

## Chapter 12 – Ofgem cost control warnings (June 2012)

### The 26 June Ofgem warning

- 12.1 In June 2012 DECC published the results of its consultation, commenced in March, some three to four months after passage of the GB RHI regulations, as to the need for some form of interim cost control for the GB RHI scheme. The relevant GB amendment regulations were duly made at the end of July.
- 12.2 During a teleconference, which took place on 26 June 2012 between a number of Ofgem employees and Ms McCutcheon and Mr Hutchinson of DETI, Ofgem referred to the concerns that they had expressed in the November 2011 legal review document and to the forthcoming amendment to permit interim cost control in GB with regard to the draft NI regulations.
- 12.3 As the NI regulations were intended to reflect those in force in GB, Ofgem felt that it would be advisable to wait for the GB amendments and adopt those considered relevant, including any form of interim cost control, thereby avoiding any risk that it had been considered necessary to guard against in GB. Ofgem offered to put DETI in touch with the DECC officials who were concerned in the imminent amendment to the GB regulations.
- 12.4 Draft minutes of the teleconference of 26 June 2012, which Ofgem sent to Ms McCutcheon and Mr Hutchinson of DETI on the 29 June 2012, recorded that Ofgem were told by the DETI officials that they had a commitment to their Minister to bring the NI RHI regulations into force by the end of September 2012 and this could not be put back to dovetail into GB legislative updates and that there might also be a risk of putting funding in jeopardy. They were also informed that DETI intended to have a Phase 2 update to the regulations in the summer of 2013 when they would reproduce the amendments which DECC were to consult on in the summer.<sup>773</sup> It was only on this latter point that DETI sought an amendment to the minutes of the teleconference of 26 June, to reflect that although they would be making amendments to the NI RHI regulations in the summer of 2013 (to align with DECC's planned changes in January 2013), the main objective of the amendments was to bring in Phase 2 of the NI RHI.<sup>774</sup> Mr Hutchinson told the Inquiry that they preferred to get their scheme up and running and make changes in the future – to stop everything was just not “a feasible option for us.”<sup>775</sup>
- 12.5 The Inquiry believes that Mr Hutchinson, who had read and was familiar with the GB RHI consultation documents, recognised the legal implications of Ofgem's advice, namely that it would be advisable to wait to see whether DECC decided that an amendment to its legislation was justified in order to protect its budget. However he also thought that Ofgem understood DETI's position from an administration standpoint with a commitment to their Minister to “get the scheme launched”.<sup>776</sup>
- 12.6 The Inquiry notes that since DETI did not make a Technical Standards Directive application to the European Commission until 25 July 2012 the NI RHI regulations could not, in any event, have been brought into force until 25 October to take account of the necessary three month

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773 OFG-03517 to OFG-03519

774 OFG-00633 to OFG-00636

775 TRA-02211

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“standstill”. Marcus Porter, a lawyer within Ofgem’s legal department, participated in the teleconference on 26 June and he was adamant in an internal email of 29 June that the Ofgem minutes of the teleconference should have “hammered home” the significance of Ofgem’s concerns regarding the course that DETI was proposing to adopt.<sup>777</sup> The recommendation to adopt some form of cost control was stimulated by the risk arising from the absence thereof from the current DETI draft regulations. Mr Hutchinson accepted that the minute reflected the clear recommendation made by Ofgem.<sup>778</sup>

## Ms Hepper’s claim to have passed on the Ofgem warning to Minister Foster

- 12.7 Ms Hepper was not present during the 26 June teleconference, but she was informed of its contents by Mr Hutchinson and Ms McCutcheon. Ms Hepper told the Inquiry that, at the time, they were conscious of slippage in launching the scheme as originally hoped in April or June.<sup>779</sup> By the date of the teleconference they had obtained State Aid clearance and an SL1 letter had gone to the ETI Committee of the NI Assembly on 22 June, in anticipation of a committee meeting before the July break, with a view to launching the NI RHI in September or October. She said that she was satisfied that Minister Foster was aware of and content with the commitment to bring the regulations into force by the end of September or as soon as possible thereafter.<sup>780</sup>
- 12.8 Ms Hepper explained that incorporating an amendment for interim cost control would have had to be put out to consultation for an 8 to 12 week period, the responses analysed, the amended regulations resubmitted to the EU for the three month standstill period and a further SL1 submitted to the ETI Committee, with the launch of the scheme being postponed to February or March of 2013.<sup>781</sup> She also explained how, by not incorporating interim cost controls from the outset of the NI RHI scheme, DETI was in fact “doing the same as” DECC which had launched their scheme, and run it for several months, without such controls.<sup>782</sup>
- 12.9 Ms Hepper said that when her team raised the Ofgem advice with her she appreciated that it had come from the Ofgem legal advisers and that was sufficiently important to raise it further up the line. Accordingly, she discussed the options with her superior, Mr Thomson, who agreed that she should bring the matter to the attention of the Minister.<sup>783</sup> Mr Thomson told the Inquiry that he could recall the issue and a discussion with Ms Hepper. However, he was unable to recall whether he had advised that they needed to talk to the Minister or, if so, whether a submission was necessary. He did say that taking such a matter to the Minister would generally have been done by way of a submission. Mr Thomson told the Inquiry that it would have been better to have advanced a written submission incorporating a copy of DECC’s public consultation documents relating to the GB interim cost control mechanism.<sup>784</sup>

