for generation and wholesale supply of electricity in Great Britain where NNB Companies will be active and the following downstream market: the market for retail supply of electricity in Great Britain where EDF is active.⁴⁴

5.1. Market for generation and wholesale supply of electricity

(54) The Commission has previously defined the market for generation and wholesale supply of electricity as "*domestic generation of electricity at power stations within a certain geographic market as well as the electricity that is physically imported into this*

⁴¹ Information on the turnover of a company like China National Chemical Corporation ("ChemChina") is sufficient to determine EU jurisdiction. ChemChina is a Chinese SOE controlled by Central SASAC and active among others in the energy area through several refineries that process crude oil. This company has more than EUR 250 million turnover in the EU.

⁴² See Section 6.3 of the Form CO for the definition of affected markets.

⁴³ The question as to which companies shall be considered in the competitive assessment (i.e. CGN, Chinese SOEs controlled by Central SASAC and/or Chinese SOEs controlled by Local SASACs) can be left open, as the Transaction does not lead to competition concerns irrespective of the assessment of this point.

⁴⁴ EDF is also active in the potential market for electricity trading services and in other services ancillary to the generation and wholesale supply to electricity. However, none of these markets are affected as a result of the Transaction.

geographic market via interconnectors to be sold on to retailers".⁴⁵ The Commission's previous decisions⁴⁶ also made no distinction between the different sources of electric energy⁴⁷ within the wholesale electricity market.

- (55) From a geographical perspective, the Commission has consistently defined the relevant geographic market as at most national.⁴⁸ In relation to the UK, the Commission has defined the geographic market as Great Britain.⁴⁹

5.2. Market for the design and manufacture of nuclear islands

5.2.1. Product market definition

- (56) The two main components of a nuclear power plant are the nuclear island and the conventional island.⁵⁰ The nuclear island generates steam using nuclear technology, while the conventional island contains equipment to change the heat in the steam taken across from the nuclear island into electricity.⁵¹ The Commission has previously identified a separate product market for nuclear islands which may be affected under a potential market segmentation.⁵²

- (57) The Parties consider that the relevant product market is the market for the design and manufacture of nuclear islands, without distinction by reactor type or other reactor characteristics.

- (58) In particular the Parties do not consider segmentation by reactor type to be relevant in defining the product market as the service rendered by each reactor type is essentially the same (in terms of function, availability, etc). According to the Parties, this is particularly true between the two types of light water reactors ("LWR"): pressurised water reactors ("PWR") and boiling water reactors ("BWR"). This would be demonstrated by the fact that a number of operators have both PWRs and BWRs or plan to do so or that various tenders for the supply of nuclear islands allow the submission of bids to supply either PWRs or BWRs. Moreover, since LWRs share an important part of their technology, suppliers of nuclear islands should not be limited to a single type of reactor.

45 Case COMP/M.7137 – EDF/Dalkia en France, paragraph 34; Case COMP/M.6984 – EPH/Stredoslovenska Energetika, paragraph 15; Case COMP/M.5445 – Mytilineos/Motor Oil/Corinthos Power, paragraph 12; Case COMP/M.5224 – EDF/British Energy, paragraph 11; Case COMP/M.4180 – Gaz de France/Suez, paragraph 674; Case COMP/M.3883 – GDF/Centrica/SPE, paragraph 9.

46 Case COMP/M.4517 – Iberdrola/Scottish Power, paragraph 11; Case COMP/M.5224 – EDF/British Energy, paragraphs 15-19.

47 Gas fired, coal fired, nuclear, hydroelectric power stations, wind farms or others.

48 Case COMP/M.7137 – EDF/Dalkia en France, paragraph 39; Case COMP/M.6984 – EPH/Stredoslovenska Energetika, paragraph 15; Case COMP/M.5445 – Mytilineos/Motor Oil/Corinthos Power, paragraph 23; Case COMP/M.4180 – Gaz de France/Suez, paragraphs 696 et seq.; Case COMP/M.3883 – GDF/Centrica/SPE, paragraph 21.

