Implementation of changes to the Paris and Brussels Conventions on nuclear third party liability - a public consultation

Response form

You may respond to this consultation by email or by post.

Respondent details	
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Tick this box if you are requesting non-disclosure of your response. ☐

Please return by 28 April 2011 to:

Consultation on Paris and Brussels Conventions on nuclear 3rd party liability
Department of Energy and Climate Change
Area 3C
3 Whitehall Place
London
SW1A 2AW

You can also submit this form by email:
parisbrussels@decc.gsi.gov.uk

Please select the category below which best describes who you are responding on behalf of.

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Thank you for taking the time to let us have your views.

The Government does not intend to acknowledge receipt of individual responses unless you tick the box. ✓

Consultation questions

1 **Chapter 4** **Categories of damage**	We would welcome views on our proposed implementation of the new categories of damage as described in this chapter and as set out in the draft Order. Particular questions you may wish to consider include: a) should particular types of claim be prioritised, and if so, how (see paragraph 4.14) b) should we make provision to deal with the case where a claim is made by a public authority for the cost of reinstating property in respect of which compensation has already be paid to the owner (see paragraph 4.29) c) should "compensatory remediation" be expressly included or excluded from the measures of reinstatement that can be claimed for (see paragraph 4.39) d) should we define what constitutes a "grave and imminent threat" and, if so, how (see paragraph 4.66)?
Response	a) We agree that it would be difficult to create a system of prioritisation that could adequately cover all types of incident and that any would be difficult to implement. Our view is that no such provision should be included. b) We believe that this could lead to an inequitable solution where an operator could be liable for the same loss twice. We suggest that in this circumstance the public authority pursue the compensated property owner for the cost of re-instatement. c) We believe that compensatory remediation should be included under s11A provided that its inclusion does not serve purely to increase the quantum of the operator's liability. To this end we believe that the public authority should be required to consider the economic advantage of compensatory remediation as one of the factors in deciding the reinstatement measures that it will take. d) We agree that it is difficult to appropriately define the variety of circumstances that may constitute a "grave and imminent threat". It is important that authorities have the flexibility to take preventative measures to prevent nuclear damage and the interpretation of what constitutes "a grave and imminent threat" should therefore be at their discretion provided that this is exercised reasonably as is contemplated by the current draft Order.

2 **Chapter 5** **Geographical Scope**	We would welcome views on our proposed implementation of the revised geographical scope of the Paris Convention and the Brussels Supplementary Convention as described in this chapter and as set out in the draft Order. Particular questions you may wish to consider include: a) should we align our legislation with the Paris Convention by deleting current section 13 (2) of the 1965 Act. Would any important protections be lost (see paragraph 5.13)? b) how should we define who should be treated as a UK "national" for the purposes of section 16A (see paragraph 5.21)?
Response	a) Given the inconsistency between the geographical scope of the various global regimes which cover nuclear liability we believe that this point is a relatively minor issue. Notwithstanding this our preference is to align the geographical scope of the 1965 Act with that of the Paris Convention and we do not believe that any important protections would be lost through the deletion of section 13(2) of the 1965 Act.
3 **Chapter 6** **Limitation periods**	We would welcome views on our proposed implementation of the revised provisions on limitation periods in the Paris Convention as described in this chapter and as set out in the draft Order. A particular question that you may wish to consider is whether we should apply the 30 year limitation period to claims in respect of injury caused by preventative measures (see paragraph 6.6).
Response	Whilst we understand the rational for longer limitation periods to reflect the long periods of time in which damage can materialise from certain nuclear incidents, we believe that this must be balanced against the operator's ability to provide appropriate financial security for the extended period. Following discussions with the insurance industry we understand there is a substantial reluctance from traditional nuclear insurers to underwrite this risk. Please refer to our comments in section 9 on the provision of financial security for the 30 year limitation period. We believe that claims for personal injury which result from the taking of preventative measures by the public authority will become apparent within 10 years of the measures being taken and that it is therefore unnecessary for the limitation period in respect of such claims to be extended to 30 years. Extending the limitation period in respect of these claims would further exacerbate the financial security issue highlighted above.

