Downstream Oil Resilience Bill

Explanatory Document for Business, Energy and Industrial Strategy Select Committee

August 2021

This bespoke document has been prepared for the Business, Energy and Industrial Strategy Select Committee. It is solely intended to assist the Committee in carrying out pre-legislative scrutiny of the Downstream Oil Resilience Bill, to summarise the Bill in accessible language and explains what each power does, including the underlying policy intentions.[1]

Overview

1. The Downstream Oil Resilience Bill introduces measures that will enable Government to support the downstream oil industry in maintaining the security of fuel supply to consumers. Those measures are described below:

    - **Power of direction** (clauses 3 to 8): enables Government to direct industry to take measures to improve their own resilience or ensure continuity of supply – this power would be used proportionately and only if the Government is not able to achieve the necessary outcomes by voluntary means.
    - **Information power** (clauses 9 to 14): requires industry to provide regular data and report incidents to ensure Government can identify potential and actual disruptions early and target contingency measures more effectively.
    - **Restriction on acquisitions** (clauses 15 to 29): ensures companies gaining control of critical infrastructure are financially and operationally fit, reducing the risk that fuel supplies are jeopardised by high-risk ownership.
    - **Spending power** (clause 40): allows Government to provide financial assistance to support sector resilience and ensure continuity of supply, only if it is deemed necessary and value for money.

Overall Policy background

2. The downstream oil sector comprises over 200 companies involved in the refining, importing, distribution and marketing of petroleum products. The sector plays a key role in our energy security, supplying products that are vital to our economy and our way of life. In particular, petroleum-based fuels provide 98% of the energy for the transport sector. Furthermore, the sector estimates it supports the employment of over 150,000 people and contributes to around 7% of the Exchequer's total receipts.

3. The sector is usually efficient, flexible and effective in ensuring the continuity of fuel supply. However, it is also responding to global market factors and, as it changes, the ability of the UK supply system to protect the continuity of fuel supplies and be resilient to disruptions needs to be maintained. There is no central authority or mechanism in the downstream oil supply system by which supply capacity can be managed. Instead, supply capacity is determined by individual enterprises, and capacity investment and rationalisation are driven by competition. In a competitive market place, participants may

[1] The explanations of policy and drafting set out in this document are intended to reflect the Department's current position and understanding, which may change in light of the outcome of the Committee's scrutiny, further stakeholder engagement and other developments. In the event of any discrepancy between this document and other material produced in relation to the draft Bill, e.g. the Explanatory Notes or Delegated Powers Memorandum, those other materials should be considered to take precedence.

not know the supply capacity/ capability of their competitors or, consequently, the system as a whole.

4. The UK market for petroleum products is a mature market, facing both changing patterns of demand and high levels of global competition. The consequence has been:

    - fragmenting supply chains with major oil companies, which used to run vertically integrated well-to-pump operations, divesting themselves of categories of assets or outsourcing some operations; and
    - relatively high utilisation rates and closures of spare or uneconomic capacity. For example, currently there are six UK oil refineries, down from a high of 19 in 1975, and the number of filling stations has declined from around 18,000 sites in 1990 to 8,400 now.

5. There are a number of inherent risks to fuel infrastructure including accidents, severe weather, malicious threats, industrial action and financial failure. As in other important sectors like this, Government works with fuel suppliers to mitigate such risks. However, not all risk can be prevented.

6. The sector has also faced new and growing pressures and risks in recent years. In addition to the additional stress imposed by the Covid-19 pandemic, the sector is now faced with an increasingly ambitious trajectory for reduction of greenhouse gas emissions. On 27 June 2019, the target in s1(1) of the Climate Change Act 2008 was amended, requiring the UK to bring all greenhouse gas emissions to net zero by 2050. On 20 April 2021, the Government confirmed it would adopt a sixth carbon budget requiring the cutting of emissions by 78%, compared to 1990 levels, by 2035. As the UK makes this transition to a zero carbon economy, it will still need to ensure reliable fuel supplies are available. Critical services (public and private sector) will continue to be dependent on fuel for many years, while the sector comes under increasing economic pressure due to the prospect of falling demand.

