

Energy Bill – European Convention on Human Rights - Memorandum from the Department for Energy Security and Net Zero

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Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Energy Bill (“the Bill”). This memorandum has been prepared by the Department for Energy Security and Net Zero (“the Department”).
2. The Secretary of State for the Department for Energy Security and Net Zero made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in his view, the provisions of the Bill are compatible with Convention Rights.

Summary of the Bill

3. The Bill will provide a basis for the regulation and development of the UK’s energy system to ensure that system plays its part in reducing Carbon Dioxide (CO2) and other greenhouse gas emissions and therefore contributing to meeting the UK’s net zero goal. For that purpose, the Bill also makes provision for updating the existing energy efficiency in buildings certification regime and makes provision about energy

efficiency measures taken by energy companies. The Bill will also provide for greater energy security by, for example, providing the Secretary of State with powers to obtain information about the state of the core fuel sector and to direct certain persons to take action to prevent or rectify disruption or deal with emergencies in the core fuel sector.

Part 1: Licensing of Carbon Dioxide Transport and Storage

4. Part 1 (including Schedules 1 to 6) makes provision for the licensing arrangements for a new transport and storage (T&S) network, the purpose of which is to transport and permanently store CO₂ captured from industrial and commercial settings.
5. Chapter 1 makes provision for the objectives to be pursued by the Secretary of State and by the economic regulator (Ofgem) in carrying out their functions under Part 1; these objectives include: protecting the interests of users of the network, protecting the interests of consumers whose interests may be impacted by the exercise of those functions as well as promoting the efficient and effective development of the T&S network. Further it confirms that the Secretary of State and economic regulator must exercise their respective functions in a manner best calculated to: promote the resilience of the network, promote effective competition, protect the public from risks associated with the network, contribute to sustainable development and assist in meeting decarbonisation targets. Clause 2 makes it an offence to operate a site for the disposal of CO₂ by way of geological storage or to operate a licensable means of CO₂ transportation (i.e. transport CO₂ through pipes for the purpose of that CO₂ being geologically stored) – unless the person doing so holds an appropriate licence. Clauses 7 to 19 make provision for the economic regulator to grant licences, to set conditions for licences, to modify licences and to terminate licences or consent to the transfer of a licence; those sections also provide powers for the Secretary of State to make regulations about subdividing licences (e.g. a transport licence or a storage licence), the procedure for applying for a licence or for the competitive tendering of licences. For an interim period, the Secretary of State can issue licences and in doing so has the same powers as the economic regulator (see section 16 and Schedule 1).
6. Chapter 1 also makes provision:

- a. for appeals to be made to the Competition and Markets Authority (CMA) against certain decisions taken by the economic regulator;
 - b. about providing information to the economic regulator and the Secretary of State;
 - c. for an enforcement mechanism in relation to breaches of obligations in Part 1 (see section 32 and Schedule 3);
 - d. for an offence of making a false statement in connection with providing information.
7. Chapter 2 modifies provisions of the Enterprise Act 2002 and the Competition Act 1998 to enable the economic regulator to exercise concurrent functions with the CMA in respect of commercial activities connected with relevant T & S activity.
 8. Chapter 3 imposes certain reporting requirements on the economic regulator in relation to forward work programmes, the Secretary of State's "Strategy and Policy Statement" and an annual report on the exercise of their functions under Part 1 of the Act and of any action taken by the CMA during the reporting year under the concurrent powers.
 9. Chapter 4 provides for a special administrative regime (SAR) for the transport and storage network which is intended to provide for companies running that network who are likely to enter into administration with a regime separate from the general insolvency legislation. This is to ensure that the purpose of the T & S activity can continue to be fulfilled even if the licenced operator has ceased trading. Because the Energy Act 2004 contains similar provision concerning SARs for energy licences, that Act is modified so that its provisions can be understood to apply to a T & S SAR. This modification includes a modification of the provisions related to making transfer schemes¹ and such transfer schemes are known as ordinary transfer schemes.
 10. Chapter 5 makes provision for CCUS transfer schemes. These are transfer schemes made by the Secretary of State (unlike ordinary transfer schemes where the scheme is made by the administrator) in circumstances where the assets of a T & S operator have

¹ These are schemes made under statute which transfer property from one legal entity (usually in the context of insolvency) to another legal entity in circumstances where that property might not otherwise transfer.

become stranded or where there has been a leak from a storage site or where there has been a breach by the T & S operator.

11. Chapter 6 contains provisions which amend the Energy Act 2008 to insert new sections relating to cooperation between the licencing authority (the Oil and Gas Authority) and the economic regulator for the purposes of Part 1 of that Act and the economic regulator exercising functions under Part 1 of the Bill.

