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Business, Energy and Industrial Strategy Committee

Pre-legislative scrutiny: draft Downstream Oil Resilience Bill

Fifth Report of Session 2021–22

Report, together with formal minutes relating to the report

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Business, Energy and Industrial Strategy Committee

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Introduction

Draft Downstream Oil Resilience Bill

1. The draft Downstream Oil Resilience Bill was published on 7 June 2021.[1] The Government states that the purpose of the proposed measures contained in the draft bill is to ensure a secure and reliable energy supply, by giving the Secretary of State powers to pre-emptively prevent potential disruption to the downstream oil sector.[2] In this context, the downstream oil sector refers to any persons involved in any part of the: import, supply, storage, distribution and or retail of petroleum and or petroleum products, into or within the United Kingdom.[3] The foreword to the draft bill sets out its four main powers:

- Information power: requires the industry to provide information to ensure the Government can identify potential disruptions and monitor the impact during a crisis;
- Power of direction: requires the industry to take measures to improve their own resilience, such as keeping critical infrastructure operating;
- Control test power: ensures companies gaining control of critical downstream oil infrastructure are financially and operationally fit for the task; and
- Spending power: provides financial assistance to support the sector to improve resilience and ensure continuity of supply.

Our inquiry

2. On 7 June 2021 the (then) Minister responsible for the draft bill, Rt Hon Anne-Marie Trevelyan MP, Minister for Energy, Clean Growth and Climate Change ('the Minister'), made a statement to the House announcing the publication of the draft bill, and confirming that it would undergo pre-legislative scrutiny by this Committee.[4] We launched our inquiry on 18 June 2021.[5]

3. On 13 July 2021 we took evidence from an academic, a sector representative, and an official from the Department for Business, Energy and Industrial Strategy ('BEIS', 'the Department').[6] In addition to attending a private briefing hosted by BEIS officials, the Chair wrote to the Minister on 15 July with a number of technical questions on the draft bill.[7] A response was received on 21 July 2021.[8] The Department also provided this Committee with a bespoke explanatory briefing document on the draft bill.[9] We are grateful to BEIS for producing this comprehensive and accessible summary, which has aided our understanding of the legal effect and policy intentions behind the draft bill. On

1 Downstream Oil Resilience Draft Bill, CP 435
2 Downstream Oil Resilience Draft Bill, CP 435
3 Downstream Oil Resilience Draft Bill, CP 435
4 Written statement HCWS64, Publication in Draft - Downstream Oil Resilience Bill
5 BEIS Committee launches Downstream Oil Resilience Bill inquiry
6 Qq 1–48
7 Letter to the Minister for Energy, Clean Growth and Climate Change, regarding the draft Downstream Oil Resilience Bill, 15 July 2021
8 Letter from the Minister for Energy, Clean Growth and Climate Change, regarding the draft Downstream Oil Resilience Bill, 21 July 2021
9 Explanatory document for Business, Energy and Industrial Strategy Select Committee

14 September 2021 we took evidence from Daniel Greenberg CB, Speaker's Counsel for Domestic Legislation.[10] We have also received written evidence submissions. The public submissions have been published on our website.[11]

4. In September 2021, the Chair also invited the Delegated Powers and Regulatory Reform Committee to scrutinise the delegated powers memorandum provided by the Department.[12] In October 2021, the Committee provided a note, which is appended to this report.[13] We are grateful to the Committee for undertaking this work, and supporting our effort to provide effective pre-legislative scrutiny of the draft bill. In its response to this report, we expect the Government to respond to the points raised by the Delegated Powers and Regulatory Reform Committee in the appendix, as well as our conclusions and recommendations.

5. The fuel supply chain pressures and spikes in localised demand, which we saw in September and October 2021, serve to underline the importance of a robust and resilient downstream oil sector. It is within the context of this, as well as the wider structural pressures facing the industry, such as the Net Zero transition, that we will follow the bill closely if and when it is introduced in Parliament in its final form. The Chair also wrote to the Secretary of State in October 2021 asking for reflections on the draft bill in the context of the fuel supply pressures.[14] The Secretary of State's response is published on our website.[15]

6. We would like to thank everyone who provided oral and written evidence, as well as BEIS officials for their collaborative approach to the Committee's inquiry.

10 Qq 49–83
11 BEIS Committee, Downstream Oil Resilience Bill - publications
12 Letter to the Chair of the Delegated Powers and Regulatory Reform Committee, regarding the draft Downstream Oil Resilience Bill, 17 September 2021
13 See appendix
14 Letter from the Chair to the Secretary of State, regarding the Downstream Oil Protocol, 27 September 2021
15 Letter from the Secretary of State to the Chair, regarding the Downstream Oil Protocol, dated 25 October 2021

1 Fuel supply resilience in the UK

7. Fuel supply resilience is the ability to protect against, react to, and recover from any fuel supply disruptions, in order to ensure the reliable and continuous supply of fuel across the UK.[16] The Government believes that, generally, the UK currently has strong fuel supply resilience.[17] However, the Government has set out concerns that this resilience could be weakened, firstly, due to previous changes in the structure of the industry. BEIS told us that due to high levels of global competition, the downstream oil sector has "gone through a process of restructuring to remain internationally competitive which has reduced the [sector's] spare capacity" in recent years.[18] This, in turn, means there is "an increased risk of market disruption… given the lower capacity to react to sudden supply and demand shocks".[19]

8. The Government is also concerned that the transition to a decarbonised economy as part of the Net Zero transition presents a significant threat to the UK's fuel resilience, as the downstream oil sector responds to decreased demand for oil-based fuels.[20] Mark Prouse, Deputy Director, Energy Resilience & Emergency Response, BEIS highlighted that the Government expects more companies in the downstream oil sector to fail financially because the economics of supplying carbon-based fuels "just do not stack up" in the context of the transition to renewable and carbon-free fuels.[21] The Minister has said that demand for oil-based road transport fuel will be "[less than] half of the current volume" due to the Net Zero transition.[22] The Government explained that it expects this reduction in demand "to lead to declining investment and infrastructure rationalisation drive[s] by individual companies' commercial drivers".[23] The Department argues that this expected reduction in resilience necessitates that the Government takes pre-emptive action to proactively protect fuel supplies.[24]

9. Professor Stevens, Distinguished Fellow, Chatham House told us that the UK's fuel resilience is currently "in quite a good position", but agreed with the Government's assessment that this may not remain the case for much longer.[25] Professor Stevens also agreed that the limited economic incentive for downstream oil operators to maintain spare capacity within the system is a concern.[26] Peter Davidson, Executive Director, Tanker Storage Association concurred that the energy transition is one of the "biggest potential threats to the supply chain", and told us that the industry's natural incentive is

16 Department for Business, Energy and Industrial Strategy, Downstream Oil Supply Resilience: Proposals to strengthen the resilience of fuel supply to UK consumers, October 2017
17 Department for Business, Energy and Industrial Strategy, Government Response to consultation on Fuel Resilience Measures, April 2018
18 Written statement HCWS64, Publication in Draft - Downstream Oil Resilience Bill
19 Written statement HCWS64, Publication in Draft - Downstream Oil Resilience Bill
20 Downstream Oil Resilience Draft Bill, CP 435
21 Q9
22 Letter from the Minister for Energy, Clean Growth and Climate Change, regarding the draft Downstream Oil Resilience Bill, 21 July 2021
23 DSORB0007 - Department for Business, Energy and Industrial Strategy
24 DSORB0007 - Department for Business, Energy and Industrial Strategy
25 Qq1–2
26 Q5, Q1, Q6

to minimise spare capacity as much as possible.[27] He agreed with the Department that the measures set out in the draft bill would enable the Government and sector to "manage and navigate through" these challenges.[28]

10. However, we also heard from the UK Petroleum Industry Association (UKPIA) that whilst the Net Zero transition does present a significant risk to the UK's fuel resilience, demand for oil-based fuels is likely to remain high for some time to come, and on that basis "it does appear a little premature as a strong justification for the bill".[29]

11. Our evidence has also been consistent that the industry itself has handled previous crises well. UKPIA noted that there have been few examples of fuel resilience issues ultimately affecting end-consumers, and that in the vast majority of cases "the industry has demonstrated its resilience and flexibility by adapting its infrastructure and processes to ensure that supply is quickly restored in affected areas and the public remained unaffected by the incidents".[30] UKPIA also highlighted the Government's own admission that "in the main, the sector is efficient, flexible and effective in ensuring the continuity of supply".[31] This assessment was shared by Professor Stevens, who told us that "on balance" the industry had "done a good job" of managing fuel resilience challenges, as most fuel shortages "have been relatively short-lived".[32] Mark Prouse agreed with this assessment, but explained that the draft bill is designed to prevent crises emerging in the first place by "tak[ing] action in *advance* of disruption".[33]

12. When asked for the Government's reflections on the measures in the draft Bill in the context of the localised spikes in fuel demand seen in September and October 2021, the Secretary of State told us that some of the powers in the Bill (such as the information power) would have given the Government "a clearer picture of the situation in the sector and emerging risks beforehand".[34] He also noted that the power of directions could have been used "to ensure that there was no disruption to supply by asking suppliers to take certain actions".[35] However, the Government argued that a full assessment of the Government and industry's response to the crisis, and the implications for the draft Bill, "cannot yet be made until we have rescinded all the response measures which we put in place".[36]

The Government's consultation

13. In 2017 the Government undertook a formal consultation to assess the UK's fuel supply resilience.[37] The Government's conclusion from that review, published in April 2018, was that there is "limited co-ordination" within the sector due to commercial and competition sensitivities, and "no mechanism to share burden [for protecting resilience]

27 Q14, Q18, Q4
28 Q14, Q18
29 DSORB0003 - UK Petroleum Industry Association
30 DSORB0003 - UK Petroleum Industry Association
31 DSORB0003 - UK Petroleum Industry Association
32 Q7
33 Q9
34 Letter from the Secretary of State to the Chair, regarding the Downstream Oil Protocol, dated 25 October 2021
35 Letter from the Secretary of State to the Chair, regarding the Downstream Oil Protocol, dated 25 October 2021
36 Letter from the Secretary of State to the Chair, regarding the Downstream Oil Protocol, dated 25 October 2021
37 Department for Business, Energy and Industrial Strategy, Downstream Oil Supply Resilience: Proposals to strengthen the resilience of fuel supply to UK consumers, October 2017

across the sector or with Government".[38] The Government also concluded that existing emergency legislation does not enable the Government to *proactively* protect fuel supply, and that legislation is therefore required to address shortcomings in the powers available to take preventative action.[39]

14. **We agree with the Government that it is vital to protect the UK's fuel supply against long and short-term changes which may threaten its resilience, during the decarbonisation of the economy. Whilst the industry itself has historically worked well with government to effectively address individual, short-term and isolated crises, longer-term changes in the market (caused, for example, by the Net Zero transition) presents a more fundamental threat to the sector's resilience, and therefore to the UK's fuel supply. The Government should be equipped with the appropriate powers to enable it to maintain the UK's fuel resilience and to protect the UK's national interests. We therefore support, in principle, the overarching policy intent of this draft bill.**

38 Department for Business, Energy and Industrial Strategy, Government Response to consultation on Fuel Resilience Measures, April 2018; Downstream Oil Resilience Draft Bill, CP 435

39 Downstream Oil Resilience Draft Bill, CP 435

2 Draft Downstream Oil Resilience Bill

15. The draft Downstream Oil Resilience Bill was published on 7 June 2021.[40] The Government's stated purpose behind the draft Downstream Oil Resilience Bill is to ensure a secure and reliable energy supply, by giving the Secretary of State powers to identify potential disruption to the downstream oil sector, and then to proactively respond to it. The draft bill contains the following main powers:

- **Powers of direction**: There are two main direction-making powers. The first is contained in clauses 3 to 7, which creates a new power for the Secretary of State to direct a person "to do anything" in relation to their relevant activities or assets:

  i) for the purpose of "maintaining or improving downstream oil sector resilience" (clause 3(1));

  ii) to "remedy or mitigate disruption to or failure of supply of fuel" (clauses 3(2) and 3(3)); and

  iii) to "reduce the risk" of disruption of failure of continuity of supply, where a significant risk exists (clauses 3(4) and 3(5)).[41]

  Subclause 6 specifies that such directions can be made to:

  i) anyone carrying out downstream oil sector activities in the course of a business which has capacity in excess of 500,000 tonnes; or

  ii) a downstream facility owner if the owned facility has capacity in excess of 20,000 tonnes.

