Delegated Powers Memorandum – Energy Bill

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Summary

Introduction

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Energy Bill ("the Bill"). The Bill was introduced in the House of Lords on 6 July 2022. This memorandum identifies the provisions of the Bill that confer delegated powers. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected. Provisions are described below in the order in which they appear in the Bill.

2. To support its policy objectives, the legislation includes a significant number of delegated powers which is considered proportionate to the size of the Bill (243 clauses). In addition to delegated powers, this memorandum also refers to other powers in the Bill which do not confer powers to make delegated legislation, but which involve parliamentary scrutiny or relate to administrative functions that may be of interest to the Committee and Parliament. A summary incorporating both types of powers can be found at Annex A.

Purpose and Effect of the Bill

3. The Energy Act 2013, which reformed the electricity market of Great Britain, was the last major piece of primary energy legislation. Over the last year, demand for energy has risen significantly as global economies emerge from COVID-19. As a result, the wholesale price of gas has reached historic heights and has been exacerbated by Russia's invasion of Ukraine.

4. In response, the Government published the British Energy Security Strategy (BESS) in April this year, as a pathway to secure, clean and affordable British energy for the long term. It marks a decisive shift away from the use of expensive fossil fuels and the orderly transition to a clean energy future, including reducing our dependence on volatile oil and gas prices.

5. This Energy Security Bill will deliver the commitments made in the BESS and the Prime Minister's Ten Point Plan to secure our energy needs and build a more affordable energy system that is fit for the future.

6. The Bill will support the Government's objectives in the following ways:

    a. <u>Leveraging investment in clean technologies:</u> The Bill makes provisions aimed at accelerating the growth of low carbon technologies in the UK, helping us to reduce emissions and secure UK energy needs. It aims to facilitate state-of-the-art business models for carbon dioxide (CO_2) transport and storage, carbon capture and low carbon hydrogen production. This will enable the Government to provide investors with the certainty of long-term revenue to kick start and scale up these technologies, create new industries and transform our former industrial heartlands.

    The Bill will enable the delivery of a large village hydrogen heating trial by 2025, providing crucial evidence to inform strategic decisions in 2026 on the role of hydrogen in heat decarbonisation.

The Bill will establish a market-based mechanism for the low-carbon heat industry to step up investment and lower the cost of electric heat pumps, through scale and innovation.

Through this Bill, the UK will be the first country to legislate for fusion regulation, providing clarity on the regulatory regime for fusion energy facilities and removing uncertainty for the fusion industry.

b. Reforming the UK's energy system and protecting consumers: The Bill will establish an Independent System Operator (ISOP), an independent body with responsibilities in both the electricity and gas systems, ensuring efficient energy planning, enhancing energy security, minimising cost to consumers and promoting innovation.

Transitioning to a smart and flexible energy system is essential to improving energy security, reducing consumer bills, and meeting our targets for Net Zero. We are introducing smart-related measures to ensure the electrification of heat and transport can be delivered securely and at the lowest cost to consumers. And we are continuing to drive industry progress on the smart meter rollout which is set to deliver a £6 billion net benefit to society.

We are also overhauling the way that the technical and commercial rules of the energy system are governed, to enable innovation and ensure that they can meet the pace of change required to deliver Net Zero.

The energy price cap is the best safety net for 22 million households, preventing suppliers from overcharging consumers. The Bill will enable the extension of the price cap beyond 2023.

This Bill will enable competition in onshore electricity networks, delivering up to £1billion savings for consumers by 2050 from projects over the next ten years.

The Bill will also bring forward powers for heat networks. By appointing Ofgem as the new regulator for heat networks, we will ensure consumers get a fair price and a reliable supply of heat. And by enabling heat network zoning in England, this will overcome barriers to deployment that the heat network market currently faces and ensure this sector can contribute to delivering net zero in the most cost-effective way.

c. Maintaining the safety, security, and resilience of the UK's energy system: The British Energy Security Strategy is clear that nuclear remains an important part of the UK's energy mix. Through this Bill we will support and help nuclear deliver its important role and remove potential barriers to future investment by enhancing our nuclear third-party liability regime.

The Bill will also facilitate the safe, and cost-effective clean-up of the UK's legacy nuclear sites, ensuring the UK is a responsible nuclear state by legislating on the licensing of geological disposal facility.

We will reduce the risk of fuel supply disruption by giving Government the power to give directions to require information from and provide financial assistance to core fuel sector businesses to ensure resilience and continuity of fuel supply.

This Bill will introduce legislation to enable the Civil Nuclear Constabulary to utilise their expertise in deterrence and armed response to support the security of other

critical infrastructure sites or provide other policing services in the interests of national security.

Summary of delegated powers

7. The legislative landscape covering electricity, gas and nuclear power in the UK is highly complex and technical in nature, which inevitably means it is appropriate that a certain amount of technical detail should be left to secondary legislation. It is the Department's view that the delegated powers in this Bill should be seen in that context. The delegated powers in the Bill can be grouped under the five broad categories in (a) to (e) below.

   a. Powers providing financial support to, setting targets for, or in other ways helping establish new industries and technologies: The following measures fall under this category:

      i. Hydrogen, carbon capture and transport and storage revenue support: Powers are required which enable the Secretary of State to designate and direct a counterparty to the CO_2 transport and storage, hydrogen production, and carbon capture revenue support contracts. Powers are also needed to establish and manage a more competitive allocation process via regulations to allocate support to low carbon hydrogen producers and carbon capture entities. The Secretary of State will also be granted powers to establish a hydrogen levy in regulations. This levy will enable the funding of the hydrogen production revenue support contracts (and other relevant costs).

      ii. Hydrogen grid conversion trials: The Secretary of State requires a power which includes ensuring gas transporters take specified steps and that consumers are informed about the trial. A further power to make regulations is required to ensure consumers are appropriately protected. These powers are narrow in scope as they apply to hydrogen grid conversions only. The two regulation making powers will be subject to the negative procedure.

      iii. Low-carbon heat schemes: A power to allow the Secretary of State to make regulations to establish a low-carbon heat scheme, introducing market-wide targets, and associated scheme administration and enforcement processes. This will provide a policy framework for industry investment in expanding the consumer market and supply chains for strategically important low-carbon heating technologies. This power is subject to the negative procedure, as well as the affirmative resolution for specific categories of regulations.

   b. Powers supporting the establishment of a new ISOP: Several powers are required to ensure the new body functions effectively. Provision is required to extend the Secretary of State's existing power to write a Strategy and Policy Statement to include the ISOP, and for the ISOP to have regard to it. This is subject to a procedure similar to the affirmative resolution as set out in section 135(8) of the Energy Act 2013.

      Powers are also required for a transfer scheme to facilitate the transfer of property, rights, and liabilities to enable the creation of the ISOP and to adjust the tax implication of the government funded transfer. These matters are more suitable for secondary legislation given that they are technical in nature and may need to be updated over time and will be subject to the negative procedure.

Powers are also required to facilitate the moving of pension schemes to the new ISOP and to amend specific existing pension schemes as considered appropriate. The pensions and employment arrangements regarding the creation of the ISOP can only be properly determined as part of the overall structuring of the transfer scheme and cannot be determined in advance and are therefore more suitable to secondary legislation. The parliamentary procedure for these powers is the negative resolution.

c. Powers that support the creation of new licensing activities: The following measures fall under this category:

   i. Licensing of load control: The Secretary of State requires the power to make one or more activities relating to load control a licensable activity, as well as the power to amend existing licence conditions and industry codes to ensure that the new scheme can be implemented alongside the existing regulatory framework. The first is a Henry VIII power subject to the affirmative procedure, and the second contains a Henry VIII power to allow the Secretary of State to amend the timeframe of the power to amend existing licence conditions and codes. A further power is required to allow for the potential of competitive tendering for licences for new licensable activities associated with load control, this will be subject to the negative procedure.

   ii. Multi-purpose interconnectors (MPIs): Operating an MPI is being introduced as a new licensable activity (alongside enabling Ofgem to issue MPI licenses under the existing framework) and the Secretary of State requires a power to set the standard conditions for MPI licences. This is highly technical in nature and should be exercised by licence document, in line with arrangements in the electricity sector. A second power is required to enable the Secretary of State, following consultation, to grant existing interconnector or offshore transmission licence holders an MPI licence, in order to ensure a smooth transition into the new regime. A final power is required for the Secretary of State to make consequential amendments to other legislation in respect of MPIs as this is an emerging sector. This is a Henry VIII power which will be subject to the affirmative procedure.

d. Powers which enable amendment or modification of existing legislation or documents: The following measures fall under this category:

   i. Mergers of energy network enterprises: The Bill amends the Enterprise Act 2002 to require the Competition and Markets Authority in certain circumstances to assess whether a merger between energy network enterprises substantially prejudices the Gas and Electricity Markets Authority's (GEMA) ability to carry out its functions when it compares data from these enterprises to set price controls (known as comparative regulation). This builds on the existing framework for the UK's general merger regime, which assesses whether a merger results in a substantial lessening of competition.

   A power is required, to add to, amend or exclude the types of enterprise to which the regime applies. This is a Henry VIII power subject to the negative procedure, as this is a technical matter allowing the Energy Network Special Merger regime to stay up to date with changes in the way GEMA regulates. Use of this power is something which impacted businesses could reasonably foresee and would be a logical consequence of a decision by GEMA to expand or otherwise change the types of energy network enterprise subject to comparative regulation and a price control process. The Bill also modifies eight existing powers within the UK's general merger regime in the EA 2002, for application in relation to energy network

mergers. These existing powers allow for smooth functioning of the current merger regime and are mostly Henry VIII powers.

ii. Competitive tenders for electricity projects: The legislative measure which enables competition in onshore electricity networks, takes eight delegated powers. These are technical powers, all required to introduce the new regime into Great Britain's onshore electricity networks (there is an existing regime in place for offshore transmission) and will help enable smooth delivery of competitions in respect of electricity projects. Three of these powers will be exercised by Statutory Instruments (SIs); one will allow the Secretary of State to appoint a body to run tenders (negative procedure), the second will allow the Secretary of State to set criteria stipulating the electricity network project eligible for competition (negative procedure), and the third will allow the Authority (Ofgem) to set rules and methodology for tenders to be run (no parliamentary procedure). These powers, in particular the Authority's power, are technical and allow for effective delivery of competitions.

The remaining five powers extend powers which exist under the current regulatory framework to allow for the Authority to make consequential amendments to licences and codes to enable winning bidders to deliver electricity projects, and to create property schemes where necessary for such delivery. These existing powers have no associated parliamentary procedure broadly due to their technical and routine nature and the fact that the Authority is accountable to Parliament so any additional procedure would be disproportionate.

iii. Energy company obligation (ECO): Several delegated powers are required to enable provision to be made for an ECO buy-out mechanism, including which obligated gas and electricity licence-holders can use the mechanism, how the buy-out price will be set, to whom a buy-out payment may be made and for what purpose. The existing ECO schemes are made under delegated powers and it is a logical and consistent approach for further delegated powers to be used to establish buy-out. All of these new powers are subject to the affirmative procedure.

iv. Domestic gas and electricity tariff cap: A power is required to ensure the Secretary of State has the ability to extend the domestic gas and electricity tariff cap for one or two years at a time, subject to a review of whether the conditions for effective competition in the market have been met in the market. This is a Henry VIII power which has the affirmative procedure attached.

v. Smart meters: An existing power for the Secretary of State to modify licence conditions and codes is required to be extended for a further period. This power remains subject to the equivalent of the draft negative procedure. Another existing power, exercised by order, to allow the Secretary of State to provide for activities connected with smart meters to be licensable activities is also required to be extended for a further period. This second power is a Henry VIII power and remains subject to the affirmative procedure. Both of these powers support the rollout and operation of smart meters thereafter.

vi. Licensing of CO_2 transport and storage: The Bill creates a new Special Administration Regime (SAR) for licensed CO_2 transport and storage companies including by application of provisions in the Energy Act 2004 with appropriate modifications. In particular it extends the ability of the Secretary of State to make company insolvency rules conferred by section 411 of the Insolvency Act 1986 for

the purposes of giving effect to Special Administration Orders. There are also two regulation making Henry VIII powers to enable modifications to be made to the Enterprise Act 2002 and to relevant insolvency legislation. One power is subject to the affirmative procedure, and it is deemed appropriate that the second has the negative procedure attached. This is due to the limited scope and circumstances in which the power can be exercised, and the precedent taken from existing energy SARs.

vii. Civil nuclear sites: A delegated power is required to allow the Secretary of State to make regulations setting out which documents must be supplied to allow disposal facilities for low level radioactive waste of nuclear origin to exit the requirement for nuclear third-party liability via the Low Level Waste Exclusion. The documents required to demonstrate compliance are already required to be produced under other secondary legislation, and it is deemed more appropriate to insert a reference to delegated legislation in secondary legislation. The proposed regulations will be subject to the negative procedure.

e. Powers that support the development of new regulatory regimes: The following measures fall under this category:

i. Governance of gas and electricity industry codes: The Bill establishes a new governance framework for the energy codes. It does this by granting the Authority (GEMA) a collection of new code-related functions, which will allow it to drive strategic change across the energy codes, and by creating code management as a new licensable activity. To ensure that this new framework is able to operate effectively, the Secretary of State requires powers to make regulations for the following purposes: to further define the required content of the Authority's new strategic direction document; to transfer the duty to set a strategic direction to the ISOP (this is a Henry VIII power with the affirmative procedure attached); to further define the context in which the Authority can make direct code modifications; to identify which codes, central IT systems and persons are within the scope of the new governance framework; to set conditions regarding when code manager should be selected on a competitive versus non-competitive basis; and to define how code managers may be selected on a non-competitive basis. In addition to these powers, the Authority also requires powers to draft regulations for the competitive selection of code managers and to address any pension-related issues that arise in connection with a transfer scheme. All of these powers are subject to the negative procedure unless otherwise stated.

ii. Energy efficiency of premises: The existing regime was made under section 2(2) of the European Communities Act 1972 and therefore a replacement power is now required specifically for the purposes of amending the existing EPB regime to ensure that it remains fit for purpose. The amount of technical detail will be such that it is appropriate for it to be set out in secondary legislation. This will be subject to the negative procedure.

iii. Energy smart appliances: The Bill provides powers to allow the Secretary of State to set regulations for energy smart appliances. This also enables the Secretary of State to prohibit the supply of appliances which are not compliant with the regulations, or which do not have energy smart functionality (electric heating appliances and electric vehicle charge points only). The powers to introduce energy smart regulations provide for an enforcement regime to be put in place, and to create offences and sanctions, as well as appeals processes. The powers also

enable the Secretary of State to amend the list of purposes applicable to the regulations, which constitutes a Henry VIII power. The first SI introducing energy smart regulations will be subject to the affirmative procedure and any other subsequent SIs will follow the negative resolution procedure, though with the following exceptions. Any SI creating a criminal offence, or any SI that amends the list of purposes applicable to the energy smart regulations will be subject to the affirmative procedure.

iv. Heat networks regulation: A regulation making power is required to allow the Secretary of State to amend the definition of a relevant heat network. This is a Henry VIII power subject to the negative procedure as this is a technical power which would enable future heat network technologies to be captured in regulation. It is also a narrow power given it would not amend regulatory requirements or the approach to regulation. A second power to change the body appointed as a regulator for heat networks is also a Henry VIII power with the affirmative procedure attached. A third power is required to make regulations for the purpose of regulating heat networks. This is a Henry VIII power in respect of specific cases where the affirmative procedure applies.

v. Heat networks zoning: A power to publish guidance on the heat network zoning methodology, compliance with the low carbon standard, and granting exclusive rights to connect. Powers to define the responsibilities of the zoning central authority and local zoning co-ordinator by regulation, define the types of buildings and heat sources required to connect and a power to define a list of statutory consultees. Powers conferred on the Secretary of State are largely subject to the affirmative procedure, whilst two powers are negative with the option to combine with affirmative regulations on functions of Central Authority or zoning coordinators.

vi. Core fuel sector resilience: Several powers are conferred on the Secretary of State and exercised by direction for the purpose of maintaining or improving core fuel sector resilience, and to restore continuity of supply of core fuels or counteract a disruption to or failure of continuity of core fuels or its potential adverse impact. In addition, there is a power to give directions to reduce the risk of disruption to, or a failure of, continuity of supply of core fuels or to reduce the potential adverse impact of the same. There is a corresponding power to make regulations for the same purposes which is subject to the affirmative procedure.

There are also powers to make regulations to require a person to provide information to the Secretary of State, at specified intervals, relating to the person's relevant activities or asset. These powers are all subject to the affirmative procedure. In addition, there is a requirement to publish guidance as to sanctions and enforcement of offences, which will be laid in draft and subject to a resolution of either House not to issue.

Finally, there is a Henry VIII power which allows regulations to amend or modify thresholds specified in certain provisions of this Part which is subject to the affirmative procedure.

vii. Licensing of CO_2 transport and storage: The Bill establishes a new licensing framework for CO_2 transport and storage which is a nascent industry. To establish the new regulatory framework, and for it to operate as is intended, the Secretary of State requires powers to be able to make regulations to:

a) Extend the licensable means of transportation of CO_2. This is a Henry VIII power which allows activities to become licensable activities only if they are or relate to activities of transporting CO_2 by means of transport other than by pipeline to a site for the purpose of geological storage of CO_2 (affirmative procedure).
b) Provide for persons and/or activities to be exempt from the requirement to hold a CO_2 transport and storage licence and to set and vary the persons or classes of person who are exempt (negative procedure).
c) Transfer the ability to grant licences to the economic regulator after an interim period (negative); provide for future processes for licence applications (negative); and to enable future licences to be granted on a competitive basis (affirmative).
d) Power to create licence types, to enable the future separate licensing of onshore and offshore CO_2 transport and/or storage networks. This is a Henry VIII power (affirmative).
e) Provide for the enforcement of licence conditions by the economic regulator, and procedural and other requirements relating to the conduct of licence enforcement, to be specified in regulations (affirmative).
f) A power to make regulations regarding access to infrastructure, including the ability to amend the Storage of Carbon Dioxide (Access to Infrastructure) Regulations 2011 and the Storage of Carbon Dioxide (Access to Infrastructure) Regulations (Northern Ireland) 2015, which were implemented using the powers in 2(2) European Communities Act 1972, and which it is appropriate to review the continued appropriateness of in light of the new economic licensing framework established by this Bill. (affirmative).

viii. Carbon Capture Usage and Storage (CCUS) decommissioning and re-use: Decommissioning costs for offshore carbon storage will be funded as part of the regulated model for CO_2 transport and storage. Secretary of State will have the power to determine how this funding will be managed to ensure it is available to be used for decommissioning activities. Secretary of State will also have the discretionary power to remove the decommissioning liability (“Change of Use Relief") from previous oil and gas asset owners where assets are transferred to CO_2 transport and storage networks. One power is required for the Secretary of State to establish the detailed requirements for the accrual of decommissioning funds. This power will have the negative procedure attached, except for any regulations that create civil penalties or offences, or delegate functions, which will be subject to the affirmative procedure. Another power is required for the Secretary of State to obtain information relating to Change of Use Relief, which will have the negative procedure attached.

ix. Offshore Oil and Gas - Habitats: reducing effects of offshore oil and gas etc. and Arrangements for Responding to Marine Oil Pollution: Powers are required to ensure existing regulations in these areas keep pace with emerging offshore energy sectors. These powers are subject to the negative procedure with the affirmative procedure attached for the creation of a criminal offence, increasing the maximum penalty for a criminal offence or the creation of civil sanctions. The affirmative procedure will be required where the powers are used for making regulations to confer functions on a person other than the Secretary of State.

x. Offshore oil and gas decommissioning charging schemes: An existing delegated power to charge fees will be replaced with a different delegated power to make a charging scheme. It is accepted practice to use delegated powers to charge for

services of Government departments. The services to be charged for (i.e. those connected with the exercise of functions under Part 4 PA 1998 and section 30 Energy Act 2008) are clear on the face of the primary legislation.

Framework Clauses

8. In addition to the analysis above, which breaks the powers down into categories, the Department would also like to draw the Committee's attention to the fact that some clauses in the Bill provide a framework for future developments to be set out through secondary legislation and may therefore be regarded as 'framework clauses'. The policy areas covered by these clauses fall into the following two categories:

    a. Nascent industries, new areas of regulation or new operational bodies:

        This is where the Department is seeking both to stimulate the development of an industry through either direct financial stimulus, statutory targets, or by the setting up new bodies or new roles for regulators, whilst also providing the basis for future regulation to ensure the safe and fair operation of these new industries, sectors, or bodies.

        Future developments in these areas are difficult to predict at this stage of development and some of which are still subject to consultation. These areas require provisions being made for a broad regulatory framework with appropriate and robust Parliamentary controls in place. These frameworks will ensure the Department has the correct regulatory tools at its disposal to ensure that these aspects of the UK's energy system can adapt and flourish into the future to support the UK's net zero legal commitments, whilst providing sufficient Parliamentary oversight.

        The following areas may be considered framework clauses under this category:

        i. CO_2 Capture, Storage etc Hydrogen Production (Part 2)
        ii. Low-Carbon Heat Schemes (Part 3, Chapter 1)
        iii. Heat Networks Regulation (Part 7)

    b. Former EU schemes:

        Several powers are being taken to replace powers lost by the repeal of section 2(2) of the European Communities Act 1972. Having carefully considered the areas below, the Department has determined that a secondary legislation framework with a specific set of powers is a more suitable way of regulating these subject areas.

        In two areas, powers are being taken in the context of an ambitious Government policy to reduce greenhouse gas emissions over the coming decades, including industrial premises and domestic buildings. In these areas, the Department's view is that the detailed provisions needed in each of these areas to regulate the energy transition and reduce greenhouse gas emissions are more suited to secondary legislation which can build on and improve the current regulatory frameworks rather than being set in primary legislation.

        In terms of offshore oil and gas habitats assessment, powers are being taken to ensure that there is an appropriate habitats consenting regime in place prior to the authorisation or licensing of various offshore energy activities relating to oil and

gas. This ensures the existing EU derived regime can be updated to accommodate new activities such as offshore hydrogen production and storage.

The following subjects in the Bill are based on legislation or take powers to amend legislation which was originally made under section 2(2) of the European Communities Act 1972 and may be regarded as framework clauses:

i. Energy Smart Appliances (Part 8, Chapter 2)
ii. Energy Performance of Premises (Part 9)
iii. Oil and gas environmental protection (clauses 225-226)

Abbreviations

9. This Memorandum contains the following abbreviations:

CCUS	Carbon Capture Usage and Storage
CFD	Contracts for Difference
CMA	Competition and Markets Authority
CO_2	Carbon Dioxide
DSR	Demand Side Response
EA 1989	Electricity Act 1989
EA 2002	Enterprise Act 2002
ESAs	Energy Smart Appliances
GB	Great Britain
GDNs	Gas Distributor Network operators
GA 1986	Gas Act 1986
GEMA	Gas and Electricity Markets Authority (also in other energy legislation referred to as “the Authority”)
ISOP	Independent System Operator Planner
MPI	Multi-purpose interconnector
PA 1998	Petroleum Act 1998
SI	Statutory Instruments
SPS	Strategic Policy Statement

Part 1 Licensing of Carbon Dioxide Transport and Storage

Clause 2(3) Licensable means of transportation

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative (Henry VIII power in respect of consequential amendments)

Context and Purpose

10. The Bill establishes an economically regulated licensing framework for CO_2 transport and storage. In this regulatory model, operators of CO_2 transport and storage networks will be required to hold a licence in order to operate and charge for use of transport and storage networks. The licence grants a CO_2 transport and storage company the right to charge users in exchange for delivering and operating the transport and storage network. As CO_2 pipeline transport and storage networks have monopolistic characteristics, which are typically subject to economic regulation, charges will be overseen by GEMA as the economic regulator. This regulatory model is based on a range of precedents, including economically regulated utilities.

11. Licensable activities will initially include the transportation of CO_2 via onshore pipelines and offshore pipelines, and the operation of an associated geological storage facility, as these assets have monopolistic characteristics. This power provides for other means of transportation of CO_2 to become licensable by regulations made by the Secretary of State, should that be considered appropriate as the CO_2 transport and storage market evolves.

12. The Department expects non-pipeline methods of transportation (shipping, road, rail) to form part of the wider CO_2 transport and storage networks. Non-pipeline methods of transport will be particularly important for 'dispersed sites' where there are emitters who wish to have their CO_2 captured and transported for permanent storage but who are not suitably co-located to join a transport and storage network by pipeline. The ability for transport and storage networks to be able to accept CO_2 from dispersed sites, and also international sources, via non-pipeline transportation are seen as vital for the UK's long-term objectives for decarbonisation across the economy in line with our statutory emissions reduction targets. However, these methods of transportation have different characteristics to pipeline transportation, and the potentially lower costs of entry and ability for multiple assets running in parallel suggests that competitive regional markets may emerge for non-pipeline transport of CO_2 to storage.

13. The Department considers there is currently insufficient evidence to justify economically regulating non-pipeline methods of CO_2 transport. However, if competitive markets do not emerge as anticipated, this may be a rationale for future regulatory intervention.

Justification for the power

14. A delegated power is required to allow for the CO_2 transport and storage regulatory system to adapt to developments in what are currently nascent carbon capture, usage and storage (CCUS) markets.

15. The effect is to give the Secretary of State a regulation-making power to extend the licensable means of transportation of CO_2. This power only allows activities to become licensable activities if they are, or relate to, activities of transporting CO_2 by means of transport other than by pipeline to a site for geological storage with the purpose of permanent containment of CO_2.

16. This power also enables consequential, transitional, incidental, and supplementary amendments to be made to legislation (including primary legislation) to reflect any change in licensing and storage activities. This is necessary to ensure that the role of the economic regulator fits cohesively with the role of any existing regulators that regulate the other methods of transportation such as road, rail, or shipping.

17. This power will provide for Secretary of State to review the appropriateness of regulating non-pipeline forms of transportation, considering the experience of early operation of the regulatory regime, and provide the ability to respond swiftly and appropriately to any concerns about anti-competitive behaviours in the sector which may arise. This is particularly important given the financial support provided by the Exchequer to support carbon capture facilities, and to ensure appropriate and effective protections can be put in place for users of the network.

Justification for the procedure

18. This power enables Secretary of State to extend the scope of the activities requiring a licence to encompass means of CO_2 transportation other than by pipeline. The Department considers that the affirmative procedure provides an appropriate level of Parliamentary scrutiny for such a power because: firstly, its use could have an impact on the economic activities of transport operators and, secondly, because it may need to make changes either to provisions in this Bill or to other primary legislation in consequence of the excise of the power.

19. This power is not expected to be utilised unless market conditions require it. Any future use of the power would be subject to statutory consultation as set out in clause 3, including consultation with the economic regulator to confirm the rationale for market intervention.

Clause 5 Exemption from prohibition

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative

Context and Purpose

20. To ensure that the prohibition applied to operating a CO_2 transport and storage network without a licence doesn't impact activities which it is not considered necessary or appropriate to economically regulate, a power is needed to enable exemptions from the requirement to hold a licence for where this may be appropriate. For example, there may be small-scale or other CO_2 transport and storage operations for which economic regulation is not justifiable. This might apply, for example, to certain CO_2 transport and storage research and development activities.

21. This power enables the Secretary of State, by regulations, to establish activities, or categories of activity, which are exempt from the requirement to hold a licence. Exemptions may be granted either to a class of persons or to an individual person.

Justification for the power

22. Whilst the definitions of CO_2 transport and storage activities that are intended to be captured by the prohibition on operating a transport and storage network without a licence, at clause 2(2), are appropriately narrow in scope, this power is necessary to ensure the prohibition is proportionately applied and does not capture activities for which the requirement to hold a licence to operate would be unnecessarily onerous.

23. It would not be appropriate to specify exemptions categories on the face of the Bill as it is important that the exemptions categories can be easily updated in the future as CO_2 transport and storage networks, and related activities, continue to grow and develop. This clause also provides for a process of consultation on proposals for exemptions.

24. Similar powers are established in section 6A of the Gas Act (GA)1986 and section 5 of the Electricity Act (EA) 1989 for exemptions from the requirement to hold the relevant licences.

25. To protect the interests of network users and consumers, and to allow the economic regulator to perform its duties, the Secretary of State may attach conditions to any exemption, and may revoke or withdraw the exemption if, for example, such a condition is breached, as set out in clause 6.

Justification for the procedure

26. The negative procedure is appropriate as exemption classes are likely to be technical in nature, for example, potentially in relation to pipeline sizing. It is appropriate for the decision on exemptions to rest with Secretary of State as opposed to the economic regulator, as the exemptions remove the specified activities outside of the scope of economic regulation and the remit of the regulator's decision-making.

27. This approach is consistent with the procedure for exemptions from the licensing requirements established in the relevant clauses of the GA 1986 (section 6A) and EA 1989 (section 5).

Clause 6 Revocation or withdrawal of exemption

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative

Context and Purpose

28. It will be important to review and keep up to date the persons and activities which are specified as exempt from the requirement to hold a licence to operate a CO_2 transport and storage licence under clause 5; and the Secretary of State will need to be able to update categories and classes of exemptions as circumstances change and markets develop.

This power enables the Secretary of State to revoke or withdraw exemptions which may have been granted, where it would be appropriate to do so.

Justification for the power

29. Activities which may be granted exemptions from the requirement to hold a licence will need to be kept under review and able to be updated as market circumstances change. This power is necessary to ensure that exemptions from the requirement to hold a licence continue to be appropriately applied. For example, as the CCUS market and infrastructure develops, it is conceivable that certain activities, or categories or classes of activity which are appropriately exempt from economic regulation in the early years of CCUS deployment, may as the sector matures, be considered more appropriate for licensing and regulation, or the particular activity that was subject to the exemption itself develops and changes.

30. This power enables Secretary of State to revoke, vary or withdraw exemptions which have been granted to an individual person or class of persons, in the following defined circumstances:
    a. At a person's request
    b. In accordance with any provisions of the regulations by which the exemption was granted
    c. If it appears to the Secretary of State inappropriate that the exemption should continue to have effect.

Justification for the procedure

31. The negative procedure is appropriate as exemption classes are likely to be technical in nature, for example, potentially in relation to pipeline sizing. It is appropriate for the decision on exemptions to rest with Secretary of State, as opposed to the economic regulator, as the factors relevant to a decision to revoke, vary or withdraw certain classes of exemptions may extend beyond the scope of economic regulation and the remit of the regulator's decision-making.

32. Before making regulations to withdraw, vary or revoke exemptions, the Secretary of State must give notice of the proposal to do so, and of a period within which representations can be made.

33. This approach is consistent with the procedure for withdrawing and revoking exemptions from the licensing requirements established in s6A GA 1986 and s5 EA 1989

Clause 7 Power to grant licences

Power conferred on: Economic regulator and Secretary of State

Power exercised by: Written notice

Parliamentary Procedure: None

Context and Purpose

34. A power is needed to grant licences to CO_2 transport and storage network companies, where a licence then allows those companies to operate a transport and storage network and charge fees for use of the network.

35. The process for selecting the first licensed CO_2 transport and storage networks is being conducted by the Secretary of State in a fair and transparent way, as part of a UK-wide process to establish CCUS 'clusters', where a cluster comprises a CO_2 transport and storage network and industrial and power generators of CO_2 emissions who will connect to and use the network to transport and permanently store their CO_2 emissions. This process has been designed to ensure CO_2 transport and storage networks will have sufficient users connected to the network to ensure they are an investable proposition.

36. For the first-of-a-kind transport and storage networks, the Secretary of State will determine which network operators should be awarded a licence, and the terms and conditions of such licences. This is appropriate to reflect the Exchequer support which will be available to those operators and enables the Secretary of State to conduct a thorough assessment of suitability and value for money in these determinations.

37. In future, in an enduring regulatory regime, and in line with regulatory licensing practice in other sectors, the Department anticipates that responsibility for grant of licences will transfer to the economic regulator.

38. This power provides for the granting of licences to CO_2 transport and storage companies, with power vested in the Secretary of State for an interim period, and in the economic regulator in the enduring regulatory regime.

39. The enduring power is granted to the economic regulator in clause 7 whilst clause 16 and Schedule 1 of the Bill set out that, for an interim period, this power will be held by the Secretary of State. Schedule 1 provides for the Secretary of State to prescribe, by regulations, the date on which the power to grant licences transfers to the economic regulator.

Justification for the power

40. This power is necessary to provide for the economic regulator, and the Secretary of State in the interim regime, to grant licences. It is through these licences and the associated powers of enforcement that this Bill confers on the economic regulator, that the fees charged to users of the transport and storage network will be overseen and independently regulated, in order to prevent monopolistic behaviours.

Justification for the procedure

41. This granting of a licence will be a power exercised by written notice. Before granting a licence, the economic regulator or Secretary of State will give written notice of intent to grant a licence; stating the reasons why they propose to grant the licence and specifying the time (which must not be less than 28 days from the date of publication of the notice) within which, representations or objections with respect to the proposed licence may be made. The grantor, whether the economic regulator or Secretary of State, must consider any representations or objections which are duly made and not withdrawn.

42. A written notice must be published in such manner as the grantor considers appropriate for bringing it to the attention of persons likely to be affected by the grant of the licence. There is precedent for this in the Nuclear Energy (Financing) Act 2022 which sets out a similar procedure for designation by notice.

43. The Department considers that designation of licences by written notice is an appropriate procedure. Parliament will have approved the overall licensing framework in this Bill, including the duties which the Secretary of State and the economic regulator will be bound by in carrying out their functions, and it would be a disproportionate use of Parliamentary time for Parliament to subsequently approve individual licence grant decisions.

44. In addition, as the industry becomes more established, powers at clause 9 of the Bill enable the making of regulations to govern the process for licence applications, which would be subject to Parliamentary scrutiny.

Clause 8 Power to create licence types

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative (Henry VIII power in respect of consequential amendments)

Context and Purpose

45. Initially it is intended that licences and associated government support will be offered to transport and storage network developers who intend to operate a full transport and storage network, comprising onshore pipelines, offshore pipelines and an associated offshore geological storage facility. However, it is conceivable that in the future it may become desirable to be able to separately licence constituent parts of a network, to allow operators to specialise in the provision and operation of certain elements of the CO_2 transport and storage infrastructure, an onshore pipeline network for instance, or offshore geological storage site.

46. As a hypothetical example, there may in future be the possibility of injecting CO_2 directly into an offshore store via a ship, and not via an offshore pipeline connection to the shore. Although we do not yet know if this is economically or technically feasible, the Department does not wish to inhibit the potential for such market developments. Such market developments may necessitate a licence but potentially with different conditions.

47. Given that both pipeline transport and storage sites currently have monopolistic characteristics, the requirement to obtain a licence should equally apply to any entity that intends to either store CO_2 and/or transport it by pipeline to a store.

Justification for the power

48. This power is intended to facilitate the future development of separate licensing such as to enable separate licences for onshore and offshore activities. The effect of this power is to enable Secretary of State, by regulations, to provide that different types of licence may be granted in respect of different types of transport and storage activity.

49. This power only allows the separation of licence types in relation to the specific activities defined in clause 2(2) which are: providing a service of transporting CO_2 by a licensable means of transport and operating a site for the disposal of CO_2 by way of geological storage.

50. This power also enables consequential, transitional, incidental, and supplementary amendments to be made to legislation (including primary legislation) to reflect any change in licensing and storage activities as well as to modify any standard conditions of licences. This may be necessary to ensure, for example, that other provisions in the Act are consistent with, and remain appropriate for, any new types of licence.

Justification for the procedure

51. Regulations made under this clause would be subject to the affirmative procedure. The Department considers that this procedure provides an appropriate level of Parliamentary scrutiny for such a power because: firstly, its use could have an impact on the economic activities of transport operators and, secondly, because it may need to make changes either to provisions in this Bill or to other primary legislation in consequence of the excise of the power.

Clause 9 Procedure for licence applications

Power conferred on: Secretary of State and the Economic Regulator

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative

Context and Purpose

52. The Secretary of State will determine which operators of the first-of-a-kind transport and storage networks should be awarded a licence and the terms and conditions of such licences. This is appropriate to reflect the Exchequer support which will be available to those operators. In future, in an enduring regulatory regime, and in line with regulatory licensing practice in other sectors, the Department anticipates that responsibility for grant of licences will transfer to the economic regulator under the provisions made elsewhere in this Bill.

53. The process for selecting the first licensed CO_2 transport and storage networks is being conducted by the Secretary of State in a fair and transparent way, as part of a UK-wide process to establish CCUS 'clusters', where a cluster comprises a CO_2 transport and storage network and industrial and power generators of CO_2 emissions who will connect to and use the network to transport and permanently store their CO_2 emissions. This process has been designed to ensure CO_2 transport and storage networks will have sufficient users connected to the network to ensure they are an investable proposition.

54. Following this initial 'cluster sequencing' process, a procedure for future licence applications is expected to be developed, taking into account learnings from the process.

Justification for the power

55. Exchequer support is available for the establishment of the first-of-a-kind CO_2 transport and storage networks, and a fair and transparent process is being undertaken to identify the first CO_2 transport and storage operators to receive such support and be granted a licence.

56. The 'cluster sequencing process' is specifically designed for first-of-a-kind projects but we consider it appropriate that a future licence application process should be determined considering evaluation of both the process itself and the evolution of the CCUS market. It would be premature to establish the most appropriate procedure for licence applications in the longer-term at this stage, during the development of the market. It will also be important for the procedure to be able to be reviewed and updated if requirements change in the future, for example if it becomes pertinent for the economic regulator to require additional or new information relating to a licence application.

57. The powers in 9(2) and 9(5) enable the Secretary of State to establish the procedure for licence applications, including conditions that future licence applicants may be required to meet to obtain a licence. The power in 9(1) is a more limited power, enabling the form and manner in which a licence application can be made to be established in regulations by either the Secretary of State, or the economic regulator acting under the appropriate authority pursuant to the Statutory Instruments Act 1946.

Justification for the procedure

58. The power is to be exercised via the negative procedure; this is considered appropriate as the regulations will specify procedural requirements for licence applications, such as the information to be provided in any application and the amount of any application fee. Any regulations that specify the matters which could be taken into account on licence application would be bounded by the general considerations in clause 1, which again have been subject to Parliamentary scrutiny.

Clause 10 Competitive tender for licences

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative

Context and Purpose

59. The Secretary of State will determine which operators of the first-of-a-kind projects should be awarded a licence under a fair and transparent selection process. The future process for granting licences will need to balance a range of considerations and it may be appropriate for this to be carried out in the future on a competitive basis.

Justification for the power

60. Exchequer support is available for the establishment of the first-of-a-kind CO_2 transport and storage networks, and a fair and transparent process is being undertaken to identify the first CO_2 transport and storage operators to receive such support and be granted a licence.

61. As this process is specifically designed for first-of-a-kind projects, it is appropriate that a future licence allocation process should be determined considering evaluation of this process and the evolution of the CCUS market.

62. This power is needed to allow for a future process for licence grants to be determined on a competitive basis. It would be premature to set in primary legislation now the detail of a future process, as it will be important to take into account both the learnings from the initial cluster sequencing process for CCUS deployment as well as wider developments in the CCUS markets, including the anticipated number of market participants.

Justification for the procedure

63. The power is to be exercised via the affirmative procedure. This power would establish a new process for licence allocation and Parliament should have sufficient opportunity to scrutinise and debate this future process for CCUS.

Clause 12 Standard conditions of licences

Power conferred on: Secretary of State

Power exercised by: Written notice

Parliamentary Procedure: None

Context and Purpose

64. The first licences will be designated by Secretary of State through a fair and transparent process to determine which projects are sufficiently advanced to award a licence. The initial licence conditions will be agreed as part of the settlement with the Secretary of State prior to designation.

65. There are likely to be a number of conditions which are considered appropriate to include as standard in all licences of the relevant type and this power enables Secretary of State to specify these. For example, it is likely to be appropriate to require all operators to avoid any undue preference or undue discrimination in the terms on which they undertake the conveyance of carbon, to ensure there is an open market which drives down costs by reducing anticompetitive behaviour. Establishing standard conditions may also give some certainty to the market as to the expectations on them when they apply for a licence and facilitate any allocation process.

Justification for the power

66. The Department considers it is appropriate that the Secretary of State should have the ability to designate standard conditions which shall be contained in any licence. This is in line with other regulated sectors, see for examples s8(2) Gas Act 1995 as originally made in relation to the standard conditions for gas licensing, s33 Utilities Act 2000 (for electricity generation, distribution and supply licences) and s137 Energy Act 2004 (for electricity transmission licences), s17H Water Industry Act 1991 and s21 Energy Act 2008.

67. As CCUS comprises a new market, and the Department has yet to apply learnings from the initial allocation of licences and application in practice, the Department considers it is appropriate to be able to determine conditions that are to be standard conditions in such

licences in the future once this process is complete. Once the Secretary of State has determined the conditions that are to be the standard conditions of a licence, the Secretary of State will be required to publish the standard conditions in an appropriate manner. In determining the conditions, the Secretary of State will be bound by public law requirement to take relevant considerations into account, as well as the principal objectives and general duties specified in clause 1 of the Bill.

Justification for the procedure

68. A fair and transparent process is being undertaken to identify the first CO_2 transport and storage operators to be designated and granted a licence. These are first-of-a-kind projects, and the licence conditions for the first CO_2 transport and storage operators will be the subject of extensive and direct commercial negotiations between the government and designated companies.

69. Publishing the standard conditions via written notice after the conclusion of this process follows the approach to publishing standard licence conditions in other regulated sectors, for example s33 and s81 of the Utilities Act 2000, and s17H of the Water Industry Act 1991.

Clause 13 Modification of conditions of licences

Power conferred on: The Economic Regulator

Power exercised by: Written notice

Parliamentary Procedure: None

Context and Purpose

70. The primary legislation provides powers for the economic regulator to modify the conditions of a licence. This is to ensure licence conditions can keep pace with the evolution of the market and to enable the economic regulator to undertake periodic reviews of the amount of allowed revenue an operator can receive, which will then be specified in the licence.

71. As licensees may have entered into contracts with the Secretary of State, and given that certain users of the licensed transport and storage network may be in receipt of Exchequer-funded support, it is important the Secretary of State is expressly consulted on proposals to modify licence conditions and, should Secretary of State object to proposed modifications (for example, because of implications for supported users of a network), be able to direct the economic regulator not to make the proposed modification.

Justification for the power

72. In economically regulated sectors, price controls are a method of setting the amount of money (allowed revenue) that can be earned by network companies over the length of a given price control period. Regulated companies then recover their allowed revenues through the charges they are able to set. The revenues have to be set at a level which covers the companies' costs and allows them to earn a reasonable return subject to them delivering value for consumers, behaving efficiently and achieving their targets as set by the economic regulator. The amount of allowed revenue an operator is able earn is set out in the licence conditions.

73. Licence conditions will need to be updated to reflect the outcomes of these periodic regulatory reviews, as well as to keep pace with the evolution of the market more broadly. This power provides for the economic regulator to make such licence modifications, subject to an appropriate consultation process.

74. Licence modifications that affect the amount of allowed revenue an operator can receive may have a material impact on the support being provided by government to establish the CCUS sector. Given the Exchequer support available to transport and storage operators and industrial users connecting to the networks, the Department considers it appropriate that the Secretary of State should have the right, within the relevant time period provided for objections to be made to direct that the modification should not be made. The economic regulator should be obliged to comply with any such direction. There is precedent for this in s11A(5) EA 1989, s23(5) GA 1986 and in the Water Industry Act 1991 17H(1).

Justification for the procedure

75. It is appropriate that the power to modify licence conditions rests with the economic regulator as the body with relevant expertise and capability to take account of all relevant factors and arbitrate between any required trade-offs.

76. Before making any modifications to licence conditions, the economic regulator must, by way of a written notice, set out the proposed modifications, the rationale for the modifications, and the timeframe within which representations with respect to the proposals may be made (which must no less than 28 days from the date of publication of the notice). This written notice must be brought to the attention of those likely to be affected by the making of the modifications and sent to each relevant licence holder and the Secretary of State. The economic regulator must consider any representations which are duly made.

77. Following the consultation period, the economic regulator will be obliged to publish the decision and modifications in such manner as it considers appropriate to bring it to the attention of those likely to be affected by the modification, stating the effect of the modifications, how it has taken account of any representations, and the reasons for any proposed differences between the original and modified proposal.

78. It is appropriate that there is a power to object to any licence modifications proposed by the economic regulator which rests with the Secretary of State. In practice any decision will need to be made quickly by the Secretary of State and will require a balancing of factors relating to the wider energy and industrial policy context, including consumer and taxpayer interests, decarbonisation objectives and security of energy supply. Should the Secretary of State object to a particular modification, the economic regulator would need to consider whether to pursue the modification in an alternative form, which would require re-starting the process of notifying and consulting on the new proposals.

79. The Department considers that the processes of publishing and publicising planned licence modifications by way of written notice, and the associated consultation process and publishing of consultation outcomes, as established in this Bill, provide sufficient transparency of decisions taken. This also establishes a consistent procedural approach for the granting of licences, the establishment of standard licence conditions, and licence modification decisions, by written notice.

80. Given that the modification of an existing licence may amount to the determination of an existing licence holder's rights, in the event that an affected party feels aggrieved by a licence modification, they would have the opportunity to appeal a licence modification to the CMA.

Clause 16, Schedule 1 Interim power for the Secretary of State to grant licences

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative

Context and Purpose

81. The Secretary of State will determine which operators of the first-of-a-kind CO2 transport and storage networks should be granted a licence and the terms and conditions of such licences. In an enduring regulatory regime, the Department would expect the function of licence award to transition to the economic regulator in line with regulatory licensing practice in other sectors. The point at which it is appropriate to effect this transition will depend on the developments in the market in the early years of its operation, and on levels of HMG support for future operators. This power provides for the Secretary of State to determine the date on which the ability to grant licences shall transfer to the economic regulator.

Justification for the power

82. It is appropriate that the power to grant the first CO2 transport and storage licence is vested with the Secretary of State, as it is the Government who have committed to establishing CCUS in the UK. Exchequer support will be available to first-of-a-kind transport and storage network developers, as well as to industrial emitters using the networks to transport and store their carbon emissions.

83. Once the CO2 capture and storage market has evolved sufficiently, it is the Department's view that decisions on licence award may be taken by the economic regulator, subject to an appropriate process, and in line with regulatory practice in other sectors.

84. This power is required to enable responsibility for licence grant to transfer from the Secretary of State to the economic regulator at a suitable point in time, once the market for CCUS has sufficiently matured.

85. This power enables the Secretary of State to specify by regulations a date at which the power to grant licences transfers from the Secretary of State to the economic regulator.

Justification for the procedure

86. The power is to be exercised via the negative procedure. This procedure is appropriate as the regulations will simply set the date by which the power for licence grant transfers. The principle of the power to grant such licences in the first place, and the principle of transferring responsibility for granting licences, will have been subject to Parliamentary scrutiny through consideration of the primary legislation.

Clause 32 Enforcement of obligations of licence holders

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative

Context and Purpose

87. The primary legislation establishes an economically regulated licensing framework for CO2 transport and storage. To ensure the framework operates as intended, the economic regulator requires appropriate powers of enforcement in relation to licensable activities, to ensure licence conditions are adhered to, and there is appropriate redress for regulatory breaches, including to act as a sufficient disincentive to licence holders to breach licence conditions.

