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**Subject: State aid SA.31860 (N 506/2010) – Slovakia  
Partial financing of decommissioning of two already shut down nuclear plants (A1 and V1)**

Sir,

**1. PROCEDURE:**

- (1) On 4 November 2010 the Slovak authorities notified for reasons of legal certainty a levy introduced for financing part of costs for the decommissioning, treatment of nuclear waste resulting from decommissioning and for the treatment of spent nuclear fuel related to two already shut down nuclear plants (A1 and V1). They consider that the measure does not constitute State aid as it does not grant any advantage.
- (2) On 14 January 2011, 11 April 2011, 8 July 2011, 10 October 2011 and 29 June 2012, 8 August 2012 and 4 October 2012 the Slovak authorities submitted additional information. On 3 December 2012 a meeting was organised during which additional information was provided.
- (3) The government regulation implementing the introduction of the levy entered into force on 1 January 2011. The Slovak authorities confirmed that the collected financial resources will not be used until the Commission adopts a decision.
- (4) Previously the Commission had received a complaint submitted by Greenpeace<sup>1</sup> arguing that the financing of the historical deficit provides an advantage to ENEL (majority shareholder of Slovenské elektrárne) as it covers the costs which should have been paid by Slovenské elektrárne in line with the polluter pays principle.

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<sup>1</sup> CP 95/2008 Alleged aid to ENEL for nuclear decommissioning – Slovakia. The complaint was closed on 2 March 2010 following no reaction of the complainant to the Art. 20 letter containing the information that the Slovak authorities will notify to the Commission the introduction of the levy.

## 2. DESCRIPTION OF THE MEASURE

### 2.1. Objective of the aid measure

- (5) In order to ensure the financing of the decommissioning of nuclear installations and management of nuclear fuel and radioactive waste, Slovakia set up a special purpose fund in 1995<sup>2</sup> (the "Decommissioning Fund"). This fund was replaced in 2006 by Act No 238/2006 Coll. on the National Nuclear Fund for decommissioning nuclear installations and managing spent nuclear fuel and radioactive waste (hereinafter "NNF Act") and which established the National Nuclear Fund for the Decommissioning of Nuclear Installations and the Management of Spent Nuclear Fuel and Radioactive Waste ("NNF"). Like its predecessor, the NNF has the task of collecting and administering funds earmarked for the final phase of nuclear energy, i.e. in particular decommissioning of nuclear installations, including the management of radioactive waste from such decommissioning and the management of spent nuclear fuel after closure of the nuclear installation<sup>3</sup>.
- (6) The NNF Act foresees that every permit holder for operation of a nuclear installation which generates electricity is required to pay a mandatory contribution to the NNF in separate subaccounts for each nuclear installation. The contributions will be used for decommissioning the given installation<sup>4</sup>.
- (7) Similar contributions were imposed on nuclear power plant operators for the first time as of 1 January 1995 on the basis of the Act No 254/1994 when the predecessor of the NNF was set up.
- (8) Prior to 1995 nuclear power plant operators were not required to pay a financial contribution. For this reason the Decommissioning Fund and the NNF did not accumulate sufficient resources for the decommissioning of the A1 Jaslovské Bohunice (A1) and V1 Jaslovské Bohunice (V1) nuclear power plants decommissioning during the time they were in operation.
- (9) In the framework of the accession negotiations, the early closure of V1 was decided. After the early closure of the nuclear power reactor plant the contributions to the NNF that should have been paid during the remaining lifetime of V1 were not collected anymore.
- (10) Also, for the historical reasons described below in section 2.5.4 of this decision, the costs linked to the disposal of spent nuclear fuel ("SNF") have not immediately been integrated in the mandatory contributions to the Decommissioning Fund as of 1995.
- (11) The "missing" financial contributions for decommissioning of A1 and V1 described in paragraphs 8 to 10 above make up the so-called "historical deficit".

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<sup>2</sup> The fund was set up on the basis of the Act 254/1994 of the National Council of the Slovak Republic of 25 August 1994 on the State Fund for the Decommissioning of Nuclear Power Facilities and the Treatment of Spent Nuclear Fuel and Radioactive Waste. The provisions related to the fund were later incorporated into the NNF Act.

<sup>3</sup> The tasks of the NNF and the funds administered by the NNF in relationship with other nuclear plants do not make part of the notification..

<sup>4</sup> This mechanism is not part of the notification, and will therefore not be assessed in this decision. The Commission reserves the right to analyse it at a later stage.

The Slovak Republic intends to cover this historical deficit from the general budget. To that effect, the Slovak Republic has established a levy to be paid by electricity consumers as part of the price for electricity (hereinafter "levy"). In 2011 and 2012 the proceeds of the levy have been paid directly to the NNF. As of 2013 they will be paid to the general State budget.

## **2.2. Financing mechanism**

- (12) The levy was introduced by the Government Regulation No. 426/2010. The levy is imposed on final customers based on the amount of electricity supplied to them. It is collected by the transmission/ regional distribution/ local distribution systems operators depending on the point of connection of the final customer. In 2011 the levy was set at 3 EUR/MWh on electricity delivered to final customers.

### *2.2.1. The Levy, as imposed in 2011 and 2012*

- (13) Initially, Articles 7(4) and 7(5) of the NNF Act and Article 2 (1) of the Government Regulation No. 426/2010 foresaw that the levy as collected by the transmission/ regional distribution/ local distribution systems operators had to be paid monthly on the account of the NNF.

### *2.2.2. The Levy, as of 2013*

- (14) On 4 October 2012 the Slovak Republic notified a draft act amending article 7(4) and (5) of the NNF Act.
- (15) According to this draft amendment, from 2013 onwards the operator of the transmission system and the operators of the distribution system will pay the levy into the account of the budgetary chapter of the Ministry. The Ministry will then make from the general budget monthly payments to the NNF in order to cover the historical deficit. Although the levy will provide the State with the resources necessary to make payments to the NNF, the yearly amount that the NNF will obtain does not equal the amount of the levy (See Article 7(12) to be inserted in the NNF Act).
- (16) In the draft amending act, a new Article 13b is foreseen and reads as follows

*"Transitional provisions for the legal arrangement effective from 1 January 2013*

*(1) For December 2012 the operators of the systems shall still pay the levy referred to in Section 7(1)(b) into the account of the Nuclear Fund.*

*(2) An amount comprising the product of the effective rate of the levy and the balance of electricity comprising the difference in the value of total electricity imported into and total electricity exported from the territory of the Slovak Republic in the year in question shall be deducted from the amount received in the account of the Nuclear Fund pursuant to the special legislation<sup>19f</sup>. This amount shall be transferred from the account of the Nuclear Fund into the account of budgetary chapter of the Ministry by 31 March 2013. The balance of the amount received in the account of the Nuclear Fund pursuant to the special legislation<sup>19f</sup> shall remain in the account of the Nuclear Fund account and be used to finance the historical deficit of financial resources for the final phase of nuclear energy."*

- (17) Slovakia indicated that for 2011 the net imports amounted to 354 737.5 MWh.