  Directions given under this power must be issued in writing, and to particular, identified persons. Before issuing a direction, the intended recipient must receive a draft with 14 days' notice before it is due to take effect.

  16. The second direction making power is the "corresponding power to make regulations in respect of a class of persons", established in clause 8. This gives the Secretary of State the same powers as those discussed above, but in relation to "a class of persons" rather than specific individuals as is covered by clause 3. This power of direction is to be exercised by delegated legislation, subject to the affirmative procedure. This power applies to a wider range of people than are subject to the clause 3 directions, namely:

  i) anyone carrying out downstream oil sector activities in the course of a business which has capacity in excess of 1,000 tonnes; or

  ii) a downstream facility owner if the owned facility has capacity in excess of 1,000 tonnes.

- **Power to require information**: Clause 9 gives the Secretary of State power to give a notice in writing which requires persons, for the purpose of maintaining

40 Downstream Oil Resilience Draft Bill, CP 435
41 Explanatory document for Business, Energy and Industrial Strategy Select Committee

or improving downstream oil sector resilience, to provide the Secretary of State with information relating to their activities or assets. Under subclause 4 the Secretary of State may specify the manner in which the information should be provided, as well as the time limits and intervals for providing the information. As with directions under clause 3, this power can only be used to require information from particular, identified persons, and not an entire class of persons. This includes persons:

i) carrying out downstream oil sector activities within a business which has capacity over 1,000 tonnes; and

ii) owners of downstream oil facilities which have capacity over 1,000 tonnes.

Clause 12 also creates a new power for the Secretary of State to make regulations - subject to the affirmative scrutiny procedure - requiring a class of persons to provide information relating to their activities or assets at specified intervals.

- **Duty to report incidents**: Clause 10 places a duty on relevant people in the sector to report to the Secretary of State as soon as possible after a 'notifiable incident' - defined as an incident which causes a significant risk to or cause of i) disruption to continuity of crude oil supply, or ii) adverse effects on downstream oil sector resilience. Subclause 2 sets out that this applies to:

  i) people carrying out downstream oil sector activities in the course of a business which has capacity in excess of 500,000 tonnes;

  ii) people who own a downstream oil facility which has capacity in excess of 500,000 tonnes; and

  iii) persons of a class or description whom the Secretary of State has otherwise specified by regulations.

- **Restriction on acquisitions**: Part 3 of the draft bill creates a new restriction on the acquisition of assets in the downstream oil sector. Clause 15(1) provides that no person may make a "qualifying acquisition" without the written consent of the Secretary of State. The details of what constitutes qualifying assets and acquisitions are set out in clauses 16 to 18 and Schedule 1. Part 3 sets out an application process which new owners must follow if they want to buy a critical national downstream oil facility. Clause 22 enables the Secretary of State to refuse an application, to consent to it unconditionally, or to consent to it with specific conditions in place, and sets out the criteria which must be considered.

- **Financial assistance**: Part 5 allows the Secretary of State to provide financial assistance - in any form - to an "appropriate person" for the purposes of maintaining or improving downstream oil sector resilience, or securing or maintaining continuity of supply of crude oil-based fuels. This expenditure could take the form of grants, loans, guarantees or indemnities, or investment by acquisition, amongst other forms. This expenditure can be paid to anyone carrying out downstream oil sector activities, or the owner of a downstream facility.

Necessity of proposed powers

17. The Government currently has a number of powers available to maintain and protect fuel supplies in the UK under existing legislation. These include:

- **Energy Act 1976**: Wide powers to regulate or prohibit the production, supply, acquisition or use of petroleum products, fuel or electricity where "there exists or is imminent… an actual or threatened emergency affecting fuel or electricity supplies".[42]
- **Offshore Safety Act 1992**: Powers that allow directions to be given "for preserving security of petroleum and petroleum products".[43] The power of direction is limited to security purposes, and can only be used in relation to refineries, or terminals that receive crude oil directly or indirectly from a UK offshore installation.
- **Civil Contingencies Act 2004**: Powers to make emergency regulations to deal with actual or threatened emergencies where, for example, there is a serious threat to human welfare arising from disruption to the supply of money, food, water, energy or fuel, or a threat to communication or transport systems.[44]
- **Enterprise Act 2002**: Powers to intervene in relevant mergers on national security (which can include security of supply), financial stability or media plurality grounds. For Government to be able to intervene, particular turnover or share of supply tests must be met.[45] Related powers are available under the National Security and Investment Act 2021.[46]

18. However, the Department argued that these powers are "primarily directed to emergency situations and would not enable Government to direct in relation to emerging risks or the need for more effective contingency planning".[47] Mark Prouse told us:

> Taking the powers in the Energy Act, for example, the Government would need to declare a national emergency before we could leverage them. What we want to do here is take pre-emptive action before an emergency situation.[48]

19. BEIS added that the measures in the draft bill are "designed to address the current gap between the voluntary approach, and an emergency situation where Government already has powers to act".[49] When asked how the measures in the draft bill would enable the Government to respond to a potential fuel crisis caused by a refinery becoming insolvent, Mark Prouse explained:

> In the first instance, I would hope we then start collecting information from both the organisation that is going insolvent and other parts of the sector to understand where the spare capacity is to pick up the fuel gap that

42 Energy Act 1976
43 Offshore Safety Act 1992
44 Civil Contingencies Act 2004
45 Enterprise Act 2002
46 National Security and Investment Act 2021
47 DSORB0007 - Department for Business, Energy and Industrial Strategy
48 Q26
49 DSORB0007 - Department for Business, Energy and Industrial Strategy

> is going to be created. If we found that not to be forthcoming, we would use the power of direction to direct plans to be made to pick up that fuel shortage when it occurs. We would use the information power to require participants in the sector, both the owner of the potentially insolvent asset plus the owners of the other operators, to provide us with the information to understand where that spare capacity is. All of that would be done in collaboration with the sector.[50]

20. We heard some evidence, for example from Peter Davidson, that the proposed powers were necessary and proportionate to the Government's stated policy objective, as described by Mark Prouse, and were justifiable on that basis.[51] On the other hand, we also heard evidence suggesting that the existing powers available to Government are not as much of a limiting factor in the Government's ability to respond, as the Department has suggested. For example, Professor Stevens argued that there is not a "great deal of value added by this legislation in terms of what is already available to the Government to change things".[52] He added that he "struggle[s] to see why existing legislation cannot be used", and that there is little in the draft bill "that the Government cannot already do simply through existing legislation and their emergency powers".[53]

21. A similar point was made by UKPIA, which noted that the Government already has powers it could exercise, but has thus far chosen not to use:

> Within the industry-led framework, BEIS already has powers it can exercise as well as established and proven means of working with industry (as demonstrated recently in the response to the combination of disruption from COVID-19 and Brexit). It is important to note, however, that to date BEIS has chosen not to exercise some of its powers, most notably: the Downstream Oil Protocol… the National Emergency Plan for Fuels, and the powers under the Energy Act 1976, which are extensive.[54]

UKPIA added that:

> Given the lack of impact on the consumer over the past 20 years, as well as the choice by BEIS not to make use of its existing (broad) powers, it can perhaps be concluded that the existing policy of working with industry without the need for a regulator or further powers has proven effective at managing continuity of supply of fuels in the UK. UKPIA therefore believes that the case for the Bill requires further clarification.[55]

UKPIA accepted that BEIS still believes there are "shortcomings in its available levers to ensure resilience and continuity of supply", but concluded that the proposed powers "do not appear proportionate at this point".[56]

50 Q32
51 Q14
52 Q16
53 Q48, Q16
54 DSORB0003 - UK Petroleum Industry Association; UKPIA's evidence was submitted before BEIS enacted the Downstream Oil Protocol in September 2021
55 DSORB0003 - UK Petroleum Industry Association
56 DSORB0003 - UK Petroleum Industry Association

22. However, Daniel Greenberg CB, Speaker's Counsel for Domestic Legislation, House of Commons, agreed with the Government's argument that the existing powers available to it are limited to emergency or crisis situations.[57] He told us that, whilst powers do exist under current legislation, they are generally "blunt tools and do not address the wider policy issues" as set out by the Government and acknowledged by the sector.[58] For example, the power of direction under section 6 of the Energy Act 1976 - referenced by UKPIA as a significant existing power - is narrowly concerned with ensuring that fuel stocks do not fall below particular levels. Similar limitations apply to the Offshore Safety Act 1992, the direction power of which only applies in relation to offshore installations, and onshore terminals and refineries, and the Civil Contingencies Act 2004, which can only be used during an appropriate class of emergency.[59] Daniel Greenberg agreed that the existing powers would therefore not enable the Government to take action outside of the relatively narrow scope as set out in statute, to achieve a more widely defined objective of protecting fuel resilience.[60] He added, however, that if the Government's intention is to equip itself with powers which would enable it to respond to a wider range of threats than are articulated in or enabled by existing legislation (such as economic and industrial issues), it might be desirable to see this primary policy driver made plainer on the face of the bill.[61] This additional clarity would aid the courts' and stakeholders' interpretation of the legislation.[62]

23. **We agree with the Government that the existing powers available to the Government to respond to fuel resilience threats are mostly only available in emergency and crisis situations. We therefore support, in principle, a package of appropriately specific and limited measures to remedy this.**

24. **However, we are concerned that the Government's policy intention is not made sufficiently clear on the face of the bill.** ***The Government should consider including a purpose clause on the face of the bill to provide the courts (and stakeholders) with a clearer and more detailed articulation of when and to what end the powers in the draft bill should be used.***

Proportionality of powers

25. The Government's 2018 consultation response said the Department would bring forward "a small number of light-touch measures which provide Government with the tools to identify fuel supply risk and support industry in ensuring downstream oil sector resilience".[63] The Department's written evidence similarly refers to the draft bill's measures as "light touch", as does the draft bill's impact assessment.[64] The Government also believes the powers in the bill are "back stop" measures, and that the "vast majority of issues will be addressed through a voluntary, collaborative process with industry".[65]

57 Q55
58 Q49
59 Q55
60 Q49
61 Q49
62 Q49
63 BEIS, Government response to consultation on fuel resilience measures, April 2018
64 DSORB0007 - Department for Business, Energy and Industrial Strategy, Department for Business, Energy and Industrial Strategy, Downstream Oil Supply Resilience Bill - Final Impact Assessment
65 Letter from the Minister for Energy, Clean Growth and Climate Change, regarding the draft Downstream Oil Resilience Bill, 21 July 2021

