ÁLLAMI TÁMOGATÁS – EGYESÜLT KIRÁLYSÁG

Állami támogatás C 39/2004 (ex N 613/2003) – Nuclear Decommissioning Agency

(2004/C 315/05)

(EGT vonatkozású szöveg)

A Bizottság a 2004. december 1-jei levelében, amelynek szövege a hiteles nyelvi változatban ezen összefoglalót követően megtalálható, értesítette az Egyesült Királyságot az EK-Szerződés 88. cikkének (2) bekezdése szerinti eljárás megindításáról a fent említett intézkedésekkel kapcsolatosan.

Az érdekelt felek benyújthatják az intézkedésre vonatkozó észrevételeiket, amellyel kapcsolatosan a Bizottság eljárást kezdeményez, az ezen összefoglaló és az ezt követő levél közzétételét követő egy hónapon belül, az alábbi címre:

Commission of the European Communities
Competition DG, State aid Greffe
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Ezeket az észrevételeket az Egyesült Királysággal közlik. Az észrevételeket előterjesztő érdekelt felek írásban kérhetik – kérésük okát megnevezve –, hogy személyazonosságukat bizalmasan kezeljék.

ÖSSZEFOGLALÓ

1. Eljárás

2003. december 19-én kelt levelében az Egyesült Királyság („UK”) hatóságai értesítették a Bizottságot a Nukleáris Leszerelési Ügynökség felállításáról szóló törvény állami támogatásokra vonatkozó hatásáról (a továbbiakban: az „intézkedés”). A Bizottság legutóbb 2004. október 19-én kért és kapott tájékoztatást az Egyesült Királyság hatóságaitól.

2. Az intézkedés leírása

Az Egyesült Királyság kormánya Nukleáris Leszerelési Ügynökség (a továbbiakban: NDA) néven állami szervet hoz létre, amelynek feladata a kormányhoz vagy általában az állami szektorhoz tartozó atomenergia-létesítmények leszerelésének kezelése.

Az NDA hatáskörébe kerülnek a jelenleg az Egyesült Királyság Atomenergia-ügynökségéhez (UKAEA) tartozó, és a legtöbb, a Brit Nukleáris Üzemanyag Társasághoz (BNFL) tartozó atomenergia-létesítmény, nevezetesen a Magnox erőművek, a Sellafield létesítmény, a Springfields létesítmény, a Drigg létesítmény és a Capenhurst létesítmény.

A források és a tárgyi javak, valamint a leszerelésre szánt pénzügyi eszközök egy része az NDA-ra kerül átruházásra. A gyártási kiesést az Egyesült Királyság hatóságai finanszírozzák.

Az Egyesült Királyság hatóságainak becslése szerint a kiesés 0 és 2 milliárd GBP közötti összegre tehető.

3. Az intézkedés vizsgálata

Az UKAEA nem végez kereskedelmi tevékenységet. Forrásainak az NDA-ra történő átruházása tehát nem tartozik az állami támogásról szóló szabályok hatálya alá.

A BNFL ezzel szemben kereskedelmi szervezet. Az intézkedés révén a BNFL szelektív versenyelőnyhöz jut, mivel mentesül a „szennyező fizet” elvből eredő kötelességei alól. Ez az előny állami forrásokból kerül finanszírozásra.

Az Egyesült Királyság hatóságai szerint a BNFL tevékenységi köre nem érinti a versenypiacot, tehát az intézkedésben szereplő állami támogatás nem befolyásolja a versenyt és ezáltal a Közösségen belüli kereskedelmet. A Bizottságnak fenntartásai vannak ezzel az érveléssel szemben. A vizsgálat jelenlegi állása szerint az a véleménye, hogy az intézkedés az EK-Szerződés 87. cikke (1) bekezdése értelmében állami támogatásnak minősül.

A Bizottság először a környezetvédelmi állami támogatásról szóló közösségi iránymutatásra ([1]), illetve annak a szennyezett ipari területek rehabilitációját célzó támogatásra vonatkozó rendelkezéseire való figyelemmel vizsgálta meg az ügyet. Úgy véli, kétséges, hogy a támogatás összeegyeztethető-e ezekkel a rendelkezésekkel, mivel a jelek szerint megállapítható, hogy ki a szennyezésért felelős személy, aki legalább részben kötelezhető a rehabilitáció költségének viselésére.

A Bizottság ezután közvetlenül az EK-Szerződés 87. cikke (3) bekezdésének c) pontjára való figyelemmel, az Euratom-Szerződés céljait tekintetbe véve vizsgálta meg az ügyet, hogy felmérje az intézkedésnek a Közösség gazdaságára kifejtett kedvező hatását.

Következtetése szerint a vizsgálatnak ebben a szakaszában kétséges, hogy jelentősebb-e az intézkedésnek az Euratom-Szerződés céljainak teljesítésében kifejtett kedvező hatása, mint a Közösségen belüli kereskedelmi feltételekre gyakorolt kedvezőtlen hatása.

([1]) HL C 37., 2001.2.3., 3. o.

Végül a Bizottság szerint az is kétséges, hogy engedélyezhető-e a támogatás a nehéz helyzetben levő cégek megmentésére és szerkezetátalakítására vonatkozó állami támogatásról szóló közösségi iránymutatás [2] alapján vagy általános gazdasági érdeket képviselő szolgáltatás teljesítéséért nyújtott kárpótlásként.

A fenti megfontolások alapján a Bizottság kétségesnek látja, hogy az intézkedés összeegyeztethetőnek minősül-e a közös piaccal. A Bizottság tehát úgy határozott, hogy eljárást kezdeményez az EK-Szerződés 88. cikkének (2) bekezdése szerint.

