

## **ANNEX 12**

### **NUCLEAR ADMINISTRATION AND NUCLEAR TRANSFER SCHEMES**

This Annex sets out the legislative and statutory background to the nuclear administration regime set out in Part 3 of the 2022 Act and the Nuclear Transfer Scheme set out in Chapter 2 of the 2004 Act, including as they relate to the SZC Economic Licence and the FDP.

#### **1. NUCLEAR ADMINISTRATION**

##### **1.1 Background and objective**

- (A) Part 3 of the 2022 Act established a special administration regime to apply to relevant licensee nuclear companies. The objective of this regime is to ensure the continued generation of electricity from the relevant nuclear installation even if the licensee becomes insolvent. Under this special administration regime, a court order can be sought to appoint an administrator to manage the affairs of a relevant licensee nuclear company should insolvency occur (see paragraph 1.2 below for further discussion).
- (B) This regime is specifically designed to support the RAB model for nuclear energy generation projects provided for in the 2022 Act. In contrast to the existing insolvency regime, which prioritises creditor interests, this regime prioritises the commencement and/or continuation of electricity generation and aims to rescue the plant as a going concern. The regime is based on provisions set out in the 2004 Act, as applied and amended by Section 33 of the 2022 Act.

##### **1.2 RLNC Administration Order**

- (A) The FAP requires the Operator to notify the FDP Implementation Company and the Secretary of State as soon as reasonably practicable after it becomes aware that an Operator Insolvency Event has occurred (such as when the Operator is unable or admits inability to pay its debts as they fall due, among other events).
- (B) If a relevant licensee nuclear company becomes insolvent, the Secretary of State or GEMA with the Secretary of State's permission may apply to the court for a relevant licensee nuclear company administration order pursuant to Section 31 of the 2022 Act. Such an order appoints a nuclear administrator to manage the affairs of the relevant licensee nuclear company (the "**RLNC Administration Order**").
- (C) The nuclear administrator must: (i) manage the company's affairs, business and property; and (ii) exercise and perform all the powers and duties of a nuclear administrator, to achieve the above-mentioned objective of commencing and/or continuing electricity generation from the relevant nuclear installation and rescuing the plant as a going concern.
- (D) Section 32 of the 2022 Act provides that the objective of a relevant licensee nuclear administration may be achieved by one or both of: (a) rescuing the company as a going concern; and (b) transferring, as a going concern, the whole or part of the company to

a wholly owned subsidiary, with the securities in this subsidiary subsequently transferred to a third party company.

### 1.3 **SZC Economic Licence**

- (A) Even in circumstances where an RLNC Administration Order has been issued in respect of the Operator, the SZC Economic Licence provides for the Allowed Revenue (including the FDP Allowance Building Block) to continue to be paid to the Operator and prohibits GEMA from revoking the SZC Economic Licence (fully or partially) during the currency of the RLNC Administration Order. This is a key protection and aligned with the objective of commencing and/or continuing electricity generation and to rescue the plant as a going concern.
- (B) Further, the Secretary of State would be able to modify the SZC Economic Licence if an RLNC Administration Order is in force in relation to the Operator and for the purpose of furthering the objective of commencing and/or continuing electricity generation and to rescue the Plant as a going concern.
- (C) Section 35(4) of the 2022 Act sets out examples of such modifications to the SZC Economic Licence that the Secretary of State may make. These examples include provision for the revenue that the Operator may receive in respect of its activities and provision for the amounts that the Operator may receive or pay under any revenue collection contract (such as the Revenue Collection Contract).

### 1.4 **Other insolvency processes**

In principle, there are other insolvency processes, being those pursuant to the Insolvency Act 1986, that could be commenced with respect to the Operator should the Operator become insolvent. This is however unlikely for the following reasons:

- (A) The court may not exercise its powers on a winding up petition against the Operator unless notice has been served on the Secretary of State and the Authority and 14 days elapse (2004 Act, section 160). This means a creditor is not prevented from presenting a winding up petition, but the Court will not make a winding up order unless the notice provisions are complied with;
- (B) The Operator may not pass a resolution for voluntary winding up without the permission of the court (which first requires notice on the Secretary of State and the Authority, and 14 days to elapse) (2004 Act, section 161);
- (C) Again, an administration application cannot be made unless notice is served on the Secretary of State and the Authority, and 14 days have elapsed (and there is no application for an RLNC Administration Order outstanding) (2004 Act, section 162);
- (D) Section 163 of the 2004 Act sets out similar restrictions as above for out-of-court administration appointments under the Insolvency Act 1986; and

- (E) Given the policy objective of the Secretary of State and DESNZ in relation to energy security, it would seem unlikely that the Secretary of State would let the 14 days elapse without initiating the nuclear administration regime under Part 3 of the 2022 Act, which is intended to ensure the continued generation of electricity from the relevant nuclear installation.

## **2. NUCLEAR TRANSFER SCHEME**

### **2.1 Background**

- (A) Section 38 of the 2004 Act authorises the Secretary of State to make a Nuclear Transfer Scheme. Pursuant to this Nuclear Transfer Scheme, certain property, rights and liabilities of a nuclear company that is not publicly owned may be transferred to a publicly owned company or the NDA, provided that the person who is entitled or subject to such property, rights and liabilities has consented to such transfer.
- (B) In light of this, the NASTA provides for a "Pre-Consented Nuclear Transfer Scheme". That is, the NASTA will provide that the Secretary of State may implement this Pre-Consented Nuclear Transfer Scheme to transfer the Operator's property, rights and liabilities in accordance with the NASTA and the 2004 Act broadly in the following circumstances (subject to certain requirements):
- (i) Expiry of the Initial Regulatory Period or Extended Regulatory Period;
  - (ii) Discontinuation of the Plant;
  - (iii) Nuclear Administration, including where an RLNC Administration Order is in force; or
  - (iv) Operator insolvency, where the Secretary of State or the GEMA has not applied for an RLNC Administration Order or an RNLC Administration Order has not been granted by the court.