7. The Government undertook an internal research project in 2014-15 which examined evidence of GB fuel supply system resilience and risks to supply. The research findings took account of information supplied by many fuel companies. The findings of the research project (which were confirmed by a repeated assessment in 2019-20) were:

    - There are a number of major GB infrastructure sites which are essential to regional fuel supply because other local infrastructure is too small to replace them if they cease supply (also referred to as ‘single points of failure’).
    - Supply chains are very dynamic and can adjust to disruption at these sites over weeks but not immediately.
    - The key constraint is finite logistical capability of pipelines and tankers within the country to distribute fuel to retail sites – not a national lack of access to fuel from UK refineries or imports.
    - A sudden failure at the identified essential sites could not be compensated for immediately and fuel shortages could occur within days.
    - There is a market failure in that, while individual suppliers invest in the resilience of their own supply chain, there is neither a mechanism nor a market incentive for them to share the costs of investing in system resilience as a whole.

8. To address these concerns, Government has put in place a small number of measures to identify fuel supply risk and support industry in ensuring fuel supply resilience, with

further back-stop powers to protect fuel supply resilience when required. These measures are designed to work with the structure of the fuel supply market.

9. The Government held a consultation ('Proposals to strengthen the resilience of fuel supply to UK consumers') from 17 October 2017 to 12 December 2017 to obtain a formal view from industry and other interested parties on the proposed measures, seek ideas as to how these proposals can be improved and gather further evidence on regulatory impacts. The findings of this consultation was used to inform the measures now included in the Bill.

10. A response to the consultation was published on 17 April 2018. The response confirmed that Government has heard clearly industry's calls for a light-touch approach to measures and has given careful consideration to minimise any impacts on market dynamics and competitiveness.

Key Definitions (Clauses 1 to 2)

11. Clauses 1 and 2 are intended to set out the key definitions used throughout the Bill, including the scope of the relevant "downstream oil sector activities", and the meaning of "resilience" and "continuity of supply" in this sector. These definitions are intended to ensure the following provisions apply to the sector as explained above, and that the meaning of these key concepts is clear for all stakeholders.

Powers of direction (Clauses 3 to 8)

12. The downstream oil sector faces an increasing level of challenge. As the sector adapts and reorganises to deal with these challenges, maintaining and securing the continuity of fuel supply is likely to become more difficult. The limited powers under current Legislation available do not provide government, on behalf of fuel consumers, with the ability to ensure appropriate measures are put in place by industry to protect UK fuel supply. The powers of direction in clauses 3 to 8 of the draft Bill seek to address this gap.

Individual directions under clause 3

13. Clauses 3 to 7 of the draft Bill create a new power for the Secretary of State to give directions for fuel supply resilience purposes. Clause 3 sets out three separate, though related, powers of direction:

    - A power to give directions "*for the purpose of maintaining or improving downstream oil sector resilience*" (clause 3(1)).
    - Where there is a disruption to or failure of continuity of supply of fuel, a power to give directions to remedy or mitigate that disruption or failure (clauses 3(2) and 3(3)).
    - Where there is a significant risk of such disruption to or failure of continuity of supply, a power to give direction to reduce the risk or mitigate any disruption or failure (clauses 3(4) and 3(5)).

14. As set out below, directions under clause 3 must be given by written notice so can only be given to particular, identified persons. The powers apply to the following:

    - A person carrying on downstream oil sector activities with a capacity in excess of 500,000 tonnes (clause 3(6)(a));

- A downstream facility owner with a capacity in excess of 20,000 tonnes (clause 3(6)(b)).

15. Clause 4 sets out the scope of directions under clause 3. A direction may impose a time limit or a requirement that must be complied with within specified intervals. Requirements may be imposed for a limited period or indefinitely. A direction to 'do anything' covers both refraining from doing anything and achieving an outcome. A direction may make different provision for different purposes and may be modified or revoked by a later direction.