### **2.3. The historical deficit: definition and amount**

- (18) Art. 7(1)(b) of the NNF Act defines the historical deficit as a debt that arose in the creation of funds intended to cover the costs of the final phase of nuclear energy incurred during the operation to date of nuclear installations for the purposes of producing electricity, at an amount corresponding to the debt created as at the entry into force of the act (i.e. 1 July 2006).
- (19) The same approach is followed in the Government Regulation No. 426/2010 which implements the introduction of the levy (Art.1 a): *"the "debt" means the deficit of financial resources generated when establishing the financial resources intended to cover the costs of the final stage of the nuclear cycle, incurred during the earlier operation of nuclear installations for the purpose of producing electricity, in the amount of the debt generated until the date of entry into force of [the NNF-Act No 238/2006]. In addition, it is indicated in Art. 1.a of Government Regulation No. 426/2010 that the debt is calculated as: "the difference between financial resources required for implementation of the final stage of nuclear installations, and for which financial resources were not levied at the required amount during their operation, and the financial resources levied and held in the relevant Nuclear Fund sub-accounts or analytical accounts"*
- (20) The Slovak authorities have explained that at the entry into force of the NNF Act it was known that resources accumulated through the mandatory contributions to the NNF would not be sufficient in order to cover decommissioning costs, nuclear waste management costs and spent fuel management costs relating to A1 and V1. This was due to the following circumstances:
- Before 31 December 1994 there was no legal obligation for operators of nuclear assets to contribute financially with respect to future decommissioning costs. Indeed, Act No 254/1994 Coll. on the State Fund for Decommissioning of Nuclear Power Installations and Management of Spent Nuclear Fuel and Radioactive Waste that introduced a contribution obligation for owners of nuclear installations and holders of licences to operate a nuclear installation imposed the payment of contributions as from 1 January 1995. As a result no contributions to the Decommissioning Fund were paid in connection with A1. Contributions relating to V1 were paid only as of 1 January 1995.
  - The V1 nuclear power plant (which is made of two blocks) should normally have remained in operation until 2015. In the course of the accession negotiations, however, the early shut down of the power plant was decided. The first block was shut down on 31.12.2006 and the second block on 31.12.2008. This means that the V1 nuclear power plant operator paid contributions to the National Nuclear Fund up to 31.12.2006 for the operation of the two blocks and only for the remaining block until 31.12.2008. As a result, a deficit in contributions to the NNF arose for the period from 2009 on until the end of the planned operation of the plant around 2015.

- Until 1 January 2002 the contributions to the NNF did not include a portion designed at covering the costs relating to the final disposal of SNF. Until that period Slovakia did not know how the final disposal of SNF would be dealt with and what the costs of final disposal would be. In this respect, Slovakia has explained that when setting the contribution of nuclear power plant operators to the Decommissioning Fund for the future decommissioning of nuclear power plants under the Act No 254/1994, no decision had been taken on the way to deal with final disposal of SNF. Under communist times, there had been an agreement in force between the USSR and Czechoslovakia on the payment-free export of SNF to the USSR. When it became clear that the agreement on the payment-free export of SNF would not be honoured anymore, that similar arrangements would not be possible or realistic and that Slovakia would most likely have to build a disposal facility attention was paid to the incorporation of final disposal costs into the costs assumptions on which the mandatory contributions were based. Mandatory contributions were adapted accordingly.

- (21) As a result, the historical deficit comprises the following costs:
- a) All of the costs of decommissioning nuclear plant A1 and the costs resulting from the treatment of the radioactive waste resulting from the decommissioning<sup>5</sup>.
  - b) Part of the costs of decommissioning nuclear plant V1 and of the treatment of the radioactive waste resulting from the decommissioning.
  - c) Part of the costs of treating SNF from nuclear plant V1 occurring as of the start of the first phase of the decommissioning. These relate to costs of the long-term interim storage of spent fuel and the final disposal of spent nuclear fuel in deep geological disposal site.
- (22) Part b) and c) of the historical deficit are calculated as the difference between the total decommissioning costs (including the management of nuclear waste resulting from the decommissioning) and the total SNF costs (occurring as of the start of the decommissioning) minus the contributions paid by Slovenské elektrárne a.s. to the Decommissioning Fund/NNF between 1995 and 2008 for V1.
- (23) The level of the historical deficit is currently estimated at the level of EUR 2 364 million.

*Table 1: Contribution of nuclear plant A1 to the historical deficit amount:*

<b>Item</b>	<b>EUR</b>
Status at 31.12.2010	8 508 000 <sup>6</sup>
Costs of decommissioning the plant from 2011 (including radioactive waste management of waste resulting from decommissioning)	- 828 306 000
Plant decommissioning costs paid out before the end of 2010	- 263 112 000
<b>Historical deficit for the A1 plant</b>	<b>- 1 082 910 000</b>

<sup>5</sup> Costs linked to SNF are not included. Indeed, The treatment site of SNF of A1 is not located in the Slovak Republic but in Russia. The last SNF from A1 was exported to the Russian Federation around 2000.

<sup>6</sup> Positive amount on A1's analytical account in the NNF.

Table 2: Contribution of nuclear plant V1 to the historical deficit amount:

<b>Item</b>	<b>EUR</b>
Status at 31.12.2010	319 301 000
Costs of decommissioning the plant (including radioactive waste management of waste resulting from decommissioning)	- 826 749 000
Spent fuel storage costs as of start of decommissioning phase	- 108 439 000
Contribution towards disposal of spent nuclear fuel	- 665 585 000
<b>Historical deficit for the V1 plant</b>	<b>- 1 281 472 000</b>

- (24) The commitment to early closure of V1 was part of Protocol 9 to the Act of Accession of the Slovak Republic to the European Union. In the same Protocol, the European Union committed to provide compensation to the Slovak Republic in the form of financial assistance. The Slovak Republic and the European Bank for Reconstruction and Development (EBRD) signed a Framework Agreement on 16 November 2001, which established the Bohunice International Decommissioning Support Fund (BIDSF). The BIDSF fund, which is administered by the EBRD, is intended to finance or co-finance selected projects for the decommissioning of nuclear plant V1 and the activities associated with the decommissioning of nuclear plant V1. All activities financed by resources transferred via the BIDSF are subject to public procurement under EBRD rules. The Ministry of Economy oversees and coordinates the fund in the Slovak Republic. The period of activity of the BIDSF has been extended to 2016.
- (25) The total historical deficit of V1 plant will be covered from the levy and the BIDSF. The amount to be used from BIDSF to cover the decommissioning costs linked to V1 plant is estimated at the level of EUR 440.545 million.