4 **Chapter 7** **Liability during transport**	We would welcome views on our proposed implementation of the change to the Paris Convention regarding liability for transport of nuclear substances and the other related matters as discussed in this chapter and set out in the draft Order. In particular, we would welcome views on the options set out in paragraphs 7.11 and 7.12. Is it common for nuclear substances to transit a licensed site while *en route* from one nuclear installation to another?
Response	As a major international transporter of certain categories of nuclear materials we require certainty over when nuclear liability passes between operators. To this extent we welcome the clarity provided by section 7A of the draft Order. One area that does however cause concern is the inclusion of the "direct economic interest" concept which we believe creates uncertainty by deviating from the strict liability imposed on operators under current legislation. Our strong preference would be for each nuclear operator to have nuclear liability for all nuclear material on its site. This approach is aligned with each operator's responsibilities under its nuclear site licence If the concept is to remain, then our strong preference is that the option set out in paragraph 7.11 be adopted. This would obviate any need to assess whether a nuclear operator has a direct economic interest in nuclear materials. In the event that the option in paragraph 7.12 is implemented then a more detailed definition of what constitutes a "direct economic interest" should be included in the draft Order. We suggest that this definition clarify whether storage of a third party's nuclear material as part of a package of services being provided to that third party would constitute a direct economic interest. We also have some uncertainties as to whether the direct economic interest principle adequately provides for situations where title to nuclear materials is transferred between nuclear operators by means of book transfer as opposed to physical delivery. Due to comingling of fungible materials title to specific physical material may be impossible to determine in the case of a nuclear incident. We are happy to elaborate on this matter further if required. In our experience it is not usual for material to transit a third facility en route to its final destination although this does happen on occasion.
5 **Chapter 8** **Financial liability levels**	We would welcome views on our proposed implementation of the revised financial liability levels as described in this chapter and set out in the draft Order.

	In particular, we would welcome views on: a) the likely impact of increasing the standard liability level to €1200 million as compared to €700 million; b) the proposal to set a reduced level specifically for low-risk transport and to use the criteria in the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2009. Is this a practical solution? Would it add significant administrative burdens? Are there alternative criteria that could be used to identify low-risk transport?
Response	<u>Financial Liability Level</u> Whilst we acknowledge the need to establish appropriate levels of financial liability for nuclear operators we believe that a distinction should be drawn between different categories of nuclear facilities based on the level of risk associated with each type of facility. This risk based approach would ensure that each operator is only required to fund an appropriate level of financial security. This could be achieved either by (i) establishing the amount of an operator's nuclear liability based on risk and requiring a commensurate level of financial security to provided or (ii) by establishing the level of financial security based on the level of risk whilst maintaining a generic cap on nuclear liability for all nuclear operators. Pursuant to Article 7(1)(b) of the Paris Convention the government has the ability to exercise its discretion and establish a level of liability for nuclear installations that is lower than €700m "having regard to the nature of the nuclear installation and to the likely consequences of a nuclear incident originating therefrom". We therefore suggest that the government exercise its discretion to establish appropriate levels of liability based on actual risk for lower risk nuclear sites in an amount of between €70m and €700m. Such an approach would be aligned with the governments approach to establishing levels of liability for transport based on the level of risk posed by the material being transported. As an operator of uranium enrichment facility the likely consequences of a nuclear incident originating from our facility are substantially less serious than for nuclear installations which have nuclear reactors on-site. We are of the opinion that the likely damage that would result from a nuclear incident originating from our installation would be considerably lower than €700m. In order to determine the appropriate level of liability a detailed estimate of the likely losses could be prepared by an independent actuary in conjunction with the regulator utilising their assessment of likely consequences. To the extent that the likely losses are significantly lower than €700m we believe that it is not appropriate to apply the same level of liability to enrichment operations. The application of the higher limit may also put the UK at a competitive disadvantage when compared with sites in other countries with lower levels of liability. The government has already exercised its discretion to establish lower

amounts of liability for certain prescribed sites and it therefore seems appropriate to extend this concept to other categories of low-risk site. The lower limit for prescribed sites of €10m was established by the Nuclear Installations (Prescribed Sites) Regulations 1983 ("Prescribed Sites Regulations") and this approach could be extended to establish a further category of new prescribed sites with an appropriate level of liability. An alternative way of introducing this change would be through the inclusion of an additional category of prescribed site directly in s16(2) of the draft Order.