88. Enforcement powers for Ofgem as the economic regulator of CO2 transport and storage are intended to be the same as those that are available to Ofgem in the regulation of electricity licensing under the EA 1989 and the drafting expressly refers to section 25 EA 1989 to clarify this intention.

89. This power enables Secretary of State to establish in secondary legislation how the economic regulator's enforcement powers should be applied in the CO2 transport and storage sector, establishing procedural and other requirements relating to the application of these powers.

Justification for the power

90. This power is required to enable the economic regulator to enforce the terms and conditions of CO2 transport and storage licences. Detailed regulations are expected to set out the procedure that the economic regulator should follow when making an order as well as setting out requirements relating to both the size of penalties which may be applied for breaches of licence conditions and the method by which orders may be appealed, to ensure sufficient transparency of regulatory decision-making. Regulations made under this power would be expected to include requirements upon the economic regulator in relation to the publication of guidance on its policy and approach to enforcement in the CO2 transport and storage sector, which should include the factors and circumstances which would be considered in decisions on whether to impose a financial penalty, and in determining the amount of any financial penalty.

91. Regulations are expected establish a cap on the amount of penalty the regulator is able to impose, which we anticipate will be a cap of 10% of company turnover following precedent in s27O EA 1989 and s36 Competition Act 1998. Regulations are also expected to set out how company turnover is defined for these purposes, noting in particular that the first CO2 transport and storage companies are expected to be established as Special Purpose Vehicles (SPVs), subsidiary companies of larger parent companies formed specifically to undertake CO2 transport and storage activity. As such, the Department considers that the size of the maximum penalty should appropriately reflect the size of the transport and storage business operation, rather than the parent company's full business operation. Whilst the first CO2 transport and storage operators are expected to be established as SPVs, this may not be the case for all future operators. The ability to regularly review and update how company turnover should be determined is important to ensure the enforcement and penalty regime remains appropriate as the market develops. This is

consistent with delegated powers for Secretary of State to determine company turnover for penalties and compensation orders in s30O GA 1986 and s27O EA 1989.

Justification for the procedure

92. This power enables Secretary of State to determine the detailed process regarding enforcement of CO_2 transport and storage licences by Regulation, including time limits for bringing and appealing a penalty and the process for challenging an order, as well as in respect of the imposition of penalties for regulatory breaches. This respects limits on Parliamentary time given the technical nature of the process. Having a regulatory power provides the opportunity for further consultation. The affirmative procedure is appropriate to ensure Parliamentary scrutiny of the enforcement and penalty regime, and to provide assurance that it is being appropriately applied.

Clause 44 Special Administration Regime

Power conferred on: Lord Chancellor with the concurrence of the Secretary of State (in relation to England and Wales) and the Secretary of State (in relation to Scotland)

Power exercised by: Regulations made by Statutory instrument

Parliamentary procedure: Negative

Context and Purpose

93. This power extends the ability of the Secretary of State to make company insolvency rules conferred by section 411 of the Insolvency Act 1986 ("Section 411"), for the purposes of giving effect to Special Administration Orders under the relevant clauses of the Bill. These rules would be likely to cover procedural issues, such as the quorum required for various meetings and the detail of what constitutes service of documents.

Justification for the power

94. The Insolvency Act is supplemented by separate Insolvency Rules. For England and Wales, the most recent iteration is the Insolvency (England and Wales) Rules 2016 (the "Rules"). The Rules set out a number of procedural matters, including the form and content required for insolvency procedure applications, as well as substantive matters, such as the provisions governing the costs of administration.

95. Rather than amend these Rules to apply to Special Administration Regimes (SARs) in the energy sector, separate insolvency rules have been established for each of the supply, network, and smart meter communication device company SARs, the most recent example of which is the Smart Meter Communication Licensee Administration Rules (England and Wales) 2020.

96. This power takes the same approach, to provide for the detailed procedural requirements applicable to the relevant CO_2 transport and storage company administration to be set out in insolvency rules following enactment of the primary legislation. Without this power, the provisions in the Bill itself would need to be significantly expanded to address the very detailed issues of procedure applicable to the various aspects of the special administration regime for relevant companies.

Justification for the procedure

97. The negative resolution procedure applies to the power to make Insolvency Rules under s411 of the Insolvency Act and, for Energy SARs, under s159 of the Energy Act 2004. The same Parliamentary procedure is envisaged here. These rules can be detailed, technical and complex relating to aspects such as the machinery of proving a debt and the way a claim can be quantified. Furthermore, under section 413 of the Insolvency Act 1986, before making any rules under Section 411 the Lord Chancellor must consult the Insolvency Rules Committee. Therefore, the negative resolution procedure is considered appropriate given the technical nature of the rules and the scrutiny that they will already be subject to by the Insolvency Rules Committee. This procedure follows that for the equivalent power in the Nuclear Energy (Financing) Act 2022.

Clause 47 Modification under the Enterprise Act 2002

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory instrument

Parliamentary procedure: Negative (Henry VIII)

Context and Purpose

98. The EA 2002 made a number of changes to insolvency law, including the regime for administration. Sections 248 and 277 of the EA 2002 conferred powers on the Secretary of State to make consequential amendments to insolvency legislation. As the SAR for relevant CO_2 transport and storage companies contains several provisions from the ordinary administration and the insolvency regimes, the use of those powers in the EA 2002 may affect the SAR in this Bill. These measures extend the power of modification or application conferred on the Secretary of State in sections 248 and 277 of the EA 2002 to make such consequential amendments as the Secretary of State considers appropriate in connection with any other provision made under those sections of the EA 2002. Clause 47 is a Henry VIII power.

99. This regime will help ensure that the SAR is maintained as broader insolvency law evolves (allowing the Secretary of State to modify the Bill in circumstances where powers have been exercised under the EA 2002), and adopts the same approach taken in the Smart Meters Act 2018. Failure to make these changes could have detrimental impacts on the operability of the SAR in the event of a relevant company's insolvency.

Justification for the power

100. As with the other SARs in the energy sector, this regime tries to preserve as much of the normal insolvency and administration regimes as it appropriately can (see for example Schedule 20 to the Energy Act 2004).

101. However, modifications or the application of enactments to the normal regimes which are applied by this Bill may create difficulty with the functioning of this SAR. Conferring the power of modification or application in sections 248 and 277 of the EA 2002 on the Secretary of State is considered necessary to enable the Secretary of State to maintain that this SAR achieves its purpose (the protection of consumers) where other provisions are made under those sections of the EA 2002.

102. The scope of the power is limited in two respects. The power can only be used to make modifications to the SAR provisions in the relevant clauses of this Bill. Modifications can only be made in connection with provisions made under sections 248 and 277 of the EA 2002. As the use of this power will depend on future uses of the power in sections 248 and 277 of the EA 2002, it is not possible to predict what amendments may be made to this SAR. However, as the effect of the power is to ensure that this SAR functions as intended by enabling the Secretary of State to respond to uses of the power in sections 248 and 277 of the EA 2002, it is envisaged that the nature of those modifications will be narrowly focussed.

103. Conferring the powers in sections 248 and 277 on the Secretary of State to make consequential amendments in connection with any other provision made under those sections has been included in several other SARs, recognising the potential need to make amendments to keep SARs in line where changes are made to general insolvency law using those powers in the EA 2002.

104. The SARs for social housing providers and for postal service providers contain a similar power.

Justification for the procedure

105. The modifications envisaged in this clause are consequential to provisions made under sections 248 and 277 of the EA 2002. It is envisaged that the nature of these modifications will be narrowly focussed and can only be made in relation to the relevant provisions in this Bill.

106. It is considered that the negative procedure would allow for an appropriate level of parliamentary scrutiny given the very limited scope and circumstances in which this power may be exercised.

107. The proposal is to extend the application of existing powers in the EA 2002 and the Energy Act 2004. As the power and procedure is provided for in the application of sections 248 and 277 of the EA 2002, the same procedures in that Act are applied by the drafting of this clause 47 of this Bill. The commensurate powers in the existing energy SARs are subject to the negative resolution procedure. The intention of this power is the same as the powers provided for in those previous SARs.

Clause 48 Power to make further modifications of insolvency legislation

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory instrument

Parliamentary procedure: Affirmative (Henry VIII)

Context and Purpose

108. This power grants the Secretary of State the power to make modifications to existing insolvency legislation. The purpose of this power is to ensure that the SAR for CO_2 transport and storage networks fulfils its purpose to protect users of the network. Given the contribution that taxpayers and consumers make to financing CO_2 capture it is imperative that the Secretary of State can make modifications to insolvency legislation should, for example, practical experience highlight difficulties in the application of the SAR, or if a change in general insolvency law necessitates a change to this SAR.

Justification for the power

109. A delegated power is required so the Secretary of State can amend the detail of the regime, should experience of its application highlight any difficulties or areas for concern. This is particularly important, given expected longevity of operating a licensed CO_2 transport and storage network.

110. This power is limited in scope insofar as it can only be exercised in relation to provision made by or under the relevant provisions in this Bill. This power is based on the existing power in section 9 of the Smart Meters Act 2018, which itself is based on a similar power in the Energy Act 2004 (see paragraph 46 of Schedule 20). There is recognition of the need for this power in relation to SARs more generally to allow the Secretary of State to make appropriate amendments to the regime as insolvency law and practices develop. The SARs for social housing providers (see paragraph 45 of Schedule 5 to the Housing and Planning Act 2016) and for postal service providers (see paragraph 46 of Schedule 10 to the Postal Services Act 2011) contain a similar power.

Justification for the procedure

111. This is a Henry VIII power which covers a range of insolvency legislation. It is therefore considered that the affirmative resolution procedure is appropriate to ensure sufficient Parliamentary scrutiny.

Part 2 Carbon Dioxide Capture, Storage etc and Hydrogen Production

Clause 57(1) Regulations about revenue support contracts

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Revenue support regulations making provision falling within any of clauses 58(2), 60(3), 61(3), 62(2), 63(3), 64(2), 70, 71 or 75(4) will be subject to the affirmative procedure. The first revenue support regulations making provision falling within clauses 66, 67, 72, 73, 76 or 77 will be in accordance with affirmative procedure, and any further regulations made as relate to those provisions, would be made by negative procedure.

112. This clause sets out the overarching power for the Secretary of State to make regulations in relation to revenue support contracts (including the funding of liabilities and costs in relation to such contracts). There are a number of provisions which set out the matters which regulations made under the overarching power in section 57(1) may cover. These are outlined below:
    a. provision about the duties of a revenue support counterparty and the controls and directions that the Secretary of State can issue to a revenue support counterparty (Clause 58(2)).
    b. provision about the Secretary of State's power to direct a revenue support counterparty to offer to contract with eligible persons (Clauses 60(3), 62(2) & 64(2)).
    c. provision to define "eligible low carbon hydrogen producer" and "eligible carbon capture entity" (Clauses 61(3) & 63(3)).
    d. provision to require relevant market participants to make payments to a hydrogen levy administrator and provision about the administration of the levy/levies, including functions of a hydrogen levy administrator and the controls and directions that the Secretary of State can issue to a hydrogen levy administrator (Clauses 66 & 67).
    e. provision about allocation notifications (Clause 70).
    f. provision about how hydrogen production and carbon capture revenue support contracts are to be allocated, including provision to make an allocation framework (Clause 71).
    g. provision about the duty for a hydrogen production counterparty and a carbon capture counterparty to offer to contract with eligible persons following an allocation notification (Clause 72).
    h. provision about the modification of standard terms (Clause 73).
    i. supplementary provisions (Clause 74).
    j. provision about the period of time for which, and the circumstances in which, a person who has ceased to be a revenue support counterparty is to continue to be treated as such (Clause 75(4)).
    k. provision about the application of sums held by a revenue support counterparty, including provision about apportioning sums received by a revenue support counterparty from a hydrogen levy administrator or received by the counterparty under a revenue support contract where it is unable to fully meet its liabilities under a revenue support contract (Clause 76).

l. provision about the provision and publication of information and advice (Clause 77).

Context and Purpose

113. The overarching power in clause 57 enables the Secretary of State to make regulations relating to revenue support contracts (including the funding of liabilities and costs in relation to such contracts). The purpose of these regulations will be to ensure that the Secretary of State is able to set out and maintain the business model schemes and ensure contracts are managed effectively and stable funding flows are in place.

114. This power is similar to section 6 of the Energy Act 2013 which established the CFD regime. The power at Section 6 allows the Secretary of State to make regulations about Contract for Difference (as defined in Section 6 (1)) between a counterparty and an eligible generator for the purpose of encouraging low carbon electricity generation. The power in this clause has been adapted from this model.

115. Clause 58, duties of a revenue support counterparty, sets out the manner in which the Secretary of State has the ability to exert control over the activities of a revenue support counterparty, given that its role is of critical importance to the effectiveness of a revenue support contract.

116. We have set out the provisions that the Secretary of State would likely make under the revenue support regulations from clause 58(2). These may include:
    a. Requiring a revenue support counterparty to enter into arrangements or to offer to contract for purposes connected to a revenue support contract.
    b. Specifying things that a revenue support counterparty may or must do, or things that a revenue support counterparty may not do.
    c. Conferring on the Secretary of State further powers to direct a revenue support counterparty to do, or not to do, things specified in the regulations or direction.

117. Additionally, clause 58(2)(b) and (c) includes provisions which require consultation with, or the consent of, the Secretary of State in relation to modification of standard terms, variation, termination or enforcement of a revenue support contract, settlement or compromise of claims, conduct of legal proceedings and/or any other exercise of rights under a revenue support contract.

118. The Bill will provide the Secretary of State with a power to make regulations determining the meaning of “eligible” in relation to a low carbon hydrogen producer and a carbon capture entity, in clauses 61(3) and 63(3) respectively. This is required as the Secretary of State is only able to direct a counterparty to enter into a contract with an ‘eligible’ person. An allocation body will also only be able to give a notification to a counterparty specifying an eligible person to enter into a contract with.

119. The Bill will give the power for the Secretary of State to direct a revenue support counterparty to offer to enter into contract with eligible persons. Under clauses 60(3), 62(2) and 64(2), regulations may make provision about the circumstances and terms of a direction to a revenue support counterparty.

120. These powers will allow the Secretary of State to make regulations specifying when directions to offer contracts may or must be made, and what terms may or must be set out in the contracts. The regulations will describe the process and obligations the Secretary of State must adhere to when making the direction to offer a contract. For example, provision

is likely to require the direction to be in writing and specify the day on which the revenue support counterparty must comply with a direction.

121. Clause 66 enables revenue support regulations to make provisions requiring relevant market participants to make payments to a hydrogen levy administrator for the purposes described in subsections (1) and (2). Subsection (3) enables revenue support regulations to make provision about the method of calculating or determining amounts that are to be paid by a hydrogen levy administrator for those purposes, including provision for adjustments or apportionments in cases where an amount required to be paid by a hydrogen levy administrator for such a purpose has not been paid in full. Subsection (4) specifies that revenue support regulations may also make provision requiring relevant market participants to provide collateral to a hydrogen levy administrator. Subsection (5) requires regulations made under this section to impose a duty on a hydrogen levy administrator in relation to the collection of sums from relevant market participants. Subsection (8) sets out that "relevant market participants" means one or more descriptions of persons specified in revenue support regulations, but such description(s) cannot include persons other than gas suppliers, electricity suppliers or gas shippers (as defined in clause 56). Subsection (9) enables revenue support regulations to make provision about eligibility for exemptions from obligations imposed on relevant market participants by regulations within subsections (1) to (5).

122. Clause 67 enables revenue support regulations to make provisions establishing the functions and duties of a hydrogen levy administrator, as well as conferring powers on the Secretary of State to direct the administrator to do, or not to do, things specified in the regulations or direction. Those functions and duties may include provisions such as those set out in subsections (3) and (4) relating to the administration of the levy, for example provision relating to the calculation and collection of levy payments and collateral, the issuing of notices requiring payment, the enforcement of obligations, the holding of sums in reserve and arrangements for dispute resolution. Subsections (6) and (7) allow for revenue support regulations to make provision about the application of sums held by a hydrogen levy administrator. For example, if overpayments are made by relevant market participants, then provision may need to be made about the repayment of such overpayments.

123. Clauses 69 to 74 are largely based on the equivalent provision in sections 11 to 16 of the Energy Act 2013 which seek to establish the mechanics of the contract allocation process.

124. Clause 70, allocation notifications, enables the Secretary of State to make provision in regulations about allocation notifications. Subsection (4) provides an indication of the types of provision the Secretary of State would likely make, for example provision about the circumstances in which an allocation notification may or must be given, the content of a notification and appeals against decisions not to give allocation notifications.

125. Clause 71, allocation of contracts, enables the Secretary of State to make provision in regulations about how revenue support contracts are to be allocated to eligible low carbon hydrogen producers and carbon capture entities. We have set out the provisions that the Secretary of State would likely make under the regulations in clause 71(2). These may impose requirements on the Secretary of State under clause 71(3). Clause 71(2)(a) and (7) allows provision conferring a power on the Secretary of State to make rules about the allocation of hydrogen production revenue support contracts or carbon capture revenue support contracts (known as an "allocation framework"), as well as a power to amend, add to or remove an allocation framework. Clauses 71(4), 71(5) and 71(6) provide examples of what may be included in an allocation framework. However, these are subject to any

provision contained in revenue support regulations, for example regulations may make provision about matters in relation to which provision may or must be made in an allocation framework (clause 71(2)(e) and (8)).

126. Clause 72, duty to offer to contract following allocation, enables the Secretary of State to make further provision about offers to contract in regulations. This may include setting out how a counterparty is to apply or complete standard terms in relation to the offer in accordance with information specified in an allocation notification, the time within which the offer must be made and what is to happen if the person to whom the offer is made does not enter into a contract as a result of the offer.

127. Clause 73 enables the Secretary of State to make further provisions in regulations on how modifications of standard terms are agreed and made. This may include the circumstances in which a low carbon hydrogen producer or carbon capture entity may make an application for modification and the procedure to be followed. A counterparty may only enter into a modification agreement providing for the modification of a standard term if it is satisfied that the effect of the modification is minor and that the modification is necessary. The standard term in question must also not have been designated under clause 69(5) as a term that may not be modified. Regulations therefore may make provision about how a counterparty is to determine an application for a modification agreement, including how it is to determine whether the effect of a modification is minor and whether it is necessary (clause 73(4)(d)).

128. Clause 74 clarifies that the Secretary of State, when making provision under the powers in sections 70 to 73, may include provision relating to determinations on a competitive basis and enabling calculations and determinations to be made by such persons and in accordance with such procedure as is specified.

129. Clause 75(4) enables the Secretary of State to make provision in regulations enabling a person who has ceased to be a revenue support counterparty to continue to be treated as such a counterparty, including provision about the circumstances in which, and the period for which, such a person may be so treated.

130. Clause 76 provides for revenue support regulations to be made relating to the application of sums held by a revenue support counterparty. Subsections (1) and (2) allow the Secretary of State to make provision about the apportionment of sums in circumstances where a revenue support counterparty is unable to meet its liabilities under a revenue support contract in full. Subsections (4) and (5) allow the Secretary of State to make regulations about the application of sums held by a counterparty, including whether sums are to be paid, or not to be paid, into the Consolidated Fund. For example, should it be identified that amounts are owed to relevant market participants, it may be appropriate to make provision about such repayments from sums held by a revenue support counterparty.

131. Clause 77, information and advice, sets out that revenue support regulations may make provision about the provision and publication of information, and the giving of advice. This is considered essential for the functioning of the business models and hydrogen levy. For revenue support contracts to function effectively, flows of information and advice may be needed between (but not limited to) the Secretary of State, a revenue support counterparty, an allocation body, a hydrogen levy administrator, and any other person specified in revenue support regulations. Subsection (2)(g) will allow the Secretary of State to set out the enforcement of any requirement imposed by this section. Subsection (3) disapplies the prohibition on disclosure of information by section 105(1) of the Utilities Act

2000 and Article 63(1) of the Energy (Northern Ireland) Order 2003 (S.I. 2003/419 (N.I. 6)). Instead regulations may make provision for the classification and protection of confidential or sensitive information (clause 77(2)(f)).

Justification for the power

132. The Department judges that it is appropriate that these powers be delegated to the Secretary of State, as the detailed technical and administrative nature of the provisions makes it inappropriate for them to be included in primary legislation. These regulations underpin the effective operation of a revenue support contract and are essential to the credibility of the business models with industry and their investors. Without the power for the Secretary of State to set out these requirements in regulations, it is unlikely that the business models could be successfully implemented to support the development of these new technologies, meeting the Government's decarbonisation ambitions.

133. To ensure this power is used effectively, before making regulations under this power, the Secretary of State must consult the Scottish and Welsh Ministers and the Department for the Economy in Northern Ireland (in areas of devolved legislative competence only) and other such persons that the Secretary of State considers appropriate. This provides an opportunity for both those directly affected by these regulations and those with special expertise to express their views on their design.

134. Low carbon hydrogen production and carbon capture are at an emergent stage in the UK. In addition, the transport and storage, hydrogen production and carbon capture revenue support contracts are still being developed (and will evolve over time) and, as such, it is necessary for the Secretary of State to have the ability to make provision in regulations about them. This is needed to ensure that government can set technical detail in respect of such contracts and be responsive to changes and act quickly where appropriate. This approach aligns with similar provision in section 6 of the Energy Act 2013 and the section 15 of the Nuclear Energy (Financing) Act 2022 which address the detailed, technical and administrative nature of provisions through delegated powers.

135. The proper functioning of a revenue support counterparty is fundamental to the stability of the revenue support contracts. It will be responsible for managing large amounts of funds to meet its payment obligations under a revenue support contract. It is therefore important for the Secretary of State to exercise a degree of control over how it operates, which is done through clause 57(1). The powers under clauses 58(2), replicates the provisions set out in section 21(1) of the Energy Act 2013 in relation to the CFD regime and section 17 of the Nuclear Energy (Financing) Act 2022.

136. In respect of clauses 61(3) and 63(3), it is not possible to define an 'eligible low carbon hydrogen producer' or 'eligible carbon capture entity' on the face of the Bill as eligibility may change over time as the industry and technologies evolve. The regulations that define the term "eligible generator" for the low carbon CFDs have themselves been updated since they were introduced in 2014 as the industry and technologies have evolved.

137. The regulation making powers in clauses 60(3), 62(2) and 64(2) are necessary as the precise circumstances in which a direction to offer to contract may or must be given and the terms which may or must be specified in a direction may change over time, given the nascent, first-of-a-kind nature of the contracts. In the medium-term, when contracts are allocated through the more competitive allocation process, this power may be needed to ensure the Secretary of State's direction making power is workable for projects which may not be suited to that process.

138. Regarding clauses 66 and 67, the duties and functions of the hydrogen levy administrator, the types of market participants obliged to pay the levy and the nature of the levy requirements and how the levy works (for example, how it is to be calculated and enforced) may need to change over time to reflect the development of the market for low carbon hydrogen and future changes to the wider energy market (for example, a decrease in the role of natural gas in heating as we progress towards our net zero target). The Department therefore judges that it is appropriate for the Secretary of State to be able to make such provision in regulations.

139. The power in clause 70 for the Secretary of State to make further provision about allocation notifications in regulations is required as the design of the allocation processes may need to change over time, which may affect, for example, the precise circumstances in which an allocation body may or must give a notification and the specific content of a notification. This aligns with the approach in section 12 of the Energy Act 2013.

140. The powers contained in clause 71 are required to provide for the detailed mechanics of the allocation process(es) for hydrogen production revenue support contracts and carbon capture revenue support contracts in regulations, similar to section 13 of the Energy Act 2013. It would not be appropriate to set out the detailed allocation process in primary legislation owing to the need to amend the process swiftly as the market and business models develop. The CFD regime has demonstrated how this is likely to be the case as government, and industry, learn from each competitive round. For example, new technologies or applications (such as industrial sectors) may emerge warranting their own separate allocation processes compared to more established technologies or applications.

141. By setting out the fundamental components of the processes in regulations, including imposing the necessary obligations on an allocation body and counterparty, this will provide the requisite certainty to investors and prospective applicants about the allocation process.

142. However, the Department does not consider it appropriate for all detailed aspects of the processes, for example the rules of a particular allocation round, to be set out in regulations and consider that these in turn should be set out in an allocation framework. An allocation framework will sit outside of regulations but would be constrained by provision made in regulations. An allocation framework will be produced and published for each allocation round and include information about the detailed allocation process to act as a “rule book” for how allocation rounds will operate.

143. The power contained in clause 72 is required as the Department may need to set out further details about an offer to contract once the respective business model allocation processes are confirmed. This will also allow the Department to amend the details more swiftly as the details of the allocation processes and aspects of the business models change over time.

144. A delegated power is required in clause 73 to set out the details of how modifications of standard terms are agreed and made once the future allocation process is confirmed and to address changes over time as the Department gains more experience of the modifications process.

145. The provisions in clause 74 clarify regulations may include competitive determination of a matter, for example competitive award of contracts, and may also include calculations and determinations.

146. A delegated power is needed in clause 75(4) to ensure the Department can react appropriately to a situation where a designation of a revenue support counterparty is withdrawn. It is imperative that no revenue support contracts are left stranded and that at any one time there is a revenue support counterparty liable for the obligations, and able to exercise the rights, under the contracts.

147. The Department would therefore expect the incumbent counterparty to continue in its role until a new revenue support counterparty is identified and ready to operate. However, the Department recognises that there may be circumstances where it would not be possible or reasonable for the incumbent revenue support counterparty to continue in its role until a new revenue support counterparty is identified and ready to operate. The Secretary of State therefore requires this power to provide for the detail in regulations of any requirement on an incumbent revenue support counterparty to continue to be treated as such a revenue support counterparty, rather than on the face of the Bill.

148. The provisions set out in clause 76(1) is necessary to address cases where exceptional circumstances may mean that the revenue support counterparty is unable to meet its payment obligations under its revenue support contracts. It is important to have clear provisions in place governing this apportionment since it would involve the interests of contract holders who need to have certainty over how their claim to payment would be treated in this scenario.

149. Should this power not be taken, there would not be sufficient protection in place to ensure that a revenue support counterparty could meet its payment obligations under a revenue support contract, and it is unlikely that investors would feel that the structure was reliable enough to warrant investment into low carbon hydrogen production and carbon capture projects. The provisions in 76(4) and 76(5) are required to ensure the Secretary of State can set out how sums held by a revenue support counterparty are to be treated, and in particular whether they should or should not be paid into the Consolidated Fund.

150. The Department judges that it is appropriate that the powers in clause 76 should be delegated to the Secretary of State. Any provision in regulations is likely to be very detailed and technical in nature, with a relatively narrow purpose. These powers are based on section 18 of the Energy Act 2013 and section 21 of the Nuclear Energy (Financing) Act 2022.

151. Given the emergent stage of low carbon hydrogen production and carbon capture projects in the UK, with no commercial scale projects in operation, and pending the detailed design of the hydrogen levy, clause 77 provides powers which allow for the provision of information, which is important to build the government's evidence base as projects are developed and to inform future policy. Information gathered could include information on forfeited UK Emissions Trading Scheme (ETS) free allowances, capture rates/emissions data and contract performance (specific or aggregated) to inform, for example, future allocation rounds. Advice and information could be based on complex modelling forecasts and its form may change over time as better, more sophisticated modelling and data become available.

152. Specifying precisely what information or advice is required, requires analysis of the way in which the low carbon hydrogen and carbon capture markets will develop, and may require detailed consultation with a counterparty, an allocation body, and stakeholders. The information that may be required may also change over time as well as the stage at which

the Department requires it. It is therefore necessary for these arrangements to be put in place through regulations rather than on the face of the Bill.

153. It is likely that information and advice will need to be provided to the Secretary of State, but it is necessary for these powers to provide the scope to allow for information to be provided to other persons/bodies, for example regulators or the devolved administrations.

154. As mentioned above, the design of the levy may need to change in the future, to accommodate changes to the energy market. Changes to the levy design are likely to require changes to the flow of information needed to enable the functioning of the levy and may include changes in relation to the bodies that are required to provide information to a hydrogen levy administrator. In the interests of future-proofing the levy and ensuring that it can continue to collect the monies required to enable payments to the relevant counterparties, the Department therefore judges that it is appropriate that the information and advice arrangements for the levy are also determined through regulations. It is also necessary that there is provision for regulations to specify any other person who may be required to provide information or advice to Secretary of State or to a hydrogen levy administrator. This provision is needed because, pending the detailed levy design and given the possibility of future changes to that design, we cannot at this stage identify every possible person from whom information or advice may be required.

Justification for the procedure

155. In respect of provisions which may be included in regulations by virtue of clauses 58(2), 60(3), 61(3), 62(2), 63(3), 64(2), 70, 71 or 75(4), which deal with the fundamental parameters of the schemes, including how support is allocated and who is eligible for support, it is appropriate for these measures to be subject to a greater level of parliamentary scrutiny through the affirmative procedure. Use of the affirmative procedure will also reassure prospective contract holders that fundamental aspects of the process upon which they will need to rely on when applying, are unlikely to change frequently or at short notice.

156. In respect of clauses 66, 67, 72, 73, 76 or 77, it is considered that the affirmative procedure is most appropriate for first use, so Parliament is able to scrutinise how government intends to exercise those powers when introducing initial regulations to establish the business models. However, given the highly technical nature of this area, it is considered proportionate for subsequent use of those powers to be subject to the negative procedure.

157. In the case of clause 77, the expected sequencing of bringing forward regulations may mean that it is used a number of times to establish the scheme. The Department has however assessed that this approach is proportionate as, in combination with the limitations of the clause itself, affirmative on first use will provide Parliament with further opportunity to debate the intended application of the power. Parliament will, of course, also have the opportunity to debate under the negative procedure for subsequent uses.

158. Any other regulations made under clause 57 itself are subject to the negative procedure as they are considered of less significance for Parliamentary debate and therefore suitable for the negative procedure.

159. Prior to making the regulations, the Secretary of State is required to consult with counterparts in the devolved administrations in areas of devolved legislative competence, and such other persons as they consider appropriate.

160. Clause 57(11) provides that revenue support regulations should not be treated as a hybrid instrument. Regulations conferring functions on a revenue support counterparty, levy administrator or allocation body could be regarded as adversely affecting its private interests, raising the possibility that they could be considered hybrid. It is not considered necessary for the regulations to be treated as hybrid because appointments of these bodies will only be made with their prior consent, providing adequate protection that private interests will be fully considered.

161. The allocation framework, a technical sub-component of the process, will not be subject to parliamentary scrutiny due to the highly technical information and administrative rules it will include. The Department also needs to ensure that it can organise and run allocation rounds to short timeframes to avoid investor uncertainty as well as avoid wasted costs. This would be challenging if an allocation framework were to be subject to parliamentary time. This aligns with the approach in the Energy Act 2013.

Clause 58(1)(a) Power for Secretary of State to direct the revenue support counterparty

Power conferred on: Secretary of State

Power exercised by: Secretary of State's direction

Parliamentary Procedure: N/A

Context and Purpose

162. This subsection provides that a revenue support counterparty must comply with any direction given by the Secretary of State in accordance with this Chapter.

163. This power sits alongside but is distinct from the delegated power relating to the Secretary of State making regulations under the Chapter.

Justification for the power

164. This power is required to give the Secretary of State sufficient ability to exert control over the activities of the revenue support counterparty, given that this role and function is of critical importance to the revenue stream. There is a risk that, if the Secretary of State does not retain this ability, then this could impact the stability of cash flow to contract holders.

165. This power replicates the provision set out in section 8 of the Energy Act 2013 and section 17 of the Nuclear Energy (Financing) Act 2022.

Justification for the procedure

166. It is the Department's view that, given the accompanying regulations made will set out the detailed nature of directions made to the revenue support counterparty, and that these will be subject to Parliamentary scrutiny through the affirmative procedure, that no procedure for this power is required.

Clauses 59(1), 61(1) and 63(1) Designation of counterparty

Power conferred on: Secretary of State

Power exercised by: Notice

Parliamentary Procedure: None

Context and Purpose

167. These powers will enable the Secretary of State to designate consenting person(s) to be a counterparty for transport and storage revenue support contracts, hydrogen production revenue support contracts and carbon capture revenue support contracts. The counterparties will be responsible for managing the contracts and making payments to the contract holders, as well as collecting any necessary payments from contract holders, as set out in the contracts. The power will also enable the Secretary of State to cease the effect of a designation using the same process to that of the designation itself. A designation will also cease to have effect if the person withdraws consent by giving not less than 3 months' notice in writing to the Secretary of State (see clause 75(1)).

168. The power is very similar to section 7 of the Energy Act 2013 in relation to the CFD regime, which gave a power to the Secretary of State to designate a CFD counterparty.

Justification for the power

169. For revenues to flow to contract holders effectively, it is necessary to have counterparties charged with managing the contracts and making payments. A counterparty needs to be designated to fulfil this function effectively.

170. It also is likely that, in the event of a change of revenue support counterparty, the Department will need to act more quickly than would normally be compatible with the timetable primary legislation allows. The likelihood of the need for a quick response justifies the necessity of a delegated power. Failure to provide continuity of counterparties would undermine investor and developer trust in these business models. Developers and investors are likely to see the need for parliamentary approval as increasing the risk that a new counterparty would not be in place in a timely manner.

Justification for the procedure

171. Prior to the appointment of a revenue support counterparty, the government will conduct internal assessments in order to determine their suitability for this role. The Department will also seek the consent of the counterparty prior to designation, in line with the requirement in clause 59(4), 61(5), and 63(5). Under the CFD regime, the power to designate a CFD counterparty was exercisable by order made by statutory instrument without any parliamentary procedure. We consider that the more appropriate route for designation in this context is for the Secretary of State to give notice to a person (and publish that notice). This is aligned with the approach taken in Section 16 of the Nuclear Energy (Financing) Act 2022.

172. The appointment of a revenue support counterparty is an administrative exercise and would be carried out only with the consent of the person in question. Due to this, the Department judges that it is appropriate to appoint this body by notice without parliamentary procedure.

Clauses 60(1), 62(1), 64(1) Direction to offer to contract

Power conferred on: Secretary of State

Power exercised by: Secretary of State's direction

Parliamentary Procedure: N/A

Context and Purpose

173. These powers allow for the Secretary of State to issue a direction, in accordance with any provision made by revenue support regulations, requiring a revenue support counterparty to offer to enter into a revenue support contract with an eligible person. This is separate to the delegated power to make regulations governing the direction by Secretary of State.

Justification for the power

174. The power to direct a revenue support counterparty is linked to the regulations governing how the Secretary of State may make that direction, which will be provided for in the revenue support regulations in accordance with clauses 60(3), 62(2), and 64(2).

175. Without this power there would be no provision allowing the Secretary of State to make a direction that allows for eligible persons to be offered to enter into a revenue support contract. A revenue support contract is part of the package of measures considered necessary to address the market failure and to secure the establishment of initial CCUS clusters and deployment of low carbon hydrogen production and so a specific power is required.

176. This delegated power is similar to section 18 of the Nuclear Energy (Financing) Act 2022 and to the CFD scheme, namely section 10 of the Energy Act 2013.

177. In future, the expectation is that hydrogen production and carbon capture revenue support contracts will be awarded by way of a more competitive allocation process – also provided for in the Bill. It is expected that an allocation body will be generally notifying a counterparty to issue a generic contract on standard terms as the result of the allocation process set out in the regulations. This direction power may also be required after the transition to a more competitive allocation process in case support needs to be allocated outside of that process, for example for major novel one-off projects. (A similar provision is not required for the transport and storage revenue support contract as the recipient of an agreement will be determined by the licensing process).

Justification for the procedure

178. It is the Department's view that, given the accompanying regulations to this power will set out the detailed nature of directions made to a revenue support counterparty, and that these will be subject to Parliamentary scrutiny through the affirmative procedure, that no procedure for this power is required. This follows the precedent of section 10 of the Energy Act 2013 and section 18 of the Nuclear Energy (Financing) Act 2022.

Clause 65 Appointment of hydrogen levy administrator

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: N/A

Context and Purpose

179. This power will enable Secretary of State to appoint one or more persons to carry out the functions of a hydrogen levy administrator. The administrator(s) of the levy will be responsible for functions such as calculating levy payments owed, collecting levy payments, and undertaking any reconciliation of payments. This power is separate from the delegated power to make regulations establishing the functions of a hydrogen levy administrator – see clause 67. Under subsection (3), an appointment can only be made with the consent of the person appointed. The power will also enable the Secretary of State to cease the effect of an appointment using the same process to that of the appointment itself.

Justification for the power

180. For revenues to flow between the market participants required to make levy payments and a counterparty, it is necessary to have a levy administrator charged with processing payments. An administrator needs to be appointed to fulfil this function effectively, and to have the requisite powers in place to recover the costs of administering payment.

181. An initial decision on who should serve as the levy administrator is not likely to be taken until 2023. Prior to the appointment of the levy administrator, the government will conduct internal assessments relating to their experience, capacity and resource, in order to determine their suitability for this role. The Department will also seek the consent of the person prior to appointment, in line with the requirement in subsection (3).

182. The duration of the hydrogen production revenue support contracts is still under consideration although the Department has indicated through the Government Response to the Hydrogen Business Model Consultation that the Department's starting point is for contract duration to be set between 10 to 15 years. This means that the levy may be operational for at least 15-20 years. Over the coming decades, it is possible that there may be a scenario where a levy administrator might fail or no longer wish to act as levy administrator or that changes in the energy system may mean that a different person may become a more appropriate choice for the levy administrator. Given the importance of investor confidence in payments under the hydrogen revenue support contracts being made, the Department requires sufficient powers to make any necessary changes to the levy administrator in the future.

183. It is necessary to keep this power separate from the powers making regulations setting out the levy administrator's functions and setting out the details of the levy. This is so that the Department can make the necessary administrative changes to the identity of the levy administrator quickly by not being subject to statutory consultation requirements or parliamentary procedure. However, the Department would not expect the Secretary of State to appoint a person to carry out the levy administrator functions without the prior consent of the person.

Justification for the procedure

184. The consequences of disruption to the administration of the levy – in particular, any delay to appointment a new administrator, where a change of administrator is required – are likely to be significant, impacting the collection of the monies required to fund hydrogen production revenue support contracts. The Department therefore judges that it is essential that such appointments are made without parliamentary procedure, as this will allow for the quick implementation of any changes to the identity of the administrator. The impacts associated with delays to the appointment of a new allocation body are likely to be less significant, which explains the difference in parliamentary procedure across these provisions.

Clause 68 Power to appoint allocation bodies

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Negative (except for 68(3) which is none)

Context and Purpose

185. Subsection (1) enables the Secretary of State to appoint a consenting person to carry out functions in connection with the allocation of hydrogen production revenue support contracts and carbon capture revenue support contracts respectively. A hydrogen production allocation body will be responsible for administering the allocation process for hydrogen production revenue support contracts and a carbon capture allocation body will be responsible for administering the allocation process for carbon capture revenue support contracts.

186. Subsection (3) enables the Secretary of State to cease the effect of a designation by regulations revoking the appointment. An appointment will also cease to have effect if the person withdraws consent.

187. Subsection (4) allows the Secretary of State to also set out in regulations arrangements for the cessation of an allocation body, including how much notice is to be given when a person withdraws consent and any conditions to the power to withdraw consent as well as in which circumstances and for how long a person is to continue to be treated as if they were so appointed.

Justification for the power

188. To reduce costs to government and the consumer, it is necessary to have allocation bodies charged with running a more competitive allocation approach (e.g. auction), similar to the CFD regime under the Energy Act 2013. An allocation body needs to be appointed to fulfil this function effectively, and to have the requisite powers in place to run the process.

189. A decision is yet to be taken on the appropriate entity(ies) to fulfil the role of allocation body for the hydrogen production revenue support contracts or carbon capture revenue support contracts. A delegated power is therefore required to enable the Secretary of State to appoint an allocation body. This power will also be needed in the event there is a change of allocation body.

Justification for the procedure

190. The Department considers that the designation by statutory instrument should be subject to the negative procedure. This aligns with the approach taken in section 46 of the Energy Act 2013 under which the Secretary of State has the power by order to transfer Electricity Market Reform functions (including CFD competitive allocation functions) from the national system operator to an alternative delivery body specified in the order.

191. The Department does not consider that any parliamentary control is necessary for a cessation of appointment as this is something that may need to take place quickly in certain circumstances, for example where an allocation body is failing or where there are serious concerns about the ability of an allocation body to carry out its functions.

192. The Department considers that regulations about how cessation of an appointment is to take place should be subject to negative resolution procedure as this would provide sufficient parliamentary scrutiny of the more administrative and technical details of the cessation process. It is possible that the Department might wish to combine such provisions in the same statutory instrument as the designation as it is likely we would be best placed to make these provisions once we know the identity of an allocation body.

Clause 69 Standard terms of revenue support contracts

Power conferred on: Secretary of State

Power exercised by: Issue of standard terms

Parliamentary Procedure: N/A

Context and Purpose

193. This power enables the Secretary of State to issue, and revise, standard terms and conditions of hydrogen production and carbon capture revenue support contracts respectively. This power also enables the Secretary of State to designate particular standard terms as terms that may not be modified under clause 73.

194. A move to a more competitive allocation process would necessitate the standardisation of the carbon capture and hydrogen production revenue support contract terms, and market participants would need prior understanding of those terms.

Justification for the power

195. A delegated power is required as the contracts are not yet mature enough for standardisation. The contacts are also expected to be hundreds of pages long and highly contractual and technical in nature. Contracts may also need revision to respond to market developments. The ability to designate standard terms which may not be modified is needed if, for example, there are certain key terms that affect the balance of risk and reward in the revenue support contracts.

196. This approach, set out in section 11 of the Energy Act 2013, has been highly successful for CFDs.

Justification for the procedure

197. The Department does not consider that the standard terms should be subject to any parliamentary scrutiny. The standard terms will comprise a complex set of commercial contract terms which would not be well suited to parliamentary scrutiny. In addition, the standard terms will continue to be refined, adding detail for certain types of projects to negate the need for contract adjustments by a revenue support counterparty. It is likely that changes will be required up until shortly before each allocation round, as and when new variations are found to be necessary. Therefore, it will be important to have the ability to adjust the standard terms quickly.

198. Before publishing standard terms (whether for the first time or when making revisions), the Secretary of State is required to consult with those persons the Secretary of State considers it appropriate to consult. Standard terms must also be in accordance with (any) provision made in revenue support regulations and such regulations are subject to separate procedure.

Clause 79 and 80 Transfer schemes, and Modification of transfer schemes

Power conferred on: Secretary of State

Power exercised by: Transfer scheme

Parliamentary Procedure: N/A

Context and Purpose

199. This power enables the Secretary of State to make transfer schemes allowing for the transfer of designated property, rights or liabilities of a person who has ceased to be:
    a. a revenue support counterparty
    b. a hydrogen levy administrator
    c. an allocation body.

200. For example, the Secretary State may cease a designation in the case of financial difficulty or poor performance. Although this event is unlikely, the Department considers these powers necessary to ensure continuity of, for example, revenue support contracts and payments being made to relevant contract holders. This also accounts for a scenario in which a person no longer wishes to act in the relevant role.

201. Additionally, clause 80 allows the Secretary of State to make modification to a transfer scheme and, if a transfer under the scheme has taken effect, such modification is subject to agreement of the transferor and/or transferee affected by the modifications. This clause would be expected to be used where necessary for the functionality or efficiency of the transfer scheme.

Justification for the power

202. Should the responsibilities of a revenue support counterparty, hydrogen levy administrator or an allocation body need to be transferred, the Department would likely need to act promptly to avoid disruption to any revenue support contracts currently in place or any relevant allocation process. In respect of the counterparty and levy administrator, this power will allow the Secretary of State to ensure continuity of revenue flow. If this were not

maintained, it would result in loss of confidence from investors and potential developers in the resilience of revenue support contracts.

203. It is not possible to know at this stage what property, rights and liabilities may need to be transferred to effect the transfer of the functions. In addition, transfer schemes would be technical and bespoke in nature. It is therefore appropriate that this is done through a transfer scheme.

Justification for the procedure

204. The power is not subject to any parliamentary procedure. Transfer schemes are technical and often contain information that is commercially sensitive, confidential or personal information. In addition, the negative impact on existing revenue support contracts if the transfer is delayed means that it is not appropriate that transfers are made through Parliamentary procedure.

205. Failure to provide continuity of a counterparty or levy administrator has the potential to undermine investor and developer trust in the continuity of revenue flow and, as concerns the hydrogen production revenue support contracts, sustainability of funding. Therefore, developers and investors are likely to see the need for parliamentary control as increasing the risk that a new counterparty or levy administrator will not be in place in a timely manner.

Clauses 82 -84 Decommissioning fund requirements

Power conferred on: Secretary of State

Power exercised by: Statutory Instrument

Parliamentary Procedure: Negative, except for Cl. 83(3), Cl. 83(4), and Cl. 83(8) which are subject to the affirmative procedure

Context and Purpose

206. There is a clear obligation on CO_2 transport and storage operators under existing legislation (the PA 1998, as applied by section 30 Energy Act 2008) to undertake appropriate decommissioning in respect of CO_2 storage. In the oil and gas regime, funding is left to commercial arrangements. The decommissioning regime for oil and gas and the requirements around this have been in place for a number of years and are well understood.

207. However, the nature of CO_2 storage, particularly the uncertain nature of decommissioning costs, the fact that it will be a new regime for the UK, alongside the expected profile of the companies themselves, mean that the Government would like to implement a funded decommissioning regime for carbon storage to help manage risks.

208. Furthermore, the regulatory regime being implemented for CCUS means that the operating companies will receive regular payments throughout the operational life of the CCUS networks to cover their expected decommissioning costs. The Government believes it is right to implement a regime where this funding is managed appropriately to ensure it remains in place to cover its intended purpose. This principle received broad support during consultation.

209. This clause gives the Secretary of State a power to make regulations regarding the financing and provision of security for decommissioning and legacy costs associated with CCUS transport and storage networks. These regulations may include provisions about (amongst other things): the estimation of decommissioning and legacy costs; and the establishment and management of decommissioning funds, as security for these costs. The clause also requires the Secretary of State to publish guidance on decommissioning and legacy cost estimates.

210. Clause 83 makes supplementary provision concerning the regulations made under section 82. It clarifies that these regulations may include provision for fees in respect of regulatory functions; information sharing; enforcement (including creation of criminal offences and civil sanctions).

Justification for the power

211. The Government's intention is that the decommissioning regime for carbon storage is funded as part of the regulated model for the CCUS transport and storage network.

212. As set out in proposals consulted on in 2021[1], there will be a decommissioning fund for each carbon storage site, and a proportion of an operator's allowed revenue would be accrued within this fund for decommissioning purposes. Decommissioning funds would be ring-fenced and protected in an insolvency scenario.

213. The consultation and the Government's subsequent response made clear the principles surrounding the establishment and maintenance of these decommissioning funds. The Department believes it is not appropriate to include these detailed provisions in the Bill, which are expected to include mechanisms for the accrual of funding and conditions of withdrawal. It is also intended that there would be guidance to support interpretation of the legislation regarding the decommissioning funds and help operators and other relevant parties better understand the requirements placed upon them.

Justification for the procedure

214. The requirements for a decommissioning fund will be technical in nature, and it is the Department's view that the primary legislation provides sufficient clarity concerning the intended function and operation of the decommissioning funds; and of supplementary matters such as accompanying fee charges. Therefore, it is the Department's view that that the negative procedure is appropriate. However, any regulations which create civil sanctions or offences, or delegate functions, will be subject to affirmative procedure.

