

Biggest change to the UK nuclear liability regime for 50 years expected on 1 January 2022

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1. Key message

- 1.1 From 1 January 2022, we expect the liability exposure for operators of nuclear installations and radioactive waste disposal facilities in the UK to increase significantly. This includes both an increase to the operators' liability caps, as well as introducing liability for damage to the environment and loss of profit arising from the same.
- 1.2 This increase in exposure comes from the Nuclear Installations (Liability for Damage) Order 2016 (the "**Order**") which, after a 5 year period of dormancy on the statute books, is expected to come into force on 1 January 2022. This date is aligned with the updated international conventions the Order incorporates into UK law: the twin 2004 Protocols (the "**2004 Protocols**") amending the Paris Convention on Third Party Liability in the Field of Nuclear Energy (the "**Paris Convention**") and the Brussels Supplementary Convention to the Paris Convention (the "**Brussels Convention**"). The 2004 Protocols are also expected to come into force in the other signatory countries¹ at around that date.
- 1.3 The 2004 Protocols mandate a minimum level of liability for operators of nuclear installations which, with the exception of lower risk installations (see paragraph 3.3), the UK has met but has generally not exceeded. The 2004 Protocols do not, however, set a maximum bar, and other signatories will likely have their own way of incorporating the requirements into their own national law. This may include in some cases uncapped operator liability (such as in Germany with some exemptions) or a wider scope of liability channelled to the operator.
- 1.4 Operators of nuclear installations and the wider nuclear supply chain all need to understand the extension to the regime, whether inside or outside of the UK. Prior to 1 January 2022 all industry participants should review their contracts and indemnities, and (especially for operators) check their insurance arrangements to ensure they can obtain cover under the updated regime.

2. Summary of proposed changes

- 2.1 The Order was passed 5 years ago and, despite a flurry of activity in the immediately following few months, has been sitting on the statute books, mostly dormant, since then. The Order is intended to bring into force in the UK the 2004 Protocols. The trigger for the

¹ These would include Belgium, France, Germany, Italy, the Netherlands and Spain.

Order becoming wholly enforceable is the ratification of those protocols in the UK. We have learnt that the UK Government expects this to occur on 1 January 2022 (see also paragraph 9 regarding implementation).

- 2.2 The Order updates the Nuclear Installations Act 1965 (the "NIA") and in particular the regime in the NIA which channels liability to the operator of a nuclear installation. This note is not intended to cover that underlying regime in any detail, but in broad terms the NIA allocates liability for a nuclear incident to the operator (and licence holder) of the relevant nuclear installation and provides a full defence in the UK courts to everyone else for certain types of liability covered by the NIA. The regime does not, however, provide a defence for liability not covered in the NIA. Industry participants often therefore require additional cover for these 'gaps' through indemnities tracing back to the operator or UK Government.
 - 2.3 The key updates to the NIA and the channelling regime from the Order include:
 - (a) significant increases to the liability cap of the operator;
 - (b) a new operator duty not to cause significant impairment of the environment;
 - (c) additional categories of compensation for which an operator will be liable, including in some circumstances loss of profits arising from the environmental impact of a nuclear incident; and
 - (d) material extensions to the geographical scope of those who can claim against the operator (now including, e.g. Ireland).
 - 2.4 The Order also clarifies the obligations in the NIA relating to the carriage of nuclear matter. These are not addressed in this note in detail, but please contact us if you would like more information.
 - 2.5 All statutory references in this note are to the updated NIA as will be amended by the Order, rather than the Order or the NIA as currently enacted.
- 3. Increase in liability cap**
- 3.1 If the Order comes into force as expected, from 1 January 2022 there will be an immediate increase in the operator's liability cap from £140m to €700m (although see paragraph 3.3 below for lower thresholds for lower risk sites). This operator liability cap is then increased annually by €100m until it reaches €1.2bn².
 - 3.2 On top of the operator's liability, an additional amount will be available from public funds to a party which incurs injury or damage or loss³. This amount is only accessible once the operator's limit has been exhausted. This will start at €800m reducing to €300m in line with the operator's increase in liability, so that the total amount available to claimants (from the operator and UK Government) will be €1.5bn⁴ from the time at which the relevant section of the Order is brought into force. To access the amount for which UK Government is liable, proceedings must be brought against the Secretary of State rather than the operator⁵.
 - 3.3 There are lower caps on the operator's liability for certain prescribed sites. Under the current NIA there is a £10m operator liability cap for prescribed sites. This will rise to €70m for 'low risk' sites, €160m for 'intermediate risk' sites, and €80m for transportation of

² Subsections 16(1)(f) and 16B.