The distinction between the level of risk associated with an enrichment facility and reactor operators is an established concept in other European jurisdictions, and as such this approach would be in-line with other Paris Convention contracting parties. Certain jurisdictions outside of the Paris Convention have also established different levels of liability for low risk nuclear facilities.

- In the Netherlands enrichment facilities fall within a category of low-risk installations that are prescribed with levels of liability between €22.5m and €45m which is lower than the €340m level of liability for other nuclear operators. The concept of low-risk installations is comparable to the prescribed sites within the UK. Enrichment facilities have a €45m level of liability.

- In Germany the position is that whilst all nuclear operator's nuclear liability is unlimited in amount, enrichment facilities are required to carry a lower level (€140m) of financial security than reactor operators.

- France also have the concept of low risk installations which carry a level of liability which is lower than that of nuclear reactor operators.

- In the USA enrichment facilities constructed after 1990 are exempt form the Price-Anderson Act which imposes liability on nuclear operators and provides for the Nuclear Regulatory Commission to determine appropriate levels of liability for such enrichment facilities. The Nuclear Regulatory Commission has subsequently determined that an appropriate level of nuclear liability for URENCO's enrichment facility in New Mexico is $300m, which is substantially less that the level imposed on reactor operators.

The definition of a new category of low risk prescribed site which would capture our enrichment facility could be defined as:

"Any site in respect of which a nuclear site licence is for the time being in force which is not a prescribed site and on which:

a. there is no nuclear reactor; and
b. the primary business activity is the enrichment of uranium for civil nuclear purposes and the management and storage uranium."

	In this response we have only considered the establishment of a separate level of liability for uranium enrichment facilities although we accept the principle that other types of nuclear installation, particularly other participants in the nuclear fuel cycle, which have a lower level of risk should have a level of liability of less than €700m which is commensurate to the level of risk. <u>Low Risk Transport</u> We strongly support the proposal to set a reduced level of liability specifically for low-risk transport. A risk based proportionate approach will ensure that an adequate level of financial security is provided whilst not placing an unnecessary burden on nuclear operators. In principle we have no objection to determining liability levels by reference to the criteria in the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2009. We believe that a preferable approach may however be to determine the level of liability by reference to the material being transported rather than its packaging requirements although we appreciate that both approaches may yield similar results. Whichever approach is chosen, we would like the opportunity to review and comment of the levels of liability afforded to each category of goods whilst being transported.
6 **Chapter 9 – Availability of insurance/financial security**	We would welcome views on the availability of insurance or other financial security. In particular, we would welcome views on: a) what forms of alternative financial security should be acceptable and over what classes of liability might alternative forms of financial security be appropriate? b) how Government should assess operators' proposals for alternative financial security arrangements? In addition, we would welcome views on the Government stepping in as a last resort to fill any insurance gap. How should Government calculate the charge for this?
Response	a) Subject to compliance with appropriate acceptability criteria we believe that a variety of forms alternative financial security should be acceptable in addition to, or as an alternative to, insurance. These should include letters of credit, surety bonds, parent company guarantees and self-guarantees. Permitting operators to use a number of financial assurance options would allow each operator the flexibility of providing security in the way which best meets its needs and will help to ensure that the

pricing of nuclear insurance remains competitive.

As each of the forms of alternative financial assurance products would be for specified sums of money rather than coverage in respect of particular heads of damage, each should be acceptable for the all of the various nuclear liabilities provided that the security is for the total amount of such liability. Operators should have the flexibility of utilising a combination of one or more instruments to provide the full amount of the financial security required.