Clauses 85 and 86 Change of use relief

Power conferred on: Secretary of State

Power exercised by: Administrative decision

Parliamentary Procedure: None

[1] https://www.gov.uk/government/consultations/carbon-capture-usage-and-storage-ccus-offshore-decommissioning-regime-for-co2-transport-and-storage

Context and Purpose

215. Certain oil and gas infrastructure has the potential to be re-used for CO_2 transport and storage purposes. To facilitate this, Secretary of State currently has a limited discretionary power to remove the decommissioning liability from previous oil and gas asset owners where assets are used for carbon storage demonstration models. This is referred to as 'Change of Use Relief' and is set out in Sections 30A and 30B of the Energy Act 2008.

216. This clause makes amendments to Sections 30A and 30B of the Energy Act 2008, broadening the scope of change of use relief; so that it is no longer limited to demonstration models.

217. Assets expected to be considered suitable for Change of Use Relief will remain unchanged for now and will include offshore installations and submarine pipelines.

Justification for the power

218. The decision of whether to designate a particular asset as eligible, subject to conditions, for Change of Use Relief, is one which properly sits with Secretary of State as a discretionary decision, as any decommissioning liability not met by operators would need to be publicly funded. An administrative decision is appropriate because a full technical and factual assessment will be needed in each individual case.

Clause 87 Change of use relief: provision of information and advice

Power conferred on: Secretary of State

Power exercised by: Statutory Instrument

Parliamentary Procedure: Negative

Context and Purpose

219. This power enables regulations to be made providing for information sharing where this is relevant to Change of Use Relief. Without information sharing the Secretary of State would be unable to verify information.

Justification for the power

220. The types of information sharing envisaged are set out in the clause. It would be inappropriate for primary legislation to address the issue in a more granular way, but it will be appropriate for regulations to do so in order to achieve greater legal certainty.

Justification for the procedure

221. The information sharing provision is uncontentious and similar to those seen in other statutory contexts, for which the negative procedure is also used.

Clause 88 Designation of Strategy and Policy Statement

Power conferred on: Secretary of State

Power exercised by: Designation

Parliamentary Procedure: Approval by resolution of each House of Parliament

Context and Purpose

222. The primary legislation establishes a clear and predictable framework for independent regulatory decision making in relation to CO_2 transport and storage, where regulatory decisions are transparent, fair, reasonable, and non-discriminatory, in line with the regulator's statutory duties.

223. Decisions taken by the economic regulator will impact how the CO_2 transport and storage networks are delivered. To ensure regulatory decision-making is consistent with broader developments in public policy, the Secretary of State should have the power to establish a framework of strategic direction and policy priorities which the economic regulator must have regard to in the conduct of its functions. This framework needs to be responsive to the evolving market for CCUS and policy development more broadly, while at the same time ensuring a stable and predictable regulatory framework in which the regulator, consumers and investors can take informed decisions.

224. This power to enable the Secretary of State to set strategic direction and policy priorities for CCUS is consistent with the approach in other economically regulated sectors. It is also aligned with commitments in the Government's established Principles for Economic Regulation[2], which sets out that government's role is in establishing the policy direction and articulating this, together with appropriate guidance, on a periodic basis, while leaving regulators to carry out their regulatory duties independently. These Principles are also clear that government should exercise restraint when making changes to this context, and in line with this the primary legislation sets out the circumstances, timeframes and process for reviewing and updating the strategic direction and policy priorities set out in the Statement.

Justification for the power

225. This power is necessary to ensure that the economic regulation of CO_2 transport and storage remains consistent with Government policy priorities. It provides for Secretary of State to provide strategic direction on a periodic basis through designating a SPS to which the economic regulator must have regard.

226. This power is appropriate to ensure that the regulator operates and takes decisions in a manner that is consistent with Government's policy priorities for CCUS and related policy areas. The economic regulator must have regard to the SPS when carrying out its regulatory functions and will be duty-bound to carry out its functions in the manner it considers is best calculated to further the delivery of the policy outcomes.

227. This power is important to ensure that the economic regulation of CO_2 transport and storage takes place in the context of energy and climate change policy more broadly which has the potential to evolve according to national and international priorities.

[2] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31623/11-795-principles-for-economic-regulation.pdf

228. The process of setting policy direction should not be more often than once a Parliament, to reduce the risks associated with frequent change to policy priorities and ensure a stable and predictable regulatory landscape for investors. However, there should be scope to review outside of this timeframe, if for example, a general election has taken place outside of this cycle, to ensure the SPS reflects the priorities of the government of the day. A review may result in a new Statement, revisions to the existing Statement or the conclusion that the existing Statement remains relevant and appropriate.

229. This is consistent with the approach in other regulated sectors. By way of examples, both the Water Industry Act 1991 and the Energy Act 2013 provide powers for a SPS to be designated.

Justification for the procedure

230. The SPS will be subject to appropriate consultation and Parliamentary scrutiny. Amending the primary legislation potentially every five years, or in certain circumstances potentially more frequently, to ensure the strategic policy framework for CCUS remains consistent with the development of energy, industrial and climate change policy, would take a considerable amount of Parliamentary time. To ensure sufficient Parliamentary oversight and assurance that public resources are being appropriately directed, a draft SPS would be laid before Parliament for approval by resolution of each House before the Secretary of State may designate it. Prior to laying a Statement before Parliament, the Secretary of State will consult on a draft and lay a report detailing the outcomes of this consultation alongside the draft Statement presented to both Houses. This follows a similar procedural precedent for designating a SPS under Part 5 of the Energy Act 2013 and is intended also to enable a single SPS which covers both energy and CCUS policy but relies on the powers in both the Energy Act 2013 and Energy Bill, if appropriate.

Clause 96 Access to infrastructure

Power conferred on: Secretary of State

Power exercised by: Statutory Instrument

Parliamentary Procedure: Affirmative

Context and Purpose

231. There is existing legislation in place governing access to CO_2 transport and storage infrastructure in the Storage of Carbon Dioxide (Access to Infrastructure) Regulations 2011 and the Storage of Carbon Dioxide (Access to Infrastructure) Regulations (Northern Ireland) 2015. These Regulations were developed to implement EU Carbon Capture and Storage Directive 2009/31/EC and therefore prior to the Government's current CCUS programme involving the establishment of an economic regulator and an economic regulatory regime. It is appropriate that the existing Regulations can be reviewed to ensure the overall legislative framework applying to CO_2 transport and storage activities is coherent.

232. The Regulations set detailed requirements on how user access to transport and storage networks should be managed, including any disputes arising. As the Regulations derive from an EU Directive, this delegated power ensures that Secretary of State has a clear and unambiguous authority to review, and update if needed, the existing Regulations.

233. Transport and storage network operators are expected to have an obligation, under the licence and associated network codes, to provide access to networks on non-discriminatory terms. The existing Regulations, on the other hand, envisage that parties seek to negotiate access in the absence of a regulated framework. As such, this potentially gives rise to two different regimes applying in parallel, with potentially conflicting outcomes.

Justification for the power

234. As the current Regulations were implemented using the powers in 2(2) European Communities Act 1972, a new delegated power is required to enable the Secretary of State to ensure access arrangements remain fit for purpose. Modifications to the Regulations would be to facilitate the process of how third-party access appeals could take place, rather than the substantive decision of whether they can take place.

Justification for the procedure

235. As this power may be used to amend processes established in existing Regulations and noting that the original Storage of Carbon Dioxide (Access to Infrastructure) Regulations amended primary legislation and created a criminal offence, the Department considers that the affirmative procedure is appropriate to ensure appropriate scrutiny of updated or new provisions.

Part 3 New Technology

Clauses 98-107 Low-carbon heat schemes

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Negative, but affirmative for regulations which:

a. *establish a low-carbon heat scheme;*
b. *extend the descriptions of persons in scope of a scheme or the heating appliances the scheme is designed to encourage;*
c. *impose or provide for the imposition of new financial or other penalties or increase the amount of existing financial penalties above inflation;*
d. *create an offence or increase the penalties for an existing offence;*
e. *confer new powers to enforce requirements imposed by a scheme; or*
f. *amend primary legislation.*

Context and Purpose

236. These clauses provide the Secretary of State with a power to make regulations to establish a scheme to encourage the sale and installation of low-carbon heating technologies, such as electric heat pumps, through the imposition of targets on certain market actors (clauses 98-100) and the creation of consequences for persons failing to achieve those targets (clause 101(4)). It also allows the regulations to stipulate means by which those persons covered by the scheme might meet the targets, other than through their own direct activities, in particular through the acquisition of scheme credits ('certificates') from other persons (clause 101(3)).

237. Market-based obligation mechanisms such as this have a strong track record both in the United Kingdom and elsewhere in correcting market failures and supporting the emergence of strategically important technologies, in particular for environmental or greenhouse gas emissions reduction purposes. They do so by reducing market uncertainty and improving the incentives to invest in developing key supply chains. Prominent examples include the Energy Company Obligation, the Renewables Obligation, the Renewable Transport Fuel Obligation, and the CO_2 Emissions Performance Standards for Vehicles.

238. In this case, the purpose is to support the growth of the market and supply chain in low-carbon heating appliances, in particular electric heat pumps. The Government, as well as advisors such as the Committee on Climate Change, have identified a growing heat pump market as critical for the decarbonisation of heat in buildings, which is responsible for around 25% of UK greenhouse gas emissions.

Justification for the power

239. Clauses 98, 99 and 100 enable the specification in regulations of the parties on whom low-carbon heating targets will be imposed, the levels of targets, the activities which will qualify towards meeting the targets, and the conditions under which they will do so.

240. The Department judges that this is appropriate as the technical nature of many of the provisions makes them inappropriate for inclusion in primary legislation. The need for the design and rules of a scheme to remain responsive to changing conditions in the market, and potentially to be adjusted at short notice, makes regulations a more appropriate legislative approach.

241. For instance, the weightings and incentives relating to a particular low-carbon technology (clause 100(5)) may need to be adjusted if considerably higher or lower deployment of that technology is seen than was anticipated or than is strategically desirable. Similarly, requirements governing qualifying installations may need to be adjusted to strengthen consumer protections or maintain high standards of products and installations, especially if harmful practices emerge in the market that need to be mitigated. Targets for an obligation period are likely also to need to be set or finalised relatively close to the start of that period, in order that they strike the best balance between driving additional action and not exceeding what the supply chain can achieve.

242. The parties in scope of an obligation (clause 99(1)) may also need to be adjusted from time to time in order, for instance, to ensure that any exclusions or de minimis conditions remain fit for purpose, balancing the effectiveness of the policy with avoiding undue regulatory burden, for example on small businesses. Similarly, the power would allow for the placing of targets on other classes of actors at a later date. This power could be used, for instance, if it is determined that the most effective way to support the development of the targeted net zero supply chains is to place complementary targets on several classes of market actors in the supply chain, rather than just one such class.

243. There is clear precedent for the detailed parameters of similar market-based mechanisms to be established and adjusted by regulations under delegated powers. For instance, the Renewable Transport Fuel Obligations (Energy Act 2004, s124ff), the Renewables Obligation (EA 1989 s32ff), the Energy Company Obligation (EA 1989 s41A).

244. Clauses 101, 102, 103 and 104 enable operational arrangements relating to the administration and enforcement of a scheme established under this power to be established and adjusted as necessary in regulations.

245. In particular, clause 101 allows regulations to establish and adjust arrangements for credit-trading between parties in scope of the scheme, for pooling together of targets and activities between parties, and for the consequences of missed targets, including payments in lieu. This aspect of the delegated power is important so that the tariff of such payments or other consequences for missed targets can remain responsive to the evolution of the market and to be adjusted at relatively short notice if necessary. Such tariffs need to strike a balance between encouraging compliance with the scheme and thus achievement of the intended outcome, and consideration of the impact of associated costs on both businesses and consumers. This is by nature dynamic and liable to change as wider costs and prices evolve.

246. Clause 103 enables regulations to make provision for the consequences for non-compliance with the requirements of the scheme. This included both civil penalties and, if necessary, criminal offences. The penalty for offences created by regulations made under the power is limited to a fine. This aspect of the delegated power is necessary so that the design of penalties and offences can keep pace, if necessary, with non-compliant conduct by parties in the market to protect the interests of compliant companies and of consumers.

Justification for the procedure

247. Regulations which establish a low-carbon heat scheme under this power will be subject to the affirmative procedure. Similarly, regulations which make substantive changes to the fundamental parameters of a scheme will be subject to the affirmative procedure, that is the parties in scope of targets or the heating appliances the scheme is designed to encourage, or the imposition or substantive increase of penalties for non-compliance.

248. The Department judges that it is appropriate that provisions of this nature are subject to this greater level of parliamentary scrutiny since in the former case they would be establishing or changing the fundamental parameters of a scheme and in the latter case would have potential (albeit limited) implications for the civil justice system.

249. It is appropriate that any provisions which create new criminal offences, if considered necessary to dissuade particularly egregious conduct to undermine a scheme, will be subject to the affirmative parliamentary procedure due to the likely interest of Parliament and the potential (albeit in likelihood limited) impact on the justice system. Similarly, if it were necessary that provisions make limited amendment to primary legislation, for instance to adjust the powers of a statutory body such as Ofgem to enable scheme enforcement (clause 102(6)), this would also be properly subject to the affirmative procedure, in line with convention.

250. Regulations that are more administrative in nature will be subject to the negative resolution procedure. This would include, for instance, adjustments to requirements for the keeping or provision of information, adjustments from year to year of targets, weightings and payments for missed targets, adjustments to consumer protection requirements, or adjustments to the rules and requirements governing certificate-trading between parties. The Department judges that the negative procedure resolution is appropriate in these instances where the fundamental elements of a scheme are not being altered.

Clause 109(1) Power to require gas transporters to take specified steps to ensure consumers are appropriately informed about hydrogen grid conversion trials

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Context and Purpose

251. The provision will facilitate the effective running of a village scale trial of using hydrogen for heat (“the trial”). Government is working with industry, regulators, and others to deliver a range of research, development, and testing projects to assess the feasibility, costs, and benefits of using 100% hydrogen for heating, as low carbon hydrogen could be a key option for decarbonising heat in buildings. This work includes a pioneering programme of community trials. As set out in the Prime Minister’s Ten Point Plan for a Green Industrial Revolution, the Government will support industry to deliver a neighbourhood trial (H100 Fife project) by 2023, a village scale trial by 2025 and a potential hydrogen heated town before the end of the decade. This work is intended to enable strategic decisions in 2026 on the role of hydrogen for heat decarbonisation and whether to proceed with a hydrogen heated town, as set out in the Hydrogen Strategy, the Heat and Buildings Strategy, and the Net Zero Strategy, all published in 2021.

252. The trial will be a grid conversion, meaning the existing local gas network will be converted from carrying natural gas to hydrogen in the chosen village trial area. Those who cannot or do not wish to take hydrogen will be offered an alternative energy source for heating and cooking. Final decisions on where the trial will take place are expected to be made in 2023.

253. Two clauses are included on the face of the Bill and will apply only to a hydrogen grid conversion trial. Clause 108 provides for expanded powers of entry for the purposes of the trial. This clause does not contain a delegated power; however, the following detail may provide useful context for the delegated powers covered below. Clause 108 will extend the existing powers of the Gas Distribution Network Operators (GDNs, referred to as gas transporters in the legislation), so that the GDN delivering the trial has clear grounds to enter private property for the purpose of a pre-trial survey, other preparation or conversion for the trial, and to disconnect the natural gas supply. This clause modifies the GA 1986 and builds on existing provisions within that Act. The Department envisages that these extended powers of entry will only be used as a last resort to undertake essential work (e.g. to ensure consumers' safety), where all other avenues have been exhausted. Clause 109 makes provisions in relation to consumer protections for the trial, by providing two delegated powers for the Secretary of State to make regulations.

254. The delegated power in subsection 1 of clause 109 enables the Secretary of State to make regulations by statutory instrument to require GDNs to take specified steps to ensure consumers in a trial location are appropriately informed about a hydrogen grid conversion trial being conducted in the trial location, and about the need for their premises to be disconnected from their natural gas supply for the purposes of the trial.

255. The power is required to ensure that consumers are informed about the trial appropriately. As such a trial has not been done before, consumers will not be familiar with what is involved. Their agreement and understanding are essential for successful delivery. This power aims to minimise the need for the GDNs to use their powers of entry by introducing additional requirements for the GDNs to inform consumers so they can make an informed choice about whether to participate. The power will also allow the department to set out any enforcement requirements for these regulations, which may include civil penalties but will not create any new criminal offences.

256. There has been broad support for the proposals. The Department held a public consultation, entitled `Hydrogen for heat: facilitating a grid conversion hydrogen heating trial' last year. Respondents to that, which included GDNs, trade associations, appliance manufacturers, think-tanks, charities, and others, overall agreed with the Department's proposals. The Department has used the responses received from the consultation to inform the consumer protection framework that has been developed to govern the trial. This includes the two delegated powers on consumer protections, within which the Department has incorporated suggestions from stakeholders, such as the power to require GDNs to take specified steps to inform consumers about the trial.

Justification for the power

257. Consumers in the trial area will need to be informed by GDNs about the trial and the need to move their connection away from natural gas. As outlined above, this is a delegated power to set out specified steps that GDNs must take to communicate this effectively to consumers. This will likely involve setting out the detail of the steps and a specific timeline in which the steps must happen in relation to different points in the trial. The Department

considers that it would not be appropriate or proportionate to include this level of administrative detail in primary legislation.

258. In addition, the novel nature of the trial and the early stage of planning also means it is important that government is able to establish the details of these regulations, after identifying the needs for the trial; the Department wishes to avoid committing GDNs to a rigid schedule at the time of the passage of the Bill that may not in practice be appropriate or in the best interests of consumers in the trial area. A delegated power enables government to introduce legislation and adjust the requirements as needed, in line with the development of the trial.

Justification for the procedure

259. The Department considers that the negative procedure is proportionate and appropriate. The purpose of the delegated powers is to expand the responsibilities of the GDNs, so the Department considers the consultation with the GDNs and their broad support for the proposed consumer protection framework reduces the need for enhanced Parliamentary scrutiny.

260. The delegated powers will apply to hydrogen grid conversion trials only, of which there is one currently planned. In practice, this means that the legislation will impact a very limited number of properties (around 1,500-2,000).

261. This delegated power, which requires GDNs to take specified steps to inform consumers about the trial and the need for them to be disconnected from natural gas, has a very narrow scope and purpose.

262. Due to the broad support garnered from the consultation exercise, the narrow nature of the power, and the power's applicability to a hydrogen grid conversion trial only, the Department believes that this provision will not require enhanced Parliamentary scrutiny, and as such that the negative procedure is appropriate.

Clause 109(4) to (5) Power to protect consumers and other persons affected by a grid trial

Power conferred on: The Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Negative

Context and purpose

263. The background of the hydrogen village trial has been outlined previously at paragraph 252.

264. The delegated power in subsection (4) enables the Secretary of State to make regulations in relation to consumer protections for the trial. These protections could be in relation to:
    a. making complaints about the GDN delivering the trial.
    b. the award of redress.
    c. requirements on the GDN to provide information to consumers or others affected by the trial.

d. ensuring consumers are not financially disadvantaged as a result of the trial.
e. ensuring the fair treatment of consumers before, during and after the trial.
f. ensuring the quality of products and works carried out on premises owned by consumers, and:
g. the enforcement of such provisions.

265. The Secretary of State's ability to make regulations relating to consumer protections is required to further strengthen the protections for consumers in the trial area. Consumers within the trial area will continue to be protected under the provisions in existing consumer legislation and the gas supply regulatory framework. Over and above this, the Department has a number of levers available. These include amending standard licence conditions and putting requirements within project funding agreements. This power will complement these non-legislative levers to ensure that where appropriate, consumers benefit from additional protections in legislation.

266. The power will also allow the department to set out any enforcement requirements for these regulations, which may include civil penalties but will not create any new criminal offences. If a penalty is created by this power or the power in subsection (1), provisions may also be made for a right to appeal.

Justification for the power

267. A hydrogen conversion trial of this kind has not taken place before in the UK and it is therefore vital that we have the right powers to ensure that consumers are appropriately protected. The trial is at a relatively early stage of development, including consumer engagement, and the Department is working with GDNs and the Authority to establish what will be needed in the next detailed design stage of the trial, including on consumer protections.

268. The detailed trial plans from the GDNs are due to be submitted in 2023 and will contain further detail on consumer protection requirements and proposals. These plans will be assessed by the Authority and the Department to determine which aspects of consumer protection will need to be delivered through regulations.

269. Consumers within the trial area will continue to be protected under the provisions in existing consumer legislation and the gas supply regulatory framework. However, these alone may not be enough to meet the Government's consumer protection framework (which was set out in our consultation and received broad support from stakeholders). A power to introduce regulations for consumer protections will therefore work alongside the existing protections, to provide additional legislation for consumers where needed.

270. These protections cannot be put on the face of the Bill as the exact consumer protections required will likely not be clear until the GDNs have completed further planning (for example individual property surveys in the trial location scheduled from mid-2022 onwards) and submitted their detailed proposals. The requirements may also be technical or administrative in nature. It is important that the power provides different options for the Department to introduce enforcement requirements that are appropriate for the regulations.

271. The power is required so that the Government can meet its commitment to consumer protections for this trial in a way that can be tailored to a specific trial location and proposal. A delegated power would also afford the Department the ability to respond promptly to any unforeseen consumer protection issues that may arise ahead of or during the trial.

Justification for the procedure

272. The Department proposes that the negative procedure applies to this provision. This is considered most proportionate and appropriate as the delegated powers will apply to hydrogen grid conversion trials only, of which there is only one planned currently. In practice, this means that the legislation will impact a very limited number of properties (around 1,500-2,000).

273. Due to the broad support for the Department's consumer protection proposals garnered from the consultation exercise, the narrow nature of the power, and the power's applicability to a hydrogen grid conversion trial only, the Department believes that this provision does not require enhanced Parliamentary scrutiny.

Part 4 Independent System Operator and Planner

Clause 116 Duty to have regard to the Strategy and Policy Statement

Power conferred on: Secretary of State

Power exercised by: Guidance (Strategy and Policy Statement)

Parliamentary Procedure: similar to affirmative procedure (see section 135(8) of the Energy Act 2013)

Context and Purpose

274. Clause 116 on the face of this Bill places a duty on the ISOP to have regard to the Strategy and Policy Statement (SPS). The SPS will state the strategic priorities, and other main considerations, of the government in formulating its energy policy for GB (strategic priorities), the particular outcomes to be achieved as a result of the implementation of that policy (policy outcomes), and the roles and responsibilities of persons who are involved in implementing that policy or who have other functions that are affected by it.

275. Provision for the Secretary of State to designate a Strategy and Policy Statement (SPS), exists under section 135(8) of the Energy Act 2013, to be 'approved by a resolution of each House of Parliament before the Secretary of State may designate it as the strategy and policy statement'.

276. To date, no SPS has been designated, but the intention is to designate one soon. The intention that the ISOP should, like Ofgem, be subject to a duty to have regard to the strategic priorities in the SPS once one is designated is in clause 116(1). Subsections (2) and (3) provide for the ISOP to indicate to the Secretary of State where it concludes that a policy outcome set out in the SPS is not realistically achievable. Subsections (5) to (10) make consequential amendments to Part 5 of the 2013 Act.

Justification for the power

277. Legislation gives the Secretary of State and the Authority powers in relation to the energy sector, many of which are not subject to Parliamentary control. They are also required (notably by s.3A EA 1989 and s.4AA GA 1986) to have regard to a wide range of considerations relevant to energy policy decisions. The point of the SPS is to ensure some coherence of emphasis, for example as between the sometimes-conflicting objectives that legislation requires them to pursue. By incorporating a mechanism for Parliamentary control over the SPS process (see below), the overall effect should be to increase the democratic accountability of energy sector regulation at a high level, without unduly politicising the day-to-day exercise of economic regulatory powers.

278. The power to designate an SPS (although not yet used) is not new. The ISOP's functions will cover a broad range of areas and its role has a strong strategic focus. Its general duties (clauses 114 and 115 are drafted in terms that strongly parallel the principal objectives and general duties of the Authority under s.3A EA 1989 and s.4AA GA 1986. Accordingly, although the ISOP is not a regulator, it is considered appropriate that it should also be subject to the same requirements as regards the SPS strategic priorities and policy outcomes as the Authority.

Justification for the procedure

279. There are two ways that the ISOP would become subject to the SPS. The Secretary of State would include it either in the first (or otherwise a completely new) SPS, or in amendments to an existing SPS. The designation of an ISOP is made a specific trigger for reviewing the existing SPS by subsection (9) of this clause 116. In either case, the designation of the new / amended SPS must be approved by both Houses (see sections 134 and 135 of the 2013 Act), after a statutory consultation process, before the Secretary of State can designate it. This gives a high degree of Parliamentary control, and Parliamentary scrutiny of the new or revised SPS will take place with the benefit of the output of the statutory consultation process.

Clause 125 and Schedule 6, paragraph 8(5) Transfer scheme (compensation)

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Context and Purpose

280. As part of the creation of the ISOP various functions currently carried out by National Grid and its subsidiaries will be transferred to the ISOP. This will also require property currently owned by National Grid, or other energy market participants, to move into the ownership of the ISOP. The Bill includes powers for these transfers to be effected by transfer schemes made by the Secretary of State. The Bill also specifies in Schedule 8 that the transferor may be compensated for such transfer of property.

281. Paragraph 8 of Schedule 6 sets out that, in the absence of an agreement on compensation between the Secretary of State and the transferor, the parties must appoint an independent valuer to determine the compensation, and in absence of an agreement on valuer, the Secretary of State can appoint a valuer on behalf of both parties. There are a number of aspects of this determination which the Secretary of State may provide for in regulations. These are set out at paragraph 8(5) and include matters such as the procedure to be followed by the valuer, and the matters to which the valuer must have regard, or assumptions which the valuer must apply.

Justification for the power

282. The matters which will make up the content of the regulations are technical and procedural; in that they determine the detailed rules for how the valuer will carry out its task. These matters will need to be discussed with potential valuers to ensure that the regulations are fit for purpose. The requirements might also change over time, and to adapt according to what the normal business practise is amongst providers of independent valuation services. Allowing the Secretary of State to update these requirements over time will ensure that the valuation procedure remains fair, that it continues to provide good value for many for government, and that it properly reflects how valuers carry out their services.

Justification for the procedure

283. The Government considers that the negative resolution procedure is appropriate, given this regulation will be the produce of extensive due diligence review and sensitive commercial negotiation requiring detailed technical input. This due diligence process is

expected to be significant in volume and market sensitive in nature. The Government will not be in a position to share the third-party information used in the development of these regulations.

Clause 125 and Schedule 6, paragraph 9(1) Transfer Scheme (Taxation)

Power conferred on: HMT

Power exercised by: Regulations

Parliamentary Procedure: Negative

Context and Purpose

284. As part of the creation of the ISOP various functions currently carried out by National Grid and its subsidiaries will be transferred to the ISOP. This will also require property currently owned by National Grid, or other energy market participants, to move into the ownership of the ISOP. The Bill includes powers for these transfers to be effected by transfer schemes made by the Secretary of State. Such transfer schemes may result in tax liabilities on the Secretary of State (as potential transferee under the scheme) or on other parties to the transfer scheme, or on those who are otherwise affected by the transfer scheme. It may be appropriate to vary how such tax liabilities apply, to ensure value for money for government, allow the most efficient structure to be adopted for the transfer, and protect against inadvertent imposition of tax liabilities on persons who are not best placed to take on the burden of those liabilities.

Justification for the power

285. The variation of how relevant tax applies will need to be adapted to the actual scheme or schemes which may be made under the transfer scheme powers set out in the Bill. It would not be appropriate to put the tax variation on the face of the Bill before it has become apparent how the transfers are likely to be structured and what tax issues may arise. It may also be necessary for the Treasury to amend the variation over time.

286. It is not uncommon for variations to tax liabilities to be drafted by way of power for the Treasury, as here. Examples include paragraph 4 of Schedule 5 to the Investigatory Powers Act 2016 and section 25 Public Bodies Act 2011.

Justification for the procedure

287. The Government considers that the negative resolution procedure is appropriate, given that the Treasury will be well placed to determine the technical details and policy drivers of what taxes should apply to the relevant transfers. The resulting SI would most likely be technical and focused on internal government administration and is unlikely to justify significant parliamentary scrutiny.

Clause 125 and Schedule 6, paragraph 14(2) Transfer Scheme (Reimbursement and compensation: further provisions)

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Context and Purpose

288. This power sits within a wider Schedule which is concerned with the making of transfer schemes by the Secretary of State. The Schedule's primary purpose is to ensure that the property, rights and liabilities currently owned by the National Grid group that the ISOP needs in order to carry out its functions are transferred to the ISOP, and that the ISOP is owned by the Secretary of State. In order to ensure that the transfer is a smooth one, the transfer scheme is able to do things that an ordinary commercial agreement (e.g. between National Grid and the Secretary of State) would not be able to achieve. For example, it can override agreements with third parties that might otherwise prevent or restrict the transfer: see paragraphs 3(2) and 6(1)(e).

289. It is therefore possible that third parties (other than National Grid, but possibly including them as well) may suffer loss or damage in consequence of the Secretary of State's exercise of the transfer scheme powers. Where this is the case, it is appropriate that they should be compensated.

Justification for the power

290. It would not be appropriate for these third parties to receive compensation under the transfer scheme, since they will not be transferors under it. The third-party compensation provision needs to be freestanding rather than part of the transfer scheme itself. However, merely stating in the Schedule that the Secretary of State may compensate third parties would not tell them how they should go about notifying the Secretary of State of their claims for compensation; nor would it establish any legal framework for processing such claims.

291. If government already had a clear picture of the nature and scope of the claims that third parties are likely to make, it might have been in a position to include in the Schedule provision about the making and processing of such claims that was tailored to their likely volume, nature and extent. However, this is not the case. Even after the Bill is published, it will be some time before the due diligence process in relation to the transfers likely to be effected by the transfer scheme powers progresses to the stage where the information necessary to legislate suitably for the third party compensation process is available.

292. In these circumstances, taking a power to put a suitable procedural framework in place using secondary legislation seems the best approach. It makes it possible for a clear legal framework for the compensation process to be in place by the time it is needed, and for that framework to have been tailored to the needs of third parties when more information is available about what these are likely to be. Since the proposed regulations will make essentially procedural provision about the consequences of a statutory transfer scheme, their subject matter is not inherently inappropriate for delegated legislation.

Justification for the procedure

293. There is only one real point of policy here: that third parties should receive compensation. That principle is arguably in place as a matter of general law in any event, but the inclusion of the regulation-making power reinforces or highlights it. Determining the contents of the regulations will be a matter of practicalities rather than policy. Given the pressures on Parliamentary time, scrutinising them under the affirmative procedure would be a poor use of either House's resources, and the negative procedure seems appropriate. For an example of regulations relating to compensation being subject to the negative procedure, in potentially considerably more sensitive circumstances, see s.37 and s.64(3)(3) Commonhold and Leasehold Reform Act 2002.

Clause 126 and Schedule 7, paragraph 2(1) Pensions (participation in qualifying pension schemes)

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Context and Purpose

294. As part of the transfer of functions from National Grid to the ISOP a number of employees will also transfer to the ISOP. As part of this transfer it is important to separate the pension arrangements of the ISOP and National Grid (including determining how the historic liabilities should be apportioned) whilst ensuring that employees' accrued pensions benefits are not adversely impacted (for example, by the loss of the employees' final salary link) and that future service benefits are broadly the same immediately after the transfer. In addition, it is important that the pensions arrangements of such employees are not unnecessarily disturbed by needing to set up new pension schemes or by requiring any third-party consents.

295. Powers are therefore required to allow the Secretary of State to make provision to enable the ISOP and associates of ISOP to participate in pensions schemes which are currently in existence for the National Grid transferor entities. In addition, and in order to ensure durable pensions arrangements which take into account both the requirements of the new ISOP and also the pension benefits of the employees and former employees remaining the responsibility of National Grid, powers are required to allow the Secretary of State to make provision for the division of the relevant pensions schemes into different sections, for participation of existing and new employers in those different sections, for the allocation of assets and rights between those sections (and for the valuation of assets and rights in that context), and the transfer of assets and rights from the newly created sections to another pension scheme.

Justification for the power

296. The pensions and employment arrangements regarding the creation of ISOP can only be properly determined as part of the overall structuring of the transfer scheme and cannot be determined in advance. Provision will need to be made taking into account the detail of the pension schemes themselves, and the decisions on how employees and property will transfer to the ISOP as well as how the historic pension liabilities will be apportioned between ISOP and National Grid. The detailed provision of these matters can only be

made once the due diligence process associated with the transfer scheme has taken place. This due diligence can only take place once powers within the Bill are secured as government can only rely on voluntarily disclosure by the relevant parties otherwise prior to this. Further, any speculative information gathering undertaken at this stage would become out of date and therefore of limited use. Consequently, this process must wait and be carried out once legislation has passed. The legislation will provide (at paragraph 4(2)) that in exercising the powers under paragraph 2, the Secretary of State must ensure that relevant employees are, in all material respects, no worse off in terms of their pensions provision immediately after the exercise of the power. Before the power is exercised, the relevant pension scheme trustees and principal employers must be consulted. The power in section 96 Transport Act 2000 is in some ways a precedent for taking this kind of delegated power.

Justification for the procedure

297. The Government considers that the negative resolution procedure is appropriate, given that the regulations have the potential to be highly technical requiring actuarial expertise once the full evidence is available. There is potential for this evidence to include granular information on pensions, access to which may need to be necessarily restricted. The regulations will be, in essence, the technical working out of the key principle of protecting existing scheme member rights set out in primary legislation.

Clause 126 and Schedule 7, paragraph 3(1) Pensions (amendment of qualifying schemes)

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Context and Purpose

298. As part of the transfer of functions from National Grid to the ISOP a number of employees will also transfer to the ISOP. As part of this transfer it is important to separate the pension arrangements of the ISOP and National Grid (including determining how the historic pensions liabilities should be apportioned) whilst ensuring that employees' accrued pensions benefits are not adversely impacted (for example, by the loss of the employees' final salary link) and that future service benefits are broadly the same immediately after the transfer. In addition, it is important that the pensions arrangements of such employees are not unnecessarily disturbed by needing to set up new pension schemes or by requiring any third-party consents.

299. The Bill contains powers (as described above '*Pensions (participation in qualifying schemes)*') for the Secretary of State to make provision to enable the ISOP to participate in the current National Grid pensions schemes and to sectionalise the existing pension schemes thereby separating the pension arrangements of the ISOP and National Grid.

300. The Bill also includes this power, for the Secretary of state to, by regulation, make amendments to certain existing pension schemes as they consider appropriate. This can include provisions regarding determining the amount of benefits payable by reference to pensionable service (sub-paragraph (2)).

Justification for the power

301. The pensions and employment arrangements regarding the creation of ISOP can only be properly determined as part of the overall structuring of the transfer scheme and cannot be determined in advance. Provision will need to be made taking into account the detail of the pension schemes themselves, and the decisions on how employees and property will transfer to the ISOP as well as how the historic pension liabilities will be apportioned between ISOP and National Grid. The legislation will provide (at paragraph 4(2)) that in exercising the powers under paragraph 3, the Secretary of State must ensure that relevant employees are, in all material respects, no worse off in terms of their pensions provision immediately after the exercise of the power.

Justification for the procedure

302. The Government considers that the negative resolution procedure is appropriate, given that it will be best placed to determine, once the full evidence is available to it, how the pension schemes ought to be separated and managed as part of the creation of the ISOP.

Part 5 Governance of Gas and Electricity Industry Codes

Clauses 133 and 135 and Schedule 9(1) Lists of relevant documents, central systems, responsible bodies and contracts

Power conferred on: Secretary of State

Power exercised by: Notice

Parliamentary Procedure: N/A

Context and Purpose

303. There is no existing definition which clearly identifies the codes and central systems that are intended to be included within the scope of this new governance framework. The Secretary of State will therefore need the power to create and amend lists of "designated" codes and central systems (along with their responsible bodies). The purpose of these lists will be to identify those designated documents, systems and persons listed as within the scope of the enduring functions conferred on the GEMA or the Secretary of State in Part 5 of the Bill. These functions include the ability to select and licence a code manager for a given code; the ability to make direct code modifications; the power to direct central system delivery bodies; the duty to publish an annual strategic direction document; and the power to request information.

304. As a complement to this power, the Secretary of State will also need the ability to create and amend lists of "qualifying" codes, central systems (along with their responsible bodies) and contracts. These lists will operate in the same manner as set out above, but their purpose will be to identify those qualifying documents, systems and persons listed as within the scope of the transitionary powers conferred on the GEMA or the Secretary of State in Schedules 9 – 11. These powers will include the ability to modify codes, licences and contracts for the purposes of implementing code reform; the creation of a code scheme; the creation of transfer schemes; the power to amend pension schemes; compensation-related provisions; and the power to require information to be provided. The power to create lists of "qualifying" documents, contracts and systems will therefore expire once the transitionary period has been completed for each code, with a longstop date of 7 years from Royal Assent of the Bill.

305. Designating documents: The Secretary of State's power to designate documents will be limited to "a document maintained in accordance with the conditions of a licence under the EA 1989 or the GA 1986". The term "document" is used rather than code because not all of the documents that we intend to list call themselves "codes". At least one is itself an agreement, others are considered to be standards, and a third group are not themselves contracts but are given effect through framework agreements.

306. It is intended that the following industry documents should be designated in the first instance, either as currently constituted or in a consolidated form, all of which have been announced publicly following consultation:
    a. Balancing and Settlement Code (BSC)
    b. Connection and Use of System Code (CUSC)
    c. Distribution Connection and Use of System Agreement (DCUSA)
    d. Distribution Code
    e. Grid Code
    f. Retail Energy Code (REC)

g. Smart Energy Code (SEC)
h. SO-TO Code (STC)
i. Uniform Network Code (UNC)
j. Independent Gas Transporter UNC
k. Security and Quality of Supply Standard (SQSS)

307. Designating central systems and responsible bodies: Separately to the designation of codes, the Secretary of State will also have a power to designate which central systems are in scope. A central system is an IT system, the principal function of which is to support, process, transmit and/or store data in connection with the operation of a code. The purpose of designating central systems is to enable the GEMA to direct a person who is responsible for controlling or operating a designated central system (the responsible body), who the Secretary of State will also be empowered to identify, using the new direction power set out in clause 145.

308. It is intended that the following central systems and responsible bodies should be designated in the first instance, all of which have been announced publicly following consultation:
    a. The central system underpinning the gas industry arrangements (including those contained in the Uniform Network Code and the Independent Gas Transporter UNC) that is currently operated by Xoserve;
    b. the central system underpinning the electricity industry balancing and settlement arrangements (contained in the Balancing and Settlement Code) that is currently operated by Elexon;
    c. the central system underpinning the rules and requirements for service delivery for smart metering that are under the Smart Energy Code, that is currently operated by the Data Communications Company; and
    d. the central system which provides the Data Transfer Service, which carries data (as required by the Retail Energy Code and the BSC) that is currently operated by Electralink.

309. Amendment to designations: The Secretary of State will have the power to add and remove items from these lists, but only after the GEMA has consulted on the relevant change and put forward a recommendation to the Secretary of State. Once the GEMA has taken those steps, the Secretary of State has a discretion whether to make the amendment (although we anticipate it is highly likely that the Secretary of State would always make the amendment following a GEMA recommendation).

310. Updating the identity of the body that is listed as being responsible for operating or procuring the operation of the central system (e.g., if a new person is contracted to carry out those activities) will not require consultation, but it will still require the GEMA to deliver an appropriate recommendation to the Secretary of State.

311. Designating “qualifying” documents, systems and contracts: The Secretary of State’s power to create and amend lists of “qualifying” documents, central systems and contracts will apply in the same way as set out above. The main difference is that these lists will become redundant once the transition period has been completed and can also include contracts, such as the framework agreements that give contractual force to a code, which may need to be amended as part of the transition.

Justification for the power

312. The ability for the Secretary of State to create lists of codes and central systems (along with their delivery bodies) is an essential feature of the legislative framework for energy code governance reform. Without these lists, it would not be possible to define the scope of the enduring and transitionary powers conferred on the GEMA and the Secretary of State by the Bill with the necessary level of precision.

313. The need for sufficient scope is also crucial in this context because the contents of these lists are expected to change over time. For example, the GEMA may consolidate the 11 existing codes into a smaller number of successor codes as part of this reform process, with all decisions regarding the exact number of codes (and their names) subject to future consultation. It is also possible that new codes may need to be created in future, either because a new code is needed for an existing class of licensee or because changes in the market, such as in relation to hydrogen, require the creation of a new class of licence with a code of its own. Including a list of codes in primary legislation would make it difficult to achieve either of these outcomes, which would undermine the long-term resilience of the new governance arrangements.

314. Similarly, there is no fixed limit to the number of central systems that may be needed to support the operation of the codes, particularly since the energy market and the codes themselves are expected to become increasingly digitised over time. A fifth central system, the Central Switching Service, is already expected to be brought into scope once it has become operational and others are likely to be developed in future.

315. The new framework will also need to be able to accommodate changes to the identities of central system delivery bodies (i.e., the person who is contracted to run the underlying IT system). If this is not possible, then there is a risk that the GEMA's new power to issue and enforce directions against central system delivery bodies would become ineffective if the relevant person were ever to change.

Justification for the procedure

316. The Government considers that the ability for the Secretary of State to create and amend lists by notice is appropriate. The intended content of the initial set of lists has already been subject to public consultation and announced in the Government response to that consultation, subject to Parliament and passage of the Bill. Any changes to the contents of these lists in future would similarly be subject to public consultation and require receipt of a recommendation from the GEMA. The Secretary of State will also be required to publish the contents of these notices in a way that would be likely to bring any future changes to the attention of those likely to be affected. The Department believes that this is sufficient assurance and that listing and debating the intended contents of these lists in the Bill itself is unlikely to be an effective use of parliamentary time.

Clause 138 Regulations about selection methods of code managers

Power conferred on: Secretary of State

Power exercised by: Regulation

Parliamentary Procedure: Negative

Context and Purpose

317. This clause will allow the Secretary of State to make regulations that set conditions and constraints under which the GEMA can determine which code manager selection method to use, either competitive or non-competitive. In practice, the GEMA will always make the decision about code manager selection, including which process to use.

318. There may be cases in which non-competitive options are preferable to running a competitive tender, such as where there is only one viable candidate to become the code manager. It may also be necessary to make provision to ensure that any conflict-of-interest issues are dealt with appropriately, including potential exclusion of parties from competing or being directly selected. These regulations will also provide legal certainty to the GEMA in making these decisions and communicate to stakeholders how these decisions will be made, which will create greater transparency and provide better objectivity in decision-making.

319. These regulations may also set out eligibility criteria to be met by code managers, or ongoing requirements that they must meet. In addition, it is intended that the regulations will also detail conditions for a second selection method to be used if the first chosen method fails. For example, if the GEMA has carried out (or tried to carry out) a competitive process and no code manager has been identified, the regulations will set out next steps for a switch to a non-competitive method of appointment.

Justification for the power

320. The alternative to regulations would be to set out all the necessary details in the Bill itself, including which criteria would need to be met for each selection route to be used. Without an established code manager market, it is currently difficult to determine which parties would put themselves forward for competitive tendering, and where there might be conflicts of interest. Similarly, it is currently difficult to predict the appropriate knowledge base and expertise of the candidates for each code manager licence, and whether directly selecting one of them would be more efficient. Therefore, it is highly likely that anything drafted now would be inaccurate and need large amounts of amendment.

321. Managing these conditions by regulation will allow them to be frequently updated and adapt to the requirements and specific circumstances encountered in the code manager market. As each code and the code manager market continues to develop, it is important that the recommended selection option for each code is not fixed, allowing future benefits that might not have been available when the original code manager was selected.

322. The selection of code managers is likely to be of high interest to code parties, as well as any entity looking to become a code manager. Therefore, to avoid any potential challenge regarding the selection method on a continued basis, it is important that conditions are kept up to date, particularly regarding developments in the selection of the first few code managers.

Justification for the procedure

323. The Government considers that the negative resolution procedure is appropriate. The details of the selection method regulations are likely to be technical in nature and will deal with issues, such as conflict of interest, which are unlikely to be controversial. There is also sufficient detail regarding the intended purpose of the regulations set out on the face

of the Bill, which is likely to be of more interest to Parliament than the fine details of how that purpose will be implemented.

Clause 139 Regulations for code manager selection (non-competitive)

Power conferred on: Secretary of State

Power exercised by: Regulation

Parliamentary Procedure: Negative

Context and Purpose

324. The implementation of the new code governance framework will require the replacement of the existing combination of code administrators and code panels with a new class of code manager. These new code managers will need to be selected and licensed by the GEMA. This clause will grant the Secretary of State the power to make regulations providing for the selection of a code manager by the GEMA (other than by competitive tender).

325. These regulations will provide for different methods of non-competitive selection of a code manager by the GEMA and set out any processes that apply in relation to non-competitive selections. Potential non-competitive selection options include (without limitation) the ability for the GEMA to create a shell company, appoint the board and licence that company; or direct selection of an existing entity (e.g., the Independent System Operator and Planner, an existing licensee, an existing code administrator, etc.). These regulations will also make provision for a backstop option in the event that an existing code manager is unable to fulfil its licence obligations, which will minimise the risk of any disruption to the code modification process and other elements of code governance.

326. Regulations under this section must also make provision to ensure that there will be no conflict of interest (for example with existing commercial interests) on the part of the person selected to be code manager.

Justification for the power

327. The main justification for taking this power is that directly selecting a code manager may be the most desirable outcome for some of the energy codes. All 11 of these codes have evolved to meet the unique demands of a discrete sector of the energy market and have different internal governance processes. As a result, some of them may benefit from the potential efficiencies that a competitive code manager selection process could bring, whereas others might benefit from some form of direct selection process instead. It is also difficult to guarantee the long-term viability of the code manager market so it will be important for the GEMA to have a range of potential selection options to choose from.

328. The alternative to granting the Secretary of State the power to draft code manager selection regulations would be to set out all of the necessary details in the Bill itself. Although this would be possible at a high-level, the level of detail required to establish precisely how each of the direct selection options would work in practice would be impractical in primary legislation. It would also remove the ability for the Secretary of State to refine the various selection options over time or to add entirely new selection options if that is deemed to be appropriate, which would make the new governance framework less flexible than intended. Similarly, it will be useful to have the scope to refine the planned

'code manager of last resort' policy option over time to ensure that it is able to serve its intended purpose.

Justification for the procedure

329. The regulations will be highly technical in nature, with a focus on describing the different types of direct selection option (e.g., appointment of an existing licensee, creation of a shell company, etc.) and any constraints on their use. Debating these in detail is unlikely to be an effective use of parliamentary time, particularly since they will all be in effect variations of a 'direct selection' route that is already set out on the face of the Bill and will therefore be subject to Parliamentary scrutiny during passage of the Bill. The Government therefore believes that negative procedure would be the most appropriate mechanism to address the fine details, subject to Parliamentary scrutiny of the proposed primary legislation.

Clause 140 Regulations for code manager selection (competitive)

Power conferred on: The GEMA with Secretary of State consent

Power exercised by: Regulation

Parliamentary Procedure: Negative

Context and Purpose

330. The implementation of the new code governance framework will require the replacement of the existing combination of code administrators and code panels with a new class of code manager. These new code managers will need to be selected and licensed by the GEMA. This clause will grant the GEMA the power to make regulations for the purposes of conducting a tender to select a code manager, subject in practice to any conditions or restrictions imposed by the Secretary of State by regulation (see below).