16. The draft Bill specifies the procedure for giving a direction as follows under clause 5:

- Prior to issuing a direction, the Secretary of State must give the intended recipient a notice accompanied by a draft of the proposed direction (clause 5(1)). The notice must explain the reason for issuing the direction, when it will come into effect and a period (not less than 14 days beginning the date on which notice is given) within which the recipient may make written representations (clause 5(2)).
- Prior to issuing a direction, depending on which part of the UK the facility or activities subject to the direction are located, the Secretary of State must consult the relevant Health and Safety regulator and competent authority for control of major accident hazards, and anyone else the Secretary of State deems appropriate (clauses 5(4) and 5(8)). The decision on whether to issue the direction must take account of any representations received from the recipient and those consulted (clause 5(5)).
- If the decision is taken to issue the direction, written notice of this decision must be given to the recipient, including the details of the direction and the timeframe in which it will take effect (clauses 5(6) and (7)).

17. Clause 6 provides for appeals against directions to be made to the First-Tier Tribunal. Clause 7 creates a new criminal offence of failing to comply with a direction without reasonable excuse.

Corresponding power to make regulations in respect of a class of persons

18. Clause 8 creates a new power to make regulations corresponding to directions under clause 3, via the affirmative procedure (clause 42(4)(a)). Clauses 8(1), 8(2) and (3), and 8(4) and (5) create regulation powers corresponding to those of clauses 3(1), 3(2) and 3(3), and 3(4) and (5) respectively. Regulations under clause 8 are to apply to a class of persons. As a form of delegated legislation, they can identify persons subject to the regulations by description, without every individual member of that class having to be notified or consulted in advance.

19. The powers apply to the following:
    - A person carrying on downstream oil sector activities with a capacity in excess of 1,000 tonnes (clause 8(6)(a));
    - A downstream facility owner with a capacity in excess of 1,000 tonnes (clause 8(6)(b)).

20. As for directions under clause 3, before making any regulations, the Secretary of State must consult with the relevant Health and Safety regulator, the competent authority for control of major accident hazards and anyone else the Secretary of State consider appropriate (clauses 8(9) and 8(10)). Regulations can create new criminal offences for failure to comply with their requirements without reasonable excuse (clause 8(7)).

Policy Intentions

21. The power of direction is considered a backstop, where government considers that industry has not taken proportionate measures to mitigate resilience risks. The powers are not intended to address actual or imminent emergencies, where existing powers may be available (e.g. under the Civil Contingencies Act 2004 and Energy Act 1976). Instead, the new powers are intended to ensure that Government can require industry participants to take appropriate steps to ensure they have appropriate resilience measures in place, to avoid or reduce the risk (among other things) of any emergency situation arising. Government will always seek a voluntary solution before considering whether a direction is appropriate. Government anticipates that the use of the powers will be limited and by exception.

22. The powers are supported by a power of spending (discussed further below), which could allow government to provide financial assistance for the purpose of maintaining or improving sector resilience and continuity of fuel supply. However, where the cost is considered disproportionate to the benefit, government would not expect to provide financial support.

23. Government anticipates that the powers of direction could be used for the following reasons:
    - Ensuring critical asset resilience: i.e.
        - ◊ Security – physical and cyber
        - ◊ Flood defences
    - Contingency planning for nationally significant risks (i.e. pandemic influenza, failure of electricity supply, failure of telecoms systems)
    - Direct or indirect action to prevent critical site closure - where failure of an asset leads directly to a supply disruption
    - Direct or indirect action to prevent secondary site closure - where failure of an asset leads to a reduction in resilience

Information powers (Clauses 9 to 15)

24. BEIS continuously monitors the state of the Downstream Oil supply chain – from the volume of crude oil imports to forecourt fuel sales. Downstream Oil data enables BEIS to monitor the supply chain situation and, anticipate pinch points and any potential issues in supply. Information can then be used to avoid issues or support decision making during an emergency. This will require BEIS to have the necessary powers to assess compliance of operators of Downstream Oil essential services in:

    - having appropriate and proportionate measures to manage risks posed to the supply of fuel;
    - having appropriate measures to prevent and minimise the impact of security incidents on supply system with a view to ensuring continuity of those services; and,
    - providing notification without delay of incidents having a significant impact on continuity of service.

25. The information powers in the draft Bill have three strands, as set out below.

Power to require information (clause 9)

26. Clause 9 creates a new power for the Secretary of State to require information from a person relating to their downstream oil sector activities or assets by notice in writing. As with directions under clause 3, this power can only be used to require information from particular, identified persons, not an entire class of persons.