Ez a határozat nem sérti az Euratom Szerződés alkalmazását. Az intézkedést az Euratom-Szerződés céljaira való figyelemmel kell vizsgálni. A Bizottság ezért felkéri az Egyesült Királyságot, hogy bocsásson rendelkezésére minden olyan információt, amelynek segítségével az intézkedést az Euratom-Szerződés céljaira való figyelemmel meg lehet vizsgálni.

A 659/1999/EK tanácsi rendelet 14. cikke értelmében minden jogellenes támogatás visszavonható a kedvezményezettől.

A LEVÉL SZÖVEGE

„The Commission wishes to inform the United Kingdom that, having examined the information supplied by your authorities on the measures referred to above, it has decided to initiate partially the procedure laid down in Article 88(2) of the EC Treaty, while examining to which extent the measures are necessary to fulfil objectives of the Euratom Treaty.

1. PROCEDURE

By letter dated 19 December 2003, registered by the Commission on 22 December 2003, the United Kingdom (»UK«) authorities notified the Commission of the State aid implications of the law setting up the Nuclear Decommissioning Authority (hereafter »the Measure«).

By letter ref. D/51248 of 20 February 2004, the Commission asked questions on the Measure. The UK authorities replied by letter dated 29 March 2004, registered by the Commission on 15 April 2004.

By letter ref. D/54319 of 16 June 2004, the Commission asked further questions on the Measure. The UK authorities replied by letter dated 14 July 2004, registered by the Commission on 19 July 2004.

The UK authorities 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.

Meetings with the UK authorities were held on 16 January 2004, 14 July 2004 and 28 September 2004.

2. DESCRIPTION OF THE MEASURE

2.1. Nuclear liabilities in the UK

The UK has been one of the first countries world wide to engage in the technologies of nuclear industry, both for civil and military purposes.

At the time these technologies were first introduced, the emphasis of the industry was put on scientific improvements and on gains on efficiency. The management of nuclear liabilities was generally not taken into consideration, or only in a very limited way.

The rising awareness of the need to ultimately decommission nuclear sites progressively resulted in some funds for the management of nuclear liabilities being set aside. But 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 20th century, the management of nuclear liabilities was still handled independently by each of their owners, and very much on a case by case basis.

The UK authorities consider that this way of management has 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.

In 2001, the UK Government decided to start a review of the way the management of the public sector nuclear liabilities could be concentrated in the hands of a single public body. A White Paper titled »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 a draft legislation: the Energy Bill 2004 [3].

2.2. The Nuclear Decommissioning Authority

Under the provisions of the draft legislation, a new non-departmental public body, known as the Nuclear Decommissioning Authority (»NDA«), will be created. It is presently foreseen that it will be set up formally as of 1 April 2005.

The NDA will progressively be made responsible for the management of most of the nuclear liabilities of the public sector in the UK. For this purpose, the ownership of the sites will be transferred to the NDA. Along with the ownership of the sites, the NDA will be transferred nuclear liabilities linked to them as well as all financial assets that are clearly attached to these sites.

The management of nuclear liabilities in an efficient and safe way will be the NDA's only objective. The NDA will have the possibility to continue to operate the physical assets that will be 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 will not decommission the sites it will have the responsibility of itself. It will delegate this task to other entities. Competition will be progressively introduced in this respect, with a view to trigger the development of a real nuclear decommissioning and clean up market. The continued operation of nuclear assets may be similarly delegated by the NDA to site licensee companies, which will probably at first be the former owners of the sites and will later on be chosen via competition procedures.

In order to fund its activities, the NDA will use the value of the transferred financial assets and the net revenues that the transferred physical assets may 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.

[2] HL C 288.,1999.10.9., 2. o.

[3] This draft legislation can be found at the following web site : http://www.publications.parliament.uk/pa/ld200304/ldbills/002/2004002.pdf.

It is currently foreseen that the NDA will be transferred assets belonging to the UK Atomic Energy Authority (»UKAEA«) and to British Nuclear Fuels Limited (»BNFL«).

2.3. Sites and financial assets that will be transferred to the NDA

UKAEA sites

The UKAEA is a non departmental public body which was created with a view to conduct research in the atomic energy field. During the second part of the 20th century, it worked on a number of programmes involving many nuclear sites. Its main focus has now shifted to research on nuclear sites decommissioning. It is also in charge of the Joint European Torus nuclear fusion research site in Culham.

At present, all UKAEA nuclear sites, but the Culham site, are in the process of being decommissioned, the decommissioning expenses being shared between the UKAEA and the Ministry Of Defence (»MOD«). All UKAEA sites will eventually be transferred to the NDA.

BNFL sites

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, supplies nuclear fuel, generates electricity and manages spent nuclear fuel.

Most of BNFL's nuclear activities and sites will be transferred to the NDA, but not all of them. The NDA will receive:

– all magnox electricity generation sites (10 sites, only 5 of which are operational),

– 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),

– the Springfields site, which is dedicated to nuclear fuel manufacturing,

– the Drigg low level waste disposal site,

– the Capenhurst site, which is presently focused on the decommissioning and storage of uranics material.

Other BNFL activitieswill not be transferred to the NDA, and will remain in a smaller residual company, that will be thereafter referred to as »the New BNFL«. The New BNFL's activities will comprise mostly uranium enrichment and nuclear plants design, maintenance and services. The Commission understands that BNFL's rail subsidiary, Direct Rail Services, will also remain with the New BNFL.

Together with the sites mentioned above, BNFL will transfer to the NDA a number of financial assets linked to these sites, and that were set up in the past to fund at least in part their decommissioning. These assets are:

– the Nuclear Liabilities Investment Portfolio. This financial instrument includes the proceeds of the fund owned by Magnox Electric, from whom BNFL inherited the magnox power stations, and was later funded by BNFL,

– the Magnox Undertaking. This is an undertaking by the United Kingdom's Secretary of State for Trade and Industry to fund part of the magnox power plants' nuclear liabilities. It is considered as an asset in BNFL's accounts,

– other, more minor, contributions, including in particular the Springfields gilts, that are funds earmarked to cover decommissioning costs at the Springfields site.