Justification for the power

331. The GEMA already have the power to create tender regulations in other contexts, such as in relation to offshore transmission licences (see section 6C of the Energy Act 1989), so there is precedent for granting them this kind of power. They will also be responsible for running individual tenders, either directly or through third-party contractors, so it was deemed to be desirable from an efficiency standpoint to have the GEMA be responsible for drafting the regulations rather than building tender into the range of selection options available to the Secretary of State.

332. The alternative to granting the GEMA the power to draft tender regulations would be to set out all of the necessary detail in the Bill itself. Although this would be possible, the level of detail required to establish a viable tender process would make it inadvisable. It will also be important for the GEMA to have the ability to review and adapt its code manager tender process over time, both to ensure that it produces the best outcome for consumers and to reflect any future developments in the code manager market (which will only come into existence upon the passage of the Bill). Setting out anything more than the high-level details on code manager tendering in the Bill would be unnecessarily restrictive

Justification for the procedure

333. The Government considers that the negative resolution procedure is appropriate given the highly technical nature of tender regulations. There is also precedent for the use of the negative procedure in this context, which has been used for the GEMA to create other tender regulations in the past.

Clause 141 Regulations for content of strategic direction

Power conferred on: Secretary of State

Power exercised by: Regulation

Parliamentary Procedure: Negative

Context and Purpose

334. This clause provides the Secretary of State with the power to create regulations that establish what matters the GEMA must cover in its annual strategic direction document for the energy codes. These regulations will enable the Secretary of State to supplement the list of required content set out at clause 141(3)(a), which states that the GEMA must publish a strategic assessment of government policies, and of developments relating to the energy sector, that it considers will or may require the making of code modifications. This power will enable the Secretary of State to ensure that the strategic direction document fulfils its intended purpose over time by making it possible to update the matters that the GEMA must consider.

335. The publication of an annual strategic direction document by the GEMA is intended to fulfil three core purposes: it will serve as a framework by code managers when they develop their annual delivery plans; it will provide interested parties and government with information regarding pending code changes; and it will be the primary vehicle by which government policy priorities will be factored into the future development of the energy codes.

336. Examples of potential additional content that the Secretary of State may ask the GEMA to consider when preparing and drafting the strategic direction document are set out below:

a. Strategy and Policy Statement (SPS): The Energy Act 2013 allows the Secretary of State to designate a SPS that sets out the government's strategic priorities and desired policy outcomes, which the GEMA must have regard to when carrying out its regulatory functions. If any code-relevant content is contained in a designated SPS, then it may be desirable for the GEMA to set that content out in its strategic direction document and explain how it thinks the codes should be modified as a result (if at all).

b. Wider developments: The energy sector is undergoing a period of rapid change that is likely to continue into the foreseeable future. To supplement the GEMA's overarching obligation to report on matters relating to changes in government policy or developments in the energy sector, it may also be desirable for the Secretary of State to identify specific policies or developments that it would like the GEMA to consider when preparing and publishing its report.

c. Advice from the ISOP: The GEMA will be required by clause 141(4) to have regard to any advice from the Independent System Operator and Planner (ISOP) when preparing its strategic direction document. Accordingly, it may be desirable for the GEMA to set out a summary of this advice on an annual basis, along with any actions that they think should be taken as a result.

Justification for the power

337. One alternative to taking a delegated power would be to set out a detailed description of all required document contents in the Bill itself. However, doing so would make it difficult for the Secretary of State to specify these requirements to account for any changes in government priorities over time, whether due to the introduction of a new policy or a wider shift in the state of the energy sector. Another alternative would be to rely wholly on the SPS, which the GEMA will also need to have regard to when carrying out its functions, but its quinquennial publication cycle would make it less well-suited to addressing areas of rapid change. The SPS is also expected to be a relatively high-level statement so it may not be appropriate to rely on its content to specify other matters that will fall within the scope of the strategic direction.

338. The ability for the Secretary of State to create regulations specifying what kind of content the strategic direction must contain will also ensure that an appropriate, and proportionate, line of accountability is established between BEIS and the GEMA. Although all decisions regarding what details to include in the document will be left to the discretion of the GEMA, the ability for the Secretary of State to update the required content will help to ensure that the strategic direction continues to fulfil its intended purpose over time. The GEMA will also be under an obligation to consult on the contents of the strategic direction prior to its publication, which will ensure that the document as a whole is subject to an appropriate level of scrutiny.

Justification for the procedure

339. The Government considers that the negative resolution procedure is appropriate given that the breadth of the power is relatively narrow, in the sense that it will only allow government to set out minimum requirements for the GEMA rather than limiting what they are able to include in the strategic direction document. Given the technical nature of the codes more generally, and the fact that this delegated power deals with the minutiae of document content, following an affirmative procedure is unlikely to be an effective use of parliamentary time.

340. The annual strategic direction statement will also be publicly consulted on prior to publication, which will give both members of Parliament and the wider public the opportunity to scrutinise (and influence) its content moving forward.

Clause 142 Regulations for transfer of strategic direction duty to the ISOP

Power conferred on: Secretary of State

Power exercised by: Regulation

Parliamentary Procedure: Affirmative (Henry VIII Power)

Context and Purpose

341. This clause provides the Secretary of State with the power to transfer the GEMA's new strategic direction setting duty to the ISOP. The GEMA will have a duty in primary legislation to publish a document annually that sets out a strategic direction for the evolution of the energy codes.

342. Given its advisory capacity and overview of the energy systems, the ISOP may be better placed going forward to prepare such a document and take a view on what code modifications may be appropriate. The ISOP will not, however, be able to take on this role from when it is first set up (nor has a policy decision been taken that the ISOP should in fact assume this role) so initially the duty will sit with the GEMA.

343. The Secretary of State will be required to consult with the GEMA, the ISOP and any other persons whose interests are likely to be affected before transferring the duty. Where the duty has been transferred to the ISOP, the obligations will be the same as those previously held by the GEMA, with the exception that:
    a. The duty to consider advice from the ISOP will not apply; and
    b. The GEMA will be included in the list of parties that the ISOP would be required to provide a copy of the strategic direction statement to.

344. This is a single-use, specific power. Therefore, once transferred to the ISOP, the strategic direction duty cannot be transferred back to the GEMA under the same power. The only use of these regulations will be to make amendments to the newly set out strategic direction clause so its scope will be limited solely to facilitating the transfer described on the face of the Bill, rather than anything broader.

Justification for the power

345. It may in the future be deemed that the ISOP is better placed to hold the strategic direction duty. This may fit better with the ISOP's other strategic planning duties and could allow a wider system expertise to be brought to the codes strategy. If it is identified that the strategic direction duty should best sit with the ISOP, this transfer would be best enacted as quickly as possible, in order to keep the energy system agile and responsive.

346. In order to achieve this as quickly and effectively as possible, this transfer should be carried out through secondary legislation. This will ensure that the energy system continues to receive strategic direction from the entity that is best placed to guide the evolution of the codes, whether the GEMA or the ISOP.

347. The clauses have been drafted to make the regulations narrow and specific to requirements. It will therefore not be possible to use the regulations for any purpose other than the intended transfer of the strategic directions setting duty, with the necessary amendments themselves already listed on the face of the Bill. The clauses also place an explicit requirement on the Secretary of State to consult the GEMA, the ISOP and any other persons whose interests are likely to be affected before making regulations under this section, which will ensure that a broad range of perspectives are considered prior to deciding whether to ask Parliament to approve the transfer.

Justification for the procedure

348. The Government considers that the affirmative procedure would be most appropriate given the implications of the transfer in overriding clauses of the initial Bill. This is a Henry VIII power in that it allows the Secretary of State to override primary legislation, albeit in a very limited way as the only amendment that can be made is to clause 141 of the Bill, subject to the conditions at clause 142. Since the transfer can only be done once under this power and would represent a significant change within the energy system, Parliament should be given sufficient opportunity to scrutinise and debate it at point of use. While it will follow a public consultation, the affirmative procedure will allow a final level of assurance to the details of the legislation.

Clause 143(7) Regulations related to modification of designated documents by GEMA

Power conferred on: Secretary of State

Power exercised by: Regulation

Parliamentary Procedure: Negative

Context and Purpose

349. This clause provides the Secretary of State with the power to create regulations that further define the specified circumstances in which the GEMA is allowed to make direct modifications to the contents of designated documents, as well as to set out any other requirements or conditions on the use of this power beyond those already set out on the face of the Bill.

350. The energy codes are documents that evolve in line with the energy market and changing practices and must be modified on a regular basis. The new code governance framework will make licensed code managers responsible for facilitating the necessary code modification process, which is how the vast majority of modifications are expected to be handled. However, it is anticipated that circumstances may arise in which it would be better for the GEMA to have the option of modifying the contents of designated codes directly, rather than needing to rely on the standard code manager-led process.

351. The Bill includes a power for the GEMA to make direct modifications to the contents of designated codes if it judges that at least one of the following specified circumstances exists:
    a. Urgency: a direct code modification is required as a matter of urgency and proceeding with the modification under the normal process for amending codes would result in delay leading to adverse consequences for consumers or code parties.
    b. Conflict of interest: the normal processes for amending codes would be put at risk by an actual or perceived conflict of interest of the code manager in respect of the matter to be addressed by the modification.
    c. Complexity: the direct code modification is required to implement the strategic direction and the complexity of the matter to be addressed means that the normal processes for amending codes would be unlikely to achieve the desired aims.
    d. Code consolidation: the direct code modification is for the purposes of implementing code consolidation (i.e., the combination of one or more codes into a single code); or
    e. Consequential: the direct code modification is required as a consequence of changes made to a different document using the transitional powers set out in Schedule 9 (e.g., updating references to the name of a code that has been consolidated using transitional powers).

352. To provide clarity regarding when the GEMA can make a direct code modification, the Secretary of State should be empowered to create regulations for the following two purposes:
    a. to further define the specified circumstances in which the GEMA is able to exercise its direct code modification power; and
    b. to set out any other requirements or conditions in relation to the exercise of the power to make a direct code modification.

Justification for the power

353. The alternative to a delegated power would be to set out extensive detailed conditions in the Bill itself. Although this would be possible to do in theory, the core conditions and principles constraining the GEMA's ability to make direct code modifications are already set out in the Bill. It is these conditions and principles that Parliament is likely to be most interested in, rather than the detailed implementation of those principles in the supplementary regulations. Adding more detailed provisions into primary legislation would also constrain the Secretary of States' ability to refine them over time, where needed and appropriate, as well as remove its ability to set out additional conditions or restrictions if these are deemed to be necessary.

354. It is also worth noting that most industry codes take the form of a document (a code), which is given contractual force through a separate framework agreement that makes the provisions of the code contractually binding among the parties to it. Granting the GEMA the ability to amend the codes directly is therefore akin to granting it the ability to modify the terms of these multi-party contracts, without needing to engage in the normal code change process.

355. Establishing a power for the Secretary of State to further define when the GEMA can make direct code modifications will therefore act as a further significant constraint on the exercise of this power. It will also help to provide certainty to both the GEMA and stakeholders regarding when the use of this power would be proportionate, as well as the kinds of circumstances in which it could conceivably be employed.

Justification for the procedure

356. The details of the situations in which the GEMA can exercise the power for direct code modifications are likely to be highly technical in nature, particularly around 'complexity'. We believe that the primary legislation sets out sufficient constraints on the powers' usage that affirmative parliamentary procedures will not be necessary and is unlikely to be a good use of Parliamentary time.

Schedule 10(2) and Schedule 10(3) Regulations to create pension provisions and to alter existing qualifying pension schemes as part of transfer schemes

Power conferred on: The GEMA with Secretary of State consent

Power exercised by: Regulation

Parliamentary Procedure: Negative

Context and Purpose

357. Schedule 10 contains two paragraphs allowing the GEMA to make complementary sets of regulations. Through these regulations the GEMA will be able to make new pensions provisions and alter existing qualifying pensions schemes as part of any staff transfers that may be necessary to facilitate code reform, in connection with a transfer scheme established by the GEMA using the powers set out in Schedule 9 of the Bill.

358. The precise details of these transfer schemes will be subject to future negotiation between the GEMA and relevant parties so it is currently unclear whether existing pension arrangements will be affected. However, staff transfers at some level from existing bodies, such as code administrators, to the newly appointed code managers are likely to occur

and it may be necessary to alter the pension schemes of the relevant staff to ensure that they are not adversely affected by the transfer. A full list of potential provisions and amendments can be found in Schedule 10, but they will include the ability to divide schemes into different sections, to value and allocate assets between those sections, to transfer assets between schemes, etc.

359. The GEMA will be able to make regulations as it considers appropriate. However, in each case it must consult with the affected parties, including trustees and employers in relation to those schemes. In exercising its powers to make such regulations the GEMA will also be under a duty to ensure that qualifying members of the affected pension schemes are not adversely impacted in material terms in respect of their pension provision as a result of these reforms. In addition, Secretary of State approval will be required before these regulations can be made.

Justification for the power

360. We do not currently know who the incoming code managers will be, what staff may need to be transferred or what their pension requirements will be. Therefore, it would be impractical to set out the precise details of individual transfers in the Bill itself because anything drafted now would likely be inaccurate and need large amounts of amendment.

361. The time-sensitive nature of these transfers also means that it would be inadvisable to provide for them through later primary legislation once more information is known.

362. The level of detail potentially required for these regulations would also be better suited to secondary legislation, which is likely to be highly technical and specific to the relevant pensions scheme. Managing these details by regulations will allow the GEMA to update them as required to adapt to the changing requirements of transfer schemes as each code manager is appointed.

363. The power to draft these regulations has been granted to the GEMA, rather than the Secretary of State, because they will be responsible for creating any required transfer schemes and will therefore be best placed to make regulations related to pensions.

Justification for the procedure

364. The Government considers that the negative procedure is appropriate for these regulations. The details of the pension scheme transfers are likely to be highly technical and therefore scrutinising these through the affirmative procedure is unlikely to be an effective use of parliamentary time, particularly if Parliament has already scrutinised the detailed list of potential provisions included in the Bill itself.

365. The Department believes that the combination of a consultation requirement with the need for the GEMA to obtain Secretary of State approval prior to making regulations will also offer additional assurance.

Part 6 Market Reform and Consumer Protection

Clause 153 and Schedule 12 (paragraph 2) introducing new section 6BA of the Electricity Act 1989

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Negative

Context and Purpose

366. The purpose of the power in new section 6BA (introduced to the EA 1989 by clause 153 and paragraph 2 of Schedule 12) is to enable the Secretary of State to set specific criteria for the electricity projects to be tendered and in turn the models of competition which may be introduced by the Authority (section 6C of the EA 1989 (as substituted by paragraph 3 of Schedule 12) will allow for regulations to be made by the Authority for different models of electricity network competition).

367. The different models are: 'early' competition where the solution to the network need is not known and so the design, build, ownership and operation for a solution to that need is tendered for; 'late' competition where the solution to the network need is known, and the build, ownership and operation for that solution is tendered for; and 'very late' competition where a network solution is already built, and its ownership and operation is tendered for (this is the model already in place for offshore transmission assets). Different types of competition may suit different network needs, both onshore and offshore.

Justification for the power

368. This delegated power is required because the criteria will need to be set following advice of the Authority and industry experts, and it will allow the Secretary of State to ensure the criteria deliver the objectives of the competition policy suitable for the evolving network. It is important that the Secretary of State has the power to introduce specific criteria for different models of competition, for example, if the criteria relate to network projects over a certain cost value, to alter cost thresholds over time in respect of certain technologies. As such, criteria will be specific to the type of competition, and the point in time that competition is being applied.

369. The electricity system is undergoing significant changes in its structure (due to innovative solutions) and governance (for example, by the introduction of an Independent System Operator). To enable the Secretary of State to set criteria, whilst retaining Parliamentary oversight, allows for relatively quick responsive action to ensure that this policy is implemented in a way suited to the sector and is fit-for-purpose for an ever-changing electricity system.

Justification for the procedure

370. This power is subject to the negative resolution procedure (by virtue of section 106 of the EA 1989) in order to retain Parliamentary supervision whilst enabling sufficient scope to make rapid changes given the technical nature of the considerations. When making any regulations, the criteria will be set by the Secretary of State who we expect will take into

account technical, expert advice to tailor regulations to different models of competitions for onshore and offshore networks, suited to the network at any given time.

Clause 153 and Schedule 12 (paragraph 2) new section 6BB of the Electricity Act 1989 designation of delivery body

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Negative

Context and Purpose

371. Clause 153 and Schedule 12 (paragraph 2) inserts new section 6BB into the EA 1989 which provides a power for the Secretary of State to make regulations designating a person as a "Delivery Body". A Delivery Body will deliver the competitive tenders which are enabled by the Authority when it makes regulations under new section 6C of the EA 1989 (as substituted by clause 153 and paragraph 3 of Schedule 12. This power takes account of the ongoing shift in system governance in the electricity sector and so the potential for a greater range of bodies which could be suited to run tenders, with expertise in different parts of the electricity system - for example, National Grid Electricity System Operator is expert for onshore networks, whilst the Authority (Ofgem) could be more expert in offshore networks given their experience with Offshore Transmission (OFTO) tenders. This power allows the Secretary of State to appoint a Delivery Body most suited to the type of competition at any given time and allows for changes to be made should governance in the system adapt further. It also allows multiple Delivery Bodies to be appointed, depending on the model of competition, due to the broad scope of models of competition possible.

372. The Secretary of State will retain the discretion to determine who to appoint. For example, in respect of offshore transmission, prior to the amendments coming into force, section 6C provides that the Authority is the person designated to deliver competitive tenders to determine offshore transmission owners (OFTOs). Ofgem is an economic regulator and so its main purpose and expertise is in regulating the network. Whilst it has expertise and experience in running offshore tenders, governance in the electricity sector has changed since OFTOs' introduction in 2009. Therefore, other bodies may be more suited to running tenders going forward; for example National Grid Electricity System Operator (NGESO) has become legally separate from National Grid Electricity Transmission (NGET), and so could be considered to be more appropriate to run tenders over the transmission network, the balancing of which it oversees. Furthermore, the Bill includes delegated powers in respect of an Independent System Operator and Planner, an independent body responsible for managing the electricity network, with roles including network planning and encouraging more competition across the network. Such a body could be a suitable Delivery Body for this policy of competition, and this power will enable Secretary of State to appoint the most suitable body for both onshore and offshore network competitions.

Justification for the power

373. It is necessary for the Secretary of State to retain sufficient scope in appointing a body to run different types of tenders, most suited to the system governance at any given time, rather than name a body on the face of the Bill.

374. The Offshore Transmission Network Review (OTNR) (a joint government and Ofgem review) is considering, amongst other things, the structure around competition for OFTOs. Under current circumstances, we expect to maintain Ofgem as the Delivery Body to run offshore tenders, as the experts in running OFTOs to date. Part of this Review is considering models for offshore competition and with that who might be best placed in the future to run such tenders. Therefore, it is important the Secretary of State has the required scope in this space to implement the policy.

375. On the onshore network, as set out in the government consultation on competition in onshore electricity networks, the Secretary of State will consider who is best suited to be the Delivery Body. At this time, we consider the Authority (Ofgem) or National Grid Electricity System Operator ('NGESO') to be the most appropriate bodies to run tenders for transmission level competitions (both early and late model), with a view to this changing to the Independent System Operator and Planner (ISOP) in due course. The government response to this consultation will provide more detail on this when published.

376. It is possible that other entities may arise which may be suited to take forward different types of competition; for example, Ofgem's Distribution System Operation Governance Review is likely to inform and affect the Secretary of State's decision on who is best suited to run tenders at electricity distribution network level.

Justification for the procedure

377. This power is subject to the negative resolution procedure (by virtue of section 106 of the EA 1989) in order to retain Parliamentary oversight whilst providing scope to make alterations quickly to ensure any handover between Delivery Bodies is smooth and the implementation of competition is not slowed. Given the significant anticipated changes in electricity network system governance which are likely to arise in coming years, this procedure will allow quick changes in Delivery Body to ensure the Secretary of State appoints the most suitable body in the current system. Furthermore, the appointment power is in effect an administrative appointment of the Delivery Body and we do not expect such regulations to set out its functions in detail, so any additional procedure would be disproportionate.

378. With regards to bodies being considered for this role, they are either the independent regulator, the Authority (Ofgem), the system balancing body, NGESO, or the ISOP (being legislated for elsewhere in this Bill), all of which are already established (or will be in the case of the ISOP) in law and have and are ultimately accountable to Parliament. The regulations will not specify new technical functions nor cover matters in respect of revenue, so the negative procedure is considered justified.

Clause 153 and Schedule 12 (paragraph 3) substitution of section 6C of the Electricity Act 1989 competitive tenders for electricity projects

Power conferred on: GEMA, the independent regulator (whose duties are discharged by Ofgem)

Power exercised by: Regulations

Parliamentary Procedure: None

Context and Purpose

379. Under existing section 6C of the EA 1989, the Authority has the power to make regulations to facilitate the determination by a competition of the person who should be awarded a licence to operate an offshore transmission asset. The Electricity (Competitive Tenders for Offshore Transmission Licences) Regulations 2015 were made under this power and set out the process which the Authority follows when administering a competition to determine the party which will be awarded the final licence and be the Offshore Transmission Owner (OFTO).

380. Substituted section 6C of the EA 1989 will allow for regulations to be made by the Authority for different models of competition and in respect of relevant projects which will include onshore transmission and distribution, in addition to offshore transmission. This power therefore extends the power in place under section 6C of the EA 1989 to enable the Authority to make tender regulations for onshore network competition, rather than just offshore as is currently the case.

381. The tender regulations will, like the Electricity (Competitive Tenders for Offshore Transmission Licences) Regulations 2015, set out the method for running tenders, how costs can be recovered, and who pays costs during the process.

Justification for the power

382. Tender regulations will set out the technical processes behind competitive tenders, and the associated cost recovery mechanisms. These are more appropriately set out in secondary legislation following consultation between Ofgem and the Secretary of State and development with industry experts. Tender regulations will need to vary depending on the competition model in question and the type of network at hand, whether onshore or offshore. This means the power may be exercised more than once, so the detailed content of the regulations cannot be pre-emptively set out in the Bill itself.

383. The legislative measure enabling onshore competition allows for competitive tenders onshore and offshore, using different models of late or early competition to suit the network need at the time. By having the power to alter the Tender Regulations to suit the network need, and allow for development of the Regulations over time, government can ensure that competition remains fit for purpose as time passes and competition becomes more embedded in GB's regulatory system for electricity networks.

Justification of the procedure

384. There is no parliamentary procedure for regulations made under section 6C (The Authority is not subject to a Parliamentary by virtue of section 106 of the EA 1989) and this is not being changed. The approval of the Secretary of State, who is accountable to Parliament, is required before the Authority (Ofgem) make tender regulations. These regulations are highly technical and concern the processes which the Authority, appointed delivery body and bidders must follow during a competitive process. The amendments made to expand section 6C extensively to contain the scope and parameters for what tender regulations will contain, will be scrutinised during the Parliamentary process for the Bill which we consider is suitably robust Parliamentary scrutiny.

Clause 153 and Schedule 12 (paragraph 3) new section 6CC(5)(a) power to modify licences

Power conferred on: GEMA

Power exercised by: Licence modifications process

Parliamentary Procedure: None

Context and Purpose

385. The intent of this legislative measure is to enable competitions to be run for network solutions in the onshore electricity network. Under the current regime, network companies are responsible for the electricity network within their geographic region, and this is reflected in their licences through which they are regulated.

386. As network needs are competed through a tender process, the outcome could be that a licence and/or contract is granted to a third party, different to the incumbent network company for the given geographic area where the network solution will be placed. Therefore, the rights and liabilities associated with the given network solution tendered for would lie with the third party who wins a tender. As such, licences of incumbent network companies will need amendment to reflect that they are no longer liable for or have rights over that given network solution, even if it is within their network region.

Justification for the power

387. The Authority (Ofgem) sets and enforces licences on network companies and other licensed entities. This delegated power enables them to exercise that role in the context of onshore competition. The need to modify licences will arise as and when tenders are completed, and will relate to specific projects, so this power needs to be delegated rather than those modifications set out on the face of the Bill.

388. The exercise of this power will be necessary to enable the wider policy objectives of the measure, which is to enable new third parties to enter the network and provide network solution in regions of incumbent network operators.

Justification for the procedure

389. As mentioned above, this provision enables the Authority (Ofgem) to exercise their duty amending licences to give effect to competition explicitly. Ofgem is accountable to Parliament for its actions, and the specifics of licence amendments are technical matters for the expertise of the regulator and so any additional procedure beyond the existing procedure would be disproportionate.

Clause 153 and Schedule 12 (paragraph 7) amendment of section 6H of the Electricity Act 1989 power to modify codes and agreements

Power conferred on: The Authority

Power exercised by: Code and Agreement modification by way of notice

Parliamentary Procedure: None

Context and Purpose

390. This provision amends section 6H of the EA 1989 (power for the Authority to modify codes or agreements) to extend the power to modify industry codes so that it applies to codes maintained in accordance with the wider set of licensed activities in the electricity sector namely transmission, distribution, supply and interconnection licences. The power to modify licences can only be used where the Authority considers it necessary or desirable to do so for the purposes of implementing or facilitating regulations made under section 6C (as substituted by paragraph 3 of Schedule 12) or the operation of sections 6F or 6G of the EA 1989.

391. A series of multilateral codes and agreements place detailed obligations on holders of electricity licences in relation to processes, arrangements between parties and technical specifications, which enable the electricity networks to function effectively. Licences require their holders to comply with the terms of the codes and agreements. Changes will need to be made to a number of industry codes and agreements to reflect the fact that certain types of network licences can be the subject of a competitive tender exercise.

Justification for the power

392. Codes and agreements are normally maintained and modified by industry. This can be a lengthy process, and one where outcomes of amendments can be uncertain until after the industry consideration process is complete. As modifications will need to be made to several different codes on a co-ordinated basis and in a timely manner to effectively deliver the outcome of competition in electricity networks, this normal code modification process will not be appropriate in this situation. This power therefore enables the Authority to make such modifications where it considers it necessary or desirable for the purpose of implementing, or facilitating the implementation of, a competitive determination or implementing, or facilitating the operation of sections 6F or 6G of the EA 1989.

Justification for the procedure

393. This provision is an extension of an existing power for the authority to modify codes and agreements for which there is no parliamentary procedure. However, before making any modifications, the Authority will be required to consult persons the Authority considers appropriate and publish a notice:
    a. stating that it proposes to make modifications and its reasons for proposing to make them.
    b. setting out the proposed modifications and their effect; and
    c. specifying the time within which representations with respect to the proposed modifications may be made – which may not be less than 28 days from the date of the publication of the notice.

394. After the modifications have been made, the Authority is required to publish a notice stating its reasons for making the modifications.

395. Existing section 6H was inserted by the Energy Act 2013 to enable offshore tendering and did not include an associated Parliamentary procedure. The amendments maintain this position – the Department's view is that this procedure remains an appropriate level of scrutiny for these sorts of changes which are highly technical in nature and are best scrutinised within the industry rather than through a Parliamentary procedure.

Clause 153 and Schedule 12 (paragraph 11) amending Schedule 2A of the Electricity Act 1989: power to make a property scheme

Power conferred on: GEMA

Power exercised by: Making a Scheme

Parliamentary Procedure: None

Context and Purpose

396. Clause 153 and paragraph 11 of Schedule 12 amend Schedule 2A to the EA 1989 so that the power to make a property scheme applies to the results of a wider range of competitions in respect of electricity projects.

397. There are several situations in which property might need to be transferred between parties, including but not limited to the one in which one party has been awarded planning consent for a project but another has won the right to build and operate it. It is expected that commercial negotiations would almost always resolve any potential disagreements between parties over the transfer of any assets. Having transfer scheme powers available provides generators, network companies and investors with confidence that the transfer of preliminary works will occur should commercial negotiations fail, risking delays or stranding of associated transmission and generation assets.

Justification for the power

398. The property transfer scheme mechanisms are designed to provide a last-resort mechanism to ensure that the transfer of any assets following a successful tender occurs in a fair, timely and effective manner, should a commercial route fail. The last-resort nature of this power is demonstrated by the powers not having been used for the offshore competition regime to date (since introduction in 2009).

399. These schemes deal with asset transfers on a project specific basis. The Department's view is that it would not be possible to provide in primary legislation for each of these circumstances or deal with the commercially sensitive nature of asset transfers in primary legislation and that consequently a delegated power is needed for the Authority to make schemes to suit circumstances of each case.

400. The power to make property schemes is limited to scenarios where the Authority considers the relevant rights could not be acquired by the successful bidder by another means, so this power is limited in scope, but important to ensure effectiveness of the outcome of tenders.

Justification for the procedure

401. Transfer schemes under Schedule 2A of the EA 1989 are not currently subject to any Parliamentary procedure and the Department does not propose to alter that position. Transfer schemes are technical and often contain information that is commercially sensitive, confidential, or personal. It is therefore usually inappropriate for transfer schemes to be published or laid before Parliament.

Clause 153 and Schedule 12 (paragraph 23) new paragraph 36A in Schedule 2A of Electricity Act 1989: power to direct transmission owner or distribution network owner to act as owner of last resort

Power conferred on: Authority

Power exercised by: Notice and Licence amendment

Parliamentary Procedure: None

Context and Purpose

402. Electricity networks are fundamental to transporting electricity around GB; they are necessary to ensure security of supply to consumers. In order to ensure energy provision is secure, a last resort process is needed in the event that a network solution and/or its provider fails.

403. This power relates to the Authority's powers under the transmission and distribution licence to direct transmission owners and distribution network owners to undertake duties in lieu of a failed preferred or successful bidder.

Justification for the power

404. As the regulator, the Authority is best placed to engage network owners to undertake duties of last resort provider for network solutions. It is technical and requires rapid changes of rights and liabilities where licences are the most efficient and effective route. The Authority (Ofgem) has the power to grant and modify licences, and so this power extends to the scenario for onshore electricity network competition.

405. This power reflects a similar one which exists for offshore competition, in how the Authority notifies parties, the scenarios in which it can exercise this power and who it can appoint. As this power will need to be exercised as and when a tender is complete in relation to specific electricity projects, these appointments cannot be made on the face of the Bill but need to be made pursuant to a delegated power.

Justification for the procedure

406. As mentioned above, this provision enables the Authority (Ofgem) to exercise its duty amending licences to give effect to competition explicitly. Ofgem is accountable to Parliament for its actions, and licence amendments are technical matters for the regulator and so any additional procedure beyond the Authority's approval would be disproportionate.

Clause 153 and Schedule 12 (paragraph 25) extension of power in Schedule 4 of Electricity Act 1989 to grant wayleaves

Power conferred on: Secretary of State, Scottish Ministers

Power exercised by: Granting a wayleave

Parliamentary Procedure: None

Context and Purpose

407. The powers in Paragraph 6 of Schedule 4 to EA 1989, in certain circumstances (such as where, after having notice, a landowner refuses), enable the Secretary of State to grant electricity licence holders the right ("wayleave") to install and keep installed an electric line on or over land owned by a third party. This is helpful for the effective delivery of onshore competition because it allows the Secretary of State (or Scottish Ministers, in Scotland) to grant a wayleave to a successful bidder, following a competition, to install and maintain an electric line over a relevant piece of land, thereby ensuring security of supply for all licence holders on the electricity network, whether they are incumbents or as a result of onshore competition.

408. The proposed amendments to this paragraph do not change the nature of the delegation or its purpose. Instead, they clarify the scope of the delegation in two respects, namely:
    a. that the Secretary of State may grant the right to access land to any electricity licence holder; and
    b. that a necessary wayleave granted to one licence holder may be transferred to another licence holder.

409. The power in respect of wayleaves in Scotland is devolved to the Scottish Ministers.

Justification for the power

410. This power is currently delegated to the Secretary of State or to Scottish Ministers and the amendments made by clause 153 and paragraph 26 of Schedule 12 do not change the nature of the power in a fundamental way. The Department's view therefore is that the delegation remains appropriate.

Justification for the procedure

411. The Department's view is that the nature of this power has not changed fundamentally and that it is appropriate to maintain the same level of procedure, namely no Parliamentary procedure, for the exercise of this power. The same protection for dwellings and for the rights of landowners remain in place.

Clause 154 and Schedule 13 (paragraph 2) New power under new section 68A(4) to amend new section 68A(2)and (3) to add, exclude or amend exclusions for types of enterprises within the scope of the scheme

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Negative (Henry VIII power)

Context and Purpose

412. This power is to amend new section 68A (2) of the EA 2002, to (i) add types of "energy network enterprise" that fall within scope of the Energy Network Special Merger regime established by the Bill, by reference to the type of licence an enterprise holds under the GA 1986 or EA 1989; (ii) create an exception for any of the types of enterprise specified; and (iii) amend or remove an exception that applies to the types of energy network enterprise within scope. The Bill provides that enterprises must be of the same type, for a

merger between them to be within scope of the regime. The Bill defines the types of "energy network enterprises" in subsection 2 as:

a. an enterprise holding a licence under section 7 of the GA 1986 (gas transporter).
b. an enterprise holding a licence under section 6(1)(b) of the EA 1989 (transmission of electricity).
c. an enterprise holding a licence under section 6(1)(c) of the EA 1989 (distribution of electricity).

Subsection 3 provides that an enterprise holding a transmission or distribution licence granted following a competitive tender will not be in scope of the provisions, if they hold no other relevant licence that was not granted by tender. This is because only energy network enterprises who are regulated via price controls are intended to fall within scope. Before the Secretary of State may exercise the power to amend the list in subsection 2 or otherwise amend which types of enterprises are excepted, there is a requirement to consult GEMA and the CMA.

Justification for the power

413. It is possible that there will be future policy changes in the energy industry that affect the way that certain activities are licensed and regulated and therefore impact on the types of enterprise that ought to be within or excluded from the scope of the energy network merger regime. For example, as the scale of energy network activity that takes place following competitive tenders increases, then it is foreseeable that companies that hold licences through competitive tenders and were previously out of scope, may have enough valuable data that Ofgem can use when setting the price control. In this instance, and following advice from GEMA, then it may be suitable for the Secretary of State to exercise the power to remove exceptions so that such companies are within scope of the merger regime.

414. In addition, as the energy system changes in the transition to net zero emissions by 2050, certain licensable activities may become regulated through a system of comparative benchmarking, whereby companies' performance requirements are set by the Authority (via Ofgem), based on the performance of other companies that also undertake the regulated activity. Following this sort of regulatory change, it may be necessary to use this power to add a new licence category to the types of enterprise that are within scope of the regime, following advice from GEMA. The speed and nature of change in energy networks due to the systemwide transformation needed to meet our net zero commitments means that it will be necessary to make changes to the scope of the merger regime quickly and the Government considers that this type of power will allow this type of change to happen most efficiently.

Justification for the procedure

415. This power is subject to the negative Parliamentary procedure. The addition of/exception for an energy network enterprise type does not require a higher level of Parliamentary scrutiny because it does not change the nature of the policy and allows the measure to remain future proofed for changes to the energy network landscape. If the rationale for the regime's application to types of licensed entities is already agreed by Parliament, then additions of other such licensed entities or exceptions in relation to these should be made quickly to give effect to the change in the system. To ask Parliament to consider their inclusion may be overly onerous given the demands on Parliamentary time. Furthermore, as set out above, adding enterprises using this power is only expected to happen following a separate policy decision taken by GEMA to expand the types of energy network enterprise subject to comparative regulation (or to reduce the types of enterprise subject

to comparative regulation in the case of exceptions). The Secretary of State would not be obliged to exercise this power following that GEMA decision. However, we consider it a likely consequence of that separate decision by GEMA for the Secretary of State to decide to exercise this power, which would allow the Energy Network Special Mergers policy to apply to the newly relevant enterprises or to exempt relevant enterprises from the regime. Energy network enterprises are already subject to regulatory scrutiny by GEMA (via Ofgem), as the independent regulator. This additional level of scrutiny (by being added into scope of the Energy Networks Special Merger regime), is something that impacted businesses could reasonably foresee and would be a logical consequence of changes to the way they are regulated. Therefore, this is a technical matter ensuring this regime (which is intended to protect GEMA/Ofgem's ability to regulate effectively) is in step with a decision by GEMA to expand or otherwise change the types of energy network enterprise subject to comparative regulation.

Clause 154 and Schedule 13 (paragraph 30) Application of existing power under section 121 EA 2002 to require fees to be paid

Power conferred on: Secretary of State

Power exercised by: Order (existing order making power)

Parliamentary Procedure: Negative

Context and Purpose

416. Section 121 of the EA 2002 empowers the Secretary of State to make an order requiring fees to be paid in connection with functions of the Secretary of State, the CMA and Ofcom under Part 3 EA 2002, and in particular upon the occurrence of certain events, such as the CMA deciding that there is or may be a relevant merger situation in relation to a reference under their existing investigatory regime. Part 3 EA 2002 will include the provisions establishing the Energy Network Special Merger regime. The Department requires the existing power to be amended to also include a relevant merger situation relating to an Energy Network Special Merger reference, as one of those events. Paragraph 30 of Schedule 13 inserts references to new sections 68B and 68C (themselves inserted by paragraph 2 of Schedule 13) into section 121 EA 2002.

417. The EA 2002 (Merger Fees and Determination of Turnover) Order 2003/1370 ("the 2003 Order") was made under section 121 and provides for fees to be paid in pursuance of general merger investigations and water merger investigations. The 2003 Order will need to be amended to ensure that fees are payable following a phase one decision (which is when CMA determines whether a merger should be referred to a CMA group for investigation) under the new Energy Networks Special Merger regime.

418. The Bill's amendment of section 121 would enable the Secretary of State to use the section 121 power to update the 2003 Order.

Justification for the power

419. This power is required so that the CMA can collect fees from the energy network enterprises subject to the Energy Network Special Merger regime. This is standard practice under merger regimes that will allow for sufficient scope in application. It is more appropriate to include detail of the events that give rise to the payment of fees, how much is payable, who is responsible for paying them, and who the payment goes to, within the

Order rather than on the face of the legislation, as these are the types of technicalities which are more likely to need amending over time. The overarching principle (that fees are payable) is included on the face of the EA 2002 as amended by the Bill.

Justification for the procedure

420. This is a power that exists for other UK merger regimes and is subject to the negative procedure. The power is administrative in nature. As noted above, the overarching principle (that fees are payable) is included on the face of the EA 2002 as amended by the Bill. The Department intends to produce an indicative draft Order ahead of introduction in the House of Lords that demonstrates how this power is intended to be used. Parliament will therefore already have had an opportunity to understand and debate the use of this power and it would be unnecessary and disproportionate to require them to do so repeatedly.

Clause 154 and Schedule 13 (paragraph 3) Application of existing power under section 28(2) EA 2002 to determine how turnover should be calculated

Power conferred on: Secretary of State

Power exercised by: Order (existing order-making power)

Parliamentary Procedure: Negative

Context and Purpose

421. Section 28(2) EA 2002 provides an existing power which applies to the existing merger investigation regime under Part 3 EA 2002 (for mergers which result in a substantial loss of competition). The Bill applies Chapter 1 of Part 3 EA 2002 to energy network merger investigations (new section 68F, inserted into the EA 2002 by clause 154 and Schedule 13 paragraph 2), which would make this power available in respect of energy network merger investigations.

422. Section 28(2) of the EA 2002 provides for the turnover of the company to be determined in accordance with an order made by the Secretary of State. Both the existing merger investigation regime and the Bill's provisions for energy network mergers, only apply where the turnover of the enterprise being taken over exceeds a threshold.

423. The 2003 Order (referenced above) was also made under the existing power in section 28(2) and specifies how turnover is determined. The 2003 Order will need to be amended to ensure that the qualifying threshold for energy network mergers is based on GB (rather than UK) turnover. This is to reflect the application of the Bill's energy networks special merger provisions, to enterprises licensed in GB, due to the way that energy networks are regulated (i.e. energy networks are regulated separately in Northern Ireland).

424. The Department intends to rely on this power once section 28 is amended.

Justification for the power

425. Applying this existing power to the energy networks special merger regime is consistent with the approach to determining turnover in the general UK merger regime and that for mergers of water enterprises, and so reflects accepted practice. Itis more appropriate to include detail of how the turnover is determined through an order, as these are the types

of technicalities which are more likely to need amending in the future, rather than in primary legislation. The overarching principle (that there be a turnover threshold) is included on the face of the EA 2002 (as applied by the Bill).

Justification for the procedure

426. This is a power that already exists for other UK merger regimes and is subject to the negative procedure. The power is administrative in nature. As noted above, the overarching principle (that the policy is limited in scope in part by virtue of a turnover threshold) is included on the face of the Bill. The Department will produce a draft Order ahead of introduction in the House of Lords that demonstrates how this power is expected to be used. Parliament will therefore already have had an opportunity to understand and debate the use of this power and it would be unnecessary and disproportionate to require them to do so repeatedly.

Clause 154 and Schedule 13 (paragraph 3) Application of existing power under section 28(6) to amend the turnover threshold in section 23 EA 2002

Power conferred on: Secretary of State

Power exercised by: Order (existing order-making power)

Parliamentary Procedure: Negative (Henry VIII Power)

Context and Purpose

427. Section 28(6) EA 2002 is an existing power which applies to the existing merger investigation regime under Part 3 EA 2002 (for mergers which result in a substantial loss of competition). The Bill would enable the Secretary of State to rely on this power in respect of energy network merger investigations.

428. Section 28(6) EA 2002 provides that the Secretary of State may by order amend section 23(1)(b) so as to alter the sum mentioned there. Section 23(1)(b) sets out the amount of the turnover threshold (which will be £70m).

429. This threshold test is used to help scope the regime and determine whether merging companies will be subject to the new Energy Network Special Merger Regime.

430. Companies that would be included by virtue of their licence type (for example, due to possession of a gas transporter licence) would be excluded at this point if the turnover of the enterprise being taken over does not meet the threshold (i.e. not exceeding the £70m GB turnover threshold).

Justification for the power

431. The Bill will set the turnover threshold value for the Energy Networks Special Merger Regime at £70m turnover in GB. This value has been chosen because:
    a. It is similar to the existing and generally well-known substantial lessening of competition (SLC) regime (although the threshold for SLC is £70m UK turnover and for Energy networks it will be set at £70m GB turnover). Setting the threshold at the same level will help with consistency for businesses who are subject to both merger regimes, or who are already familiar with merger investigations under the SLC regime.
    b. It is suitably high as to ensure that all the companies who are in scope by virtue of their energy network licence type are of a sufficient size as to potentially cause prejudice to

Ofgem's ability to make comparisons when setting price controls, such that they should fall within scope of the energy networks special mergers regime.

432. Application of the s28(6) power is necessary because it will allow the turnover threshold level to be amended in line with inflation, or as the size and scale of this energy networks adapt to the challenge of meeting net zero. For example, the Fair Trading Act 1973 had an assets value threshold which was originally £5m and increased to £70m by the time it was superseded by the EA 2002, in line with inflation. For another example, if Ofgem decided to start using independent Distribution Operators (iDNOs) as a benchmark in their setting of the price control for electricity distribution networks, then it may be necessary to reduce the £70m threshold. Similarly, if the turnover threshold for the SLC regime was changed, the Secretary of State may consider it appropriate to also change the turnover threshold to the Energy Network Special Merger Regime, to maintain consistency.

Justification for the procedure

433. Section 28(6) EA 2002 is an existing power for the SLC regime to which the negative resolution procedure applies. The negative procedure also applies to the equivalent power in relation to water enterprises. The negative procedure remains appropriate for the application of the power to energy network mergers, because adjusting the threshold level is a technical consideration that will be informed by the regulators' (Ofgem and the CMA) expertise: s28(5), as modified by the Bill, requires the CMA and GEMA to keep the threshold sum under review and advise the Secretary of State as to whether it remains appropriate. Using this power would not change the character or nature of the policy, or how it applies once a merging company falls within scope.

Clause 154 and Schedule 13 (paragraph 3) Application of existing power under section 34 EA 2002 to make provision in relation to sections 27 and 29 EA 2002

Power conferred on: Secretary of State

Power exercised by: Order (existing order-making power)

Parliamentary Procedure: Affirmative Procedure (Henry VIII power)

Context and Purpose

434. This is an existing power which applies to the existing merger investigation regime under the EA 2002 (for mergers which result in a substantial loss of competition). The Bill should enable the Secretary of State to rely on this power in respect of energy network merger investigations.

435. Section 34 of the EA 2002 enables the Secretary of State to make such provision as they consider appropriate about the operation of sections 27 and 29 EA 2002 (which set out when enterprises cease to be distinct and when multiple transactions on different dates can be deemed to have occurred on one date) in relation to anticipated mergers.

436. The s34 power has been exercised to make the EA 2002 (Anticipated Mergers) Order 2003. It ensures that the provisions of sections 27 and 29 work effectively in relation to anticipated mergers. As per the Explanatory Notes for the existing EA 2002 (Anticipated Mergers) Order 2003, '[t]his Order makes provision about the operation of sections 27 and 29 of the EA 2002 ("the Act") in relation to anticipated mergers and public interest intervention notices relating to them. It provides that sections 27 and 29 of the Act apply

in relation to such cases, but with certain modifications. The modifications permit one or more events or transactions which have occurred over a period of two years before the date of reference to be aggregated by the decision-making authorities under the Act (the CMA and the Secretary of State) with future events or transactions that are in progress or in contemplation for the purposes of deciding whether a merger qualifies for investigation by virtue of Part 3 of the Act.'

Justification for the power

437. The power allows technical operational detail to be added by way of order. The overarching principle (that the regime comes into force when multiple entities cease to be distinct, or it is anticipated they will cease being distinct) is included on the face of the EA 2002. It is appropriate for this power to apply in respect of Energy Network Special Merger regime, for consistency with existing merger regimes.

Justification for the procedure

438. This is an existing power for which the procedure is affirmative. It is not deemed necessary to change the applicable procedure for the Energy Networks Special Mergers Regime. This will allow for consistency with other merger regimes.

Clause 154 and Schedule 13 (paragraph 3) Application of existing powers under section 40 EA 2002 to amend and make provision for time limits for investigations and reports

Power conferred on: Secretary of State

Power exercised by: Order for section 40(8); regulations for section 40(12)

Parliamentary Procedure: Negative Procedure for section 40(8) (Henry VIII power); None for section 40(12)

Context and Purpose

439. These are existing powers which apply to the existing merger investigation regime under the EA 2002 (for mergers which result in a substantial loss of competition). The Bill would enable the Secretary of State to rely on these powers in respect of energy network merger investigations.

440. Section 40(8) provides a power for the Secretary of State to amend the time limits for investigations and reports, as provided for in section 39 of the EA 2002. Section 39 requires the CMA to prepare and publish its report within 24 weeks from the date a merger was referred to a CMA group and provides that this can be extended by no more than 8 weeks where there are special reasons. Section 40(8) provides that these timeframes can be altered by the Secretary of State but that such alteration cannot result in timeframes which exceed the 24- and 8-week periods (i.e. the alteration can reduce the timeframes and, where they have been reduced, re-alter them to the maximum of 24 and 8 weeks).

441. The Department does not intend to rely on this power at present, and nor has this power been relied on for the general UK merger regime.

442. Section 40(12) gives the Secretary of State a power to make regulations specifying detailed procedural matters connected with the provision of information and documents. These are the time at which information is to be treated as having been provided or a

person is treated as appearing as a witness or providing for persons carrying on enterprises to be informed of certain occurrences, in relation to an extension to the period for a report where there has been a failure to provide information.