49 Great Britain comprises England, Wales and Scotland but excludes Northern Ireland. See Case COMP/M.5224 – EDF/British Energy, paragraph 20.

50 Case COMP/M.4839 – Areva NP/MHI/Atmea, paragraph 11.

51 Case COMP/M.4839 – Areva NP/MHI/Atmea, paragraph 12; Case COMP/M.1940 – Framatome/Siemens/Cogéma, paragraph 13.

52 Case COMP/M.4839 – Areva NP/MHI/Atmea, paragraph 13.

- (59) The Parties do not therefore consider it relevant to segment the market for the design and manufacture of nuclear islands by reactor type or to further segment LWRs into PWRs and BWRs.
- (60) The Commission has previously considered sub-dividing the nuclear island market by reactor type, power capacity, age/generation of the reactor⁵³ and according to the different reactor components (or subassemblies) used.⁵⁴ Nevertheless further segmentation of the market for design and manufacture of nuclear islands has ultimately been left open.⁵⁵
- (61) In any event, the Commission considers that the precise product market definition concerning the market for the design and manufacture of nuclear islands can be left open as the proposed transaction does not raise serious doubts as to its compatibility with the internal market under any possible approach.

5.2.2. *Geographic market definition*

- (62) The Parties consider that the relevant geographic market is global in scope as there has been a relaxation of export restrictions on nuclear islands and a relaxation in relation to countries which were exclusively supplied by a national provider.
- (63) The Commission has previously left open the definition of the geographic scope of the market for the design and manufacture of nuclear islands, envisaging the following possibilities: (i) worldwide; (ii) worldwide, excluding countries where export restrictions apply; and (iii) global, excluding countries where export restrictions apply and countries which are currently exclusively supplied by a national supplier.⁵⁶
- (64) The Commission considers that the precise geographic market definition concerning the market for the design and manufacture of nuclear islands can be left open as the proposed transaction does not raise serious doubts as to its compatibility with the internal market under any possible approach.⁵⁷

5.3. **Sites considered suitable for building new nuclear power stations**

- (65) The Commission identified a separate product market akin to a real estate market for sites considered suitable for building new nuclear power stations. This involved a limited number of suitable sites, mostly sites on or next to pre-existing or decommissioned nuclear power plants.⁵⁸

⁵³ Case COMP/M.4153 – Toshiba/Westinghouse, paragraph 13.

⁵⁴ Case COMP/M.4153 – Toshiba/Westinghouse, paragraphs 23-24.

⁵⁵ Case COMP/M.4839 – Areva NP/MHI/Atmea, paragraphs 14-16.

⁵⁶ Case COMP/M.4839 – Areva NP/MHI/Atmea, paragraphs 18-24.

⁵⁷ The list of the corresponding excluded countries is based on the analysis made in Case COMP/M4839 – Areva NP/MHI/Atmea adopted in 2007. The Parties contest this market definition, considering that the competitive situation has evolved since 2007.

⁵⁸ Case COMP/M.5224 – EDF/British Energy, paragraphs 104-105.

(66) The Commission concluded that, as nuclear power plants are built to supply electricity into electricity wholesale markets, the geographic scope of the real estate market for the build of new nuclear power stations cannot be larger than national.⁵⁹

5.4. Other relevant markets

(67) For the sake of completeness, the Transaction also leads to vertical relationships with the market for the generation and wholesale supply of electricity (where NNB Companies will be active) without giving rise to affected markets in relation to certain activities of Chinese SOEs. In the course of the market investigation, some players active in markets upstream to the market for generation and supply of electricity expressed concerns about the potential impact on competition of the Transaction due to the fact that Chinese SOEs in particular CGN and CNNC are active in several nuclear markets upstream to the market where NNB Companies will be active. The markets where Chinese SOEs are active and which are upstream to the market for generation and wholesale supply of electricity are the following:

- (i) design and manufacture of conventional islands,⁶⁰
- (ii) (a) supply of safety-related instrumentation and control systems ("I&C"), and (b) supply of operational I&C systems,⁶¹
- (iii) services and equipment to existing nuclear islands,⁶²
- (iv) construction services: (1) civil engineering for large projects which encompass (a) earthworks, (b) main civil engineering and (c) marine works; (2) commercial building construction; (3) installation and electrical services for large projects which may be further segmented into (a) electrical services, (b) mechanical services and (c) heating, ventilation and air conditioning for heavy commercial and industrial use^{63, 64}

⁵⁹ In Case COMP/M.5224 – EDF/British Energy, paragraph 106, the Commission left open the question whether the relevant geographic market could be confined to England and Wales, given that the Scottish authorities had the legal right to prevent the construction of nuclear power plants in Scotland.

⁶⁰ In Case COMP/M.1940 — Framatome / Siemens / Cogéma / JV, Case COMP/M.4153 - Toshiba / Westinghouse and Case COMP/M.4839 - Areva NP / MHI / Atmea, the Commission considered the market for conventional islands as a separate market. The question whether the market is EEA-wide or global was left open.

⁶¹ In Case COMP/M.1940 — Framatome / Siemens / Cogéma / JV and Case COMP/M.4153 - Toshiba / Westinghouse, the Commission considered that the supply of safety related I&C and the supply of operational I&C were separate markets and left open whether they should be considered as EEA-wide or worldwide in scope. In Case COMP/M.1940 — Framatome / Siemens / Cogéma / JV the Commission left open whether the maintenance for safety related I&C constitutes a separate market.

⁶² In Case COMP/M.4153 – Toshiba / Westinghouse, the Commission considered the market for supply of services and equipment for nuclear islands. The Commission left open whether the markets are EEA-wide, global excluding Japan or global in scope.

⁶³ In Case COMP/M.5445 - Mytilineos / Motor Oil / Corinthos Power, a distinction between "building construction", "civil engineering" and "mechanical and electrical services" was considered, as well as a distinction between civil engineering for small projects and civil engineering for large projects, and a potential separate market for construction of power plants. The markets were considered as national or EEA-wide in scope.

- (v) mining and supply of uranium,⁶⁵
- (vi) supply of enriched uranium,⁶⁶ and,
- (vii) manufacture and supply of nuclear fuel assemblies for light water reactors.⁶⁷

(68) In addition, EDF is active on the market for retail supply of electricity in Great Britain which is downstream to the market for generation and wholesale supply of electricity.⁶⁸

(69) The Commission considers that the precise market definition concerning those markets do not need to be analysed in further details as they are not affected markets and the proposed transaction does not raise serious doubts as to its compatibility with the internal market under any possible approach.

6. COMPETITIVE ASSESSMENT

6.1. Market for generation and wholesale supply of electricity

(70) While NNB Companies will be active in the market for the generation and wholesale supply of electricity, EDF and CGN each have separate activities in the same market that will remain independent from the joint venture. In 2014, EDF had a market share of [10-20]% based on share of generation capacity and [20-30]% based on

⁶⁴ Should each of these potential markets be limited to services for nuclear power plants, Chinese SOEs have a share of supply of less than 30% on each of these potential product markets in both the UK and the EEA, as the only Chinese SOE active in the EEA is Northern Heavy Industries through its subsidiary NFM Technologies.

⁶⁵ In Case COMP/M.3099 – Areva / Urenco / ETC JV, the Commission considered the parties' activities in mining and supply of uranium. The Commission has previously defined separate markets for different metals, including uranium, for mining and metal producing activities (see, for example the decision in Case IV/M.660 – RTZ/CRA) and considered the markets as global in scope.