## 2.4. Plants and entities involved

### 2.4.1. The A1 nuclear power plant

- (26) The A1 nuclear power plant (in Jaslovské Bohunice) was in operation in the period 1972 - 1977. There were two accidents in this period. After a technical, economic and safety analysis, it was decided in 1978 to start its decommissioning.

### 2.4.2. V1 nuclear plant

- (27) The V1 nuclear power plant, also in Jaslovské Bohunice, consists of two reactors which started the commercial operation in 1981.
- (28) The operation of these two blocks was then phased out as of 31 December 2006 and 31 December 2008 respectively.

### 2.4.3. Slovenský energetický podnik

- (29) The operation of both plants A1 and V1 started during communist times in the framework of a centrally managed economy A1 and V1 were operated by a productive economic unit called "Slovenské energetické podniky group".

- (30) As from 1 July 1988, both A1 and V1 were operated by *Slovenský energetický podnik, štátný podnik* (Slovak Energy Enterprise, State enterprise), "SEP", which was a State enterprise and was founded by the Ministry of fuels and energy.
- (31) Under Act No 88/1988 on state companies, State companies were socialist organisations and had a separate legal status from that of the State.
- (32) In 1990, Act No 88/1988 was replaced by a new State Company Act (Act No 111/1990). Slovakia has explained that state companies under Act No 111/1990 cannot be compared to trading companies since there are no shares which the State could transfer to other persons. State companies which were to be privatised first had to be transformed into trading companies first. This was done with SEP in 1994 that was transformed into Slovenské elektrárne a.s..

#### 2.4.4. *Slovenské elektrárne a.s.*

- (33) Slovenské elektrárne a.s. ("SE") was established on 1 November 1994 in the context of the future privatisation of SEP<sup>7</sup>. SE was the legal successor of SEP.
- (34) Decommissioning of A1 plant was after 1995 financed from the NNF as well as the State budget (through payments to the NNF). SE ensured the management and maintenance of A1 buildings mainly from its operating revenues.
- (35) As for V1, SE paid the contribution to the NNF between 1995 and 2006.
- (36) SE is a joint stock company whose core business is production and sale of electricity. In terms of available installed capacity it is the largest power generating company in Slovakia. It also generates and sells heat, and provides ancillary services to the power grid. Since 2006, its majority shareholder is ENEL. The State owns the remaining shares.

#### 2.4.5. *Javys a.s.*

- (37) In April 2006 SE transferred A1 and V1 and corresponding liabilities for a symbolic price to GovCo, State owned company taking over some nuclear assets of SE before its privatisation<sup>8</sup>. GovCo a.s. was founded on 6 July 2005 as a branch of SE. After its registration in the business registry, 100% of the shares were transferred to the State (Ministry of Economy). In 2007 GovCo was renamed to JAVYS a.s. (current owner). JAVYS a.s. is 100% owned by the State.
- (38) GovCo was transferred plants A1 and V1 consisting of the objects, other rights and asset values used to operate them, including the spent nuclear fuel generated by nuclear plant V1 and A1 up to the date of effectiveness of the contract, the nuclear fuel used in nuclear plant V1 and A1 at the time of entry into effect of the contract, and the radioactive waste generated in nuclear plant V1 and A1 up to the date of effectiveness of the contract, and also the existing and potential liabilities tied to the transferred assets.

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<sup>7</sup> In accordance with the privatisation process assets and property rights of SEP were transferred to the State Privatisation Fund. They were then transferred from the State Privatisation Fund to various companies, depending on the activities concerned. Part of the assets (including A1 and V1) and rights were transferred to Slovenské elektrárne a.s..

<sup>8</sup> The privatisation agreement with ENEL was signed on 17 February 2005. It nevertheless contained the suspensive condition concerning the transfer of assets of A1 and V1 plants to GovCo.

- (39) As V1 was still (partly) in operation when it was transferred to GovCo/JAVYS a.s., JAVYS a.s. paid the mandatory contribution to the NNF as required by the NNF Act for plants in operation.
- (40) JAVYS a.s. is holder of the decommissioning authorisation for A1 and V1. It is responsible for carrying out the decommissioning of nuclear plants in line with the approved Strategy of final stages of the nuclear energy use. It obtains payments from the NNF for the decommissioning.
- (41) The Slovak authorities have indicated that several mechanisms are in place to ensure that the financial resources provided to JAVYS are used only for the decommissioning of A1 and V1 and are limited to the minimum necessary to cover the historical deficit.
- (42) The Slovak authorities have explained that this follows from the following provisions of the NNF-Act: eligible costs must comply with the Strategy for final phase of nuclear generation, which contains specific calculation of decommissioning costs, (Art. 10(2) of the NNF-Act); the recipient must submit calculations of requested financial resources and the description of activities to finance; the calculations are reviewed by the NNF. Furthermore, the agreement between the NNF and the recipient on the provision of resources from the NNF must contain provisions on the level and the purpose of the requested financial resources, on the accounting method, on control mechanism and sanctions in case the money are used in an unauthorised or uneconomical way, which include also repayment with interest.
- (43) In addition, concerning the establishment of decommissioning costs in the Strategy, Slovakia has explained that the costs for decommissioning the nuclear facilities listed in the Strategy for the Final Phase of Nuclear Power were calculated using OMEGA code. The calculation methodology implemented in this code is based on the international structure for determining decommissioning costs (ISDC- International Structure for Decommissioning Costing of Nuclear Installations)<sup>9</sup>, which was issued by IAEA<sup>10</sup> in Vienna, OECD/NEA in Paris and the European Commission in Brussels.

## **2.5. Legal framework on the financing of decommissioning of nuclear installations, spent fuel and radioactive waste in Slovakia**

### *2.5.1. The establishment of the NNF and of mandatory contribution to the Decommissioning Fund as of 1 January 1995*

#### A) Government Resolution No 190/1994:

- (44) As a result of the end of the communist times in 1989 and its independence in 1992, the Slovak Republic realised that it did not have any clear and reliable organisational and legal framework for the management of nuclear waste. In order to create a technical-economic, organisational and legislative framework for the

<sup>9</sup> OECD Nuclear Energy Agency, International Atomic Energy Agency, European Commission, 'International Structure for Decommissioning Costing (ISDC) of Nuclear Installations' OECD/NEA No. 7088, (2012) ISDC.

<sup>10</sup> International Atomic Energy Agency, Financial aspects of decommissioning: Report by an expert group, IAEA-TECDOC-1476, IAEA, Vienna, 2005.

reliable and safe disposal of radioactive waste, the Slovak Republic drew up a "Concept for the disposal of radioactive waste from nuclear power installations and other facilities with ionising radiation" (the "1994 Concept"). It was approved by Government Resolution No 190/1994 of 8 March 1994.