26. Peter Davidson agreed with the Government that the proposed powers generally seem to be "fairly light touch".[66] He added that he was generally content with the extent of the proposed powers, and that - provided the Government consults with the industry when making regulations under the power of direction - he is satisfied the proposed legislation is appropriately "light touch".[67]

27. However, some witnesses suggested that the measures in the draft bill are not as 'light-touch' as the Government has indicated or intends. UKPIA told us that the draft bill's powers are currently "too broadly defined" and that, whilst the current Government's intent behind the draft bill may be for a 'light touch' approach, "the powers themselves are extremely broad and–without further clarity–give potentially extreme powers to future Secretaries of State, which might not have the same views as the current Government".[68] For example, UKPIA highlights that, although BEIS says the proposed spending power is intended to be a "backstop" measure, "there is no guarantee that this will remain the case in future".[69]

28. We have also heard that some of the powers in the draft bill are poorly defined. The Delegated Powers and Regulatory Reform Committee in the House of Lords noted in its memo, which is appended to this report, that powers relating to directions under clauses 3 and regulations under 8, "are framed in very broad terms without clear criteria or parameters for their exercise".[70]

29. Similar concerns were articulated by Daniel Greenberg, who argued that the legislation as currently drafted does not clearly define conditions or circumstances in which the powers could be used, nor to what end they should be used:

> If there is to be a broader framework that goes beyond the existing powers, and [is] not aimed at a particular emergency, the parameters need to be clearly set out in some way on the face of the Bill.[71]

As currently drafted, the 'trigger' for the use of the powers is "a concept of resilience that is a necessarily broad concept".[72] For example, the power under clause 3 for the Secretary of State to direct a person "to do anything" to reduce fuel resilience risks is engaged when the Government "considers that there is a significant risk of disruption".[73] However, the threshold for what constitutes "a significant risk" is not defined. Similarly, part of the legislation relies on the concept of "normal levels"; the Government defines "normal levels" as those "not substantially below those that are normal".[74] Daniel Greenberg argued that such circularity means the legislation does not provide an appropriate clear 'trigger' threshold for the Government's use of the powers.[75] This, in turn, means the industry (and Parliament) lacks clarity on the sort of circumstances and conditions which will trigger

66 Q20
67 Q20
68 DSORB0003 - UK Petroleum Industry Association
69 DSORB0003 - UK Petroleum Industry Association
70 Memo from the Delegated Powers and Regulatory Reform Committee
71 Q55
72 Q56
73 Downstream Oil Resilience Draft Bill, CP 435
74 Downstream Oil Resilience Draft Bill, CP 435
75 Q56

particular responses from the Government.[76] In contrast, the threshold to use the existing powers under current legislation are "very high" (for example, the necessity for a national emergency to be declared before using powers under the Civil Contingencies Act).[77]

30. In addition to vague 'triggers', Daniel Greenberg told us that the legislation also contains ill-defined outcomes.[78] For example, clause 3(5)(a) allows the Secretary of State to direct a person "to do anything" for the purpose of "reducing… a significant risk of disruption". As discussed above, what constitutes a "significant risk" is not defined, and the outcome (i.e. 'reducing' that ill-defined risk) is equally vaguely defined. Daniel Greenberg explained that, in contrast, existing legislation requires that the Government can only use the powers to achieve "[mandated] specific results".[79] For example, the direction powers under section 6 of the Energy Act allow the Secretary of State to issue directions, but only for the purpose of bringing fuel stocks up to a specified level: "it is not only a more specific trigger; it is also a more specific set of outcomes that you are aiming at".[80]

31. Further to his broader concern about specificity and definition, Daniel Greenberg argued that the Government should include on the face of the bill the parameters of propriety and the criteria of proportionality to be used when the Government is considering whether to exercise its powers.[81] He argued that greater detail, and the inclusion of proportionality criteria would give the Government a clearer mandate to utilise the broad powers, and avoid any doubt on the part of the courts, which could otherwise ultimately result in the courts providing "the criteria and parameters that are missing from the face of the bill":

> The broader a power is, the less you can assume that it allows you to do specifically extreme things. There is a presumption from the courts that you, as Parliament, are not mandating, for example, expropriation—very relevant here. If I want to be able to expropriate, I have to say so expressly. The extraordinarily broad language of "do anything" is the core language in this Bill …
>
> The danger from the Government's side is that it actually will not allow them to do some of the things they might want to do, precisely because of its breadth.[82]

Daniel Greenberg drew comparisons with the Energy Act 1976, in which the Government recognised the extremity of the powers it was proposing, and so set them out in no uncertain terms to "cover themselves expressly":

> If the Government wish to be able to do similarly extreme kinds of interference—remember that it mentioned enactment and contractual obligations—for the Government's security, for their peace of mind, as well as the stakeholders' understanding of what the legislation does, I would expect that to be set out.[83]

76 Q60
77 Q56
78 Q56
79 Q56, Q59
80 Q56
81 Q57
82 Q58
83 Q58

32. The Delegated Powers and Regulatory Reform Committee raises similar concerns in its memo, noting that the breadth of powers in the draft bill could ultimately "be to the Government's detriment", because "if an exercise of the powers was challenged and a court had to make a determination as to the parameters of those powers then the absence of provision on the face of the Bill gives rise to a risk that the court might determine that the powers were not in fact as broad as the Government intended".[84]

33. Further concerns about proportionality and breadth are discussed in detail in relation to each main power in the next chapter.

34. **There is a disjuncture between the Government's claim that the proposed powers are intended as "backstop" measures, and the text of the draft bill, which includes no such qualification.** ***The Government should revise the bill before introduction to include on its face the qualification that the powers are backstop measures only.***

35. ***The Government should also improve the clarity of the legislation by including on its face more clearly defined parameters and criteria for the thresholds which 'trigger' the powers in parts 1 and 2 of the bill, and set out more specific and clearly defined ends to which the powers can be used.***

Detail

36. An oft-cited concern raised by both proponents and opponents of the draft bill, was that the legislation does not contain sufficient detail on how the various powers will operate in practice, and the documents accompanying the draft bill lack sufficient detail to fully understand the potential implications of the proposals. For example, UKPIA told us that "there is not enough detail on implementation to confidently conclude that the bill is appropriate, proportionate and practical", and that the breadth of the powers as currently drafted makes it difficult for the industry "to fully understand its implications for their operations".[85] UKPIA added that "the nature of, extent and precise conditions under which the powers contained would be applied would benefit from much more precise definition".[86]

37. Similarly, while Peter Davidson supported the draft bill overall, he noted that "the devil is in the detail", and that further scrutiny of the level of proportionality in the Government's use of these powers in practice would be required.[87] He reiterated that detailed guidance would be vital to understanding how the Government intends to interpret and apply the proposed powers.[88] We also received evidence in private from companies which similarly noted that clear implementation guidance would be vital to ensuring the measures are implemented with proportionality and clarity. In response to these concerns, Mark Prouse said that BEIS officials were in the process of preparing guidance across all the powers in the draft bill.[89]

84 Memo from the Delegated Powers and Regulatory Reform Committee
85 DSORB0003 - UK Petroleum Industry Association
86 DSORB0003 - UK Petroleum Industry Association
87 Q14
88 Q22
89 Q23

38. **We are concerned about the lack of substantive detail from the Government on how the draft bill's four - broad - powers would operate in practice. We note, in particular, the Government's vagueness on the circumstances in which, and specifically how, the spending and direction powers would be used.**

39. **If the bill is introduced in Parliament, it is crucial that the Government provides Parliamentarians with adequate clarity on how the measures would operate in practice, in order to allow effective Parliamentary scrutiny.**

3 The draft bill's powers

Direction power

40. The Department noted that the direction power will enable the Government "to intervene where supply resilience is compromised, or there is a significant risk that it will be, and the industry has not taken any action".[90] Mark Prouse further explained that the proposed power of direction:

> would allow us to direct the industry to take specific action, whether that be to prioritise fuel in a particular way, to shift the balance of fuel being refined or imported to support where it was needed, or, potentially, as a last resort if required, to look at the financial assistance options open to the sector.[91]

He added that the Government "would not anticipate issuing a direction out of the blue that has not been discussed" with the sector, and that such an approach would in any case be "counterintuitive".[92] He explained that the power of direction is "a last resort in our suite of tools", and that it would only be used in addition to continued engagement and collaboration with the sector.[93]

41. The Department anticipates that the powers of direction could be used for some of the following reasons:

- Ensuring critical asset resilience: i.e. physical and cyber security, or 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; and
- Direct or indirect action to prevent secondary site closure - where failure of an asset leads to a reduction in resilience.[94]

None of these examples are included on the face of the draft bill.

42. The Government considers this power a "backstop" measure, and that it is proportionate because it has been drafted "in a way that limits [its] scope" and "applies appropriate procedural safeguards" - for example, it includes an appeal route.[95] Mark Prouse also argued that the power of direction is appropriately constrained by the requirement to demonstrate that any direction is "fair, reasonable and proportionate, and does not result in undue impact on market competition".[96]

90 Written statement HCWS64, Publication in Draft - Downstream Oil Resilience Bill
91 Q12
92 Q23
93 Q24, Q23
94 Explanatory document for Business, Energy and Industrial Strategy Select Committee
95 Explanatory document for Business, Energy and Industrial Strategy Select Committee, DSORB0007 - Department for Business, Energy and Industrial Strategy
96 Q23

43. The Department set out in writing what it considers to be the five principal checks on the power of direction:

i) Directions can only be given for the "specific and narrowly defined purposes" of maintaining resilience and ensuring continuity of supply;

ii) Directions can only be given to persons meeting the capacity thresholds set out in the draft bill;

iii) Before deciding whether or not to give any direction, the Secretary of State would have to give the proposed recipient an opportunity to make representations;

iv) The Secretary of State would also have to consult with the relevant Health and Safety regulator; and

v) Recipients of a direction have the right of appeal.[97]

44. The Government's Written Ministerial Statement also includes the qualification that the direction power will be used in instances where "the industry has not taken any action".[98] This qualification is not included on the face of the draft bill.