27. This power can only be exercised for the purpose of maintaining or improving downstream oil sector resilience (clause 9(2)), and only in respect of persons meeting the 1,000 tonne capacity threshold (clause 9(3)). Failure to comply with a requirement under clause 9(1) without reasonable excuse is a criminal offence (clause 11(1)).

Duty to report incidents (clause 10)

28. Clause 10 creates a new duty to report "*notifiable incidents*" to the Secretary of State. This duty only applies to the most significant facilities and businesses in the UK downstream oil sector and there is a 500,000 tonne capacity threshold (clause 10(2)(a) and (b)).

29. For these purposes, a "*notifiable incident*" is one affecting the person's downstream oil sector activities or assets in such a way as to create a significant risk of, or cause, disruption to or failure of supply of fuel, or an adverse effect on downstream oil sector resilience (clause 10(3)). Examples of the sort of incidents that are intended to be notifiable under clauses 10(1) and (3) include a loss of operational capability due to accident, malicious attack or planned maintenance, a failure of fuel to meet specification, a threat of industrial action, and a risk of or actual insolvency.

30. Failure to comply with a requirement under clause 9(1) without reasonable excuse is a criminal offence (clause 11(1)).

Regulations requiring the provision of information at specified intervals (clause 12)

31. Clause 12 creates a new power to make regulations requiring a person to provide the Secretary of State with information about their downstream oil sector activities or assets at specified intervals. Regulations will be made via the affirmative procedure (clause 42(4)(b)).

32. The capacity thresholds determining who may be subject to these regulations are the same as those for notices under clause 9, i.e. 1,000 tonnes (clause 12(3)). However, as for regulations under clause 8, these regulations are to apply to a class of persons. Regulations under clause 12 may create new criminal offences of failing to comply with their requirements without reasonable excuse (clause 12(5)).

Other provisions – information sharing

33. The draft Bill also includes provisions relating to the sharing of information.

34. Firstly, the draft Bill limits the circumstances in which the Secretary of State can disclose any information obtained to other government departments or devolved authorities. The limited circumstances in which such disclosure is permitted are set out in clause 13(2). Those circumstances are expressly limited by clause 13(3), to confirm that clause 13(2) does not authorise any disclosure that would otherwise be prohibited by data protection legislation or the Investigatory Powers Act 2016.

35. Secondly, clause 14 creates a new gateway allowing HMRC to share relevant information with the Secretary of State for the purpose of facilitating the exercise of functions relating to downstream oil sector resilience. Clauses 14(2) to (5) contain further restrictions on the use of that information, and similar limitations on any disclosure that would be prohibited by data protection legislation or the Investigatory Powers Act 2016.

Policy Intentions

36. Currently, there is no legal requirement or obligation for UK Downstream Oil companies operating to supply data or information to BEIS for the purposes of understanding the risks to Downstream Oil Resilience on infrastructure, supply or demand. Existing information collection mechanisms are designed to monitor specific UK and EU legislation and are fit for purpose against current reporting requirements (for VAT/tax, Compulsory Stocking Obligation and official statistical purposes). Existing Information reported to BEIS on the Downstream Oil supply system's capabilities and risks is done through voluntary arrangements, is often incomplete, and carries the risk that industry engagement could be stopped at any time. Current reporting requirements (or the lack of any legal obligation) do not provide the detailed Information that is required to fully understand the risks and capabilities of the Downstream Oil sector in the event of a supply disruption.

37. Government will use the information provided using these new provisions to build a consistent, accurate and up-to-date picture of the health of fuel supply resilience in the country.

38. Government's intention is to place regular reporting of relevant downstream oil sector activities and assets on a statutory footing, using the powers in clauses 9 and 12. As was set out in the consultation and consultation response, Government is the only body that has an overarching view of the entire downstream oil supply system.

39. Under the proposed legislation, the information required from industry will be limited to what is necessary and Government will work with industry to minimise the administrative burden. The Impact Assessment published with the draft Bill has estimated that the total costs of compliance with the information reporting regime will be only £30,000 per year, including familiarisation costs in the first year.

40. Full detail of the regime will be set out in guidance accompanying the secondary legislation that will bring the regulations into force.

