

## COMMISSION DECISION

of 4 April 2006

## on the State Aid which the United Kingdom is planning to implement for the establishment of the Nuclear Decommissioning Authority

(notified under document number C(2006) 650)

(Only the English text is authentic)

(Text with EEA relevance)

(2006/643/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provision(s) cited above <sup>(1)</sup> and having regard to their comments,

Whereas:

## 1. PROCEDURE

- (1) By letter dated 19 December 2003, registered by the Commission on 22 December 2003, the United Kingdom notified the Commission of the State aid implications of the draft law setting up the Nuclear Decommissioning Authority (NDA), hereinafter 'the Measure'.
- (2) By letter D/51248 of 20 February 2004, the Commission asked questions on the Measure. The United Kingdom replied by letter dated 29 March 2004, registered by the Commission on 15 April 2004.
- (3) By letter D/54319 of 16 June 2004, the Commission asked further questions on the Measure. The United Kingdom replied by letter dated 14 July 2004, registered by the Commission on 19 July 2004.
- (4) The United Kingdom submitted additional information on the Measure by letter dated 10 September 2004, registered by the Commission on 14 September 2004, and by letter dated 14 October 2004, registered by the Commission on 19 October 2004.
- (5) By letter dated 1 December 2004, the Commission informed the United Kingdom that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid.

- (6) The Commission decision to initiate the procedure (hereafter 'the Opening of Procedure') was published in the *Official Journal of the European Union* <sup>(2)</sup>. The Commission called upon interested parties to submit their comments.
- (7) The United Kingdom provided the Commission with its comments on the Opening of Procedure by letter dated 31 January 2005, registered by the Commission on the same day.
- (8) The Commission received comments from interested parties. It forwarded them to the United Kingdom, which was given the opportunity to react. The United Kingdom's comments were received by letter dated 4 March 2005, registered by the Commission on 7 March 2005.
- (9) Meetings between the United Kingdom authorities and the Commission took place on 20 April, 25 August and 11 October 2005.
- (10) The United Kingdom submitted additional information on the Measure by letter dated 23 January 2006, registered by the Commission on the same day. An amendment to this letter was sent by letter of 1 February 2006, registered by the Commission on the same day. Further additional information on the Measure was submitted by the United Kingdom by letter of 7 February 2006, registered by the Commission on the same day. Further additional information was submitted by the United Kingdom by letter of 10 February 2006, registered by the Commission on 10 February 2006. Further additional information was submitted by the United Kingdom by letter dated 29 March 2006, registered by the Commission on 30 March 2006.

## 2. DETAILED DESCRIPTION OF THE AID

- (11) The United Kingdom was one of the first countries worldwide to engage in nuclear technologies, both for civil and military purposes.

<sup>(1)</sup> OJ C 315, 21.12.2004, p. 4.

<sup>(2)</sup> See footnote 1.

- (12) At the time these technologies were first introduced, the emphasis of the industry was on scientific improvements and on gains in efficiency. The management of nuclear liabilities was generally not taken into consideration, or only in a very limited way.
- (13) The rising awareness of the need to ultimately decommission nuclear sites progressively resulted in funds being set aside for the management of nuclear liabilities. However, these funds were generally insufficient to face liabilities the estimated amount of which was still very uncertain, but growing. Even at the end of the 20<sup>th</sup> century, the management of nuclear liabilities was still handled independently by each of their owners, and very much on a case by case basis.
- (14) The UK Government considered that this kind of management had reached its limits and that a new and more efficient method should be put in place in order for nuclear liabilities to be more efficiently handled, while preserving the highest level of safety.
- (15) In 2001, the United Kingdom Government decided to start a review of ways in which the management of public sector nuclear liabilities could be concentrated in the hands of a single public body. A White Paper entitled *Managing the Nuclear Legacy — A strategy for action* was published in July 2002. After a consultation process, the ideas of the White Paper were implemented in legislation in the form of the 2004 Energy Act.
- (16) Under the provisions of this legislation, a new non-departmental public body, known as the Nuclear Decommissioning Authority (NDA), was created. The NDA will progressively be made responsible for the management of most public sector nuclear liabilities in the United Kingdom<sup>(3)</sup>. For this purpose, the ownership of nuclear sites and assets will be transferred to the NDA. Along with the ownership of the assets and sites, the NDA will take over the responsibility for the nuclear liabilities linked to them as well as all financial assets that are clearly attached to these sites.
- (17) The management of nuclear liabilities in an efficient and safe way is the NDA's objective. The NDA can continue to operate the physical assets that are transferred to it if the continued operation of these assets covers more than their avoidable costs and therefore contributes to reducing the value of their liabilities. The NDA is a public authority and does not have a commercial objective. It will not invest in any new asset nor enter any new activity.
- (18) The NDA does not itself decommission the sites for which it will have responsibility. It will contract this task out to other entities. The continued operation of nuclear assets may similarly be contracted by the NDA. Entities contracted by the NDA to manage a site are known as Site Licensee Companies (SLCs). Initially, SLCs will be the former owners of the sites. Later on, they will be selected via competitive procedures, with a view to triggering the development of a real nuclear decommissioning and clean-up market.
- (19) In order to fund its activities, the NDA uses the value of the transferred financial assets and the net revenues that the transferred physical assets generate. Since it is very likely that these resources will not be sufficient to pay for the entire costs of management of the nuclear liabilities, the State will finance the shortfall.
- (20) Assets belonging to the United Kingdom Atomic Energy Agency (UKAEA) have been transferred to the NDA. This aspect of the Measure has already been decided upon by the Commission in the decision referred to in recital (5) above. The Commission found that this aspect of the Measure did not include State aid within the meaning of Article 87(1) of the EC Treaty.
- (21) The NDA has also received assets belonging to British Nuclear Fuels Limited (BNFL). This aspect of the Measure is the object of the present decision. It must be noted that transitional arrangements were put in place by the United Kingdom to ensure that, even though BNFL's assets were formally transferred to the NDA, no State aid is granted until the Commission takes a final decision on the case.
- (22) BNFL is a publicly owned limited company that operates in many fields in the nuclear sector. It is present in nearly all steps of the nuclear fuel cycle: it enriches uranium (through Urenco), supplies nuclear fuel, generates electricity and manages spent nuclear fuel.
- (23) Most but not all of BNFL's nuclear activities and sites have been transferred to the NDA. It has received:
- all Magnox electricity generation sites and the Mawntrog station;
  - the Sellafield site, including in particular the Thermal Oxide Reprocessing Plant (THORP) and the Sellafield Mox Plant (SMP). The Sellafield site also includes one of the Magnox plants referred to above (the Calder Hall station) and a small Combined Heat and Power plant (the Fellside plant);

<sup>(3)</sup> This does not include British Energy's liabilities, although this company has been classified by the British Office of National Statistics as a public sector company after its restructuring.

- the Springfields site, which is dedicated to nuclear fuel manufacturing;
  - the Drigg low level waste disposal site;
  - the Capenhurst site, the decommissioning of which is nearly completed, and which will eventually focus on the storage of uranium materials.
- (24) Other BNFL activities, in particular the ones linked to Urenco and Westinghouse, will not be transferred to the NDA. They will be reorganised, resulting in a smaller residual group.
- (25) Together with the sites mentioned above, BNFL transfers to the NDA a number of financial assets linked to these sites, which were set up in the past to fund at least in part their decommissioning. These assets are:
- the Nuclear Liabilities Investment Portfolio;
  - the Magnox Undertaking;
  - other, more minor, contributions, including in particular the Springfields gilts, which are funds earmarked to cover decommissioning costs at the Springfields site.
- (26) Technically, these assets are not transferred directly to the NDA, but rather consolidated in a Government fund, the Nuclear Decommissioning Funding Account. The Government will in turn fund the NDA by grants.
- (27) In their notification, the UK authorities had provided the Commission with an estimate of the nuclear liabilities and assets that would be transferred to the NDA, together with a split of these amounts between the ones that originate from commercial activities and the ones that originate from non-commercial activities.
- (28) All liabilities linked to UKAEA sites were viewed as non-commercial in the Opening of Procedure.
- (29) In order to estimate the share of the liabilities linked to BNFL sites that originate from non-commercial activities, the United Kingdom had taken the approach that only

financial liabilities still recognised by either the Ministry of Defence (MOD) or the UKAEA were non-commercial. Liabilities linked to assets with dual (commercial/non-commercial) use which were still not recognised by either the MOD or the UKAEA were attributed to BNFL's commercial activities, since BNFL was the operator and owner of these assets, even if they had been used by the MOD or UKAEA in the past.

- (30) The estimated liabilities associated with sites then owned by BNFL, split between commercial and non-commercial activities, was as follows:

Table 1

**Nuclear Liabilities to be transferred to the NDA, estimates as of March 2003, 2003 prices, discounted at 5.4 % nominal, amounts in billion GBP <sup>(1)</sup>.**

	Non-commercial	Commercial	Total Liabilities
Magnox stations sites (except Calder Hall/Chapelcross)	0	3,9	3,9
Sellafield site (except Calder Hall station)	3,8	10,1	13,9
Calder Hall/Chapelcross <sup>(2)</sup>	0,2	0,6	0,9
Springfields site	0,1	0,2	0,2
Capenhurst site	0	0,2	0,3
<b>Total</b>	<b>4,1</b>	<b>15,1</b>	<b>19,1</b>

<sup>(1)</sup> Note: in all Tables, totals may not exactly match the sums of items because of rounding.

<sup>(2)</sup> Unlike the other magnox plants, these two power plants feature some non-commercial liabilities since they were originally military power plants.

- (31) The following table was also provided by the United Kingdom authorities in their notification. It compared the estimated value of the commercial part of the liabilities linked to sites to be transferred to the NDA by BNFL and the economic value of the assets to be transferred to the NDA along with these sites. For physical assets, the economic value was considered to be equal to the cash flows that their continued operation was expected to generate.