Justification for the power

443. Section 40(8): The power allows for amendment of time limits but, the overarching principle (that the CMA must investigate within a set time limit) is included on the face of the EA 2002 and the periods may not be extended beyond the original limits. The Secretary of State must consult the CMA and such other persons as considered appropriate before exercising this power.

444. The power would be used if evidence shows that the period for investigation could and should be shortened (for example, if this was demonstrated to cause better outcomes for businesses and the sector in question) or – if previously shortened - could and should be re-lengthened. If relied on at all, the power must be used in the first instance to shorten the time limit for investigation (because such alteration cannot result in the timeframes exceeding the 24-week and 8-week limits, as currently provided for in section 39). If the timeframes were reduced and the power was used again to extend the time limit, then the power is limited in scope so that the investigatory period may only be extended back to its original point of 24 and 8 weeks (which Parliament has already agreed to).

445. Section 40(12): The power allows particular technical operational detail to be addressed by way of regulation. This power would likely be used if there are operational issues with the provision of information, such as uncertainty as to when requirements are treated as being met. This would likely only be used following advice from the CMA.

446. These powers are therefore required to allow practical details of the merger regime, to stay up to date with the advice and decisions of the relevant regulators, and to reflect how this aspect of the regime is operating in practice.

Justification for the procedure

447. Section 40(8) and (12) are both powers that exist for the UK merger regime. Section 40(8) is subject to the negative procedure, and s.40(12) is subject to no procedure as it enables times to be specified for requirements to be treated as being met, and requirements to inform certain persons of limited occurrences. Applying these powers allows consistency with existing UK merger regimes. This approach to procedure is deemed appropriate due to the powers being limited in scope and impact as well as being focused on the technical operation of the regime, and the overarching principles (that the CMA must investigate within a set time limit, and that an extension for non-compliance ends when this is rectified) already having been accepted by Parliament.

Clause 154 and Schedule 13 (paragraph 3) Application of power in section 41B EA 2002 to amend the period in which CMA must take remedial etc. action

Power conferred on: Secretary of State

Power exercised by: Order (existing order-making power)

Parliamentary Procedure: Negative (Henry VIII power)

Context and Purpose

448. This is an existing power which applies to the existing merger investigation regime under the EA 2002 (for mergers which result in a substantial loss of competition). The Bill would enable the Secretary of State to rely on this power in respect of energy network merger investigations.

449. Section 41B of the EA 2002 enables the Secretary of State to amend section 41 to: alter the period set out in existing section 41A (currently 12 weeks) in which the CMA must take action to remedy, mitigate or prevent the anti-competitive outcome and any adverse effects which have/may result from the anti-competitive outcome; and/or the CMA's power to extend the 12-week period (CMA can currently extend this by 6 weeks). Alterations made under section 41B cannot result in the timeframes exceeding their respective 12 and 6 weeks (i.e. it can reduce these timeframes and, if reduced, re-alter them to increase them to the maximum 12 and 6 weeks). The Bill would modify these provisions so that under an energy network merger, they would apply in relation to substantial prejudice.

Justification for the power

450. This power will be used if evidence shows that the period for the CMA to take action to remedy, mitigate, or prevent the prejudice and any adverse effects which have or may result from the prejudice, is not appropriate to remedy the prejudices identified by the CMA. The Secretary of State must consult the CMA, and other persons considered appropriate, before exercising the power. Having this power will enable the Energy Networks Special Merger Regime, and in particular the remedial period within it, to be adjusted according to how it is operating in practice. This will ensure that the regime balances the necessary scope to deal with real world operation, with certainty for businesses as they forward plan during a merger.

451. If relied on at all, the power must be used in the first instance to shorten the time limit for investigation (because such alteration cannot result in the timeframes exceeding the 12 plus 6-week limits). If the timeframes were reduced and the power was to be used again to extend the time limit, then the power is limited in scope so that the period may only be extended back up to its original point of 12 and 6 weeks (which Parliament will have already agreed to).

Justification for the procedure

452. This is a power that exists for other UK merger regimes and is subject to the negative procedure. Including this type of power allows consistency with existing UK merger regimes. The negative procedure is deemed to be appropriate due to the power being limited in scope and impact, as well as it being focused on the technical operation of the regime, and the overarching principle (that remedial period must take place within a set time limit) having already been accepted by Parliament.

Clause 154 and Schedule 13 Application of existing Power under section 101 EA 2002 to make regulations on merger notices

Power conferred on: Secretary of State

Power exercised by: Regulations (existing regulation-making power)

Parliamentary Procedure: None

Context and Purpose

453. This is an existing power which applies to the existing merger investigation regime under the EA 2002 (for mergers which result in a substantial loss of competition). The Bill would enable the Secretary of State to rely on this power in respect of energy network merger investigations.

454. Section 101 of the EA 2002 empowers the Secretary of State to make regulations in relation to particular aspects of merger notices.

455. This power has previously been used to make The EA 2002 (Merger Prenotification) Regulations 2003. These Regulations made further provision in relation to the operation of the merger notice procedures. They provide, inter alia, that the persons authorised to make a merger notice are the potential merger parties; for the time at which a merger notice is to be treated as received; for the manner in which such a notice can be rejected and withdrawn and the time at which any notice is to be treated as rejected; for the manner in which information requested by the CMA is to be provided or disclosed; for the time at which any merger notice fee is to be treated as paid and the circumstances in which a person is or is not to be treated as acting on behalf of the person giving a merger notice.

Justification for the power

456. The power allows technical operational detail to be added by way of regulation. The power enables particular issues to be addressed, which could otherwise adversely affect the operation of the merger notice process. The power has already been exercised to address operational details of the UK's general merger regime and the power remains in place for the general merger regime. The Department considers it is appropriate for it to also apply to the Energy Network Special Merger regime, to allow such operation details to be amended or added to.

Justification for the procedure

457. Applying this power with no procedure, as is currently the case under the EA 2022, allows consistency with existing UK merger regimes. The Department does not consider it necessary to change the procedure for the Energy Networks Special Mergers Regime. Having no procedure is deemed to be appropriate due to the power being limited in scope and impact, as well as it being focused on technical and practical detail of merger notices, with the framework for merger notices (such as the requirement for merger notices to follow a standard form and content, their effect and the circumstances in which the CMA may reject them having already been accepted by Parliament.

Clause 154 and Schedule 13 application of existing Power under section 102 Enterprise Act 2002 to modify sections 97 to 101 of the Enterprise Act 2002

Power conferred on: Secretary of State

Power exercised by: Order (existing order-making power)

Parliamentary Procedure: Affirmative (Henry VIII power)

Context and Purpose

458. This is an existing power which applies to the existing merger investigation regime under the EA 2002 (for mergers which result in a substantial loss of competition). The Bill would enable the Secretary of State to rely on this power in respect of energy network merger investigations.

459. This is a power to modify sections 97 to 101 for the purposes of determining the effect of giving a merger notice and the action which may be or is to be taken by any person in connection with such a notice. Sections 97 and 98 have been repealed, but sections 99 to 101 are still in force and set out the framework for merger notices. Section 99 sets out certain functions of the CMA in relation to merger notices and section 100 sets out exceptions to protection given by merger notices, when a case may be referred to the CMA group for investigation despite the expiry of the usual initial period to decide whether to refer.

Justification for the power

460. The effects of, and actions that may or must be taken in connection with, merger notices are significant. Therefore, it is appropriate that these matters be included on the face of the EA 2002. However, these also involve practical and technical detail, which may need to be modified, so that the merger regime remains practical for operational business needs. This is necessary for the Energy Networks Special Mergers Regime, as it is for the general merger regime under the existing Part 3 EA 2002.

461. This power would enable modification of aspects of the merger notice arrangements to ensure the regime fits with market practice or developments. For example, if the six-month period after the initial reference period set out under s.100(1)(e) EA 2002, following which mergers may be referred, was being exceeded regularly under business-as-usual operation, it may be determined that an alternative period would be more appropriate.

Justification for the procedure

462. This is an existing power for which the procedure is affirmative. The Department does not consider it necessary to change the applicable procedure for the Energy Networks Special Mergers Regime. This will allow for consistency with other merger regimes and sufficient parliamentary scrutiny.

Clause 156 Standard conditions for Multi-purpose Interconnector licences

Power conferred on: Secretary of State

Power exercised by: Licence document

Parliamentary Procedure: None

Context and Purpose

463. Clause 155(5) inserts a new sub-section (3EA) into section 4 of the EA 1989 which defines a multi-purpose interconnector (MPI). Clause 155 also amends section 6 and more generally Part 1 of the EA 1989 (Electricity Supply) to introduce participation in the operation of MPIs as a licensable activity. This will enable the Authority to have regulatory

oversight of that activity. In turn, clause 156, paragraph (1) provides the Secretary of State with the power to determine the first set of standard licence conditions for MPI licences. This procedure is in line with that of existing licences (for example, when interconnection was introduced as a licensable activity by the Energy Act 2004) and will ensure that the Secretary of State retains an initial role in ensuring that the conditions of the new licences are implemented in consideration of expert evidence and the advice of the Authority.

464. The power must be exercised before clause 156(6) is commenced. That paragraph amends section 8A of the EA 1989, inserting provision into it so that after that time, the Secretary of State will have no role in relation to the standard conditions, and the Authority will have its existing powers to enable new special conditions.

Justification for the power

465. The licensable activity of operation of an MPI is new to the energy sector and the first set of standard licence conditions will need to be made in consideration of extant and future technology, to ensure that MPIs are regulated appropriately and can operate effectively. As the sector is evolving and may be subject to rapid change, it is important that the Secretary of State can respond and ensure that the conditions can be written to account for emerging developments. To allow for sufficient scope in the licensing arrangements, clause 156, subsection (2) permits the standard conditions to make provision for a standard condition not to be brought into operation, to be suspended or be reactivated in circumstances specified in the condition.

Justification for the procedure

466. There is no parliamentary procedure associated with this power, owing to the complex technical nature of the initial standard licence conditions. This is in line with current arrangements in respect of licensing in the electricity sector. The Secretary of State expects to introduce the standard conditions with the advice of industry stakeholders and the Authority.

Clause 159 Power to make consequential provision in respect of Multi-purpose Interconnectors (MPIs)

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative Resolution (Henry VIII)

Context and Purpose

467. MPIs integrate offshore renewable energy (e.g. offshore wind) onto the grid, supporting decarbonisation and the transition to Net Zero. MPIs are a new asset type; at present, there are no MPIs in the UK and only one MPI in Europe. MPIs will deliver benefits to consumers by widening energy markets, promoting cross-border trade, and delivering cheaper electricity to GB, whilst diversifying electricity supply and increasing security of supply. In comparison to separate interconnection and point-to-point offshore wind assets, MPIs are more efficient, offering a reduction in the amount of offshore transmission infrastructure. The benefits of this are decreased capital expenditure and a reduction in

coastal landing points and impacts on the seabed, the latter of which offers advantages towards the planning and consenting processes. Introduction of the licensable activity will enable nascent and future projects to secure investment and develop.

468. Clause 159 provides the Secretary of State with a power to make consequential provision in connection with MPIs. MPIs are a new type of asset that combines interconnection with offshore transmission from an offshore generating station. The EA 1989 does not provide for a specific MPI activity so clause 159 provides the Secretary of State with a power to make consequential provision in connection with the introduction of MPIs and the MPI activity. This power is proposed to ensure the statute book continues to operate effectively and is kept up to date regularly.

469. Some consequential amendments are being made directly by the Bill. Clause 160 and Schedule 14 contain minor and consequential amendments to primary legislation where the necessary change in light of the introduction of MPIs is evident in order to retain robust Parliamentary scrutiny.

Justification for the power

470. Clause 159 amends the EA 1989 to introduce MPIs to the statute book for the first time. As a result, there are multiple references to interconnection or offshore transmission across secondary legislation for example in respect of which reference to an MPI may need to be added.

471. MPIs are a new asset type and there are several different MPI models in existence. These models are complex and subject to evolution (within the parameters of the definition introduced by this bill) as MPI projects are realised. Moreover, market trading arrangements are yet to be fully determined. It is therefore critical that there is sufficient scope to amend primary legislation as well as secondary legislation and retained EU law in respect of MPIs.

472. MPIs are a nascent technology, in respect of which policy intent will be implemented once projects mature. Therefore, retaining a power to make amendments to primary legislation in the future is a suitable back-stop. Unlike for primary legislation (amended by clause 160 and Schedule 14), no identified instances have been found in retained direct principal EU legislation to which the new definition for MPIs applies. Despite this, it is considered necessary to also retain a power to make amendments to retained EU legislation in the future as a back-stop.

Justification for the procedure

473. This is a Henry VIII power. The Department proposes that the affirmative procedure would afford parliament the required level of robust scrutiny of use of this power. This is considered appropriate as the power could be exercised to modify primary and retained direct principal EU legislation in respect of MPIs. Offshore transmission and electricity interconnection have garnered keen interest during previous debates due to the impact on coastal communities and the seabed of offshore transmission assets and the inter-jurisdictional nature of interconnectors. As MPIs combine these two activities we consider it appropriate for Parliament to have oversight of development of the sector.

Clause 161(4) Extension of domestic gas and electricity tariff cap

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Context of Purpose

474. The Domestic Gas and Electricity (Tariff Cap) Act 2018 ("the 2018 Act") places a requirement on Ofgem to provide for a price cap in the supply licence conditions (these conditions are referred to as the 'tariff cap conditions'). If the conditions for effective competition (CfEC) in domestic supply contracts are not met, an extension can be made on an annual basis, by means of a written ministerial statement from the Secretary of State. Currently the 2018 Act provides that the default tariff price cap will lapse at the end of 2023, which is known as the 'long-stop date'. There is currently no Parliamentary procedure for an extension of the tariff cap under the 2018 Act. The Department has determined that there is a significant risk that the CfEC will not be in place by the end of 2023.

475. Clause 161(4) inserts a new section 8A into the 2018 Act which allows for extensions of the tariff cap conditions on a two-yearly (exceptionally, on a yearly) basis post-2023 via affirmative regulations, if the Secretary of State determines that the CfEC are not in place. Suppliers will need to plan in advance before the imposition of a new price cap. Therefore, the power in new section 8A must be exercised to ensure that regulations are laid before Parliament by 1 July in any given year (see section 8A(9)). This should ensure that the regulations can progress through Parliament and be brought into force in time, allowing Ofgem to give suppliers sufficient notice of the price cap level.

Justification for the power

476. Clause 161(3) (amendment to section 8 of the 2018 Act) removes the 2023 long-stop date provided for in the 2018 Act. The Department's view is that, given the tariff cap may now be extended continuously, subject to CfEC not being in place, Parliament should be given the opportunity to scrutinise any extension and the Secretary of State's assessment of CfEC.

Justification for the procedure

477. The Department's view is that the affirmative procedure is the correct procedure for making regulations to extend the default tariff price cap. Given the removal of the long-stop date, it is necessary for any decision to extend the cap to be scrutinised by Parliament, to help ensure there is a widespread consensus that the CfEC are not present in the market. The debate over whether the CfEC are present in the market will hold the Secretary of State to account for their decision and ensure any assessment is supported by rigorous evidence. The Department anticipates that Parliament will have a keen interest in this area and in whether the CfEC are met or not in any given year.

Clause 163 Payment as alternative to complying with certain energy company obligations

Power conferred on: Secretary of State and Scottish Ministers

Power exercised by: Order

Parliamentary Procedure: Draft Affirmative

Context and Purpose

478. Section 33BC of the GA 1986 provides powers for the Secretary of State to impose carbon emissions reduction obligations on gas transporters and suppliers. Section 33BD of the GA 1986 provides similar powers to impose home-heat cost reduction obligations. Some of these powers have been transferred to the Scottish Ministers. Near identical powers are provided in sections 41A to 41BA of the EA 1989 in respect of electricity distributors and suppliers. These powers have been used to make a number of successive energy company obligation ("ECO") schemes.

479. Under each ECO scheme, there have been exemptions for smaller electricity and gas suppliers. These exemptions have been contentious, and Government committed in the Energy White Paper to consult on how they could be removed without incurring disproportionate costs on suppliers.

480. The exemptions have been considered justified because it is estimated that the administrative costs of participating in the ECO scheme would be disproportionately high for small suppliers, as compared to the size of their obligation. They would have proportionately higher set up and fixed costs and a smaller customer base to recoup these costs from. The small suppliers would also not benefit from economies of scale that would enable them to spread their delivery risks amongst several delivery partners, or to contract with third parties for the installation of measures on advantageous terms, and their obligation would be too small to justify the creation of in-house installation arms.

481. However, the exemption of small suppliers means that they do not incur any ECO costs at all, unlike their larger competitors. It also means they face a cliff-edge sudden increase in costs when they grow above the size threshold and cease to be exempted. Therefore, the policy aim is to find a way that small suppliers could meet a share of the home-heating cost reduction target or carbon emission reduction target with the lowest possible administrative cost for those suppliers and for the Administrator.

482. Option to make a buy-out payment (subsection (7C): The clause adds to the existing ECO powers to enable provision to be made as to the circumstances in which obligated suppliers, gas transporters or electricity distributors, have the option of complying with all or part of their carbon emissions reduction obligations or home-heating cost reduction obligations by making a buy-out payment.

483. Setting the buy-out price (subsection (7D)(a) and (7E)): The clause provides for the buy-out price to be determined and published by the Secretary of State. The Secretary of State may set different buy-out prices for different periods and for different cases. For example, the buy-out price is expected to vary for each phase of the ECO scheme. And a higher buy-out price might be set for buying out sub-targets. The Secretary of State is not required to set the buy-out prices in the order. This is because it is intended that the buy-out prices for later phases should be based on the most up to date information possible as to the estimated costs of meeting the obligation through the promotion of measures.

484. We expect to set the buy-out prices using estimates of the cost of meeting the home-heating cost reduction target through the promotion of measures for reducing the cost to individuals of heating their homes. This estimate would be based on the impact assessments done for the ECO scheme, regular information reported by suppliers to Ofgem and to BEIS and other market price data and research gathered by BEIS.

485. Making the criteria for approved third parties and purposes (subsection (7F)): The clause enables the Secretary of State and Scottish Ministers to make provision as to the procedure and the criteria by reference to which the Administrator of the ECO scheme is to approve a person to whom a buy-out payment may be made, and the purpose of the buy-out payment. The Administrator of the ECO scheme is Ofgem, or such other body as is specified in the order (section 33BC(2A) of the GA 1986). An example of the criteria that might be set by the order might be that the person to whom the buy-out payment is made is a charity, community interest company or a public authority.

486. Another example is that the criteria set by the order might be that the purposes of the buy-out payment are to be limited to funding any of the measures described in sections 33BC(2) and 33BD(2)(b) of the GA 1986 and also funding activities for the purpose of reducing fuel poverty. In particular:
    a. Funding advice, goods or services that are intended to reduce energy use or increase energy efficiency by consumers in their homes
    b. Funding advice, goods or services that are intended to reduce gas or electricity bills or any other energy bills for the use of energy by consumers in their homes.
    c. Funding advice or assistance with gas or electricity bills or any other energy bills for the use of energy by consumers in their homes, including by writing off debt or making payments towards these bills.

487. Setting the procedure to be followed by suppliers proposing to make buy-out payments (subsection (7G)(a)): This includes that the order may require obligated suppliers to notify the Administrator of their intention to buy-out, and of other specified matters, such as the intended amount of buy-out, by a specified time, such as before the start of each ECO phase. The order may also prevent a notification from being withdrawn.

488. The rationale for requiring suppliers to decide prior to each phase is to minimise risk of market disruption and administrative burden. We need to avoid a situation where fluctuating measure delivery prices increase, making buy-out more desirable, as the buy-out price would be static for the whole 1-year phase, risking ECO delivery contracts, impact on the supply chain and delays in installations of measures in homes.

489. Interaction with provision made under existing ECO powers (subsection (7G)(b) to (d) and (7H)): Where permitted by the order and subject to any restrictions imposed by the order, suppliers may have the option to buy-out all or part of their ECO obligations. Where an obligated supplier buys-out part of their obligation, it may be necessary for the order to set out how the Administrator is to adjust the supplier's remaining obligation and any sub-targets and caps, to reflect the buy-out. It may also be necessary for the order to set out how buy-out affects any rules in the order relating to carry-over or carry-under of measures and obligations from earlier ECO schemes or into future ECO schemes, transfers of measures between suppliers or transfers of obligations between suppliers.

Justification for the power

490. Option to make a buy-out payment (subsection (7C)): The entire ECO scheme is made by delegated powers conferred on the Secretary of State and, in some cases, the Scottish Ministers. These new powers therefore need to take the same approach, as the detail of the provision made using the new powers will need to vary to reflect the provision made for the rest of the ECO scheme using the existing powers. Each ECO scheme generally runs for a period of 3 or 4 years. Each scheme is different from the last, as lessons are learned and to reflect changes in policy background and in wider market circumstances, across the energy industry and the energy efficiency and heating installation sectors. We do not think it is possible to capture confidently the precise circumstances in which a buy-out option will be necessary in future scheme years. Therefore, power is provided for the Secretary of the State to make provision as to the circumstances in which a buy-out payment is an option.

491. Setting the buy-out price (subsection (7D)(a) and (7E)): Given that actual costs of promoting measures are unpredictable, the Secretary of State must be able to set the buy-out prices for each ECO phase just before the phase starts. The intention is that buy-out should not be a significantly cheaper or more expensive way of meeting the obligation, not counting admin costs and other cost disadvantages faced by small suppliers. This approach should make ECO participation fairer for all suppliers.

492. Making the criteria for approved third parties and purposes (subsection (7F)): It is intended that buy-out payments should support the wider policy goals of each ECO scheme, which are subject to change over time. For instance, while previous schemes focused on reducing carbon emissions, in recent years ECO schemes have focused on reducing fuel poverty and the costs for the supply of heating. For each policy goal, there are several ways in which these can be furthered by the making of buy-out payments to third parties, hence the need to ensure sufficient scope for the Secretary of State and Scottish Ministers. For instance, the criteria or scope may also be informed by growing evidence that certain activities and criteria are more likely to achieve wider policy goals than others, or by a desire not to duplicate or (alternatively) to support funding from different schemes such as the Warm Home Discount's Industry Initiatives.

493. Section 33BC(4) of the GA 1986 (and the EA 1989 equivalent) require the Secretary of State to exercise the ECO powers in the manner they consider is best calculated to ensure that no supplier is unduly disadvantaged in competing with other suppliers. This will apply to the new powers and requires the provisions of each ECO scheme to take into account latest market circumstances. The principal objective and general duties under section 4AA of the GA 1986 (and the EA 1989 equivalent) will also apply to the exercise of the new powers.

Justification for the procedure

494. The exercise of these new powers is subject to the draft affirmative procedure. This procedure is considered appropriate as it is the procedure that applies to the exercise of most existing powers to make orders for the ECO scheme.

Clause 164 Smart meters: extension of time for exercise of powers

Power conferred on: Secretary of State

Power exercised by: Licence or code modification

Parliamentary Procedure: Equivalent to a draft negative procedure

Context and Purpose

495. This provision would extend by five years (from 1 November 2023 to 1 November 2028) the period within which the Secretary of State can exercise the power in section 88(1) of the Energy Act 2008 to modify electricity and gas licence conditions and related industry codes for purposes relating to the rollout of smart meters.

496. This clause does not change the nature of the existing power. It only seeks to extend the period during which the existing power can be exercised, and section 88(2) of the Energy Act 2008 will continue to limit the purposes for which the power may be exercised in the way it does now.

497. This extension and the continued ability to exercise the licence modification power is necessary so that the government can remove any barriers to the completion of the rollout of smart meters and ensure benefits for consumers are maximised in the continuing operation of smart meters following completion of the rollout. A new Policy Framework for smart metering commenced on 1 January 2022 and runs for 4 years to 31 December 2025. The Government has made public commitments to undertake reviews related to this new phase of the smart meter rollout. The first will be a mid-point review of the four-year Policy Framework (in 2023) and the second a post-implementation review of the rollout (after 2025).

Justification for the power

498. Changes to energy licence conditions and industry codes may be appropriate following these reviews in order to maximise the benefits to GB of having a market-wide smart metering system. An extension to this delegated power is sought as it is not possible to foresee the interventions which may be necessary to deliver a programme of this scale and complexity after November 2023.

499. For example, in response to the mid-point review of the new Policy Framework, the Department may need to make changes to regulatory obligations to ensure energy suppliers' annual smart meter installation targets remain robust and effective in Year 3 (2024) and Year 4 (2025) of the Framework.

500. In response to the post-implementation review of the rollout, the Department may wish to make regulatory changes to ensure the enduring regulatory regime maximises the benefits of the smart meter rollout. As BEIS reduces its involvement in smart metering over time, it will be necessary to make reforms to the structures that relate to the enduring governance regime and operating environment for smart meters to ensure that no "gaps" are created as a consequence of the Department's reduced involvement in the future.

501. The Data Communications Company ("the DCC") provides smart metering communications to domestic and small non-domestic premises. There are a number of

plans and programmes led by the DCC that may require the Secretary of State to exercise beyond 1 November 2023 the powers to make amendments to the Smart Energy Code. These include programmes to deliver the connectivity of the smart metering system as communication technologies evolve over time.

502. Changes to licences and codes may be needed to further enhance consumer uptake of smart metering to reach the very highest levels of coverage over the duration of this phase of the rollout.

503. While Ofgem also has the power to modify energy licence conditions and industry codes (through a Significant Code Review), the Secretary of State continues to need this power to make licence and code modifications. Ofgem is an independent national regulatory authority. Therefore, the government, rather than Ofgem, is responsible for developing and setting the overall policy for smart metering. As such, these reviews, and any changes to energy licence conditions and industry codes that arise from them, fall squarely within the remit of the Department rather than Ofgem.

504. The government is accountable for smart meter benefits being realised as soon as possible. Supporting and monitoring the delivery and effectiveness of the regulatory regime and policy framework as a whole is a task only the Department can undertake.

Justification for the procedure

505. The exercise of this power will remain subject to the procedure in Section 89 of the Energy Act 2008. This section includes a consultation with relevant stakeholders and provides for any changes to energy licence conditions and industry codes made under section 88 to be subject to a level of Parliamentary scrutiny equivalent to a draft negative resolution procedure. The Secretary of State has used this power extensively since 2008 to make changes to licences and related industry codes, such as the Smart Energy Code.

506. Licence condition and industry code modifications for the most part are technical, operational, and uncontentious. It is atypical for such modifications to be subject to Parliamentary control but the provision for a Parliamentary procedure in this case in 2008 recognised the “potential importance” of the Programme and its scope to directly impact business and consumers.

507. In keeping with the existing power, the Department considers it appropriate and proportionate to the nature of the possible amendments which we would bring forward, that they continue to be subject to a level of Parliamentary scrutiny equivalent to a draft negative resolution procedure.

Clause 164(2)(b) and (3)(b) Smart meters: extension of time for exercise of powers

Power conferred on: Secretary of State

Power exercised by: Order

Parliamentary Procedure: Affirmative (Henry VIII power)

Context and Purpose

508. This provision seeks to extend by five years (from 1 November 2023 to 1 November 2028) the period within which the Secretary of State can exercise the power in section 56FA of the EA 1989 and section 41HA of the GA 1986 to amend Parts 1 of the GA 1986 and the EA 1989 ("the Gas and Electricity Acts") to add new licensable activities relating to smart meters. This power is a Henry VIII power.

Justification for the power

509. This extension is necessary as the Secretary of State might in future consider that certain activities are required to be licensable activities in order to remove barriers to the completion of the rollout of smart meters and to ensure benefits for consumers are maximised in the continuing operation of smart meters following rollout completion. The Programme continues to develop policy to support these objectives and one of the tools the Secretary of State may need to use to deliver the policy intent is requiring activity to be licensed. Indicative examples are:
    a. The term of the existing Smart Meter Communication Licences expires in September 2025. The Authority (Ofgem) has initiated a process to appoint a replacement licensee and, as part of this, it is conducting a wider review of the Smart Meter Communication Licences and the nature of the organisation that should be the replacement licence holder. There may be a need to create new smart metering-related licensable activities that arises from these considerations.
    b. As part of our review of the changes needed to support the enduring governance arrangements for smart metering when the Department's involvement is reduced in the future, the need to exercise such powers may arise.

510. An extension to this delegated power is sought as it is not possible to foresee whether additional smart metering-related licensable activities will be required prior to the outcome of these reviews.

511. This clause does not change the nature of the power. It only seeks to extend the duration in which the existing power can be exercised and so the power will still be time limited. The activities that can be added as licensable activities under this power would continue to be limited to those set out in section 56FA(3) of the EA 1989 and section 41HA(3) of the GA 1986.

512. This power also enables the Secretary of State to remove any licensable activities added by virtue of the power. The government has no specific intention to use the power in this way. To date, the only licensable activity that has been added using this power is the provision of a smart meter communication service. This is a monopoly service which is necessary to allow the smart meter rollout to progress cost-effectively. For example, it assists interoperability so smart meters work with any supplier (for example after a consumer has switched supplier) and provides a level playing field between suppliers in support of competition. Although unlikely, the Department cannot rule out that evidence could emerge to suggest that some limited removal or modification to the scope of the licensable activity might be justified and so retaining the power is consistent with the Secretary of State's principal objective under the Gas and Electricity Acts, to protect the interests of energy consumers.

Justification for the procedure

513. Before exercising the power under section 41HA of the GA 1986 and section 56FA of the EA 1989, the Secretary of State must consult Ofgem, and any other persons considered appropriate. Any use of this power would be accompanied by an assessment of the benefits of the proposed intervention using the information obtained in the consultation and any other information that the Secretary of State considered relevant.

514. As this is a Henry VIII power, and as there is likely to be parliamentary interest in any change to the range of licensable activities under the Gas and Electricity Acts, the Department considers the affirmative procedure continues to provide an appropriate level of parliamentary scrutiny.

Part 7 Heat Networks

Clause 165 Power to amend the section for the purpose of changing the definition of "relevant heat network"

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Negative (Henry VIII power)

Context and Purpose

515. A definition of a "relevant heat network" is included in the Bill to define the scope of regulation.

516. The Department estimates that around 90% of heat networks are currently gas-fuelled. The sector will need to transition to low carbon heating sources to make its contribution to the Government's net zero ambitions, and new technological developments such as ambient temperature networks have begun to develop. Further developments in heat network technology in future means that the existing heat network definition in the Bill may require amending to capture these new technologies and new sources of low carbon heat.

Justification for the power

517. In the future, the definition of a heat network included in the Bill may not always capture all types and technologies of heat network. It is therefore necessary to provide the Secretary of State with a delegated power to amend the definition should that be required. As a precedent section 92 of the Climate Change Act 2008 includes a power to change the definition of a "greenhouse gas" by secondary legislation.

Justification for the procedure

518. This is a technical power which would enable future heat network technologies to be captured in regulation. We have sought to future proof the current definition by ensuring it accounts for anticipated technological advancements of heat networks, thereby minimising the likelihood we need to amend the definition in future. Any amendments would therefore likely involve small changes to the existing definition. The power is not designed to capture technologies which are radically different to those which will already be captured. It is also a narrow power given it would not amend regulatory requirements or the approach to regulation. For example, this power could not be used to introduce a new set of regulatory requirements specific to any new technologies captured by a definitional amendment. We therefore consider the negative procedure to be appropriate.

Clauses 166 and 167 Power to change the body appointed as regulator for England and Wales and Scotland, and a power to make consequential amendments to the Alternative Dispute Resolution Regulations 2015. Equivalent powers for the Department for the Economy in Northern Ireland.

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Affirmative (Henry VIII power)

Context and Purpose

519. This Bill will appoint GEMA as the regulator of heat networks. The Heat Networks Market Framework consultation found that 75% of respondents agreed with our proposal to appoint the GEMA as the regulator. It brings experience of setting and enforcing consumer protection rules from regulating the energy market. It could use its role as gas and electricity regulator to ensure heat networks are considered as part of an integrated net zero energy system and will require lower set-up costs than a new organisation.

520. However, although the government has concluded that the GEMA is the current best choice for regulator, it is necessary to ensure the regulatory framework has the scope to enable the appointment of a different body as sole regulator in future, should that be desirable for achieving our aims of protecting consumers and decarbonising the market. The government may also determine that a subset of functions is better carried out by another body. For example, to allow the Office for Product Safety and Standards to continue with functions similar to those it currently performs under the Heat Network (Metering and Billing) Regulations 2014.

521. This power therefore enables the Secretary of State to make regulations by statutory instrument which change the body appointed as heat networks regulator.

522. We also need to ensure that heat network consumers have recourse to an Alternative Dispute Resolution (ADR) body, like how gas and electricity consumers have recourse to refer a complaint to the Energy Ombudsman. The Heat Networks Market Framework consultation found that 74% of respondents agreed with our proposal to give domestic consumers access to an ADR body. This power therefore enables the Secretary of State to make consequential amendments to the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015. Such amendments would allow the Secretary of State or a different heat networks regulator (i.e. other than the GEMA) to be the competent authority with responsibility for approving the Alternative Dispute Resolution body in GB. Clause 167 allows for similar provision in Northern Ireland.

Justification for the power

523. A delegated power is required should a scenario arise in the future where it is considered that another body should take on the role of heat networks regulator from the GEMA. It is not possible to determine whether there will ever be a need in future for a change in the body appointed as sole regulator, and if so, which body that would be.

524. In addition, these changes may need to happen quickly to ensure regulation remains suited to the growth and decarbonisation of the market. It is necessary therefore to include

this power in secondary legislation to provide sufficient scope to make this change in the future if required.

525. Schedule 2 of the Climate Change Act 2008 includes a similar power to appoint an administrator of carbon trading schemes by regulation.

526. A power to make consequential amendments to the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 is needed to enable the Secretary of State or a different heat networks regulator (i.e. other than the GEMA) to be the competent authority with responsibility for approving the Alternative Dispute Resolution body. A similar approach is to be taken in Northern Ireland.

Justification for the procedure

527. The affirmative procedure is considered appropriate given that such regulations would enable a change of the sole heat networks regulator. As the choice of regulator is an important aspect of the regulatory framework, it is deemed necessary for Parliament to have a sufficient level of scrutiny. This power also allows regulations to amend primary legislation. It is therefore considered appropriate that these powers should be subject to the affirmative procedure.

Clause 168 Power to make provisions for the regulation of heat networks and conferring powers in relation to the development or maintenance of relevant heat networks

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Negative resolution, except in the following cases, where the affirmative procedure will apply:

a. *Where the regulations are the first ones made by the Secretary of State under this power i.e. "affirmative on first use"*
b. *Where the regulations define or amend the list of activities prohibited without authorisation i.e. "regulated activities"*
c. *Where the regulations prohibit a person from performing, without a licence, functions in relation to the governance of a documents setting out technical standards of heat networks*
d. *Where the regulations define or amend the rights conferred on a person by a licence*
e. *Where the regulations create an offence or provide for an increase in the penalty for an existing offence*
f. *Where the regulations repeal or amend any provision of primary legislation (Henry VIII power).*

Context and Purpose

528. Heat networks currently meet around 2-3% of the UK's heat demand. The Committee on Climate Change (CCC) recommends that the UK increases the share of heat provided by heat networks to 18% to meet national Net Zero targets. A robust regulatory framework will ensure that heat network consumers are sufficiently protected while still allowing the market to grow.

529. The Bill appoints the GEMA as the regulator. The regulator's main objective is expected to be set out in regulations under this clause. It could, for example, be to protect the interests of existing and future heat network consumers. These interests would include: the reliable supply of heat from the network, reduction of greenhouse gas emissions from heat sources that supply networks, ensuring fair and proportionate charges, and ensuring transparent communication of services and charges. The regulator would be bound to the objectives set out in the regulations when carrying out the functions necessary to regulate the heat network market.

530. The Regulations are expected to set out or provide for the regulator to set out (consistently with its objectives) rules and processes that heat network developers, operators, and suppliers must follow. This is intended to be through mechanisms that we refer to as authorisation and licensing.

531. Authorisation will allow heat networks to carry out certain activities subject to compliance with regulatory requirements. Authorisation conditions will include requirements on consumer protection, technical standards, decarbonisation, and step-in arrangements.

532. Licensing will grant rights and powers to carry out additional actions related to the construction and maintenance of heat networks. These rights and powers will include, for example, the right to access equipment for necessary maintenance and the right to install pipelines under roads. Additionally, companies applying for licences will need to show that they can meet the financial obligations licensing entails.

533. The Bill provides for the introduction of enforcement powers for the GEMA to ensure that heat network developers, operators and suppliers comply with the conditions set out in their authorisation or licence. The current proposal is for the GEMA to have the ability to issue notices or penalties to these organisations to protect consumers from actions which may harm their interests.

534. It is also intended that the GEMA will have the ability to investigate breaches of authorisation or licence conditions. This includes powers to investigate disproportionate prices and to require entities to provide documents for the purposes of an investigation. The Bill also provides for the creation of offences through regulations. Examples of offences which we intend to introduce include carrying out a regulated activity without being authorised, the intentional provision of false information, and entry into a premises by falsely pretending to be an authorised person.

535. Schedule 15 of the Bill, which sets out detailed provision regarding the power in this clause, in doing so gives some indication of the expected use of the power.

Justification for the power

536. This power allows the Secretary of State to introduce regulations for the heat network market, similar to the regulation-making powers granted to the Secretary of State in the Pollution Prevention and Control Act 1999, section 2(1).

537. The need for this power is twofold. Firstly, while the core technical concepts of heat networks are well established, the heat network market in the UK is nascent, supplying only 2-3% of the UK's heat demand. The required expansion of the market to meet climate goals and innovation in the technologies of the sector means that the market landscape is changing and will continue to change over the coming years.

538. Because of this, it will be important for the Secretary of State to be able to quickly introduce or amend regulations to adapt the regulatory regime. The rapid expansion in the number of heat network customers may, for example, highlight new or unexpected issues in the market, in which case the Secretary of State will be able to rapidly take steps to introduce or amend regulations to correct them. Also, the ability to adjust elements of the legislation deemed to be overly restrictive without proportionate benefits will allow the removal of administrative barriers to growth in the market.

539. Finally, the heat networks market encompasses a wide range of technologies, and we therefore cannot pre-empt what potential technological innovations may occur in the years to come. Technological changes may introduce new regulatory challenges, which existing regulations may not be suited to. This power will ensure that the regulatory regime can remain robust to innovations in the market.

540. Paragraphs 13, 25, 32 and 60 of Schedule 15 allow regulations to provide for the Regulator to make sub-delegated regulations. The subject-matter of these sub-delegated regulations is very narrow. Paragraphs 13, 25 and 32 allow regulations to permit the Regulator to make procedural provision about different types of application (for example as to the form of applications and how they need to be made). Paragraph 60 allows regulations to permit the Regulator to make provision in relation to standards of performance, similar to provision that GEMA can make under the Gas Act 1986 (e.g. s33A) and the Electricity Act 1989 (e.g. s39). These delegations are likely to be necessary because in each case the Regulator is best placed to make the relevant rules and to adjust them as appropriate. None of the provisions specify a Parliamentary procedure but that is considered appropriate given the technical nature of the delegations and the Gas Act and Electricity Act precedents.

Justification for the procedure

541. The Secretary of State will have the power to make these regulations using the negative procedure by default, with some key exceptions.

542. In the first instance, the first regulations made under this power will be subject to the affirmative procedure. The higher level of scrutiny of these SIs is justified due to their wide ranging and impactful measures. In particular, many of the provisions introduced will grant the GEMA new powers to regulate heat networks, as well as the power to alter and amend the rules which determine which companies can operate in the heat network market. Parliamentary scrutiny is justified in these cases.

543. We expect that, in the first instance, the regulations will introduce the bulk of the framework for regulating heat networks, such as provisions related to the responsibilities and functions of the regulator, authorisation and licensing, enforcement of conditions, investigatory powers, step-in and special administration, and consumer protections. Schedule 15 of the Bill provides an indication of the Government's intended approach to regulation.

544. Further amendments or regulations will aim to refine the details of these regulations or update them to adapt to the changing landscape of the heat networks market and ensure the regulatory framework is fit for purpose. We expect that these will be relatively minor changes which would better suit the negative procedure.

545. Regulations which define the “regulated activities” relevant to heat networks that can be prohibited without authorisation will always be subject to the affirmative procedure. Expanding the definition of a regulated activity will bring more segments of the market into the regulatory regime, such as asset owners or third-party intermediaries. These bodies may then face restrictions in activities they were previously free to carry out and possible costs associated with complying with the conditions now imposed on them. As the regulator will have the ability to define the conditions under which an authorisation can be granted, and therefore how easy or difficult it is to comply, it is appropriate for the affirmative procedure to apply to provide sufficient parliamentary scrutiny.

546. Regulations which define or amend the rights granted to a person via an installation and maintenance licence will always be subject to the affirmative procedure as they confer on private companies and organisations significant powers in relation to property and therefore benefit from parliamentary scrutiny

547. Additionally, any regulation prohibiting a person from performing, without a licence, functions in relation to the governance of a documents setting out technical standards of heat networks will be subject to the affirmative procedure. This is because such regulations would introduce a prohibition on certain unlicensed activities relating to code managers, and we therefore consider it appropriate for the affirmative procedure to apply to provide sufficient parliamentary scrutiny.

548. Finally, amending primary legislation via regulations made by the Secretary of State will be subject to the affirmative procedure. This provision will be used to make consequential amendments to existing legislation, for example making amendments to the Utilities Act 2000 which provided for the establishment and functions of GEMA. Consequential amendments may be needed to ensure the Act reflects the GEMA’s new function as heat networks regulator.

549. Additionally, any regulation introducing an offence or increasing the penalty for an offence will be subject to the affirmative procedure, due to the significant step of imposing criminal liability and the potential impact on the justice system. Before making regulations using this power, the Secretary of State will also be obliged to consult relevant persons and bodies.

Clause 171 Power to designate GEMA as the licensing authority under the Heat Networks (Scotland) Act 2021

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Negative resolution

Context and purpose:

550. The conferring of functions on GEMA is reserved to the UK government. Discussions between BEIS and the Scottish Government have led to an agreement that delegated powers will provide for the appointment of GEMA as the licensing authority for the purposes of the Heat Networks (Scotland) Act 2021.

Justification for the power

551. This power is necessary to ensure that the Heat Networks (Scotland) Act 2021 can operate as intended by the Scottish Government, which expressed a preference for GEMA being appointed as licensing authority. The appointment will also promote coherent regulation of heat networks across GB given we are also appointing GEMA as heat networks regulator under this Bill.

552. It is necessary for the appointment to be made through regulations because the Scottish Government has not yet introduced its secondary legislation for the purposes of the Heat Networks (Scotland) Act 2021, and it will be important to ensure that the wording of this appointment power is coherent with how those future regulations will be drafted. This will also allow the Scottish Government to set out in further detail the functions of the licensing authority in its regulations before the appointment is made through our regulations. This will ensure the UK government is conferring any functions provided for in Scottish Government regulations, consistent with the reserved nature of conferring functions on GEMA.

Justification for the procedure

553. The appointment of GEMA as the heat networks regulator across GB has broad support from industry and consumer representation stakeholders. Its appointment as heat networks regulator in this Bill was the subject of a public consultation where 75% agreed with GEMA's appointment. Scottish Government has informed the UK government that it considers it desirable for GEMA to also take on the role as licensing authority under the Heat Networks (Scotland) Act 2021. We therefore do not believe this power merits the same parliamentary time and scrutiny as other measures being passed through the affirmative procedure.

Clause 172 Power to create enforcement powers for the Scottish licensing authority

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative resolution

Context and Purpose

554. The Heat Networks (Scotland) Act as passed by the Scottish Parliament in 2021 did not include compliance monitoring and enforcement powers for GEMA as the Licensing Authority in Scotland. Following negotiations between UK Government and the Scottish Government it has been agreed that regulations made under the Energy Security Bill will grant the Scottish licensing authority the necessary monitoring and enforcement powers. These monitoring and enforcement powers will be identical to the monitoring and enforcement powers being given to GEMA as the heat networks consumer protection regulator for GB.

Justification for the power

555. If we do not provide the Scottish licensing authority with the necessary monitoring and enforcement powers, GEMA will be incapable of carrying out its regulatory functions in

Scotland. For GEMA, and Ofgem as an organisation, this would pose severe risks and may lead to it being unable to carry out its functions in a consistent way across GB.

556. It is necessary to pass these as secondary legislation to ensure that GEMA's monitoring and enforcement powers are consistent with the powers it has for its GB-wide functions (which will also be conferred by regulations under this Chapter), and adaptable for what is a nascent market in the UK, and that they remain able to ensure adequate monitoring and enforcement capabilities as the heat networks market grows and changes significantly over the coming decades. This will also allow for the monitoring and enforcement powers to be drafted to align with the regulations which the Scottish Government will draft and introduce under the Heat Networks (Scotland) Act 2021.

Justification for the procedure

557. The monitoring and enforcement powers that will be introduced through these regulations will be based on the wider monitoring and enforcement powers necessary for heat network regulation and will be agreed with the Scottish Government prior to introduction. We believe this reduces the requirements for parliamentary scrutiny and that the negative procedure is therefore appropriate.

Clause 174 Power to make provision about heat network zones ("'zones regulations")

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative (except in relation to regulations made by virtue of clauses 177(1)(c) or 4(c) or 178(2)(c) or (6), where the negative procedure may be used).

Context and Purpose

558. This power grants the Secretary of State the ability to make regulations about heat network zones. Clauses 176 to 184 enumerate specific areas in respect of which regulations may be made under this power. The regulations will provide the framework for implementing heat network zoning, such as establishing the bodies of the Authority and the zone coordinator, the methodology and process for identifying zones, introducing requirements within zones and providing for data collection and enforcement powers.

Justification for the power

559. We expect that the power will be exercised in accordance with clauses 177 to 186. The following sections of the DPM provide justifications in respect of each of those clauses.

Justification for the procedure

560. The default position is that the Secretary of State will have the power to make regulations under this power using the affirmative procedure. This is subject to the limited exceptions. The following sections of this memo provide specific justifications for the chosen procedure in respect of each of the areas covered by this regulation making power.

Clause 175 Power to appoint a person as the heat network zones authority ("the Authority")

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Context and Purpose

561. The Heat Network Zones Authority ("the Authority") will be a national body responsible for functions that require national-level standardisation or are most efficiently or effectively carried out at a national level. This may include the identification of areas where zones should be and maintaining a centralised register of zones.

562. This power allows the Secretary of State to make regulations designating a person to act as the Authority, and to provide that the Authority may delegate any of its functions to persons specified in the regulations.

Justification for the power

563. In the Department's public consultation, 81% of respondents agreed that some functions required for zoning need to be carried out centrally to maximise consistency and efficiency. This power allows the Secretary of State to appoint a body to act as the Authority and fulfil these centralised functions.

564. We currently expect that the Secretary of State will be designated as the Authority immediately following the establishment of the role. However, in the future the Secretary of State may determine that another body is better placed to carry out some or all the Authority's functions. This will only become clear after the zoning process is underway. Therefore, it is important to provide for this power so that the appointed body can be changed, or certain functions delegated to another party, in line with the best available evidence.

Justification for the procedure

565. The power will be subject to the affirmative procedure as it allows the Secretary of State to grant the powers of the Authority to a body – this will include the ability to issue penalties to different organisations or intervene in local zones. As such, it is appropriate for any change in the Authority to receive Parliamentary scrutiny.