Technically, these assets will not be transferred directly to the NDA, but rather consolidated in a Government fund: the Nuclear Decommissioning Funding Account (»NDFA«) [4]. The funds in the NDFA will be available for the NDA to use in the discharge of its statutory responsibilities and duties, under the control of the Government. They will not be earmarked for the decommissioning of specific assets.

2.4. Valuation of liabilities and assets transferred to the NDA

The valuation of liabilities and assets that will be transferred to the NDA is difficult, in particular in view of the limited experience accumulated in the field of decommissioning and the very long time span during which decommissioning operations will take place.

Furthermore, because of the historical development of nuclear energy in the UK, sites and even individual assets might have been used for many different purposes, ranging from the development of nuclear weapons to strictly civil commercial programmes.

The UK authorities have provided the Commission with an estimate of the nuclear liabilities and assets that will 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.

All liabilities linked to UKAEA sites are viewed as non-commercial.

In order to estimate the share of the liabilities linked to BNFL sites that originate from non-commercial activities, they have taken the approach that only financial liabilities still recognised by either the MOD or the UKAEA are non-commercial. Liabilities linked to assets with dual (commercial/non-commercial) use and that are not still recognised by either the MOD or the UKAEA were attributed to BNFL's commercial activities, since BNFL is the present operator and owner of these assets, even where they might have been used by the MOD or UKAEA in the past.

The estimated liabilities associated with sites presently owned by the UKAEA are as follows:

[4] As for the Magnox Undertaking, due to its specific nature, it will be extinguished, and an amount equivalent to its value will be credited to the NDFA.

Table 1 — UKAEA nuclear liabilities — breakdown by site, estimates as of March 2003, 2003 prices, amounts in billion GBP

Sites	Discounted at 5,4 % nominal	Undiscounted
Culham	0,1	0,2
Dounreay	2,5	3,8
Harwell	0,6	0,9
Windscale	0,3	0,7
Winfrith	0,4	0,6
Programme Management	0	0,1
Subtotal	4,0 (1)	6,3
BNFL Pre & Post 1971 Liabilities	0,9	2,0
Management of UKAEA fuels & wastes at Sellafield	0,2	0,3
Deep disposal (NIREX)	0,4	1,1
Total	**5,6** (1)	**9,7**

(1) The sum of items differs from the total due to rounding.

The estimated liabilities associated with sites presently owned by BNFL, split between commercial and non-commercial activities, are as follows:

Table 2 — Nuclear Liabilities to be transferred to the NDA, estimates as of March 2003, 2003 prices, discounted at 5,4 % nominal, amounts in billion GBP

	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 (1)	0,3	0,6	0,9
Springfields site	0,1	0,2	0,2
Capenhurst site	0	0,2	0,3
Total	**4,1** (2)	**15,0**	**19,1** (2)

(1) Unlike the other magnox plants, these two power plants feature some non-commercial liabilities since they originally were military power plants.
(2) The sum of items differs from the total due to rounding.

The following table was provided by the UK authorities in their notification. It compares 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 is considered to be equal to the cash flows that their continued operation is expected to generate.

Table 3 — Difference between commercial liabilities and assets value as of 31 March 2003, 2003 prices, amounts in billion GBP

	Discounted at 5,4 % nominal	Undiscounted
Total commercial nuclear liabilities	− 15,0	− 36,4
Magnox stations future cash flows	− 1,3	− 1,4
THORP future cash flows	2,0	2,5
SMP future cash flows	0,3	0,3
Springfields future cash flows	0	0 (1)
Nuclear Liabilities Investment Portfolio	4,1	4,1
Magnox Undertaking	7,5	26,5
Other customer contributions not included above	0,1	0,1
Cash and liquid assets	0,2	0,2
Total	**− 2,0** (2)	**− 4,1**

(1) This item is expected to be positive, but lesser than GBP 50 m.
(2) The sum of items differs from the total due to rounding.

The UK authorities provided later on an update of these estimates aimed at taking account of updates in the evaluation of nuclear liabilities and of the recent upward evolution of electricity prices.

Table 4 — September 2004 update of the difference between commercial liabilities and assets value as of 31 March 2003, 2003 prices, amounts in billion GBP

	Discounted at 5,4 % nominal	Undiscounted
Total commercial nuclear liabilities	− 14,7	− 36,0
Magnox stations future cash flows	− 0,1	− 0,2
Sellafield operations cash flow (THORP & SMP)	2,3	2,3
Springfields future cash flows	0,2	0,2
Nuclear Liabilities Investment Portfolio	4,3	4,3
Magnox Undertaking	7,9	27,2
Other customer contributions not included above	0,2	0,2
Cash and liquid assets	0,1	0,1
Total	**0,0** (1)	**− 2,0** (1)

(1) The sum of items differs from the total due to rounding.

2.5. **Transitional arrangements**

The UK authorities intend to formally set up the NDA on 1 April 2005. For this purpose, a number of steps have to be taken as from the end of year 2004.

The UK authorities are aware that the setting up of the NDA might have implications in terms of State aid. They are aware of the suspensive effect of Article 88(3) of the EC Treaty, which provides that Member States should refrain from putting State aid into effect before approval by the Commission.

For the purpose of being able to formally set up the NDA while complying with Article 88(3) of the EC Treaty, the UK authorities will put in place transitional arrangements that, in their view, ensure that no State aid is granted without a Commission approval.

These transitional arrangements concern the transfer of sites from BNFL to the NDA. The transfer of sites from the UKAEA will take place as initially foreseen.