45. Some witnesses suggested that, as with the control test power (discussed later), the direction power overlaps with and potentially duplicates existing legislation - most notably, the Energy Act 1976. Sections 1 and 2 of the Act contains similar reserve powers to control by direction, which enable the Secretary of State to direct a person on the production and use and supply of a product. Section 6 of the Act also enables the Secretary of State to mandate minimum levels of fuel stock. The Government has argued that these powers are "restricted in scope … or [are] only available for use during an emergency or crisis situation".[99] However, UKPIA disagreed with this assessment, arguing that "this would appear to be an issue of timing, as BEIS can already use powers in the Energy Act where 'there exists or is imminent … an actual or threatened emergency affecting fuel'".[100]

46. UKPIA also raised concerns that the breadth of the direction power, and BEIS's indication that it intends to exercise this power proactively, could potentially impact the UK's attractiveness as a place to do business:

> The scope of that power is so broad that companies could view future UK investment as a higher risk given BEIS's ability to direct more or less anything in future … There is a significant risk that this power could create market distortion both directly (by forcing a company to do something that is not commercially viable) and/or indirectly (through the fettering of investment).[101]

97 Letter from the Minister for Energy, Clean Growth and Climate Change, regarding the draft Downstream Oil Resilience Bill, 21 July 2021
98 Written statement HCWS64, Publication in Draft - Downstream Oil Resilience Bill
99 Downstream Oil Resilience Draft Bill, CP 435
100 DSORB0003 - UK Petroleum Industry Association
101 DSORB0003 - UK Petroleum Industry Association

UKPIA added that the industry will therefore "need to have a firm understanding of when and how this may occur to avoid reducing confidence on the part of companies to invest given the risk of government intervention".[102]

47. We raised concerns with the Government that the direction power is currently drafted in extremely wide terms and its phrasing is unusually general.[103] This reflected the concerns of some witnesses, including Peter Davidson, who was "worried" about, and "uncomfortable" with, the breadth of the power of direction.[104] The Delegated Powers and Regulatory Reform Committee, also noted that:

- the Bill simply gives the Secretary of State power to require a person "to do anything" in relation to a downstream oil sector activity carried on by them or a downstream facility owned by them. It says nothing about what a person can be required to do;
- although the powers can only be exercised for specified purposes, these are framed by reference to broad - and somewhat vague - concepts such as "maintaining or improving… resilience", avoiding "disruptions" and maintaining "normal levels" of supply; and
- the power in clause 3(1) to give directions, and the corresponding power in clause 8(1) to make regulations, "for the purpose of maintaining or improving downstream oil sector resilience" are particularly broad.[105]

The Committee therefore concluded that "clauses 3 and 8 contain inappropriate delegations of power because the Bill lacks clear criteria or parameters for the exercise of the very broad powers in those clauses to impose requirements backed by criminal penalties".[106]

48. The Committee also raises a concern in its memo about the levels of scrutiny applied to powers exercised under clauses 3 and 8. As currently drafted, regulations under clause 8 are subject to the affirmative scrutiny procedure. As Daniel Greenberg noted, any directions issued under clause 8 are not necessarily required to be published, and the draft bill does not currently contain any provision for parliamentary scrutiny of these directions.[107] The Government justifies this on the basis that directions under clause 3 "are not considered to be legislative powers, because directions will impose specified obligations on individual entities, rather than being measures of more general effect".[108] However, the Lords Delegated Powers and Regulatory Reform Committee concluded that this argument "gives undue weight to form over substance. Directions under clause 3 would be quasi-legislation which would have essentially the same legal effect as regulations under clause 8".[109]

49. **We recognise the Government's need for an appropriately limited general power to allow it to respond proactively to fuel resilience threats. However, the direction**

102 DSORB0003 - UK Petroleum Industry Association
103 Letter to the Minister for Energy, Clean Growth and Climate Change, regarding the draft Downstream Oil Resilience Bill, 15 July 2021
104 Q21, Q46
105 Memo from the Delegated Powers and Regulatory Reform Committee
106 Memo from the Delegated Powers and Regulatory Reform Committee
107 Qq50–51
108 Delegated powers memo, para 11
109 Memo from the Delegated Powers and Regulatory Reform Committee

power, as currently drafted, is unusually and unacceptably broad. We do not agree with the Government that "to maintain or improve the resilience of the sector or to ensure continuity of supply during disruptions" is a sufficiently specific or narrowly defined purpose.

50. **BEIS officials and Ministers have provided various assurances that the direction power is a last resort option. However, these reassurances are ultimately non-binding and therefore insufficient.**

51. ***For the reasons set out above, and in the first chapter of this report, we recommend that the Government revises the draft bill to include on its face a set of criteria or parameters for the use of the direction power. The Government should not be hesitant to do so, since this proposal would serve only to codify and make binding the assurances Ministers and officials have already provided that the direction power is a last resort option when the industry itself has not taken appropriate action.*** **If the draft bill is introduced to Parliament in its final form without such changes, Parliament should consider carefully whether to grant the Government such a broad power.**

52. **We understand that directions issued under this legislation may, for reasons of commercial sensitivity, need to remain unpublished. However, it is proper for these directions to still be subject to some form of parliamentary scrutiny. This Committee is an appropriate forum for this scrutiny.** ***The draft bill should be revised to include the provision of parliamentary scrutiny of any directions issued under the legislation. The Government should engage with this Committee in advance of the bill's introduction, to agree a protocol of engagement to enable parliamentary scrutiny of directions. This protocol should include how decisions on whether to publish directions should be made; in what circumstances it is appropriate for directions to be published; and how this Committee should treat directions in instances when publication is not appropriate.***

Information power

53. The proposed information power is one of two fully 'new' powers.[110] The Department told us that there is currently "no legal requirement or obligation" for downstream oil sector companies to supply information to the Government "for the purposes of understanding the risks to downstream oil resilience on infrastructure, supply or demand".[111] Mark Prouse explained that, currently, the Government relies on companies providing critical financial information on solvency on a voluntary basis.[112] However, competition law and commercial sensitivities sometimes prevent this voluntary sharing.[113] In certain circumstances, companies have refused to provide the Government with information when requested. Mark Prouse explained:

> We have had companies refuse to provide us with information in a timely manner when they are facing an insolvency, for example. We have had the same during potential industrial action and unrest. We have had companies

110 DSORB0003 - UK Petroleum Industry Association
111 Explanatory document for Business, Energy and Industrial Strategy Select Committee
112 Q13
113 Q13

> refuse to provide us with details about the nature of the impact on their company, which makes it much harder for us to engage with the sector on broader impacts.[114]

54. BEIS argued that the information powers will "help the Government identify risks of disruption to the UK fuel supply market in advance", for example, by being notified of incidents which could create risk of disruption or failure of fuel supply.[115] Such incidents could 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.[116]

55. BEIS also used the recent crisis caused by spiking demand for fuel to demonstrate how the information power could be used in practice. The Secretary of State told us that the spike in demand was sparked by leaked comments about forecourt delivery issues at a major fuel supplier, which were reported in the media. The Government told us that, in this instance, the major supplier "was under no obligation to–and therefore did not–report to BEIS… the issues which it faced in making deliveries to forecourts, which were leaked to the media".[117] The Government argued that, "with the powers in the Bill, [the supplier] would have a duty to report the situation", and that this information "would have allowed the Department to put measures in place to avoid the situation in the first instance", which might have included "the direction powers in exceptional circumstances".[118]

56. The Department argued that the Government "is the only body that has an overarching view of the entire downstream oil supply system", and that these powers would enable it to "build a consistent, accurate and up-to-date picture of the health of fuel supply resilience in the country".[119] Mark Prouse also emphasised that the proposed information power would be vital to enabling the Government to identify potential developing crises - for example, in an instance where a business within the downstream oil sector is facing financial insolvency:

> that is an area where pre-emptive action would be able to be taken in the event that we see an insolvency coming. We can prepare the sector to develop risk-specific plans for whatever insolvency is potentially at hand, to get ready to pick up the capacity of fuel distribution that is being lost from that insolvency. That is an example where action in advance would be able to be taken.[120]

114 Q34
115 Written statement HCWS64, Publication in Draft - Downstream Oil Resilience Bill, Explanatory document for Business, Energy and Industrial Strategy Select Committee
116 Explanatory document for Business, Energy and Industrial Strategy Select Committee
117 Letter from the Secretary of State to the Chair, regarding the Downstream Oil Protocol, dated 25 October 2021
118 Letter from the Secretary of State to the Chair, regarding the Downstream Oil Protocol, dated 25 October 2021
119 Explanatory document for Business, Energy and Industrial Strategy Select Committee
120 Q12

Professor Stevens agreed that transparency and information is an obvious area in which the UK's fuel resilience could be strengthened, and that he could see the value added by these powers.[121]

57. **We do not have significant policy concerns regarding the proposed information power, but do have some technical observations, explored in chapter 4 of this report.**

Spending power

58. The spending power is the second of two fully 'new' measures.[122] The Department noted that the Government "does not currently have dedicated powers to provide financial support to maintain resilience", and that this may limit the ability of the Government to intervene on occasions when providing direct financial assistance "may be the best value for money means of preserving resilience".[123]

59. UKPIA raised concerns about the "open-endedness" of the proposed spending power, and its intended scope.[124] Indeed, the Government's commentary on the draft bill says only that the Secretary of State may "provide financial assistance in any form, with terms and conditions for the purpose of maintaining or improving downstream oil sector resilience or for the purpose of securing or maintaining continuity of supply of crude oil-based fuel".[125] BEIS has further outlined that, in some cases, it envisions the spending power being used to financially assist the sector and enable it to comply with a direction, where one has been issued under clause 3 of the bill.[126] It explained that "this would allow any adverse effect on property rights to be ameliorated".[127] The Government told us that it would only consider providing financial support if the following criteria are met:

i) 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;

ii) The additional cost to the company is sufficient to have a significant negative impact on their commercial sustainability; and/or

iii) There is no more cost-effective way of achieving the same outcome and this has been tested by independent audit and/or competitive tender.[128]

60. The Government added that it intends that this power will only be a "backstop" measure, and that there is no intention to allocate a budget for this purpose.[129] However,

121 Q17, Q2
122 DSORB0003 - UK Petroleum Industry Association
123 Explanatory document for Business, Energy and Industrial Strategy Select Committee, Written statement HCWS64, Publication in Draft - Downstream Oil Resilience Bill
124 DSORB0003 - UK Petroleum Industry Association
125 Downstream Oil Resilience Draft Bill, CP 435
126 Letter from the Minister for Energy, Clean Growth and Climate Change, regarding the draft Downstream Oil Resilience Bill, 21 July 2021
127 Letter from the Minister for Energy, Clean Growth and Climate Change, regarding the draft Downstream Oil Resilience Bill, 21 July 2021
128 Explanatory document for Business, Energy and Industrial Strategy Select Committee
129 Explanatory document for Business, Energy and Industrial Strategy Select Committee

as these qualifications are not included on the face of the draft bill, UKPIA has argued that "there is no guarantee that this will remain the case in future, increasing the risk to companies of government intervening and potentially distorting the market".[130]

61. Any financial assistance provided under the draft Bill "will be funded from BEIS's existing budget, with no standing budget specifically for providing such assistance and no additional revenue raising powers taken to fund it".[131] The Government does not expect to make frequent use of this power, and any spending committed under the bill will be published in the Department's financial transparency data and annual accounts in the usual way. It suggested that this "strikes an appropriate balance between ensuring proper use of public funds and achieving the policy aim for downstream oil sector resilience".[132]

62. **The Government has not clearly set out how it intends to use the proposed spending power.** ***If the bill is introduced in Parliament, the Government must provide sufficient detail in accompanying guidance on the specific circumstances in which, and how, the spending power will be used.***

63. **Financial assistance provided under these provisions - particularly liabilities - could constitute significant cost to the taxpayer. Ex-post disclosure of this assistance in annual reports and accounts does not allow for adequate parliamentary scrutiny. Given the Government's reassurances that it envisions providing such assistance only infrequently, it would not be onerous to commit to a higher degree of parliamentary scrutiny.** ***We therefore recommend that the bill is amended to include a statutory requirement for a Ministerial statement in both Houses when financial assistance is provided, or notification via private correspondence to this select committee, in instances where a statement would not be appropriate on grounds of commercial confidentiality or national security.***

Control test power

64. 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".[133] BEIS argued that the control test power in part 3 of the draft bill will therefore "allow the Government to ensure that anyone taking control of critical infrastructure in this sector has appropriate financial and operational measures in place".[134] Professor Stevens explained that "there is a degree of value" in the proposed power, in so far as it would enable the Government to monitor and determine who can buy assets in the downstream oil sector, and that such measures could "protect the value chain".[135]