Clause 176 Power to make provisions about zoning coordinators

Power conferred on: Secretary of State

Power exercised by: Regulation by statutory instrument

Parliamentary Procedure: Affirmative

Context and Purpose

566. Zone coordinators will support the delivery of the zoning policy at a local level and can be established by one or more units of local government where zones are identified, such as district or county councils or combined authorities.

567. This power allows the Secretary of State to define how one or more local authorities can designate zone coordinators or establish a body that can perform the role, as well as to make provisions regarding the governance and funding of zone coordinators. The power also grants the Secretary of State the ability to specify when the Authority can intervene and perform the function of a zone coordinator or direct a zone coordinator to act in a certain way. The regulations can also make provision for the Authority to require one or more local authorities to designate a person as the zone coordinator.

Justification for the power

568. The intent is that one or more local authorities at any level of government, from parish councils up to combined authorities, should have the ability to nominate (or establish) a zone coordinator. Outlining this process in regulations reduces the risk of creating gaps or overlap in the coverage of zones – the Secretary of State can amend the regulations to address any arising issues.

569. The power to determine the governance and funding of zone coordinators is best placed in regulations as these are tied to the responsibilities of the zone coordinators which will be set out in regulations. Amendments to the responsibilities of the zone coordinators may require an adjustment to their governance structure or funding, or the Secretary of State may choose to amend these independently of any other changes.

570. The power to allow the Secretary of State to make regulations allowing the Authority to perform any function of a zone coordinator or to direct a zone coordinator to act in a specific way is key for ensuring that the zoning project can meet its objectives. Through the regulations, the Secretary of State will set out the conditions for the Authority to intervene if, for any reason, the zone coordinator or local authority cannot or will not perform the tasks required to implement zoning. By providing for this power in regulations, its ambit and the conditions for its use can be more easily amended in response to any identified issues.

Justification for the procedure

571. The power will be subject to the affirmative procedure as it establishes the zone coordinator role and its accompanying powers – this will include the ability to issue penalties to different entities (clause 183 or require certain buildings and heat sources to connect to heat networks in zones (clause 180). Additionally, it is important that local democracy is respected in the context of any power conferred on the Authority to intervene in the work of zone coordinators. As such, it is appropriate for any regulations related to the establishing of the zone coordinator to receive Parliamentary scrutiny.

Clause 177 Power to provide for the identification, designation and review of heat network zones

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Affirmative, except when making regulations in connection with review of the designation of an area as a heat network zone under clause 177(1)(c) and consultation requirements under clause 177(4)(c, in which case negative.

Context and Purpose

572. The zoning process will consist of a series of stages to identify and then designate heat network zones, facilitated by a methodology for identifying the most suitable areas for zones.

573. This power allows the Secretary of State to outline how that process should take place. In the initial stages, the Authority and the zone coordinators will work together to identify areas most suitable for low-cost, low-carbon heat networks, followed by a refinement of the boundaries of the zone using local knowledge. The regulations made by the Secretary of State must require that the identification process is carried out in accordance with the zoning methodology. The zone coordinators will then officially designate the zones. Following the designation of a zone, the Authority will be notified of the designation and the zone officially recorded in a zone register.

574. This power also allows the Secretary of State to make regulations relating to the review of designation decisions by zone coordinators or the Authority. This ensures that zones can evolve appropriately in light of changes in local conditions, as well as wider changes in the energy market or broader regulatory landscape that might have a bearing on where a heat network zone is best located. Such changes could include changes to the economics of heat networks and other clean heat technologies, new local infrastructure, and other developments, as well as wider regulatory changes or changes to assumptions used in the methodology.

575. This power can also be used to specify the circumstances in which a zone coordinator may vary or revoke a designation. This will allow the zone coordinator to adjust the boundaries of the zone in response to a zone review, to ensure that the zone is fit for purpose and meets the criteria outlined in the methodology.

Justification for the power

576. This power is necessary to allow the Secretary of State to outline the procedure that must be followed when identifying and designating zones.

577. The power will also allow zone coordinators to vary or revoke zone designations. This will be necessary for cases where zone reviews or local conditions require an adjustment to the zone boundaries. Without this measure, zones may become inefficient and not cost effective. Outlining the conditions under which the zone coordinators (or, in the case of zone reviews, the Authority) can do this in regulations is appropriate as they depend on the methodology, which is also due to be provided for in regulations.

578. There are a variety of factors that may be relevant to the question of when a zone review should take place. Setting out the zone review process in regulations will provide the Secretary of State with sufficient scope to adapt the process to what is an emerging market. The approach to zone reviews will be closely linked to the zoning methodology itself, which as described above is expected to evolve to reflect changes in technology, costs, government policies, and changes in other factors.

579. The zoning methodology is currently being piloted in 28 towns and cities across England and this is expected to help inform the most appropriate approach to zone reviews, for example whether fixed term reviews, reviews after a minimum period and/or reviews triggered by material changes (e.g. in assumptions which informed the Zoning Methodology) should be provided for.

Justification for the procedure

580. This power will determine how and when the Authority and zone coordinators may use certain powers, as well as providing them with the ability to determine or vary the location of heat network zones using the methodology. As persons in the zones will be subject to particular requirements and duties, it is appropriate that regulations made under this power face parliamentary scrutiny.

581. The two exceptions are for regulations made relating to the review of zone designations, and regulations relating to the consultation requirements placed on zone coordinators or the Authority when carrying out reviews. As in clause 177, as the zone review process involves an information collecting exercise and the list of consultees may change frequently, the negative procedure is appropriate.

Clause 178(1) Power for to provide for a methodology to identify heat network zones

Power conferred on: Secretary of State

Power exercised by: Regulation by Statutory Instrument

Parliamentary Procedure: Affirmative, except when making regulation on consultation requirements, in which case negative

Context and purpose

582. This power allows the Secretary of State to make regulations providing for a methodology, which will be used by the Authority and zone coordinators to identify suitable areas for zones. The intention is for the regulations to specify that the Authority will oversee the development of the methodology, which will standardise the identification and designation of heat network zones in England based on criteria which will determine what defines a zone. The government's intent is to define zones as areas where heat networks are the lowest cost solution to decarbonise heat.

583. The Authority and the zone coordinators will collaborate throughout to ensure that local views and those of key stakeholders are incorporated into the process of identifying zones.

Justification for the power

584. A delegated power is required as the conditions of the heat network market will not be static: technology, costs, government policies, and other factors will change over time and the underlying approach to model and design heat network zones will need to account for these developments. The power allows the Secretary of State to amend the regulations to account for these changes and ensure the methodology continues to accurately identify heat network zones as areas where heat networks provide the lowest cost, lowest carbon heating solution.

585. The power also allows the Secretary of State to make regulations about the roles of the Authority and zone coordinator in the methodology. Following the implementation of the methodology, it may become clear that the balance of responsibilities between the zone coordinator and the Authority should change and this power allows the Secretary of State to provide for such changes. It is appropriate to do so using a delegated power as any changes will only become evident following the implementation of the methodology.

Justification for the procedure

586. This power will be used to set the criteria that will determine the location of zones. As those in zones will be subject to requirements and duties not imposed on those outside zones, it is appropriate that regulations made under this power face parliamentary scrutiny.

587. Regulations which make provision for requirements as to consultation will be subject to the negative procedure. The intent is that consultation requirements will consist of a list of "statutory consultees" whose views will be considered at certain points in the methodology. Amending this list is of limited significance, and the nascent nature of the heat networks market means amendments may be frequent. Thus the negative procedure is appropriate.

Clause 178(3) Power to make provision for the Authority to publish documents connected to the methodology

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Affirmative

Context and Purpose

588. The government intends for the Authority to develop and publish a document or documents regarding the methodology. This document or documents will provide bodies involved in the zoning process with information on the application of the methodology, including their duties and responsibilities. This power allows the Secretary of State to make regulations regarding the publication of such documents and to obligate the Authority and zone coordinators to comply with them.

589. The intent is that the Authority will develop the core document(s) for approval by the Secretary of State. Any updates to the document(s) will be subject to consultation but will not require a legislative process.

590. This approach is broadly akin to the powers in Section 6 of the Building Act 1984, which gives the Secretary of State powers to approve and issue 'approved documents' containing practical guidance with respect to the requirements of any provision of the building regulations. Section 6(4) of the 1984 Act allows the Secretary of State to approve and/or issue revisions of the approved document.

Justification for the power

591. The publication of the documents is necessary to ensure the consistent application of the methodology across all zones.

592. This power is required as, until the form of the methodology is known, it is not possible to know the most appropriate procedure for publishing supplementary documents, making this most suitable for secondary legislation.

593. 88% of respondents in the Department's recent public consultation agreed with the approach of issuing methodology documents which would not require legislative approval when updated.

Justification for the procedure

594. The affirmative procedure is appropriate for this power as regulations made under this power may require the Authority and zone coordinators to comply with any documents issued. This may, in turn, require action from those located in zones or areas which may be designated as zones. Therefore the affirmative procedure is appropriate.

Clause 178(5) Power to provide for the Authority to issue guidance in relation to the methodology

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Affirmative

Context and Purpose

595. This power allows the Secretary of State to make regulations providing for the Authority to issue guidance relating to the zone methodology. In addition to the publication of the documents under clause 178(3), it may be helpful for the Authority to issue guidance to assist bodies involved in the zoning process follow the methodology.

Justification for the power

596. Following the publication of methodology documents, it may become necessary for the Authority to publish additional advisory documents or to provide specific advice to those executing the methodology. This power will allow the Secretary of State to outline when this is appropriate and the requirements on the Authority when publishing the guidance. It is appropriate to provide for this in secondary legislation as the most suitable manner and form for the guidance may only become clear following the publication and implementation

of the methodology. In addition, as this guidance is advisory it will place no additional duties on any of the bodies to whom it is directed.

Justification for the procedure

597. Any regulations relating to the issuance of guidance by the Authority will likely complement and be made at the same time as other regulations made under clause 178(1) or (3). Subjecting this power to the affirmative procedure will allow these related regulations to be made in the same package.

Clause 178(6) Power to carry out reviews of the zoning methodology

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Negative

Context and Purpose

598. The purpose of the zoning methodology is to identify the most appropriate areas for the designation of heat network zones. A review process is required so that the Secretary of State may be satisfied that the methodology is achieving its objectives and to make changes accordingly. This power allows the Secretary of State to make regulations regarding that review process.

Justification for the power

599. It is appropriate to use a delegated power for this purpose as the review of the methodology ultimately depends on the methodology itself, as outlined in clause 178(1). An appropriate review process can only be determined once the methodology has been decided. Without reviews, the methodology risks becoming redundant due to changes in the underlying market conditions.

Justification for the procedure

600. When the Secretary of State makes regulations as to reviews of the methodology, these will be subject to the negative procedure. As these reviews will primarily be an information-collecting exercise and therefore relatively uncontroversial, the negative procedure is appropriate. Any changes to the methodology regulations arising from a review will be subject to the affirmative procedure, as explained above.

Clause 179 Requests for information in connection with section 178 or 179 (identification etc. of heat network zones and heat network methodology)

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Affirmative

Context and Purpose

601. This power allows the Secretary of State to make provisions regarding the ability of the Authority and zone coordinators to request information in connection with their functions relating to the identification, designation and review of zones.

602. The regulations will specify the parties which are subject to this requirement, the type of information they may be required to provide and provide details as to how the power is to be exercised (e.g. regarding how much notice parties are provided). The Authority and the zone coordinators may also be provided with the power to issue penalties to those who do not comply with the information requests.

Justification for the power

603. The power allows the Secretary of State to specify the persons subject to the requirement to provide information. This power should be provided for in secondary legislation because it is possible that the parties to which this provision applies may need to change over time. The heat network market is currently nascent and emerging delivery models may produce new entities that have to be added to the list of parties in due course. Including the parties within regulations will allow for easier amendment going forward.

604. The power also allows the Secretary of State to outline the specific information which can be requested. Setting this out in regulations will allow for the scope and type of requestable information to be updated over time as the market matures and data needs become clearer. The outputs from the ongoing zoning pilots and the development of the methodology may also impact the specific information that needs to be collected and the ability to amend regulations to account for this will ensure the swift integration of this information into the process.

605. The power allows the Secretary of State to outline how the requirement will be exercised. This aspect also depends on other delegated powers such as how the zone coordinators are established and governed. Therefore the details of how the power will be exercised is better suited to regulations than provisions made on the face of the Bill.

606. In addition, these powers also allow the Secretary of State to put in place protections for those from whom information may be collected. These protections may prevent requests for information which would involves breaches of confidence or data protection legislation. As the requirement for this protection will likely depend on the specific information that can be requested, it is appropriate to define them in the regulations.

607. The power also allows the Secretary of State to outline when zone coordinators can delegate their data requesting powers to another body. Zone coordinators may wish to delegate this power to specialised data collection experts, for example. This is appropriate for secondary legislation as the conditions under which this power can be used depend on the bodies subject to the requirement and the information in scope.

608. Finally, by reference to clause 183(1), the regulations may outline the penalty regime, including amounts, procedure and destination of funds. This will allow the Secretary of State to adjust the penalties to ensure they are effective.

Justification for the procedure

609. Regulations made under this power give the Authority and zone coordinators significant powers to request information from a range of bodies. The affirmative procedure will allow Parliament to determine if the scope of the powers handed to the Authority or zone coordinator is right and appropriate.

Clauses 180 Power to make regulations about connections to buildings and heat sources within heat network zones

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Affirmative

Context and Purpose

610. This power allows the Secretary of State to make regulations regarding heat networks within heat network zones. These regulations may, in particular, regulate which buildings are required to connect to a district heat network within a designated zone.

611. The risk of future heat loads not connecting to heat networks creates uncertainty which can hamper investment. Knowing that certain types of building within a heat network zone will connect to a district heat network[3] and use the heat provided, provided it is cost-effective to do so, gives project sponsors and investors greater assurance which helps support delivery of viable, large-scale heat networks. Another key factor in determining the viability of a heat network zone is whether there are existing sources of low carbon heat which can provide the supply for a heat network within the zone. The scope to require both new eligible buildings and new heat sources in zones to be “heat network ready” will increase this confidence by ensuring that mandated connections can be made as simply as possible.

612. Successfully addressing these supply and demand considerations can further support the optimisation of the scale of a heat network, with associated local emissions reductions from heat, and potentially lead to a fall of fixed costs of the network per consumer.

613. The requirement to connect will be time-bound based on 'trigger points' which are to be defined further in regulation, this could include asset replacement within existing buildings or construction/completion dates for new builds.

614. We recognise that introducing a requirement on all building of a particular category in a heat network zone to connect may lead to sub-optimal outcomes, such as where buildings already have a low carbon heat source installed. A process will therefore be introduced to enable buildings to seek an exemption from the requirement to connect.

[3] Following consultation in 2021, we are minded to require that large public buildings, large non-domestic buildings and existing residential buildings already supplied by a communal heat network are subject to this requirement. Further detail on how these buildings are defined and other aspects of the policy will be considered in a future consultation.

615. Regulations may provide zone coordinators with powers to request information from prospective heat sources[4] to help determine their viability as a source of heat for heat networks in zones and require that heat sources connect to a heat network and the circumstances and timeframe in which they should do so.

616. Furthermore, another of our key policy objectives is that heat network zoning delivers carbon savings at scale and pace. While the authorisation conditions as part of the heat network regulation measures in Chapter 1 of Part 7 of the Bill allow general limits to be set on emissions from heat networks (whether they are within or outside of a heat network zone), zones regulations may also provide for zone coordinators to set different local limits in respect of heat networks in zones. Zone coordinators would be required to obtain the consent of the Authority before setting a different local limit and may offer grace periods for compliance with these requirements, i.e. a time-limited period following connection where a heat network does not meet the local emission limit. This approach recognises that it may be more cost effective for a building to connect to a heat network before a planned low carbon source becomes available. There is precedent for such time-limited exemptions, for example applicants to the Green Heat Network Fund Transition scheme may make the case in their application that additional time is required to achieve the carbon intensity threshold.

617. These provisions ensure there is both heat demand and heat source certainty in the implementation of zones and construction of subsequent heat networks. This will increase investor confidence by removing the connection risk for both heat demand and heat sources, helping to accelerate construction and delivery of heat networks and ultimately lower the cost of their heat. The ability for zone coordinators to set local emissions limits is designed to ensure that heat networks developed in zones are compatible with local net zero objectives.

Justification for the power

618. A delegated power is required as this will allow for amendments to be made over time as heat network standards improve and the sector grows substantially. Through the growth of the sector, and the zoning pilot studies currently being conducted, the Department will continue to learn about the scenarios in which buildings and heat sources should or should not be required to connect to heat networks and when exemptions are best justified or unjustified. Secondary legislation will give the Department the ability to refine these requirements over time as the market develops.

619. The power will also ensure that the Department can continue to engage stakeholders, in particular, owners of buildings within zones, prospective heat source owners and local government actors, before determining the precise nature of how the measures will be applied.

[4] Heat networks are uniquely able to use local sources of low carbon heat which would otherwise go to waste. This could be from natural sources such as canals and rivers, or man-made sources such as waste heat from industrial processes.

Justification for the procedure

620. Regulations made under this power may impose significant requirements on those in zones. The affirmative procedure will allow parliament to determine if the scope of the requirements in zones is appropriate.

Clauses 181 Power to make regulations about the delivery of heat networks within zones

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Affirmative

Context and Purpose

621. This power enables the Secretary of State to make regulations regarding the delivery of district heat networks within heat network zones.

622. Zone coordinators will oversee the delivery of heat networks within their zones. As such, it may be necessary for them to have powers to decide what networks are built, and by whom. In these cases, the zone coordinator would have strategic oversight of the development of the zone. In some cases, the zone coordinator themselves may be the body that runs the heat networks in their zone – this would, for example, apply if a local authority wished to own the heat network as a municipal utility.

623. There are several different delivery options for the delivery of heat networks. One possibility is to allow zone coordinators to grant exclusive rights to a heat network developer and/or operator to operate within a heat network zone. The exclusive rights for a heat network developer will be exclusive rights to connect to buildings which are required to connect within the heat network zone; for a heat network operator, they will be exclusive rights to operate a heat network within the heat network zone. These will be subject to standard conditions that must be followed when granting exclusive rights.

624. Regulations under this provision may also make provision for funding arrangements for the design, construction, operation or maintenance of district heat networks within heat network zones, as well for the work zone coordinators carry out in relation to them.

625. Importantly, regulations can be made under this power specifying when a zone coordinator may lose control over the delivery of heat networks in their zones. The intent is that this will occur after the expiry of a set time period following the designation of the heat network zone, unless the zone coordinator has taken specified steps in relation to the development of the zone.

Justification for the power

626. Heat networks are natural monopolies, and the proposed approach will enable refinements to be made to the policy over time and avoid instances where it creates sub-optimal outcomes for consumers, or heat network developers and operators.

627. The guidance for granting exclusive rights in zones will need to evolve alongside the methodology and its associated guidance. We envisage that the guidance will provide the zone coordinators with guidelines on when it is appropriate to use an exclusive connection model, and the mitigations needed to ensure that they do not slow down the development of the zone. These guidelines will need to be concordant with the zoning methodology guidance, so their respective recommendations do not conflict with or preclude the recommendations of the other.

628. The Heat Networks (Scotland) Act takes a similar approach by providing for Scottish Ministers to prepare guidance in relation to various aspects of heat network zoning (see for example sections 15, 34, 54 and 66 of that Act).

Justification for the procedure

629. The regulations will provide the zone coordinators with significant powers to determine how heat networks are delivered in their zones. Therefore the higher level of scrutiny provided by the affirmative procedure is appropriate.

Clauses 182 Power to make regulations about the enforcement of requirements in zones

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Affirmative

Context and Purpose

630. This power allows the Secretary of State to make provisions regarding the enforcement of heat network zone requirements imposed by clauses 180 or 181. The zoning legislation will introduce requirements on parties within heat network zones such as the requirement to connect to a heat network, compliance with a zone-specific emission limits and the requirement to provide information. Zone coordinators require effective and proportionate enforcement powers to deter non-compliance with these obligations. The intent is for zone coordinators to have the ability to issue notices and impose civil penalties for those who do not comply with requirements.

631. The zoning enforcement process will apply to bodies subject to zone specific requirements. The heat network market framework will also introduce a general heat network enforcement regime that will apply inside and outside of zones but is outside the scope of this specific provision.

Justification for the power

632. The functions of the zone coordinator may change over time as zones become established. A delegated power is required to provide the Secretary of State with sufficient scope to make amendments to ensure the enforcement regime remains appropriate. The enforcement powers provided to the zone coordinator will be dependent on how the zone coordinator is established, governed, funded and its functions and we therefore believe that the enforcement powers must also be delegated.

633. Similarly, the enforcement approach will largely depend on the approach taken to monitoring and information gathering within heat network zones. As described in the requirement to provide information power, the ongoing zoning pilot will provide more information on the critical data needed to inform the design of the zoning methodology. The information requirements may also change over time as the market matures and grows, and enforcement processes will need to reflect any changes.

634. Finally, by reference to clause 183(1), the regulations may outline the penalty regime, including amounts, procedure and destination of funds. This will allow the Secretary of State to adjust the penalties to ensure they are effective.

Justification for the procedure

635. As this power will provide the Authority and zone coordinator the ability to issue penalties, they are rightly subject to the affirmative procedure to allow sufficient parliamentary scrutiny.

Clauses 183 Power to provide for the publication of guidance on penalties

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Affirmative

Context and Purpose

636. This power allows the Secretary of State to make regulations providing for the Authority to publish guidance regarding the imposition of penalties, including the calculation of their amount, on those who fail to comply with their requirements within zones, including by failing to provide information.

637. The clause also specifies what may be included in regulations made under the powers provided for in clauses 179(2)(c) and 182(2)(c).

Justification for the power

638. A delegated power is appropriate as the appropriate form and content of the guidance will depend on the enforcement regime, which is yet to be set out in regulations. Further, any amendment to the penalty regime, which can be made via regulations, may necessitate amendment of the rules governing the publication of the guidance.

639. The justification for the powers in clauses 179(2)(c) and 182(2)(c) are set out above in the relevant sections.

Justification for the procedure

640. As regulations made under this power will likely complement those made under the previous power, subjecting this power to the affirmative procedure will allow these related regulations to be made in the same package

Clauses 184(1) Power to make regulations about the information zone coordinators are required to collect which is relevant to zones or the identification heat network zones.

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Affirmative

Context and Purpose

641. This power allows the Secretary of State to make regulations requiring zone coordinators to collect information relevant to the identification of areas as zones. This supplements the powers that may be granted to zone coordinators to request information from other persons under clauses 179 and 180.

642. Additionally, for the purposes of monitoring and reporting, zone coordinators may also be required to collect data following the designation on a zone. This data may, for example, be used by the Authority to evaluate the success of zones as part of a review of the methodology.

Justification for the power

643. Setting out these rules in regulations is appropriate, as the sort of information that zone coordinators should be required to collect will depend on the requirements of the methodology and on heat network in zones and their delivery, which is yet to be set out in regulations.

Justification for the procedure

644. As this power will place an obligation on zone coordinators to provide information to other bodies, parliamentary scrutiny can determine if those obligation are proportionate and appropriate.

Clauses 184(2) Power to provide for the information zoning coordinators must maintain records of

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Affirmative

Context and Purpose

645. This power allows the Secretary of State to make regulations requiring zone coordinators to keep records of information in their possession that is relevant to heat network zoning. This includes anything they have requested by means of their powers to request information and any other data they are required to collect by regulations.

Justification for the power

646. This power is necessary to compel the zone coordinator to keep records of information they collect which can be used for identifying or designating zones, and for monitoring and reporting. It is appropriate to define this in secondary legislation as the details of the records required to be maintained will depend on the methodology and duties of the zone coordinator.

Justification for the procedure

647. Any regulations made under this power will likely complement those made under the following power. Using the affirmative procedure will allow these related regulations to be made in the same bundle.

Clauses 184(3) Power to provide for the provision by the zoning coordinator of information from their records to the Authority, Regulator, or other zoning coordinators.

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Affirmative

Context and Purpose

648. Zone coordinators will collect and store a wide range of information by use of their data collection powers. This power allows the Secretary of State to make regulations enabling or requiring them to report some of this information to various bodies; namely the Authority and regulator, but other zone coordinators may also be included.

Justification for the power

649. This power is required to enable the transfer of information from the zone coordinators to Authority, the regulator and other zone coordinators. This may be for the purposes of monitoring the roll out of zones, allowing the regulator to carry out their duties within zones, or any other purpose.

650. A delegated power is appropriate as the details about the transfer of information from the zone coordinators to other bodies will be highly dependent on the functions of those bodies and the data they have access to, which is yet to be determined in regulations and in any event will be subject to change.

Justification for the procedure

651. This power will be subject to the affirmative procedure. As it places an additional duty on zone coordinators it should be subject to the additional parliamentary scrutiny.

Clauses 184(4) Power to provide for the information the Authority must maintain records of

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Affirmative

Context and Purpose

652. This power allows the Secretary of State to require the Authority to keep records of information in its possession that is relevant to heat network zoning. This includes any information acquired from requests to the zone coordinators, the identification of zones or the development of the methodology, and any other information they collect in their role as the Authority.

Justification for the power

653. This power is necessary to compel the Authority to keep records of information they collect which can be used for identifying or designating zones, and for monitoring and reporting. It is appropriate to define this in secondary legislation as the details of the information required to be recorded will depend on the methodology and duties of the Authority, which will be set out in regulations.

Justification for the procedure

654. Any regulations made under this power will likely complement those made under the following power. Using the affirmative procedure will allow these related regulations to be made in the same bundle of regulations.

Clauses 184(5) Power provide for the provision by the Authority of information from their records to the Regulator or zoning coordinators.

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Affirmative

Context and Purpose

655. The Authority will collect and store a wide range of information by use of its data collection powers. This power allows the Secretary of State to enable or require the Authority to provide information to the regulator or the zone coordinators.

Justification for the power

656. This power is required to enable the transfer of information from the Authority to the regulator or zone coordinators. This may be for the purposes of monitoring the roll out of zones, allowing the regulator to carry out their duties within zones, or any other purpose.

657. A delegated power is required as the appropriate way to structure the transfer of information from the Authority to other bodies will be highly dependent on the functions of each of these bodies and the data they have access to, both of which are yet to be determined in regulations and in any event will be subject to change.

Justification for the process

658. This power will be subject to the affirmative procedure. As it places an additional duty on the Authority it should be subject to the additional parliamentary scrutiny.

Clauses 184(6) Power to make regulations about the disclosure of information by the zoning coordinators or Authority not to breach any obligation of confidence or data protection regulation

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Affirmative

Context and Purpose

659. The zone coordinators and the Authority may hold data provided in confidence or subject to data protection legislation. This power allows the Secretary of State to introduce controls that will prevent the Authority or the zone coordinators from being required to provide information in breach of obligations of confidence or data protection regulations.

Justification for the power

660. A delegated power is required as the appropriate form and content of restrictions on the obligation to disclose information will depend in part on the specific types of information that the Authority and zone coordinators hold and their functions; both of these points are yet to be determined in regulations and in any event will be subject to change.

Justification for the procedure

661. This power is subject to the affirmative procedure as it places an additional duty on the zone coordinators and Authority and should therefore be subject to the additional scrutiny.

Part 8 Energy Smart Appliances and Load Control

Clause 187 Energy smart regulations

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Affirmative procedure for the first regulations, negative procedure thereafter. Any provisions which make a criminal offence or amend the list specific purposes subject to the regulations are always affirmative.

Context and Purpose

662. Transitioning to a smart and flexible energy system is essential to improve energy security, reduce consumer bills, enable new and innovative industries to flourish, and meet our targets for net zero. Smart energy technologies and services minimise the amount of generation and network capacity needed to meet our increasing electricity demand needs and help integrate intermittent renewables. New smart energy technologies will play an important role in minimising the grid impact of transport and heat decarbonisation and electrification.

663. ESAs are an essential part of this smart energy system. They enable consumers to shift their electricity usage to times when it is less costly for the energy system. For example, running a heat pump when renewable generation is most abundant, or charging an Electric Vehicle (EV) overnight when there is lower demand on the electricity system. Individual consumers are rewarded for this flexible energy use by saving money on their energy bills, while all electricity consumers benefit from the overall reduction in system costs. This smart and flexible consumer activity is often termed “Demand Side Response” (DSR) and the organisations who provide these smart services by remotely controlling devices are referred to as “load controllers”. Further detail on the role of load controllers is described in paragraph 724 under “New licensable activities: load control”.

664. Ensuring that ESAs are safe and secure for both consumers and the grid will be key to realising the potential benefits of DSR markets and services. For example, where devices are connected without appropriate cyber security they could be hacked and controlled to cause harm to consumers and the grid, potentially disrupting the supply of power to large numbers of homes and businesses. Government needs to regulate to mitigate these risks and ensure consumers have confidence in ESAs. Without a high consumer uptake of such devices, the benefits of a smart and flexible system cannot be realised.

665. Furthermore, specific appliances like electric vehicle charge points and heat pumps have high potential to provide electricity system flexibility, due to their expected high proliferation and the high volume of electricity they consume. By mandating that these devices must be capable of supporting smart services, we will encourage greater uptake of smart technologies and as a result, more consumers will use these appliances at times of benefit to the energy system. This will not only benefit the consumers who make use of these devices’ smart capability, but all consumers, given the costs to upgrade networks and increase generation to meet new electricity demand is socialised through energy bills.

666. Clause 187 contains a delegated power which enables the Secretary of State to make regulations for ESAs. The other clauses within Chapter 2 of Part 8 are supplemental to this clause, providing further detail on how it can be used.

667. The overarching purpose of this clause is to provide the Secretary of State with an enabling power so as to ensure that ESAs placed on the market in GB must meet minimum standards for interoperability, grid stability, cyber security and data privacy, so that these appliances are safe and secure for both consumers and the grid.

668. The additional purpose of this clause is to prohibit the placing on the GB market of specific appliances which are not compliant with the energy smart regulations. In particular, this clause and the supplementary information in clause 188 enable the prohibition of placing specific appliances on the GB market without energy smart functionality. This only applies to any electric vehicle (EV) charge point and electric heating appliances (e.g. heat pumps), as set out in clause 188(3).

669. The energy smart regulations will enable the imposition of technical standards or other requirements. The regulations may refer to published documents or standards, or a list, published by the Secretary of State, of such standards or documents. The requirements will be imposed on economic actors throughout the supply chain (e.g. any person making, selling, importing or distributing ESAs) to produce and sell compliant devices.

670. Clause 187(4)(d) provides for enforcement of the regulations, with clauses 189, 190 and 191 providing further detail on the likely enforcement provisions, sanctions including criminal offences, and appeals process.

Justification for the power

Regulatory requirements for ESAs

671. To ensure there are appropriate consumer protections, and to drive consumer trust in this market, Government needs to ensure that measures to mitigate any potential risks such as cyber security and risks to the stability of the electricity grid are in place ahead of time.

672. The regulatory requirements will be highly detailed and technical in nature, and hence it would not be suitable for them to sit on the face of primary legislation. The final regulatory requirements must also reflect the capabilities of contemporary technology and it is expected that they will need to change as industry standards for how products are configured change, and what was once considered advanced technology becomes routine. The market for load control services and DSR is expected to grow significantly over the coming decade and will be accelerated by Government promoting low-carbon technologies, such as electric vehicles and heat pumps. For example, DSR capacity is expected to increase from 8GW in 2020 to 19-44 GW in 2050.[5]

673. Furthermore, the technology for charge points and electric heating appliances is evolving rapidly, and requirements will need to keep pace with the technological change in this sector. For example, it is expected that there will be at least 600,000 heat pumps installed per year by 2028.[6] Due to the speed of this technological advancement and market development, these requirements will need to be amended, updated and added to, for example on cyber security as new threats emerge to consumers and the energy system.

[5] This range is across the four respective scenarios run in the Future Energy Scenarios 2021 analysis.

[6] Heat and Buildings Strategy (2021) https://www.gov.uk/government/publications/heat-and-buildings-strategy

674. For the provisions set out in clause 187 to function effectively they therefore must remain responsive and agile to these technological changes. Taking these enabling powers now will enable the Government to put in place the regulatory framework to protect consumers, unlock the potential benefits of flexibility in reducing costs for all electricity consumers, and mitigate emerging risks to cyber security and grid stability, as uptake of these devices grows in the coming years.

675. For these reasons, a delegated power is required to enable government to set and update the exact smart functionality requirements in regulations and to modify these as the market develops.

676. The power to make energy smart regulations in subsection (1) of clause 187 is constrained to specific devices including EV charge points and ESAs used in connection with the list of intended purposes specified in subsection (2) of clause 187. The application of the power to set prohibitions on ESAs without smart functionality will be limited to EV charge points and electric heating appliances only, as set out in clause 188(3).

677. The specific electric heating appliances that will be captured by regulations will also need to be adaptable over time and they are therefore not specified within the primary power. This is to ensure that the requirements can capture new electrical heating devices as they come to market, given that the market is continuing to develop, and new technologies are emerging.

678. Section 15 of the Automated and Electric Vehicle Act 2018 ("AEVA") confers a similar power on the Secretary of State to mandate that electric vehicles (EV) charge points must meet requirements in regulations, including in relation to smart functionality. The power provides relevant precedent for the approach being taken for this clause.

679. Whilst the Government can achieve some of its objectives for EV smart charge points with the AEVA powers, to ensure there is one coherent regime for all ESAs it is necessary to include EV charge points in these new powers too. All ESAs present similar risks and benefits from an electricity system perspective, and the Government therefore intends to set similar regulatory requirements across these devices in the mid-2020s. If EV charge points are not included within these powers, there would be divergence between the government's powers for EV charge points and other ESAs, mainly in relation to how obligations are distributed across actors in the supply chain, and in relation to certain enforcement measures. This would create an uneven regulatory playing field with different regulatory and enforcement approaches. This could increase complexity for industry and consumers in future and could also make it harder to effectively regulate to manage cyber security and grid stability risks.

Enforcement, sanctions and appeals

680. Clause 187 subsection (4)(d) and the supplementary provision contained in clauses 189 to 191 allows the energy smart regulations to make provision for the enforcement of the regulations. An enforcement authority has not been appointed, and therefore the powers need to be conferred accordingly for the Secretary of State to designate an authority to carry out enforcement.

681. The intent is to grant an enforcing authority sufficient powers to enable them to swiftly and effectively investigate, act against non-compliance, and provide support to economic actors to enable them to comply with their obligations. Since the regulatory requirements

will be specified in secondary regulations made under the power in clause 187, and the enforcement of compliance will relate to specific information related to these regulatory requirements, it is not practical for the detailed enforcement approach to be described on the face of the Bill. However, clauses 189 to 191 do provide further details as to the likely enforcement provisions that will be contained within energy smart regulations.

682. The ESA market is expected to evolve rapidly, and Government will need to assess what is a proportionate enforcement approach, including appropriate sanctions and offences, in line with the state of the market when the regulations are drafted. We will consult with industry and wider stakeholders and the enforcement authority/authorities on what is proportionate given the risks, and the state of the market at the time.

683. In addition, prior to introducing secondary legislation, Government will continue to work to best determine the appropriate forums for the appeals process and undertake the required justice impact test to ensure the appeals process can be delivered in an appropriate and proportionate way.

Justification for the procedure

684. Clause 192 provides that the first statutory instrument, any statutory instruments which create a criminal offence or any statutory instruments that amend the list of purposes applicable to the energy smart regulations must follow the affirmative procedure. Any other subsequent statutory instruments will follow the negative resolution procedure.

685. The initial secondary legislation is likely to include substantive and detailed technical requirements which will impact a large number of economic actors and devices. The requirements will be subject to further consultation to ensure they are fit for purpose, and we expect they will be of interest to Parliament. Therefore the affirmative resolution procedure is considered appropriate to allow for sufficient parliamentary scrutiny of the initial suite of regulations we intend to impose.

686. Given the market for ESAs is expected to be fast-growing, we consider that updates to the regulations will need to be made regularly. The regulations will need to be agile and quickly amendable after the regulations have first been made in order to reflect the pace of technological change in the sector and the new risks which emerge over time. We therefore consider it appropriate that most subsequent statutory instruments to energy smart regulations can be made via negative resolution, as set out in clause 192(5).

Clause 187(6) Energy smart regulations

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Affirmative procedure for the first regulations, negative procedure thereafter. Any provisions which make a criminal offence or amend the list (Henry VIII power) specific purposes subject to the regulations are always affirmative.

Context and Purpose

687. Ensuring ESAs are safe and secure is essential to fully realising the benefits they can bring, by saving individual consumers money on their energy bills and reducing energy system costs.

688. The power conferred on the Secretary of State by clause 187(1) to regulate ESAs is limited to those appliances which offer the greatest opportunity for DSR, being those which consume high levels of electricity and are most suitable for flexible use by consumers. Clause 187(6) provides the Secretary of State with the power to amend the list of specified purposes with which ESAs must be connected for the regulations to apply. This gives the Secretary of State the power to extend the regulations to other ESAs outside those listed within the Bill, by statutory instrument.

689. This clause also provides the Secretary of State with the power to define the term "relevant electronic communications network" in regulations. This term is used in Part 8, Chapter 1 to define the meaning of load control signal. The "relevant electronic communications network" is the network over which signals are sent to ESAs, to control their load. For example, an EV charge point may be sent a signal over a communications network such as the internet to turn off at peak times by a DSR provider.

Justification for the power

690. The ESA market is developing at pace, and domestic appliances are increasingly being manufactured and sold with 'smart' functionality. Responses to the Government's 2018 consultation on ESAs highlighted the need to retain sufficient scope to make changes in the future too, due to how dynamic and novel this market is. As electricity consumption and systems evolve in the future, the Government may therefore need to extend the scope of the energy smart regulations to other appliances.

691. As new devices become suitable for use in domestic DSR, their energy smart functionality would be unregulated and could pose risks to consumers and the wider electricity network. The cyber security risks and the consequences for critical national infrastructure are significant enough that the Government cannot wait for them to emerge and will need to take swift action to bring them into scope of the energy smart regulations. Without the power to make amendments to the list of purposes for which ESAs can be used, the Government would not have the ability to bring them into scope and mitigate emerging risks.

692. This power to amend the list of purposes would only be used to bring into scope devices with the potential to provide DSR services and bringing any new devices in to scope would be subject to a statutory requirement for consultation. This is a Henry VIII power.

693. Defining the term "relevant communications network" will require a complex, technical set of clauses. The definition is likely to change over time as new smart technologies and load control services emerge, and as the networks ESAs use develop. It would therefore not be suitable for this definition to sit on the face of primary legislation.

694. The market for ESAs is expected to accelerate in the coming decade, driven by Government promoting low-carbon technologies, such as electric vehicles and heat pumps. Without the ability to amend this definition, new technologies will emerge beyond the scope of the communication networks captured within the Bill. Excluding these new devices from scope would pose risks, and Government would need to take swift action to bring them into scope of the energy smart regulations to mitigate such risks.

Justification for the procedure

695. Amendments made to the list of specified purposes with which ESAs must be connected will follow the affirmative procedure. The Department consider this to be the appropriate procedure, which will give parliament adequate opportunity to scrutinise the amendments.

696. The regulations to define "relevant electronic communications network" will likely need to be made in the first statutory instrument, and hence will also be subject to the affirmative procedure.

697. This power is strictly limited to amending specified purposes applicable to the energy smart regulations and defining communications network. It cannot be used more widely to amend other aspects of the primary legislation.

Clause 193 Power to amend licence conditions etc: load control

Power conferred on: Secretary of State

Power exercised by: Licence or code modification to amend licence conditions. Regulations made by statutory instrument to extend power to amend licence conditions.

Parliamentary Procedure: None to amend licence conditions. Affirmative procedure (Henry VIII power) to extend the power to amend licence conditions.

Context and Purpose

698. The use of load control has potential impacts on the wider electricity system and all of the regulated participants in the electricity market. Therefore, it will be necessary for the Secretary of State to be able to modify the conditions of licences across the electricity industry, so as to regulate the interface between load control activities and all other regulated activities having an impact on the system. Modifications may be made (among other things) for the purpose of facilitating the secure and appropriate use of load control, promoting its effective contribution to the efficient operation of the electricity system, and ensuring that it is appropriately regulated in the interests of consumers.

699. The licences within scope of this power are:
    a. licences granted under the EA 1989, such as licences for the transmission, distribution or supply of electricity and the smart meter communication licence.
    b. gas supply licences and the smart meter communication licence awarded under the GA 1986. Although not directly relating to electricity, these licences are included because where possible these licences are the same for both gas and electricity, and maintaining consistency is desirable since many companies hold both gas and electricity licences at the same time. These licences also define the scope of some industry codes (the Smart Energy Code[7] and the Retail Energy Code[8]) that may need to be extended as part of the arrangements.

[7] The Smart Energy Code deals with matters primarily concerned with communicating to and from smart meters.

[8] The Retail Energy Code is a contact that deals with the maintenance of the central industry databases that map energy suppliers to consumer premises by MPANs and MPRNs (i.e. consumers' unique gas and electricity identifiers), as well as the change of supplier processes when a consumer switches supplier.

700. Where the Government makes regulations to introduce a new licensable activity relating to load control using the powers in new section 56FBA of the EA 1989, we would expect to use the regulations to add these new licences to the list of licences whose conditions can be modified under this power.

701. The power also allows for modification of documents maintained in accordance with any of the electricity and gas licences set out above. These documents are known as “industry codes”, and they contain most of the detailed technical rules under which the participants in the electricity industry deal with each other and interface with the system.

702. The power can be used to modify both standard licence conditions and the conditions of particular licences.

703. The modifications to licence conditions that may be made are any that could lawfully be made by the Authority under section 7 of the EA 1989 or section 7B of the GA 1986. The clause sets out a non-exhaustive list of matters that could be the basis for either licence or code modifications and could, for example include introducing provisions that prevent load control services being provided other than from devices that meet requirements set out in published documents or standards.

704. The power may be exercised differently in different cases or circumstances and includes the ability to make incidental, supplementary, consequential or transitional modifications to the licences or codes.

705. This provision will enable the Secretary of State to modify licences and industry codes to suit the specific needs which may arise in the context of regulating load control in a number of future circumstances.

706. As set out in clause 194, before making any modifications the Secretary of State must consult the holder of any licence being modified, the Authority and such other persons as the Secretary of State consider appropriate.

707. The principal objectives and general duties under sections 3A to 3D of the EA 1989 will apply to the Secretary of State in the exercise of the power, as will the principal objectives and general duties under sections 4AA to 4B of the GA 1986.

708. As with most other recent powers for the Secretary of State to modify electricity and gas licences and codes, we accept that this power needs to be appropriately time-constrained, and it is for that reason clause 193(5) provides for the power to expire ten years after it comes into force.

709. However, as per clause 193(6) and 193(7), if the Secretary of State further wishes to be able to amend the date that these powers expire, he may do so under regulations made by the Secretary of State, conditional on the fact that the regulations should be subject to the following procedural protections:
    a. There is no limit on the number of occasions on which regulations may be made, but on each occasion, it may only specify a date which is no more than three years later than the date it is replacing; and
    b. The regulations are to be subject to affirmative resolution.

Justification for the power

710. The introduction of a new licensable activity into the electricity sector is likely to have a material impact across it. There will be many interactions that need to be dealt with between existing licensees and the new ones.

711. For example, where energy suppliers carry out load control activities, we will need to decide whether they need to be separately licensed to do this, or whether we will deal with any load control requirements in their existing supply licences. In either case, we envisage interactions between the two licensable activities, and some changes to supply licences are likely to be needed. The Government also anticipates that there will be material interactions with existing industry processes, for example with the Centralised Registration arrangements provided for under the Retail Energy Code and to the wholesale electricity market arrangements set out under the Balancing and Settlement Code[9] (and underpinned by provisions of the Grid Code[10]) as well as the Smart Energy Code.

712. It may be deemed necessary to expand the scope of an existing industry code to deal with the contractual arrangements between the operator of any central load controller systems and load controllers themselves. This would have the benefit of not requiring the creation of another separate industry code. However, given the likely scope of the interactions in the electricity sector, the Government is seeking the power to be able to modify any electricity licence or code under such a licence.

713. The powers being sought have a number of legislative precedents, most obviously at section 88 of the Energy Act 2008 in relation to licence condition and industry code modifications needed to facilitate the introduction of smart metering.

714. This power is needed for a minimum period of three years after the expiry of the power to make new licensable activities, as the Government believes that this is the minimum realistic period of time in which the details of how any new category of licensable activity fits into the existing industry arrangements can be determined and the appropriate amendments introduced. However, there is a risk that this period of time might not be sufficient. There is potentially a substantial time lag between the making of secondary legislation which introduces a new category of licensable activity into the EA 1989 and companies obtaining that new category of licence and commencing full commercial operations under it.

715. For instance, if a new category of licence is introduced into the Act, it may take quite some time before any company makes an application for that licence, to make a decision on whether or not to grant the licence, and then a further (potentially extended) period of time before the new licensee commences its business under the licence that has been granted. In short, the introduction of a new type of licence into the legislation is just the beginning of a process. It does not necessarily mean that companies will instantly obtain or start to operate under the licence, still less that the full nature, extent and impact of their relationships with other licensees or the wider electricity system will be immediately apparent as soon as they have commenced operations.

[9]The Balancing and Settlement Code deals with the trading of energy imbalances (the difference between the amount of energy a supplier has actually supplied and the amount they have bought under bilateral contracts, and the difference between the amount of energy a generator has actually generated and the amount they have sold). It also deals with certain services used by the system operator to balance the system in real time.

[10] The Grid Code is a technical document dealing with processes, information exchange and safety matters relating to the use of the GB transmission system.

716. The effect of this is that the amendments to other licences and industry codes that are required because of the introduction of this new category of licensee may only become clear gradually as a newly licensed entity begins its commercial activities and starts to engage with the rest of the industry and interface with the electricity system. It is not likely to be possible to anticipate all of the changes that would be needed to licence conditions and industry codes without at least some, and perhaps substantial, real world experience of the new type of licensee in operation.

717. In this context, the three-year period for licence and code modifications after the expiry of the power to create new types of licence may easily prove, in practice, to be inadequate, and to require one or more periods of extension.

Justification for the procedure

718. Since the Utilities Act 2000, powers have been conferred on the Secretary of State to modify the conditions of licences and/or industry codes for specific purposes over fifteen times. The Government understands that only twice have those powers required the Secretary of State to lay proposed changes before Parliament for negative resolution prior to making the changes.

719. The powers that require the changes to be made using the negative resolution procedure are the powers related to the introduction of smart metering under sections 88 and 89 of the Energy Act 2008 and those relating to feed-in tariffs in section 41 and 42 of the same Act. The 2008 Act also conferred powers on the Secretary of State to be able to modify licences for reasons related to granting access to offshore transmission systems (section 81), but these were not subject to a negative resolution procedure. Nor were the powers to modify licences set out in sections 94 and 97 of the same Act (although it is acknowledged that the scope of these powers is quite limited). In the case of the powers under sections 88 and 89 of the Energy Act 2008, none of the changes that have been laid before Parliament have been debated, and there has been no negative resolution in relation to any of the proposed changes.

720. Four sets of powers to modify conditions of licences for broader reasons under the Energy Act 2013 (sections 37, 45, 49 and 50) were not subject to negative resolution and consequently not subject to any Parliamentary procedure. The same also applies to powers relating to unilateral changes to supply contracts (EA2010, section 25) and those to implement the “Green Deal” (Energy Act 2011, sections 17-20).

