Energy Bill

Supplementary Delegated Powers Memorandum

Introduction

1. This Memorandum has been prepared by the Department for Business, Energy and Industrial Strategy ("the Department") to assist with scrutiny of the Energy Bill ("the Bill"). This Memorandum describes powers in the Bill conferring power to make subordinate legislation and other delegated powers which were added or amended at the first half of the Committee stage in the House of Lords (first House). This Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

Note to the Committee on amendments to Part 1: Licensing of Carbon Dioxide Transport and Storage

2. The Committee may wish to note that Clause 32 of the Bill (*Enforcement of obligations of licence holders*) which was a delegated power to make regulations about the enforcement of obligations of licence holders in the context of CO_2 transport and storage (see page 24 paragraphs 87-92 of the Delegated Powers Memorandum accompanying the Bill's introduction), has now been replaced with substantive provisions about enforcement. However, the Committee will note that the Schedule making that provision contains one delegated power (see paragraph 10 of the Schedule inserted before Schedule 3) for the purposes of making provision for how a person's turnover is to be determined for the purpose of setting a maximum penalty under the provisions. This power was discussed at paragraph 91 of the Delegated Powers Memorandum accompanying the Bill's introduction and is not discussed further in this supplementary memorandum.

Amendments to Part 2: Carbon Dioxide Capture, Storage etc and Hydrogen Production

Amendment of Clauses 82-83: Power to make regulations regarding the financing of decommissioning costs relating to carbon dioxide-related sites, installations and pipelines

Power conferred on: Secretary of State
Power exercised by: Statutory Instrument
Parliamentary procedure: Negative

Context and purpose

3. This amendment introduces new subsections (1), (1A) and (1B) into clause 82. This clarifies that the Secretary of State's power to make regulations regarding decommissioning funds encompasses both onshore and offshore installations, sites and pipelines; this aligns with the scope of the licence in Part 1 of the Bill.

4. As set out in proposals consulted on in 2021, transport and storage network operators will be expected to establish decommissioning funds. A proportion of the operators' allowed revenue would be accrued within this fund for decommissioning purposes. Decommissioning funds would be ring-fenced to pay for decommissioning and post-closure activities.

Justification for the power

5. The amendment is required so that regulations made under clause 82 could apply to onshore and offshore installations, sites and pipelines, rather than just offshore (as set out in the Delegated Powers Memorandum published at introduction).

6. The licence under Part 1 of the Bill captures both onshore and offshore carbon transportation and storage activities, which means that these licence holders will be allowed revenue for contributions to the relevant decommissioning fund. It is therefore important that any regulations regarding decommissioning funds are able to capture both onshore and offshore carbon storage.

7. As set out in the Delegated Powers Memorandum at introduction, the consultation and the Government's subsequent response made clear the principles surrounding the establishment and maintenance of these decommissioning funds. The delegated power in clause 82 is required for the Secretary of State to establish the detailed requirements for the accrual of 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.

Justification for the procedure

8. 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. The Department's view is that this amendment has not fundamentally changed the nature of the power. It is therefore appropriate to maintain the same level of procedure, namely the negative procedure, for the exercise of this power (except for any regulations which create civil sanctions or offences, which will be subject to affirmative procedure).

Amendments to Clauses 85-86

Powers conferred on: Secretary of State
Powers exercised by: Statutory Instrument
Parliamentary procedure: Negative

Context and purpose

9. These amendments to clauses 85 and 86 insert new regulation making powers into section 30A (Change of use relief for certain installations) and 30B (Change of use relief: carbon storage network pipelines) of the Energy Act 2008 (see amendments to subsection 85(10) and subsection 86(8)). Paragraphs 215 to 217 of the Delegated Powers Memorandum accompanying the introduction of the Bill set out the background to the amendments made by clause 85 and clause 86 as introduced and the background to change of use relief.