Table 2

**Difference between commercial liabilities and assets value as of 31 March 2004, 2004 prices, discounted at 5,4 % nominal, amounts in billion GBP <sup>(1)</sup>.**

Total commercial nuclear liabilities	-14,7
Magnox stations future cash flows	-0,1
Sellafield operations cash flow (THORP & SMP)	2,3
Springfields future cash flows	0,2
Nuclear Liabilities Investment Portfolio	4,3
Magnox Undertaking	7,9
Other customer contributions not included above	0,2
Cash and liquid assets	0,1
<b>Total</b>	<b>0,0</b>

<sup>(1)</sup> Values are discounted at 5,4 % nominal.

### 3. GROUNDS FOR OPENING THE PROCEDURE

- (32) In the Opening of Procedure, the Commission first raised doubts as to which entity would be in receipt of State aid within the meaning of Article 87(1) of the EC Treaty. The Commission took account not only of the situation of the NDA, which might receive direct payments from the State, but also that of BNFL, which could be relieved of charges that it might otherwise have had to bear under the polluter-pays principle.
- (33) The Commission then analysed whether such State aid could be found compatible with the EC Treaty. It expressed serious doubts that this aid was compatible under the guidelines on State aid for environmental protection <sup>(4)</sup>. It also expressed serious doubts that the aid could be found compatible with the Community guidelines on State aid for rescuing or restructuring firms in difficulty <sup>(5)</sup>.
- (34) The Commission then assessed whether such State aid could be found compatible in direct application of Article 87(3)(c) of the EC Treaty, and in the light of the objectives of the Euratom Treaty. The Commission took the view that such an approach could indeed be undertaken in principle, but also expressed doubts that the United Kingdom authorities had submitted sufficient proof that

the positive impact of the aid on fulfilling the objectives of the Euratom Treaty outweighed its negative impact on competition in the internal market.

- (35) Finally, the Commission raised doubts about the possible absence of State aid due to the fact that, before actual competitive procedures can take place, BNFL would act as SLC on a temporary basis.

### 4. COMMENTS FROM INTERESTED PARTIES

- (36) Following the publication of the Opening of Procedure, and within the deadline laid down by that publication, the Commission received comments from three third parties. They are summarised below:

#### Electricité de France (EDF)

- (37) EDF supports the general orientation of the Measure. It considers that it contributes to the achievement of the objectives of the Euratom Treaty. It considers that it is necessary to establish proper conditions for the final disposal of nuclear waste. As regards the financing of the decommissioning of nuclear sites, EDF considers that financial and industrial responsibility must go together and that proper funds must be set aside and secured during operation time. EDF supports the Commission's actions to set up a Community-wide framework for solving such problems, and welcomes the fact that the Commission takes account of the Euratom Treaty in the matter.

#### British Energy plc (BE)

- (38) BE welcomes the establishment of the NDA. It does not see the Measure as likely to have anti-competitive effects in its regard.
- (39) BE points out that it is also a customer of BNFL's current fuel supply and waste management activities. After the transfer of these activities to the NDA and the tendering of their operation by the authority, it may well be that one of the selected new operators will be a competitor of BE. BE is concerned by this situation where it could end up being a customer of one of its competitors.
- (40) BE also draws the Commission's attention to the fact that the setting up of the NDA and its analysis by the Commission should not endanger its own restructuring plan, as approved by the Commission.

<sup>(4)</sup> OJ C 37, 3.2.2001, p. 3.

<sup>(5)</sup> In view of the date of notification of the Measure, the applicable guidelines would be the ones that were published in OJ C 288 of 9.10.1999, p. 2.

- (41) BE goes on to explain that it does not believe that the Measure has any impact on trade as regards the supply of AGR fuel and reprocessing of AGR spent fuel because, even if BNFL's only EU competitor, AREVA, were to settle in the United Kingdom, BE would not be in a position to switch to it because it already has arrangements with BNFL for the lifetime requirements of its AGR stations.
- (42) As regards Magnox power plants and the electricity market, BE believes that the Measure, even if it reduces BNFL's power plants' Short Run Marginal Costs (SRMCs), cannot have an effect on the price at which BE can sell its own nuclear and fossil output. Based on its own experience, BE also believes that the Measure will not artificially prolong the lifetime of BNFL's plants, since, still according to BE's estimates, these power plants should reasonably be in a position to cover their SRMCs.
- (43) BE gives its view of the interactions between the EC and Euratom Treaties. This aspect of the company's comments, though not easy to interpret, seems to suggest that only measures that are not necessary for or that go beyond what is necessary for achieving the objectives of the Euratom Treaty can be analysed under the EC Treaty.

### Greenpeace

- (44) Greenpeace considers that the Measure includes State aid within the meaning of Article 87(1) of the EC Treaty. It states that it is fundamental to ensure the safe decommissioning of nuclear sites, and equally fundamental that the polluter-pays principle should apply to the nuclear industry.
- (45) Greenpeace considers that the aid should not be found compatible with the common market. It considers that the positive impact on the achievement of the safe and efficient management of nuclear liabilities does not outweigh the impact of the Measure on competition.
- (46) Greenpeace's submission is very substantial in size and includes many annexes. An important part of the comments relate to Greenpeace's scepticism about nuclear energy in general and the way it has been handled in Britain in particular. According to Greenpeace, nuclear energy entails very significant risks for the environment. Also, the reprocessing of nuclear waste, as opposed to direct disposal, would be a dangerous and costly option.
- (47) According to Greenpeace, BNFL, one of the most important actors of this sector in the United Kingdom and under public ownership, has been managed in a particularly hazardous and opaque way. Its accounts are difficult to analyse. Poor management of cash and risky investments

that have ultimately proved uneconomic have jeopardised the company's ability to fund its nuclear liabilities. Part of the provisions aimed at matching these liabilities are not liquid, or, as in the case of the Magnox Undertaking, are of a virtual nature. Furthermore, BNFL has always underestimated its liabilities and overestimated its future income, which has worsened its position further. Greenpeace submits a report that analyses and criticises BNFL's investment policy and accounts.

- (48) As regards the Measure more specifically, Greenpeace contends that it should be looked upon as a way for the United Kingdom Government to restructure an ailing company — BNFL — by ridding it of its worst assets and the potentially unfunded liabilities attached to them, in order to allow it to stay on the market and continue as a successful company.
- (49) Greenpeace also questions the nature of the future relationship between BNFL and the NDA. According to Greenpeace, with BNFL becoming an SLC for the NDA, it is difficult to tell which of the two entities is of a commercial nature. If it were the NDA, deriving profit from commercial activities would be contrary to its aim. Furthermore, because of this difficulty in deciding which of the two entities is actually the commercial one, it would be also very difficult to decide who is in receipt of State aid.
- (50) Greenpeace adds that the NDA will probably be creating new waste with its operations, and that it is not clear whether it will set aside monies to pay for waste management.
- (51) Greenpeace also questions the future of Westinghouse, a company owned by BNFL but not transferred to the NDA. Greenpeace questions the viability of Westinghouse without its parent's support. The Commission understands that Greenpeace suggests that, should Westinghouse continue its operations as a part of the BNFL, the historic as well as future ties between BNFL and the NDA might result in a cross-subsidisation from the NDA to Westinghouse. Greenpeace also fears that such a cross-subsidisation might affect the interests of Westinghouse's competitors in the nuclear reactor design business. These cross-subsidisation concerns would be increased if, as Greenpeace suspects, there are plans to sell parts of BNFL to the private sector.
- (52) Greenpeace goes on to consider the specific case of BNFL's reprocessing activities. Greenpeace challenges the United Kingdom authorities' argument that State support to these activities cannot affect trade because nuclear wastes are difficult to transport, and it would therefore be uneconomic for competitors to invest in new reprocessing assets in

Britain. According to Greenpeace, this disregards the fact that nuclear wastes do not necessarily have to be reprocessed, but can also be disposed of via direct storage. New investment in direct storage facilities would be a viable economic alternative to be offered by BNFL's competitors.

- (53) Greenpeace also notes that, according to figures available to it, prices offered by BNFL in its fuel reprocessing contracts appear to be too low to cover costs. BNFL, and hence the NDA, would therefore generate even greater losses with these activities, creating the need for operating aid. To support this comment, Greenpeace quotes a figure of GBP 140 000/tonne for fixed payments by BE to BNFL for managing its spent fuel. Greenpeace compares this figure to estimates of between GBP 330 000/tonne and GBP 533 000/tonne for the comprehensive management of such waste according to independent studies from the University of Harvard and NIREX.
- (54) Greenpeace questions the forecasts for the operation of the SMP. SMP would be difficult to commission, and MOX fabrication would be a decreasingly attractive option for plutonium management.
- (55) Regarding the Magnox plants, Greenpeace considers that their continued operation affects competition in the electricity market, in particular from renewable energies. Greenpeace also submits that Magnox spent fuel should be directly disposed of rather than reprocessed.