³ Subsections 16(3),(3A),(3B) and 18(1),(1A). This applies to damage incurred in contracting parties to the Brussels Convention only.

⁴ Subsections 18(1) and (1A).

⁵ Subsection 16(3). NB the €700m cap only increases in respect of damage incurred in countries which are contracting parties to the Brussels Convention, and for all other claims remains at €700m.

nuclear material⁶. The UK Government will then meet claims up to the minimum threshold required by the 2004 Protocols.

- 3.4 All operators of sites except for low risk sites will need to obtain (and maintain) a full nuclear site licence, with low risk sites being dealt with by a separate permitting regime in a similar manner to sites for disposal of other non-radioactive hazardous waste.
- 3.5 In January 2018, BEIS published a response to the Government consultation on the definition of these ‘intermediate’ risk prescribed sites. The criteria for intermediate risk nuclear sites are as follows:
 - (a) former nuclear power generating sites that have been permanently defueled and the spent fuel is stored in accordance with relevant good practices;
 - (b) sites which store radioactive material where the radionuclide inventory is greater than the threshold criteria for low risk sites, but are not sites for the storage of highly active radioactive waste (e.g. waste from processing used nuclear fuel);
 - (c) nuclear fuel fabrication plants (does not include plants manufacturing fuel from plutonium or plutonium mixtures);
 - (d) uranium enrichment facilities;
 - (e) the national repository for low level waste – as it is a licensed nuclear site (rather than a relevant disposal site);
 - (f) plants for the manufacture of radioactive isotopes for industrial, chemical, agricultural, medical or scientific purposes; or
 - (g) sites that no longer serve one or more of the purposes set out in paragraphs (c) to (f) above, and are being decommissioned.

4. New duty of the operator – preventing significant impairment of the environment

The Order extends the duties currently placed on the operator to include an obligation to secure that no occurrence involving nuclear matter or emission of ionising radiations causes significant impairment of the environment⁷. The duties under the current NIA are limited to not causing personal injury or damage to any property of any person other than the operator. Under the Order, the operator is also required to ensure that no event creates a grave and imminent threat of a breach of any of these duties of the operator⁸.

5. New types of compensation

- 5.1 The Order introduces new types of compensation for which the operator will be liable. The compensation summarised in paragraphs 5.1(a) and (b) relate only to the new duty to prevent significant impairment of the environment (described at paragraph 4 above), and the compensations summarised in paragraphs 5.1(c) and (d) relate to all duties under the NIA. The new types of compensation are for:
 - (a) *the cost of measures of reinstatement of the impaired environment*⁹ – this can only be claimed by a qualifying public authority¹⁰; the cost of the measures and the taking

⁶ Subsections 16(1)(a)-(e).

⁷ Subsections 7(1A)(c), 7(1C)(c), 10(1)(c).

⁸ Subsection 7(1E).

⁹ Subsections 11A-F and Schedule 1A.

¹⁰ Subsections 11A(1) and (4).

- of the measures must be reasonable¹¹; and the measures must be approved by the Secretary of State¹²;
- (b) *the loss of profits derived from the environment as a result of significant impairment of the environment*¹³ – the profits are limited to profits a person generates by means of an activity which entails directly exploiting resources in a part of the environment (e.g. fishermen and potentially windfarms)¹⁴;
 - (c) *the reasonable cost of preventive measures* – these are limited to those reasonably taken after the breach of a duty¹⁵. The preventative measures may also be taken in respect of a grave and imminent threat of a nuclear incident, rather than having to wait for a nuclear incident to occur¹⁶; and
 - (d) *personal injury or property damage caused by preventive measures* – these are limited to those reasonably taken after the breach of a duty¹⁷. It is irrelevant whether the preventive measures are carried out by the operator or another party.
- 5.2 Many of the losses listed above may not otherwise have been claimable by third parties under the general rules of legal responsibility. This expansion of the channelling regime increases the protection for other participants in the nuclear supply chain by ensuring that the vast majority of nuclear liability should be channelled to the operator (or to the UK Government above the operator's cap on liability), giving those other participants a good defence if sued in the UK for compensation by an affected party.
- ## 6. Increase in geographical coverage
- 6.1 The Order increases the geographical scope of the NIA. Under the revised NIA, additional parties would be able to bring a claim for damage incurred outside of the UK caused by a nuclear incident which occurs inside the UK.
 - 6.2 Previously, compensation was only available for damage caused in a country which is a contracting party to the Paris Convention¹⁸. This included contracting parties to the Brussels Convention¹⁹, as all contracting parties to the Brussels Convention are also contracting parties to the Paris Convention²⁰. The Order extends this geographical coverage.
 - 6.3 Importantly for installations in the UK, this would result in the channelling regime in the NIA applying to claims in the UK from Ireland. There still remains the possibility, however, that a claim in the Irish courts (or other country not a signatory to one of the relevant conventions) could get around the channelling regime and result in liability attaching to another party other than the operator.
 - 6.4 Under the revised NIA, damage caused in the following locations may also be claimed against an operator following a nuclear incident which occurs in the UK:

¹¹ Subsections 11A(1),(5) and 11B(6).