Part 2: Carbon Dioxide Capture and Storage and Hydrogen Production

12. Part 2 makes provision related to Carbon Capture and Storage (CCUS) and hydrogen production.
13. Chapter 1 includes powers to make revenue support regulations and to designate counterparties in relation to revenue support contracts for carbon dioxide transport and storage, hydrogen production and carbon capture. Revenue support regulations will make provision for a number of matters including who will be eligible to receive support for carbon capture and hydrogen production. Regulations will also provide for a hydrogen levy and make provision for which market participants are to be liable to pay that levy.
14. Chapter 2 makes provision for the decommissioning of carbon storage installations and in particular powers to make regulations about the financing of the costs of that decommissioning. For this purpose, amendments are made to sections 30 (which modifies Part 4 of the Petroleum Act 1998), 30A and 30B of the Energy Act 2008.
15. Chapter 3 makes provision for the designation of a CCUS strategy and policy statement (see also Chapter 3 of Part 1) which sets out the government's priorities in formulating its carbon dioxide, capture usage and storage policy and the outcomes to be achieved by that policy.
16. Chapter 4 makes provision about changes of control in holders of carbon dioxide storage licences issued by the Oil and Gas Authority, including associated criminal

offences and information gathering powers, and for this purpose amends the Energy Act 2008 and secondary legislation made under that Act (see specifically Schedule 6).

17. Chapter 5 provides power to make regulations regarding the acquisition of rights to use relevant infrastructure. It also allows the Secretary of State to provide financial assistance for the purpose of encouraging, supporting or facilitating transportation and storage of carbon dioxide, carbon capture facilities, low carbon hydrogen production or the transportation and storage of hydrogen.

Part 3: New Technology

18. Part 3 makes provision for the incentivisation of, or the testing of, the feasibility for the use of new technology especially in relation to home heating.
19. Chapter 1 provides powers to create a low-carbon heat scheme. Such a scheme is intended to encourage the manufacture and installation of low-carbon heating technologies (such as air source heat pumps) through the setting of mandatory targets.
20. Chapter 2 makes provision for a hydrogen grid conversion trial for the purposes of testing the feasibility of using hydrogen for home heating by conducting a trial in certain defined areas. For this purpose, modifications are made to the Gas Act 1986 to enable the relevant changes to be made to gas supply and domestic appliances within the designated area; powers are also provided to make secondary legislation for the purposes of protecting consumers in the trial area where that protection is needed beyond existing protections.
21. Chapter 3 makes two miscellaneous amendments to primary legislation for the purpose of facilitating new technologies. The Nuclear Installations Act 1965 is amended to clarify the regulatory position in relation to that Act of nuclear fusion facilities. An amendment is also made to the Climate Change Act 2008 to broaden the range of greenhouse gas removals that are defined in that Act. An amendment is also made to the Energy Act 2004 to enable renewable transport fuel orders to include support for recycled carbon fuels and nuclear derived fuels.

Part 4: Independent System Operator and Planner

22. Part 4 (and Schedules 7, 8 and 9) makes provision for the designation of a new independent system operator and planner (ISOP) which will take over some of the roles currently performed by the National Grid Plc. Schedules 7 and 8 make provision for the transfer of property and staff from the existing operator to the ISOP.
23. The ISOP will have certain specific responsibilities, such as co-ordinating the electricity transmission system, providing strategic planning in respect of the conveyance of gas and providing advice and analysis. The ISOP can also be given additional functions by other parts of this or other legislation. The ISOP has certain statutory objectives, in particular relating to ‘net zero’ (as defined by sections 1 and 4(1)(b) of the Climate Change Act 2008), security of supply and a number of other matters. The ISOP also has a duty to have regard to the strategic priorities set out in the Energy Act 2013.
24. A person who carries out the function of an ISOP must hold a licence for that purpose under the Electricity Act 1989 and the Gas Act 1986 and it would be an offence under that legislation to carry on that activity without such a licence. Part 4 contains further provisions about granting licences, modifying licences and transferring licences (Schedules 7 and 8 make further provision about such transfers and other connected matters).

Part 5: Governance of Gas and Electricity Industry Codes

25. Part 5 (and Schedules 10 to 12) provides powers for the Secretary of State to designate documents or codes and to designate a “central system” for the purposes of operating the codes and storing documents and data in connection with that operation. These codes are industry codes which define the terms under which the industry participants can access the electricity and gas networks, and/or set commercial and/or technical rules for operating in the relevant markets.
26. This Part also contains powers for the Authority (Ofgem for practical purposes) to modify codes under the circumstances set out in Part 5 and to give directions to a body

operating the central system. Powers are also provided to Ofgem to affect the necessary transfers from existing licensed code managers to new code managers.