##### 5. COMMENTS FROM THE UNITED KINGDOM ON THE OPENING OF PROCEDURE

- (56) The United Kingdom first recalls its commitment to nuclear decommissioning and clean-up. The United Kingdom views the establishment of the NDA as a unique means in Europe attempt to deal with historical nuclear liabilities in a systematic way. The NDA would be expected not only to make decommissioning safer and more efficient but also to pave the way for a real nuclear decommissioning market.
- (57) The United Kingdom believes that the Measure does not constitute State aid to BNFL, since BNFL will no longer own any of the assets whose decommissioning costs may be funded in part by the State. The United Kingdom adds that the transition period during which BNFL will be SLC before SLCs can actually be selected by competitive procedures will not lead to any State aid to BNFL either, since all payments to the company in this period will be benchmarked against international comparators.
- (58) The United Kingdom contends, however, that, even if the Commission were to consider that the Measure includes State aid to BNFL, this aid should be found compatible with the EC Treaty as supporting several objectives of the Euratom Treaty (promoting R&D, health and safety, investment, regular and equitable supply, common market and competition benefits in the nuclear sector). Moreover, the Measure would also deliver environmental benefits consistent with the objective of Article 174 of the EC Treaty.
- (59) The United Kingdom states that it accepts that the Measure is an aid to the NDA. In this case again, it contends that the aid should be found compatible with the common market, for the same reasons. The United Kingdom provides a list of benefits brought by the Measure in the light of the objectives of the Euratom Treaty. For all of these benefits, a qualitative assessment is given, together with a quantitative estimate of the gains where deemed possible.
- (60) The United Kingdom gives a detailed list and assessment of the activities that will remain with BNFL. It also explains how BNFL will be paid for when operating as SLC in the temporary period until SLC can be selected by competitive procedures. BNFL will receive payments for allowable costs only. This will include a duty for NDA to achieve efficiencies of 2 % cost reduction per year. Allowable costs will in principle exclude any return on capital. They will also be capped by the budget of the annual site funding limit as set by the NDA.
- (61) Payments may also include so called 'performance based incentives', which will be awarded only if challenging costs-based performance targets are achieved. The value of these incentives is based on careful benchmarking of the average profit margins of international engineering and construction companies.
- (62) The United Kingdom then gives its views on the impact of the Measure on competition in each of the markets concerned by the sites that are transferred by BNFL to the NDA.
- (63) As regards Magnox power plants, the United Kingdom believes that the Measure will not have any impact on the electricity market. The rank of the magnox plants in the SRMCs order would be always under the marginal plant, even at periods of minimum demand. This would imply that any reduction in SRMCs resulting from the Measure could affect neither the time during which competitors can run their plants nor the price at which they could sell their output.
- (64) As regards the THORP plant of the Sellafield site, the United Kingdom explains that it reprocesses AGR and LWR nuclear spent fuel. New entry into AGR spent fuel reprocessing would be economically very unattractive, due in particular to transport costs to and from Britain, which is the only country where such fuel is used. While storage would indeed be a possible alternative to reprocessing of AGR fuel,

the United Kingdom also contends that the tight time and regulatory constraints for the construction of any new AGR storage site even in Britain would make it also economically unattractive for new entrants, in particular in view of the limited size of the AGR spent fuel disposal market. The same types of arguments are also used for the Springfields plant, which produces only AGR and Magnox fuel.

(65) Concerning LWR spent fuel, the United Kingdom argues that most of this type of fuel to be reprocessed by THORP is already in Britain and that the difficulty of shipping it to the continent would limit the economic incentive for competitors.

(66) As regards the SMP plant of the Sellafield site, the United Kingdom argues that it would be detrimental to competition if it were to cease operation. Indeed, it would remove an important actor in a very concentrated market. Furthermore, the closure of SMP would mean that significant amounts of plutonium would have to be transported regularly out of the United Kingdom, which would be very costly to customers and also potentially dangerous.

(67) As regards the Drigg low level waste repository, the United Kingdom argues that, since most countries do not allow the import of foreign radioactive waste for storage or disposal, the only way to offer competition would be to build another site in Britain. This would be an unattractive investment since obtaining all necessary consents would be difficult. It would also result in excess capacity which would make investment even less attractive. Tendering by the NDA of the operation of the Drigg site would be a more efficient way to promote competition on this market.

#### 6. REPLIES FROM THE UNITED KINGDOM TO COMMENTS FROM INTERESTED PARTIES

##### EDF's comments

(68) The United Kingdom welcomes the support of EDF for the Measure.

##### BE's comments

(69) The United Kingdom welcomes BE's supporting comments for the Measure.

(70) The United Kingdom believes that proper legal measures will ensure that no problems will arise from the potential operation of some of the NDA's sites by BE's competitors.

(71) The United Kingdom is confident that the Commission will take the terms of its decision on the restructuring plan of BE <sup>(6)</sup> fully into account when considering the facts of the present case.

##### Greenpeace's comments

(72) The United Kingdom considers that its comments on the Opening of Procedure already provide significant details on issues addressed by Greenpeace. Its replies to Greenpeace's comments are therefore limited to certain statements of a general nature.

(73) The United Kingdom states that the Measure is in fact wholly consistent with the polluter-pays principle. The BNFL group would contribute to over 88 % of the liabilities through assets transferred to the NDA <sup>(7)</sup>. The aid from the United Kingdom Government would be limited to what is required in recognition of the Government's ultimate responsibility for nuclear safety and security in the country. BNFL would not benefit directly from the assets and commercial revenues it will transfer to the NDA. It will only benefit from potential performance-based incentives for the time it operates the sites if it outperforms the objectives fixed by the Government.

(74) The United Kingdom gives a detailed explanation of the new structure of the BNFL group and its relationship with the NDA.

(75) The United Kingdom also states that the principal function of the NDA is site decommissioning. If operating certain assets on a commercial basis allows the NDA to secure this objective in a less costly way while keeping the same high level safety standards it is authorised to do so. The NDA will make such decisions, not BNFL.

(76) The United Kingdom notes that the Commission has already addressed the issue of the price charged by BNFL to BE for the management of its spent fuel in its decision on the British Energy restructuring aid.

(77) Finally, the United Kingdom challenges Greenpeace's view that the operation of the NDA would be opaque and could lead to cross-subsidisation with BNFL. The United Kingdom claims that, on the contrary, the NDA would be a 'champion of public information'. Its statutes would include several transparency mechanisms for its accounts, expenditures and overall programming.

<sup>(6)</sup> Commission Decision 2005/407/EC of 22 September 2004 on the State aid which the United Kingdom is planning to implement for British Energy plc (OJ L 142, 6.6.2005, p. 26).

<sup>(7)</sup> The United Kingdom later on submitted updated figures demonstrating that, according to the United Kingdom, more than 100 % of the liabilities are covered.

## 7. ASSESSMENT

(78) At least part of the Measure concerns issues covered by the Euratom Treaty and therefore has to be assessed accordingly<sup>(8)</sup>. However, to the extent that it is not necessary for or goes beyond the objectives of the Euratom Treaty or distorts or threatens to distort competition in the internal market, it has to be assessed under the EC Treaty.

### 7.1. Euratom treaty

(79) The establishment of the NDA and the manner in which it will be funded will, by definition, have an impact on the management and funding of nuclear liabilities, including the decommissioning of many nuclear installations and the treatment of large quantities of radioactive waste. Decommissioning and waste management constitute an important part of the life-cycle of the nuclear industry, giving rise to risks which have to be responsibly addressed, and of the costs covered by the sector. In fact, the need to address the risks linked to the dangers arising from ionising radiation constitutes one of the major priorities of the nuclear sector. The Commission notes that after over 50 years of operation of the nuclear industry in the United Kingdom, the issues of decommissioning and waste management are becoming increasingly important, as more facilities reach the end of their lives and important decisions and efforts are required to ensure the health and safety of workers and of the population.

(80) In this regard, the Euratom Treaty deals with this important health and safety issue and at the same time aims at creating the 'conditions necessary for the development of a powerful nuclear industry which will provide extensive energy sources...'. Article 2(b) of the Euratom Treaty provides that the Community, in order to perform its task, is to establish uniform safety standards to protect the health of workers and of the general public and ensure that they are applied. Article 2(c) of the Euratom Treaty also provides that the Community must facilitate investment where appropriate in the nuclear sector. On this basis, the Euratom Treaty establishes the European Atomic Energy Community, creating the necessary instruments and attributing responsibilities to achieve these objectives. In this regard, and as confirmed by the Court of Justice, nuclear safety is a Community competence which must be linked to the protection against the dangers arising from

ionising radiations laid down in Article 30, Chapter 3 of the Euratom Treaty, relating to Health and Supply.<sup>(9)</sup> The Commission must ensure that the provisions of this Treaty are applied and can therefore adopt decisions in the manner provided for in this Treaty or deliver opinions if it considers it necessary.

(81) The Commission takes note of the elements provided by the United Kingdom authorities that the effects of the notified measure will be, *inter alia*, to ensure the safety of nuclear facilities both active and obsolete, to provide for the correct, timely and safe decommissioning of obsolete nuclear facilities, and to store and provide long-term solutions for spent nuclear fuel and radioactive waste.

(82) When assessing this information, and notably in determining whether the Measure is necessary or falls within the objectives of the Euratom Treaty, the Commission notes that the financial support granted by the Government to the NDA is designed to facilitate the previously mentioned objectives of the Treaty. The United Kingdom authorities have decided to create and fund the NDA to ensure the correct establishment of a process of decommissioning and management of the wastes that would adequately protect the health and safety of the workers and the population. The Commission therefore acknowledges that the United Kingdom authorities have addressed their obligations under the Euratom Treaty to provide for safe and adequately provisioned decommissioning in a correct and responsible manner which is compatible with the objectives of the Euratom Treaty.

(83) The notified measure further reinforces the fulfilment of the Euratom Treaty objectives by ensuring that the public intervention will not be used for other purposes than the decommissioning of obsolete nuclear facilities and the safe management of radioactive waste in the context of the discharge of nuclear liabilities. A system of cap and threshold will ensure that enough funds are available for the fulfilment of these goals, while restricting the intervention to the minimum necessary for their achievement.

(84) The Commission concludes that the measures proposed by the United Kingdom authorities are appropriate to address the combination of objectives pursued and are fully in line with the objectives of the Euratom Treaty.

<sup>(8)</sup> Article 305(2) of the EC Treaty lays down that 'the provisions of this Treaty shall not derogate from those of the Treaty establishing the European Atomic Energy Community'.

<sup>(9)</sup> Ruling of the Court of Justice of 10 December 2002 in Case C-29/99.