- (45) The 1994 Concept states that the disposal of radioactive waste and decommissioning costs constitute costs for the future and will be covered partly from the operating revenues of entities creating waste and partly from a State fund for nuclear decommissioning. Contributions based on the electricity production costs and contributions from the State budget are contemplated to finance the fund for nuclear decommissioning. An overview of costs and resources necessary for the decommissioning of each Slovak nuclear plant are specified in the annex of the 1994 Concept. They are split between contributions of the nuclear power plants operators and contributions from the State budget. For A1, only contributions from the national budget are foreseen in the annex to the 1994 Concept.
- (46) The Slovak authorities explain that the document was adopted in certain historical context and some assumption referred to in this document might be obsolete. It was, however, the first document which approached more systematically the issue of nuclear decommissioning in Slovakia. It is as a follow up to the 1994 Concept that Act No 254/1994 Coll. on the State Fund for Decommissioning of Nuclear Power Installations and Management of Spent Nuclear Fuel and Radioactive Waste was adopted.

B) Act No 254/1994 Coll. on the State Fund for Decommissioning of Nuclear Power Installations and Management of Spent Nuclear Fuel and Radioactive Waste:

- (47) The Decommissioning Fund is established to finance decommissioning, nuclear waste treatment and nuclear spent fuel treatment.
- (48) Art. 3(2) of the Act No 254/1994 specifies that owners of nuclear installations shall be obliged to pay contributions to the Decommissioning Fund. On this basis, contributions of the nuclear operators to the Decommissioning Fund were imposed as from 1 January 1995.
- (49) Act No 254/1994 Coll. foresaw also direct contributions of the State as additional financial sources for the Decommissioning Fund. The direct contributions from the State budget were linked to the fact that before 1995 no financial resources had been collected from operators (there was no legislation imposing such obligation). However, unlike the contributions of the operators, contributions from the State budget were not obligatory. The State, lacking financial resources, did not contribute at the level necessary to cover the historical deficit. During the period 1995-2001 EUR 20 334 600 were drawn from the State budget for the decommissioning of A1, which corresponds to approximately only 1/10 of the financial resources foreseen originally by the 1994 Concept to be provided from the State budget for financing of decommissioning of plant A1 (total amount foreseen for A1 from the national budget: SKK 6012 million, i.e. around EUR 200 million). Financial resources from the State budget were not used for any means other than nuclear plant than A1.

C) Act 238/2006 Coll. on the National Nuclear Fund.

- (50) From 1 July 2006 on the contributions were imposed on the basis of the NNF Act No 238/2006.

### 2.5.2. *The level of the contributions*

- (51) The Slovak authorities have indicated that the level of mandatory contributions has each time been determined so as to cover the expected decommissioning costs.
- (52) In 1995 the contribution was set at 10% of the sales price of the electricity produced in the nuclear plant. They were determined on the basis of the then expected financial needs from contributions of the operator (for V1, the expected needs were at SKK 319 million annually during 6 years, i.e. SKK 1.914 billion (€63.53 million) and on the basis of the average annual output of the reactors and the expected electricity price.
- (53) The amount of collected financial resources based on this method exceeded the levels considered in the 1994 Concept as required. For example, for plant V1, the level of the annual contribution range from the lowest level of SKK 468.8 million in 1998 to the highest level of SKK 691.9 million in 1995.
- (54) After Act No 560/2001 came into force (amendment of Act No 254/1994), contributions for all power plants were established at the level of SKK 350 000 p.a. per MW of the installed electric output of a nuclear installation and 6.8% from the sale price of energy produced annually in a given installation. The annual amount collected according to this method ranges between the lowest level of SKK 849.7 million in 2002 to the highest level of SKK 917.7 million in 2004.
- (55) The contributions foreseen in Act No 560/2001 had been based on updated cost estimations<sup>11</sup> that included also the costs related to the final disposal of SNF.
- (56) When Act No 238/2006 on the NNF came into force and the contributions were set at SKK 350 000 p.a. per MW of the installed electric output of a nuclear installation and 5.95 % of the sale price of energy produced in a given installation in the previous year.
- (57) Act No 238/2006 foresees that cost estimates be regularly reviewed. When necessary, contributions to the NNF are then adapted. Slovakia is currently reviewing cost estimations in order to verify whether contributions need to be adapted<sup>12</sup>.

### 2.5.3. *Provision on nuclear liability*

- (58) Slovakia's first Atomic Act (Act No 130/1998), Section 19(2) states: '*The decommissioning of a nuclear facility shall be the responsibility of the operator. The operator shall ring-fence funds to cover costs related to the decommissioning of the nuclear facility.*' This Act was replaced by Act No 541/2004 Coll. on the

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<sup>11</sup> Estimations can be found in the Slovak Government Resolution No 429 of 7 June 2000 forecasting a complete financial support for back end of nuclear power engineering in the SR.

<sup>12</sup> See Chapter 9 of the draft Strategy for the Final Phase in the Peaceful Use of Nuclear Power.

peaceful use of nuclear energy. As regards the liability for decommissioning costs, under Art. 20 of this Act, a holder of a licence to operate a nuclear installation is obliged to ensure its decommissioning. Similarly, the originator of radioactive waste is, under Art. 21 of this Act, responsible for its safe treatment. As regards the financing of the nuclear liabilities, Art. 19(8) of Act No 541/2004 states that the holder of an operating permit must provide earmarked financial resources to cover costs related to decommissioning.

- (59) In this connection, the Slovak authorities indicated that if during the operation of the power plant, it is observed that the accumulated financial resources in the NNF are not sufficient to cover the decommissioning, the operator stays liable for the missing amounts. The same is valid in case the operator shuts down voluntarily the nuclear plant before its planned lifetime, i.e. the operator is liable for the missing contributions to the NNF.
- (60) However, in case the early shut down follows the decision of the Slovak authorities not linked to safety reasons, such authorities shall be obliged to reimburse the authorisation holder for the costs needed to assure nuclear safety, and State Fund of Decommissioning of Nuclear Installations and Management of Spent Fuel and Radioactive Waste for the corresponding portion of costs incurred as a result of such a decision (see Art. 32 of Act No 541/2004).