10. The amendment to clause 85 enables the Secretary of State to make regulations under s30A of the 2008 Act (which relates to change of use relief for installations). Such regulations could specify who is a 'relevant person' for the purposes of contributions to the fund and approval notices under subsection 30A(5), and what is meant by 'the required amount" that needs to be contributed to the decommissioning fund. These definitions are relevant for working out whether a 'trigger event' has occurred, which is one of the conditions to qualify for change of use relief.

11. The amendment to clause 86 would grant the Secretary of State a parallel power to make regulations under s 30B of the 2008 Act (which relates to change of use relief for pipelines).

Justification for the power

12. These two powers would enable the Secretary of State to set out further detail on required contributions to decommissioning funds, such as how to calculate the decommissioning liability of the previous oil and gas asset owner. These matters are more suitable for secondary legislation, rather than primary, given that they are technical in nature.

Justification for the procedure

13. It is the Department's view that the primary legislation provides sufficient clarity concerning the conditions to qualify for Change of Use Relief, including the requirement to contribute to the decommissioning fund. The Department considers that the negative resolution procedure is appropriate for these powers, given that the regulations have the potential to be detailed and technical in nature.

New Clause inserted after Clause 77: Enforcement of the hydrogen levy (see clauses 65 to 67)

Power conferred on: Secretary of State
Power exercised by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative

Context and purpose

14. This new clause (*Enforcement)* inserted after clause 77, enables revenue support regulations to make provision for the Gas and Electricity Markets Authority (GEMA) to use certain of its enforcement powers under the Gas Act 1986 and the Electricity Act 1989 to enforce hydrogen levy requirements imposed under regulations on relevant market participants. The clause includes a parallel provision for the Northern Ireland Authority for Utility Regulation (the Utility Regulator), enabling revenue support regulations to make provision for the Utility Regulator to enforce levy requirements imposed on relevant market participants under regulations using certain of its enforcement powers under the Energy (Northern Ireland) Order 2003. It also enables enforcement under the terms of a relevant market participant's licence.

Justification for the power

15. This clause complements the existing powers relating to enforcement in subsection (3)(b) to (d) of clause 67 of the Bill. It will help ensure that regulations establishing an obligation on relevant market participants to make payments to a hydrogen levy administrator are underpinned by robust enforcement arrangements, thereby enabling a levy administrator to collect the monies required to fund payments under hydrogen production revenue support contracts and related costs.

16. As discussed in paragraph 138 of the Delegated Powers Memorandum at introduction, the types of market participants obliged to pay the levy, and the levy design itself, 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. Future changes to the wider levy design and to those market participants who are subject to the levy, may necessitate the application of the enforcement arrangements listed in the amendment at different times and to different groups of market participants. The Department therefore judges that it is

appropriate for the Secretary of State to be able to make this provision in regulations. It is also worth noting that this type of provision has precedent – namely, section 22 of the Energy Act 2013 and section 22 of the Nuclear Energy (Financing) Act 2022, which enable regulations to make provision for GEMA to enforce the respective supplier obligations that fund the CFD Regime and nuclear revenue collection contracts.

Justification for the procedure

17. The Department considers that regulations falling within this provision should be made according to the affirmative resolution procedure. This differs from the parliamentary procedure for regulations which make provisions falling within clauses 66 and 67 relating to the hydrogen levy. However, the Department considers that it is appropriate to require additional scrutiny for regulations made under this new Clause given that the enforcement arrangements provided for by such regulations may enable GEMA and the Utility Regulator to take actions that have significant implications for relevant market participants.

New Clause after Clause 81: Licence Modification

Power conferred on: Secretary of State
Power exercised by: Licence / code modification document
Parliamentary procedure: Draft Negative Resolution

Context and purpose

18. This new clause (*Modifications of licences etc.)* inserted after current Clause 81, enables the Secretary of State to modify the licences of certain market participants in the gas and electricity markets in Great Britain and Northern Ireland, as well as documents maintained in accordance with such licences (such as industry codes) or agreements that give effect to such documents. The licences that may be modified using this power are set out in subsections (1) to (4) (subsection (1) is amended by clause 117(11), and subsection (2) is amended and a new subsection (1A) inserted by paragraph 12 of Schedule 11, when the new system operator and planner provisions in Part 4 of the Bill and the new governance of gas and electricity industry codes provisions in Part 5 of the Bill are respectively brought into force).