Part 6: Market Reform and Consumer Protection

27. Part 6 (and Schedules 13-15) contains a number of measures relating to reforms of the energy market. Amendments are made to the Electricity Act 1989 to insert provisions which will introduce the same competitive tendering regime that currently applies to offshore electricity transmission into the onshore network sector. Amendments are also made to the Enterprise Act 2002 to enable the Competition and Markets Authority (CMA) to take action to investigate and regulate where the merger involves two or more energy network enterprises. Provision is also made in this part for the participation in the operation of a multi-purpose interconnector to be a licensable activity under the Electricity Act 1989 and for the generation of electricity from a stored energy source to be an activity which requires a licence under that Act.

28. Part 6 also makes provision amending the Energy Act 2008 (along with associated provisions in the Electricity Act 1989 and the Gas Act 1986) to extend the period during which licence conditions for smart meters can be amended to 1st November 2028. Provision is also made (by making amendments to the Electricity Act and Gas Act) to enable changes to be made to the basis on which energy companies meet their Energy Company Obligation².

Part 7 Heat Networks

29. Part 7 (including Schedule 16) provides for the Secretary of State to make secondary legislation to regulate heat networks, confer powers for their development and maintenance and establishes a process of heat network zoning to support the increased use of heat networks. Powers under Part 7 include a power to require authorisations to carry out specified activities relating to heat networks. The subject matter of regulation in this area (including through authorisation conditions) may include rules about

² The Energy Company Obligation (ECO) is a government energy efficiency scheme in Great Britain to help reduce carbon emissions and tackle fuel poverty.

technical standards of heat networks, price regulation and service standards, for example.

Part 8 Energy Smart Appliances and Load Control

30. Chapter 2 of Part 8 makes provision for the regulation of energy smart appliances³ and provides for a sanctions and enforcement regime to enforce those new requirements.

31. Along with the introduction of energy smart appliances is the ability to remotely control the amount of electricity consumed by those devices or the production of electricity from within the device. This is the process known as “load control”. Chapter 3 of Part 8 makes provision for the licensing of load control and makes amendments to the Electricity Act 1989 (See Schedule 17) for the purposes of creating power to provide for new licenced load control activities. These regulations may make provision enabling those currently carrying out load control activities to transition to the new licenced regime.

Part 9: Energy Efficiency & Energy Performance Regulations

32. This part provides for powers to make energy performance in buildings regulations, including powers to amend the existing Energy Performance of Buildings (England and Wales) Regulations 2012 which govern the requirements for energy certificates including energy performance certificates.

Part 10: Energy Savings Opportunity Scheme

33. Part 10 provides powers for the Secretary of State to make one or more new energy saving opportunities schemes or to make changes to the existing Energy Savings Opportunity Scheme (ESOS). The requirements for the current ESOS scheme are set out in the Energy Savings Opportunity Scheme Regulations 2014. As part of EU Exit, the European Communities Act 1972, which provided the primary powers to amend the 2014 ESOS Regulations, was repealed. The new powers in the Bill will provide powers, enabling the Government, following a consultation, to amend or replace the

³ These are appliances that can adjust the use, discharge or storage of electricity in response to a digital signal received over a public communications network.

existing ESOS Regulations, to ensure the ESOS scheme or schemes continue to meet UK-specific objectives.

Part 11: Core fuel sector resilience

34. This Part (and Schedule 18) provides a number of powers for the Secretary of State to take action to ensure continuity of supply of core fuels, counteract any disruption in supply of those fuels (essentially crude oil or renewable transport fuel) and reduce the risk or adverse impact of a disruption or failure of supply of those core fuels. These powers can be exercised either through a direction from the Secretary of State to someone carrying out a core fuel activity or by making corresponding regulations on the same issues but imposing obligations on a particular class or description of persons. The power to issue a direction will only apply to certain large scale core fuel sector activities or large facilities used for carrying out fuel sector activities. Provision is also made for criminal offences for breaches of directions or regulations, for requirements to provide the Secretary of State with information and a duty on certain core fuel sector persons, or owners of facilities, to notify the Secretary of State of any incidents affecting their activities which could create a risk of or cause a disruption to or failure of supply of core fuels. Provision is also made enabling HMRC to disclose information related to the core fuel sector to the Secretary of State. Information held for these purposes by the Secretary of State may be disclosed to other government departments or devolved administrations.

Part 12: Offshore Wind Electricity Generation, Oil and Gas

35. Chapter 1 contains powers to deliver elements of the Offshore Wind Environmental Improvement Package, which was announced as part of the British Energy Security Strategy.

36. This Chapter will allow a public authority that is subject to one or more environmental compensation obligations to determine that compensatory measures

taken or secured, or to be taken or secured, are to count towards discharging those obligations.