#### *2.5.4. The issue of spent nuclear fuel*

- (61) The Slovak authorities have explained that nuclear energy in the Slovak Republic (Czechoslovakia) was from the outset developed in close cooperation with the Soviet Union. Several treaties had been signed with the Soviet Union in this field:
- Treaty on the construction of A1 from 1956. Under this agreement, the Soviet Union supplied Czechoslovakia with enriched fuel free of charge and Czechoslovakia returned to the Soviet Union the SNF free of charge.
  - Treaty between the Government of the Soviet Union and the Government of Czechoslovakia on cooperation in the construction of two nuclear power plants in Czechoslovakia of 30 April 1970 (V1 and V2 Bohunice), it was agreed that the Soviet Union would supply enriched fuel made from concentrate from Czechoslovakia over the entire period of operation of the power plants. The Soviet Union was to take delivery of SNF to storage and reprocess it in accordance with technical specifications.
- (62) However, in the 1990's, this treaty could not be implemented properly anymore given that on both sides the contracting parties did not exist anymore. Negotiations with a view to transfer responsibility for the agreement to the Slovak Republic and the Russian Federation were then undertaken without resulting in a final agreement. While on the SNF from A1 an agreement could be found and the SNF could be exported to Russia until about 2000 (the fuel of the A1 is of natural uranium), a similar solution could not be found for the SNF of V1 (enriched uranium) due to the Russian legislative framework that changed in the late 1990's.
- (63) Around 2000 Slovakia concluded that it would have to build a final disposal facility for SNF. In this framework it undertook a review of the financing of the back end of nuclear power. This review ("Prognosis of complete financial support for back end of nuclear power engineering in the SR") showed that contributions

to the NNF had to be increased in order to cover the full costs related to SNF treatment, including final disposal. Mandatory contributions to the Decommissioning Fund were subsequently increased with the entry into force on 1 January 2002 of Act 560/2001 Coll. (see paragraph (54) above).

- (64) Under Section 9(1)(c) of the NNF-Act, the NNF covers the costs for treating SNF after the end of operations at a nuclear facility. A nuclear plant's owner/operator pays the storage costs of the spent fuel up to the end of operations at the plant. The anticipated costs for the treatment of the SNF (after the end of operations at the plant) are included in the mandatory contributions under Section 7(1)(a) of the NNF-Act.

### **3. ASSESSMENT**

- (65) Article 106a(3) of the Euratom Treaty provides that the provisions of the Treaty on European Union and of the Treaty on the Functioning of the European Union shall not derogate from the provisions of this Treaty.
- (66) Hence, as long as the application of the TFEU does not imply derogation from the Euratom Treaty, the TFEU applies.

#### **3.1. Existence of State Aid pursuant to Article 107(1) of the TFEU**

##### *3.1.1. State aid for SE*

- (67) According to the case-law of the Court, the concept of aid is wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without, therefore, being subsidies in the strict meaning of the word, are similar in character and have the same effect.<sup>13</sup>
- (68) Until the transfer of V1 and A1 from SE to GovCo for a symbolic price in April 2006, SE was, pursuant to the applicable Slovak legislation, liable for the decommissioning costs for V1 (see description of the legislation in section 2.5.3 above). Although SE has not as such been the operator of the A1 plant, it is the legal successor of the operator of A1 and was transferred all liabilities relating to A1 and would as such have had to finance the decommissioning costs relating to A1 as well.
- (69) The applicable Slovak legislation constitutes an implementation of the polluter pays principle. This principle, which is also part of EU State aid policy, requires that the costs of pollution are internalised by the polluters<sup>14</sup>. Applied to nuclear energy, this means that costs related to the decommissioning, the treatment and management of nuclear waste, the treatment and management of nuclear spent

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<sup>13</sup> Case 30/59 Steenkolenmijnen v High Authority [1961] ECR 3, at 19.

<sup>14</sup> See paragraph 24 of the Environmental Aid Guidelines, Court case C-126/01 GEMO [2003] ECR I-13769, and Commission decision on the State Aid which the United Kingdom is planning to implement for the establishment of the Nuclear Decommissioning Authority (2006/643/EC); OJ L 268, 27.9.2006, p. 37, paragraph 90.

fuel correspond to pollution costs which should normally be borne by the polluters, i.e. the operators of the nuclear plants.

- (70) This is further confirmed in Commission Recommendation No.2006/851/Euratom of 24 October 2006 on the management of financial resources for the decommissioning of nuclear installations, spent fuel and radioactive waste<sup>15</sup> ("Recommendation"). Section 3 (3) of the Recommendation states:

*"The polluter pays principle should be fully applied throughout the decommissioning<sup>16</sup> of nuclear installations. In this regard, the primary concern of nuclear operators should be to ensure the availability of adequate financial resources for safe decommissioning by the time the respective nuclear installation is permanently shut down."*

- (71) This principle is also enshrined in Directive 2011/70/Euratom establishing a Community framework for the responsible and safe management of spent fuel and radioactive waste<sup>17</sup>. This Directive requires that Member States ensure that adequate financial resources be available when needed for the management of spent fuel and radioactive waste, including from decommissioning, taking due account of the responsibility of spent fuel and radioactive waste generators. Although the transposition period will end only on 23 August 2013, this Directive confirms that in principle the costs for the management of spent fuel and radioactive waste shall be borne by those who generated those materials.
- (72) The relief of an operator from financing of decommissioning, nuclear waste treatment and spent fuel management costs by the State thus constitutes an advantage for the operators of the nuclear power plants concerned.
- (73) Through the transfer of V1 and A1 from SE to GovCo, SE has been relieved from this obligation and the costs relating to it. Therefore, by agreeing to this transfer in the privatisation contract signed between the Slovak Government and ENEL, Slovakia has mitigated the charges which are normally included in the budget of an undertaking operating a nuclear power plant in Slovakia, and has therefore granted an advantage to SE.
- (74) This advantage has been financed from State resources, as GovCo is owned by the government and is now liable, as the new operator of the plants, for decommissioning costs. As will be analysed below in 3.1.2, GovCo receives itself State aid in order to cope with these costs.
- (75) SE is operating on the electricity generation market. Electricity is traded between Slovakia and other Member States through interconnectors, and the market has been liberalized at the EU level. The aid is therefore liable to affect trade and distort competition between Member States.

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<sup>15</sup> OJ L 330, 28.11.2006, p. 31.

<sup>16</sup> Decommissioning within the meaning of the Recommendation encompasses "all activities covering the technical decommissioning of the nuclear installation (decontamination, dismantling and demolition) and waste management (management and disposal of radioactive waste and spent fuel) leading to the release of the nuclear installations from radiological restrictions" (Section 2 (a) of the Recommendation).

<sup>17</sup> OJ L 199, 2.8.2011, p. 48.

(76) Therefore, the transfer of V1 and A1 from SE to GovCo constitutes State aid in the sense of Article 107 (1) TFEU for SE.

### *3.1.2. State aid for JAVYS*

(77) As holder of the operating licence for V1, GovCo/JAVYS would normally have to bear the decommissioning costs, costs of treatment of nuclear waste and costs of management of spent nuclear fuel not yet covered through contributions to the NNF (see above paragraphs (69) to (72)).

(78) JAVYS has never been the operator of the A1 plant. This plant was shut down in 1977. However, as mentioned under paragraph (38) of this Decision, JAVYS was transferred all existing and future liabilities relating to A1 and would as such have had to finance the decommissioning costs relating to A1 as well. By financing the decommissioning costs of the A1 nuclear plant, the State is relieving JAVYS from costs that it should have borne also in relationship to A1.