⁶⁶ In Case COMP/M.3099 – Areva / Urenco / ETC JV, the Commission analysed the market for supply of enriched uranium and considered the different types of low enriched uranium as interchangeable, left open the question whether enriched blended uranium was a separate market and considered the market for MOX as a separate market. The Commission considered an EEA-market with a strong competitive constraint exercised by Tenex but left the exact market definition open.

⁶⁷ In Case COMP/M.5254 – EDF / British Energy, Case COMP/M.4153 - Toshiba / Westinghouse and Case COMP/M.1940 – Framatome / Siemens / Cogéma / JV, the Commission analysed the market for fuel assembly services for light water reactors and considered that the market for PWR-fuel assemblies and BWR-fuel assemblies. In Case COMP/M.1940 – Framatome / Siemens / Cogéma / JV, it also mentioned Western PWR-fuel assemblies (which have a square form as opposed to fuel assemblies with hexagonal form used for example in Russia). The question whether the market was EEA wide or larger was left open.

⁶⁸ The Commission considered the market for retail supply of electricity in Case COMP/M.7137 EDF / Dalkia and in Case COMP/M.5224 - EDF / British Energy. The Commission distinguished between (i) domestic customers; (ii) smaller industrial and commercial customers (SMEs) which do not use "half hourly rates" (i.e. which do not have their electricity consumption automatically measured every half an hour) ("non-HH customers"); and (iii) large industrial and commercial customers which do use half hourly rates ("HH customers"). In Case COMP/M.5224 - EDF / British Energy the Commission considered Great Britain as the relevant geographic market.

generation output. In both bases, CGN's market share is less than 1% through three wind farms.

- (71) As a result, there is no risk of coordination between both Parties within the meaning of Article 2(4) of the Merger Regulation and Article 101 TFEU as a result of the Transaction.

6.2. Market for the design and manufacture of nuclear islands

- (72) The market for design and manufacture of nuclear islands where Chinese SOEs⁶⁹ are active may also be vertically affected according to one possible market definition: the global market for pressurised water reactors ("PWR") excluding countries subject to export restrictions and countries exclusively supplied by national suppliers.

- (73) The market shares of the Chinese SOEs are above 30%⁷⁰ only under this market definition and remain moderate (below 33.6%). In addition, most of the sales of Chinese SOEs are made in China (Chinese SOEs' market shares drop to 7%, if sales only made outside of the Chinese market are considered).

- (74) As the downstream market (market for generation and wholesale supply of electricity) where NNB Companies will be active is not affected, only input foreclosure could arise as a consequence of the Transaction. Withholding the Hualong reactor technology would have no effect on plans of NNB Companies' competitors in the UK as these competitors are planning to build nuclear plants with other reactor technologies.⁷¹ There is in addition a wide range of other PWR reactor technologies available in the EEA which are supplied by other nuclear island suppliers (e.g. Toshiba-Westinghouse, Areva, Rosatom, Kepco and MHI). The Chinese SOEs are very unlikely to have the ability to engage in a foreclosure behaviour.

- (75) On the basis of the above, the Commission considers that the vertical relationship arising from the Transaction in relation to (i) the design and manufacture of nuclear islands, irrespective of the segmentation of the market definition and (ii) generation and wholesale supply of electricity will not raise competition concerns.

6.3. Sites considered suitable for building new nuclear power stations

- (76) EDF owns three of the six sites in the UK where development plans have been announced (subject to final investment decisions to be made): the nominated area at these three sites is c.618ha, which is 49.5% of the total area. EDF also owns some land

⁶⁹ The following Chinese SOEs are active in this market: CGN (in China), CNNC (in Argentina, China and Pakistan), State Power Investment Corporation (China and South Africa), as well as Chinergy (a joint venture of Tsinghua and China Nuclear Engineering Group Corporation (CNEC)), Dongfang Electric Corporation, Harbin Power Electric Group China, First Heavy Industries China and Erzhong Heavy Industry (all active in China).

