Fifth Report of Session 2021–22

On 12 November 2021, the Business, Energy and Industrial Strategy Committee published its Fifth Report of Session 2021–22, Draft Downstream Oil Resilience Bill *UK.* The Government's response was received by correspondence on 14 February 2022. The Government's cover letter and response is appended below. The Committee's recommendations are in ***bold*** type, the Government response is in plain type.

Appendix: Government Response

Introduction

1. The Government welcomes the Business, Energy and Industrial Strategy Committee report that was published on 12 November 2021, following their inquiry into the 'Draft Downstream Oil Resilience Bill'. The Government is grateful to the Select Committee, the Delegated Powers and Regulatory Reform Committee (DPRRC) and all those that provided evidence for their work.
2. The Committee's aim was to examine whether the purpose of the proposed measures contained in the draft bill would ensure a secure and reliable fuel supply, by giving the Secretary of State powers to pre-emptively prevent potential disruption to the downstream oil sector.
3. The following response includes the Committee's specific recommendations and sets out the Government's response to each recommendation or groups of recommendations. The Government has also used this opportunity to respond to the recommendations made by the Delegated Powers and Regulatory Reform Committee to the delegated powers in the draft Bill.

Definitions and objectives

4. **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 23)**
5. **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 24)**
6. **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 34)**
7. **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 35)**
8. **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 38)**

9. **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 51)**

10. **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 72)**

11. **The circularity in this case renders the definition unfit for purpose. (Paragraph 79)**

12. The Government welcomes the Committee's support for the underlying case for measures to strengthen the resilience of the fuel supply sector.

13. The Government recognises the importance of ensuring that policy objectives of the bill is achieved, how the bill should be used, and key definitions is made sufficiently clear within the bill to aid stakeholders, other government departments, Parliament, and the courts' interpretation of the legislation. We are grateful to the committee for their advice on this.

14. The policy intention of the power of direction is to allow government to act when industry has not taken proportionate measures to mitigate resilience risks. The powers are not intended to address actual or imminent emergencies, where existing powers may be available (e.g. under the Civil Contingencies Act 2004 and Energy Act 1976). Instead, the new powers are intended to ensure that Government can require industry participants to take appropriate steps to ensure they have appropriate resilience measures in place, to avoid or reduce the risk (among other things) of any emergency situation arising. Government will always seek a voluntary solution before considering whether a direction is appropriate. Government anticipates that the use of the powers will be limited and by exception. The powers are supported by a power of spending (discussed further below), which could allow government to provide financial assistance for the purpose of maintaining or improving sector resilience and continuity of fuel supply where this provides value for money. The Government will consider its options to make this clearer in the bill.

15. The policy intent for these measures is to manage risks to the supply of fuels to end users. The nature of risk management is that there is often a significant degree of uncertainty over the exact triggering event and scale of the consequences. For this reason, proscriptive triggers and pre-defined outcomes in primary legislation may well turn out to be inappropriate when individual risks become apparent.

Furthermore, the lead-in time and sensitivity of these risks may not reasonably allow the Government to rely on amendments to primary legislation.

16. The Government takes on board the recommendation that Clause 2(3) which contains a definition of "normal levels" is circular and will look to amend this.

17. The Government has considered this recommendation and has not identified any material scenarios in which downstream oil companies would be able to evade the controlling motivations of the bill for critical operations by arranging their corporate structure or offshoring operational processes. There are no existing cases that suggest that this would occur. However, Government will continue to consider this matter further.

18. Ahead of the introduction of the bill, the government will consider how to take on board the thrust of the Committee's recommendations and will amend the bill to reflect the above suggestions, where appropriate. This consideration will include the potential merits of a purpose clause, the circumstances in which the measures will be used and clarification of the purposes of the individual measures, including of the definition of resilience.

Parliamentary scrutiny and consultations

19. **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 39)**

20. **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 52)**

21. **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 63)**

22. **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 81)**

23. **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. (DPRRC's comment p.41)**

24. **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. (DPRRC's comment p.42)**

25. **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. (DPRRC's comment p.46)**

26. The Government recognise the importance of Parliamentary scrutiny and welcome the scrutiny from Parliament and the select committees through regular Oral Questions and correspondence.

27. The Government will engage with the Committee in advance of the Bill's introduction, to agree a protocol of engagement to enable parliamentary scrutiny of directions including those that have to remain unpublished due to commercial sensitivity. The Government will also set out in the guidance how Ministers will inform the committee when financial assistance is provided. In this consideration we will take account of the precedents set by previous legislation such as the Offshore Safety Act 1992 and the Industrial Development Act 1982.

28. As set out above in paragraphs 11-15, the Government will consider how it can improve the definitions and how the powers will be exercised, which will clarify the use of the powers under clauses 3 and 8.

29. The Government does not intend for the provisions in the bill to allow the circumvention of the statutory consultation requirements. However, the Government does not intend to amend clause 5 as the public law principles of fairness would always require further consultation if a significant modification is made following consultation. The Government does not state that expressly in every statute requiring consultation because it is a consequence of common law. If a significant modification is applied to a direction after a consultation with industry or other government departments, the Government will consult on these changes again.