19. Based on the precedent set by the Contracts for Difference (CFD) regime, the Secretary of State may want persons (other than the hydrogen levy administrator), such as external delivery bodies, to carry out various functions and provide services, as well as provide information and advice, to support or facilitate administering and enforcing the hydrogen levy. Such functions or services may include the collection and calculation of meter data from relevant market participants who are obliged to pay the levy. This new clause is required to make modifications to relevant licences and/or related documents or agreements (such as industry codes) to support and facilitate the administration and enforcement of the levy, including the carrying out of functions or provision of services by such persons.

Justification for the power

20. As discussed in paragraph 138 of the Delegated Powers Memorandum at introduction, the types of market participants obliged to pay the levy, and the levy design itself, 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. It is crucial that the Secretary of State can make changes to relevant licences and codes; this will likely help support and facilitate the implementation of the levy and accommodate potential future updates to the levy design as well as changes in the wider energy market. A delegated power is required for this

provision, as it is not possible to determine the potential licence and code modifications that may be needed in the future as the levy and the energy market evolve. In addition, the complexity and technical nature of potential modifications to licences and codes are likely to be such that it would not be appropriate to include such modifications on the face of the Bill.

21. There is precedent for this type of power. Section 26 of the Energy Act 2013 enables the Secretary of State to modify the licences and codes of certain electricity market participants for purposes related to the CFD regime. A similar power is contained in Section 29 of the Nuclear Energy (Financing) Act 2022. The Department is aware of the Section 26 power having been used in the context of the CFD regime.

Justification for the procedure

22. New clause (*modifications of licences etc.: supplementary)* provides that the Secretary of State may only make modifications under subsections (1) to (4) of the new clause (*modifications of licences etc.)* if those modification are first laid in draft before Parliament for a 40-day period (as defined by subsections (6) and (7) of clause *modifications of licences etc.: supplementary*) and neither House resolves not to approve the draft during that time. The Secretary of State must publish details of any modifications made as soon as reasonably practicable after they are made. This is analogous to the draft negative resolution procedure used for statutory instruments and aligns with parliamentary procedure for the exercise of powers under section 26 of the Energy Act 2013.

23. Before making a modification, the Secretary of State must consult the holder of any licence being modified and such other persons as the Secretary of State considers it appropriate to consult. This will help ensure that relevant delivery bodies and regulators are engaged on potential changes to licences and/or related documents or agreements (such as industry codes).

New Part 9A: Energy savings opportunity schemes (ESOS)

First ten new clauses (ESOS regulations)

Power conferred on: Secretary of State
Power exercised by: Regulations made by statutory instrument
Parliamentary Procedure: Negative, but affirmative for regulations which:

a. *extend the descriptions of undertaking to which an energy savings opportunity scheme applies;*
b. *require participants to take action for the purpose of achieving energy savings or greenhouse gas emissions reductions of a kind not previously provided for in regulations;*
c. *confer on a scheme administrator enforcement powers of a kind not previously provided for in regulations;*
d. *create new penalties;*
e. *increase the amount of existing financial penalties by more than is necessary to reflect changes in the value of money;*
f. *create an offence or increase the fine for an existing offence;*
g. *provide for the payment of a new fee;*
h. *amend or repeal primary legislation (Henry VIII power).*

Context and purpose

24. These new clauses enable the Secretary of State to make regulations about the establishment and operation of one or more energy savings opportunity schemes. The clauses also enable the existing UK-wide Energy Savings Opportunity Scheme ("ESOS") to be changed, replaced or brought to an end[1].