41. In addition to the regular reporting regime, clause 10 also imposes a new requirement on industry to report incidents that pose a risk to either their continuity of supply or their resilience. In a scenario where there is an incident, the primary concern is ensuring that notification is given to Government of a threatened or actual disruption as swiftly as possible (without undermining the practical response to the event). However, the initial notification must also contain sufficient detail to provide Government with an initial picture of the nature, severity and likely impact of the incident. Key details included in the incident notification could include:

    - Name and contact details of primary, and supplementary, point of contact(s);
    - Site location;
    - Nature of incident/risk – description of the issue or threat;
    - Quantity and duration of impact (including confidence on both);
    - Response by company to resolve the issue – both initial and planned;
    - Mitigations to handle the loss of product, either by the company directly or known response from other companies.

42. Government will, in consultation with industry, develop a notification template through which notification should be provided.

43. Reporting may be required for the duration of the disruption or for the reasonable likelihood of the disruption as directed. BEIS may require the companies involved to report other information it considers relevant dependent on the individual nature of the disruption.

44. Government has heard industry's concerns about the thresholds for triggering a notification under clause 10, and the associated timelines. As we move towards introducing the legislation, Government will explore with stakeholders how best to balance the burden on industry with Government's duty to ensure a secure and resilience fuel supply in Great Britain. Government will publish guidance in support of the powers in the legislation to ensure there is a shared understanding between all parties of the requirement.

Restriction on acquisitions (Clauses 15 to 29 and Schedule 1)

45. These clauses of the Bill create a new restriction on the acquisition of assets in the downstream oil sector, with clause 15(1) providing that no person may make a "*qualifying acquisition*" without the written consent of the Secretary of State.

46. The meaning of "*qualifying acquisition*" is set out in clauses 16 to 18 and Schedule 1. In short, there must be a "*qualifying asset*" located in the UK and used for downstream oil sector activities in relation to more than 500,000 tonnes of oil in the previous calendar year. A "*qualifying acquisition*" takes places where someone gains a specified degree of ownership or control over that asset (generally more than 25% of the value of or rights in the asset), either directly or indirectly. This test is therefore intended to catch transactions where a significant degree of ownership or control of major downstream oil sector assets changes hands.

Application Process

47. Clauses 15(2) to 15(4) set out the procedure for applying for the necessary consent. When a new owner wants to buy a critical national downstream oil facility, an application for consent must be made to the Secretary of State and must specify the asset or the company, the holding or interest that the person proposes to acquire, and the proposed date of the acquisition (clause 15(2) and (3)). The Secretary of State must acknowledge receipt of an application under this section in writing before the end of the fifth working day following the day of receipt (clause 15(4)). Further details of the application procedure will be set out in regulations made under clause 15(5), and it is our intention to prepare draft regulations before the Bill is introduced to Parliament.

48. Once an application has been made, the Secretary of State must reach a decision within 13 weeks (clause 19(1). That decision period is extendable in certain circumstances (clauses 19(2) to (8)), and the Secretary of State can request further information from the applicant (clause 20) or third parties (clause 21).

Deciding Applications

49. Under clause 22(1), the Secretary of State has three options when considering an application:

    - consent to the acquisition unconditionally;

- consent to the acquisition on condition that specified conditions are met in respect of the acquisition or before the acquisition takes place; or
- refuse consent.

50. The Secretary of State may only impose conditions in applications where he or she would refuse the application if the conditions were not imposed (clause 22(4)), and may only refuse an application if there are reasonable grounds for doing so or if information required has not been provided or is incomplete (clause 22(5)). The Secretary of State must notify the applicant of the decision before the expiry of the decision period (clause 22(6). If no decision is made within the decision period (as extended), the Secretary of State is treated as having consented to the application (clause 19(9)) so the acquisition can proceed.

51. When deciding an application, the Secretary of State must take into account the impact of the proposed transaction on the financial and operational capability of the business or asset being acquired. More specifically, the Secretary of State must consider:

    - any risks that the acquisition poses to the financial stability of the relevant business (clause 22(2)(a)); and
    - any risk that the acquisition will adversely affect the availability and effective use of technical resources that are required for the sound management of the relevant business (22(2)(b)).