65. However, our evidence also suggests that this measure overlaps with existing legislation concerning acquisitions - notably, the National Security and Investment Act 2021. UKPIA raised concerns about potential duplication across the draft bill and NS&I Act 2021:

130 DSORB0003 - UK Petroleum Industry Association
131 Letter from the Minister for Energy, Clean Growth and Climate Change, regarding the draft Downstream Oil Resilience Bill, 21 July 2021; Explanatory document for Business, Energy and Industrial Strategy Select Committee
132 Letter from the Minister for Energy, Clean Growth and Climate Change, regarding the draft Downstream Oil Resilience Bill, 21 July 2021
133 Explanatory document for Business, Energy and Industrial Strategy Select Committee
134 Written statement HCWS64, Publication in Draft - Downstream Oil Resilience Bill
135 Q17

> The Explanatory Memorandum does not refer to the recently adopted National Security and Investment Act 2021 under which the sector will have a mandatory requirement to notify the BEIS Secretary of State of changes in acquisitions or voting rights (and others) under the Act. These existing powers appear to be potentially duplicated by the new Control Power which also requires Secretary of State approval before changes can take place. While it is accepted that the notification procedures will assess against different criteria, we believe that there should be at least considerable streamlining potential between this Bill and the NSI Act.[136]

66. **We do not have significant policy concerns about the control test power in its own right. However, we are concerned that the Government has not clearly set out how it envisions the proposed power interacting with existing legislation. Most notably, there is the potential for duplication of and overlap with the National Security and Investment Act 2021.**

67. ***If introduced in Parliament, the Government should set out - in the bill's explanatory notes, or in accompanying guidance - how the bill would interact with other relevant legislation, including the National Security and Investment Act 2021.***

4 Technical observations

68. We expect the Government to respond to all of the conclusions and recommendations on the technical points set out below, in the same way as it will for the conclusions and recommendations set out in the policy discussion in chapters 1 to 3.

Extra-territoriality

69. The definition of downstream oil sector activity in clause 1 requires activity to be being carried on in the UK in the course of a business. A number of the Bill's provisions, however, operate by reference to the business owner which is defined in clause 1 in a form that is broad enough to include overseas interests. We raised a concern with the Government that the intended extra-territorial reach of the draft bill in relation to foreign interests, and how effectively that reach is expected to be capable of being enforced, could therefore be unclear.

70. In response, the Government told us that:

> [It is] envisaged that both UK and non-UK companies carrying on downstream oil sector activities in the United Kingdom, or owning downstream oil facilities in the United Kingdom, will fall within the scope of the powers set out in the draft Bill… Given that any entity falling within the scope of the powers must necessarily have a close connection to the United Kingdom through its assets or activities, enforcement should be possible within the United Kingdom. Activities and assets that do not have any nexus to the United Kingdom are outside the scope of the draft Bill.[137]

71. **We are not satisfied with the Government's response.**

72. **The Government's explanation exhibits a potentially outdated understanding of how companies in the downstream oil sector operate. The bill's drafting may not be sufficiently robust to prevent downstream oil companies arranging their corporate structure or offshoring operational processes in such a way as to evade the controlling motivations of the bill.**

Resilience

73. Clause 3(1) is drafted in broad terms. In particular, the phrase "may … direct a person … to do anything in relation to the person's relevant activities or assets" is unusually broad. We asked the Government to share its understanding of the effect of section 3 of the Human Rights Act 1998 in imposing implied parameters on clause 3(1) insofar as it does, or could, relate to expropriatory actions that would engage Article 1, Protocol 1 of the ECHR.

74. In response, the Government told us:

> The Government considers that the power in clause 3(1) of the draft Bill as drafted is compatible with Article 1, Protocol 1 of the ECHR.

137 Letter from the Minister for Energy, Clean Growth and Climate Change, regarding the draft Downstream Oil Resilience Bill, 21 July 2021

> Directions under clause 3 do not directly deprive persons in the downstream oil sector of property, but they do allow the Secretary of State to regulate how they use their property. Therefore, as with much regulation, the Government accepts that they are a control of use under the second paragraph of Article 1 Protocol 1 of the ECHR. As previous small-scale interruptions have shown, a breakdown in the downstream oil sector can quickly have a marked impact on both economic activities and individuals. The Government therefore considers that the securing of downstream oil sector resilience is clearly in the general interest, as set out in paragraph 2 of Article 1.
>
> Government also considers that these measures are proportionate and strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.[138]

75. **We are not satisfied with the Government's response.**

76. **The difference between depriving persons of property, and regulating how it is used, is misleading. In the context of commercial property, regulation of use could be as much of an interference as expropriation.**

77. **We are also not satisfied with the Government's argument that the measures "strike a fair balance" between the general interests of the community, and the protection of individual fundamental rights. The Government cannot be sure of ensuring a "fair balance" with such a broad range of potential uses of the draft bill's powers. *The Government can only ensure these potentially intrusive powers strike the "fair balance" it professes by outlining the criteria and factors that the Government intends to give regard to when considering this balance. The essence of those criteria and factors should be included on the face of the bill.***

78. Clause 2(3) contains a definition of "normal levels" that is partly circular: ""normal levels" means levels that are not substantially below those that are normal".

79. **The circularity in this case renders the definition unfit for purpose.**

Procedure for directions

80. Clause 5 includes extensive consultation requirements in subsection (4). Subsection (5) provides for directions to be given with modifications to the original draft of which the affected person was given notice.

81. ***The Government should apply consultation requirements again in respect of significant modifications. Otherwise, the consultation requirement may effectively be circumvented by issuing unobjectionable directions in draft and introducing objectionable matter by way of modification.***

138 Letter from the Minister for Energy, Clean Growth and Climate Change, regarding the draft Downstream Oil Resilience Bill, 21 July 2021

Offence of failing to comply with resilience directions

82. Clause 7 creates an offence of failing to comply with a resilience direction. It includes a qualification so that it is committed only by failure to comply "without reasonable excuse". Daniel Greenberg explained that the phrase "reasonable excuse" does not resonate in a legally clear way:

> I cannot start to conjure up obvious examples in my mind [of what would constitute a 'reasonable excuse'] because the essence of this Bill is intervention by the Government in a sector that presumably already thinks it is behaving reasonably, which is why you have had to intervene. As we said before, you have had your negotiations. They have said what they think is right. You have said, "No, we are going to intervene", so the reason why they were opposing the use of powers will appeal to them as a reasonable excuse for not obeying the powers. What do the courts do? … Here, the courts will have to decide what amounts to a reasonable excuse for failure to comply with the direction.[139]

83. We asked the Government to outline what range of activities it believes the qualification is, and is not, intended to cover, and to outline whether it intends to provide greater clarity on this matter on the face of the bill in its final form. In response, the Government told us that:

> As with the power of direction, any offence or potential offence in respect of a direction will have to be assessed on its own merits. The circumstances that constitute a reasonable excuse are not defined or fixed and the Court or Secretary of State (as appropriate) will consider whether any reasons for failure to comply amount to a reasonable excuse on a case-by-case basis …
>
> The Government will produce guidance on the enforcement of offences under the draft Bill, as required by clause 38(1). That guidance will be prepared following consultation with appropriate persons, as set out in clause 38(1). If and to the extent that further clarification of what would or would not constitute a "reasonable excuse" for the purposes of clause 7 is considered necessary, that will be addressed in that guidance.
>
> The Government is therefore not currently intending to provide further clarification of this point on the face of the Bill.[140]

Daniel Greenberg took issue with the Government's response, and argued that more clarity is required on the face of the bill in terms of the parameters of the criminal offence:

> I would expect more clarity on the face of the Bill, and, again, I would not expect the Government… to say, "We will produce guidance on the enforcement of offences". That is unacceptable. To suggest that the Government will informally tell the courts what does and does not amount to a reasonable excuse is objectionable in legislative terms.[141]

139 Q74

140 Letter from the Minister for Energy, Clean Growth and Climate Change, regarding the draft Downstream Oil Resilience Bill, 21 July 2021

141 Q74

84. **We are not satisfied with the Government's response.**

85. **The fact that the Government believes criminal sanctions will only be needed rarely does not remove the need or expectation for it to clearly set out to Parliament a robust understanding and expectation for how criminal sanctions will be exercised. It is unacceptable for the parameters of a criminal offence to be left to guidance. If the Government does not make changes to the face of the bill to correct this before introduction, Parliament must consider carefully whether it is appropriate to create a criminal offence regime when the Government evidently does not have a sufficiently clear idea of how the regime is to be used.**

Penalties for failure to comply

86. Clause 7(2) sets out penalties for *individuals* failing to comply with the draft Bill's provisions, rather than the *corporations* of which those individuals are a part. We heard that this potentially causes confusion about whether directions (and therefore criminal liability) can be directed at individuals, or the overarching corporate entity of which they are a part.[142] We asked the Government to outline its assessment of how this proposed legislation would ensure downstream oil sector corporations themselves (rather than individuals) are properly accountable.

87. In response, the Government told us that:

> The references to "persons" in the draft Bill include a body of persons corporate or unincorporate (see Schedule 1 to the Interpretation Act 1978), 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 …
>
> Offences under clause 7 can only be committed by a person to whom a direction under clause 3 has been given (see clause 7(1)).[143]

88. **We are not satisfied with the Government's response.**

89. **We are not convinced that the link between the actions of individuals, and the wider responsibilities of the corporation of which that individual is a part, is sufficiently clear. *The Government must provide greater clarify on the face of the bill the relationship between individuals and commercial organisations, and their personal and corporate liability for criminal offences.***

Resilience directions and regulations

90. We raised concerns with the Government that the intended relationship between resilience directions under clause 3 and resilience regulations under clause 8 is not sufficiently clear.

91. In response to this concern, the Government told us that:

142 Q73

143 Letter from the Minister for Energy, Clean Growth and Climate Change, regarding the draft Downstream Oil Resilience Bill, 21 July 2021

> The primary distinction between resilience directions under clause 3 and resilience regulations under clause 8 is that the former will be made in respect in of particular, identified persons, while the latter are intended to apply to a class of persons. As above, these measures are primarily intended to catch corporate entities, rather than individuals …
>
> In contrast, 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. The Government believes it is appropriate that a class of persons are better dealt with by way of regulations, with the corresponding parliamentary procedure, than by way of direction. The Government also believes it would not be appropriate to impose an offence, or the mode of trial and levels of sanction, by way of direction.[144]

92. However, the Delegated Powers and Regulatory Reform Committee note, in their memo appended to this report, that the Government's explanation is not reflected in the Bill's drafting, as:

- clause 3 allows the Secretary of State to give both "general directions" and "specific directions"; and
- there appears to be nothing to prevent "a class of persons" being dealt with by multiple directions under clause 3.

The Delegated Powers and Regulatory Reform Committee therefore recommends that, if the intention is that requirements that are to apply to a class of persons must be imposed by regulations rather than by direction, this should be provided for on the face of the Bill.

93. **We are not satisfied with the Government's response.**

94. **The difference between directions under clause 3, and regulations under clause 8, is insufficiently clear. The Government's assertion that resilience directions under clause 3 will be made in respect of individuals, and regulations made under clause 8 and the manner in which the Government intends to use them will apply to a class of persons, is not borne out by the clauses are currently drafted.**

95. ***The Government should provide clearer justification for its proposal to include two overlapping forms of power - directions and regulations - and clearly explain the circumstances in which (and why) it would choose to exercise its power by direction as opposed to regulation (and vice-versa, or both). If the intention is that requirements that are to apply to a class of persons must be imposed by regulations rather than by direction, this should be made plainer on the face of the Bill.***

Information

96. Clause 9 provides the Secretary of State with a power to require information about downstream oil activities and assets, with a qualification in subsection (2) that the

144 Letter from the Minister for Energy, Clean Growth and Climate Change, regarding the draft Downstream Oil Resilience Bill, 21 July 2021

information may be required only for purposes of maintaining or improving resilience. We raised concerns with the Government that it is unclear the uses to which information can, and cannot, be put, once supplied for legitimate reasons as set out in subsection (2).