**7.2. Aid within the meaning of Article 87(1) of the EC Treaty — Application of the polluter-pays principle.**

- (85) According to Article 87(1) of the EC Treaty, State aid is defined as aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and affects trade between Member States.
- (86) In order to analyse whether the Measure includes State aid to BNFL and/or to the NDA, the Commission first assessed whether it provided an advantage to these entities.
- (87) Providing an advantage has to be understood in this respect as the State paying for costs that should normally have been borne by each of the two companies. It is therefore necessary to first establish a benchmark for normal costs to be borne by a company in order to analyse later whether the State is paying part of these costs.
- (88) Under Article 174 of the EC Treaty, the Community policy on the environment shall be based in particular on the principle that the polluter should pay.
- (89) Under Article 6 of the EC Treaty, environmental protection requirements must be integrated into the definition and implementation of the Community policies.
- (90) In practical terms, it is Commission practice to consider that the implementation in State aid policy of the polluter-pays principle requires that the costs of pollution be internalised by polluters<sup>(10)</sup>. This means that such costs should be considered precisely as costs normally to be borne by the polluter, which, in turn, means that their payment by the State should be considered as an advantage granted by the State.
- (91) In the present case, the State will undertake to cover any shortfall in the NDA's ability to cover the costs linked to the nuclear liabilities of the assets that will be transferred to the NDA. Since these liabilities relate to the clean-up of sites contaminated by radioactivity, the Commission considers that they are pollution costs which, as explained above, should normally be borne by the polluters, namely, the operators of the sites. Since the State will pay for part of these costs, these payments should be considered as granting an advantage to the polluters.
- (92) In this respect, the Commission disagrees with the United Kingdom's claim that the Measure fulfils the polluter-pays principle because, according to the United Kingdom's
- figures, over 88 % of these costs will be paid for by the operators. The Commission considers that these estimates show that about 12 % of the pollution costs will not be covered by the polluters, which demonstrates that the Measure does not fully implement the polluter-pays principle.
- (93) Whilst, as explained above, it is relatively easy to determine in this case that the Measure results globally in polluters being granted an advantage because they do not pay the full costs arising from their pollution, it is more difficult to determine the precise extent to which each of the operators is a polluter, and therefore the precise extent to which each of them is relieved of bearing its pollution costs.
- (94) Indeed, the majority of the pollution costs at stake in this case are costs linked to the decommissioning of nuclear power plants that were operated by several operators during their total lifetime. Implementing the polluter-pays principle in this case requires the ability to decide which of the successive operators is responsible for what part of these costs.
- (95) Decommissioning costs are generated in one go in the very first moments of the operation of the plants. Later increments in these costs are marginal as compared with those created at the outset.
- (96) A completely direct implementation of the internalisation of costs principle, which is the translation of the polluter-pays principle, would therefore require that all the plant's decommissioning costs be factored in the price of the first units of energy sold by the plant.
- (97) It is obvious that such an interpretation of the polluter-pays principle would be in complete contradiction with the economics of electricity generation and would be so impracticable that it would not even achieve its own goal. It is therefore generally accepted that, in order to apply the polluter-pays principle to these costs in a way that would be practical, a means should be found of spreading the pollution costs (or, to be more exact, the legal duty to cover them) over at least the expected lifetime of the plant.
- (98) The way these pollution costs are spread has a particular relevance for the application of State aid rules where the State intervenes to pay the decommissioning costs of plants that have been owned by several owners. Indeed, in such a case, the spread of the pollution costs between the successive owners also drives the spread of the potential advantage granted by the State to each of them.

<sup>(10)</sup> See in particular the Community guidelines on State aid for environmental protection (OJ C 37, 3.2.2001, p. 3) in this respect. This approach has also been upheld by the Court in its judgment of 20 November 2003 in Case C-126/01.

- (99) There is no harmonised Community-wide system for allocating decommissioning costs to the successive owners of a nuclear plant. Member States have different systems for implementing a legal duty to meet nuclear liabilities, these systems resulting in different possible attributions of costs between successive plant owners <sup>(11)</sup>.
- (100) Despite the lack of a harmonised system, the Commission considers that it is still possible to identify two broad categories.
- (101) The first type of system consists in treating decommissioning liabilities as investment costs. In this case, the liability to cover these costs is created at the time the plant is turned on, and the cost becomes unavoidable from then on. In accounting terms, liabilities are similar to a debt to a hypothetical decommissioning operator. Like all debt, this one may be repaid in instalments, as well as purchased or sold by various parties. But it is in any event completely triggered as from the beginning of operations.
- (102) The second type of system consists in treating decommissioning liabilities as operating costs. In such cases, the legal liability to cover these costs is created periodically, normally on a yearly basis, as a counterpart for the operation of the plant. Future instalments therefore remain avoidable. In accounting terms, liabilities are similar to an annual tax paid to a hypothetical decommissioning operator. The legal charge for this equivalent of a tax is not completely triggered as from the beginning of the operations, but on a continuous basis during the operation of the plant.
- (103) The two systems above may in practice lead to the same behaviour in many cases, in particular for economically efficient power plants <sup>(12)</sup>. In this case, operators covered by the first system would tend to put money aside to meet their originally triggered liability in the same regular way as they would if they had to meet an annual payment.
- (104) However, they lead to two very different interpretations in State aid analysis in cases where an economically inefficient power plant is transferred from one owner to another under the promise by the State to pay for a shortfall in decommissioning costs.
- (105) Under the first system, liability for funding the whole decommissioning cannot be avoided by the first owner. If he cannot sell a part of this liability under market conditions to the new owner he remains liable for this part, and the new owner cannot be held liable for it, irrespective of the size of this part as compared to the actual time during which the first owner operated the plant. This can lead to a situation where the first owner has to face a burden which is disproportionately high in relation to the time during which it operated the plant and, conversely, the new owner is faced with a burden which is disproportionately low. The economic situation of the power plant is the factor that determines the spread of liabilities. In the extreme case where the power plant is so inefficient that it covers no more than its operating costs, the first owner would be liable for all decommissioning costs and the new one for none. State intervention would then have to be interpreted as an advantage to the first owner only.
- (106) Under the second system, the new operator would in any event have to pay for amounts that would be charged to it under the periodical liability mechanism in the future. These liabilities, on the other hand, are avoidable for the first operator, since the legal duty to pay them is only triggered upon actual operation of the plant. Therefore, the first operator cannot be charged for future liabilities by the new operator under a market transaction unless it receives proper compensation. Under this system, operators therefore always remain liable for their share of the decommissioning costs, whatever the economic situation of the power plant.
- (107) The United Kingdom's method for treating nuclear liabilities is neither of the two reference systems to implement the polluter-pays principle described in recitals (101) and (102) above, since, as has already been mentioned, it does not implement fully the polluter-pays principle. It is nevertheless necessary to refer to one proper benchmark in order to assess the Measure, otherwise it would not be possible to assess the extent to which the polluter-pays principle has not been implemented.
- (108) At the present stage of its legal analysis, the Commission is not in a position to decide whether Community law allows it to impose one of the two methods above in the context of analysing the implications of the polluter-pays principle under the State aid rules. The Commission finds that, in any event, it is not necessary to decide on this question for the present case, since, as will be demonstrated below, the two methods come to the same conclusion as regards BNFL and the NDA, that is, that the Measure does not include State aid to BNFL and includes a State aid to the NDA that can be found compatible with the common market.

<sup>(11)</sup> It must be noted however that, in many Member States with a nuclear industry, the question of successive owners of plants is theoretical since all plants have always been owned by a single operator.

<sup>(12)</sup> In this framework, an economically efficient power plant is deemed to be one that generates enough revenue to cover all its costs, including all decommissioning costs.

7.3. **Aid within the meaning of Article 87(1) of the EC Treaty — Absence of aid to BNFL.**

- (109) The Commission has analysed whether the Measure includes an advantage to BNFL under each of the two reference systems described in recitals (101) and (102) above. As is explained above, both analyses aim at making sure that, consistently with the polluter pays principle, BNFL has covered the part of the nuclear liabilities that is attributable to it by its own means only –and in particular not by State support.
- (110) In conducting these two analyses, the Commission took account of the history of the ownership of the assets under consideration, as well as the history of State intervention in their favour, which is summarised below.
- (111) The Magnox power plants were originally owned and operated by two publicly owned companies that also owned other, non-Magnox, power plants in the United Kingdom. The British nuclear sector was then restructured in several steps.
- (112) In a first step, Magnox plants were separated from non-Magnox plants. The former were grouped together in a single publicly-owned company known as Magnox Electric. A debt corresponding to the book value of the transferred plants was created. This debt was owed to Magnox Electric by the companies now owning only the non-Magnox plants (hereunder referred to as ‘the Non-Magnox Operators’). The debt later on was earmarked for covering the Magnox plants’ complete nuclear liabilities.
- (113) In a second step, the UK Government purchased the debt from Magnox Electric and replaced it with an undertaking to pay for the shortfall of nuclear liabilities, capped with the same value as the debt, and indexed with the same rates. It should be noted that this step did not change Magnox Electric’s position as it was entitled to receive this money as a result of the first step. On the other hand, by this step the State alleviated the debt burden to the Non-Magnox Operators.
- (114) In a third step, BNFL purchased Magnox Electric from the Government for a symbolic price of one pound. At that time, the Government undertaking mentioned above was replaced by a new one, fixed at the newly estimated negative net book value of the power plants: GBP 3,7 billion. It must be noted that, in contrast to what the Commission believed at the time of the Opening of Procedure, this undertaking bears no relationship with the letter of comfort which was approved by the Commission under State aid Case N 34/90<sup>(13)</sup>.
- (115) The Measure represents the fourth and last step of the restructuring. BNFL transfers the power plants to the NDA, together with all financial assets attached to them, including the aforementioned undertaking (hereinafter the Magnox Undertaking).
- (116) The Calder Hall and Chapelcross Magnox plants represent an exception to the process described above. They have been the responsibility of BNFL since 1971, when BNFL was set up and these stations were transferred to it. BNFL assumed ownership and responsibility for the Springfields site at the same time.
- (117) The other assets concerned by the transfer to the NDA, and in particular THORP and SMP, were owned by BNFL from the beginning of their operations until their transfer to the NDA.
- 7.3.1. *Analysis under the first reference system (decommissioning costs as investment costs).*
- (118) Under this analysis, as explained in recital (105), if an installation changes ownership the buyer cannot be held responsible for nuclear liabilities in excess of those he would be ready to acquire from the seller. This means that, in this reference system, where an asset has a negative book value that consists in nuclear decommissioning liabilities, the burden stays with the seller, and, should the buyer agree to take responsibility for the liabilities, it is entitled to receive payment for these liabilities as a negative price.
- (119) In this reference system, when it acquired the plants from Magnox Electric BNFL was therefore entitled to receive the value of the Magnox Undertaking as a negative price for their negative book value. The Magnox Undertaking cannot therefore be interpreted as an advantage given to BNFL, and could be rightly included in the company’s balance sheet as an asset it owned. Thus it can be counted as a contribution by BNFL towards meeting the nuclear liabilities for which it had assumed complete responsibility.
- (120) The same reasoning must be used for the transfer of the assets from BNFL to the NDA: since the NDA takes over all liabilities under this reference system, BNFL should at the same time provide the NDA with positive assets of a total value equal to that of the liabilities transferred. If it did not do so, the difference would constitute aid to BNFL.