25. ESOS requires large undertakings, and corporate groups containing large undertakings, to carry out assessments of their energy consumption at least every 4 years, as a result of which they receive recommendations on making energy efficiency savings which are reasonably practical and cost-effective. ESOS is a key building block of the Government's strategy for non-domestic energy efficiency by overcoming a key barrier to information on how energy savings may be achieved.

26. ESOS was established by the Energy Savings Opportunity Scheme Regulations (S.I. 2014/1643) (the "2014 Regulations"). The 2014 Regulations were made under section 2(2) of the European Communities Act 1972. Despite the repeal of that Act (which means it cannot be used to amend the 2014 Regulations), the European Union (Withdrawal) Act 2018 provided for the 2014 Regulations to remain in force. It is likely that regulations under the new Part (Energy Savings Opportunity Schemes) will be used in the first instance as a replacement enabling power to amend the 2014 Regulations, rather than revoking and replacing them.

27. Subsection (1) of the first new clause sets out the overarching power to provide for energy savings opportunity schemes. An "energy savings opportunity scheme" is a scheme that requires undertakings to assess their energy consumption with a view to identifying possible energy savings and reductions in greenhouse gas emissions resulting from their energy consumption (and the costs and benefits of those savings and reductions). Undertakings may be required to produce action plans or set targets for achieving energy savings and greenhouse gas reductions; report on progress in carrying out plans, achieving targets or taking other forms of specified action for the purpose of achieving energy savings and greenhouse gas reductions; or to take such specified action (rather than merely reporting on progress).

28. Subsection (6) of the first new clause enables regulations to specify what constitutes "energy consumption", and the greenhouse gas emissions resulting from that consumption, for the purposes of an assessment, and how they are to be determined. Regulations may, for example, provide that energy consumption includes energy consumed by employees of an undertaking in commuting to work, energy consumed in business travel in means of transportation not operated by the undertaking and energy consumed in transportation services procured by the undertaking[2]. Regulations may also provide that an amount of energy may be excluded from total energy consumption for the purposes of assessments. ESOS does not currently require greenhouse gas emissions to be assessed or recommendations to be made about reductions in such emissions; and it is proposed that the power will be exercised to provide for this.

[1] See subsection (9) of the first new clauses. ESOS was the means by which the UK, as a member State of the European Union, complied with the obligations set out in Article 8(4) of Directive 2012/27/EU (the "Energy Efficiency Directive").

[2] See also subsection (6)(b) of the second new clause.

29. The second new clause enables regulations to specify the undertakings within the scope of an energy savings opportunity scheme. Regulations may bring more undertakings within scope of ESOS or exclude undertakings currently within scope.

30. The third and fourth of the new clauses enable regulations to make provision about assessments, including their frequency, how they should be carried out, their form and content and requiring that specified functions relating to assessments may be carried out only by persons of specified competence ("assessors"). Currently, an ESOS assessment must be reviewed by an assessor. Regulations may require assessors to be trained to new standards (relating, for example, to including an assessment of greenhouse gas emissions and recommending emission reductions or to new standards for assessments) and to do more in relation to assessments than merely review them. Provision may also be made about the processes by which assessors are approved, including by inclusion in lists maintained by specified bodies.

31. The fifth and sixth of the new clauses enable regulations to make provision about action plans, including their form and content and how progress in carrying out plans and achieving targets should be reported, and to specify other forms of action to achieve energy savings and greenhouse gas reductions and require undertakings either to report on whether the action has been taken or to take the action (or both).

32. The seventh and eighth of the new clauses enable regulations to provide for the appointment of one or more scheme administrators and for various functions to be conferred on the scheme administrator, including requiring certain scheme information to be made public or shared with the UK government and the devolved administrations. Although there are currently no fees under ESOS, regulations may in the future provide for the scheme administrator to provide for fees to be paid.

33. Regulations may provide for the scheme administrator to have powers to monitor compliance with, and enforce requirements imposed by an energy savings opportunity scheme, including a power to provide for the publication of specified information about an undertaking's failure to comply with scheme requirements, and for financial penalties and offences for a failure to comply. The penalty for offences created by regulations is limited to a fine.