⁷⁰ Market shares are calculated considering 1) reactors planned and under construction as known on 31 December 2014 and 2) reactors planned, under construction and connected to the grid between 2005 and 2014.

⁷¹ NuGen (JV between Toshiba and ENGIE) plans to use AP1000 nuclear reactor technology of Westinghouse, see for instance: <http://www.nugeneration.com/> (Accessed on 4 March 2016); Horizon (owned by Hitachi) plans to use the UK Advanced Boiling Water reactor provided by Hitachi-GE, see for instance: <http://www.horizonnuclearpower.com/about-us>.

at two additional sites where plans have not yet been announced. Neither CGN nor the Chinese State currently own a potential new nuclear site in the UK. EDF will sell shares of NNB Companies⁷² to CGN (rather than title to the land itself).

- (77) Considering a potential vertical relationship between sites considered suitable for building new nuclear power stations and the market for the wholesale generation of electricity, only input foreclosure could arise as a consequence of the Transaction, as the downstream market (market for generation and wholesale supply of electricity) is not affected. The Transaction will however have no impact on EDF's incentive to make available for sale or not its two remaining sites in Great Britain, as EDF will control these two remaining sites both before and after the Transaction and was already present on the downstream market for the generation and supply of electricity. In addition, there are other competitors who own land suitable for the construction of nuclear plants which they can sell or use for building nuclear plants.⁷³ Both of them have announced plans to build plants on their sites, but none of them has taken a final investment decision. These sites were acquired following an auction of sites by the UK Nuclear Decommissioning Authority ("NDA") in 2009: Horizon signed agreements in 2009 to purchase land at Wylfa from the NDA and EDF and land at Oldbury from the NDA, and NuGen signed a contract with the NDA to transfer land at the Sellafield site in 2015 after having signed an option to purchase land in 2009.
- (78) On the basis of the above, the Commission considers that the vertical relationship arising from the Transaction in relation to (i) sites considered suitable for building new nuclear power stations and (ii) generation and wholesale supply of electricity will not raise competition concerns.

6.4. Other markets

- (79) In the course of the market investigation, some players active in markets upstream to the market for the generation and supply of electricity (see paragraph 67 above) expressed concerns about the potential impact on competition of the Transaction. Although these markets are not affected by the Transaction irrespective of the market definition, these players were concerned that the Parties could engage in customer foreclosure by limiting the access to NNB Companies and more generally to EDF or CGN post-Transaction. This would arise as a consequence of CGN's and other Chinese SOEs' presence on markets upstream to the generation and wholesale supply of electricity.
- (80) As regards customer foreclosure in relation to NNB Companies, the Parties would not have the ability to exclude competitors of the markets concerned, as a consequence of the proposed Transaction. Almost all the markets concerned (except construction markets) are at least EEA-wide in scope, while the activities of NNB Companies only concern the UK market and will therefore be insufficient to give EDF and CGN the ability to exclude competitors of CGN and other Chinese State-owned enterprises active in these areas. As regards the construction markets which are national or at most EEA-

⁷² EDF owns land or holds land interests at the three sites. NNB Companies will enter into a series of land arrangements to ensure that they comply with their nuclear site licence conditions imposed by the Office of Nuclear Regulation ("ONR"). The ONR requires that land which is licenced for use as a nuclear power station is controlled by the licensee through freehold or long term lease arrangements.

⁷³ See for example Nugen's website: http://www.nugeneration.com/about_nugen.html and Horizon's website: <http://www.horizonnuclearpower.com/about-us>

wide in scope, Chinese companies are currently not or to a limited extent active in the UK and in the EEA. Customer foreclosure is therefore unlikely in the construction markets as well, as confirmed in the market investigation.

- (81) As regards customer foreclosure outside the UK, EDF which is not vertically integrated will not have the incentive to foreclose competitors of CGN and other Chinese State-owned enterprises.