52. The Secretary of State must also have regard to the desirability of securing continuity of supply of crude oil-based fuel and the likely influence that the applicant will have on the relevant business (clause 22(3)).

53. The Secretary of State also has to publish a statement setting out how it is proposed that these decisions will be made (clause 22(1)), and in particular specifying the factors to be taken into account when assessing financial and operational risks (clause 22(2)). This statement must be consulted on (clause 24(2)) and then approved by Parliament (clause 24(3) before the final version is published.

54. The Secretary of State's decisions are subject to appeal to the First-tier Tribunal (clause 25).

Enforcement Provisions

55. In addition to the general sanctions and offences (discussed further below), the Bill also introduces a number of specific enforcement measures for the acquisition control powers. These address the situation where a person makes a qualifying acquisition without the necessary consent, and they continue to own or hold an interest in the qualifying asset.

56. Clause 26 first allows the Secretary of State to give the person a "warning notice", which tells them the Secretary of State is considering taking further action. Warning notices can also require the recipient to comply with specified conditions relating to the financial and operational capability of the business in question.

57. After a warning notice has been given, the Secretary of State can move on to give a "restriction notice" under clause 27. Restriction notices can impose restrictions on further transactions involving the relevant asset, preventing the person from selling on their interest in the asset, for example.

58. Recipients of warning and restriction notices can appeal to the First-Tier Tribunal (clause 28).

59. Failure to comply with the requirement for consent for a qualifying acquisition, or requirements imposed by a warning or restriction notice, is an offence under clause 29.

Policy Intentions for the restriction on acquisition powers

60. The downstream oil sector is largely unregulated, and unlike other sectors with critical national infrastructure, there is no licensing regime on the grounds that the acquirer's lack of technical competence or financial stability raises a risk to the resilience of fuel supply that would enable Government to intervene in any changes of ownership or control. These assessments are currently outside the National Security and Investment Act 2021 which considers matters of National Security and Enterprise Act 2002. This means that there may be no opportunity for the Secretary of State to scrutinise or assess the deal as increasing risks to security of supply.

61. The restrictions on acquisition powers have been included in the bill because there are currently no powers that specifically enable Government to intervene in changes of ownership or control to prevent unsuitable investment prejudicing UK fuel supply resilience. There has been an observed trend over recent years that assets are being transferred from long-established oil companies which are well funded with major portfolios of assets to smaller, new entrants whose financial resources and operational experience are thinner. The best-known example of this is the collapse of Petroplus, as owners of Coryton refinery, in 2012. The Government is concerned that this trend may continue as the economics of the downstream sector come under more pressure during the transition to Net Zero.

62. These clauses of the Bill therefore seek to create a regime specifically to protect the downstream oil sector from influence or control by persons who are not financially sound and technically competent.

Sanctions and offences (Clauses 30 to 39 and Schedule 2)

Further measures in relation to criminal offences

63. As set out above, to support a number of the new powers the Bill creates new criminal offences. Clauses 30 to 33 set out further provisions in relation to criminal offences, including:

- A new offence of making false statements (clause 30);
- Further detail on the offences that may be created by regulations under clauses 8 and 12 (clause 31), including maximum penalties;
- Provision that proceedings for offences under the Bill can only be brought by or with the consent of the Secretary of State or the Director of Public Prosecutions / Director of Public Prosecutions for Northern Ireland (as appropriate) (clause 32); and
- Provisions concerning the liability of officers of corporate entities (clause 33).

64. In relation to clause 33, the majority of the Bill's provisions refer to "persons", so can, on their face, apply to individuals, corporate entities (e.g. limited companies) or unincorporated associations. However, the thresholds and other definitions in the draft Bill are intended to ensure that the powers are primarily directed at corporations, and therefore in most instances any criminal offence will only be committed by a corporate body rather than any individual. Under clause 33, where a corporate body commits an

offence, anyone who is a director, manager, secretary or other similar office of that body corporate may also incur criminal liability. However, this will only be the case where the offence was committed with the consent or connivance of that individual, or is attributable to their neglect. This offers an additional measure to ensure compliance by corporate entities, by allowing criminal sanctions to be imposed on key individuals responsible for directing the entity's actions.

65. Clause 38 also requires the Secretary of State to publish guidance in relation to the various criminal offences under the Bill.