(79) JAVYS will obtain the resources from the NNF to cover decommissioning costs of A1 and V1 for which it is responsible. This transfer of resources from NNF to JAVYS will mitigate the charges which are normally included in the budget of an undertaking operating a nuclear power plant in Slovakia, and therefore grant an advantage to SE.

(80) This advantage is financed from State resources, as the NNF is funded from the levy respectively the State budget, and it is imputable to the State, as it has been decided by the Slovak legislator.

(81) GovCo/JAVYS are active on the market for dismantling nuclear power plants, which is liberalized within the EU. The advantage granted to JAVYS therefore has the potential to affect trade and distort competition.

(82) Therefore, the fact that NNF finances part of the dismantling costs for V1 and A1 constitutes a State aid for GovCo/JAVYS.

### *3.1.3. The State was not legally liable for the historic deficit*

(83) Slovakia argues that the State recognised its liability for the historical deficit in decommissioning costs in Government Resolution No 190/1994 of 8 March 1994 approving the Concept of disposal of radioactive waste from nuclear power installations.

(84) However, a government resolution does not have in the Slovak legal order a character of a generally legally binding document, which can be enforced in courts.

(85) In addition, the Government resolution does not refer to a liability of the State but merely to a State contribution to cover the costs. Also Act No. 254/1994, which was adopted on the basis of the 1994 resolution and can be considered as its implementation, did not anyhow refer to the liability of the State for the historical deficit in the decommissioning costs. The Act merely imposed the obligatory contributions to the Nuclear Fund of the nuclear assets operators to finance decommissioning costs on operators of nuclear assets as from 1 January 1995 but did not cover the issue of a formal recognition of the liability of the State in respect of a historical deficit. In addition, although it foresaw the possibility for

the State to make payments to the Fund, it did not enshrine any obligation that would require mandatory payments from the State budget. Also, in 1994 SE was transferred the A1 and V1 plants with all liabilities.

- (86) Finally, even if Slovakia had recognized any liability in Government Resolution No 190/1994, this could necessarily only relate to a historic deficit as at 1994. However, as indicated in paragraph (21) the decommissioning costs that Slovakia will cover do not correspond only to resources that had not been accumulated before 1995 but also encompasses other elements, like insufficient contributions between 1995-2002 for the final disposal of SNF.

### 3.2. Compatibility

- (87) Article 107(1) of the TFEU provides for the general principle of prohibition of State aid within the Union.
- (88) Article 107(2) and 107(3) of the TFEU provide for exemptions to the general incompatibility set out in Article 107(1).
- (89) . Article 107(3)(c) provides for the authorisation of State aid granted to promote the development of certain economic sectors, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.
- (90) According to the case-law, the Commission may declare State aid compatible with the internal market if the aid contributes to the attainment of an objective of common interest<sup>18</sup>, is necessary for the attainment of this objective<sup>19</sup>, and does not adversely affect trading conditions to an extent contrary to the common interest.
- (91) Accordingly, it is established Commission practice that measures may be declared compatible directly under Article 107(3)(c) TFEU if they are necessary and proportionate and if the positive effects for the common objective outweigh the negative effects on competition and trade<sup>20</sup>. The Commission considers it appropriate here to ask the following questions:

1. Is the aid measure aimed at a well-defined objective of common interest?

2. Is the aid well designed to deliver the objective of common interest? In particular:

(a) is the aid measure an appropriate and necessary instrument, or are there other, more suitable instruments?

(b) is there an incentive effect, or in other words does the aid change the behaviour of undertakings?

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<sup>18</sup> Case T-162/06 *Kronoply v Commission* [2009] ECR II-1, especially paragraphs 65, 66, 74 and 75.

<sup>19</sup> Case T-187/99 *Agrana Zucker und Stärke v Commission* [2001] ECR II-1587, paragraph 74; Case T-126/99 *Graphischer Maschinenbau v Commission* [2002] ECR II-2427, paragraphs 41-43; Case C-390/06 *Nuova Agricast* [2008] ECR I-2577, paragraphs 68-69.

<sup>20</sup> Community framework for State aid for research and development and innovation, point 1.3 (OJ C 323, 30.12.2006, p. 1); Community guidelines on State aid for environmental protection, point 1.3 (OJ C 82, 1.4.2008, p. 1).

(c) is the aid measure proportional, or in other words could the same change in behaviour be obtained with less aid?

3. Are the distortions of competition and the effect on trade limited, so that the overall balance is positive?

3.2.1. *Is the aid measure aimed at a well-defined objective of common interest ?*

- (92) The aid measures, that is the transfer of A1 and V1 from SE to GovCo and the subsequent financing of the decommissioning by NFF, which in turn is partly financed by the new levy on electricity consumption, aim at ensuring the safe decommissioning of A1 and V1.
- (93) The close-down of A1 has been decided, for safety reasons, in 1977. At that time, Slovakia had a centrally planned economy, and electricity markets were not liberalized. Therefore, it has been possible to put the burden of decommissioning costs on the legal predecessor of SE. After the transition to a market economy and the opening of electricity markets, the burden that is represented by this decommissioning could no longer be reasonably assumed by SE.
- (94) The close-down of V1 is laid down in the Act of Accession, and is therefore an obligation deriving from primary law.
- (95) The preamble to the Treaty establishing the European Atomic Energy Community ("Euratom Treaty") sets out the objective of creating the conditions of safety necessary to eliminate hazards to the life and health of the public<sup>21</sup>. ' Also Article 2(b) of the Euratom Treaty instructs the Community to establish uniform safety standards to protect the health of workers and of the general public and to ensure that they are applied. Article 30 of the Euratom Treaty provides for the establishment of basic standards for the protection of the health of workers and the general public against the dangers arising from ionising radiations. As recognized by the Court of Justice of the European Union in its case-law, the provisions of Chapter 3 of the Euratom Treaty, on health and safety, form a coherent whole conferring upon the Commission powers in order to protect the population and the environment against the risks of nuclear contamination<sup>22</sup>.
- (96) The Commission takes note that the notified measure will ensure the safety of nuclear facilities to provide for the correct, timely and safe decommissioning of obsolete nuclear facilities, and to store and provide long-term solutions for spent nuclear fuel and radioactive waste. The notified measure thus contributes to an objective of common interest.

3.2.2. *Is the aid well designed to deliver the objective of common interest?*

- (97) In its Recommendation of 24 October 2006 (2006/851/Euratom<sup>23</sup>), the Commission has recognized that although in principle operators should bear the entire costs of decommissioning, related nuclear waste management and spent

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<sup>21</sup> See also C-29/99 [2002] ECR p. I-11221.

<sup>22</sup> C-187/87 [1988] ECR p.5013 and C-29/99 [2002] ECR p. I-11221.