37. This Chapter also provides powers for the Secretary of State to make regulations which make provision for the establishment, operation and management of one or more Marine Recovery Funds. The regulations may make provision about the extent to which a payment into a fund discharges a condition imposed on a person requiring them to take compensatory measures for adverse effects on protected sites.
38. Chapter 1 also confers a power on the appropriate authority to make provision by regulations about the assessment of environmental effects of relevant offshore wind projects on protected sites; and about the taking or securing of compensatory measures for adverse environmental effects on those sites.
39. Chapter 2 (and Schedule 19) contains powers to make regulations in two areas. Firstly, regulations which make provision for those engaging in certain offshore oil or gas related operations including the storage of CO₂ as a gas, to have contingency plans which set out the arrangements for responding to incidents which might pollute the environment. Secondly, powers related to ensuring that environmental implications for protected offshore habitats and species are taken into account when consents for certain activities related to offshore oil and gas activities are being considered or granted.
40. This Part also makes provision for charging schemes, by inserting a new section 38C into the Petroleum Act 1998, which allows the Secretary of State to make regulations about charges in connection with carrying out functions under Part 4 of the Petroleum Act 1998 (which concerns the abandonment of offshore installations).
41. Part 12 also makes provision about changes of control in holders of petroleum licences issued by the Oil and Gas Authority, including associated information gathering

powers, and for this purpose amends the Petroleum Act 1998 and secondary legislation made under that Act (see specifically Schedule 19).

Part 13: Civil Nuclear sectors

42. Chapter 1 of Part 13 makes provision for the regulation of the nuclear sector. Amendments are made to the Nuclear Installation Act 1965 (“the 1965 Act”) to exempt certain nuclear facilities and disposal sites from the regime created by that Act. The 1965 Act is also amended to make it expressly clear that certain nuclear sites situated in or under the territorial sea adjacent to the United Kingdom require a licence and are regulated by the Office for Nuclear Regulation. In addition, amendments are made to the 1965 Act (see Schedule 20) to enable the UK to accede to the Convention on Supplementary Nuclear Damage.
43. Chapter 2 of Part 13 also makes provision for expanding the role of the Civil Nuclear Constabulary (CNC) by making amendments in particular to the Energy Act 2004. Amendments are also made to the Criminal Justice and Public Order Act 1994 and the Counter-Terrorism Act 2008. These amendments will enable the Civil Nuclear Constabulary to provide additional police services such as protecting other facilities, equipment or locations which are not part of the nuclear facilities they currently protect and provide those services throughout Great Britain. They will also ensure that the CNC’s powers can be used to assist other police forces within Great Britain and also to enable the CNC to have cross border warrant, search and arrest powers.
44. Chapter 3 of Part 13 provides powers to make regulations for the purpose of amending relevant nuclear pension schemes so that those schemes are more closely aligned with other public sector pension schemes.

ECHR issues raised

45. The ECHR rights relevant to the provisions of the Bill are: the right to property (Article 1 of the First Protocol or A1P1), the right to respect for private and family life, home and correspondence (Article 8) and the right to a fair trial (Article 6). We have considered these Articles and the rights which they provide against each substantive measure in the Bill and have highlighted below those measures which we regard as

being of significant interest (other measures may raise minor ECHR issues but are not thought significant enough for the purposes of this memorandum). In light of the scale and nature of the Energy Bill we have sought to group these issues under themes relevant to the Convention rights, rather than taking a clause-by-clause approach.

46. Having considered these points, we regard the measures in the Bill as being compatible with the Convention rights.

Article 1 of the First Protocol (“A1P1”)

47. A1P1 provides the right of any natural or legal person to the peaceful enjoyment of their possessions and that no such person should be deprived of their possessions other than where it is in the public interest to do so and where it has been provided for in law. However, A1P1, does not prevent the state from enforcing laws which it deems necessary to control the use of property in the general interest or to secure the payment of taxes or other contributions or penalties.

48. In the Department’s view most measures in the Bill contribute (directly or indirectly) to the government’s aim of reducing greenhouse gas emissions to net zero by 2050. With regard to the public interest, the Court⁴ has held that economic considerations and certain fundamental rights such as the right to property should not take precedence over considerations related to protection of the environment, in particular where the state has enacted legislation on the subject⁵.

Licensing arrangements

49. Clauses which engage A1P1 – new Licensing requirements and modifications: clauses 2, 13, 14 and clause 199, Schedule 17 (load control), Clause 162 (multi-purpose interconnectors).

⁴ Unless otherwise stated references to the Court are to the European Court of Human Rights sitting at Strasbourg.

⁵ See *Hamer v Belgium* 21861/03 §. 79-80.