Under the transitional arrangements, assets will be transferred from BNFL to the NDA, but the NDA funding possibilities will be capped.

Financial assets linked to the transferred sites — with the exclusion of the Magnox Undertaking — will be credited to the NDFA, as well as net revenues from the operation of transferred sites.

The NDA's funding by the Government will be limited in a statutory statement to these amounts.

As a result of this step, the New BNFL will only be allowed to decrease its nuclear liabilities by the value of the financial assets and future net revenues that will have been taken away from it without compensation. Site licensee contracts for the operation of the sites that will be passed between the NDA and the New BNFL during the transitional period will explicitly ensure that no further liabilities are taken out from the New BNFL.

The transitional arrangements will remain in place until a final Commission decision on the Measure.

3. **ASSESSMENT**

At least part of the Measure concerns issues covered by the Euratom Treaty and therefore has to be assessed accordingly ([5]). 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.

3.1. **Existence of aid within the meaning of Article 87(1) of the EC Treaty**

For a measure to constitute State aid within the meaning of Article 87(1) of the EC Treaty, if must provide a selective competitive advantage to certain undertakings, be funded by State resources, and affect trade between Member States.

The Commission first notes that the UKAEA is a Government research Authority that has no commercial activities. It is not an undertaking within the meaning of the EC Treaty. Therefore, that part of the Measure which concerns the transfer of sites from the UKAEA to the NDA is not subject to State aid rules.

The rest of this decision concentrates on the part of the Measure which concerns the transfer of assets presently belonging to BNFL. Indeed, BNFL is clearly an undertaking within the meaning of the EC Treaty. Commercial activities are its very purpose.

The Commission considers in this respect that the split of nuclear liabilities between commercial ones and non-commercial ones that was drawn by the UK authorities is relevant. It is based on a conservative approach which can only result in underestimating the part of the liabilities that can be attributed to non-commercial activities.

Advantage

The normal operational framework for companies the commercial activity of which generates pollution is the polluter pays principle. Under this principle, which is enshrined in Article 174 of the EC Treaty, a company that generates pollution should in normal commercial operations internalise the costs of managing this pollution. This is in particular the case for companies that produce waste or companies that pollute land in such a way that land restoration activities are necessary to make the land available again for other uses after they have ceased operations.

This implies that any payment by the State of costs linked to pollution management relieves the beneficiary company of costs that it should normally bear.

While transferring nuclear liabilities and assets to the NDA, the UK Government will undertake to pay for any shortfall in the funds available for the decommissioning of the sites.

The estimates in Table 3 and Table 4 of the respective values of the liabilities and assets that will be transferred by BNFL to the NDA show that the value of the physical assets, as determined by their future cash flows, does not match the nuclear liabilities attached to them.

The difference between the two values is reduced when one takes account of the financial assets that are attached to the sites and that will be transferred to the NDA along with the physical assets. It does not however come to zero in all scenarios. Furthermore, as will be described in section 3.2, at this stage of the analysis, the Commission considers that the amount of the Magnox Undertaking should not be netted off the liabilities while computing the size of the State support included in the Measure.

Furthermore, among the financial assets transferred to the NDA by BNFL, at least one: the Magnox Undertaking is itself a promise of payment by the State. It can therefore not be netted off the liabilities when computing how much of these will be paid for by the company itself in accordance with the polluter pays principle.

The Measure therefore involves an advantage for BNFL that would have to meet the liabilities with its proper funds alone if the State did not intervene.

([5]) 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„.

At this stage of its analysis, the Commission considers that this advantage will mainly benefit the New BNFL. Indeed, the majority of the value of the commercial liabilities linked to sites that will be transferred to the NDA originate from the operation of these sites by this company or companies that it previously purchased. The polluter pays principle therefore traces the charge for these liabilities to this company. Furthermore, if the sites had been sold in a normal commercial way by BNFL to another company, for example in some restructuring plan, it is the Commission's view that BNFL would have received a negative price for these assets (corresponding precisely to the net liabilities). The competitive advantage linked to the transfer therefore clearly goes in large majority to the New BNFL.

However, at this stage of its analysis, the Commission cannot exclude either that some competitive advantage might also accrue to the economic entity that the NDA might constitute. Indeed, the NDA will be a economic entity as its own, since it will own a number of assets and the revenues that are generated by them. By operating the nuclear assets, it may generate new liabilities, for instance in the form of waste to be treated. As was discussed above, under the polluter pays principle, the NDA is required to cover these new liabilities with its own resources. Now the State will undertake to cover all NDA liabilities if the NDA's resources are insufficient to meet them, be these liabilities transferred to the NDA by BNFL or generated by the operation of the assets by the NDA after their transfer. The Commission cannot at this stage exclude that this State coverage implies some advantage to the NDA itself.

To end with, the Commission notes that, after the sites have been transferred to the NDA, the New BNFL will continue for some time to operate the sites on behalf of the NDA, before a competition process can be organised to select the site operator. At this stage of its reasoning, the Commission is of the opinion that this delegation without a competition process may also include some advantage if it is not duly proved that the contracts under which the New BNFL will operate do not provide it with more that a remuneration for its services under market conditions.

Selectivity

The measure is clearly selective since it benefits at most two economic entities: the New BNFL and the NDA.

State resources

Payments by the UK Government to the NDA will come directly from the State budget. These payments are therefore unquestionably made of State resources.

Impact on trade between Member States

The UK authorities argue that BNFL's activities are so specific that giving State support to them cannot have an impact on competition in general. The absence of impact on competition would imply in particular the absence of impact on trade between Member States.

More precise arguments used by the UK authorities to conclude that the aid has no impact on competition are summarised below for major BNFL activities that will be transferred to the NDA.