<sup>23</sup> OJ L 330, 28.11.2006, p. 31.

fuel management "*due attention should be paid to cases arising for historical reason where a special solution is the most appropriate*" (Section 6 (14)).

#### 3.2.2.1. The historical deficit as at 31 December 1994

- (98) The Commission notes that Slovakia established a decommissioning fund financed by contributions imposed on operators already in 1995, which is much earlier than in most Member States. The fund was established with a view to ensuring safe decommissioning of nuclear plants while at the same time taking into account the polluter pays principle. Slovakia thus ensured an efficient handling of nuclear liabilities based on the polluter pays principle at a time when environment policies had not yet reached present-day standards.
- (99) The Commission notes also that already in 1994 Slovakia was conscious that it would have to find also a (financial) solution for the past.
- (100) Given that the financial burden resulting from the decommissioning of A1 and the absence of contributions for V1 before 1995 were linked to the fact that Czechoslovakia had been a centrally-planned economy until 1989, Slovakia has explained that the State felt it to be its responsibility to bear this financial burden.
- (101) In this connection, the Commission takes note in particular of following elements:
- (102) As far as A1 is concerned, given the centrally organized economy under communist times, the Commission understands that the Slovakian State has in fact to be considered as owner and operator of A1 during its operation and that even if this is not what happened in the 1990's due to a lack of resources, in accordance with the polluter pays principle it would logically have been for the State to endorse the decommissioning costs of A1.
- (103) As far as V1 is concerned, its operation also started during communist times. During those times it would have been for the State to accumulate reserves for the decommissioning of V1 which, however, was not done.
- (104) In the period 1990-1994, both the economical and the legal context in Slovakia has been the object of major uncertainties, challenges and changes (ending of the centrally organized State, progressive transformation into a completely new economic model; transformation of state companies into joint stock companies, transfer of assets, absence of any clear legal framework on nuclear liabilities, independence process of Slovakia in 1992/1993). Slovakia, however, addressed the nuclear liabilities challenge very quickly and contributions to the NNF for V1 were paid as of 1 January 1995. In addition, those contributions were adapted when new cost calculations showed that additional means were required.
- (105) Finally, the Commission notes that the historical deficit as at 31 December 1994 was created before accession of the Slovak Republic to the EU.
- (106) The Commission considers that all those elements constitute historical circumstances that warrant the special financing arrangements set up by Slovakia in order to cover the historical deficit as at 31 December 1994.

3.2.2.2. The historical deficit resulting from the early shut down of V1

- (107) As indicated under paragraph (20) of this Decision, further to reconstruction works decided in the early 90's, V1 should have remained in operation until 2015. However, in the framework of the accession negotiations, Slovakia committed to early shut down the two units of V1 in 2006 and 2008 respectively.
- (108) In order to compensate Slovakia for this commitment, the Union committed to provide financial support to Slovakia to help it bear the resulting financial burden and ensure the safe decommissioning of V1.
- (109) In this connection, Protocol 9 of the Act of Accession of the Slovak Republic to the EU, states:

*Article 1*

*Slovakia commits to the closure of Unit 1 of the Bohunice V1 Nuclear Power Plant by 31 December 2006 and Unit 2 of this plant by 31 December 2008 at the latest and to subsequent decommissioning of these units.*

*Article 2*

*1. During the period 2004-2006, the Community shall provide Slovakia with financial assistance in support of its efforts to decommission and to address the consequences of the closure and decommissioning of Unit 1 and Unit 2 of the Bohunice V1 Nuclear Power Plant (...).*

*Article 3*

*The European Union acknowledges that the decommissioning of the Bohunice V1 Nuclear Power plant will have to continue beyond the current financial perspective and that this effort represents for Slovakia a significant financial burden. Decisions on the continuation of EU assistance in this field after 2006 will take the situation into account.*

- (110) The commission notes that the early shut is an obligation deriving from the Act of Accession. According to the Slovak authorities, the operator of V1 would in fact be entitled to the application of Art. 32 of Act No 541/2004<sup>24</sup> that states that in case the early shut down follows the decision of the State not linked to safety reasons, the State is obliged to cover the portion of decommissioning costs arising as a result of such decision.
- (111) The Commission further notes that as a result of the obligation to early shut down the V1 reactors, the operator of V1 was not in a position to obtain revenues from the nuclear power plant until 2015 as should have been the case and to accumulate reserves for the decommissioning during the same period.
- (112) Finally, the Commission notes that the Union acknowledged already in 2004 that the financial burden resulting from the early shut down would fall on the State rather than on the operator. Also, the Union felt necessary to show its solidarity

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<sup>24</sup> Art. 32 of Act No 541/2004 would normally require that the State reimburses certain costs to the operator and the NNF. In this case, the Slovak authorities decided to include the costs resulting from the early shut (in fact the missing contributions between 2006 and 2015) in the historical deficit.

with Slovakia to contribute financially to the specific decommissioning costs resulting from the early shut down.

- (113) The Commission considers that the above mentioned elements form specific historical conditions that justify that the Slovakian State will finance the part of the historical deficit relating to the partial absence of contributions to the NNF between 2006 and 2008 and the total absence of contributions to the NNF between 2009 and 2015 as compatible with the internal market.

#### 3.2.2.3. The historical deficit related to the spent nuclear fuel

- (114) Given that no contributions were paid to the NNF before 1995 for A1 and V1 and after 2006/2008 for V1, inevitably, no proportional contributions were paid to the NNF in order to cover the corresponding proportionate part of the treatment costs linked to SNF (intermediate storage and disposal as of decommissioning).
- (115) Slovakia has, however, also explained that the contributions between 1995 and 2001 did not - for the historical reasons explained under section 2.5.4 of this Decision – cover the costs linked to the final disposal of SNF.
- (116) The Commission notes that the absence of a portion in the contributions to the NNF designed at covering a proportionate part of the costs related to the final disposal of SNF in the initial years of the establishment of the decommissioning fund is a legacy from the past. At the moment the decommissioning fund was created Slovakia had no experience in final disposal. Spent nuclear fuel had always been exported to the Soviet Union (after cooling down on the premises of the nuclear power plant concerned). Also, it appears that Slovakia initially thought that the issue would be solved out before the decommissioning of V1 would start (as far as A1 was concerned, all spent nuclear fuel has been exported to the Soviet Union/Russia until 1999).
- (117) In addition, the Commission notes that once Slovakia had to conclude that no agreement with Russia would be reached, was attention paid to the construction of a final disposal site and to the incorporation of these costs into the mandatory contributions. Those costs were fully included as of 1 January 2002.
- (118) Also, while a nuclear plant's owner/operator pays the storage costs of the SNF up to the end of operations at the plant, Article 9(1)(c) of the NNF-Act, provides that the NNF covers the costs for treating SNF after the end of operations at a nuclear facility. Consequently, the anticipated costs for the treatment of the SNF are included in the mandatory contributions under Section 7(1)(a) of Act No 238/2006.
- (119) In this connection, the Commission also welcomes that cost estimates are updated regularly so as to ensure that a sufficient volume of funds will be accumulated in the NNF. Slovakia has indicated in this connection that the current review undertaken under Chapter 9 of the draft Strategy for the Final Phase in the Peaceful Use of Nuclear Power reveals that according to current knowledge of the production volumes of SNF, the current costs for their storage *and* current knowledge of costs for the development, construction and operation of facilities for implementing the final phase of the treatment of SNF, a sufficient volume of funds will be accumulated in the NNF.