7. ANCILLARY RESTRICTIONS

- (82) According to Article 6(1)(b), second sub-paragraph, of the Merger Regulation⁷⁴, a decision declaring a concentration compatible with the internal market shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration (so-called "ancillary" restrictions).

- (83) As part of their overall strategic partnership to which the Transaction forms part, the Parties intend to enter into (i) exclusivity arrangements in the UK for which the Parties submit that they should be cleared as part of the Commission's present decision clearing the Transaction and (ii) [geographic scope] cooperation arrangements, for which the Parties provide a specific description in their notification⁷⁵.

- (84) The Parties also intend to create GDA JVCo which is an inherent part of their partnership in relation to the development of nuclear new build projects in the UK. For the sake of legal clarity, since the Parties expressly indicate that this cooperation shall be assessed as part of the Transaction and the related arrangements are defined in the same document⁷⁶ as other arrangements in relation to intellectual property rights ("IPR"), the Commission will clarify below which of these arrangements must be considered as being part or ancillary to the Transaction.

7.1.1. Exclusivity arrangements

- (85) The Parties submit that the exclusivity arrangements contained in the Exclusivity Principles Paper⁷⁷ and described below should be cleared as part of the Commission's overall clearance decision.

- (86) According to the Exclusivity Principles Paper both Parties will be restricted in the UK from:

- [commercial arrangements]⁷⁸;
- [commercial arrangements];
- [commercial arrangements] or
- [commercial arrangements].

⁷⁴ Commission Notice on restrictions directly related and necessary to concentrations ("Notice on ancillary restrictions") (OJ C 325, 22.12.2005, p. 7), paragraph 1.

⁷⁵ Form CO, paragraphs 87-89.

⁷⁶ Annex 3(7) to the Form CO, *IPR Principles Paper*.

⁷⁷ Annex 3(6) to the Form CO.

⁷⁸ As explained in footnote 5, the UK Hualong Technology will consist of [IP arrangements]. (Source: Parties' response to RFI #10, Question 4 and 5).

- (87) These arrangements are subject to a further carve-out that [commercial arrangements].
- (88) The exclusivity arrangements described in the Exclusivity Principles Paper will remain in place until [duration].

Parties' view

- (89) The Parties submit that the rationale behind these exclusivity arrangements is to protect the significant financial, intellectual property and know-how investments being made by the Parties in order to realise the Transaction and enable efficiencies. These efficiencies include the generation of low carbon electricity – therefore contribution to the reduction of the overall cost of decarbonisation – and the introduction of the new UK Hualong Technology – which the Parties consider as a procompetitive factor.

Assessment

- (90) According to paragraph 11 of the Notice on ancillary restrictions, the criteria of direct relation and necessity are objective in nature. Restrictions are not directly related and necessary to the implementation of a concentration simply because the parties regard them as such.
- (91) In order for such arrangements to be necessary for the implementation of the main transaction, the Notice on ancillary restrictions requires that "*[i]n the absence of those agreements, the concentration could not be implemented or could only be implemented under considerably more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably greater difficulty.*"⁷⁹ In addition, "*[a]greements necessary to the implementation of a concentration are typically aimed at protecting the value transferred*".⁸⁰
- (92) The exclusivity arrangements relate to the activities of the JV (building new nuclear plants and developing or supporting nuclear technology to go through the GDA process in the UK) and protect the intellectual property brought by the Parties. These arrangements are therefore directly economically related to the main transaction as defined in the Notice on ancillary restrictions.⁸¹
- (93) As the development and life cycle in the nuclear industry is particularly long and the investment costs required to build a new plant significant, the absence of exclusivity arrangements would lead to considerably more uncertain conditions and increase the risk of free-riding by the Parties. These agreements will therefore protect the value transferred.
- (94) Furthermore, the Notice on ancillary restrictions indicates that "*[i]n determining whether a restriction is necessary, it is appropriate not only to take account of its nature, but also to ensure that its duration, subject matter and geographical field of application does not exceed what the implementation of the concentration reasonably requires*".⁸² In COMP/39736⁸³, the Commission considered that the eight years of Areva

⁷⁹ Notice on ancillary restrictions, paragraph 13.