### **2.2 Coverage of the Nuclear Transfer Scheme**

- (A) Pursuant to Section 40(3) of the 2004 Act, the Nuclear Transfer Scheme may provide for the transfer of the following property, rights and liabilities:
- (i) securities in the Operator (provided they are not publicly owned);
  - (ii) property and rights of the Operator in or in relation to a nuclear site or an installation in or on such a site; and
  - (iii) property, rights and liabilities to which the Operator is entitled or subject to:
    - (a) in respect of such a site or installation;
    - (b) in connection with or by reference to activities carried on in, or on, such a site or installation; or

- (c) for purposes connected with that site or installation or with any such activities.
- (B) In relation to the above, the 2008 Act provides that assets that are "protected assets" under Section 56 of the 2008 Act are to be applied in accordance with the approved FDP without regard to "any enactment or rule of law" where such enactment or rule of law would prevent or restrict the protected assets from being applied in accordance with the approved FDP or prevent or restrict their enforcement for the purposes of being so applied (Sections 56(4) and (5) of the 2008 Act). As such, the transfer of property, rights and liabilities noted above in accordance with the Nuclear Transfer Scheme would be encumbered by this Section 56 to the extent any of them are a "protected asset" under Section 56. However, the requirement in Section 56 of the 2008 Act is to apply such protected assets in accordance with the approved FDP, which includes the FAP. In this regard, clause 25.2 (*Operator Insolvency Event and Nuclear Transfer Scheme*) of the FAP allows the Secretary of State to effect a Nuclear Transfer Scheme to transfer the Operator and its assets to the NDA or another publicly owned company. As such, while the Nuclear Transfer Scheme is required to be consistent with the requirement in Section 56 of the 2008 Act to apply any protected assets in accordance with the approved FDP, the approved FDP itself will allow the Secretary of State to transfer the FDP Implementation Company and its assets to the NDA or another publicly owned company (see paragraph 2.3 below for a further discussion).
- (C) Also, the NASTA includes an acknowledgement and agreement by the parties to the NASTA that if the Operator is subject to an RLNC Administration Order, it must continue to make all required payments as determined in accordance with the Contribution Notices under the FAP and as determined by the Ofgem in accordance with the SZC Economic Licence in respect of the FDP Allowance Building Block in connection with the FDP.

### 2.3 Interaction with the FDP

- (A) The implications for the FDP (including the FAP) following a transfer pursuant to the Nuclear Transfer Scheme is dependent upon the approach adopted by the Secretary of State when enacting the Nuclear Transfer Scheme.
- (B) As referenced in paragraph 2.2 above, the Secretary of State has a number of options when implementing the Nuclear Transfer Scheme, including a transfer of the shares in the Operator or the whole or part of its assets. In addition, as noted above, pursuant to clause 25.2 (*Operator Insolvency Event and Nuclear Transfer Scheme*) of the FAP, the Operator and the FDP Implementation Company have pre-consented to the transfer of the shares or assets of the FDP Implementation Company pursuant to a Nuclear Transfer Scheme.
- (C) If the Secretary of State elects to transfer the shares of the Operator and the FDP Implementation Company, then the Nuclear Site Licence, in addition to: (i) the rights and obligations of the Operator under the SZC Economic Licence; and (ii) the Operator and the FDP Implementation Company under the FAP, would transfer together with

those entities to the new shareholder (anticipated to be the NDA) and, accordingly, the FAP and independent FDP Implementation Company would remain structurally in place.

- (D) Alternatively, if the Secretary of State were to exercise its discretion to transfer all or part of the assets and liabilities of the Operator and the FDP Implementation Company to the NDA, then this may (subject to the precise approach and replacement approved FDP arrangements adopted) have the effect of terminating the FAP. In such an asset transfer scenario, a new Nuclear Site Licence (as this cannot be separately transferred under a Nuclear Transfer Scheme), a new SZC Economic Licence and a new approved FDP pursuant to Section 45(2)(b) of the 2008 Act would be required by the incoming licensee.
- (E) Clauses 9.2 (*Asset Transfer assistance*) and 9.3 (*Assistance with transfer of FundCo*) of the NASTA contain provisions which are designed to promote the continued independence and segregation of the Fund Assets, in the event of an asset transfer pursuant to a Nuclear Transfer Scheme, by requiring the transferee to submit to the Secretary of State a new funded decommissioning programme for Sizewell C which *inter alia* provides for the Fund Assets to continue to be held on a segregated basis by an independent special purpose vehicle and to be used exclusively to discharge the decommissioning costs of Sizewell C. There is a risk that such new funded decommissioning programme may not be approved by the Secretary of State (noting that the NASTA expressly provides that nothing in clause 9 of the NASTA shall constitute a fetter of the Secretary of State's statutory and/or regulatory rights), such that the Fund Assets may not remain segregated and applied to Sizewell C decommissioning liabilities through a Nuclear Transfer (which would increase the exposure on future taxpayers). This is, however, a risk within the control of the Secretary of State.