30. The Government agrees that the guidance as to the use of civil sanctions issued under clause 39(1) would benefit from Parliamentary scrutiny therefore the Government will agree a protocol of engagement to enable this.

Spending Power

31. **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 62)

32. As set out in our letter of 11 October 2021, the Government's intention is to provide financial support for the purpose of maintaining or improving downstream oil sector resilience and continuity of fuel supply. And as we have discussed above in paragraphs 11-15, we will consider how we can clarify the overall purpose of these powers and the definition of resilience before introduction.

33. The Government does not expect to make frequent use of this spending power nor is there any intention to allocate a budget for this purpose. We have been clear to the industry that this power will only be used in exceptional circumstances with careful consideration of competition law so that financial assistance will not distort competition.

34. Any package of financial support will also be subject to subsidy controls and the normal standards for Government spending will also apply as set out in Managing Public Money, including the key principles of regularity, propriety, value for money and feasibility. Any such spending will be set out in Department financial transparency data and annual accounts in the usual way, and will therefore be subject to scrutiny by Parliament, the NAO and the wider public.

35. The Government will aim to provide guidance on how the spending power will be used. The Government will also set out in the guidance how Ministers will inform the committee when financial assistance is provided (see paragraph 24 above).

Acquisition Power

36. **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 66).**

37. **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 67)**

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

39. **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 105)**

40. **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 109).**

41. **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. (DPRRC's comment p.45).

42. Following consultation on the draft bill with stakeholders, consideration of the recommendations made by the Committee and further analysis of the National Security & Investment Act regime, the Government has made the decision to remove the acquisition power before the bill is introduced. This will eliminate Clauses 15-29 and Schedule 1 in the current draft of the Bill. We will rely on the powers currently set out NSI Act to ensure that the policy intent of ensuring that we have scrutiny over specific acquisitions of control of qualifying entities and assets in the Downstream Sector.

43. The National Security & Investment Act provides powers for the Secretary of State to scrutinise and, where necessary, impose proportionate remedies on specific acquisitions of control of qualifying entities and assets. It also sets out a statutory process for the exercise of these powers. The Secretary of State may scrutinise specific acquisitions of control of qualifying entities and assets by issuing "call-in notices". Pre-notification to the Secretary of State is required for certain acquisitions, via a mandatory notice.

44. There are certain areas within the sector that are sufficiently sensitive that they should be included in the mandatory notification requirement. The regulations [SI 2021 No. 1264[1]] cover major **downstream oil companies** as well as other critical parts of the energy sector. Following receipt and acceptance of a complete mandatory or voluntary notice, the Secretary of State must decide whether to issue a call-in notice within 30 working days. If the Secretary of State issues a call-in notice, this will trigger a national security assessment. The Secretary of State will use this process to determine whether to clear the trigger event either outright or subject to remedies, or (where this is necessary and proportionate) block or unwind it.

45. The Secretary of State may intervene where they reasonably suspect that a trigger event has taken place or is in progress or contemplation, and this has given rise to, or may give rise to, a national security risk.

46. We understand that it is an established position that national security includes energy security and that there is no requirement for a national security assessment under the NS&I Act to show malicious intent. We conclude that the legal vires under the NS&I Act are likely broad enough to cover the great majority of the policy intent of the DSO Restriction on Acquisition provisions without any amendment.

Enforcements

47. **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 76)**

[1] https://www.legislation.gov.uk/uksi/2021/1264/made

48. **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 89)**

49. **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 77)**

50. As stated in the Government response issued on 11 October 2021, 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.

51. BEIS has considered the fact that the powers proposed to direct companies working in the downstream oil sector are similar to those used in the UK's Compulsory Oil Stocking (CSO) regime. The CSO policy has been in operation for over forty years and there has not been a court-led enforcement action to date. The administration and enforcement provisions allow for official led informal action to resolve issues before a legislative route is pursued.

52. The sector as a whole is inclined towards compliance. The Government thinks it important that regulatory obligations apply equally across all companies and that sanctions exist to prevent one company obtaining a commercial advantage through non-compliance. Sector companies have responded well to these proposals to date.

53. Directions under clause 3 do not aim to deprive persons in the downstream oil sector of their property, but Government wants to reduce the risk of interruption to fuel supply to end users, such as the disruption to fuel distribution in October 2021. By allowing the Secretary of State to regulate large players' activities, this would provide a level of assurance for the downstream oil sector's resilience.

54. The Government's objective is to ensure the resilience of the downstream oil sector, and these measures are aimed to be proportionate and strike a fair balance between the general interest of the community and the protection of the individual's fundamental rights. The recent challenges with fuel distribution highlighted that the Government has no power to intervene in the sector unless a national emergency has been declared. The powers are drafted in such a way to ensure the Government will be able to support the downstream oil industry in maintaining the security of fuel supply to consumers. Following the 2021 disruption to fuel distribution, BEIS is committing to learning the lessons from this incident. The amended Downstream Oil Resilience measures will build on these lessons and implement any key findings. Government will aim to provide more information on this in due course.