<sup>(13)</sup> Commission Decision in State aid case N 34/90. Letter SG(90)D/2049.

(121) The following table, which was provided by the United Kingdom, gives an update of the values of the liabilities and assets transferred by BNFL to the NDA as provided before the Opening of Procedure. It is worth underlining that, as was explained above, the full value of the Magnox Undertaking can be considered as a contribution by BNFL since BNFL was entitled to get this value itself as a payment at the time it purchased the plants.

Table 3

**2005 estimates of assets and liabilities to be transferred from BNFL to the NDA showing BNFL contribution towards its Nuclear Liabilities. March 2005 prices, discounted at 5,4 % nominal, amounts in GBP billion.**

Total Economic Nuclear Liabilities	-15,1
Sellafield operations cash flow (THORP & SMP)	2,6
Springfields future cash flows	0,2
Magnox future cash flows	0,2
Magnox Undertaking	8,3
Nuclear Liabilities Investment Portfolio	4,0
Other customer contributions not included above	0,3
Cash and liquid assets	0,7
<b>Total</b>	<b>1,1</b>

(122) The table above is based on BNFL's accounts. These accounts have been audited. Apart from the increase in value of the Magnox Undertaking due to its indexation, the main change as compared to the figures contained in the Opening of Procedure consists in the fact that BNFL will be transferring more financial assets to the NDA.

(123) The Commission is aware that estimates for future revenue from the Sellafield site can be controversial. Greenpeace attached to its submission a report questioning the pertinence of investment in these assets, and in particular for SMP.

(124) The Commission notes however that THORP's future cash flow is based mostly on contracts which have already been signed and which will be executed in the remaining lifetime of the plant. Estimates of THORP future cash flow are therefore unlikely to be significantly flawed. It may indeed be possible, as Greenpeace argues, that reprocessing will

not be the best environmental solution for nuclear waste final management. However, the Commission considers that the power to make this decision lies solely with the countries concerned and is immaterial to the Community State aid policy.

(125) The situation for SMP is different, since SMP still has to contract most of its operations. The Commission compared the value submitted by the United Kingdom authorities with the one that resulted from the procedure of assessment of BNFL's economic case for the Sellafield MOX plant<sup>(14)</sup>. The Commission found that the figure used by the UK authorities is within the average range of reasonable scenarios resulting from the analysis undertaken by independent consultants for this assessment<sup>(15)</sup>.

(126) The Commission notes Greenpeace's comment that the aforementioned assessment of BNFL's economic case for the Sellafield MOX plant took place after most of the investment costs in SMP had been sunk. This timing meant that investment costs were not taken into account when deciding on the economic rationale for or against operating the plant. The Commission understands that, in this context, the positive result of the assessment could give the wrong impression that investment in SMP was a profitable decision overall, whereas in fact, the result meant only that, since the investment had already been made, it was more logical to operate it in the hope of losing less money overall. However, the Commission notes that this distinction only affects the validity of the choice of the timing of the assessment, not the validity of future cash flow estimates in the assessment.

(127) The estimated future cash flow for Magnox plants takes account of the latest electricity prices in Great Britain. Electricity prices in Britain were particularly high at the end of 2005. It is unclear whether they will stay at that level for a sustained period. However, some of the reasons usually

<sup>(14)</sup> See <http://www.defra.gov.uk/environment/consult/mox/> for all reports submitted in this public consultation.

<sup>(15)</sup> Due to the differences between the discount rates used by consultants and the Commission reference rate, the Commission could only compare reasonable orders of magnitudes and not exact figures.

put forward for high electricity prices, in particular the increase in gas prices and the effect of emission trading, are likely to remain, and could even grow in the case of the effect of emission trading. Furthermore, the figures used for estimating this cash flow, although they take account of the rising trend, are still very cautious as compared to prices witnessed today<sup>(16)</sup>. The Commission therefore believes that this estimate is acceptable for the few years during which Magnox plants will continue to operate.

- (128) The NDA computes and publishes its own estimates of total nuclear liabilities. These estimates are higher than the ones used in BNFL's accounts. They do not distinguish between economic and non-economic liabilities, since this distinction, which is significant for State aid control, is irrelevant for the NDA's activities. However, according to the United Kingdom, splitting the NDA's latest estimates<sup>(17)</sup> for total liabilities into economic and non-economic liabilities in the same proportion as that used for the above computation results in estimated total economic nuclear liabilities reaching GBP 18,2 billion in March 2005 prices (compared to GBP 15,1 billion from BNFL's accounts). The total BNFL contribution resulting from the same computation as in Table 3 above would become negative by GBP 1,9 billion (instead of a positive GBP 1,1 billion<sup>(18)</sup>).
- (129) The Commission acknowledges that nuclear liabilities are difficult to estimate, since they relate to activities that will take place a long time in the future, and of which we still have little experience. This is particularly true of decommissioning activities that concern very specific sites like the ones transferred to the NDA. In view of these uncertainties, the Commission is of the opinion that a GBP 3,1 billion margin of uncertainty out of a total of about GBP 15 to 18 billion is acceptable.
- (130) It is understandable that BNFL's estimate of the liabilities is smaller than the NDA's. Indeed, it is clearly in BNFL's interest to have smaller liabilities in its balance sheet. On the other hand, it is in the NDA's interest to be conservative to get sufficient funding for its activities, especially in a period of budgetary restrictions. The fact that the NDA is under an obligation to achieve a 2 % p.a. gain in efficiencies adds to the incentive to present rather conservative first estimates.
- (131) The UK Government indicates that similar but already more advanced experience in the USA shows that decommissioning costs estimates tend to follow a curve whereby, after an initial growth, they eventually decrease as a result of increased experience and technology improvements.
- (132) Over the last ten years the United States Government has introduced performance-based contracts for nuclear clean-up. This is the approach to clean-up that the NDA is now committed to implementing. Experience in the US has been that over a period of five years or so it is possible to reverse the tendency for liability estimates to increase and in contrast to reduce liability estimates through accelerating work and cost reductions. For example the US Treasury Financial Report for 2003 notes that the Department of Energy reduced its environmental liability by USD 26,3 billion or 12,5 % in fiscal year 2003; this is the second year in a row that Energy's environmental liability has decreased. The decrease in 2003 was primarily due to restructuring the clean-up programme to focus on its core mission and accelerating clean-up<sup>(19)</sup>. A more recent report by the United States Government Accountability Office (GAO) reviewed the Department of Energy's cost reduction target for nuclear clean-up. The GAO report identified that as at March 2005 the Department of Energy was on track or ahead of schedule for many of the 16 clean-up activities it measures and behind schedule for three challenging and costly activities. The GAO report stated that the Department of Energy is still expecting significant cost reductions of the initial target of 50 billion USD<sup>(20)</sup>.
- (133) In view of the above, the Commission considers that it can reasonably consider that, of the two estimates, BNFL's estimate will probably prove to be closer to reality.
- (134) Therefore, the Commission concludes that the Measure does not include any aid to BNFL within this reference system.

### 7.3.2. Analysis under the second reference system (pollution costs as operating costs).

- (135) To calculate BNFL's contribution under this reference system, the first step consists in allocating nuclear liabilities properly to the successive owners of the assets, in a way that is consistent with the fees that a hypothetical decommissioning operator would have charged to each of them. The profile of such a fee would be likely to be tightly linked to the assets' revenues.
- (136) For the Magnox plants, the Commission considers that the most appropriate way to do this is to allocate liabilities on a time proportion basis, since the output of these power plants remains very stable over time.

<sup>(16)</sup> These estimates of electricity prices are in the range of GBP 28MWh to GBP31MWh). As a reference, April 2006 baseload prices are GBP 54,48 MWh and annual 2007 baseload prices (calculated as the average of summer and winter prices) are GBP 53,75/MWh (Source: United Kingdom authorities quoting Platts European Power Daily, 8 February 2006).

<sup>(17)</sup> This estimate is referred to as Lifecycle Baseline 2.

<sup>(18)</sup> Sums may not match perfectly because of rounding.

<sup>(19)</sup> See 2003 Financial Report of the United States Government, p. 11 <http://fms.treas.gov/fr/03frusg.html>.

<sup>(20)</sup> GAO Report to the Chairman and Ranking Minority Member, Subcommittee on Energy and water Development, Committee on Appropriations, House of Representatives *Nuclear Waste* July 2005.

