

ELECTRICITY (MISCELLANEOUS PROVISIONS) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Section 1: Expenditure relating to British Energy plc

7. This section provides authority for various kinds of expenditure relating to British Energy to be paid out of money provided by Parliament through normal supply procedures. The exercise of these powers is subject to the consent of the Treasury. This conforms with the long standing practice that significant ongoing expenditure should have specific statutory authority.
8. Subsection (1)(a) authorises expenditure incurred in giving financial assistance to British Energy plc or any of its subsidiaries. This is in addition to the power that already exists to give financial assistance for nuclear liabilities under Schedule 12 to the Electricity Act 1989. Subsection (1)(a) could be used while the British Energy companies remain in the private sector, but could equally be used to fund the administration of the companies or to fund the company if the Government has acquired British Energy plc or its subsidiaries (as foreseen in subsection (b)(i)). Financial assistance includes assistance by way of grant or loan or by entering into a guarantee in respect of any obligations of British Energy.
9. Subsection (1)(b) authorises expenditure in connection with the acquisition of a British Energy company, its business or its assets. This could be done either through the purchase of British Energy plc or its subsidiaries directly (through the purchase of the ordinary shares), or alternatively through buying the underlying business (undertaking) and/or assets from the company that owns them without buying the Companies Act company that contains them. These provisions merely give Parliamentary authority to incur expenditure for this purpose. They do not give the Government any special power to acquire (compared with a normal buyer) nor do they put the company under any obligation to sell.
10. Subsection (1)(b)(i) enables the acquisition of ordinary shares and also other securities such as bonds and debentures. Acquisition could be made directly by Government, its nominee, or through a 100% Government owned company (a 'Crown company').
11. Subsection 1(c) follows on from subsection 1(b) and authorises continued funding if the Government acquires the business and/or assets of a British Energy company under (1)(b)(ii). If the Government acquired companies under (1)(b)(i) then it would be authorised to continue to fund those companies under subsection (1)(a). But if it only acquired the businesses and/or assets separately from the British Energy companies, then subsection (1)(a) would not provide the relevant authority, hence this additional provision.
12. Any expenditure under this section could only take place to the extent that it is permitted by the EC State Aid rules.

Section 2: Removal of restrictions on capacity to acquire certain securities

13. Part 2 of the Electricity Act 1989 contains a number of provisions that restructured the Electricity Industry, allowing for its subsequent sale (privatisation). In the main, Part 2 has served its purpose and the provisions no longer have effect or are now irrelevant. However, within Part 2 there are two sections, section 74 and 72, which could affect the Government's freedom to take some of the actions contemplated by section 1. This section repeals both of those sections.
14. **Section 74** (Target Investment Limits) originally ensured that the privatisation of a Government owned electricity company could not be subsequently reversed. It did this by restricting the Secretary of State's common law powers to acquire ordinary¹ shares in certain privatised electricity companies beyond a specified limit. In the specific case of British Energy Generation (UK) Ltd (an operating company within the British Energy group of companies) it would prevent Government from re-purchasing ordinary shares, since the limit for that company is set at 0%².
15. **Section 72** originally authorised the purchase of shares in a successor company during the privatisation process (until the target investment limit under section 74 became 0%).
16. These two sections create an unnecessary distinction between these companies and other companies in the electricity industry. The effect of these repeals would be to restore the Secretary of State's natural powers to acquire shares in successor companies. Those powers might be needed for the Secretary of State to take action under section 1(1)(b).
17. **Section 2(2)** of this Act gives a power to repeal any of the other provisions of Part 2 of the 1989 Act, which as stated above are, in the main, long since spent. This power is to be exercised by statutory instrument subject to the affirmative resolution procedure and enables the making of transitional and consequential provision and savings.