– Regarding the magnox power plants, the UK authorities argue that their share of the UK electricity market is negligible (about 3,7 %), and that the electrical links between the UK and other Member States are very limited. This is all the more true of the small Fellside CHP plant which serves to provide steam to the Sellafield site, and which will be transferred along with this site. The magnox plants also are to close within the next few years.

  The UK authorities also argue that BNFL's magnox plants have very low short term marginal costs, which makes them baseload producers who do not directly set the electricity price.

– Regarding the THORP plant, the UK authorities argue that some of the spent fuel to be reprocessed by the plant has already been transferred to Sellafield. It would be difficult and for customers to turn now to BNFL's competitors for these services, all the more as France, the Member State where BNFL's larger competitor — Areva — is located, has a ban on import of spent fuel for long term storage. Safety and time considerations would also be critical.

  Furthermore, BNFL mostly reprocesses magnox and Advanced Gas cooled Reactor's (»AGR«) fuel. Such reactors exist only in the UK. Areva does not have at present the proper tools to handle this type of fuel.

  To end with, the little spare capacity in the future left to Areva even further reduces the risk of distortion of competition in the future, even if THORP takes new contracts after it is transferred to the NDA. Such contracts would be entered into on an economic basis and would cover all incremental costs including those of decommissioning.

– Regarding the SMP plant, the UK authorities argue that it has only two competitors in the Union: the Dessel plant in Belgium and the Melox plant in France. The Dessel plant's capacity is much smaller than the Melox plant's. They add that safety considerations linked to international transport of plutonium to France or Belgium adds important constraints for customers which would wish to choose BNFL's competitors for MOX manufacturing services.

– Regarding the Springfields site, the UK authorities give similar arguments to the ones developed for THORP. 85 % of the nuclear fuel supplied by the Springfields site is magnox or AGR, for which competitors do not own proper manufacturing tools.

– Regarding the Drigg site, the UK authorities note that it is the sole low level waste repository in Britain.

The practise of the Commission and the jurisprudence of the Court in the State aid field usually give a broad interpretation to the concept of impact on trade between Member States. In particular, it is not necessary that the beneficiary of a State support be actually involved in export to another Member State for the support to be considered to have an impact on trade.

In practice, at present, the Commission has found that State support did not have an impact on trade only in the case of local services, mostly in the tourism and leisure sector [6].

The scope for the Commission to conclude that a State support has no impact on trade is therefore limited. At this stage of its analysis, the Commission considers that the arguments put forward by the UK authorities are not sufficient to draw such a conclusion.

In particular:

– Regarding the magnox stations and the Fellside plant, the Commission doubts that the fact that BNFL has a limited share of the electricity market is sufficient to exclude the existence of impact on trade. The size of the beneficiary's market share cannot be construed as an argument for the inexistence of impact on trade. The limited electricity interconnection between the UK and other Member States does not seem sufficient either since this interconnection at least exists. Besides, although BNFL's share of the market is not large, it remains bigger than this of many of its competitors in the UK electricity market.

  The size of the support provided may, on the opposite, have an impact on the existence of a State aid. Under certain conditions, support limited to less than EUR 100 000 for three years for one undertaking is no State aid within the meaning of Article 87(1) of the EC Treaty [7]. This is however far from being the case for the Measure, since the size of the support it brings to BNFL may reach billions of GBP.

  The Commission also doubts that the fact that BNFL's short run marginal costs make it a baseload producer is sufficient to exclude an impact on competition. Without prejudice to a deeper analysis of competition between BNFL's nuclear plants and other types of energy, the Commission notes that British Energy also uses nuclear power plants on the UK market, the short run marginal costs of which also makes them baseload plants. The aid to BNFL's magnox plants could therefore at least be detrimental to British Energy.

– The Commission takes note of the United Kingdom's argument on the fact that BNFL is the only company that has the ability to supply AGR and magnox fuel (via its Springfields plant) or to handle AGR or magnox spent fuel (via THORP). The Commission however doubts that this is sufficient to conclude that there is no impact on trade.

  In particular, the Commission cannot at present make a judgment on whether Areva is scientifically unable to build AGR fuel supply or reprocessing lines, or whether it is only not economically viable for it to invest in such assets. In the latter case at least, one could argue that the State support to BNFL is one of the reasons why Areva does not consider it economically viable to invest in a new AGR fuel management plant. The Commission is aware that Framatome ANP, an Areva and Siemens subsidiary, has been at least studying the possibility to supply AGR fuel, and has gone as far as proposing prices to customers for this operation.

  Moreover, the Commission notes that the AGR spent fuel that will be managed by BNFL in the future may not be reprocessed but rather directly stored. The Commission considers that the absence of reprocessing of the AGR spent fuel may make it easier for BNFL's potential competitors, and in particular Areva, to handle the spent fuel in its place. The Commission is aware that there are legal constraints in many Member States on the transfer of spent nuclear fuel, and even more on the storage of such waste in countries other than their countries of origin. Without prejudice to the Commission's view on the conformity of such constraints with the Community rules, the Commission notes at least that these rules would not preclude a non-British operator to settle in the UK and compete with BNFL in the field of the storage of spent AGR fuel without prior reprocessing. These considerations may also apply to the case of the Drigg repository.

  Finally, the Commission notes that BNFL also manufactures Light Water Reactor (»LWR«) and manages LWR spent fuel, in non negligible amounts. This type of fuel is more widely used in the world. The Commission doubts that it can be held that there is a limited impact on trade for this type of fuel.

– The Commission also doubts that the fact that part of the spent fuel to be reprocessed by THORP is already in the UK can lead to the conclusion that the support has no impact on trade, be it for this very spent fuel.