- (137) In the case of Springfields, the allocation distinguished between liabilities linked to the reprocessing of Magnox spent fuel, liabilities linked to the reprocessing of AGR spent fuel and other liabilities. Magnox liabilities are allocated using the same pattern as the one used for Magnox plants above, since nuclear waste generation is directly linked to the plant's electricity output. AGR liabilities are allocated to BNFL in accordance with its arrangement with BE whereby BE retained responsibility for these liabilities until 1995. The same method is used for Magnox-related liabilities of the Sellafield site <sup>(21)</sup>.
- (138) Other (non-Magnox and non-AGR) liabilities in Springfields are allocated on a time proportion basis. The same time proportion method is used for the Drigg and Capenhurst sites.
- (139) The situation is different for the THORP and SMP plants of the Sellafield site. These assets were built by BNFL. THORP was operated first by BNFL, but will continue to be operated by the NDA. SMP will be operated exclusively or almost exclusively by the NDA. Allocating liabilities on a time proportion basis would therefore lead to the attribution of an important share of these liabilities to the NDA.
- (140) However, unlike power plants or fuel supply plants, these assets are not meant to have a steady business plan. They are generally commercially managed in such a way as to generate most of their revenue at the very beginning of their operations. The first contracts that are signed in this respect are known as 'baseload' contracts. Operators aim at recovering if possible all decommissioning costs from the revenue generated by these contracts. This is typically the case for THORP and SMP. In such cases, the Commission believes that, even in this reference system, it is reasonable to allocate all liabilities to the first owner, because a diligent regulator would be likely to fix contributions to repay the full decommissioning costs in such a way as to charge most if not all of them on baseload contracts signed by this owner.
- (141) The Commission notes that comments from Greenpeace point to the fact that it is quite likely that the business prospects for THORP and SMP are not as good as they originally seemed. The Commission however believes that this should not be a reason to deviate in the allocation method, since even if the global activity of the plants is decreased, the overall profile of their revenue generation (that is, with most of the revenues generated in the beginning) should remain the same.
- (142) Accordingly, the Commission has allocated all nuclear liabilities of the THORP and SMP plants to BNFL.
- (143) The second step in the computation consists in calculating the value of BNFL's contribution to these liabilities.
- (144) This contribution must first take account of liabilities that have already been discharged by BNFL. Indeed, a certain

number of sites, including in particular some Magnox plants, have already ceased operation, and decommissioning has started. BNFL has spent GBP 5,1 billion for meeting these liabilities. While doing so, BNFL did not check whether the liabilities it was discharging were 'attributable' to it under the present reference system. However, the whole of this contribution can be included in the computation since either discharged liabilities were attributable to BNFL and therefore can be directly included in the computation, or they were not attributable to it and in this case BNFL provided contribution for more liabilities than it should have, and would have deserved compensation for it.

- (145) Second, the contribution must also take account of the financial assets that BNFL will provide to the NDA. From the value of these assets that will be transferred to the NDA must be subtracted the value that was received by BNFL at the time it purchased the Magnox plants, since only the increase in value of the assets constitutes a contribution from BNFL.
- (146) Finally, future cash flow for SMP and THORP, which will be received by the NDA instead of BNFL, should also be counted as BNFL's contribution, in order to be consistent with the aforementioned decision to attribute all the liabilities of these plants to BNFL.
- (147) The chart below summarises the results of the computation under this reference system:

Table 4

**Estimate of contribution from BNFL to its allocated share of liabilities. 2005 prices, discounted at 5,4 % nominal, amounts in billion GBP.**

Non-Thorp and Non-SMP liabilities allocated to BNFL	a		-8,0
Thorp and SMP liabilities allocated to BNFL	b		-1,4
Total Liabilities to be funded by BNFL	c	a+b	-9,4
Funds to be provided to NDA			
Magnox Undertaking	d		8,3
NLIP	e		4,0
THORP and SMP Future Cash flows	f		2,6
Other assets	g		0,7
Total value of funds	h	d+e+f+g	15,6
Funds provided to BNFL under Magnox transaction			
Magnox Undertaking	i		-5,3
Other funds	j		-4,0
Subtract total funds provided to BNFL	k	I+j	-9,4

<sup>(21)</sup> Except THORP and SMP, which are treated separately.

Value of net funds	l	h-k	6,2
Liabilities discharged by BNFL	m		5,1
Funds Provided towards liabilities	n	l+m	11,4
Result of BNFL administration	o	n-c	2,0

(148) The table above was submitted by the United Kingdom authorities. It is based on figures from BNFL's accounts, as in Table 3.

(149) The considerations developed in recitals (128) to (133) apply in this case too.

(150) Therefore, the Commission concludes that the Measure does not include any aid to BNFL within this reference system.

#### 7.4. Aid within the meaning of Article 87 (1) of the EC Treaty — Presence of aid to the NDA

(151) The two computations described above could also be applied to determine whether and to what extent the Measure gives an advantage to the NDA.

(152) However, the Commission considers that, in this case, the computation is not necessary. Indeed, the Measure provides an unlimited guarantee that the State will cover all the NDA's expenses if these expenses cannot be covered by the authority's revenues from commercial activities or by financial assets transferred to it. Nor is this guarantee is neither limited in scope nor in time. It does not exclude costs linked to competitive activities, in particular where these activities may generate added incremental liabilities, and is not limited in amount.

(153) The Commission considers that this unlimited guarantee is in itself an advantage that is granted by the State to the NDA.

(154) Since this guarantee is financed by the resources of the State and is specifically aimed at the NDA, and since the NDA will continue to have some commercial activities in markets where there is trade between Member States, the Commission concludes that the Measure involves State aid to the NDA within the meaning of Article 87(1) of the EC Treaty.

(155) The Commission notes that the United Kingdom did not challenge the fact that the measure constitutes State aid to the NDA.

#### 7.5. Compatibility assessment of the aid to the NDA under the EC Treaty

(156) Article 87(1) of the EC Treaty provides for the general principle of prohibition of State aid within the Community.

(157) Article 87(2) and 87(3) of the EC Treaty provide for exemptions to the general incompatibility set out in Article 87(1).

(158) The exemptions in Article 87(2) of the EC Treaty do not apply in this case because the Measure does not have a social character and is not granted to individual consumers, it does not make good the damage caused by natural disasters or exceptional occurrences and is not granted to the economy of certain areas of the Federal Republic of Germany affected by its division.

(159) Further exemptions are set out in Article 87(3) of the EC Treaty. Exemptions in Articles 87(3)(a), 87(3)(b) and 87(3)(d) do not apply in this case because the aid does not promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, it does not promote the execution of an important project of common European interest or remedy a serious disturbance in the economy of a Member State, and it does not promote culture and heritage conservation.

(160) Only the exemption in Article 87(3)(c) of the EC Treaty may therefore apply. Article 87(3)(c) provides for the authorisation of State aid granted to promote the development of certain economic sectors, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

(161) The Commission practice is to interpret the text of Article 87(3)(c) as meaning that a measure can be found compatible with the Treaty where its positive contribution to the fulfilment of certain Community objectives outweighs its negative impact on competition on the internal market.

(162) Section 7.1 explains in some detail the compatibility of the Measure with the objectives of the Euratom Treaty. The Commission welcomes the establishment of the NDA and views it as an excellent measure for handling in an efficient way the burden of nuclear liabilities arising from the distant past when environment policies had not yet reached present-day standards. The Commission considers that the NDA will contribute in a decisive way to the best possible implementation of the back end of the nuclear cycle. In this way, it will clearly contribute to the fulfilment of the Community's nuclear policy as set out in the Euratom Treaty. The positive contribution of the Measure is therefore very important, and well established in the Commission's view.

(163) Had the NDA been under an obligation to cease as soon as possible the commercial operation of the assets for which it will be responsible, there would probably have been no significant negative impact of the Measure on competition. However, the United Kingdom did not make this choice, and allowed the NDA to continue the commercial operation of assets under certain conditions. The Commission can only note that, by doing so, the United Kingdom has made it possible for the NDA's operations to have an

impact on the internal market. This makes it necessary to analyse the magnitude of this impact in order to assess the Measure.

- (164) The Commission considers that the continuation of the commercial operation of the assets by the NDA, with the underlying aid from the State, has a very similar impact on competition to that which would result from the continuation of operations of a company in receipt of restructuring aid. The parallelism with the BE restructuring case<sup>(22)</sup> is striking in this respect. In view of these similarities, the Commission considers that the most appropriate way to assess the impact of the Measure on competition and to establish the limits within which it may be found compatible with the common market consists in using the underlying reasoning of the Community guidelines on State aid for rescuing or restructuring firms in difficulty<sup>(23)</sup>, and in particular the need to find proportionate compensatory measures to mitigate the effects of the aid where necessary.
- (165) Before entering into a detailed analysis of the competition situation for each of the assets, the Commission has two general remarks concerning the impact of the Measure on competition.
- (166) The first remark is that the statutes of the NDA themselves mitigate the impact of the Measure on competition even for assets that will continue in operation. A company with a commercial goal would be likely to use operating aid to reduce its costs and sell at low price. In contrast, the NDA will operate assets only if the operation can add value for its main duty, the decommissioning of the plants. The NDA will therefore have no incentive to use aid to provide services below the market price, and certainly no interest in using the aid to decrease its costs. Furthermore, whilst the NDA will continue to operate the existing assets, it will not invest in any new ones. It will therefore not be in its interests to have a commercial policy aimed at gaining influence and market share.
- (167) The NDA will neither invest in new assets nor engage in new activities. The cash flow it will generate by continuing the operation of certain assets will be used solely for the purpose of providing more funding for the discharge of nuclear liabilities. The operating framework for the NDA strictly ringfences all NDA's revenues, preventing them to be used for other purposes.
- (168) All nuclear plants operators should cover in principle their proper share of nuclear liabilities under the polluter pays principle. For this purpose, the UK undertook to require the NDA and Site Licensee Companies for the power plants to undertake to use all reasonable efforts in their prices to recover the share of the liabilities that are attributable to the NDA. In the circumstances where this goal would not be reached, the UK will report to the Commission and inform it on the reasons why it could not be reached.

- (169) The second remark is that the competitive system that the United Kingdom will put in place to designate SLCs will in itself have a very beneficial effect on competition in the internal market. It will create the basis for a real market in the operation of some nuclear sites in the United Kingdom and, more importantly, their decommissioning. The Commission considers that the development of this market is an excellent opportunity for the Community economy as a whole. It will allow the spread of know-how to the whole Community industry. The Measure will therefore have significant positive externalities, which will be useful in particular in view of the numerous nuclear assets that will have to be decommissioned in the Union in the coming decades.
- (170) The Commission has also analysed the competition situation of each of the types of assets that the NDA will continue to operate commercially.