721. The Government is proposing that the powers to modify conditions of licences and industry codes for purposes relating to load control should not require the Secretary of State to lay the changes before Parliament for negative resolution before being made. Instead, it is proposed that the Secretary of State should be required only to have first consulted with affected licensees, the Authority and such other persons as he may consider appropriate prior to making his decision. This is consistent with the way in which the substantial majority of similar such powers have operated in the past.

722. The Government does not consider it appropriate to have to rely on subsequent primary legislation to extend the duration of the powers. The smart metering powers under section 88 of the Energy Act 2008 – which provide a template for the powers to which the proposed sunset clause attaches and are subject to some of the same considerations as to timing, provide relevant precedent. An extension to those powers is being sought within this Bill (see paragraph 508).

723. The Government has therefore proposed a process for extension of these powers which retains several procedural protections in the light of the fact that it entails the Secretary of State using secondary legislation to extend the period in which he can exercise the principal powers. Complex programmes of work of this nature can take time to implement and therefore an option to extend the powers without the need for new primary legislation is considered expedient.

724. Notably, the amending statutory instrument would require affirmative resolution and could not provide for a single extension of more than three years.

Clause 197 and Schedule 16 New licensable activities: load control

Power conferred on: Secretary of State

Power exercised by: Statutory Instrument (Regulations)

Parliamentary Procedure: Affirmative (Henry VIII power)

Context and Purpose

725. "Load control" is the term used to describe the remote control of an energy smart appliance so as to regulate: (i) the amount of electricity that it consumes and/or the time at which that electricity is consumed, or (ii), in the case of a device which generates or stores energy, the amount of electricity that the device discharges and/or the time at which that electricity is discharged. The use of such load control is rapidly increasing. This is a function of two developments: one technological, where an increasing number of consumer electrical appliances will have smart functionality (called ESAs, as described above) so they can be remotely controlled, and one market related, where we expect to see an increase in the uptake of DSR services. The technological development is what has made the wide-scale use of load control feasible; the market development is what makes it desirable, and therefore amenable to being financially rewarded.

726. However, as described in detail within the section above titled Energy Smart Regulations, the proliferation of ESAs which can be remotely controlled will open-up significant new challenges for consumers and the energy system, relative to their current non-smart counterparts.

727. It is therefore essential that commercial activities associated with load control are subject to a tailored and specific regulatory regime, so as to ensure both that the opportunities created by load control can be fully realised and that its risks can be mitigated.

728. The power created by clause 197 and schedule 16 is intended to address these policy imperatives by providing for a legislative framework within which organisations carrying out activity relating to load control can be subject to appropriate regulatory oversight.

729. Schedule 16 inserts a new section "56FBA New licensable activities: load control of energy smart appliances" into the Electricity Act (EA) 1989. This new section will allow the Secretary of State, by regulations, to amend Part I of the EA 1989 to add activities associated with load control to the list of licensable activities set out in Part I of that Act. Activities associated with load control could include the activity of entering into arrangements with consumers for the right to control the electricity usage of their ESAs, such as an EV charge point, for the purpose of providing DSR services. They may also include providing services which facilitate the carrying out of load control, such as data

and communications services in relation to information sent to or received from the device that is the subject of the load control activity.

730. The effect of adding new activities to those which are licensable under the EA 1989 is that they will be subject to a criminal offence under section 4 of that Act if they are carried out by a person who does not hold a relevant licence or fall within the scope of a relevant exemption. A person who obtains a licence so as to carry out the relevant activity lawfully will be subject to regulation by the Authority (i.e. Ofgem) in the same manner as all other existing licence holders. In particular, the Authority will have power to enforce compliance with licence conditions.

731. The new section will also allow regulations made by the Secretary of State to specify standard licence conditions for the new licensable activities and to make consequential, transitional, incidental and supplementary provision – this includes amendments (or repeals) to any provision of the EA 1989 or any other enactment, and amendments to the standard conditions of existing licences under the EA 1989. This power will enable the main elements of the regulatory regime established by Part I of the EA 1989 and related legislation to be applied with suitable modifications to the licensable activities associated with load control.

732. The new section will also allow regulations made by the Secretary of State to make provision:
    a. limiting the geographical scope of a licence, or enabling it to be modified.
    b. as to the duration of the licence.
    c. conferring functions on the Secretary of State or the Authority.

733. Where activities relating to load control have been added to the list of licensable activities, subsequent regulations by the Secretary of State may provide for that activity to cease to be a licensable activity.

Justification for the power

734. Similar to ESAs, load control is still a relatively nascent technology and market. However, a number of developments are expected over the next few years as the technology rapidly develops. A wide range of business models is emerging, with varied organisations ranging from electricity suppliers to electric vehicle chargepoint operators selling smart appliances and controlling them to benefit consumers and the energy system.

735. The current expectation is that, over the next few years, the nature of the activities and organisations which will need to be licensed will continue to evolve. It is within this period that the power will be needed to specify more precisely which new activities should fall within the licensing regime.

736. It would not be possible at the present time, with any degree of confidence, to capture all the relevant activities which will need to be regulated or, conversely, to avoid inadvertently capturing activities which do not need to be regulated. Consequently, these activities are not currently suitable for definition in primary legislation now.

737. Moreover, the market for load control activities will continue to develop over time, with a wider range of actors taking on a load control role. Therefore, sufficient scope is required to allow the legislation to adapt over time and keep pace with the expected rate of technological and market change.

738. The timing of the exercise of that power will require careful judgment. On the one hand, it will be important not to intervene to regulate the market too soon, since that risks stifling innovation. On the other hand, an intervention that is too late will allow the build-up of substantial unregulated risks to consumers and the electricity system as a whole. Moreover it can be anticipated that most participants in the market will welcome some early clarity on the nature of the regulation to be applied and would prefer this to the late imposition of a licensing scheme that may be inconsistent with business models which have already been developed.

739. For all these reasons, it is important to provide an enabling power authorising the Secretary of State, by means of secondary legislation, to provide in due course for regulation of appropriate activities is highly preferable to amendments made directly by way of primary legislation at the present time.

740. Given the anticipated growth in this market, Government considers it necessary to take these enabling powers now. Electricity demand could double by 2050, due to the electrification of cars and vans and the increased use of clean electricity replacing gas for heating.[11] Over the next decade, we will see significant progress towards this transition – with up to 10 million electric vehicles on our roads by 2030 (up to a quarter of all cars and vans) and at least 600,000 heat pumps being installed each year by 2028. This represents a huge quantity of potentially flexible load. The potential consequences to stability of the electricity grid of a cyber-attack against organisations that remotely controls such a large quantity of load could therefore be very significant. Due to the seriousness of these risks, Government is aiming to implement new cyber security measures from the mid-2020s, ahead of any risk to the energy system materialising.

741. In addition, it will be necessary to license load controllers in order to afford appropriate consumer protection, for example to prevent consumers from being locked into long-term unfair contracts. This risk provides further rationale for taking an enabling power now, that can adapt over time to emerging risks to consumers.

742. It may be necessary to introduce central bodies to provide centralised security systems to support load control activities. Such central systems might provide infrastructure services or systems for providing additional cyber protections for load controlling messages. While we are considering options for how these central services might be provided, one option is that they are provided by a central licensed monopoly entity, regulated by the Authority, in the same way that the Smart Meter Communication Licensee is a licensed monopoly that provides central services for communications with Smart Meters (which services include public key infrastructure and anomaly detection services). Where it is decided to adopt the central monopoly route, the Government would need to introduce a licensable activity that related to this activity, hence the need for powers that provide sufficient scope to allow for this.

743. The Government is proposing that regulations to introduce a new licensable activity would be able to confer functions on both the Secretary of State and the Authority. This is being proposed for practical reasons – for example to allow us to make amendments that deal with who would grant the first and any subsequent licences to carry out any central load control activities. We are seeking powers to be able to mirror the changes introduced by the Electricity and Gas (Smart Meters Licensable Activity) Order 2012.

[11] Energy white paper: Powering our net zero future, December 2020. https://www.gov.uk/government/publications/energy-white-paper-powering-our-net-zero-future

744. It is important that the power to make consequential, transitional, incidental and supplementary provision (including amendments or repeals) when introducing a new licensable activity applies to any provision of the EA 1989 or any other enactment or standard conditions of licences, and not just Part I of the EA 1989. This is because, for example, some relevant matters (as discussed below) are dealt with in Part III of the EA 1989 and in the schedules.

745. There is a clear precedent for what is being proposed. A new licensable activity of providing a smart meter communication service was introduced by the Electricity and Gas (Smart Meters Licensable Activity) Order 2012.[12] The 2012 order was made using powers under Section 56FA of the EA 1989 (which in turn had been introduced by the provisions of Schedule 4 to the Energy Act 2008). The order made consequential changes not just to Part I of the EA 1989, but also to sections 96 and 98 and Schedule 6A (dealing respectively with matters relating to directions for preserving security, provision of statistical information and provisions imposing obligations enforceable as a relevant requirement) which fall within or under Part III of the Act. The 2012 order was also used to make changes to other primary and secondary legislation (see Parts 4 and 5 of the order) and conditions of existing licences (see Part 6 of the order). We envisage equivalent changes being needed when new load control related licensable activities are introduced.

746. Like the power taken in respect of the smart meter roll out, we accept that this power needs to be appropriately time-constrained, and it is for this reason that we have provided under new section 56FBB for the power to expire seven years after the day on which the first regulations (for any purpose) come into force. We are also proposing that the Secretary of State would be required to consult with the Authority and any other person they think relevant before making regulations and that regulations must be approved by resolution in each House of Parliament.

Justification for the procedure

747. The Government's view is that the regulation of remote load control activity, both from the standpoint of ensuring a functioning and balanced energy system and from that of protecting the essential interests of consumers of smart appliances, will be of considerable interest to Parliament. For that reason, and because the creation of new licensable activities is underpinned by the creation of criminal offences in respect of those who require but do not obtain licences, it is considered that the affirmative procedure is appropriate.

Clause 197 and Schedule 16 (paragraph 3) Competitive tenders for licences for new licensable activities associated with load control

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative

Context and Purpose

748. As outlined above, it is possible that certain activities relating to load control are best carried out by a centralised body, or by a limited number of licensees. For example, this occurred in the context of smart meter roll out, where the Secretary of State decided to

[12] https://www.legislation.gov.uk/uksi/2012/2400/contents/made

award the smart meter communication licences for gas and electricity to a single central body identified through a competitive process. Schedule 16(3) inserts "or regulations under section 56FBA(1)(a)" into section 56FC(2) of EA 1989 (competitive tenders: definition of "new licensable activities") which will enable the Secretary of State to make regulations for the award on a competitive basis of a licence relating to load control activities.

Justification for the power

749. This power will enable the Secretary of State to make regulations setting out the conditions and parameters within which a competitive tender or tenders for licensing centralised load control activities should take place. In addition, a number of detailed matters – related to the conduct, stages, start date, notification, withdrawal and cancellation of the tender exercise – will need to be set out in the regulations.

750. The Government does not consider that these matters would be suitable for primary legislation, in particular because they are contingent on other decisions yet to be made about the nature of licensable activities. We believe that it will be necessary to design the detailed processes following a more detailed examination of the market conditions which may lead to the granting of different roles to different central bodies. Moreover, the possibility must remain open that no central monopoly body will be needed, in which case these powers would not need to be exercised at all.

751. The power taken is identical to that taken with the smart meter roll out currently in section 56FC of the EA 1989.

Justification for the procedure

752. The Government considers that the negative procedure gives Parliament the appropriate level of scrutiny and this procedure is consistent with the existing power this clause extends within the EA 1989.

Part 9 Energy Efficiency of Premises

Clause 198 Powers to amend, revoke or replace the existing Energy Performance of Buildings regime relating to Energy Certificates (Energy Performance Certificates (EPCs), Display Energy Certificates (DECs) and Air Conditioning Inspection Reports (ACIRs))

Power conferred on: Secretary of State

Power exercised by: Regulations made by statutory instrument

Parliamentary Procedure: Negative, save that the affirmative procedure will be used for any new civil penalties or new criminal offences and in respect of any regulations which amend primary legislation.

Context and Purpose

753. The purpose of this provision is to enable the Secretary of State to make changes to the existing Energy Performance of Buildings (EPB) regime, as set out in the Energy Performance of Buildings Regulations 2012, to ensure that it is fit for purpose and contributes effectively to improving the energy efficiency of buildings, which, in turn, will advance the achievement of the Government's target of net zero carbon emissions by 2050, as set out in s.1 of the Climate Change Act 2008.

754. Pursuant to European Withdrawal Act 2018, s 2(2) ECA was repealed. As a result, there is currently no suitable power to make substantive amendments to all aspects of the EPB regime. It is therefore necessary that a replacement primary power is conferred on the Secretary of State to permit future changes to, revocations of, or replacements to be made to the EPB regime.

755. In general, the changes which are envisaged might be made in due course to the existing EPB regime using the new primary powers fall into the following broad categories:
    a. Changes to the circumstances where and when an energy certificate is required, the process and timeframes to secure an energy certificate, and validity periods of energy certificates.
    b. Enhancing the extent to which EPC and DEC certificates are capable of stimulating action to reduce carbon emissions from buildings, for example, by increasing the range of recommendations shown on an energy certificate, by potentially extending the scope of DECs to all non-domestic buildings and varying the validity period for DECs.
    c. Improving the standards of assessment and of quality assurance in relation to Energy Assessors and Accreditation Schemes.
    d. Addressing specific issues relating to the performance and inspection of air conditioning, ventilation and heating systems.
    e. Possible changes to the enforcement regime to improve its effectiveness and encourage high levels of compliance by building owners, Energy Assessors and Accreditation Schemes with the EPP regime (along with sufficient, flexible enforcement options to support this).
    f. Improvements to the accuracy, accessibility and use of EPP data to support enforcement and our wider energy efficiency policy and powers to charge fees.

Justification for the power

756. The Department is seeking a replacement power to amend, revoke or replace the existing EPB regime. The power is required specifically for the purposes of amending the existing EPB regime to ensure that it remains fit for purpose. Further, the Department's view is that the amount of technical detail will be such that it is appropriate for it to be set out in secondary, not primary, legislation. Proposals to change the regime and regulations themselves (including on technical matters) have not yet been consulted on. This consultation process is expected to take place before changes to the regime are brought forward.

Justification for the procedure

757. Section 1 of the European Union (Withdrawal) Act 2018 repeals the European Communities Act 1972. Now that the UK has left the European Union, the only way to substantively amend the existing EPB regime, which exists in regulations not primary legislation, will be by obtaining new powers in primary legislation. The Department considers the negative procedure is appropriate as the existing regulations were enacted via the negative procedure and the proposed amendments include provisions relating to technical matters. Sufficient scope is required in order to update and revise the regulations over time in order to meet the net zero commitment, especially given the pace of technological change. The affirmative procedure will, however, be used for any new civil penalties or new criminal offences and in respect of any regulations which amend primary legislation.

Part 10 Core Fuel Sector Resilience

Clause 204(1) Power to give directions to particular core fuel sector participants for the purpose of maintaining or improving core fuel sector resilience

Clause 204(3) Power to give directions for the purpose of restoring continuity of supply of core fuels or counteracting the disruption to or failure of continuity of core fuels, or its potential adverse impact

Clause 204(4) Power to give directions for the purpose of reducing the risk of disruption to, or a failure of, continuity of supply of core fuels, or reducing the potential adverse impact of the disruption or failure

Power conferred on: Secretary of State

Power exercised by: Direction

Parliamentary Procedure: None

Context and Purpose

838. This Part of the Bill comprises measures which will provide the government with a suite of powers to ensure that resilience in the United Kingdom fuel supply system is maintained. Measures only apply to entities operating or owning facilities in the traditional downstream oil sector or facilities involved in the supply of renewable transport fuels and are limited for the purpose of ensuring fuel supply resilience.

839. The downstream oil sector is all parts of the industry from the point crude oil arrives at a terminal or refinery, through the refining process (including the use of non-crude oil additives) until the point of sale to a final industrial or domestic customer. This is distinct from the upstream oil sector, which covers all parts of the industry involved in seeking and obtaining oil from the ground and getting it to a terminal or refinery. As such downstream oil does not include fracking.

840. The downstream oil sector comprises over 200 companies involved in the refining, importing, distribution and marketing of petroleum products. The sector plays a key role in UK energy security, supplying products that are vital to the UK's economy and way of life. Infrastructure includes six major refineries, 61 major terminals, 3,000 miles of pipeline and 8,400 filling stations. UK refineries produced a total of 59 million tons of oil products in 2019, with UK total demand at 68 million tons. About two-thirds of the output is petrol, diesel, jet fuel, and fuel oil. The annual volume of road transport fuels sold in the UK is 44 billion litres.

841. The sector also includes service providers who provide fuel management services to forecourt operators in the downstream market. These companies and assist forecourt operators with their resupply scheduling and so hold information about downstream oil sector actors' stock levels. It is estimated that such wetstock management companies cover some 65% of forecourts in GB.

842. In the main, the sector is efficient, flexible, and effective in ensuring the continuity of fuel supply. However, it is also continually having to respond to global market factors and, as it changes, the ability of the UK supply system to protect the continuity of fuel supplies and be resilient to disruptions needs to be maintained. There is no central authority or

mechanism in the downstream oil supply system by which supply capacity can be managed. Instead, supply capacity is determined by individual enterprises, and capacity investment and rationalisation are driven by market forces rather than UK-wide resilience interests. In a competitive marketplace, participants may not know the supply capability of the competitors or, consequently, the system as a whole.

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

844. The sector is faced with an increasingly ambitious trajectory for reduction of greenhouse gas emissions. On 27 June 2019, the target in s1(1) of the Climate Change Act 2008 was amended, requiring the UK to bring all greenhouse gas emissions to net zero by 2050. On 20 April 2021, the Government confirmed it would adopt a sixth carbon budget requiring the cutting of emissions by 78% by 2035 compared to 1990 levels. As the UK makes this transition to a zero-carbon economy, it will still need to ensure reliable fuel supplies are available. Renewable transport fuels are predicted to form a part of this transition. Critical services (public and private sector) will continue to be dependent on oil for many years, while the sector comes under increasing economic pressure due to the prospect of falling demand.

845. Government internal research in 2014-2015 (the findings of which were confirmed in a repeated assessment in 2019-20) examined evidence of GB fuel supply system resilience and risks to supply. The research findings took account of information supplied by many fuel companies. The findings were:
    a. There are several major GB infrastructure sites which are essential to regional fuel supply because other local infrastructure is too small to replace them if they cease supply (also referred to as ‘single points of failure’).
    b. Supply chains are very dynamic and can adjust to disruption at these sites over weeks but not immediately.
    c. The key constraint is finite logistical capability of pipelines and tankers within the country to distribute fuel to retail sites – not a national lack of access to fuel from UK refineries or imports.
    d. A sudden failure at the identified essential sites could not be compensated for immediately and fuel shortages could occur within days.
    e. There is a market failure in that, while individual suppliers invest in the resilience of their own supply chain, there is neither a mechanism nor a market incentive for them to share the costs of investing in system resilience as a whole.

846. From discussions the Government has held with industry, there were also several features of the companies’ approach to managing risk that give us cause for concern when we consider resilience to lower probability but high impact risks.

847. As explained further below, existing powers, for example under the Energy Act 1976, are primarily directed to addressing emergency situations. They do not allow government to monitor the resilience of the sector as a whole and provide limited or no powers to identify and address lower probability, high impact risks at an early stage. government therefore has only a limited ability to ensure that such risks do not eventuate and give rise to the type of emergency situations in which existing powers may be exercised.

848. To address these concerns, government’s approach is to put in place a small number of measures that provide government with the tools to identify fuel supply risk and support

industry in ensuring fuel supply resilience, with further back-stop powers to protect fuel supply resilience when required. These measures are designed to work with the structure of the fuel supply market and encompass fuel supply activities related to both renewable transport fuels and crude oil-based fuels. This reflects that as time goes on the industry will begin to incorporate more renewable fuel sources that will also necessitate that the government has powers to ensure resilience of these fuels as well.

849. The Government held a consultation ('Proposals to strengthen the resilience of fuel supply to UK consumers') from 17 October 2017 to 12 December 2017 on the measures now included in the Bill. A response to the consultation was published on 17 April 2018. The response indicated that the Government understood that industry sought a light touch approach and has given careful consideration to minimise any impacts on market dynamics and competitiveness.

850. On 14 December 2020, the Government published an Energy White Paper ('Powering our Net Zero Future'). In that White Paper, the Government stated its intention to take powers to ensure the UK maintains a secure and resilient supply of fossil fuels during the transition to net zero emissions.

851. On 7 June 2021, the Government published part of the clauses to which this Part of the Bill relates as the 'Downstream Oil Resilience Bill'. The Delegated Powers and Regulatory Reform Committee has previously provided a Memorandum in relation to the delegated powers under that draft bill. The Government has considered the views of the Committee in its Memorandum to the Business, Energy and Industrial Strategy Committee, along with the views of the Business, Energy and Industrial Strategy Committee in its Pre-legislative Scrutiny dated 2 November 2021. The Government published a response on 17 February 2022.

852. In autumn 2021 there was a disruption to fuel distribution that resulted in forecourts not having sufficient fuel stocks. The Government activated several contingency measures to assist industry to ensure continuity of supply. The shortage at the forecourts was not caused by an overall shortage of fuel but driven by increased demand and an underlying shortage of HGV drivers. The measures in this Part are focused on encouraging industry to build resilience rather than respond to an emergency. However, the powers under this Part have the potential to assist the government to be cognisant of such risks as these prior to them escalating and to have more tools to obtain more comprehensive information about events as they unfold and, if necessary, to be able to direct relevant industry actors to take steps to shore up their own resilience or reduce the impact of any disruption or failure to fuel supply.

853. Since the publication of the draft Downstream Oil Resilience Bill, the relevant clauses have been reviewed and amended. Notably, this Part now refers to 'core fuel sector activity' rather than downstream oil sector activity. This reflects that fuel security not only includes crude oil-based fuels but also renewable transport fuels. These are collectively referred to as 'core fuels' in this memorandum. Similarly, the 'downstream oil sector' and 'downstream oil sector resilience' are now referred to as 'core fuel sector' and 'core fuel sector resilience' respectively

854. An objective clause has been used in this Part at clause 202 to show how the powers under this Part will be used, in particular, the functions of the Secretary of State under this Part must be exercised with a view to ensuring that economic activity in the United Kingdom is not adversely affect by disruptions to core fuel sector activities, and to reduce the risk of emergencies affecting fuel supplies. This applies to the Secretary of State's exercise of powers under this clause.

855. Clause 204 gives the Secretary of State three related powers to give directions requiring a person to whom the clause applies to do anything in relation to that person's relevant activities or assets.

856. First, clause 204(1) gives the Secretary of State the power to give directions for the purpose of maintaining of improving core fuel sector resilience (as defined in clause 203(5)). Examples of such directions are provided in the clause. Additionally, clause 204(2) provides that this power cannot be exercised unless the Secretary of State considers that a person to whom clause 204(1) applies has failed to make sufficient progress with steps the Secretary of State considers necessary for maintaining or improving core fuel sector resilience.

857. Second, in the event that the supply of core fuel is disrupted or fails, clause 204(3) gives the Secretary of State the power to give directions to do anything the Secretary of State considers necessary or expedient to restore continuity of supply or counteract the disruption or failure, or its potential adverse impact. Continuity of supply of core fuel is defined in clause 203(7) by reference to 'normal levels' in subclauses (8) and (9), which means levels not substantially below the average monthly levels of supply in the United Kingdom (calculated by reference to the levels of supply in the five years preceding the calculation), taking account of regional variations.

858. Third, in the event that the Secretary of State considers there to be a significant risk that the supply of core fuels will be disrupted or fail, clause 204(4) gives the Secretary of State the power to give directions to do anything which the Secretary of State considers necessary or expedient to reduce the risk or the potential impact of such disruption or failure.

859. The circumstances in which directions under clause 204 can be given are limited: in the case of clause 204(1) by purpose and by the requirement that the persons to whom the section applies must first have failed to take the steps outlined in clause 204(2); and in the cases of clauses 204(3) and (4) by reference to specific circumstances and to what is necessary and expedient to achieve the specified purposes. Clause 204(5) provides that directions under clause 204 may only be given if the corresponding cases are not sufficiently numerous to justify making regulations under clause 207, or urgency means it is not practicable to achieve the aims of the direction by making regulations under clause 207. This reflects the circumstances set out in sub-clauses (3) and (4). Clause 204(6) defines 'corresponding cases' as persons to the clause applies and to whom the Secretary of State considers it would be appropriate to take action corresponding to the direction. The people to whom a direction can be given is also restricted by the capacity thresholds for their business or facility (as appropriate) set out in clause 204(7), and a direction can only relate to the recipient's core fuel sector activities or facility. A direction will be specific to the person to whom it is given.

860. Clause 205 sets out the procedure for giving directions under clause 204 and requires the Secretary of State to give the proposed recipient an opportunity to make written representations. The Secretary of State also has to consult with:
    a. So far as the direction relates to relevant activities or assets in England, Scotland or Wales, the Health and Safety Executive.
    b. So far as the direction relates to relevant activities or assets in England, the Environment Agency.
    c. So far as the direction relates to relevant activities or assets in Scotland, the Scottish Environment Protection Agency.

d. So far as the direction relates to relevant activities or assets in Wales, the Natural Resources Body for Wales; and
e. So far as the direction relates to relevant activities or assets in Northern Ireland, the Health and Safety Executive for Northern Ireland, and the Department of Agriculture, Environment and Rural Affairs.

861. In addition to the mandatory consultees, clause 205(4)(f) also obliges the Secretary of State to consult with any other persons the Secretary of State thinks appropriate before making a final decision as to whether to give a direction. Clause 214 provides for the recipient of a direction to be able to appeal to the First-Tier Tribunal on grounds that the decision to give a direction is based on an error of fact, is wrong in law, or is unfair or unreasonable.

862. Failure to comply with a direction without reasonable excuse is an offence under clause 206.

863. These powers are intended to allow government to give directions to industry where necessary for resilience purposes, so they are better able to maintain supply in the event of disruption to supply of fuel etc., either pre-emptively or when such a disruption has actually arisen. Further, the intent is to use the power of direction 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 capacity thresholds and definition of relevant assets and activities are intended to ensure that directions can only be given in relation to critical / major sector assets and activities.

864. In some cases, the directions power under this section may be linked to an offer of financial support pursuant to clause 222 to assist the relevant undertaking to comply with the direction. Any such spending power is to be subject to any relevant rules on subsidy control and competition etc.

865. Directions are not considered to be legislative powers, because they are designed to impose specified obligations on individual entities, rather than being measures of more general effect (as will be the case, for example, for regulations made under clause 207).

Justification for the power

866. The rationale behind taking this power to direct is set out in paragraphs 842 to 852 above. In particular, the Government has been concerned with some of the industry approaches to managing risk. To ensure the UK's fuel supply remains secure and reliable, the Government considers that there may be certain situations or circumstances in which it needs to be able to ensure that major fuel supply companies take action that is in the interests of the country as a whole. Under a simple market-based approach these businesses may not have the commercial incentive or even the information necessary to do so. The power to direct under clause 204(1) gives government the ability to ensure that action can be taken for the purpose of maintaining or improving core fuel sector resilience, but only unless the Secretary of State considers that the persons to whom this section applies have failed to make sufficient progress with the steps that the

Secretary of State considers necessary for this. The powers to direct under clauses 204(3) and (4) are to allow action to be taken to ensure continuity of supply when there is an actual disruption of some kind, or a significant risk of such disruption.

867. The government already has some limited powers to control the core fuel sector. For example, it has powers of direction and regulation under the Energy Act 1976 and powers to make regulations under the Civil Contingencies Act 2004. However, these powers can only be exercised in certain situations and for certain purposes (primarily to respond to emergency situations, or for orders under section 1 of the Energy Act 1976 which provides for measures for conserving energy in certain circumstances). The government also has powers under the Offshore Safety Act 1992 to give directions for security purposes in relation to certain refineries and oil terminals.

868. These existing powers would not enable the Government to direct industry participants to take appropriate steps in relation to emerging risks, or the need for more effective contingency planning, or to reduce the risk of an emergency occurring. This new power is therefore intended to ensure that Government can require industry participants to take appropriate steps to ensure they have appropriate resilience measures in place in order to reduce the risk of disruption to fuel supply to end users.

869. It is envisaged that directions could be given where industry participants were not implementing good practice standards in operational areas, for example in relation to site security, flood defences or contingency planning for nationally significant risks (e.g., pandemic or failure or electricity or telecommunications systems). Such directions should reduce the chances of a sudden failure at a significant facility that could not be compensated for immediately and which could result in fuel shortages within days. Examples could include requiring an improvement in the maintenance of a particular asset, construction works such as digging a trench, building a wall, or installing security cameras. Examples are given in clause 204(1) of the types of actions that might be required.

870. Paragraph 852 discusses the disruption to fuel supply in autumn 2021. The direction power would be used alongside the information gathering power (clause 208) to allow the government to identify fuel supply risks and to support industry in ensuring core fuel sector resilience in advance of any fuel disruption occurring. This would be done by seeking information from qualifying persons including relevant wetstock managers to get a clearer picture of the sector and emerging risks beforehand. The government also seeks the power to require qualifying persons and relevant wetstock managers to provide information at specific intervals by regulations, which would assist in providing regular real-time information to government (see clause 211). Prior to, and during, the fuel disruption the government did not have full oversight of the situation in the United Kingdom because it lacked sufficient powers to obtain it. Once the government has the information to give it a true picture of the situation, the power of direction could then be used to ensure there would be no disruption to supply by asking suppliers which meet the relevant thresholds to take appropriate action in relation to their core fuel sector activities, which the government cannot now do except in an actual or imminent emergency.

871. Directions could also be given to implement measures that improve overall system resilience, to address the issue identified at paragraph 845(e). For example, in the UK, there are several examples of where pipelines run close to terminals, but no connection exists to allow the terminal to be supplied from the pipeline. Most often this is due to the owners of the pipeline not having any ownership interest in the terminal or the terminal having the ability to receive supply from another pipeline that the terminal owner has

equity in. In these cases, there may be limited commercial drive to install a new pipeline connection to a terminal, as the pipeline owner may prefer to sell product to their own terminal rather than one belonging to a competitor. However, if supply from the one pipeline was disrupted, or rack capacity (the ability to load fuel into road tankers for distribution) at a terminal lost, it would increase overall system resilience to have the additional scope to supply between the different pipelines and terminals.

872. 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 might well turn out to be inappropriate and unhelpful when the actual risks become apparent. Furthermore, the lead-in time and sensitivity of these risks may not reasonably allow the government to rely on making the necessary amendments to primary legislation. The power to issue directions allows the government to ensure that the core fuel sector is prepared for future risks and has a high level of resilience: this should reduce or remove the impact of any emergency situations on the sector and the resulting effect on the wider public.

873. We consider that in some circumstances, even if industry has been cooperative in taking steps to shore up resilience in other circumstances, clauses 204(3) and (4) may involve situations of some urgency or there is an unexpected disruption to security of supply such that the government is required to act more quickly when compared to cases where more general, less urgent, resilience bolstering is required. Consequently, while the Government will always engage with industry on a voluntary basis first, in some circumstances waiting to first assess whether measures an entity has taken to address the risks at clauses 204(3) or (4) will make sufficient progress to address the concern could mean that the issue is not remedied in time and develops into an emergency. It is for this reason that the exercise of directions under clause 204(3) and (4) does not include an equivalent provision as set out in clause 204(2).

874. Section 5 of the Offshore Safety Act 1992 provides a precedent of a similar power. However, the government does not intend a direction under clause 204 to disapply or override any existing legal regime, so no equivalent provision to section 5(3) of that Act is required.

Justification for the procedure

875. As explained above, the Government considers that giving a direction under clause 204 would be an executive, rather than legislative, function. The Government therefore proposes that no level of parliamentary scrutiny is required.

876. Although the power of direction is wide in terms of the action that could be required, directions under clause 204 would only be given if the corresponding cases are not sufficiently numerous to justify making regulations under clause 207, or urgency means it is not practicable to achieve the aims of the direction by making regulations. Therefore, unless there is a reason of urgency, the directions power would be focused on specific persons rather than classes of persons, who must also fall within the requirements of clause 204(7) (relating to threshold requirements). This reflects the need for government to be able to act expeditiously to avert a potential emergency, particularly in relation to 204(3) or (4). In the case of directions made under 204(1), the Secretary of State cannot make such a direction until they consider the person has not taken sufficient steps themselves to improve or maintain core fuel sector resilience. Additionally, directions may only be given to persons meeting certain thresholds of core fuel capacity, which is intended to focus on capture of larger enterprises.

877. In the event that the Secretary of State considers that action should be taken by an entire group or class of persons and the aims to be achieved by the directions was not sufficiently urgent, the Secretary of State would have to exercise the power in clause 207 to make regulations (see paragraph 879). The direction powers in clause 204 can also only be used for a specific purpose. Procedural safeguards are set out in clauses 205 and 214 including the requirement to give prior notice, a period for written representations, a duty to consult, and a right to appeal.

878. As noted at paragraph 874, directions under clause 204 would not disapply or override any existing legal regime, as is the case for directions under s5 of the Offshore Safety Act 1992. Copies of any direction under that Act must be laid before both Houses of Parliament, but the Government considers that there is no need for a similar provision in this case, given the more limited effect of a direction under clause 204. By comparison, directions made to a class of persons (and so having a wider effect), would be made by regulation under clause 207 unless urgency dictated otherwise or the cases were not sufficiently numerous, and clause 207 employs the affirmative procedure. Nonetheless, the Government will engage with the Business, Energy and Industrial Strategy Committee to agree a protocol of engagement to allow parliamentary scrutiny of directions issued under this clause.

Clause 207(1) Power to make regulations for the purpose of maintaining or improving core fuel sector resilience

Clause 207(3) Power to make regulations corresponding to directions under clause 204(3)

Clause 207(4) Power to make regulations corresponding to directions under clause 204(4)

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative

Context and Purpose

879. The general purpose of this measure is the same as that of the directions in clause 204. However, clause 207 is to be used in circumstances where actions may be required for a larger number of operators or owners and therefore application by regulations to a class or category of operators or owners would be more appropriate. For example, a standard of contingency planning or measures may be necessary for all “Designated Filling Stations” (DFS) (part of a priority fuel supply plan under the National Emergency Plan for Fuel). DFS are of relatively low capacity but have a critical function in response to an emergency – a direction (by way of regulations) would be a means to ensure some particular aspect of their resilience and ability to respond to or mitigate a disruption.

880. Clause 207(1) is the corresponding regulation-making power to the direction-making power in clause 204(1) but applies to a class or description of persons within the definition of subclause 5. It enables the Secretary of State, for the purpose of maintaining or improving core fuel sector resilience, to require an eligible class or classes of core fuel sector operators or facility owners to do anything in relation to their relevant activities or assets which a person to whom clause 204 applies could be required to do by a

direction. The Secretary of State cannot make such provision by regulation unless the Secretary of State considers that the persons mentioned in subclause 5 have failed to make sufficient progress with the steps that the Secretary of State considers necessary for maintaining or improving core fuel sector resilience.

881. Clause 207(3) is the corresponding regulation-making power to the direction-making power in clause 204(3) but applies to a class or description of persons within the definition of subclause 5. It enables the Secretary of State, to impose on a class or description of eligible core fuel sector operators or owners requirements equivalent to those that could be imposed by a direction under clause 204(3) and the exercise of this power is limited to times when there is disruption to, or failure of, continuity of supply of core fuels.

882. Similarly, clause 207(4) is the corresponding regulation-making power to the direction-making power in clause 204(4) but applies to a class or description of persons within the definition of subclause 5. It enables the Secretary of State, to impose on a class or description of eligible core fuel sector operators or owners requirements equivalent to those that could be imposed by way of a direction under clause 204(4). Clause 207(4) limits the exercise of this power to times when the Secretary of State considers there to be a significant risk of disruption to, or failure of, continuity of supply of core fuels.

883. Clause 207(5) specifies the class of people in relation to whom regulations can be made. This is restricted by the capacity thresholds for the relevant person's business or facility (as appropriate). The thresholds are lower than those set for directions in clause 204(7), to allow regulations to be made in relation to smaller businesses or facilities. This is to allow steps to be taken to ensure resilience in supply at local or regional level, for example for business supplying particular isolated communities such as the Scottish Hebridean Islands. While issues at individual smaller sites are unlikely to have an impact on overall fuel supply or resilience, and so the directions power would not be suitable, it is also a realistic prospect that a class of these smaller sites acting together can improve the resilience of the fuel supply market as a whole. Consequently, a lower threshold for the regulations power has been selected to encompass this scenario.

884. Regulations made under clause 207 may provide that a person who without reasonable excuse fails to comply with a requirement imposed under the regulations commits an offence.

885. Prior to making any regulations under clauses 207(1), (3) or (4), the Secretary of State must consult with the same bodies in England, Wales, Scotland and/or Northern Ireland (as appropriate) as for a direction under clause 204, along with any other persons the Secretary of State thinks appropriate (see paragraph 860 above in relation to directions).

886. A precedent for this power may be seen in section 17(5) of the Energy Act 1976. As noted at paragraph 867, that Act provides, inter alia, for a power to give directions in certain emergency situations. Section 17(5) provides that where the Act confers power to give directions for any purpose, there is also a power to make provision for that purpose by order to all, or to any class of, persons to whom directions could be given. Section 17(1) provides that such orders are to be made by statutory instrument and to be subject to annulment in pursuance of a resolution of either House of Parliament.

Justification for the power

887. In contrast to the power of direction in clause 204, which are to be made to individual persons unless urgency means it is not practicable to achieve the aims of a direction by

regulation, the regulations are to apply to a class or description 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.

888. The purpose of the power is as set out in paragraph 886 and affected by the overarching purpose provision of clause 202 and, in relation to clause 207(1), by clause 207(2). Using the same example as above, regulations could, for example, apply to all downstream oil companies who operate a Designated Filling Station. This would bring within scope over 750 forecourts across GB (along with their Northern Irish equivalents), the ownership / operation of which changes frequently. Setting a class in regulations would therefore be more appropriate than issuing a direction to each individual location and issuing a subsequent direction to each new owner / operator, and it also enables Parliamentary scrutiny of a potentially broad impact on a sector.

889. The Government believes it is appropriate for the Secretary of State to decide whether non-compliance with a requirement under the regulations should be a criminal offence, because it is conceivable that the requirements under the regulations will differ according to the situation or circumstances to which they are intended to address. It is therefore possible that relatively minor actions may be required under the regulations, such that it would be disproportionate to criminalise non-compliance. Conversely there may be critical actions required to be performed within strict time limits which may justify the imposition of criminal sanctions for non-compliance. Offences will only be imposed through regulations in accordance with applicable guidance and following consultation with relevant consultees as required by clause 207(7), and only where it is rational and proportionate to do so

Justification for the procedure

890. Regulations made under clause 207 will be subject to the affirmative procedure. The Government believes this is the appropriate level of scrutiny for potential interference with the activities or assets of a class of persons, and for the imposition of an offence for non-compliance.

891. Prior to laying any regulations in draft the Secretary of State must consult with the consultees specified in clause 207(7). In practice, the Government would also engage with stakeholders and/or key trade bodies to develop regulations.

892. As noted above, orders under section 17(5) of the Energy Act 1976 are made by statutory instrument and are subject to annulment by either House of Parliament. Those orders can only be made in an emergency or imminent emergency situation, whereas regulations under clause 207 of this Part are not intended for use in such exceptional circumstances. Accordingly, the Government considers that it is appropriate for Parliament to be afforded the opportunity to exercise a greater degree of scrutiny over regulations made under clause 207 than is the case for orders under section 17(5) of the Energy Act 1976.

893. The Government intends to publish a policy statement regarding such regulations.

Clause 209(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

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative

Context and Purpose

894. Clause 209(1) of this Part creates a duty to notify the Secretary of State as soon as possible when a person knows or has reason to suspect that a notifiable incident has occurred or is occurring.

895. A notifiable incident is defined in clause 209(3) as one that affects the person's relevant assets or activities in such a way as to create a significant risk of, or cause, disruption to or a failure of the continuity of supply of core fuels. Examples of the sort of incidents that are intended to be notifiable under clauses 209(1) and (3) include a loss of operational capability due to accident, malicious attack or planned maintenance, a failure of fuel to meet specification, a threat of industrial action, and a risk of or actual insolvency.

896. Clause 209(2) specifies the classes of person who are subject to this reporting duty. Clauses 209(2)(a) and (b) do so by reference to capacity thresholds for a person's business or facility.

897. Clause 209(2)(c) creates a power for the Secretary of State to specify further classes or descriptions of person who are subject to this duty to notify. Clause 209(10) provides that where Regulations are made pursuant to this power, they can also specify the meaning of the "relevant activities or assets" in relation to such a person for the purposes of determining whether or not an incident is notifiable under clause 209(3). It is not intended that this power would be used to amend the thresholds contained in clause 209(2), because there is an existing power for this pursuant to clause 223. However, recognising concerns raised during the pre-legislative scrutiny of the draft Downstream Oil Resilience Bill that it could theoretically be possible for such an amendment to be made by the (then) negative procedure under this clause, this power is now made subject to the affirmative procedure as per clause 209(11).

898. Failure to comply with the duty imposed by clause 209(1), or a subsequent notice under clause 209(4) requiring information, is an offence under clause 210. Clause 212 makes further provision in relation to disclosure of information provided pursuant to regulations made under clause 209(2)(c).

899. The Government is the only body that has an overarching view of the entire core fuel supply system. Individual companies and operators understand their own infrastructure and supply chains but, due to commercial sensitivity and competition law constraints, companies are unable to disclose information to each other on supply capabilities or contingency planning. In order to understand the resilience of the system as it changes with time and to plan to mitigate any risks to the continuity of fuel supplies to end users, the Government requires timely notification of any material incidents or risks to the operation of major core fuel operators. Information collected will provide a foundation for

the identification of risk and consideration for action under the other measures in this Part.

900. The provisions of the Competition Act 1998 that prohibit information sharing or coordinated action between industry participants may be disapplied under the Competition Act 1998 (Public Policy Exclusion) Order 2012 when the Downstream Oil Industry Protocol is activated by the Secretary of State. However, that Protocol can only be activated when there is a significant disruption or a threat of a significant disruption to the normal supply of fuel, and only for the duration of that disruption or threat. It therefore does not allow information sharing or coordinated action in normal circumstances or allow the Secretary of State to obtain an industry-wide understanding of incidents that have occurred in the way envisaged by clause 209(1).

901. Some core fuel sector enterprises may meet the threshold requirements under the Network and Information Systems Regulations 2018. If an enterprise meets a certain threshold in a particular sector (including the oil subsector) and it relies on network and information systems, then it will be designated an Operator of Essential Services (OES). A Competent Authority may also designate an OES in certain other circumstances. Once designated, an OES has obligations to take appropriate and proportionate measures to manage risks posed to the security of its network and information systems and to prevent and minimise the impact of incidents affecting such systems used to provide the relevant essential service with a view to ensuring continuity of those services. OES are obliged to report incidents that occur which have an actual adverse effect on the security of their information and network systems. However, these regulations will not cover reporting of incidents that do not affect information and network systems. These regulations would not necessarily provide the government with information about incidents which may affect an operators' activities or assets in such a way as to create a significant risk or, or cause disruption or failure to continuity of supply of core fuels but which does not necessarily affect the operators' network and information systems.

Justification for the power

902. While this Part sets out the two main categories of core fuel operators that must comply with the reporting requirements, it is conceivable that there are or will be other operators that emerge in the ongoing development of lower carbon / environmentally friendly fuels that do not fit within the traditional processing and supply structures of core fuel operators but whose activities may result in incidents which pose a risk to the continuity of supply of core fuels.

903. The Government therefore thinks it is appropriate to provide the power to add to the list, should the Government consider that different categories of core fuel sector operators should be subject to the reporting requirements. This will also allow the Government to tailor the reporting requirement to future changes in the structure of the market, for example as the market adapts to a decreased demand for road transport fuels as the UK transitions to net zero emissions. It will also allow, for example, the incident reporting duty to be imposed on entities or assets that may be (or become) of particular regional significance, for example for the supply of heating oil in Scotland or the supply of aviation fuel in the South West.

Justification for the procedure

904. The Government considers the affirmative procedure is appropriate for regulations made under clause 209(2)(c). Incidents which pose a serious risk to continuity of supply are likely to be rare, and the burden on any new core fuel sector operator caught by

regulations are likely to be small. As said above, the intent of this power is to capture new categories of operators that may emerge over time as the sector transitions to more low carbon-based fuels rather than to amend the threshold requirements for such operators as set out in clause 209(2). However, as said at paragraph 897, recognising the concerns raised during pre-legislative scrutiny of the draft Downstream Oil Resilience Bill, the affirmative procedure has been deemed to be appropriate for the sake of equivalence.

905. The Government intends to publish a policy statement regarding such regulations.

Clause 211(1) Power to make regulations requiring a person to provide information to the Secretary of State, at specified intervals, relating to the person's relevant activities or assets

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative

Context and Purpose

906. Clause 208 provides that the Secretary of State may by notice in writing require a person to whom that clause applies to provide information relating to that person's relevant activities or assets. Notices under clause 208 may only be given for the purpose of maintaining or improving core fuel sector resilience.[13]

907. Clause 211(1) creates a power for the Secretary of State to make regulations requiring a person to provide information to the Secretary of State at intervals specified in the regulations. This power can only be exercised for the purpose of maintaining or improving core fuel sector resilience (clause 211(3)), and only in relation to the person's relevant activities and assets (as defined in clause 203(10)). It may only be exercised in respect of persons whose business or facility meets the capacity thresholds in clause 211(3) or the person is a relevant wetstock manager.

908. Clause 211(5) enables the Secretary of State to provide in the regulations that any person who without reasonable excuse fails to comply with the requirement imposed commits an offence.

909. As set out at paragraph 899, the government is the only body that has an overarching view of the entire core fuel sector supply system. The government currently monitors the core fuel sector supply chain through regular dialogue with industry, through information submitted by industry on a voluntary basis, through compulsory statistical submissions (e.g., under the Statistics of Trade Act 1947), and via commercial arrangements with industry. However, the existing arrangements and powers are insufficient to provide the full range of information necessary. Without a complete, accurate and holistic view of the core fuel system, there is a risk that government can neither identify critical elements of the fuels supply system nor support industry in responding to a disruption in an

[13] As this power is to be exercised by written notice, it can only be exercised in relation to individual, specified persons. It is therefore considered to be a power of an executive, rather than legislative, nature, and is not addressed further in this memorandum.

effective and timely manner – leading to disruption that could have been avoided if better managed.

910. Such powers would likely have been used to obtain necessary information about the industry to assist in responding to the fuel supply disruption in autumn 2021, as described in paragraph 852 above.

911. Currently, wetstock management companies provide services to approximately 65% of forecourts in GB. Therefore, being able to require relevant wetstock managers to periodically report on core fuel supply and fuel levels would be crucial in getting a broader understanding of the situation in GB as to resilience. There are also smaller, independent forecourts that do not use such services. The thresholds set in this clause would allow for regulations requiring reporting of information at specified intervals to apply to these smaller enterprises and also to those in Northern Ireland. This would mean that the government is better placed to obtain an overarching view of the core fuel supply sector and be apprised of potential risks or interruptions to the same.