  It is indeed likely that it would not be economically viable for the owners of this spent fuel to decide now to drop their contract with BNFL. However, one cannot exclude that, in the absence of aid, BNFL may end up in a position where it can no longer fulfil its contractual duties with at least one of its customers. The owners of the non-managed fuel would then have to turn to another service provider. One may argue that the owners might actually prefer to leave their waste in the UK and forget about it rather than pay the expenses linked to finding another spent fuel management service provider. The Commission considers however that this behaviour would probably be illegal from the part of the waste owners. The Commission doubts that it can take account of such circumstances to determine the existence of State aid.

– The Commission also doubts that the fact that SMP has only a few European competitors, of lesser capacity, can lead to the conclusion that there is no impact on trade either. As a matter of fact, the mere existence of one competitor should be sufficient to conclude that there is an impact on trade.

  Information available to the Commission show that spent fuel management services customers may indeed arbitrate between SMP and its competitors to manage their spent fuel.

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[6] See Commission decisions in cases N 258/2000 — Germany — Freizeitbad Dorsten (OJ C 72, 16.6.2001, p. 14); NN 136/A/2001 — France — Mesures concernant l'Ecomusée d'Alsace (OJ C 97, 24.4.2003, p. 10); C 10/2003 — The Netherlands — Steunverlening aan non-profit jachthavens (OJ L 34,6.2.2004, p. 63).

[7] Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid. OJ L 10, 13.1.2001, p. 30.

The recent increase of interest for MOX generation in the framework of neutralisation of military grade plutonium stocks has shown that there was indeed some interest for the European technology in this respect. This could give rise to a non negligible market in the future, for which BNFL and Areva may be competitors. It also shows that safety considerations linked to the transportation of plutonium to a plant within inland France do not necessarily prevent customers from choosing Areva.

It is also important to recall that, in the Commission's view, the main beneficiary of the support is the New BNFL. The analysis of impact on trade of this support therefore also takes account of the activities which stay within the New BNFL, since these activities will benefit from the relief in the company's liabilities.

The New BNFL will be active in particular in the field of nuclear plants design and services, via its subsidiary, Westinghouse.

Westinghouse is one of the world leaders in the field of nuclear plants design. Within the Union, it competes with Framatome ANP, an Areva (France) and Siemens (Germany) company. The market for new nuclear reactors in Europe is not very large at present since a number of Member States have announced that they would renounce to nuclear power. However, Finland has started the construction of a new plant, and France is preparing the way for its new generation of nuclear stations. Furthermore, the market for nuclear plants in non-EU countries is important, with over 30 new power plants in construction, mainly in Asia. Westinghouse and Framatome ANP compete for this market.

Westinghouse and Framatome ANP also compete for the market of services (in particular maintenance) of nuclear plants. This market is very active even in the Union, and is very competitive. For instance, EDF, the French nuclear power stations utility, purchases steam generator services from Westinghouse. Of course, Framatome ANP and Westinhouse also compete for the market of nuclear power plants services outside the Union.

Conclusion

From the above, the Commission considers, in the present state of its analysis, that the Measure is State aid within the meaning of Article 87(1) of the EC Treaty.

3.2. **On the question whether part of the aid is existing**

As was indicated above, one of the financial assets that will be transferred from BNFL to the NDA, namely the Magnox Undertaking, consists in itself of a promise by the State to participate to a given level to the payment nuclear liabilities linked to Magnox nuclear plants.

The history of this undertaking is complex. Based on information provided by the UK authorities and other publicly available information, the Commission understands that it can be summarised as below.

In 1990 the UK Government agreed to meet a shortfall in the funds then available to the company Nuclear Electric to meet its nuclear liabilities. This agreement, which took the form of a Letter of Comfort, was notified to the Commission and approved by it ([8]).

Nuclear Electric was later partly privatised. The part of it which remained public took the name of Magnox Electric.

In 1996, an undertaking was made by the UK Government to assist Magnox Electric in meeting its nuclear liabilities. It is unclear to which extent this undertaking replaced whole or part of the original undertaking towards Nuclear Electric, nor whether the guaranteed amounts were in excess of the original amounts that could be attributed to the magnox power plants.

In 1998, Magnox Electric was acquired by BNFL for a price of 1 GBP. By that transaction, BNFL acquired the stations together with their liabilities and the benefit of the undertaking.

At this stage of its analysis, in view of the limited information available to it, the Commission is not in a position to decide whether the Magnox Undertaking is itself an aid to BNFL, nor to which extent this aid, if it exists, is existing aid within the meaning of Article 1, letter (b), of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([9]) (hereafter »the Procedural Regulation«).

Indeed, it is clear that the original undertaking granted to Nuclear Electric was authorised by the Commission, and is therefore an existing aid in the aforementioned meaning. The later undertaking towards Magnox Electric could also be existing aid to the extent that it did not constitute a substantive modification of the original undertaking.

At this stage of its analysis, the Commission considers that the acquisition of Magnox Electric by BNFL did not change the State aid status of the undertaking.

Finally, the transfer of the Magnox Undertaking to the NDA will not change its value, but it will substantially modify its reach. Indeed, the amounts that were originally foreseen for the use of covering the liabilities linked to the Magnox stations will then become available for the use of covering any of the liabilities transferred to the NDA, which is a much broader scope.

The Commission is at the present stage of its analysis of the opinion that this increase of flexibility will create a new aid within the meaning of Article 1, letter (c), of the Procedural Regulation, whatever its status initially was.

In view of the above, the Commission expresses doubts about the fact that the value of the Magnox Undertaking can be netted off the value of nuclear liabilities while computing the amount of new State aid included in the Measure.

3.3. **Compatibility of the aid — General framework**

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

Article 87(2) and 87(3) of the EC Treaty foresee exemptions to the general incompatibility principle as stated in Article 87(1).

The exemptions in Article 87(2) of the EC Treaty do not apply in the present case because the Measure neither have a social character and are granted to individual consumers, nor make good the damage caused by natural disasters or exceptional occurrences, nor are granted to the economy of certain areas of the Federal Republic of Germany affected by its division.