55. In relation to clause 33, the majority of the Bill's provisions refer to "persons", so can, on their face, apply to individuals, corporate entities (e.g. limited companies) or unincorporated associations. However, the thresholds and other definitions in the draft Bill are intended to ensure that the powers are primarily directed at corporations, and therefore in most instances any criminal offence will only be committed by a corporate body rather than any individual. Under clause 33, where a corporate body commits an offence, anyone who is a director, manager, secretary or other similar office of that body corporate may also incur criminal liability. However, this will only be the case where the offence was committed with the consent or connivance of that individual or is attributable to their neglect. This offers an additional measure to ensure compliance by corporate entities, by allowing criminal sanctions to be imposed on key individuals responsible for directing the entity's actions.
56. Ahead of introduction, the government will consider whether any clarification of drafting of this measure in the bill and will provide guidance to outline how this will work in practise.

Criminal sanctions

57. **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 85)**

58. The creation of criminal offences will serve as a deterrent measure and provide credibility to the DSOR measures. Having regarded that non-compliance is more costly than compliance and that enforcement should deliver strong deterrence against future non-compliance, it is considered appropriate to have a criminal offences which relates directly to the enforcement of a particular resilience provision to encourage consistency of compliance in the context of resilience; to deter the provision of false information, which could lead to unjustified financial burdens; these burdens could lead to substantial economic impacts.

59. As BEIS officials set out in the evidence hearing session on the 13 July 2021, the power in the Bill will be used as a backstop, because due to the likely infrequency of use of many of the powers in the Bill (e.g. directions under clause 3), the tendency towards compliance, and the intention to use sanctions proportionately and appropriately, Government anticipates that the expected volume of cases will be negligible. Government will take a proportionate and reasonable approach to the use of sanctions. The Secretary of State will take account the severity and particular circumstances of any instance of non-compliance when deciding on the most appropriate sanction to pursue.

60. Government will set out in the guidance reasonable criteria, which will set out how criminal sanctions will be exercised taking into account a number of things such as size of the company, the offence etc to ensure that any penalties imposed using these powers are proportionate in the circumstances.

61. 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.

62. Government will also consider how it can amend the text in the bill to make the above clearer.

Resilience directions and resilience regulations

63. **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 94)**

64. **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 95)**

65. **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. (DPRRC's comment p.40)**

66. As stated in the government response on the 11 October 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, identified persons, while the latter are intended to apply to a class of persons. These measures are primarily intended to catch corporate entities, rather than individuals.

67. The Government's reading of the Committee's report is that the language at issue is that the Direction under cl.3 can be "general" or "specific" (cl.4(1)) and that a "general" direction is akin to the sort of power that might be made by regulation. The intention of this wording is that a "specific" direction might be to do something very specific to a site e.g. to move a specific security fence by a specified date, whereas a general direction might be a more general requirement e.g. to "improve and maintain site security" (to a defined standard). We consider that a general direction of this sort might be justified where the owners of that site have consistently failed to meet standards which are common across the industry or

where there is a particular vulnerability to the wider fuel supply system attached to that site.

68. Government recognises the Committee's concern and will consider whether it is possible to differentiate more clearly between the powers in clauses 3 and 8.

Information Power

69. **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 98-99).**

70. Any information obtained by notice under clause 9 in the Information power 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.

71. 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.

72. The Government also considers that a portion of the information obtained by notice under clause 9 is likely to be commercially sensitive and/or subject to legal obligations of confidentiality. Information subject to such constraints will be handled in an appropriate manner, and the Government will not use or disclose the information in a way that would breach any legal obligation of confidence.

73. 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.

74. As set out above paragraph 11, the government will consider how it can amend the definition of resilience in the bill to make the above clearer.

Penalties

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

76. Government does not expect a scenario where there is continuing offences because the government recognises the sector as a whole is inclined towards compliance. However, ahead of introduction, government will consider how to address continuing offences, in the rare occasion it might occur.

77. **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 114)

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 115)**

78. Government does not accept the notion that the £10 million maximum penalty is excessive or in some cases insufficient. The upper limit for a variable monetary penalty in clause 34(4) was set by reference to a number of factors including the potential economic impact of disruption to downstream oil supply, and the scale of entities operating in the sector.

79. This provision sets the maximum level, the actual monetary penalty will vary from case to case and will be proportionate in all the circumstances. For example, the level of any penalty may depend on factors including the nature and gravity of the offence to which it relates, as well as the financial capacity of the person subject to the penalty. The Secretary of State will publish guidance on how this function and the other civil sanctions will be exercised in due course (as required by clause 39(1)) and must have regard to that guidance in exercising those functions (see clause 39(4)).

80. **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. (DPRRC's comment p.43).**

81. Government accepts that the power in clause 10(2)(c) should not be exercised in a way that would lead to affirmative procedure regulations under clause 41. Government will consider changes to the draft by placing limits on what can be done under 10(2)(c) to prevent overlap with (2)(a) and (b).