34. The ninth new clause enables regulations to provide for appeals against decisions of the scheme administrator. The tenth new clause provides for the parliamentary procedure for regulations, including providing that consequential amendments may be made that amend or repeal primary legislation.

<u>Justification of the power</u>

35. The Department considers that, once Parliament has authorised in principle the establishment (or in the case of ESOS, the continuance) of an energy savings opportunity scheme and the purposes for which such a scheme may be established, and the broad outlines of what such a scheme may contain, are clearly set out in primary legislation, it is appropriate for the technical details of such a scheme to be left to secondary legislation. For example, Part 3 of the Climate Change Act 2008 provides a broad power to make "regulations for trading schemes relating to greenhouse gas emissions", with the detail of trading schemes left to secondary legislation.

36. The regulation-making power provides the necessary scope to change ESOS and, in due course, establish a replacement or additional energy savings opportunity scheme and change that. This is to ensure that any scheme remains fit for purpose in relation to the delivery of reductions in energy consumption and that it is updated to support government targets to reduce greenhouse gas emissions. In particular, the powers may be exercised to: bring undertakings within or exclude them from the scope of a scheme; specify the energy consumption and greenhouse gas emissions that must be assessed; provide for actions to achieve reductions in energy consumption and greenhouse gas emissions that must either be reported on or taken (or both); provide for exceptions from, or alternative means of complying with, scheme requirements; specify the detailed requirements of a scheme; and generally respond quickly to any issues that arise during the operation of a scheme. In the absence of the power, primary legislation would be required every time it was necessary to change ESOS or to establish or change other energy savings opportunity schemes.

37. The Committee is asked to note that the existing energy savings opportunity scheme (ESOS) was established by secondary legislation (the 2014 Regulations). The power can therefore be seen to represent continuity in terms of the existing level of parliamentary scrutiny for ESOS, with the additional safeguard that, whilst the 2014 Regulations were made using the negative procedure, if regulations under the new Part (Energy Saving Opportunities Schemes) contain certain specified provisions, they are subject to the affirmative procedure (see further under "Justification for the procedure" below).

38. The power includes the power to create offences to enforce scheme requirements. Although the 2014 Regulations do not currently provide for offences as a way of enforcing ESOS requirements, the power to create offences is included in case it is necessary to provide for offences in relation to the following, in the same way that these are enforced under other schemes[3]:
    a. obstructing the exercise of inspection powers;
    b. failing to provide reasonable facilities and assistance requested when exercising inspection powers (which is of particular importance in relation to offshore facilities);
    c. impersonating an authorised person;
    d. making a false statement in compliance with a scheme requirement.

39. The power includes the power to make consequential amendments to primary legislation. The Department has not identified any primary legislation that needs such amendments immediately. However, paragraphs 13 to 15 of Schedule 4 to the 2014 Regulations provide for the Planning (Northern Ireland) Order 1991 (which has now been revoked) to be applied with modifications in relation to appeals brought in Northern Ireland. If the 2014 Regulations were revoked and remade, the Department considers that equivalent provision may need to be made to deliver the existing policy by modifying primary legislation, in this case, the Planning Act (Northern Ireland) 2011.

<u>Justification for the procedure</u>

40. Subsection (6) of the tenth new clause sets out that regulations containing certain provision should be subject to the affirmative procedure.

[3] See, for example, article 82 of the CRC Energy Efficiency Scheme Order 2013 (S.I. 2013/1119) (now revoked) and article 40(4) of the Greenhouse Gas Emissions Trading Scheme Order 2020 (S.I. 2020/1265).

41. The Department considers that any regulations extending the class of undertakings within scope of an energy savings opportunity scheme should be subject to the affirmative procedure, so that Parliament can decide in principle whether or not to extend the scope of the scheme to the new undertakings before any requirements apply.