⁸⁰ *Ibid.*

⁸¹ Paragraph 12.

⁸² *Ibid.*

Nuclear Power SAS ("Areva NP") lifetime had been sufficient for Areva NP to assimilate the know-how contributed by its parents. In the case at hand, the duration of the exclusivity agreements is maximum [duration] years and are not supposed to be renewable which is appropriate in view of the unusually long life cycles in the nuclear industry. The geographic scope of these agreements is the UK and the activities considered relate to fields where the JV will be active. The geographic field and subject matter of application are therefore appropriate.

- (95) In light of the above, the Commission considers that exclusivity arrangements into which the Parties intend to enter are directly related and necessary to the implementation of the Transaction.

7.1.2. *Global cooperation arrangements*

Description of the global cooperation arrangements

- (96) The Parties will enter into arrangements giving effect to [commercial arrangements].^{84,85}

- (97) The Industrial Cooperation Agreement between EDF and CGN also includes the provision that [procurement strategy].⁸⁶

Parties' view

- (98) The Parties submit that the purpose of the [commercial arrangements] is to encourage the Parties to deploy the UK Hualong Technology, which is the direct result of their collaboration, [commercial arrangements]. The [commercial arrangements].⁸⁷ Moreover, the arrangements do not restrict or limit [commercial arrangements]. Finally, the Parties consider that [commercial arrangements], each party would be incentivised to free-ride on the investments of the other Party and this prospect would prevent the Transaction from proceeding in the first place.

- (99) As regards the geographic scope of the [commercial arrangements], the Parties explain that the rationale of the Parties in seeking to attain GDA approval for the UK Hualong Technology is [commercial arrangements]. They refer in particular to the opening recital of the IPR Principles Paper which records the Parties' aim [commercial arrangements].⁸⁸

- (100) As regards the duration, the Parties underline that the Notice on ancillary restrictions provides that it can be "*for the lifetime of the joint venture*".⁸⁹

- (101) The Parties consider that the second arrangement (in relation to sourcing of [procurement strategy]) is not a restriction as such, as it merely concerns EDF's potential [procurement strategy]. Moreover, the obligation merely to "consider" would be very

⁸³ Case COMP/39736 – Siemens/Areva, paragraph 57.

⁸⁴ Annex 3(7) to the Form CO, *IPR Principles Paper*, paragraphs 37-44.

⁸⁵ Parties' response to RFI #8, Question 2 (page 4).

⁸⁶ Annex 3(5) to the Form CO, page 7.

⁸⁷ Subject to the licencing of background IPR by CGN to EDF.

⁸⁸ Annex 3(7) to the Form CO.

⁸⁹ *Ibid*, paragraph 36.

weak. They therefore expressly indicate that this arrangement does not need to be assessed as an ancillary restriction.