50. Under these clauses new licensing requirements are being created and a new prohibition is introduced (either directly or by subsequent regulations) which would require a person to obtain a licence in circumstances where no licence is currently required. A person who fails to obtain a licence for such an activity will be subject to criminal sanctions.
51. These clauses would also allow for any licences granted to be modified by the Secretary of State or the regulator.
52. These clauses may therefore affect existing property rights by imposing conditions which existing providers cannot meet or where they need to spend extra resources to meet the new requirements.
53. However, the Department's view is that these activities need to be regulated. This is because (in the case of CO₂ transport and storage) public money is being used and because the activity will play a crucial role in reducing the amount of CO₂ which the UK puts into the atmosphere. In the case of load control, critical infrastructure, which directly affects consumers, is being controlled, and those controlling it therefore need to be subject to appropriate regulatory oversight. In addition, the provisions relating to load control are discretionary regulation making powers which will, in due course, need to be exercised compatibly with the Convention rights.⁶ Similarly, with multipurpose interconnectors, these will create important energy links and will be a key part of the future energy infrastructure.
54. In all three cases therefore, the Department's view is that, to the extent that property rights could be interfered with by the introduction of these licensing regimes, any interference is being provided for in law which is sufficiently accessible and that it is in the public interest to subject each of these activities to a robust licensing regime in the same way that similar activities are regulated under existing energy statutes⁷. The Department's view is that this is also a proportionate approach which is the same approach as is taken across other parts of the energy system.

⁶ This is a Henry VIII power to amend s. 4(1) of the Electricity Act 1989 to add a new licensable activity.

⁷ See for example the s. 4 of the Electricity Act 1989.

Clauses which engage A1P1- clauses 98 and 254 (Oil and Gas Authority powers to prevent a change of control of existing petroleum or carbon dioxide storage licences)

55. Under these clauses existing petroleum and carbon storage licence holders will need to apply to the Oil and Gas Authority (OGA) for the continuation of a licence when they are considering a change of control (e.g. a corporate takeover), even where that was not one of the conditions of the original licence. Under these provisions, the OGA will be able to determine the suitability of any prospective buyer and may in effect prevent a particular merger or buy-out taking place.
56. It may be suggested that these measures interfere with the property rights of the existing licence holders in ways they couldn't have expected when the licence (potentially many years ago) was granted. A revocation or change of the conditions of a licence which affects the running of a business are normally regarded as a control on the use of property⁸. Here the exact effect of these measures is uncertain, but the measure may affect the attractiveness of the business to any prospective buyer and thus reduce its value to the current licence holder.
57. The Department however regards this power as being in the public interest and as being proportionate to the aim it seeks to achieve: namely that those who take over licences of oil and gas installations, or carbon dioxide storage installations, should be able to live up to the original obligations as to safety and environmental protection, that they have the funds to comply with those obligations in particular so far as decommissioning costs are concerned. In addition, the Department views this measure as a minimal additional safeguard which is consistent with current legal requirements related to the assignment of licences.

Clause which engages A1P1- Clause 257 decommissioning of nuclear sites

58. This clause, which makes amendments to sections 1, 3 and 5 (including inserting new sections 3A and 5A) of the Nuclear Installations Act 1965 ("the 1965 Act"), has the effect of changing a licensing arrangement by removing the freedom nuclear site licence holders currently have over their site licences. The effect of this is that the Office

⁸ Tre Traktorér Akiebolag v Sweden App no. 10873/84 § 55.

for Nuclear Regulation will be able to determine (on the basis of a statutory test) whether the site licence can be revoked rather than, as is currently the case (under the 1965 Act), the licensee having the option to surrender the licence. In that respect the Clause engages A1P1.

59. The Department's view is that these amendments to the current position will have minimal if any impact on licence holders' property rights: this is principally because nuclear site licences are not transferable and, even under current arrangements, the licence holder cannot escape financial responsibility for a site by simply surrendering their licence. Having regard to the dangers of radiation from nuclear sites it is plainly in the public interest for the decommissioning of these sites to be as safe as possible. The measure therefore pursues a legitimate aim of protecting the public and the environment and is a proportionate means of achieving that aim.

Assets and Transfers

Clauses which engage A1P1- Clauses 42 to 49 Special Administrative Scheme(s) and Transfer Schemes

60. Chapter 4 of Part 1 (clauses 42 to 49) (special administrative scheme), clause 45 (ordinary transfer schemes), clauses 50 to 52 (Carbon Capture Usage and Storage transfer schemes), clause 82 (revenue support counterparties transfer schemes), clauses 132 (Schedule 7), 158 (Schedule 10) (independent system operator and planner and code governance) and clause 160 and Schedule 13 (competitive tenders for electricity projects) all have the potential to engage A1P1.

61. Transfer schemes are a common method within the energy sector, and in other utilities sectors, of transferring property from one (old) licence holder to new or potential licence holder in order to maintain a seamless service in what are often important or critical areas of national life or infrastructure. Such schemes are often made within the context of the incumbent licence holder entering administration⁹. One of the features of such schemes is that they enable property, rights or liabilities to be transferred in circumstances where that would not otherwise be the case.