([8]) Commission decision in State aid case N 34/90. Letter SG(90)D/2049.

([9]) OJ L 83, 27.3.1999, p. 1.

Further exemptions are laid 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 the present case because the aid neither promotes the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, nor promotes the execution of an important project of common European interest or remedy a serious disturbance in the economy of a Member State, nor promotes culture and heritage conservation.

Only the exemption of Article 87(3)(c) of the EC Treaty may therefore apply. Article 87(3)(c) provides for the authorisation of State aid that is 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.

The Commission has published a number of documents aimed at explaining the conditions in the light of which it would analyse cases under Article 87(3)c of the Treaty. Each of these documents aims at a particular sectoral or horizontal State aid objective.

When the objective of a measure does not fall entirely within the scope of the objectives of these documents, the Commission may also analyse the compatibility of a measure directly in the light of Article 87(3)c. The Commission considers that, where the measure concerns the nuclear sector, the objectives of the Euratom Treaty can then be used as a background for such an analysis.

3.4. **Compatibility of the aid — analysis in view of Commission guidelines**

3.4.1. Analysis in the light of the Community guidelines on State aid for environmental protection

Point 6 of the Community guidelines on State aid for environmental protection ([10]) (hereafter »the Environmental Guidelines«) defines the concept of »environmental protection« as any action designed to remedy or prevent damage to our physical surroundings or natural resources, or to encourage the efficient use of these resources.

The aim of the Measure, which is to manage safely liabilities linked to dangerously radioactive material, might fall within this scope.

The Environmental Guidelines list different categories of State aid for the protection of environment that can be approved.

Section E.1.8 of the Environmental Guidelines provides that interventions made by firms repairing environmental damage by rehabilitating polluted industrial sites may come within the scope of the guidelines. The Commission has major doubts whether the decommissioning of nuclear installations can be considered as such an intervention. The rehabilitation refers to repairing damages of European industrial legacy in order to enable a new activity to take place in the polluted site. The decommissioning only ends an activity of existing plant without any direct objectives to utilise the site for another or similar purpose

Furthermore, the Commission doubts that the conditions set out in the Environmental Guidelines for the approval of aid to such interventions are fulfilled in the present case.

Indeed, the Environmental Guidelines foresee that State aid can be granted for such purpose only in the case where the person responsible for the pollution is not identified or cannot be made to bear the rehabilitation costs.

Now the Commission considers that the person responsible for the pollution of BNFL's nuclear sites is clearly identified as BNFL itself, either as the originator of the pollution or as the legal successor to the originators, having taken over all liabilities from them.

The Commission doubts that BNFL cannot be at least partly made to bear the costs of rehabilitation of its sites that will be transferred to the NDA.

Indeed, at that stage of its analysis, the Commission is of the opinion that the full application of the polluter pays principle that underlies the reasoning of this section of the Environmental Guidelines may impose on BNFL to go as far as selling as many of its profitable assets as is necessary to meet rehabilitation costs by its own means. In the foreseen situation, on the opposite, BNFL would isolate its profitable activities, which remain in the New BNFL, from any need to participate to the funding of the liabilities transferred to the NDA.

3.4.2. Analysis in the light of the Community guidelines on State aid for rescuing and restructuring firms in difficulty

The Measure also shares some features with cases where the State intervenes to support the restructuring of a firm in difficulty.

Indeed, the transfer of BNFL's loss making assets to the NDA at no cost of the remaining and profitable part of the company is very akin to the transfer of sunk assets to structures of defeasance owned and operated by the State that often takes place in such cases.

Besides, the taking over of nuclear liabilities by the State was also one of the most important measures in the restructuring plan of another British nuclear stations operator: British Energy plc ([11]).

The aid may therefore be analysed in the light of the Community guidelines on State aid for rescuing and restructuring firms in difficulty ([12]).

However, at the present stage of its analysis, the Commission considers that the UK authorities have not given sufficient evidence that the aid would fulfil the criteria set out in these guidelines, and chiefly the fact that BNFL could be viewed as a firm in difficulty within the meaning of the guidelines.

([10]) OJ C 37, 3.2.2001, p. 3.

([11]) See Commission decision on case C52/03 — UK — Restructuring of British Energy plc. Not yet published in the Official Journal.

([12]) In view of the date of notification of the Measure, the applicable guidelines would be the ones that where published in OJ C 288 of 9.10.1999, p. 2.

3.5. Compatibility of the aid — analysis directly in the light of Article 87(3)c of the EC Treaty and of the objectives of the Euratom Treaty

Article 87(3)c of the EC Treaty states that aid may be compatible with the common market if facilitates the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

In order to analyse the compatibility of a State aid with the common market directly in the light of this Article, the Commission must therefore examine whether the positive effects of the aid on the development of certain economic activities or of certain economic areas outweighs its negative impact on trading conditions between Member States.

The value of the positive impact of the aid on the development of certain economic activities is traditionally assessed in the light of community objectives or policies, like the promotion of research and development, the preservation of the environment of the development of regions in difficulty.

In the present case, the Commission considers that, as the Measure concerns the nuclear sector, the positive impact of the aid can be assessed in the light of the objectives of the Euratom Treaty.

In order to analyse the compatibility of the aid directly under Article 87(3)c of the EC Treaty, it would therefore be necessary to check whether the positive contribution of the measure to the achievement of the Euratom Treaty outweighs its negative impact on trade between Member States.

