

## The Revision of the Nuclear Energy Third Party Liability Ordinance

### International nuclear energy conventions and their implementation in Switzerland

On June 13, 2008, Swiss Parliament approved the revised Federal Nuclear Energy Third Party Liability Act (the “**Revised Nuclear Liability Act**”) and ratified the international Paris and Brussels Conventions (the “**Paris Convention**”) which contain provisions regarding nuclear energy third party liability in March 2009. The (revised) Paris Convention guarantees a better protection of nuclear victims’ interests and provides insurance coverage for nuclear accidents occurred in Switzerland and abroad.

In order to implement the new guidelines set out in the Revised Nuclear Liability Act, the Swiss Federal Council launched a consultation procedure regarding the complete revision of the Federal Nuclear Energy Third Party Liability Ordinance in 2013. In March 2015, the Federal Council approved the draft of the revised Federal Nuclear Energy Third Party Liability Ordinance (the “**Draft Nuclear Liability Ordinance**”). The following article deals with the most important aspects of the Draft Nuclear Liability Ordinance as well as the steps towards its enactment.

### Current nuclear energy third party liability legislation

The current Federal Nuclear Liability Act and the Ordinance are based on the following principles:

- Channeling of third party liability towards the owner/operator of a nuclear facility;
- Strict liability of the owner/operator of a nuclear facility;
- Unlimited amount of liability of the owner/operator of a nuclear facility;

- Compulsory insurance coverage of CHF 1 billion.

The Ordinance provides, inter alia, for compulsory insurance coverage by federal insurance. In addition, it stipulates that nuclear facilities and the transport of nuclear material related thereto must be insured together (all-risk insurance).

Originally, the Paris Convention of 29 July 1960 as well as the Supplementary Convention of 31 January 1963 provided for coverage of liability (based on the principle of limitation according to amount) with a maximum amount equivalent to approximately CHF 520 million. As this was considered to be unsatisfactory, the Federal Council and Swiss Parliament abstained from ratifying said Conventions.

In the meantime, the Paris Convention has been revised. The principle of limitation according to amount has been abandoned and has been replaced by a minimum liability amount. In order to convert the provisions of the revised Paris Convention into national legislation, current Swiss nuclear energy third party liability legislation had to be revised. Hence, the Revised Nuclear Liability Act and the Draft Nuclear Liability Ordinance.

### Overview of the most significant legislative amendments

#### *Total amount of insurance coverage*

According to the Revised Nuclear Liability Act, federal insurance shall assume a certain portion of liability coverage in the event that private insurance does not or does not entirely cover claims in connection with a nuclear accident.

To date, compulsory federal insurance covers claims up to CHF 1 billion per nuclear facility or per nuclear transport plus CHF 100 million for

interest and procedural costs, insofar as such damages are not or not fully covered by a private insurer. As it is likely, however, that a nuclear incident would have dramatic consequences, the total amount of coverage has now been increased to EUR 1.2 billion (i.e. approximately CHF 1.3 billion at the current exchange rate)<sup>1</sup> plus ten percent of the total amount for interest and for costs awarded by a court. This ensures that the requirements of the international liability regime of the Paris Convention are met.

#### *Technical separation of transport and nuclear facility*

Total coverage of EUR 1.2 billion applies to claims in connection with an individual nuclear facility or an individual transport of nuclear material. The Draft Nuclear Liability Ordinance stipulates in this connection that nuclear facilities and the transport of nuclear material must be insured separately.<sup>2</sup> Under current legislation, claims for damages caused in connection with the transport of nuclear material are covered by the insurance of the nuclear facility itself. The new legislation, in contrast, takes into account that nuclear facilities and the transport of nuclear material are technically two distinct risk groups which should be dealt with independently from one another in the event of an incident.

#### *Risks which may be excluded from coverage by private insurance*

Under current nuclear energy third party liability legislation, private insurers may decline coverage for certain risks. According to Article 9 para. 4 of the Revised Nuclear Liability Act, the Federal Council can determine the risks which may be excluded from coverage by private insurance companies.

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<sup>1</sup> See Article 1 of the Draft Nuclear Liability Ordinance of February 20, 2013; Message from the Federal Council regarding the Federal Resolution on the acceptance and implementation of the conventions concerning liability in the nuclear energy sector of June 8, 2007, page 5418.