⁹ See for example Schedule 21 of the Energy Act 2004.

62. Each of the transfer scheme provisions noted above have their own features and occur in different circumstances or contexts. However, we think that in general they will only engage A1P1 rights in any substantial way once the transfer schemes are made or are in the process of being made and once it is clear what property or rights are an issue. Under Section 6 of the Human Rights Act 1998, any exercise of the power to make such a scheme will need to take account of A1P1 rights.
63. Insofar as it might be suggested that the provisions of the Bill which allow for the making of transfer schemes could in themselves engage A1P1 rights, the Department's view is that the provisions will not infringe A1P1 because in each case they will be made in accordance with the law and are in the general interest; in addition, where appropriate the schemes contain provisions relating to the payment of compensation.
64. Transfer schemes are, in some cases, associated with special administration regimes (SARs) i.e. a transfer scheme can be the culmination of a special administration regimes if it is not possible for the incumbent company to be rescued. SARs, which also exist in other energy related legislation, are a means of ensuring the objectives and purpose of the activity being undertaken by an insolvent company can continue, either under the rescued company or under another company (which is likely to have the assets transferred to it under a transfer scheme). In the context of a SAR, an administrator is not solely concerned with the interests of creditors and is normally obliged to consider the wider public or consumer interest in the service or activity continuing before the interests of creditors are considered.
65. As noted above SARs have the potential to interfere with property rights¹⁰ in circumstances where creditors do not have the same rights in relation to their debts as would be the case under a normal administration. The SAR itself does not deprive a creditor of their debt but it does restrict the right of creditors to pursue those debts in court whilst a special administration order is in force. But, depending on the facts of any particular special administration order, creditors may in fact be in no worse a

¹⁰ Although we note that there are some Strasbourg cases which suggest that debts which have not been judged by a court and which are not directly enforceable don't amount to a "possession" for the purposes of A1P1.

position if, for example the administration order enables a company to be saved. The Department's view therefore is that the application for a SAR and the subsequent administration, insofar as it has the potential to interfere with AIP1 rights, is capable of being justified and is a proportionate interference with that right in that it seeks to balance the rights of the wider public interest with the rights of creditors.

Part 11 Core Fuel Sector Resilience

66. Part 11 of the Bill contains powers to give directions and to make regulations which may engage AIP1 rights, depending on the circumstances in which the directions are given or the regulations are made. The directions (clause 224), relate to maintaining or improving core fuel sector resilience, and would apply to those carrying out activities or running facilities which consist of storing, handling, carrying, transporting, conveying through pipes, processing or producing oil or renewable transport fuel. The directions may require the person to carry out specific works including installing or acquiring equipment at their own expense and it is an offence to fail to comply with a direction. A similar power to make regulations to impose similar obligations on a class or description of persons (as described above) is also provided for (clause 227).
67. As set above, an accurate analysis of the extent to which AIP1 is engaged, the extent to which it is infringed and whether that infringement is justified, can only be undertaken when the use of the powers is being considered in a specific case or in the case of a class of persons. However, the Department would draw attention to the following features underpinning the use of these powers.
68. First, the Secretary of State must exercise these powers consistently with the objective in clause 222, namely, to ensure the economic activity in the United Kingdom is not adversely affected by disruptions in core fuel sector activities and that the risk of emergencies affecting fuel supplies is reduced. The power to give a direction and the power to make regulations are both limited in terms of the type of person that can be subject to those requirements. In particular, the power to give a direction only applies to large undertakings (those with a capacity in excess of 500,000 tonnes or 20,000 tonnes in the case of a facility owner) and the power to make regulations cannot impose obligations on small undertakings (those with a capacity below 1000 tonnes). The Department considers that these limitations are sufficient to show that any interference

with AIP1 rights, should any arise in practice, is likely to be able to be justified and proportionate to the aim which is sought to be achieved.

Clause 161 and Schedule 14 – Mergers of energy network enterprises

69. These provisions bring certain energy network mergers within scope of the merger provisions in Part 3 of the Enterprise Act 2002 and therefore within the powers of the CMA. The powers the CMA has currently to regulate mergers may engage AIP1 rights. The use of those powers in the context of energy network enterprises might also engage those Convention rights. The Department's view is that CMA will need to exercise its powers regarding energy network mergers consistently with AIP1 rights.

Article 8

70. Article 8 provides everyone with a right to private and family life, home and correspondence. However, this right is subject to a number of qualifications namely that any interference must be in accordance with the law and necessary in a democratic society in the interests of a number of listed matters. In particular as regards the issues in this memorandum, it must be in the interests of public safety, for the economic wellbeing of the country, for the protection of health or for the protection of others.