Assessment

- (102) The Notice on ancillary restrictions provides that for non-compete obligations to be considered ancillary they need to be "*limited to products and services constituting the economic activity of the joint venture*".⁹⁰ As regards the geographic scope, they need to be "*limited to the area in which the parents offered the relevant products or services before establishing the joint venture*" although it "*can be extended to territories which the parent companies were planning to enter at the time of the transaction, provided that they had already invested in preparing this move*".⁹¹ If the joint venture is set up to enter a new market, reference will be made to "*the products, services and territories in which it is to operate under the joint venture agreement or by-laws. However, the presumption is that one parent's interest in the joint venture does not need to be protected against competition from the other parent in markets other than those in which the joint venture will be active from the outset*".⁹²
- (103) The [commercial arrangements] as envisaged by the Parties will be limited to [commercial arrangements].
- (104) However, the fact that the IPR Principles Paper provides that the Parties should [commercial strategy] is not sufficient to consider [commercial arrangements] cooperation between the Parties as necessary to the Transaction. The Court of First Instance considered that "*It is not a question of analysing whether, in the light of the competitive situation on the relevant market, the restriction is indispensable to the commercial success of the main operation but of determining whether, in the specific context of the main operation, the restriction is necessary to implement that operation*".⁹³ The Transaction foresees the creation of three full-function JVs, each of which will build and operate a new nuclear plant in the UK. The main rationale for EDF entering into the Transaction is to obtain financial investment from CGN as developed in the Form CO.⁹⁴ CGN's objectives are to [CGN's rationale for the transaction].⁹⁵ Even if the Parties had the intention to build other nuclear plants together in the future, there is no concrete step planned as part of the Transaction, as the NNB Companies will be solely active in the UK. In addition, design approvals are conducted nationally by independent nuclear safety authorities. [commercial arrangements] is therefore not necessary for the Transaction.
- (105) In light of the above, the Commission considers that [commercial arrangements] are not ancillary to the Transaction.

⁹⁰ *Ibid*, paragraph 38.

⁹¹ *Ibid*, paragraph 37.

⁹² *Ibid*, paragraph 39.

⁹³ Case T-112/99 (Métropole Télévision – M6), [2001] ECR II-2459, paragraph 109.

⁹⁴ Form CO, paragraph 106. The first sentence of the paragraph also indicates that EDF intends to obtain industrial cooperation and project experience, but the rest of the paragraph primarily develops the cost of the HPC, SZC and BRB projects, and merely indicates that [commercial strategy].

⁹⁵ Form CO, paragraph 107.

7.1.3. Licence agreements

Description of the licence agreements

- (106) As explained in paragraph 7, EDF and CGN will also establish a joint venture, GDA JVCo, which will be owned 33.5% by EDF and 66.5% by CGN. It will be responsible for the day-to-day management and coordination of the GDA process necessary for the UK Hualong reactor technology to be qualified for operation in the UK. In addition, GDA JVCo will have the [IP arrangements].
- (107) The intellectual property rights attached to the GDA JVCo, in particular the [IP arrangements], could be deployed by either party in the future in [IP arrangements]. The Parties also indicate that a [IP arrangements] may be necessary in other projects deploying the UK Hualong Technology. The Parties therefore propose a mechanism by which CGN would [IP arrangements]⁹⁶.

Parties' view

- (108) The Parties expressly indicate that they consider the creation of GDA JVCo as part of the Transaction. They also describe the above-mentioned licencing mechanism between the parents in the Form CO.

Assessment

- (109) The Notice on ancillary restrictions provides that a principle of self-assessment of ancillary restrictions applies and that the Commission will exercise a residual function with regard to specific novel or unresolved issues giving rise to genuine uncertainty.⁹⁷ In the case at hand, in order to avoid uncertainty concerning provisions that are part of the same agreement (IPR Principles Paper), the Commission notes that "*[l]icences granted by the joint venture to one of its parents, or cross-licence agreements, can be regarded as directly related and necessary to the implementation of the concentration under the same conditions as in the case of the acquisition of an undertaking.*" However, this is not the case for licence agreements between the parents.⁹⁸
- (110) As explained in Section 3.2, the Commission considers that the creation of GDA JVCo as an inherent part of the setting up of NNB Companies is part of the Transaction. However, any other licence mechanism between the parents are not considered as ancillary agreements.

⁹⁶ [IP arrangements].

⁹⁷ Paragraph 2.

⁹⁸ Notice on ancillary restrictions, paragraph 43.

8. CONCLUSION

(111) For the above reasons, the European Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation and Article 57 of the EEA Agreement.

For the Commission
(Signed)
Margrethe VESTAGER
Member of the Commission