97. In response to this concern, the Government told us that:

> Any information obtained by notice under clause 9 would primarily be used for the purposes for which it was obtained, i.e., to maintain or improve downstream oil sector resilience. In addition to the restrictions on the purposes for which information can be requested (in clause 9(2)), there are also a number of other constraints on disclosure and use of the information.
>
> 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 …
>
> The combined effect of the provisions of the draft Bill itself and other applicable law is therefore that information can only be disclosed in specified circumstances, and the most sensitive information, in particular confidential information and personal data, will be subject to additional protections to ensure it is used appropriately. In the circumstances, the Government does not consider that any further restrictions on use of lawfully gathered information are necessary.[145]

98. **We are not satisfied by the Government's response.**

99. **The Government's claim that information provided under clause 9 would primarily be used for the purposes of "maintain[ing] or improv[ing] downstream oil sector resilience" is of little reassurance when, as set out in chapters 2 and 3, this qualification in itself is insufficiently defined and unnecessarily broad.**

Qualifying assets

100. Clause 17 requires assets to be "located in the United Kingdom". As with the definition of downstream activities in clause 1, it is unclear whether the bill's drafting is sufficiently robust to deal with activities taking place in the UK which are controlled by operations based overseas.

101. ***The Government should consider whether the drafting of clause 17 is sufficiently robust.***

145 Letter from the Minister for Energy, Clean Growth and Climate Change, regarding the draft Downstream Oil Resilience Bill, 21 July 2021

Acquisition consent guidance

102. The acquisition consent guidance statement under clause 23 is subject to affirmative resolution scrutiny under clause 24. We raised concerns with the Government that, given the complicated and politically and commercially sensitive issues, there is a strong case for statements under clause 24 being subject to the super-affirmative procedure.

103. In response to this concern, the Government told us that:

> The Government considers that use of the super-affirmative procedure is only appropriate in exceptional cases …
>
> The Government does not, however, consider that the statement made under clause 23(1) is the sort of exceptional case that would require the super-affirmative procedure. Instead, the Government considers that the statement that the draft affirmative procedure will provide an appropriate degree of parliamentary oversight of the proposed exercise of the Secretary of State's decision-making power. The statement is not legally binding, and the draft Bill also requires the Secretary of State to carry out an appropriate consultation on the draft statement and amend it as necessary before laying it in Parliament (see clause 24(2)), ensuring that stakeholders have an opportunity to contribute to its drafting.[146]

104. **We are not satisfied with the Government's response.**

105. **Given the politically and commercially sensitive considerations, the acquisition consent guidance statement under clause 23 should be subject to the super-affirmative process.**

Appeals against acquisition consent determinations

106. Clause 25 provides for an appeal to the First-tier Tribunal against refusal of applications for consent to acquisition. There is a case to be made that such appeals will inevitably progress to the High Court in any case, and appeals should be directed there in the first instance by default.

107. In response to this concern, the Government told us that:

> The Government does not consider that it is inevitable that any such appeals appeal would progress to the High Court. The route for any further appeal from a decision of the First-Tier Tribunal will depend on the circumstances of the particular case but could involve proceedings in the Upper Tribunal. In any event, the Government expects that the number of appeals in relation to the acquisition control measures is likely to be 1 case in every 10 years, or less. Accordingly, the impact on the tribunal system (and, if relevant, court system) is likely to be negligible.[147]

108. **We are not satisfied with the Government's response.**

146 Letter from the Minister for Energy, Clean Growth and Climate Change, regarding the draft Downstream Oil Resilience Bill, 21 July 2021

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109. **We consider it unlikely that in most cases appeals would not proceed to the High Court, and we do not believe imposing an additional step in the legal route is the most appropriate use of public money.**

Continuing offences

110. ***The Government should consider whether express reference to penalties for continuing offences should be made on the face of the bill.***

Civil penalties

111. We asked the Government to set out its rationale for the £10 million maximum penalty set out in clause 34(4). We raised concerns that it could be both potentially excessive in some cases and also likely to be insufficient in others.

112. In response to this concern, the Government told us that:

> The upper limit for a variable monetary penalty in clause 34(4) was set by reference to a number of factors, including consistency with other broadly comparable energy regulation regimes, the potential economic impact of disruption to downstream oil supply, and the scale of entities operating in the sector …
>
> Taking those sort[s] of factors into account, the Government considers that £10 million is an appropriate level for the maximum financial penalty under this draft Bill. That amount is intended as a limit to provide some comfort to industry, while also indicating the seriousness with which Government will take any breach.[148]

113. **We are not satisfied with the Government's response.**

114. **We reiterate that the £10 million maximum penalty set out in clause 34(4) is likely to be both excessive in some cases and also insufficient in others. The Department's claim that the £10 million limit will "provide some comfort to industry" is inappropriate, given that £10 million is an insignificant amount when considered against the revenue and profits of many large corporations operating in the downstream oil sector.**

115. ***The Government should also include more specificity on the face of the bill about the criteria to be applied by the Secretary of State in determining the amount of a penalty, together with consideration of allowing for either no limit, or ability to exceed the limit, where compensatory or damage-rectification principles suggest a greater liability in a specific case.***

148 Letter from the Minister for Energy, Clean Growth and Climate Change, regarding the draft Downstream Oil Resilience Bill, 21 July 2021

Conclusions and recommendations

Fuel supply resilience in the UK

1. We agree with the Government that it is vital to protect the UK's fuel supply against long and short-term changes which may threaten its resilience, during the decarbonisation of the economy. Whilst the industry itself has historically worked well with government to effectively address individual, short-term and isolated crises, longer-term changes in the market (caused, for example, by the Net Zero transition) presents a more fundamental threat to the sector's resilience, and therefore to the UK's fuel supply. The Government should be equipped with the appropriate powers to enable it to maintain the UK's fuel resilience and to protect the UK's national interests. We therefore support, in principle, the overarching policy intent of this bill. (Paragraph 14)

Draft Downstream Resilience Bill

2. We agree with the Government that the existing powers available to the Government to respond to fuel resilience threats are mostly only available in emergency and crisis situations. We therefore support, in principle, a package of appropriately specific and limited measures to remedy this. (Paragraph 22)

3. However, we are concerned that the Government's policy intention is not made sufficiently clear on the face of the bill. *The Government should consider including a purpose clause on the face of the bill to provide the courts (and stakeholders) with a clearer and more detailed articulation of when and to what end the powers in the draft bill should be used.* (Paragraph 23)

4. There is a disjuncture between the Government's claim that the proposed powers are intended as "backstop" measures, and the text of the draft bill, which includes no such qualification. *The Government should revise the bill before introduction to include on its face the qualification that the powers are backstop measures only.* (Paragraph 33)

5. *The Government should also improve the clarity of the legislation by including on its face more clearly defined parameters and criteria for the thresholds which 'trigger' the powers in parts 1 and 2 of the bill, and set out more specific and clearly defined ends to which the powers can be used.* (Paragraph 34)

6. We are concerned about the lack of substantive detail from the Government on how the draft bill's four - broad - powers would operate in practice. We note, in particular, the Government's vagueness on the circumstances in which, and specifically how, the spending and direction powers would be used. (Paragraph 37)

7. If the bill is introduced in Parliament, it is crucial that the Government provides Parliamentarians with adequate clarity on how the bill would operate in practice, in order to allow effective Parliamentary scrutiny. (Paragraph 38)

The draft bill's powers

8. We recognise the Government's need for an appropriately limited general power to allow it to respond proactively to fuel resilience threats. However, the direction power, as currently drafted, is unusually and unacceptably broad. We do not agree with the Government that "to maintain or improve the resilience of the sector or to ensure continuity of supply during disruptions" is a sufficiently specific or narrowly defined purpose. (Paragraph 48)

9. BEIS officials and Ministers have provided various assurances that the direction power is a last resort option. However, these reassurances are ultimately non-binding and therefore insufficient. (Paragraph 49)

10. *For the reasons set out above, and in the first chapter of this report, we recommend that the Government revise the draft bill to include on its face a set of criteria or parameters for the use of the direction power. The Government should not be hesitant to do so, since this proposal would serve only to codify and make binding the assurances Ministers and officials have already provided that the direction power is a last resort option when the industry itself has not taken appropriate action.* If the draft bill is introduced to Parliament in its final form without such changes, Parliament should consider carefully whether to grant the Government such a broad power. (Paragraph 50)

11. We understand that directions issued under this legislation may, for reasons of commercial sensitivity, need to remain unpublished. However, it is proper for these directions to still be subject to some form of parliamentary scrutiny. This Committee is an appropriate forum for this scrutiny. *The draft bill should be revised to include the provision of parliamentary scrutiny of any directions issued under the legislation. The Government should engage with this Committee in advance of the bill's introduction, to agree a protocol of engagement to enable parliamentary scrutiny of directions. This protocol should include how decisions on whether to publish directions should be made; in what circumstances it is appropriate for directions to be published; and how this Committee should treat directions in instances when publication is not appropriate.* (Paragraph 51)

12. We do not have significant policy concerns regarding the proposed information power, but do have some technical observations, included later in this report. (Paragraph 56)

13. The Government has not clearly set out how it intends to use the proposed spending power. *If the bill is introduced in Parliament, the Government must provide sufficient detail in accompanying guidance on the specific circumstances in which, and how, the spending power will be used.* (Paragraph 61)

14. Financial assistance provided under these provisions - particularly liabilities - could constitute significant cost to the taxpayer. Ex-post disclosure of this assistance in annual reports and accounts does not allow for adequate parliamentary scrutiny. Given the Government's reassurances that it envisions providing such assistance only infrequently, it would not be onerous to commit to a higher degree of parliamentary scrutiny. *We therefore recommend that the bill is amended to include a statutory requirement for a Ministerial statement in both Houses when financial assistance*

is provided, or notification via private correspondence to this select committee, in instances where a statement would not be appropriate on grounds of commercial confidentiality or national security. (Paragraph 62)

15. We do not have significant policy concerns about the control test power in its own right. However, we are concerned that the Government has not clearly set out how it envisions the proposed power interacting with existing legislation. Most notably, there is the potential for duplication of and overlap with the National Security and Investment Act 2021. (Paragraph 65)

16. *If introduced in Parliament, the Government should set out - in the bill's explanatory notes, or in accompanying guidance - how the bill would interact with other relevant legislation, including the National Security and Investment Act 2021.* (Paragraph 66)

Technical Observations

17. We are not satisfied with the Government's response. The Government's explanation exhibits a potentially outdated understanding of how companies in the downstream oil sector operate. The bill's drafting may not be sufficiently robust to prevent downstream oil companies arranging their corporate structure or offshoring operational processes in such a way as to evade the controlling motivations of the bill. (Paragraph 70)

18. We are not satisfied with the Government's response. The difference between depriving persons of property, and regulating how it is used, is misleading. In the context of commercial property, regulation of use could be as much of an interference as expropriation. (Paragraph 73)