#### 7.5.1. Magnox power plants

- (171) The Magnox power plants are operating on the very competitive Great Britain electricity market.
- (172) The Commission notes the United Kingdom's microeconomic arguments that the Measure, even if it decreased the plants' SRMCs, would not impact the time during which competitors run their plants and the price at which they sell their electricity.
- (173) The Commission has reservations in this respect. Indeed, these arguments may be valid in a single, mostly short term, perfect market, with perfect information, preferably pool based. However, the present electricity market in Great Britain is not such a market. It is mostly based on bilateral contracts, with several futures markets. Furthermore, the market is fundamentally divided between wholesale and direct supply to business, the second segment being apparently more commercially valuable. Without affecting the actual amount of electricity sold by one of the NDA's competitors, the Measure may force it to switch partly to a less attractive part of the market, which would impact its results.
- (174) The Commission therefore considers that the Measure distorts or threatens to distort competition on this market which must be mitigated.
- (175) The ideal way to mitigate the negative impact of the aid on the market would be to cease the operations of the power plants.
- (176) The Commission appreciates however that closing down these power plants immediately might have a negative impact on the efficiency and safety of the decommissioning operations. Indeed, because the Sellafield site would not be in a position to start waste reprocessing for several power

<sup>(22)</sup> See footnote 9.

<sup>(23)</sup> See footnote 8.

plants at such short notice, temporary storage solutions would have to be provided. This would complicate decommissioning works, adding costs and potentially safety concerns. It might also cause problems for security of electricity supply in the already tense Great Britain market. The Commission considers that requiring the immediate closure of the plants is therefore not a proportionate measure for mitigating competition concerns.

- (177) The Commission notes that, whilst the plants will not be closed immediately, the United Kingdom already has a programme to close all of them in the relatively short term, the last station being scheduled to close in 2010. This implies that any impact of the Measure on competitors would decrease and end soon. In particular, the period between the time of this decision and the last closure is of the same order of magnitude as the time necessary for a new entrant on the market to develop a new electricity plant project until commissioning. The NDA also will not start new electricity generation activities nor build any other new asset.
- (178) In order to mitigate the impact of the Measure on the market in the meantime, the Commission examined the possibility of requiring measures from the NDA which would be equivalent in effect to the ones it required from BE in the framework of the State aid case for its restructuring<sup>(24)</sup>. There were three such compensatory measures.
- (179) The first compensatory measure consisted in requiring the separation of BE's nuclear generation, non-nuclear generation and trading business. In the present case, the NDA does not have any significant non-nuclear generation business. The Commission therefore considers that such a compensatory measure would not be meaningful for the present case.
- (180) The second compensatory measure consisted in imposing on BE a six-year ban on increasing capacity. In the present case, in practice, the NDA will not only not increase its electricity generation capacity, but will also gradually phase it out over four years. The effects of this measure are therefore already achieved by the normal functioning of the NDA.
- (181) The third compensatory measure consisted in prohibiting BE from selling electricity on the direct sale to business segment below wholesale market prices.
- (182) The Commission considers that a similar measure is necessary in the case of the NDA. The United Kingdom has undertaken to implement it.
- (183) In practice, the same type of derogations as the ones accepted for BE in cases of exceptional market circumstances will apply. The Commission considers that such

exceptional derogations are necessary in order not to jeopardise the very aim of the Measure. Experience of monitoring the Commission decision in the BE case shows that the derogations did not lead to abuse.

- (184) In the present case, as in the case of BE, the existence of exceptional market circumstances will be defined by the use of concrete and operational tests.
- (185) The tests will however be slightly less cumbersome than in the case of BE. The Commission considers that this is justified and proportionate because NDA's share of the market is much smaller than BE's and the impact of the Measure on the electricity market is therefore less.
- (186) The United Kingdom authorities have offered to implement the measure with the rules defined in recitals (187) to (190).
- (187) Under normal market circumstances, where the NDA wishes to enter into new contracts for sales to end-users, the Secretary of State will appoint an independent expert to report on an annual basis that such contracts have been at prices where the energy component has been set at or above the prevailing wholesale market price.
- (188) Under exceptional market circumstances, the NDA may sell new contracts where the energy component is set below the prevailing wholesale market price but only after the auditors of the NDA, or of companies operating on its behalf, have reached the opinion that one of the two tests set out below for exceptional market circumstances have been met.
- Test A: the NDA, or a company operating on its behalf, offers to sell [...] (\*) for a period of [...] a minimum of [...] for a winter season trade and [...] for a summer season trade at the prevailing wholesale market price in the wholesale market and at the end of that period such offers have not been accepted.
  - Test B: reported trades of season ahead baseload electricity on the United Kingdom wholesale electricity market have totalled less than [...] (gross), averaged over the preceding [...].
- (189) If either test is fulfilled, a period of exceptional market circumstances would commence. The NDA would then be able to sell new contracts for up to [...] to end-users for contracts at prices below the prevailing wholesale market price on the assumption that such pricing behaviour is a commercial necessity during such a period of exceptional market circumstances.
- (190) A period of exceptional market circumstances may not exceed [...]. In order for a subsequent period of exceptional market circumstances to commence either Test A or Test B must again be satisfied.

<sup>(24)</sup> See footnote 9.

(\*) Business secret.

- (191) The Commission considers that this mechanism is a suitable way to implement the compensatory measure. It is based on sufficiently transparent and practicable criteria to enable decisions to be made in a sound and efficient way. It will make it possible to mitigate significantly the distortion of competition in the market during the period pending the closure of Magnox plants.
- (192) In view of the above, the Commission considers that the distortion of competition resulting from the measure, as mitigated by the fact that the plants will close soon and by the compensatory measure that will be put in place, is outweighed by the positive contribution of the Measure on the achievement of the Euratom Treaty objectives.
- 7.5.2. THORP
- (193) The Commission considers that the impact of the Measure as regards the continuation of THORP activities by the NDA is very limited.
- (194) First and foremost, an important part of the reprocessing in THORP is of AGR fuel. In this respect, it does not have any competitors at present. Since BE is now the only source of spent AGR nuclear fuel in Europe, the Commission considers that it is clear no market investor would consider any investment in a new AGR nuclear fuel reprocessing plant.
- (195) Greenpeace argues that direct storage might be an alternative to reprocessing AGR fuel and could be a more attractive solution for an investor.
- (196) The Commission considers however that, even though investment in direct storage may be less costly, it would still remain a very unattractive option. Indeed, as the United Kingdom rightly remarks, BE, as the only source of spent AGR fuel, already has life-time agreements for the managing of its spent AGR fuel. The Commission points out that, contrary to what Greenpeace seems to claim, BNFL was under no obligation to actually reprocess this waste. It is only under a duty to manage it. According to the information available to the Commission, BNFL did not intend to reprocess it all.
- (197) These agreements are the result of a renegotiation of the initial arrangements during the restructuring of the company. Prices are therefore particularly interesting for BE, since, within such a framework, BNFL, like any private investor in a market economy, was ready to offer prices going as low as its marginal costs, surrendering part or all of its fixed costs (it should be noted however that the fixed GBP 140 000/tonne mentioned by Greenpeace and reported in recital (53) is incorrect, since prices in these arrangements depend on electricity prices, as is described in Table 7 of the aforementioned Commission decision on the restructuring of BE).
- (198) The Commission considers it impossible that a competitor, which would have to either build a new storage facility with significant fixed costs, or factor in high transport costs for hazardous material, could make any competitive offer to BE in such conditions.
- (199) Competition concerns are therefore limited to THORP's LWR spent fuel reprocessing activities.
- (200) For these activities, the Commission considers that direct storage is not a real competitor to reprocessing. Indeed, under the economic conditions prevailing now and for the foreseeable future on the uranium market, reprocessing of waste fuel is a significantly more costly option than direct storage<sup>(25)</sup>. The choice of reprocessing over direct storage is therefore very often a policy choice by Governments of countries where the nuclear plants are operated. Such a policy choice, which is often implemented by law or regulation, leaves very little if any room for competitive arbitrage by operators between the two options.
- (201) For the reprocessing of non-AGR fuel THORP has therefore only one competitor in the Union: the French company Areva.
- (202) In this context, the Commission considers that requiring advance closure of THORP to mitigate competition concerns raised by the Measure would potentially create more competition issues than it would solve. Indeed, it would establish Areva as a monopoly that would certainly be of very long duration in view of the technological and financial difficulty of entering this market.
- (203) The Commission believes that in view of the above, a better way to mitigate the impact of the Measure on competition is to ensure that, during the NDA operations, government resources will not be used to enable THORP to compete on a biased basis with Areva.
- (204) It was demonstrated in section 7.3 that BNFL had put aside enough monies to pay for THORP's fixed decommissioning costs. The Commission therefore considers that, in order to ensure that the NDA will not be in a position to offer anticompetitive pricing, it is sufficient to require that the NDA will, for any new contract for THORP, price in all costs, including all incremental nuclear liabilities.
- (205) The United Kingdom has undertaken to implement this complete pricing mechanism. It will apply to all new contracts entered into by the NDA after the date of the present decision. This restriction will not be applied to contracts entered into before the date of the Commission decision or to contracts where formal offers approved by the Nuclear Decommissioning Authority and the United Kingdom's Department for Trade and Industry have been issued to customers and are under negotiation before that date or to contracts entered into after that date pursuant to a Letter of Intent entered into before that date.

<sup>(25)</sup> See OECD/NEA, 'The Economics of the Nuclear Cycle', 1994, which is one of the most complete studies on this aspect to that date.

(206) In view of the above, the Commission considers that the distortion of competition resulting from the measure, as mitigated by the compensatory measure that will be put in place, is outweighed by the positive contribution of the Measure to the achievement of the Euratom Treaty objectives.

### 7.5.3. SMP

(207) SMP's competition situation is also very specific. SMP fabricates MOX fuel. MOX can be used only in a limited number of nuclear power plants that have been designed or adapted for its use. SMP only has two commercial competitors at present: Areva and Belgonucléaire. These two competitors have significant ties. In particular, the Commission understands that, whilst Belgonucléaire has the technological capacity for producing MOX, it is dependent on Areva to assemble a final product for use in nuclear power plants. Moreover, Belgonucléaire sells its products via Commax, a jointly owned subsidiary of Areva (60 %) and Belgonucléaire (40 %).