One area where we believe that it may be apposite for operators to use a combination of different forms of financial security is in respect of short term and continuing liabilities. This is a logical consequence of different attributes of different forms of financial security with insurance and financial instruments being used to provide cash cover for the immediate consequences of an incident and operating cash flows originating from a diversified portfolio of assets being used to meet long-term accretive consequences.

For certain operators this tiered approach to the provision of financial security may provide a useful solution to the issue of insurers not be willing to provide coverage for the 30 year limitation period as it would allow operators to provide alternative financial security (such as a parent company guarantee) in respect of losses occurring after expiry of the insurable limitation period.

(b) The Government should assess operators' proposals for alternative financial assurance arrangements against a codified set of guidance which is available to all operators. Such guidance should explicitly state the requirements for each form of financial security.

A good example of such guidance is the Nuclear Regulatory Commission's guidance on decommissioning financial assurance which is set out in Appendix A of the Consolidated NMSS Decommissioning Guidance, NUREG-1757 volume 3. This approach ensures that requirements are clearly understood by both operators and regulators and that a detailed assessment of the acceptability of each type of financial assurance is not required in each instance.

The requirements for letters of credit and surety bonds should include qualifications in respect the issuer of the instrument, should be issued in favour of the government, and should be payable in the event that the operator has failed to provide sufficient funds to meet its nuclear liabilities following a nuclear incident.

Parent Company Guarantees and Self-Guarantees should be accepted provided that the guarantor meets specified financial criteria. Such criteria could be that the issuer has a minimum net

	worth of a multiple of the operators nuclear liability, a minimum credit rating and/or fulfils certain financial ratios. For practical reasons it would be useful for the government to provide model forms of alternative financial security together with checklists of required and prohibited terms.
7 **Chapter 10 - Jurisdiction**	We would welcome views on our proposed implementation of the Paris Convention changes regarding allocation of jurisdiction, both between Paris countries and within a Paris country, as described in this chapter and set out in the draft Order. In particular, we would appreciate views on: a) whether basing our tie-breaker provisions on the impact of an occurrence, event or breach of duty would be a workable solution – how practicable would it be to measure impact (see paragraph 10.16)? b) whether we need a fall back provision giving jurisdiction to the High Court of Justice (see paragraph 10.17). In addition we would welcome views on our proposed clarification of "occurrence" in new section 26(2A) of the 1965 Act.
Response	a) In reality we believe that it in most situations it would be relatively straight forward to determine where the greatest impact has occurred. b) We see this as a sensible approach in order to give certainty to operators. With regards to the definition of "occurrence" we believe it should be ensured that a series of incidents arising from the same event counts as a single occurrence for the purposes of the 1965 Act.
8 **Chapter 11 – nuclear waste disposal facilities**	We would welcome views on our proposals for implementing the Paris Convention requirements in respect of nuclear waste disposal facilities. In particular, we would welcome views on the number of commercial waste disposal facilities who may be affected by the proposed changes and how they may be affected.

Response	It is our view that LLW disposal facilities should be excluded from this as they pose a sufficiently low risk. To include LLW disposal facilities under the regime would increase the price of the services they provide to reflect their cost of obtaining nuclear liability insurance.
9 Chapter 12 Representative actions	We would welcome views on our proposals for implementing the new Paris Convention requirements in respect of representative actions.
Response	We view it as sensible to include these provisions as they allow for the co-ordination of claims to be undertaken by a national authority.

Impact assessment questions

IA1	Can you provide information on current actual costs of financial security and the impact of the proposed changes?
Response	We are not in a position to provide details of these costs due to the uncertainty of the availability of insurance.
IA2	If you cannot provide actual costs, are you able to provide information on the scale of change for the costs of financial security through higher insurance premiums or alternatives?
Response	Estimates that we have received range between 2 and 10 fold increases on the level of current insurance premiums if all heads of damage are to be covered by insurance policies. This implies increased operating costs of several million Euros per annum for the URENCO group.
IA3	Is this for a standard installation or a low risk installation or for transport activities?

Response	
IA4	Can you provide information on ongoing legal and administrative costs as a result of the changes and the likely scale and nature of transition costs?
Response	