19. We are also not satisfied with the Government's argument that the measures "strike a fair balance" between the general interests of the community, and the protection of individual fundamental rights. The Government cannot be sure of ensuring a "fair balance" with such a broad range of potential uses of the draft bill's powers. *The Government can only ensure these potentially intrusive powers strike the "fair balance" it professes by outlining the criteria and factors that the Government intends to give regard to when considering this balance. The essence of those criteria and factors should be included on the face of the bill.* (Paragraph 74)

20. The circularity in this case renders the definition unfit for purpose. (Paragraph 76)

21. *The Government should apply consultation requirements again in respect of significant modifications. Otherwise, the consultation requirement may effectively be circumvented by issuing unobjectionable directions in draft and introducing objectionable matter by way of modification.* (Paragraph 78)

22. We are not satisfied with the Government's response. The fact that the Government believes criminal sanctions will only be needed rarely does not remove the need or expectation for it to clearly set out to Parliament a robust understanding and expectation for how criminal sanctions will be exercised. It is unacceptable for the parameters of a criminal offence to be left to guidance. If the Government does not make changes to the face of the bill to correct this before introduction, Parliament

must consider carefully whether it is appropriate to create a criminal offence regime when the Government evidently does not have a sufficiently clear idea of how the regime is to be used. (Paragraph 81)

23. We are not satisfied with the Government's response. We are not convinced that the link between the actions of individuals, and the wider responsibilities of the corporation of which that individual is a part, is sufficiently clear. *The Government must provide greater clarify on the face of the bill the relationship between individuals and commercial organisations, and their personal and corporate liability for criminal offences.* (Paragraph 84)

24. We are not satisfied with the Government's response. The difference between directions under clause 3, and regulations under clause 8, is insufficiently clear. The Government's assertion that resilience directions under clause 3 will be made in respect of individuals, and regulations made under clause 8 and the manner in which the Government intends to use them will apply to a class of persons, is not borne out by the clauses are currently drafted. (Paragraph 88)

25. *The Government should provide clearer justification for its proposal to include two overlapping forms of power - directions and regulations - and clearly explain the circumstances in which (and why) it would choose to exercise its power by direction as opposed to regulation (and vice-versa, or both). If the intention is that requirements that are to apply to a class of persons must be imposed by regulations rather than by direction, this should be made plainer on the face of the Bill.* (Paragraph 89)

26. We are not satisfied by the Government's response. The Government's claim that information provided under clause 9 would primarily be used for the purposes of "maintain[ing] or improv[ing] downstream oil sector resilience" is of little reassurance when, as set out in chapters 2 and 3, this qualification in itself is insufficiently defined and unnecessarily broad. (Paragraph 92)

27. *The Government should consider whether the drafting of clause 17 is sufficiently robust.* (Paragraph 94)

28. We are not satisfied with the Government's response. Given the politically and commercially sensitive considerations, the acquisition consent guidance statement under clause 23 should be subject to the super-affirmative process. (Paragraph 97)

29. We are not satisfied with the Government's response. We consider it unlikely that in most cases appeals would not proceed to the High Court, and we do not believe imposing an additional step in the legal route is the most appropriate use of public money. (Paragraph 100)

30. *The Government should consider whether express reference to penalties for continuing offences should be made on the face of the bill.* (Paragraph 101)

31. We are not satisfied with the Government's response. We reiterate that the £10 million maximum penalty set out in clause 34(4) is likely to be both excessive in some cases and also insufficient in others. The Department's claim that the £10 million limit

will "provide some comfort to industry" is inappropriate, given that £10 million is an insignificant amount when considered against the revenue and profits of many large corporations operating in the downstream oil sector. (Paragraph 104)

32. *The Government should also include more specificity on the face of the bill about the criteria to be applied by the Secretary of State in determining the amount of a penalty, together with consideration of allowing for either no limit, or ability to exceed the limit, where compensatory or damage-rectification principles suggest a greater liability in a specific case.* (Paragraph 105)

Appendix: Memo from the Delegated Powers and Regulatory Reform Committee

1. At the request of the Government, the House of Commons Business, Energy and Industrial Strategy Committee is examining the draft Downstream Oil Resilience Bill. That Committee has invited the Delegated Powers and Regulatory Reform Committee to consider the delegated powers in the draft Bill and to give views on whether those powers offer sufficient opportunity for parliamentary scrutiny.

2. The draft Bill would give the Government powers to ensure the maintenance of resilience in the UK's "downstream oil sector", which comprises all parts of the supply system for crude oil based fuels from the point that crude oil arrives at a terminal or refinery, through the refining process until the point of sale to a final industrial or domestic customer.

3. There are existing powers (primarily in the Energy Act 1976 and the Civil Contingencies Act 2004) to deal with threats to the fuel supply chain but these are primarily exercisable only in an emergency. The Bill would give the Government powers that could be exercised outside emergency situations.

4. The Department for Business, Energy and Industrial Strategy has provided a Delegated Powers Memorandum ("the Memorandum").[149]

5. We draw the following powers to the attention of the House of Commons Business, Energy and Industrial Strategy Committee.

Clause 3(1), (3) and (5): powers to give directions, and Clause 8(1), (2) and (4): corresponding powers to make regulations

6. Clause 3(1), (3) and (5) give the Secretary of State broad powers to give directions to-

- a person carrying on a "downstream oil sector activity" (storage, handling, carriage or conveyance of, or refining or otherwise processing, oil in the UK in the course of a business that contributes to the supply of crude oil based fuels in the UK) in the course of a business which has capacity in excess of 500,000 tonnes; or
- an owner of a "downstream facility" (a pipeline, terminal or other facility or infrastructure which is used for the purposes of downstream oil sector activities) which has a capacity in excess of 20,000 tonnes.

7. The powers allow the Secretary of State to direct such persons, for specified purposes, "to do anything in relation to"-

- a downstream oil sector activity carried on by them; or
- a downstream facility owned by them.

149 Memorandum from the Department for Business, Energy and Industrial Strategy, dated 8 September 2021.

8. The power in clause 3(1) allows the Secretary of State to give directions "for the purpose of maintaining or improving downstream oil sector resilience".[150]

9. The power in clause 3(3) allows the Secretary of State to give directions for the purpose of-

- restoring continuity of supply of crude oil based fuel; or
- counteracting disruption to, or a failure of, continuity of supply, or its potential adverse impact.

Such directions can only require a person to do things that the Secretary of State considers "necessary or expedient" for these purposes.

10. The power in clause 3(5) allows the Secretary of State to give directions for the purpose of-

- reducing the risk of disruption to, or a failure of, continuity of supply of crude oil based fuel; or
- reducing the potential adverse impact of such disruption or failure.

Such directions can only require a person to do things that the Secretary of State considers "necessary or expedient" for these purposes. This power can only be exercised where the Secretary of State considers that there is a "significant risk" of disruption to, or a failure of, continuity of supply.

11. Failure to comply with a direction given under clause 3 is a criminal offence punishable by up to 2 years' imprisonment.[151]

Relationship with the "corresponding powers to make regulations" in clause 8

12. Clause 8 allows the Secretary of State to do by regulations anything that can be done by direction under clause 3. Additionally, regulations under clause 8 can apply to persons carrying on smaller-scale activities (those with a capacity between 1,000 and 500,000 tonnes) and owners of smaller facilities (those with a capacity between 1,000 and 20,000 tonnes).

13. We are concerned that the Government has not provided an adequate explanation for the Bill containing two sets of separate powers - one exercisable by direction and the other by regulations - to impose the same requirements on larger-scale activities and facilities, giving the Secretary of State a choice as to whether to impose requirements by direction under clause 3 or by regulations under clause 8. It is not clear why both sets of powers are required and in what circumstances the Secretary of State might choose to use one rather than the other.

14. According to the Memorandum-

150 "Downstream oil sector resilience" means the capability of (a) persons carrying on downstream oil sector activities, and (b) downstream oil facility owners to (a) manage the risk of, (b) reduce the potential adverse impact of, and (c) facilitate recovery from, disruptions to downstream oil sector activities.

151 See clause 7.

> In contrast to the power of direction in clause 3 which are to be made to individual persons, the regulations [under clause 8] are to apply to a class of persons. The Government believes it is appropriate that a class of persons are better dealt with by way of regulations, with the corresponding parliamentary procedure, than by way of direction.[152]

15. However, the Bill does not appear to reflect this-

- clause 3 allows the Secretary of State to give both "general directions" and "specific directions";[153] and
- there appears to be nothing to prevent "a class of persons" being dealt with by multiple directions under clause 3.

16. **We consider that, if the intention is that requirements that are to apply to a class of persons must be imposed by regulations rather than by direction, this should be provided for on the face of the Bill.**

Breadth of powers

17. Directions under clause 3 and regulations under clause 8 are subject to the following safeguards-

- directions are subject to a notice procedure[154] (which includes requirements (a) to provide to a person to whom the Secretary of State proposes to give a direction a draft of the proposed direction, (b) to explain to the person why the Secretary of State proposes to give the direction, and (c) to consider written representations made by the person), a requirement to consult[155] and a right of appeal to the First-tier Tribunal;[156] and
- regulations are subject to a requirement to consult and affirmative procedure scrutiny.

However, the powers in clauses 3 and 8 are framed in very broad terms without clear criteria or parameters for their exercise-

- the Bill simply gives the Secretary of State power to require a person "to do anything" in relation to a downstream oil sector activity carried on by them or a downstream facility owned by them. It says nothing about what a person can be required to do;
- although the powers can only be exercised for specified purposes, these are framed by reference to broad - and somewhat vague - concepts such as "maintaining or improving… resilience", avoiding "disruptions" and maintaining "normal levels" of supply;[157] and

152 At para 30.
153 See clause 4(1).
154 See clause 5.
155 See clause 5(4).
156 See clause 6.
157 See clause 2 (resilience and continuity of supply).

- the power in clause 3(1) to give directions, and the corresponding power in clause 8(1) to make regulations, "for the purpose of maintaining or improving downstream oil sector resilience" are particularly broad. By contrast, the powers in clause 3(3) and (5) - and the corresponding regulation-making powers in clause 8(2) and (4) - can only be exercised in limited circumstances (where there is disruption to, or a failure of, continuity of supply, or a "significant risk" of such disruption or failure) and can only impose requirements that the Secretary of State considers "necessary or expedient": the powers in clauses 3(1) and 8(1) are subject to no such limitations.

18. **We consider that this makes it difficult both for Parliament and for stakeholders to understand the range of things that people could be required to do. It could also be to the Government's detriment: if an exercise of the powers was challenged and a court had to make a determination as to the parameters of those powers then the absence of provision on the face of the Bill gives rise to a risk that the court might determine that the powers were not in fact as broad as the Government intended.**

19. **We consider that clauses 3 and 8 contain inappropriate delegations of power because the Bill lacks clear criteria or parameters for the exercise of the very broad powers in those clauses to impose requirements backed by criminal penalties.**

Level of scrutiny

20. Despite the considerable overlap between the powers in clauses 3 and 8 (anything that can be done by direction under clause 3 can also be done by regulations under clause 8), there are striking differences between the two in terms of scrutiny and transparency: regulations under clause 8 are subject to affirmative procedure scrutiny but a direction under clause 3 is subject to no Parliamentary procedure at all and need not even be published.