¹² Subsection 11B(1).

¹³ Section 11G.

¹⁴ Subsection 11G(2).

¹⁵ Subsection 11H(1).

¹⁶ Subsection 11H(9).

¹⁷ Subsection 11H(2).

¹⁸ Belgium, Denmark, Finland, France, Germany, Greece, Italy, the Netherlands, Norway, Portugal, Slovenia, Spain, Sweden, Switzerland (once the 2004 Paris Protocol comes into force), Turkey and the UK.

¹⁹ Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Slovenia, Spain, Sweden, Switzerland (once the 2004 Brussels Protocol has come into force) and the UK.

²⁰ There are three contracting parties to the Paris Convention which are not also contracting parties to the Brussels Convention: Greece; Portugal; and Turkey.

- (a) a country which is a non-contracting party to the Paris Convention where:
 - (i) it has no nuclear installations in its territory or maritime zones²¹; or
 - (ii) its nuclear liability affords equivalent reciprocal benefits and is based on principles identical to those contained in the Paris Convention²²; and
- (b) in or above maritime areas beyond the territorial sea of a contracting party to the Brussels Convention:
 - (i) on a ship or aircraft registered in the territory of a contracting party to the Brussels Convention²³;
 - (ii) by a national of a contracting party of a Brussels Convention²⁴; or
 - (iii) on an artificial island, installation or structure that is subject to the jurisdiction of a contracting party to the Brussels Convention (e.g. an offshore wind farm or oil rig)²⁵; ²⁶ or
- (c) in or above the exclusive economic zone of a contracting party or on the continental shelf of a contracting party to the Brussels Convention in connection with the exploitation or the exploration of natural resources²⁷.

7. Limitation period

- 7.1 The time limit for bringing claims under the updated NIA has been significantly extended to 30 years from the date of the nuclear incident for personal injury and 10 years for all other claims²⁸. This is an extension for personal injury from the 10 years period set for all claims under the current NIA.

8. Insurance

- 8.1 Operators are required to maintain insurance or other financial security (e.g. cash, assets or parent company guarantees) to ensure that sufficient funds are available to satisfy their liability under the updated NIA²⁹. Such arrangements are subject to the approval of the Secretary of State and the Treasury. This obligation is the same as under the current NIA, but now applies to significantly increased operator liability caps.
- 8.2 The UK Government has stated that it believes that insurance will be available to cover all liability except initially personal injury for the full 30 year period, and that the increase in insurance cost will add 0.4% to operating costs. However there have been some concerns raised by the insurance industry as to whether they would be able to cover this material increase in liability coverage. The Order allows for the UK Government to step in as a last resort by granting the Secretary of State powers to make arrangements for this purpose³⁰ and we understand that BEIS are prepared to offer an indemnity to operators to cover uninsurable personal injury claims. Operators will need to check their insurance arrangements with their insurance advisers/brokers to ensure they can obtain cover under the updated regime, which is likely to apply from 1 January 2022.

²¹ Section 13 and subsection 26(1B)(b).

²² Section 13 and subsections 26(1B)(e) and 26(1A).

²³ Subsection 16A(5)(c). The current NIA allows claims for damage incurred on a ship or aircraft registered in the United Kingdom only.

²⁴ Subsection 16A(5)(d).

²⁵ Subsection 16A(5)(e).

²⁶ Subsections 16A(3)-(8).

²⁷ Subsection 16A(5)(b).

²⁸ Section 15.

²⁹ Subsection 19(1).

³⁰ Section 20A.

9. Timeline

- 9.1 The changes set out in this note are expected to come into force on 1 January 2022 after a brief period with the conventions being laid before Parliament in December 2021. Although there is a risk that Parliament may block the passage of the conventions, this requires an active veto to be tabled and passed. We understand that to be unlikely given the current cross-party consensus viewing the updated regime as desirable.
- 9.2 We expect that other signatories to the 2004 Protocols will bring into effect their own versions of the widened regime set out by those protocols at or around the same date (ie 1 January 2022). As mentioned above, the 2004 Protocols allow for the possibility that national regimes provide for uncapped liability for nuclear operators or coverage for a wider scope of operator liability.

For further information, including on the effect of the 2004 Protocols outside the UK, please contact your usual Hogan Lovells contact or one of the contacts below.

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