- (120) The Commission finally notes that this part of the historical deficit is designed to encompass a deficit in resources that occurred before the accession of Slovakia to the EU.
- (121) The Commission is therefore satisfied that the partial non-inclusion of the costs of the final disposal of SNF from V1 in the contributions is linked to historical specificities, in particular the contract between the Government of the Soviet Union and the Government of Czechoslovakia on cooperation in the construction of two nuclear power plant in Czechoslovakia of 30 April 1970 and the subsequent negotiations to renew it. The Commission also recalls in this context that Slovakia did establish a decommissioning fund based on contributions from operators at a very early stage when principles and environmental standards were not yet established as firmly as they are nowadays. In addition, SNF costs were taken into account as of 2002, i.e. before accession.

### *3.2.3. Adequacy of the measure*

- (122) The Commission considers that in light of the historical specificities of the case, the proposed notified measure providing for special financial arrangements for the historical deficit constitute an appropriate instrument to address the objectives pursued and are fully in line with the objectives of the Euratom Treaty.

### *3.2.4. Necessity and proportionality*

- (123) When assessing this information, and notably in determining whether the Measure is necessary and proportionate, the Commission notes that without financial special arrangements for the past and early shut down, neither SE nor JAVYS could reasonably have been expected to meet the entire costs entailed by the historical deficit given in particular they neither of them was provided with financial reserves from its predecessors to face the liability; nor did they operate A1 and V1 during the entire lifetime or a substantial part of the lifetime of the power plants. In other terms they did not acquire the revenues that would have allowed them to face the total nuclear liabilities.
- (124) The Commission further notes that while they were operating V1 both SE and JAVYS paid the required contributions to the NNF. When the electricity market started to be liberalised in 2002, the contributions to the Decommissioning Fund had been calculated so as to cover the full costs of decommissioning, nuclear waste treatment and SNF treatment costs.
- (125) Finally, the Commission observes that the financing mechanism combined with the system described under paragraphs (42) to (43) of this Decision ensures that enough funds are available for the fulfilment of these goals, while restricting the intervention to the minimum necessary for their achievement. It will also ensure that funds are used for the payment of nuclear liabilities only.

### *3.2.5. Are the distortions of competition and the effect on trade limited, so that the overall balance is positive*

- (126) The Commission first of all notes that contrary to other support schemes in the electricity sector, the present aid does not support an investment or constitutes operating aid for a power plant that is still in operation.

- (127) Rather, it compensates for the fact that A1 during its entire lifetime (1971 to 1977) and V1 during the first part of its lifetime (1981 to 1994) did not establish reserves for their decommissioning from their sale revenues. In the case of V1, its lifetime (and therefore the period of contribution to the NNF and its predecessor) was shortened by the Act of Accession.
- (128) The aid therefore does not subsidize current electricity production.
- (129) According to the case law, in order to determine whether an aid adversely affects trading conditions to an extent contrary to the common interest, it is necessary to consider all the legal and factual circumstances surrounding that aid, in particular whether there is an imbalance between the charges imposed on the undertakings or producers concerned on the one hand and the benefits derived from the aid in question on the other. Consequently the aid cannot be considered separately from the effects of its method of financing.<sup>25</sup>
- (130) It follows further from the case-law of the Court that when an aid is financed by an imposition levied on certain undertakings or certain productions, the Commission is required to verify whether the levy in question is likely to increase the distortive effect of the aid, in which case the aid and its method of financing could not be considered compatible with the requirements of Articles 107 and 108 TFEU, even if the levy would not constitute discriminatory taxation prohibited by Article 110 TFEU.
- (131) The Commission notes that the levy can be classified as non-harmonized duty on excise goods under Art. 1(2) 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC<sup>26</sup>. In accordance with the logic of consumption taxes, it is imposed on both domestic and imported electricity that is consumed in Slovakia and is not imposed on exported electricity, which by definition will not be consumed in Slovakia. The Commission notes that such a consumption tax, which is levied on imported and domestic products in an identical manner, does not appear contrary to Article 110 TFEU.
- (132) According to the case-law, the method of financing by a levy may nevertheless render incompatible with the internal market an aid which was in principle compatible with the provisions of Articles 107 and 108 TFEU. This occurs in cases where the method of financing of the aid is such that it makes the amount of aid dependent upon the revenue from the levy and thus has a protective effect of domestic production which goes beyond the aid itself.<sup>27</sup>
- (133) In the present case, the aid does not serve to finance the current production of electricity in Slovakia, but is strictly limited to what is necessary to cover the costs of decommissioning historic nuclear facilities, for which no adequate provisions were created in times of a centrally-planned economy. This oversight

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<sup>25</sup> Case 47/69 *France v Commission* [1970] ECR 487, paragraph 7 and 8.

<sup>26</sup> OJ L 9, 14.1.2009, p. 12–30

<sup>27</sup> Case 47/69 *France v Commission* [1970] ECR 487, paragraph 16 to 22.

of public authorities in providing the facilities operated in the past with adequate decommissioning funding was aggravated by a provision of primary law.

- (134) This distinguishes the present case from the numerous schemes of compensation for stranded costs, public service obligations and support schemes for renewable electricity, where the Commission has found that the financing of the support scheme through a levy has a protective effect of national electricity production that goes beyond the aid, with the consequence that the financing mechanism of the aid rendered the aid incompatible.
- (135) The Commission therefore concludes that the aid does not adversely affect trading conditions to an extent contrary to the common interest.

### **3.3. Conclusion on compatibility**

- (136) In the light of the above it is proposed to conclude that the Commission considers that the distortion of competition resulting from the aid granted under notified measure is outweighed by the positive contribution of the measure to the achievement of the Euratom Treaty objectives.

## **4. CONCLUSION**

The Commission has accordingly decided to consider the aid measure envisaged by Slovakia to partially finance the costs relating to the decommissioning, the treatment of nuclear waste and the treatment of spent nuclear fuel of two already shut down nuclear power plant (A1 and V1) to be compatible with the Treaty on the Functioning of the European Union.

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For the Commission

*Joaquín ALMUNIA*  
Vice-President