21. The Memorandum justifies this on the basis that the powers to give directions under clause 3 "are not considered to be legislative powers, because directions will impose specified obligations on individual entities, rather than being measures of more general effect".[158]

22. We consider that this gives undue weight to form over substance. Directions under clause 3 would be quasi-legislation which would have essentially the same legal effect as regulations under clause 8: they are a different means of imposing the same legal requirements backed by, in effect, the same offence of non-compliance.

23. One of the reasons given in the Memorandum for making regulations under clause 8 subject to the affirmative procedure is that the powers are exercisable in a broader range of circumstances than a comparable regulation-making power in section 17(5) of the Energy Act 1976 which is subject to the negative procedure but is only exercisable in emergency situations.[159]

158 At para 11.

159 See para 35 of the Memorandum.

24. Yet the Bill allows that scrutiny to be completely by-passed if requirements are imposed instead through directions: a requirement that would be subject to affirmative procedure scrutiny were it imposed by regulations under clause 8 need not even be published if it is instead imposed by direction under clause 3.

25. The Memorandum states that section 5 of the Offshore Safety Act 1992 contains a "similar power"[160] to those in clause 3. However, section 5(4) of that Act requires the Secretary of State to lay before each House of Parliament "a copy of every direction given under this section unless he is of the opinion that disclosure of the direction is against the interests of national security or the commercial interests of any person".

26. According to the Memorandum, that section can be distinguished because it allows directions to "disapply or override" an "existing legal regime" and a direction under clause 3 has a "more limited effect".[161] However, we consider that this downplays the significance of the powers in clause 3: those powers allow the imposition of wide-ranging–and potentially onerous–legal requirements.

27. We are concerned that clause 3 would confer very wide powers to impose legal requirements by Ministerial direction–backed by criminal penalties–without adequate provision for transparency.

28. **Accordingly, we consider that the Secretary of State should be required to lay before each House of Parliament a copy of every direction given under clause 3, unless the Secretary of State is of the opinion that disclosure of the direction would be against the interests of national security or the commercial interests of any person.**

Clause 10(2)(c): power to make regulations to specify a class or description of persons who are to be subject to a duty to report incidents

29. Clause 10(1) imposes a duty on persons falling within clause 10(2) to notify the Secretary of State "as soon as possible" if they know, or have reason to suspect, that a "notifiable incident is occurring or has occurred". A "notifiable incident" is one "which affects the person's relevant activities or assets in such a way as to create a significant risk of, or cause (a) disruption to, or a failure of, the continuity of supply of crude oil based fuel, or (b) an adverse effect on downstream oil sector resilience".[162]

30. Clause 10(2) specifies three classes of persons who are subject to this reporting duty-

- persons carrying on downstream oil sector activities in the course of a business which has capacity in excess of 500,000 tonnes;
- owners of downstream facilities which have a capacity in excess of 500,000 tonnes; and
- persons of a class or description specified in regulations made by the Secretary of State.

160 At para 18.
161 See para 12 of the Memorandum.
162 See clause 10(3).

31. The power to make regulations includes power to specify the meaning of "relevant activities or assets" in relation to the persons specified in the regulations.[163]

32. Failure to comply with the duty to notify under clause 10 is a criminal offence punishable by up to 2 years' imprisonment.[164]

33. The Memorandum provides the following justification for the power to specify classes or descriptions of persons who are subject to the duty to notify-

> While the Bill sets out the two main categories of downstream operators that must comply with the reporting requirements, it is conceivable that there are or will be other downstream operators that do not meet the thresholds, but may be involved in incidents which pose a risk to the continuity of supply of crude oil.[165]

34. The regulations are subject to the negative procedure.[166] The Memorandum gives the following reason for this: "Incidents which pose a serious risk to continuity of supply are likely to be rare, and the burden on any new downstream operator caught by regulations are likely to be small".[167]

35. However, the power appears to be capable of being exercised so as to significantly alter the effect of provision in the Bill itself. There appears to be nothing to prevent regulations extending the duty to notify to all businesses and facilities with a capacity in excess of, say, 100,000 tonnes. This would have the same effect as if clause 10(2) itself was amended by omitting the existing references to "capacity in excess of 500,000 tonnes" and inserting in their place references to "capacity in excess of 100,000 tonnes"–yet it could be done by negative procedure regulations.

36. Clause 41 of the Bill contains a Henry VIII power which is designed for precisely this purpose: it allows the tonnage thresholds in question to be amended by affirmative procedure regulations. Yet the power in clause 10(2)(c) would allow the same effect to be achieved by negative procedure regulations.

37. **We consider that the Bill should be amended so that the power in clause 10(2)(c) cannot be exercised so as to achieve–by negative procedure regulations–an effect that would otherwise require affirmative procedure regulations under clause 41.**

Clause 23(1): statement about how functions under clause 22 in relation to applications for consent to make qualifying acquisitions will be exercised

38. According to the Memorandum, Part 3 of the Bill (Restriction on Acquisitions) "seeks to create a regime to protect the downstream oil sector from influence or control by persons who are not financially sound and technically competent".[168]

163 See clause 10(7).
164 See clause 11(2).
165 See para 43 of the Memorandum.
166 See clause 42(3).
167 See para 45 of the Memorandum.
168 See para 63.

39. Clause 15(1) provides that "no person may make a qualifying acquisition[169] without the written consent of the Secretary of State".

40. Clause 22 makes provision about how applications for such consent are to be decided by the Secretary of State. It provides that, in deciding whether or not to consent to an acquisition, the Secretary of State must take into account the following matters-[170]

- "any risks that the acquisition poses to the financial stability of the relevant business";
- "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";
- "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".

41. Clause 23(1) requires the Secretary of State "to issue a statement about how it is proposed the Secretary of State's functions [under clause 22] will be exercised". The statement must, in particular, specify factors to be taken into account in assessing-

- any risks that the acquisition poses to the financial stability of the relevant business; 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.

42. A statement under clause 23 cannot be issued unless-

- it has been the subject of a consultation process; and
- a draft of the statement has been laid before and approved by a resolution of each House of Parliament.[171]

43. The Memorandum provides the following justification for the power to issue such a statement-[172]

- "it would not be appropriate to further limit the scope of the decision-making power in relation to acquisitions, for example by setting out an exhaustive list of factors that must be taken into account in making such decisions in the Bill or in delegated legislation";
- "the purpose of the statement is not to prescribe the procedure or basis for the Secretary of State's decisions in its entirety, or to fetter the Secretary of State's discretion, but rather to provide additional predictability and transparency for industry participants. This sort of detailed guidance is better suited to being contained in the envisaged statement than in the Bill"; and

169 "Qualifying acquisition" is defined in clause 16 of the Bill.
170 See clause 22(2) and (3).
171 See clause 24.
172 At para 68 and 69.

- "market conditions, technical capabilities and the Secretary of State's focus are all likely to change over time, so it seems more appropriate to set out how the Secretary of State expects to exercise the decision-making powers in the statement, which is likely to be more straightforward to amend, than in the Bill".

44. We readily accept that it would not be appropriate to limit the scope of the decision-making power in relation to acquisitions by, for example, setting out in the Bill an exhaustive list of factors that must be taken into account. However, we are concerned that the Bill goes to the other extreme by leaving so much to the Secretary of State's discretion. The Memorandum does not explain why, for example, the Bill does not instead contain (a) criteria for determining applications for consent to make qualifying acquisitions, or (b) a non-exhaustive list of factors that must be taken into account, coupled with a power to amend that list by affirmative procedure regulations.

45. **We consider that clause 23(1) contains an inappropriate delegation of power because it leaves it entirely to Ministers to decide the criteria that are to apply - and the factors that are to be taken into account–in the Secretary of State's consideration of the matters specified in clause 22 for the purpose of determining an application for consent to make a qualifying acquisition.**

Clause 39(1): guidance as to use of civil sanctions

46. Clause 39(1) requires the Secretary of State to publish guidance about how the Secretary of State intends to exercise functions under clauses 34 to 37 and Schedule 2.

47. Those provisions allow the Secretary of State to impose civil sanctions ("discretionary requirements" and "enforcement undertakings") as an alternative to prosecution for offences under the Bill.

48. The Secretary of State "must have regard to the guidance" in exercising the functions in question.[173]

49. The guidance must be published but is subject to no Parliamentary procedure. The Memorandum gives the following explanation: "the Government does not consider that the subject matter requires Parliament to scrutinise a document that is intended purely to provide further information to the downstream oil sector".[174]

50. Although a duty to have regard to statutory guidance does not imply a duty to follow it in any or all respects, we have repeatedly observed[175] that, where legislation requires that regard must be had to statutory guidance, in practice this means that those to whom the guidance applies will normally be expected to follow it–including by the courts - unless there are cogent reasons for not doing so. The guidance would therefore influence the exercise of the Secretary of State's functions under clauses 34 to 37 and Schedule 2.

173 See clause 39(4).

174 At paras 85 and 90.

175 For example, 37th Report, Session 2019–21, para 8; 18th Report, Session 2015–16, HL Paper 83, para 13; 20th Report, Session 2015–16, HL Paper 90, paras 10–11; 21st Report, Session 2015–16, HL Paper 98, para 27; 22nd Report, Session 2015–16, HL Paper 102, para 19; 1st Report, Session 2016–17, HL Paper 13, para 38.

51. **We consider that the guidance issued under clause 39(1) should be subject to Parliamentary scrutiny, with the negative procedure providing an appropriate level of scrutiny.**

Formal minutes

Tuesday 2 November 2021

Members present:

Darren Jones, in the Chair

Richard Fuller

Ms Nusrat Ghani

Mark Jenkinson

Mark Pawsey

Draft Report (*Pre-legislative scrutiny: draft Downstream Oil Resilience Bill*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 115 read and agreed to.

Appendix agreed to.

Resolved, That the Report be the Fifth of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Tuesday 16 November at 9:45am]

Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the inquiry publications page of the Committee's website.

Tuesday 13 July 2021

Paul Stevens, Distinguished Fellow, Chatham House; **Peter Davidson**, Executive Director, Tank Storage Association; **Mark Prouse**, Deputy Director, Department for Business, Energy and Industrial Strategy — Q1–48

Tuesday 14 September 2021

Daniel Greenberg CB, Speaker's Counsel for Domestic Legislation, House of Commons — Q49–83

Published written evidence

The following written evidence was received and can be viewed on the inquiry publications page of the Committee's website.

INQ numbers are generated by the evidence processing system and so may not be complete.

1 Association of Convenience Stores (DSORB0004)

2 Department for Business, Energy and Industrial Strategy (DSORB0007)

3 Tank Storage Association (DSORB0001)

4 UK Petroleum Industry Association (DSORB0003)

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the publications page of the Committee's website.

Session 2021–22

Number	Title	Reference
1st	Post-pandemic economic growth: Industrial policy in the UK	HC 385
2nd	Climate Assembly UK: where are we now?	HC 546
3rd	Post-pandemic economic growth: Levelling up	HC 566
4th	Liberty Steel and the Future of the UK Steel Industry	HC 821

Session 2019–21

Number	Title	Reference
1st	My BEIS inquiry: proposals from the public	HC 612
2nd	The impact of Coronavirus on businesses and workers: interim pre-Budget report	HC 1264
3rd	Net Zero and UN Climate Summits: Scrutiny of Preparations for COP26 – interim report	HC 1265
4th	Pre-appointment hearing with the Government's preferred candidate for the Chair of the Regulatory Policy Committee	HC 1271
5th	Uyghur forced labour in Xinjiang and UK value chains	HC 1272
6th	Mineworkers' Pension Scheme	HC 1346