<sup>2</sup> See Article 1 letter c and Article 2 para. 3 of the Draft Nuclear Liability Ordinance of February 20, 2013.

Article 7 para. 1 of the Draft Nuclear Liability Ordinance is in conformity with current legislation except for the following items which have been amended:

- Under current law, private insurers may exclude coverage for damages from terrorist acts between CHF 500 million und CHF 1 billion. Under the Draft Nuclear Liability Ordinance, private insurers may exclude coverage for claims related to damages from terrorist acts exceeding 50 percent of the amounts stated in Article 4 para. 1 and 2 and Article 5 of the Draft Ordinance (i.e. CHF 1 billion and EUR 700 million, respectively);
- Furthermore, coverage may be excluded for claims which are not raised within 20 years from the date of the loss, theft or abandonment of nuclear material. In contrast to current legislation, the term "jettison of nuclear material" (*Überbordwerfen*) has been stricken and is not included in the Draft Nuclear Liability Ordinance.

In addition, a new second paragraph has been introduced in Article 7 of the Draft Nuclear Liability Ordinance, thus broadening the definition of "nuclear damage" as per the definition in the Paris Convention. The term now also covers loss of income resulting from a direct interest in the use or enjoyment of the environment as well as the costs of preventive measures and other losses as a consequence of such measures.

#### *Varying insurance coverage*

The costs of measures for the restoration of the environment as well as loss of income resulting from a direct interest in the use or enjoyment of the environment do not fall within the scope of the traditional (legal) concept of damages. Coverage by private insurance companies has therefore not been available to date. Such lack of coverage is due, *inter alia*, to the fact that the terms "restoration measures" or "damaged environment" are not clearly defined. Since the quantification of such damages is difficult, it is also difficult to predict how the courts would assess such damages in the

event of an incident. Therefore, private insurance companies only cover such damages up to half of the amounts stated in Article 4 para. 1 and 2 and Article 5 of the Draft Nuclear Liability Ordinance (i.e. CHF 1 billion and EUR 700 million, respectively).<sup>3</sup>

The situation is different with respect to costs arising in conjunction with preventive measures and other losses or damages resulting from such measures. In the Paris Convention, preventive measures are defined as "*any reasonable measures taken by any person after a nuclear incident or an event creating a grave and imminent threat of nuclear damage has occurred, to prevent or minimise nuclear damage referred to in sub-paragraphs (a) (vii) 1 to 5, subject to any approval of the competent authorities required by the law of the State where the measures were taken.*"

Insofar as preventive measures are concerned, the term appears to be sufficiently well defined. Therefore, in accordance with Article 4 para. 1 and 2 and Article 5 of the Draft Nuclear Liability Ordinance, private insurance companies grant unrestricted coverage for claims concerning preventive measures.

## Results of the consultation procedure

23 cantons, six political parties and various economic and trade associations, including representatives of the energy and technology sectors participated in the consultation procedure launched by the Federal Council in relation to the Draft Nuclear Liability Ordinance.<sup>5</sup> The revision of the Ordinance produced controversial reactions.

A majority of the participants agreed that a complete revision of the Nuclear Liability Ordinance is necessary. Substantial criticism was expressed, however, with respect to the new legislation's intention to separate the insurance coverage of risks related to nuclear facilities and those related

to the transport of nuclear material. Members of the power industry criticized, in particular, that international conventions do not provide for a (compulsory) separation of such risks<sup>6</sup> and that, as a consequence thereof, said provision in the proposed Draft Nuclear Liability Ordinance is not in conformity with international law and therefore lacks a legal basis.

## Next steps

The Revised Nuclear Liability Act and the Draft Nuclear Liability Ordinance cannot come into force until the Paris Convention has been ratified by at least two-thirds of the 16 contracting states. Thirteen of the 16 contracting states are members of the European Union. All the EU member states concerned must jointly ratify the Paris Convention. It is unlikely, therefore, that this will happen before the beginning of 2016.

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<sup>3</sup> See total revision of Draft Nuclear Liability Act, Consultation, Summary of the results, March 25, 2015, page 15.

<sup>4</sup> See legal wording Article 1 para. (a) ciph. (ix) Paris Convention.

<sup>5</sup> See total revision of Draft Nuclear Liability Act, Consultation, Summary of the results, March 25, 2015, page 15.

<sup>6</sup> See media release of swissnuclear, March 25, 2015.