Civil Sanctions

66. As an alternative to the criminal offences, clauses 34 to 37 and Schedule 2 create new civil sanctions to enforce the measures set out in the Bill.

67. If the Secretary of State is satisfied beyond reasonable doubt that a person has committed certain offences under the Bill (listed in clause 34(2)), and they have not raised a defence, clause 34 allows the Secretary of State to impose one or more discretionary requirements on the person. These requirements can be any or all of:

- A "variable monetary penalty", i.e. a requirement to pay an amount up to £10 million (clauses 34(2)(a) and (4));
- A "compliance requirement", i.e. a requirement to take certain steps to ensure the offence does not continue or happen again (clause 34(2)(b)); or
- A "restoration requirement", i.e. a requirement to take steps to restore the position to where it would be if the offence had not been committed (clause 34(2)(c)).

68. Where any of these discretionary requirements are imposed, in most cases the person then cannot be prosecuted for the underlying criminal offence (clause 35). Further details about the procedure for discretionary requirements, penalties for failure to comply with them and appeals are set out in Part 1 of Schedule 2.

69. Alternatively, clause 36 provides for persons who the Secretary of State has reasonable grounds to suspect have committed one of the specified offences to offer the Secretary of State an enforcement undertaking. Under clauses 36(3)(a) and (4), these can be undertakings (i.e. promises) to take, within a specified period, action for the purposes of securing that the offence does not continue or recur, or securing that the position is, so far as possible, restored to what it would have been had the offence not been committed, or to benefit any person affected by the offence. Part 2 of Schedule 2 makes further provision about enforcement undertakings, including the relevant procedure, compliance certificates and appeals.

70. If the Secretary of State accepts an enforcement undertaking and the person performs the required action, that person may not be convicted for that offence in respect of the relevant act or omission, and the Secretary of State cannot impose any discretionary requirement under clause 34. Under paragraph 9 of Schedule 2 to the Bill, the Secretary of State must publish a procedure for entering into enforcement undertakings.

Policy Intentions for sanctions

71. The powers set out above include provision to enforce compliance through both civil and criminal sanctions. Government recognises that the downstream oil sector, as a whole, tends towards compliance in relation to other regulations. The sanctions regime attached

to the draft Bill aims to incentivise a similar, and consistent, approach to compliance for these measures.

72. Due to the likely infrequency of use of many of the powers in the Bill (e.g. directions under clause 3), the tendency towards compliance, and the intention to use sanctions proportionately and appropriately, Government anticipates that the expected volume of cases will be negligible. Government will take a proportionate and reasonable approach to the use of sanctions. The Secretary of State will take account the severity and particular circumstances of any instance of non-compliance when deciding on the most appropriate sanction to pursue.

Spending power (Clause 40)

73. Finally, clause 40 introduces a measure that allows Government to provide financial support for the purpose of maintaining or improving downstream oil sector resilience and continuity of fuel supply.

74. Government does not currently have dedicated powers to provide financial support to maintain resilience, even where direct intervention may be the best value for money means of preserving resilience. Existing spending powers are for purposes such as job creation or low carbon energy.

75. The general assumption is that it is the responsibility of the sector to maintain fuel supply resilience and meet normal industry good practice standards; therefore, reasonable costs should be borne by the operator. It is the Government's policy not to intervene in the market to unnecessarily distort competition (e.g. by subsidising loss-making businesses), and any intervention will only be made in accordance with application subsidy control measures.

76. Government does not expect to make frequent use of this spending power nor is there any intention to allocate a budget for this purpose. Rather this power is intended as a backstop in case there is an overwhelming need for intervention at some point in the future. In general, Government will only consider providing financial support if the following criteria are met:

    - The action required is clearly beyond normal industry good practice standards, or there are clear and unavoidable reasons why the costs of meeting standards are materially higher than for other comparable assets;
    - The additional cost to the company is sufficient to have a significant negative impact on their commercial sustainability; and/or
    - There is no more cost-effective way of achieving the same outcome and this has been tested by independent audit and/or competitive tender.

77. Any package of financial support given will include protections to ensure that the funds are used only for the intended purposes and not to support other operations and/or unduly distort competition.