Section 3: Amendment of Schedule 12 to the Electricity Act 1989

18. Schedule 12 to the Electricity Act 1989 provides Government with a power to give financial assistance in relation to certain nuclear liabilities, such as dealing with spent fuel and decommissioning costs, defined in the Schedule as "qualifying expenditure". Assistance can be provided in the form of grants, loans or loan guarantees. Paragraph 4 of the Schedule sets a ceiling on the level of assistance at £1 billion. This ceiling can be raised to £2.5 billion by statutory instrument, but no further.
19. **Section 3(2)** of this Act removes the ceiling on financial assistance under Schedule 12.
20. **Sections 3(3) and 3(4)** make minor amendments to the Schedule to ensure that Government can give financial assistance for nuclear liabilities via a third party if necessary.

Section 4: Undertaking to provide assistance disregarded for tax purposes

21. The relevant background to this section is the accounting and tax treatment of nuclear liabilities and payments towards them. In the main, nuclear liabilities are accounted for on an accruals basis - ie a company accounts for a liability as that liability is incurred, rather than when cash is actually paid out. For example, liabilities relating to dealing with spent fuel are recognised as soon as the fuel is irradiated (used) within a reactor, and decommissioning liabilities are recognised once a reactor is switched on. Similarly, the bulk of liabilities are treated for tax purposes on an accruals basis. Companies can claim tax relief on the provisions they make against liabilities as these are accrued (to the extent that the actual expenditure would be allowable for tax) - they would not then

¹ But note that the Government holds a 'special' share in each of British Energy plc, British Energy Generation (UK) Limited, and British Energy Generation Limited

² Electricity Act (Scottish Nuclear Limited) (Target Investment Limit) Order 1996 (SI No.3221 (S243))

*These notes refer to the Electricity (Miscellaneous Provisions)
Act 2003 (c.9) which received Royal Assent on 8 May 2003*

receive tax relief when actual cash payments are made since the liabilities are treated on an accruals basis. An undertaking to provide financial assistance for liabilities that are taxable on an accruals basis would be treated in a similar way - that undertaking would be recognised for accounting and tax purposes on an accruals basis (ie when the undertaking is given and the entitlement arises) not on a cash basis (when individual payments are made).

22. If the Government gives an undertaking to a company to provide a grant in respect of accrued expenditure this undertaking will be recognised – under generally accepted accounting practice - as an asset to the company in its balance sheet.
23. When a company first recognises such an asset in its balance sheet, this recognition would give rise to a credit in its profit and loss account. And under tax law this credit would be included in the tax computation to establish the amount of profit made by the company which is liable for corporation tax. So if the company is already making a profit, the amount of taxable profit would increase, meaning that the company would pay more tax. Alternatively if the company is otherwise making a loss, the level of the loss would be reduced by the recognition of the undertaking and so the amount of loss available to be carried forward to later years would be reduced (so the company may pay more tax in later years once it does make a profit).
24. **Section 4** provides that the initial recognition of a Government undertaking to make a grant under Schedule 12 to the Electricity Act in respect of qualifying expenditure in a company's accounts would not be included in the tax computation (“ a disregard”).
25. This disregard would only apply to the initial recognition of an undertaking – ie the value recognised by the company when it first receives the undertaking. It would not apply to any subsequent change in estimated value of the undertaking or the expenditure to which it relates (which would also generate a corresponding credit or debit in the profit and loss account). The valuation of the undertaking may change over time for different reasons for example:
 - an undertaking which relates to expenditure in the distant future would be recognised in the accounts on a present value basis (cash cost discounted over time); subsequently as time moves on and the payments become closer, so the valuation of the undertaking would increase (because the discount becomes less significant)
 - if the undertaking is written in terms of paying for a particular liability without setting a price, then any change to the expected cost of the liability would be reflected in the value of the undertaking
26. Where the undertaking has been treated on an accruals basis for tax purposes, actual flows of cash coming from the undertaking would not then themselves be subject to tax (just as, similarly, cash payments by the company on nuclear liabilities would not be eligible for tax relief, where relief had already been given on an accruals basis).
27. This particular tax disregard for Schedule 12 grants will only be available for undertakings given prior to 31 March 2008. But this latter date can itself be extended by Statutory Instrument up to 31 March 2011 at the latest.