As was explained above, the UK authorities consider that the aid has limited impact on competition, if any. They also put forward a number of qualitative elements to demonstrate the positive contribution of the measure to the achievement of the Euratom Treaty:

- the Government bears the ultimate responsibility for delivering, and, where necessary, for financing decommissioning and clean-up of nuclear sites. The Measure aims at fulfilling this objective,
- the establishment of the NDA is an efficient way to manage nuclear liabilities,
- the NDA will introduce competition for the provision of decommissioning services,
- the NDA will ensure that the aid is kept to the minimum,
- the NDA is a permanent solution for the management of nuclear liabilities.

In view of the above, the UK authorities consider that the positive contribution of the measure to the achievement of the Euratom Treaty clearly outweighs its very limited negative impact on trade between Member States.

The Commission acknowledges that the aforementioned elements show that the Measure has indeed a positive impact in the achievement of safe and efficient management of nuclear liabilities, which is within the objectives of the Euratom Treaty.

However, at this stage of its analysis, the Commission doubts that the UK authorities have sufficiently demonstrated that these positive elements outweigh the impact of the aid on trading conditions.

To begin with, the Commission considers that the Governments' responsibility for the decommissioning and clean-up of nuclear sites is a responsibility in last resort. The primary responsibility for the decommissioning and clean-up of sites remains with the undertakings. Competition issues may precisely occur in particular in cases where an undertaking is relieved by the State of this responsibility while being allowed to continue its other, potentially profitable, activities.

As was described in section 3.1, the Commission does not at that point of its analysis share the UK authorities' view on the absence or near absence of impact of the aid on competition and therefore on trading conditions to an extent contrary to the common interest.

In view of the very large potential amount of the aid, of the very long time span of the decommissioning activities, and of the absence of previous experience in the assessment of State aid to that sector outside the scope of classical Commission guidelines for State aid, the Commission considers that much more detailed and quantitative arguments should be provided in order to assess the compatibility of the aid.

At this stage of this analysis, the Commission is of the opinion that it would be necessary to determine first precisely which are the markets served by BNFL. Then, one should determine for each of these markets the extent of trade between Member States and the impact of the Measure on this trade.

Then, in order to determine whether the Measure is proportionate to the Euratom Treaty objective it aims at fulfilling, it would be necessary to determine to which extent BNFL's competitors in each of the markets would be in a position to participate to the achievement of these objectives in BNFL's place should the measure not be put in place, and if so, at what cost. This analysis would allow a much more precise view of the balance between the real contribution of the Measure to the Euratom objectives and its real impact on trading conditions.

3.6. Analysis in view of provisions concerning services of general economic interest

Finally, the Commission analysed whether the Measure could be viewed as a compensation for the achievement of a service of general economic interest.

In its Judgement of 24 July 2003, in case C-280/00 ([13]) (hereafter »the Altmark Judgement«), the Court gave a number of cumulative conditions for such a measure to be considered as no aid within the meaning of Article 87(1) of the EC Treaty.

The Commission doubts that these conditions are met.

Indeed, the very first condition set out by the Court is that the recipient undertaking be actually required to discharge public service obligations and those obligations be clearly defined.

([13]) Judgement of the Court of 24.07.2003 in case C-280/00, Altmark trans Gmbh, Regierungsprasidium Magdeburg and Nahverkehrsgesellschaft Altmark Gmbh.

It could be argued that the law that establishes the NDA defines the obligations of this entity and entrusts it of a service of general economic interest that consists in managing nuclear liabilities.

At this stage of its analysis, the Commission doubts that such a task can be considered as a service of general economic interest, in particular in the case where the undertaking which is responsible for the pollution and bears the primary responsibility for the management of the liabilities is still operating and active.

However, in any circumstance, as was described above, the Commission considers that the main beneficiary of the Measure is the New BNFL, that is discharged from liabilities it should normally face. The Commission doubts that the New BNFL can be in any respect viewed as being required to discharge the service of managing the nuclear liabilities, since, on the opposite, the law relieves it from any such activity.

At this stage of its analysis, the Commission is therefore of the opinion that the Measure does not fulfil the first of the four cumulative conditions set out in the Altmark Judgement. The Measure can therefore not be considered as no aid within the meaning of Article 87(1) of the EC Treaty in application of this Judgement.

Irrespective of whether the Almark Judgement applies to the case, the Measure could still be authorised by the Commission as State aid within the meaning of Article 87(1) of the EC Treaty, but compatible with the common market in the light or Article 86(2).

For this purpose, it would be necessary to show that a service of general economic interest was entrusted to the beneficiary by the State, that the compensations for the charges linked to the service are proportionate with this service and that the aid does not affect trade to an extent contrary to the interests of the community.

At this stage of its analysis, the Commission considers that the UK authorities did not provide sufficient evidence to be able to decide that these four criteria are met. In particular, the analysis of the absence of effect on trade to an extent contrary to the interests of the community is identical to the type of analysis that was discussed above in the framework of the direct application of Article 87(3)c of the EC Treaty. The Commission already noted that it was not at present in the position to analyse this effect with sufficient precision in view of the large potential amounts of aid concerned and of the many specificities of the nuclear sector.

The Commission therefore doubts that the Measure can be authorised as a compensation for the achievement of a service of general economic interest.

4. **CONCLUSIONS**

In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 88(2) of the EC Treaty, requests The United Kingdom to submit its comments and to provide all such information as may help to assess the Measure, within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

This procedure concerns only the transfer of assets from BNFL to the NDA. The transfer of assets belonging to the UKAEA is not subject to State aid rules.

The Commission wishes to remind the United Kingdom that Article 88(3) of the EC Treaty has suspensive effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

The Commission warns the United Kingdom that it will inform interested parties by publishing this letter and a meaningful summary of it in the Official Journal of the European Union. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

This decision is without prejudice to the application of the Euratom Treaty. As already stated, the Measure also has to be assessed in view of the objectives of the Euratom Treaty. Therefore, the Commission requests the United Kingdom to provide all such information as may help to assess the Measure in the light of the objectives of the Euratom Treaty”.