Hydrogen grid trial – access to properties

Clauses 114 and 115 Hydrogen Grid Trial.

71. This clause 114 makes modifications to the Gas Act 1986 to expand existing powers of entry to enable access to properties for the purposes of a hydrogen trial¹¹. These powers will enable persons running a trial to enter premises for the purposes of carrying out tests, inspecting anything on the premises, making preparations in connection with a trial and for the purpose of discontinuing the existing natural gas supply and converting properties from natural gas to hydrogen.

72. All properties connected to the gas network in the trial area will need to be entered by the persons running the trial, whether the consumer opts to have the property converted to hydrogen or opts for the alternative offer. For the trial to run successfully all homes

¹¹ The purpose of the trial is to test the feasibility of using hydrogen for domestic heating in a real- world setting.

in the trial area will need to be either connected to a hydrogen gas supply or taken off the gas network and put onto another form of home heating.

73. The use of these powers (particularly the power of entry) has the potential to engage Article 8.¹²¹³

74. The Department, however, regards these expanded powers as being necessary for the successful completion of the trial and that the trial itself is a necessary step in establishing whether one of the possible routes to decarbonising home heating, and thus reducing the UK's domestic carbon dioxide emissions from homes, is viable. The expanded powers do no more than is necessary to achieve a successful outcome of the trial. In particular, the power of entry can only be used with the consent of the occupier of the premises or, if without consent, only with the authority of a justice of the peace¹⁴. Furthermore, the Bill provides powers to make regulations for the purpose of protecting consumers. These could further strengthen the consumer protections provided for when the trial is running.

75. For these reasons, it is the Department's view that any interference with Article 8 rights during the trial will likely be minimal and that any interference that does occur will be both necessary and proportionate to the aim being pursued.

Powers to request information

Clause 130, Schedule 7, paragraph 12, Schedule 8 paragraph 5 – information request powers relating to the ISOP; Clause 20/21 and Schedule 2, clause 29 – CO₂ Transport and Storage - Provision of information to the CMA or from the Secretary of State and to or from the economic regulator; Clause 255– OGA information gathering power in relation to changes of control. Clause 228 Core fuel sector resilience – power to require information.

76. The first of the powers, set out above (clause 130), allows the Independent System Operator and Planner (ISOP) to request information from persons carrying out activities which fall within the functions of the ISOP (for example those persons carrying out

¹² Although there are few decided cases in the context of such a trial.

¹³ In certain circumstances we recognise that these powers may also engage A1P1 rights as well but this is not dealt with separately in this memorandum.

¹⁴ See the Rights of Entry (Gas and Electricity Boards) Act 1954 s. 1(2).

activities such a transportation or supply of gas, generation, transmission or distribution of electricity). The information is requested by notice and that notice is either subject to orders for securing compliance under the Gas Act 1986 or the Electricity Act 1989 or by means of an injunction or other form of relief.

77. Linked to the establishment of an ISOP, the second group of powers above allow the Secretary of State to direct a person to provide information in the context of designating the ISOP and transferring assets and staff (in particular, relating to staff pensions) from an existing system operator to the ISOP.
78. Under Part 1 of the Bill an economic regulator can modify licences held by those carrying out carbon dioxide transport and storage activities. Where the licensee does not agree with a modification they can appeal to the Competition and Markets Authority (CMA). Schedule 2 sets out an appeals procedure for that purpose and, in that context, paragraph 6 of Schedule 2 provides a power for the CMA to require a person to provide documents. Under this paragraph however no one can be forced to produce information that they could not be compelled to produce in civil proceedings.
79. Also, for the purposes of Part 1, the Secretary of State and the economic regulator have certain powers to obtain information. Clause 27 provides the Secretary of State with a power to require a licence holder to provide information which is reasonably required by the Secretary of State for the purposes of exercising functions under Part 1. Clause 29 provides a power for the economic regulator to serve a notice on a person for the purposes of enabling the economic regulator to carry out its monitoring function (see Clause 28).
80. Clause 101 inserts a new provision (section 29A) into the Energy Act 2008 and thereby creates a power for the OGA to require information regarding a change in the control of a carbon dioxide storage licence. A similar provision is inserted into the Petroleum Act 1998 (see clause 255) in relation to licences to search, bore for or get petroleum¹⁵. These powers are related to the provisions described above under A1P1.

¹⁵ See section 3 of the Petroleum Act 1998.

81. In Part 11, which relates to core fuel sector resilience, provision is made for the Secretary of State to require, by serving a notice in writing, information from certain persons carrying out core fuel sector activities (see clause 228). Failure to comply with such a notice can constitute a criminal offence (see clause 230).
82. Each of the information powers above have the potential to engage Article 8, but whether that Article’s protection of “home” and “correspondence” is actually engaged will depend on the facts and circumstances in which these powers are used. The Convention caselaw has established that seizures of information on or from business premise can engage Article 8 rights¹⁶.
83. However, to the extent that Article 8 might be engaged by these measures, the Department’s view is that any interference is likely to be justified on the basis that each pursues a legitimate aim and that in each case it is necessary for the purposes which these provisions pursue. In particular, the Department would note that to the extent that it is believed personal data could be collected or disclosed, that the powers cannot be used where that use would breach the data protection legislation.