42. The Department considers that regulations that require undertakings to take action (for example, to implement recommendations made) of a kind not previously provided in regulations for the purpose of achieving energy savings or reductions in greenhouse gas emissions should be subject to the greater degree of parliamentary scrutiny provided by the affirmative procedure. As ESOS currently does not require such action to be taken, regulations which amend the 2014 Regulations to impose such requirements for the first time would represent a step-change from ESOS being a scheme which encourages undertakings to take action to achieve energy savings on a voluntary basis to one that requires action to be taken, and it is appropriate that the affirmative procedure should apply.

43. The Department considers that it is appropriate for the affirmative procedure to be used if regulations confer enforcement powers of a kind not previously provided, create new penalties or increase the amount of an existing financial penalty by more than is necessary to reflect changes in the value of money, since it is appropriate for Parliament to have the opportunity to consider the new provision and decide whether or not it is appropriate before the new powers or penalties apply.

44. The Department considers that regulations that create new offences should be subject to the affirmative procedure, so that Parliamentary approval is obtained for the new offences before they apply. Offences are not currently used to enforce ESOS, so regulations which amend the 2014 Regulations to create an offence would be subject to the affirmative procedure.

45. The Department considers that it is appropriate for the affirmative procedure to be used if regulations require a fee to be paid, so that Parliament has the opportunity to debate the fee before it becomes payable and reject it, if appropriate. As ESOS currently does not provide for fees to be paid, regulations which amend the 2014 Regulations to provide for a fee would be subject to the affirmative procedure.

46. Finally, the Department considers that provision amending or repealing a provision of an enactment contained in primary legislation should be subject to the affirmative procedure, since the primary legislation will have been enacted by Parliament or the legislature of one of the other nations of the United Kingdom.

47. This new clause and existing clause 239(5) of the Bill provide that regulations containing any other provision may be subject to the negative procedure. The Department's view is that regulations containing such provision are likely to relate to the technical detail of an energy savings opportunity scheme and are unlikely to alter its fundamentals, so it is appropriate for such regulations to be subject to the negative procedure.

New Clause: Directions to scheme administrators

Power conferred on: Secretary of State
Power exercised by: Direction
Parliamentary Procedure: None

Context and purpose

48. This new clause (*Directions to scheme administrators)* enables the Secretary of State to give directions to scheme administrators of energy savings opportunity schemes, appointed under regulations made in exercise of the powers in new Part (Energy Saving Opportunities Schemes). The scheme administrator must comply with the direction. Directions may also be given to the existing bodies exercising scheme administration and compliance functions under ESOS[4].

Justification of the power

49. It is possible that from time-to-time differences may arise between the Secretary of State and the scheme administrator about how regulations establishing an energy savings opportunity scheme should be interpreted or how functions set out in regulations should be exercised. In these circumstances, it is appropriate that the Secretary of State, who is ultimately responsible to Parliament for the operation of a scheme, should have the power to direct the scheme administrator as to the exercise of scheme functions. The scheme administrator may welcome a direction, as putting the matter beyond doubt as far as the scheme administrator is concerned.

50. There is precedent for such a power in the Climate Change Act 2008. Part 3 of that Act provides a power to make regulations for trading schemes relating to greenhouse gas emissions, including for the appointment of a person as the "administrator" of a scheme (see paragraph 21 of Schedule 2 to that Act). Section 52 of that Act provides for directions to be given to the administrator of a trading scheme.

Justification for the procedure

51. No parliamentary procedure is provided. As directions may be given only to a person appointed as a scheme administrator by regulations and cannot in any event be used to change the law, the Department considers that no parliamentary procedure is necessary. No parliamentary procedure is provided for the direction power in section 52 of the Climate Change Act 2008.

[4] The Environment Agency, the chief inspector (constituted under regulation 8(3) of the Pollution Prevention and Control (Industrial Emissions) Regulations (Northern Ireland) 2013); the Scottish Environment Protection Agency; the Natural Resources Body for Wales; and the Secretary of State (for offshore undertakings).

Department for Business, Energy and Industrial Strategy

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