912. As mentioned, at paragraph 901, the Network and Information Systems Regulations 2018 may impose obligations on some operators in the core fuel sector regarding the security of their network and information systems. These regulations however would not give the government an overarching view of the entire core fuel sector supply system because of this focus. Hence the need for this power.

Justification for the power

913. The power in clause 211, which is to be exercised by regulations, allows the Secretary of State to impose a similar requirement on a group or class of persons. This will allow the government to gather timely information across the sector, or particular parts of the sector, to obtain the sort of complete, accurate and holistic view referred to at paragraph 909 above.

914. The Government believes taking this power is justified because the nature of the information required to allow it to make the judgements involved is technical in nature and is likely to change with time as the market evolves. A power to make regulations will therefore allow the requirements to be refined from time to time to ensure that the information required meets the Government's needs without imposing an unnecessary burden on the industry.

Justification for the procedure

915. The Government considers the affirmative procedure is appropriate for regulations made under clause 211(1). Although the power concerns administrative and procedural matters under a clear framework set out in this Part and the cost to industry as a whole of supplying this information is likely to be small, Parliament is likely to want to scrutinise the proportionality of imposing an offence and the level of penalty for non-compliance. If the power is used in relation to smaller entities, it may be more costly for them to comply, and Parliament will want to ensure that the regulations contain sufficient safeguards to ensure the costs imposed are proportionate and justified.

916. The Government intends to publish a policy statement regarding the use of such regulations.

Clause 219(3)(b) Power to make regulations specifying description of actions to be taken in an enforcement undertaking

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative

Context and Purpose

917. Chapters 2 and 3 of Part 10 create a number of new offences, including failure to comply with a direction given under clause 204, contravention of the information requirements in clauses 208 and 209, and an offence relating to making false statements when providing information to the Secretary of State under various provisions of this Part. This Part also provides that further offences may be created by regulations made under clauses 209 and 211.

918. As an alternative enforcement mechanism to these offences above, clause 219 provides for a civil sanction. That is, clause 219 applies if the Secretary of State has reasonable grounds to suspect that a person has committed one of the specified offences, the person offers the Secretary of State an enforcement undertaking in relation to the relevant act or omission, and the Secretary of State accepts that undertaking. Under clauses 219(3)(a) and (4), such enforcement undertakings can be undertakings to take action for the purposes of securing that the offence does not continue or recur, or securing that the position is, so far as possible, restored to what it would have been had the offence not been committed, or to benefit any person affected by the offence. Alternatively, clause 219(3)(b) allows the Secretary of State, by regulations, to specify a description of an alternative action that must be taken under an enforcement undertaking. Schedule 17 makes further provision about enforcement undertakings, including the relevant procedure, compliance certificates and appeals.

919. If the Secretary of State accepts an enforcement undertaking and the person performs the required action, that person may not be convicted for that offence in respect of the relevant act or omission. Under paragraph 1(1) of Schedule 17 to this Part, the Secretary of State must publish a procedure for entering into enforcement undertakings and must consult any persons he considers appropriate before publication (or subsequent revision).[14]

920. As set out above, the purpose of this Part is to maintain the resilience and continuity of the UK's supply of core fuels. The Government therefore wants to adopt an approach which allows steps to be taken towards meeting that objective even in the event that core fuel sector operators fail to comply. Enforcement undertakings will allow the businesses involved to come forward with proposed remedies to non-compliance and, subject to the undertaking being accepted by the Secretary of State, avoid prosecution

[14] The Government does not consider paragraph 1 of Schedule 17 to delegate any legislative powers to the Secretary of State. In order to carry out the Secretary of State's executive functions arising from statutory scheme for enforcement undertakings set out in the Part 10, the Secretary of State will have to put in place an appropriate procedure in any event. These provisions of the Part simply set a framework for the Secretary of State to do so and require publication of the procedure. The Government therefore considers that no parliamentary scrutiny of this procedure is necessary, and these provisions are not addressed further in this memorandum. A similar power to publish a procedure for entering into enforcement undertakings, without parliamentary scrutiny, was provided for by paragraph 9(1) of Schedule 11 to the Health and Social Care Act 2012.

but continue with providing a resilient supply of fuel to the market and ultimately consumers. This therefore reinforces that the creation of criminal sanctions is intended as a deterrent measure and to provide credibility to the measures on this Part.

Justification for the power

921. The Government considers that regulations under clause 219(3)(b) are an appropriate mechanism of formalising enforcement undertakings in a transparent fashion.

922. The Government's intention is to have the civil sanction (enforcement undertaking) in Part 10 align as closely as possible to the model contained in Part 3 of the Regulatory Enforcement and Sanctions Act 2008 ("RESA"). The provisions of clause 219 are therefore intended to broadly follow the scheme for the use of enforcement undertakings as part of a civil sanctions regime set out in section 50 of RESA. Section 50(3)(d) of RESA provides that the action specified in an enforcement undertaking can be an action of a prescribed description. Regulations under clause 219(3)(b) of this Part are intended to set out such a prescribed description.

Justification for the procedure

923. The Government proposes that this power should be subject to the affirmative procedure because it enables Parliament to scrutinise and approve regulations that specify which actions may be performed in order for a person to avoid being prosecuted or subject to other discretionary requirements. The Government believes it is appropriate that Parliament can expressly approve that the actions described, if performed, are appropriate to have the consequence of removing the possibility of conviction.

924. The Government intends to publish a policy statement regarding such regulations.

Clause 220(1) Guidance as to sanctions

Clause 220(2) Guidance as to use of civil sanctions

Power conferred on: Secretary of State

Power exercised by: Guidance

Parliamentary Procedure: Lay in draft and subject to a resolution of either House not to issue

Context and Purpose

925. The Government does not consider that these provisions delegate functions or powers that are strictly of a legislative nature, but noting the relevant guidance[15], has included these provisions in this memorandum to ensure the Committee has the opportunity to scrutinise the proposed powers in full.

926. Clause 220(1) provides that the Secretary of State must publish guidance as to the sanctions (including criminal sanctions) to which a person who commits an offence

[15] In particular paragraph 17 of the Guidance for Departments issued by the Delegated Powers and Regulatory Reform Committee in November 2021 and paragraph 15.15 of the Guide to Making Legislation issued by the Cabinet Office in 2022.

under this Part may be liable; the action which the Secretary of State may take to enforce offences under this Part, whether by virtue of section 220 and Schedule 17 (which relate to enforcement undertakings) or otherwise; and the circumstances in which the Secretary of State is likely to take any such action.

927. Clause 220(2) requires the Secretary of State to publish guidance about how the Secretary of State intends to exercise their functions under section 220 and Schedule 17 in relation to the use of enforcement undertakings.

928. The Secretary of State must consult such persons as they consider appropriate before publishing any guidance (or revised guidance). The Secretary of State may from time-to-time revise guidance published under this clause.

929. There is no express requirement that the Secretary of State have regard to this guidance when taking action to enforce offences under this Part.

930. The core fuel sector has a relatively strong compliance culture for such issues as Health and Safety and Environmental regulations and the Government hopes to see this transferred to the measures embodied in this Part. Most of these measures will only be employed by exception and influenced by the purpose clause in this part at clause 202. However, the supply of core fuels is vital to our economy and way of life and the Government are committed to ensuring a secure and reliable energy supply.

Justification for the power

931. It is necessary for the core fuel sector to understand the consequences of non-compliance with any of the measures in this Part and the circumstances in which action is likely to be taken. This will further encourage compliance and deter non-compliance which might jeopardise the supply of core fuels to the consumers, industries and services which rely on them.

932. As noted above at paragraph 922, the Government's intention is to have a civil sanction (enforcement undertakings) in this Part stick as closely as possible to the model contained in Part 3 of RESA. Section 64 of RESA provides that where power is conferred on a regulator under or by virtue of Part 3 of RESA to impose a civil sanction in relation to an offence, the regulator must prepare and publish guidance about how the offence is enforced.

Justification for the procedure

933. Guidance issued under clause 220(1) or (2) will not set rules but will instead assist the industry in understanding and achieving the regulator's desired outcomes.

934. Guidance prepared and published pursuant to section 64 of RESA is similarly not subject to any parliamentary procedure. However, the Government agrees that guidance as to use of sanctions would benefit from Parliamentary scrutiny and clause 221 has been inserted for this purpose.

Clause 223(1) Power to make regulations amending or modifying the thresholds specified in certain provisions of this Part

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary Procedure: Affirmative (Henry VIII)

Context and Purpose

935. This Part contains a number of thresholds that determine, in part, the group of persons who are subject to duties imposed by this Part and / or in relation to whom powers under this Part may be exercised. These include capacity thresholds for the persons in relation to whom: resilience directions under clause 204 can be given; regulations under clause 207 can be made; notices under clause 208 requiring information can be given; and regulations requiring information under clause 211 can be made. Similarly, the scope of the duty to report incidents under clause 209 and the requirement to provide information at specified intervals under clause 211 are determined, in part, by reference to specified capacity thresholds. These thresholds were consulted on and the values in the clauses reflect the responses to that consultation.

936. Clause 223(1) provides that the Secretary of State may by regulations amend or modify these thresholds.

937. The context for this power is that the sector will face an unprecedented level of change over the next few decades as the UK moves to a Net Zero economy. The impact for the core fuel sector will be driven by the rate of adoption of low-carbon transport alternatives, and this is currently uncertain and will depend on the market responses. It is important that the legislative framework can respond to this changing risk landscape.

Justification for the power

938. The power will enable the amendment of provisions within this Part. As such it is a Henry VIII power. The Government consider it necessary for two reasons. The first is that thresholds may need to change over time to reflect changes within the sector. The second is that, although the thresholds were the subject of consultation and further stakeholder engagement after publication of the draft Downstream Oil Resilience Bill (as it then was), it may be necessary for them to change over time after this Part comes into force as the sector evolves, particularly as the UK transitions towards Net Zero. Experience of operating the provisions in practice may inform the Government those certain thresholds require changing. It may be that the thresholds unnecessarily capture core fuel sector operators or that the thresholds do not capture sufficient core fuel sector operators, and this power provides the necessary scope to address that.

939. Although this constitutes a Henry VIII power, it is strictly limited to amending specified provisions of the primary legislation that creates the power and cannot be used more widely to amend other primary legislation.

Justification for the procedure

940. The Government considers that regulations made under clause 223 should be subject to the draft affirmative procedure to provide appropriate parliamentary oversight of

proposed amendments to the scope of the various duties and/or powers under this Part. For example, lowering the thresholds will increase the number of persons caught by the provisions of this Part or regulations made underneath it, so the Government considers it appropriate that Parliament has the opportunity to scrutinise and debate whether any revised thresholds are set at the right level.

941. This procedure is doubly appropriate given that these regulations may amend primary legislation, i.e., this Part itself.

Part 11 Oil and Gas

Clause 225 power to make regulations about arrangements for responding to marine oil pollution

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative, with affirmative procedure for the creation of a criminal offence, increasing the maximum penalty for a criminal offence or the creation of civil sanctions.

Context and Purpose

942. Regulation of emergency oil pollution planning and response for the offshore petroleum industry is carried out under the Merchant Shipping (Oil Pollution Preparedness, Response and Co-operation Convention) Regulations 1998 ("the Offshore Pollution Regulations"), enabled in part by the power in section 2(2) European Communities Act 1972 ("the ECA 72"). There are no suitable alternative primary legislation powers available to make regulations for oil pollution matters connected to offshore oil and gas activities. In particular, powers are needed to ensure that new offshore technologies and industries are required to put in place suitable emergency arrangements.

943. We have not limited the powers to amending existing Offshore Pollution Regulations as this would be unduly restrictive and could lead to a piecemeal and ossified approach. The powers may be exercised to amend existing regulations or to make new regulations, whichever works better at the time. This is an evolving sector and regulation needs to keep pace with industry changes. In fact, even within the oil and gas industry, experience has shown that lessons need to be learnt and adaptations made. For instance, the Macondo incident in the Gulf of Mexico in 2010 led to a number of procedural controls and regulatory changes at UK and EU level respectively.

944. As we may need to adopt new regulations, the power enables the Secretary of State to do everything done under existing Offshore Pollution Regulations, which have their origins in obligations under international law and EU law, but for a wider range of offshore energy activities. The powers enable the Secretary of State to make regulations:
    a. requiring persons to have emergency plans and to take measures in connection with those plans, such as complying with measures proposed and keeping information.
    b. making provision for fees in respect of functions under the regulations.
    c. making provision to enforce obligations imposed upon persons under the regulations including by way of civil and criminal penalties.
    d. conferring functions on other persons (for instance, authorising persons to carry out inspections of offshore oil and gas facilities); and
    e. reporting incidents.

Justification for the power

945. Expanding the scope of the existing offshore oil pollution control framework is essential for new energy activities to be undertaken in a manner that mitigates the risk of oil

pollution to the environment. There is already a detailed framework in secondary legislation for oil pollution linked to offshore oil and gas units, so the proposal to use regulations is consistent with current practice. The level of granularity that would be necessary to set out all necessary provisions in primary legislation would be disproportionate and inflexible. A delegated power is required to ensure the adaptation to technological change and will ensure alignment with new regulatory models yet to be introduced.

946. In the short term, amendments to existing Offshore Pollution Regulations that are necessary include:
    a. making amendments to accommodate new scope (for instance new definitions)
    b. making other improvements to the efficiency or effectiveness of the regulations, for instance, allowing joint Oil Pollution Emergency Plans ("OPEPs") covering multiple offshore installations and wells (connected and disconnected).

947. Ensuring a fair, proportionate and effective enforcement regime across pollution regulation of all offshore oil and gas, and emerging gas activities is a key priority for the Department. This may require creation of new criminal offences, expanding the scope of existing offences or increasing penalties, to ensure there are no gaps or anomalies. The Department also seeks to ensure that civil sanctions should be available, as an alternative to criminal offences, because experience has shown that sanctions offer an effective enforcement tool.

948. It is also possible that consolidation or revoking and re-enacting Offshore Pollution Regulations may prove necessary at some stage.

Justification for the procedure

949. The Offshore Pollution Regulations were made under the negative parliamentary procedure. However, the Department considers that the affirmative procedure should be used where any provision in new Regulations is to:
    a. create new criminal offences; or
    b. introduce civil sanctions or increase penalties for existing offences.

950. The choice of affirmative procedure for the listed cases reflects the extra scrutiny warranted for measures that can significantly affect individual rights and impact on the justice system.

951. The negative procedure is appropriate for other circumstances where the power is exercised. The justification for this is that:
    a) In this case, a longstanding regulatory regime is to be broadly maintained, but needs some modifications to keep it fit for purpose. No strategic re-design of the framework is envisaged that might suggest a need for the affirmative procedure.
    b) The expansion of scope to encompass other emerging gas activities is a significant change but is on the face of the Bill.
    c) New regulations will be made only where consistent with existing international obligations, for instance under the Oil Pollution Preparedness, Response and Co-operation Convention 1990 and Article 391 of the Trade and Cooperation Agreement with the EU.

Clause 226 Habitats: reducing effects of offshore oil and gas activities etc.

Power conferred on: Secretary of State

Power exercised by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative, with Affirmative procedure for the creation of a criminal offence, increasing the maximum penalty for a criminal offence, or the creation of civil sanctions.

Context and Purpose

952. Habitats assessment regulation of the offshore oil and gas industry is carried out under the Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001 ("the Offshore Habitats Regulations"), enabled by the power in section 2(2) European Communities Act 1972 ("ECA 72"). This power is now repealed, meaning these regulations are orphaned. There are no suitable primary legislation powers available to make regulations in respect of habitats matters connected to offshore oil and gas activities, in particular to respond to the development of new offshore technologies that require adequate environmental protection and that may fall outside the scope of existing environmental rules.

953. The nature of this power, in part, mirrors the purpose of certain delegated powers in the Environment Act 2021, in that the power will allow the Secretary of State to make changes in relation to existing regulations made under section 2(2) ECA 1972. It also enables new regulations to be made

954. The proposed power will be used to regulate not only for environmental protection of offshore oil and gas, but also for offshore hydrogen production and storage. Since these newer activities are different in nature to oil and gas extraction and production, we may need new regulations or to modify the content of existing regulations, to ensure full operability.

955. As we may need to adopt new regulations, the power enables us to do everything done under existing EU-derived offshore habitats regulations, but for a wider range of activities. The powers enable the Secretary of State to make regulations:
    a. requiring the implications of certain activities on habitats to be considered.
    b. preventing a specified type of activity from being carried out, or licence being granted, unless the Secretary of State has first considered the implications for relevant sites and granted a consent (which may be subject to conditions)
    c. making provision for fees in respect of functions under the regulations.
    d. making provision to enforce obligations imposed upon persons under the regulations including by way of civil and criminal penalties; and
    e. conferring functions on other persons (for instance, authorising persons to carry out inspections of offshore oil and gas activities).
    f. defining terms in respect of the above.

Justification for the power

956. Expanding the scope of the existing offshore habitats framework is essential for oil and gas and emerging gas activities to be undertaken in a manner that mitigates the risk of harm to the environment. There is already a detailed framework in secondary legislation for oil and gas, so the proposal to use regulations is consistent with current practice. The

level of granularity that would be necessary to set out all necessary provisions in primary legislation would be disproportionate and inflexible. A delegated power is required as the power will allow for adaptation to technological change and will ensure alignment with new regulatory models yet to be introduced. For instance, the Department intends new regulations to underpin a consenting process for offshore hydrogen technology, but such a process is yet to be finalised.

957. However, while these powers enable offshore habitats assessment to be extended to new activities, the intention is not to duplicate anything done under other habitats legislation. These powers, like the existing Offshore Habitats Regulations, are designed to ensure that regulation of offshore oil and gas activities intersects in an appropriate way with the overarching framework for habitats protection in the UK, so that oil and gas regulation aligns with that framework. The powers ensure an appropriate assessment before consenting to or licensing an offshore energy activity, with appropriate conditions and monitoring thereafter. The powers do not extend to making provision for habitats designation or designation of protected species.

958. In the short term, amendments to existing the Offshore Habitats Regulations that are necessary, include:
    a. making amendments to accommodate new scope (for instance new definitions).
    b. filling gaps in the existing regime – for instance, the Offshore Habitats Regulations will work more effectively by adding provision to monitor compliance, including appointment of inspectors.

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959. Ensuring a fair, proportionate and effective enforcement regime across environmental regulation of all offshore energy activities is a key priority for the Department. This may require creation of new criminal offences, expanding the scope of existing offences or setting penalties, to ensure there are no gaps or anomalies. The Department also seeks to ensure that civil sanctions should be available, as an alternative to criminal offences, because experience has shown that sanctions offer an effective enforcement tool.

960. Longer term, other changes may need to be made to ensure ongoing alignment, for instance with regulatory changes in other areas relating to habitats and environmental impact assessment.[16] It is also possible that consolidation or revoking and re-enacting Offshore Habitats Regulations may prove necessary at some stage.

Justification for the procedure

961. The Offshore Habitats Regulations were made under the negative parliamentary procedure. However, the Department considers that the affirmative procedure should be used where any provision in new Regulations is to:
    a. delegate functions to a person (for instance, authorising persons to carry out inspections of oil and gas activities); or
    b. create new criminal offences.

962. The choice of affirmative procedure for the listed cases reflects the extra scrutiny warranted for measures that can significantly affect individual rights and impact on the justice system; or for measures delegating functions to persons other than the Secretary of State.

[16] Such as those resulting from use of powers in the Environment Act 2021, as well as other legislation either before Parliament or likely to be introduced such as the Levelling Up and Regeneration Bill and the Brexit Freedoms Bill.

963. The negative procedure is appropriate for other circumstances where the power is exercised. The justification for this is that:
    a. In this case, a longstanding regulatory regime is to be broadly maintained, but needs some modifications to keep it fit for purpose. No strategic re-design of the framework is envisaged that might suggest a need for the affirmative procedure.
    b. The expansion of scope to encompass other energy activities is a significant change but is on the face of the Bill.

Clause 227 Power to establish an administrative charging scheme

Power conferred on: Secretary of State

Power exercised by: Making a scheme

Parliamentary Procedure: None

Context and Purpose

964. The Department is seeking to amend current powers to ensure costs can be fully recovered in respect of activities connected with the Secretary of State's statutory decommissioning functions under Part 4 of the PA 1998, including those functions as extended by section 30 Energy Act 2008, to CO2 storage ("Part 4 functions"). This power will enable the Secretary of State to administratively establish a new charging scheme to replace existing fee powers.

965. The Department is proposing to repeal current provisions set out in the PA 1998 that impose fee requirements at fixed points in time and replace these with a new charging scheme. The current system is too inflexible in limiting cost recovery to only two fixed trigger points, based on submission of an application by the operator. The Department carries out work connected with Part 4 functions over a period of many years. Therefore, the Department is proposing a new charging scheme, to be established administratively, that will allow the Department to bill regularly for work that it is doing. Charges will be based on an hourly rate, dependent on the expertise of the official involved. This will enable the Department to recover its costs more efficiently, in line with "Managing Public Money"; and will be more transparent and predictable for operators who pay the charges.

966. The regulatory activity involved in overseeing the PA 1998 Part 4 decommissioning process is extremely complex and lengthy. Comparable regulatory work of a similar scale and complexity is also recovered by way of charging scheme, as this has proven to be the most suitable costs recovery model for such work.

Justification for the power

967. The Department is seeking to replace a delegated power to charge fees with a different delegated power to make a charging scheme. It is accepted practice to use delegated powers to charge for services of Government departments. The services to be charged for (i.e. those connected with the exercise of functions under Part 4 PA 1998 and section 30 Energy Act 2008) are clear on the face of the primary legislation. The power will be exercised periodically to update charging rates. It would be an inappropriate use of time for Parliament to have to debate these charging rates, particularly as there are well established conventions in the United Kingdom to address how services of Government departments can be charged for, as set out fully in Managing Public Money.

Justification for the procedure

968. This primary legislation provides that a charging scheme can be established once it is published. It is clear also from the primary legislation which functions can be charged for. The Department therefore considers there is no need to have any intermediary regulation making power to specify anything else in relation to the charging scheme. The only matter that is likely to vary from year to year in the charging scheme is the hourly rates charged. The Department proposes to have informal engagement with industry before any updating. The hourly rate is constrained by Manging Public Money principles which prevent the Department from making a profit for its activity. Therefore, the Department considers that it would be disproportionate to make regulations to amend this rate. Similar charging scheme powers in other statutes do not require this. See, for example:
    a. Section 82 0A Energy Act 2008, as inserted by section 76(1) Energy Act 2016.
    b. Section 62 Space Industry Act 2018, enabling a charging scheme in line with Schedule 11; and
    c. Section 41 Environment Act 1995.

Part 12 Civil Nuclear Sector

Clause 232 Excluded disposal sites

Power conferred on: Secretary of State

Power exercised by: Regulations

Parliamentary Procedure: Negative

Context and Purpose

969. The UK is a signatory to the Paris Convention on Third-Party Liability in the Field of Nuclear Energy and the Brussels Supplementary Convention, which together establish a nuclear liability and compensation regime to more readily compensate victims of a nuclear incident. In 2004, Protocols amended the Conventions in various ways, including to require disposal facilities for radioactive waste of nuclear origin to have nuclear third-party liability cover.

970. The UK implemented the Protocols via the Nuclear Installations (Liability for Damage) Order 2016. This amends the Nuclear Installations Act 1965. The 2016 Order came into force on 1 January 2022. Since this time, all disposal facilities that accept radioactive waste of nuclear origin must have cover for nuclear third-party liability.

971. However, disposal facilities for some types of low and very low level radioactive waste pose very little risk and requiring them to have nuclear third party liability cover is disproportionate. In 2016, the OECD Nuclear Energy Agency published its "Decision and Recommendation Concerning the Application of the Paris Convention on Third Party Liability in the Field of Nuclear Energy to Nuclear Installations for the Disposal of Certain Types of Low-level Radioactive Waste" (referred to as the "Low Level Waste Exclusion"). This Decision sets out a mechanism for excluding disposal sites for low and very low level radioactive waste of nuclear origin from the requirement for nuclear third party liability, if they meet certain conditions.

972. Once excluded from this regime, the disposal facilities would still be covered by ordinary liability law, meaning that a robust framework for liability in the event of damage or injury would remain in place.

973. The Department is proposing to amend primary legislation (the Nuclear Installations Act 1965 section 7B) to allow disposal facilities for low level radioactive waste of nuclear origin to exit the requirement for nuclear third-party liability if they meet conditions equivalent to those set out in the Low Level Waste Exclusion. It is expected that around four existing disposal facilities may apply, plus, potentially, any new facilities which may be created during decommissioning.

974. The clause contains two regulation making powers. The first allows the Secretary of State to prescribe additional conditions that must be met before a site can excluded from the nuclear third-party liability regime. The second allows the Secretary of State to specify the documents that must accompany any application process for exclusion.

Justification for the power

975. To minimise the burden on operators who wish to claim the exclusion, a policy objective has been to, insofar as possible, identify requirements and documents within existing regulatory regimes which demonstrate that the Low Level Waste Exclusion criteria are met. Where possible, these are set out on the clause itself (see, for example, the permit condition), however to ensure full implementation of the Low Level Waste Exclusion criteria it will be necessary to refer to regimes which only exist in secondary legislation (such as the Radiation (Emergency Preparedness and Public Information) Regulations 2019). Given the greater potential for secondary legislation to be amended, it is preferable that any conditions that need to cross-refer are also set out in secondary legislation. There is currently no intention to add conditions beyond those consistent the Low Level Waste Exclusion criteria, as the principal aim of the policy is to ensure proportionate regulation of these sites.

976. Regarding the second regulation making power, specification of documents to be supplied alongside an application is subject matter more suitable for secondary legislation. It may also be necessary to cross-refer to secondary legislation when identifying documents.

Justification for the procedure

977. Regarding the first of the regulation making powers, the test for exclusion will principally be set out in primary legislation. Whilst the Secretary of State would have the power to add conditions, those could only serve to make the exclusion harder to claim. The current intention is simply to ensure the minimum standards in the Low Level Waste Exclusion are met.

978. Regarding the second regulation making power, it is very narrowly focused and only concerns matters that might be considered administrative or technical.

Annex A – Summary of powers

Clause/Schedule	Power	Procedure
Part 1: Licensing of CO_2 Transport and Storage		
Clause 2(3)	Gives Secretary of State the power to prohibit additional (non-pipeline) methods of CO_2 transportation without a licence via regulations. This is a Henry VIII power in respect of consequential amendments.	Affirmative
Clause 5	Allows the Secretary of State to make regulations to establish persons, or classes of person, that are exempt from the requirement to hold a licence for CO_2 transport and storage activities.	Negative
Clause 6	Allows the Secretary of State to make regulations to vary or withdraw regulations specifying persons or classes of persons that are exempt from the requirement to hold a licence for CO_2 transport and storage activities.	Negative
Clause 7	Provides the economic regulator with the power to grant licences to CO_2 transport and storage companies via written notice.	None
Clause 8	Allows the Secretary of State to make regulations to separate licence types for constituent parts of a CO_2 transport and storage network. This is a Henry VIII power in respect of consequential amendments.	Affirmative
Clause 9	Power conferred on the Secretary of State and, in certain cases, the economic regulator to make regulations to establish the procedure for licence applications via regulations.	Negative
Clause 10	Power conferred on the Secretary of State to make regulations to allow for a future process for licence grants to be determined on a competitive basis.	Affirmative

Clause 12	Provides the Secretary of State with the power to designate standard conditions to be contained in any licence for all CO_2 transport and storage operators. This power will be exercised by written notice.	None
Clause 13	Allows the economic regulator to modify licence conditions for CO_2 transport and storage operators to be exercised via written notice.	None
Clause 16, Schedule 1	Provides Secretary of State with an interim power to grant licences, and allows the Secretary of State to set, in regulations, the date at which power to grant licences transfers to the economic regulator.	Negative
Clause 32	Provides for the enforcement of licence conditions by the economic regulator, and procedural and other requirements relating to the conduct of licence enforcement, to be specified in regulations by Secretary of State.	Affirmative
Clause 44	Power conferred on the Lord Chancellor and Secretary of State to make regulations to provide the detailed procedural requirements applicable to relevant CO_2 transport and storage company administration to be set out in insolvency rules.	Negative
Clause 47	Allows the Secretary of State to make certain alterations to the special administration regime for licensed CO_2 transport and storage companies via regulations. This is a Henry VIII power.	Negative
Clause 48	Allows Secretary of State to make regulations to modify existing insolvency legislation for CO_2 transport and storage network. This is a Henry VIII power.	Affirmative
Part 2: CO_2 Capture, Storage etc Hydrogen Production		
Clause 57(1)	Gives Secretary of State regulation making power regarding revenue support contracts.	Affirmative unless stated otherwise

Clause 58(1)(a)	This subsection provides that a revenue support counterparty must comply with any direction given by the Secretary of State in accordance with this Chapter.	None
Clause 58(2)	A power for the Secretary of State to make provision in regulations about the duties of a revenue support counterparty and the controls and directions that the Secretary of State can issue to a revenue support counterparty.	Affirmative
Clauses 59(1), 61(1), and 63(1)	A power for the Secretary of State to designate a counterparty for each of the transport and storage revenue support contracts, hydrogen production revenue support contracts and carbon capture revenue support contracts.	None
Clauses 60(1), 62(1), 64(1)	A power for the Secretary of State to issue directions requiring a revenue support counterparty to offer to enter into a revenue support contract with an eligible person.	None
Clauses 60(3), 62(2) and 64(2)	A power for the Secretary of State to make provision in regulations regarding how they direct a revenue support counterparty to offer to contract.	Affirmative
Clauses 61(3) and 63(3)	A power for the Secretary of State to make provision in regulations for determining the meaning of “eligible” in relation to a carbon capture entity and a low carbon hydrogen producer.	Affirmative
Clause 65	A power for the Secretary of State to make regulations appointing a person to carry out the functions of a hydrogen levy administrator.	None
Clause 66	A power for the Secretary of State to make provision in regulations requiring relevant market participants to make payments to a hydrogen levy administrator for the purposes set out in that clause as well as other related provisions.	Affirmative first, with negative procedure for subsequent regulations

Clause 67	A power for the Secretary of State to make provision in regulations about the administration of the levy, the functions and duties of a hydrogen levy administrator and the controls and directions that the Secretary of State can issue to an administrator, as well as provision about the application of sums held by an administrator.	Affirmative first, with negative procedure for subsequent regulations
Clause 68	A power for the Secretary of State to make regulations appointing a person to carry out the functions of an allocation body for either the hydrogen production revenue support contracts or carbon capture revenue support contracts and to make provision in regulations about cessation of an appointment.	Negative, except for regulations revoking an appointment which are subject to no Parliamentary procedure
Clause 69	Allows Secretary of State to issue and revise standard terms and conditions of hydrogen production and carbon capture revenue support contracts, as well as designate particular standard terms as terms that may not be modified under clause 73.	None
Clause 70	A power for the Secretary of State to make provision in regulations about allocation notifications.	Affirmative
Clause 71	A power for the Secretary of State to make provision in regulations about the allocation of hydrogen production and carbon capture revenue support contracts.	Affirmative
Clause 72	A power for the Secretary of State to make provision in regulations about an offer to contract.	Affirmative first, with negative procedure for subsequent regulations
Clause 73	A power for the Secretary of State to make provision in regulations about modification agreements.	Affirmative first, with negative procedure for subsequent regulations

Clause 74	Regulation making power for Secretary of State to make supplementary provisions relating to determinations on a competitive basis and enabling calculations and determinations to be made by such persons and in accordance with such procedure as is specified.	N/A
Clause 75(4)	Allows Secretary of State to make provision in regulations enabling a person who has ceased to be a revenue support counterparty to continue to be treated as such a counterparty.	Affirmative
Clause 76	A power for the Secretary of State to make provision in regulations about the application of sums held by a revenue support counterparty.	Affirmative first, with negative procedure for subsequent regulations
Clause 77	A power for the Secretary of State to make provision in regulations about the provision and publication of information and the giving of advice.	Affirmative first, with negative procedure for subsequent regulations
Clauses 79 & 80	A power for the Secretary of State to make and modify transfer schemes, allowing for the transfer of designated property, rights or liabilities of a person who has ceased to be a revenue support counterparty, a hydrogen levy administrator or an allocation body.	None
Clauses 82-84	Provides Secretary of State with the power to make regulations to establish the detailed requirements for decommissioning funds for carbon storage and to charge fees.	Negative, but affirmative for specific regulations
Clauses 85 & 86	Secretary of State may designate offshore installations and submarine pipelines for change of use relief by an administrative decision that is published.	None

Clause 87	A power for the Secretary of State to make regulations about information required for change of use relief.	Negative
Clause 88	A power for the Secretary of State to designate a SPS for Carbon Capture, Usage and Storage.	Approval by resolution of each house
Clause 96	Gives Secretary of State make regulations regarding access to CO_2 transport and storage infrastructure, including the ability to revoke or amend The Storage of Carbon Dioxide (Licensing etc) Regulations 2010 which were implemented using the powers in 2(2) European Communities Act 1972.	Affirmative
Part 3: New Technology		
Clauses 98-107	Enables the Secretary of State to make regulations to establish and adjust a scheme to encourage the sale or installation of low-carbon heating technologies.	Negative, but affirmative for specific regulations
Clause 109(1)	Power for the Secretary of State to make regulations to require gas transporters to take specified steps to ensure consumers are appropriately informed about hydrogen grid conversion trials.	Negative
Clause 109(4) & (5)	Power for the Secretary of State to make regulations to protect consumers relating to hydrogen grid conversion trials.	Negative
Part 4: Independent System Operator and Planner		
Clause 116	Power conferred on the Secretary of State and exercised by guidance, to have regard to the Strategy and Policy statement once designated	Similar to the affirmative procedure (see section 135(8) of the Energy Act 2013)

Clause 125, schedule 6, paragraph 8(5)	Power conferred on Secretary of State to make regulations to transfer functions and property to the ISOP and to issue compensation.	Negative
Clause 125, schedule 6, paragraph 9(1)	Power conferred on HMT to make regulations relating to transfer schemes which may result in tax liabilities.	Negative
Clause 125, schedule 6, paragraph 14(2)	Allows Secretary of State to make further provisions about the compensation process in relation to transfer schemes via regulations.	Negative
Clause 126, schedule 7, paragraph 2(1)	Allows Secretary of State to make provision to enable the ISOP and associates to participate in pension schemes via regulations.	Negative
Clause 126, schedule 7, paragraph 3(1)	Gives Secretary of State the power to make regulations to amend certain existing pension schemes as considered appropriate.	Negative
Part 5: Governance of Gas and Electricity Industry Codes		
Clause 133 & 135, schedule 9(1)	Power conferred on Secretary of State and exercised by notice, to create and amend lists of codes, central systems and responsible bodies to define the scope of powers granted to GEMA and Secretary of State.	None
Clause 138	Power for the Secretary of State to make regulations setting conditions and constraints under which GEMA can determine which code manager selection method to use.	Negative
Clause 139	Regulation making power for the Secretary of State to provide for the selection of a code manager by GEMA (other than by competitive tender).	Negative
Clause 140	Provides GEMA the power to make regulations for conducting a tender to select a code manager, subject to conditions or restrictions imposed by the Secretary of State.	Negative

Clause 141	Regulation making power for Secretary of State to establish what matters the GEMA must cover in its annual strategic direction document for the energy codes.	Negative
Clause 142	Regulation making power for Secretary of State for the transferring of strategic direction duty to the ISOP. This is a Henry VIII power.	Affirmative
Clause 143(7)	Regulation making power for Secretary of State to further define the specified circumstances in which GEMA is allowed to make direct modifications to the contents of designated documents.	Negative
Schedules 10(2) & 10(3)	Power conferred on the GEMA and exercised by regulations to create pension provisions and to alter existing qualifying pension schemes in connection with transfer schemes.	Negative
Part 6: Market Reform and Consumer Protection		
Clause 153, Schedule 12, paragraph 2	Power for Secretary of State to make regulations to set specific criteria for the different models of competition.	Negative
Clause 153, Schedule 12, paragraph 2	Grants Secretary of State power to make regulations to designate a person as a Delivery Body.	Negative
Clause 153, Schedule 12, paragraph 3	Power conferred on GEMA to make regulations to facilitate the determination by a competition of the person to be awarded a licence to operate an offshore transmission asset.	None
Clause 153, Schedule 12, paragraph 3	Power conferred on GEMA and exercised by a licence modification process to enable competitions for network solutions in the onshore electricity market.	None
Clause 153, Schedule 12, paragraph 7	Power conferred on the Authority and exercised by notice to modify industry codes.	None

Clause 153, Schedule 12, paragraph 11	Power conferred on GEMA and exercised by making a property scheme apply to a wider range of projects.	None
Clause 153, Schedule 12, paragraph 23	Power conferred on the Authority and exercised by notice/licence amendment to direct transmission and distribution network owners to act as an owner of last resort.	None
Clause 153, Schedule 12, paragraph 25	Power conferred on Secretary of State and Scottish Ministers to grant wayleaves.	None
Clause 154, Schedule 13, paragraph 2	Power conferred on Secretary of State to make regulations to add, exclude or amend exclusions for types of enterprises within scope of the Energy Network Special Merger regime. This is a Henry VIII power.	Negative
Clause 154, Schedule 13, paragraph 30	Power conferred on Secretary of State and exercised by Order to requires fees to be paid in respect of energy network merger investigations.	Negative
Clause 154, Schedule 13, paragraph 3	Power conferred on Secretary of State and exercised by Order to determine how turnover should be calculated in respect of energy network merger investigations.	Negative
Clause 154, Schedule 13, paragraph 3	Power conferred on Secretary of State and exercised by Order to amend the turnover threshold in section 23 of the EA 2002. This is a Henry VIII power.	Negative
Clause 154, Schedule 13, paragraph 3	Power conferred on Secretary of State and exercised by Order to use an existing power under section 34 of the EA 2002 to make provision in relation to sections 27 and 29 of the Enterprise Act on when enterprises cease to be distinct and when multiple transactions on different dates can be deemed to have occurred on one date, in respect of energy network merger investigations. This is a Henry VIII power.	Affirmative
Clause 154, Schedule 13, paragraph 3	Power conferred on Secretary of State and exercised by Order for section 40(8) and via regulations for section 40(12) to amend and make provision for time limits for investigations and reports. Section 40(8) is a Henry VIII power.	Negative for section 40(8) and None for section 40(12)

Clause 154, Schedule 13, paragraph 3	Power conferred on Secretary of State and exercised by Order to amend the period in which the CMA must take remedial action. This is a Henry VIII power.	Negative
Clause 154, Schedule 13	Power conferred on Secretary of State to make regulations on merger notices.	None
Clause 154, Schedule 13	Power conferred on Secretary of State and exercised by Order to modify sections 97 to 101 of the EA 2002 regarding merger notices and the action which may be or is to be taken by any person in connection with such a notice. This is a Henry VIII power.	Affirmative
Clause 156	Power conferred on Secretary of State to set standard conditions for MPI licences, exercised by licence document.	None
Clause 159	Power conferred on Secretary of State to make consequential provision in respect of MPIs via regulations. This is a Henry VIII power.	Affirmative
Clause 161(4)	Gives Secretary of State the power to make regulations to extend the domestic gas and electricity tariff cap.	Affirmative
Clause 163	Power conferred on Secretary of State and Scottish Ministers and exercised by Order to allow payment as an alternative way of meeting obligations under the energy company obligation scheme.	Draft affirmative
Clause 164	Power conferred on Secretary of State and exercised by licence or code modification to extend the period to modify electricity and gas licence conditions and related industry codes for the rollout of smart meters.	Equivalent to draft negative procedure
Clause 164(2)(b) & (3)(b)	Power conferred on Secretary of State and exercised by Order to extend the period to provide for activities connected with smart meters to be licensable activities. This is a Henry VIII power.	Affirmative
Part 7: Heat Networks		

Clause 165	Gives Secretary of State ability to make regulations to amend the definition of a heat network. This is a Henry VIII power.	Negative
Clause 166 & 167	Allows Secretary of State to make regulations to change the body appointed as a regulator for heat networks and make consequential amendments to the Alternative Dispute Reform Regulations 2015. This is a Henry VIII power.	Affirmative
Clause 168	Power for the Secretary of State to make provisions by regulations for the regulation of heat networks and conferring powers in relation to the development or maintenance of relevant heat networks. Henry VIII power in respect of specific cases where the affirmative procedure applies.	Negative, except in the specific cases where the affirmative procedure will apply
Clause 171	Power conferred on Secretary of State and exercised by regulations to designate GEMA as the licensing authority.	Negative
Clause 172	Power conferred on Secretary of State and exercised by regulations to create enforcement powers for the Scottish licensing authorities.	Negative
Clause 174	Power for Secretary of State by regulations to make provision about heat network zones.	Affirmative, except in relation to regulations made by virtue of clauses 177(1)(c) or 4(c), or 178(2)(c) or (6) where the negative procedure may be used
Clause 175	Power for the Secretary of State to appoint a person as the heat network zones authority by regulations.	Affirmative

Clause 176	Power for Secretary of State by regulations to make provisions about zoning coordinators by regulations.	Affirmative
Clause 177	Power for Secretary of State by regulations to provide for the identification, designation, and review of heat network zones, via regulations.	Affirmative, except regulations on consultation requirements and review of designation of an area as a heat network zone which are negative
Clause 178(1)	Power for Secretary of State by regulations to provide for a methodology to identify heat network zones.	Affirmative, except regulations on consultation requirements which are negative
Clause 178(3)	Power for the Secretary of State to make provision for the Authority to publish documents connected to the methodology via regulations.	Affirmative
Clause 178(5)	Power for Secretary of State to provide for the Authority to issue guidance for following the methodology via regulations.	Affirmative
Clause 178(6)	Powers for the Secretary of State, exercised by regulations, to provide for the review of the methodology.	Negative
Clause 179	Power for the Secretary of State to make regulations relating to the requirement to provide information in heat network zones.	Affirmative
Clause 180	Power for Secretary of State to make regulations about connections to buildings and heat sources within heat networks zones.	Affirmative

Clause 181	Power for Secretary of State to make regulations about the delivery of heat networks in zones.	Affirmative
Clause 182	Power for Secretary of State to make regulations about the enforcement of requirements in heat network zones.	Affirmative
Clause 183	Power for Secretary of State to make regulations to provide for the publication of guidance on penalties.	Affirmative
Clause 184(1)	Power for Secretary of State to make regulations about the information zone coordinators are required to collect.	Affirmative
Clause 184(2)	Power for Secretary of State, by regulations, to detail the information that zoning coordinators must maintain records of.	Affirmative
Clause 184(3)	Power for Secretary of State, by regulations, ensuring the zoning coordinator provides information from their records to the Authority, Regulator, or other zoning coordinators.	Affirmative
Clause 184(4)	Power for Secretary of State, by regulations, to detail the information the Authority must maintain records of.	Affirmative
Clause 184(5)	Power for Secretary of State, by regulations, to ensure the provision of information by the Authority from their records to the Regulator or zoning coordinators.	Affirmative
Clause 184(6)	Power for Secretary of State to make regulations about the disclosure of information by the zoning coordinators or Authority not to breach any obligation of confidence or data protection regulation.	Affirmative
Part 8: Energy Smart Appliances and Load Control		

Clause 187	Power for the Secretary of State to make regulations relating to ESAs prohibit the supply of appliances which are not compliant with the regulations, or which do not have energy smart functionality (electric heating appliances and electric vehicle charge points only).	Affirmative for the first SI, any SIs creating a criminal offence, and any SI amending the list of purposes applicable to the energy smart regulations. Any other SIs will be negative
Clause 187(6)	Power for the Secretary of State to amend the list of purposes applicable to the regulations, which constitutes a Henry VIII power. This clause also gives the Secretary of State a delegated power to define “electronic communications network” in regulations.	Affirmative for the first SI, any SIs creating a criminal offence, and any SI amending the list of purposes applicable to the energy smart regulations. Any other SIs will be negative
Clause 193	Power conferred on Secretary of State and exercised by licence or code modification to amend licence conditions and related documents regarding load control. This includes a power to extend the timeframe of which clause 193 can be exercised through regulations of up to 3 years at a time – this is a Henry VIII power.	None to amend license conditions. Affirmative to extend power to amend license conditions (Henry VIII power).
Clause 197, Schedule 16	Power to allow the Secretary of State, by regulations, to amend Part I of the EA 1989 to add activities associated with load control to the list of licensable activities set out in Part I of that Act. This is a Henry VIII power.	Affirmative
Clause 197, Schedule 16, paragraph 3	Allows Secretary of State to make regulations setting out conditions within which a competitive tender for licensing centralised load control activities should take place.	Negative

Part 9: Energy Efficiency of Premises		
Clause 198	A power conferred on Secretary of State to make regulations in order to make future changes to, revocations of, or replacements to the existing Energy Performance of Buildings regime.	Negative except for any new civil penalties or criminal offenses and in respect of regulations amending primary legislation which are affirmative
Part 10: Core Fuel Sector Resilience		
Clause 204(1)	Power conferred on Secretary of State and exercised by direction for the purpose of maintaining or improving core fuel sector resilience.	None
Clause 204(3)	Power conferred on Secretary of State and exercised by direction for the purpose of restoring continuity of supply of core fuels or counteracting the disruption to or failure of continuity of core fuels, or its potential adverse impact.	None
Clause 204(4)	Power conferred on Secretary of State and exercised by direction for the purpose of reducing the risk of disruption to, or a failure of, continuity of supply of core fuel, or reducing the potential adverse impact of the disruption or failure.	None
Clause 207(1)	Regulation making power for Secretary of State for the purpose of maintaining or improving core fuel sector resilience.	Affirmative
Clause 207(3)	Regulation making power for Secretary of State corresponding to directions under clause 204(3).	Affirmative
Clause 207(4)	Regulation making power for Secretary of State corresponding to directions under clause 204(4).	Affirmative

Clause 209(2)(c)	Secretary of State regulation making power to specify a class or description of persons who are subject to a duty to report incidents.	Affirmative
Clause 211(1)	Secretary of State regulation making power to require a person to provide information to the Secretary of State, at specified intervals, relating to the person's relevant activities or assets.	Affirmative
Clause 219(3)(b)	Regulation making power for Secretary of State to specify descriptions of actions to be taken in an enforcement undertaking.	Affirmative
Clause 220(1)	Require the Secretary of State to issue guidance relating to sanctions and the enforcement of offences.	Lay in draft and subject to a resolution of either House not to issue
Clause 220(2)	Requires the Secretary of State to issue guidance relating to the use of civil sanctions.	Lay in draft and subject to a resolution of either House not to issue
Clause 223(1)	Power for Secretary of State to make regulations amending or modifying the thresholds specified in certain provisions. This is a Henry VIII power.	Affirmative
Part 11: Oil and Gas		
Clause 225	Power conferred on Secretary of State to make regulations concerning arrangements for responding to marine oil pollution.	Negative, with affirmative for the creation of a criminal offence etc.
Clause 226	Power conferred on Secretary of State to make regulations concerning habitats to reduce the effect of offshore oil or gas activities etc.	Negative, with affirmative for the creation of a criminal offence etc.

Clause 227	Power conferred on Secretary of State and exercised by making a scheme to establish an administrative charging scheme.	None
Part 12: Civil Nuclear Sector		
Clause 232	Regulation making power for Secretary of State to set out which documents are required as part of the application process for exclusion.	Negative

Department for Business, Energy and Industrial Strategy

Date 6 July 2022