Additional police powers and investigatory powers

Clauses 260-263 – extension of the powers of Civil Nuclear Constabulary (CNC¹⁷)

84. These clauses have the effect of broadening the places in respect of which the CNC may exercise powers of arrest, both with and without a warrant, and powers of search where individuals have been arrested with these powers. Clause 260 amends the Energy Act 2004 to provide the CNC with the powers and privileges of a Constable at every place where the CNC is providing additional police services. Clause 261 amends the Energy Act 2004 to the effect that a member of the CNC providing assistance to another force will have the powers and privileges of a Constable of that force (as is the case for mutual aid provided by other police forces). Clause 262 amends Part 10 of the Criminal

¹⁶ See for example, *Bernh Larsen Holding AS v Norway* App no. 24117/08 para 106.

¹⁷ The CNC is an armed police force which is responsible for the security of nuclear sites and the transit of nuclear material in Great Britain.

Justice and Public Order Act 1994 to enable the CNC to exercise (in Great Britain) the cross-border enforcement powers in that Part (to align with existing powers of a constable which are available for members of other Home Office police forces and the British Transport Police). The Department considers that these powers of search engage Article 8.

85. The exercise of these powers potentially effects Article 8 rights. However, the Department's view is that any interference would be justified on the basis that it is in accordance with the law and necessary in the interests of national security and public safety.

Clause 195 Energy Smart Appliances – investigatory powers

86. This clause enables an enforcement regime like that provided for in other goods and consumer protection legislation¹⁸ to apply to energy smart appliances¹⁹. Provision is made which will enable entry to premises, powers to inspect search and seize equipment or documents, including electric information held at entered premises. Although these powers can provide for reasonable force to be used to enter premises this can only be done under a warrant issued by a Justice of the Peace.

87. So far as Article 8 rights are concerned, the use of these powers could engage Article 8. However, the Department would ensure that legislation made under these powers is compliant with Article 8 rights and that it is consistent with and no more onerous than other similar regulatory enforcement provisions.

Article 6

88. Article 6 provides that, in the determination of a person's civil rights and obligations or of any criminal charge against them, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

¹⁸ Consumer Rights Act 2015, Automated and Electric Vehicles Act 2018.

¹⁹ Appliances which are capable of adjusting the use, storage or discharge of electricity in response to a digital communication from a third party.

The Article also provides for a number of other requirements and safeguards related to this general right.

89. The Bill contains a number of provisions the use and operation of which may engage either the criminal or the civil limbs of Article 6²⁰. These are set out in the following table:

Clause no.	Subject	Criminal	Civil
2	Prohibition on unlicensed activities	x	
32	Enforcement (CCUS)		x
33	Making of false statements	x	
34	Liability of Officers	x	
89	Offence for breach of regulations under clause 88	x	
109	Low-carbon heat scheme	x	x
115	Enforcement provision in consumer protection regulations in relation to hydrogen grid trial.		x
188	Enforcement -heat network zone requirements		x
196	Sanctions Energy Smart appliances	x	x
207	Sanctions -energy performance of premises	x	x
226	Offence of failing to comply with core fuel sector direction	x	
230	Offence of contravening core fuel sector notices	x	
235	False Statement – core fuel sector	x	
236	Offences under regulations	x	
239 and Schedule 18	Enforcement undertakings		x
251(6)(e)	Arrangements for responding to offshore oil and gas pollution	x	x
252(7)(f)	Reducing the effects of offshore oil and gas activities on the natural environment in respect to protected offshore habitats and species	x	x
Schedule 7 paragraph 14	Enforcement of requirements of regulations relating to reimbursement of third parties		x
Schedule 13 paragraph 3 (inserted s. 6CA EA 1989)	Competitive tenders for electricity projects – power to enforce information notice		x
Schedule 16 Part 6	Heat networks regulatory conditions enforcement		x

²⁰ Schedule 14 contains a number of amendments and modifications of Part 3 Enterprise Act 2002. These amendments relate to applying the existing enforcement regime contained in that Act to a species of merger between energy network enterprises that is not currently provided for in that regime.

90. For each of these provisions however, the Department's analysis is that either the provisions themselves comply or, when made, the enforcement provisions made under the powers will comply with Article 6. In particular, there is nothing in these provisions which could affect the right to a fair and public hearing or affect the public nature of any hearing.

Department for Energy Security and Net Zero