(208) Should SMP disappear, competition in the market would be restricted, at best to two companies with important common interests, and possibly even to a single company. It is not impossible that Japanese and Russian operators, which today own non-commercial MOX fabrication installations, may begin commercial operation in the next years. However, this is not certain, and the overlap between the operational life of SMP and these possible new non-EU commercial operators may be restricted to a few years.

(209) Within this context, the Commission considers that requiring early closure of SMP to mitigate competition concerns raised by the Measure would potentially create more competition concerns than it would solve.

(210) The Commission believes that in view of the above, a better way to mitigate the impact of the Measure on competition is to ensure that, during the NDA operations, Government resources will not be used to enable SMP to compete on a biased basis with Areva and/or Belgonucléaire.

(211) It was demonstrated in section that BNFL had put aside enough monies to pay for SMP's fixed decommissioning costs. The Commission therefore considers that, in order to ensure that NDA will not be in a position to offer anticompetitive pricing, it is sufficient to require that the NDA will, for any new contract for SMP, price in all costs, including all incremental nuclear liabilities.

(212) The United Kingdom has undertaken to implement this complete pricing mechanism. It will apply to all new contracts entered into by the NDA after the date of the present decision. This restriction will not be applied to contracts entered into before the date of the European Commission's decision or to contracts where formal offers approved by the Nuclear Decommissioning Authority and

the United Kingdom's Department for Trade and Industry have been issued to customers and are under negotiation before that date or to contracts entered into after that date pursuant to a Letter of Intent entered into before that date.

(213) In view of the above, the Commission considers that the distortion of competition resulting from the measure, as mitigated by the compensatory measure that will be put in place, is outweighed by the positive contribution of the Measure to the achievement of the Euratom Treaty objectives.

### 7.5.4. Springfields

(214) By the end of 2006, Springfields' activities will be limited to the production of Magnox and AGR nuclear fuel.

(215) Such nuclear fuels are used only in the United Kingdom. Magnox fuel is used only in the Magnox plants, the last of which will close by 2010. AGR fuel is used only by BE, which renegotiated its long term agreements with BNFL for AGR fuel delivery within the framework of its restructuring.

(216) The same arguments apply as are developed in recitals (196) to (198). No competitor would find it economically attractive to invest in an asset to compete with Springfields' activity. The Commission therefore considers that the impact of the Measure on competition as regards the Springfields site is negligible, and calls for no compensatory measure.

(217) In view of the above, the Commission considers that the distortion of competition resulting from the measure is outweighed by the positive contribution of the Measure to the achievement of the Euratom Treaty objectives.

### 7.5.5. Drigg

(218) The Drigg installation is a repository for low level nuclear waste. It is the only one in Britain.

(219) The United Kingdom authorities informed the Commission that this repository would have sufficient capacity to accommodate all such waste produced in the United Kingdom until 2050. The NDA will be the source of about 90 % of this waste.

(220) Long distance transport of nuclear waste is not recommended, and some countries even ban its import.

(221) The Commission considers that, in these conditions, the scope for a new entrant to compete with the Drigg installation is very limited, and would make the construction of a competing low level waste repository unlikely to have any economic value.

(222) The Commission therefore considers that the impact of the Measure on competition as regards the Drigg site is negligible, and calls for no compensatory measures.

(223) In view of the above, the Commission considers that the distortion of competition resulting from the measure is outweighed by the positive contribution of the Measure to the achievement of the Euratom Treaty objectives.

#### 7.6. BNFL as temporary SLC

(224) In the Opening of Procedure, the Commission expressed concern that BNFL might receive aid from the NDA in the time during which it will be the temporary SLC of the NDA's site before a competitive process can be put in place to designate SLCs.

(225) The Commission notes that the United Kingdom has delivered a complete and detailed explanation of the way SLCs –including BNFL– will be remunerated. Only necessary costs will be paid for, with annual caps. Profit will be excluded from normal payment, and may only be received if efficiency objectives set by the Government are met. Even in this case, these profits will be compared to international benchmarks in the sector.

(226) The Commission considers that this process makes it possible to conclude that SLC funding involves no State aid.

(227) In this respect, the Commission also stresses that it can find no *a priori* reason to believe that SLC contracts, even with BNFL, will entail cross subsidy. On the contrary, it believes that the framework put in place offers much better prospects for transparency than the situation where BNFL operated all its activities within a single group.

#### 8. CONCLUSION

(228) The Commission concludes that the Measure does not include aid within the meaning of Article 87(1) of the EC Treaty to BNFL, and that it does include aid within this meaning to the NDA. Insofar as there is no State aid, this decision is without prejudice to the application of the Euratom Treaty. Insofar as this aid is in line with the objectives of the Euratom Treaty and does not affect competition to an extent which is contrary to the common interest, the Measure in question is compatible with the common market. This decision does not prejudice the Commission's view on potential State aid to other subjects than BNFL and the NDA,

HAS ADOPTED THIS DECISION:

#### Article 1

1. The establishment of the Nuclear Decommissioning Authority by the United Kingdom, notified to the Commission on 22 December 2003, which consists in the transfer to the Nuclear Decommissioning Authority of British Nuclear Fuels Limited's Magnox nuclear power plants, physical assets of the Capenhurst, Driggs, Sellafield and Springfields sites, financial assets linked to these sites, and responsibility for covering their

nuclear liabilities does not include State aid within the meaning of Article 87(1) of the EC Treaty to British Nuclear Fuels Limited.

2. The establishment of the Nuclear Decommissioning Authority as described in paragraph 1 includes aid within the meaning of Article 87(1) of the EC Treaty to the Nuclear Decommissioning Authority which is compatible with the common market and the objectives of the Euratom Treaty, subject to compliance with the conditions set out in Articles 2 to 9 of this Decision.

#### Article 2

As soon as expenditure corresponding to the nuclear liabilities referred to in Article 1 exceeds GBP 15 100 000 000 at March 2005 prices, the United Kingdom shall submit enhanced additional reports to the Commission demonstrating that the expenditure is restricted to meeting the liabilities referred to in that Article, and that proper steps have been taken to limit expenditure to the minimum necessary to meet those liabilities. Such reports shall be submitted yearly.

For the purpose of calculating amounts at March 2005 prices the United Kingdom shall use the reference and discount rate published by the Commission for the United Kingdom, updating this rate every five years.

#### Article 3

1. The United Kingdom shall require the Nuclear Decommissioning Authority and Site Licensee Companies for power plants to undertake not to offer to supply non-domestic end-users who purchase electricity directly from the Nuclear Decommissioning Authority and Site Licensee Companies for power plants on terms where the price of the energy element of the contract with the users is below the prevailing wholesale market price. However, in exceptional market circumstances, where the objective tests set out in Article 4(1) are satisfied, the Nuclear Decommissioning Authority and Site Licensee Companies for power plants may, while such exceptional circumstances continue to prevail, price the energy element of the contract at below the prevailing wholesale market price in good faith where necessary to enable the Nuclear Decommissioning Authority and Site Licensee Companies for power plants to respond to competition, under the conditions set out in Article 4.

2. The United Kingdom shall report to the Commission each year on the compliance of the Nuclear Decommissioning Authority and Site Licensee Companies for power plants with this condition.

#### Article 4

1. Exceptional market circumstances shall be deemed to exist if:

(a) the Nuclear Decommissioning Authority offers to sell [...] for a period of [...] a minimum of [...] for a winter season trade and [...] for a summer season trade at the prevailing

wholesale market price in the wholesale market and at the end of that period such offers have not been accepted (Test A); or

- (b) reported trades of season ahead baseload electricity on the United Kingdom wholesale electricity market have totalled less than [...] (gross), averaged over the preceding [...] weeks (Test B).

2. If either test is fulfilled, the Nuclear Decommissioning Authority and Site Licensee Companies for power plants may sell new contracts for up to [...] to end-users for contracts at prices below the prevailing wholesale market price on the condition that such pricing behaviour is a commercial necessity during such a period of exceptional market circumstances.

3. A period of exceptional market circumstances shall not exceed [...]. In order for a subsequent period of exceptional market circumstances to commence, either Test A or Test B must again be satisfied.

#### *Article 5*

1. The United Kingdom shall require the Nuclear Decommissioning Authority to undertake that the Nuclear Decommissioning Authority and Site Licensee Companies for the Thermal Oxide Reprocessing Plant (THORP) and the Sellafield Mox Plant (SMP) will not supply spent fuel reprocessing and storage services or manufacture of MOX fuel supply contracts at prices less than the relevant projected incremental costs of supply. Such incremental costs shall include related incremental operating costs and any related incremental costs of decommissioning and waste management, and shall comprise such costs as projected shortly before the commencement of the contract.

2. Paragraph 1 shall not be applied to contracts entered into before the date of this decision or to contracts where formal

offers approved by the Nuclear Decommissioning Authority and the United Kingdom's Department for Trade and Industry have been issued to customers and are under negotiation before this date, or to contracts entered into after that date pursuant to a Letter of Intent entered into before that date.

#### *Article 6*

The United Kingdom shall submit a yearly report on the implementation of Articles 3 to 5. The report shall in particular state whether exceptional market circumstances existed in the year concerned and specify the conditions of the resulting contracts. The report shall also state whether contracts were signed in application of the provisions of Article 5(1) in the year concerned, and indicate the conditions of these contracts. The report shall also comment, where applicable, on the evolution of the estimated future cash flow of the assets that were transferred by British Nuclear Fuels Limited to the Nuclear Decommissioning Authority. It will also comment on whether the Nuclear Decommissioning Authority achieved its goal to recover the share of the nuclear liabilities of the power plants that are attributable to the Nuclear Decommissioning Authority, and the reasons why it could not if it did not.

#### *Article 7*

This Decision is addressed to the United Kingdom of Great Britain and Northern Ireland.

Done at Brussels, 4 April 2006.

*For the Commission*

Neelie KROES

*Member of the Commission*