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777 WIT-104767

778 TRA-02205

779 TRA-02356

780 TRA-02685

781 TRA-02686 to TRA-02688

782 TRA-02696 to TRA-02697

783 TRA-02689 to TRA-02691

784 TRA-05743 to TRA-05747

- 12.10 Ms Hepper was unable to recall clearly whether her conversation with Minister Foster was by telephone or face-to-face, although she thought that it had probably been the former.<sup>785</sup> Ms Hepper said that she outlined the details of the issue to the Minister explaining what the Ofgem representatives had said. She said that she had a clear recollection of not downplaying the material in any way, that she provided all the information about what DECC was doing in terms of interim cost control and that the advice came from Ofgem lawyers. She also said she described the stage which the NI scheme had reached and the likely delay that would flow from the Ofgem recommendation. She said that she had emphasised that DECC were bringing in the interim cost controls as a “failsafe” procedure, a bit of “belt and braces,” and that Ofgem had known that the GB scheme had been operating for some ten months without the amendment.<sup>786</sup> The Inquiry notes that the GB regulations had only been in operation for some four months before the initiation of the consultation to bring in interim cost control, which was implemented in July 2012. Ms Hepper said that the Minister was content that the NI RHI scheme should proceed without amendment on receiving an assurance that DETI would be consulting on cost controls during the following spring or summer.<sup>787</sup>
- 12.11 In contrast, Minister Foster told the Inquiry that she had no recollection of any such telephone call or meeting.<sup>788</sup> She said that the information confirmed a fundamental change to the GB RHI scheme in that a form of cost control had been the subject of consultation and was to be put into effect despite the low uptake of applications.<sup>789</sup> The Minister said that she would have required a formal submission had the information been clearly set out and there was “no way” that she would have taken a decision without having spoken to Dr Crawford.<sup>790</sup> She could only assume that, if any communication had taken place, it had been significantly downplayed.<sup>791</sup>
- 12.12 For his part, in his evidence to the Inquiry Dr Crawford was adamant that he had not been involved in any meeting or phone call with the Minister and Ms Hepper about cost control warnings from Ofgem. He was also not prepared to accept that there could have been a telephone conversation between Ms Hepper and the Minister, because had there been such a call about a “critical energy issue” the Minister would have spoken to him about it afterwards. He was adamant that a “critical issue” like this would have had to be followed up by a submission to the Minister.<sup>792</sup>
- 12.13 Ms Hepper told the Inquiry that the reason that there was not a written submission in respect of the conversation was that, as she had agreed with Mr Thomson, she wanted to get the matter raised as quickly as possible because the ETI Committee was sitting on the paperwork in relation to the SL1.<sup>793</sup> At another point in her oral evidence she accepted that “it was the working practices of the time that prevailed.”<sup>794</sup>

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785 TRA-02695

786 TRA-02696

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788 TRA-08242 to TRA-08244

789 TRA-08261

790 TRA-08239

791 TRA-08262

792 TRA-08042 to TRA-08044

793 TRA-02694 to TRA-02695

794 TRA-05201

## Findings

78. The Inquiry was not persuaded by the explanation put forward by Ms Hepper that, because DECC had not included an interim budget control in their original legislation, DETI, in omitting to do so in Northern Ireland, was simply doing what DECC did.<sup>795</sup> The practical approach should have been to take into account the reasons that DECC felt it necessary to amend its scheme almost immediately after it was launched, as detailed in the March 2012 DECC interim cost control public consultation document, and to ensure that the NI RHI scheme took the benefit of this experience. This would have been consistent with the argument put forward by the DETI presenting officials at the March 2012 DETI Casework Committee meeting in favour of an NI RHI scheme, namely consistency of approach with GB which would assist policy development in the future in Northern Ireland.<sup>796</sup>
79. The Inquiry gave very careful consideration to the two accounts given by Ms Hepper and Minister Foster with regard to the conversation said to have taken place subsequent to the Ofgem warning of June 2012. The Inquiry has taken into account the effect of hindsight as well as the requirement to be fair to both Ms Hepper and the Minister. Ms Hepper was unable to recall whether the conversation had been face to face or by telephone. On the other hand, the acceptance by Mr Thomson that she did speak to him about contacting the Minister, although he did not remember a meeting, was consistent with some form of conversation having taken place. However, apart from that fact, Mr Thomson's evidence was not particularly supportive. The Minister did not have a clear recollection. It was a conversation which was of particular significance in that Ms Hepper had been copied in to the 3 May 2011 email exchange advising of the need to include adequate controls in RHI budgetary expenditure because of the potential implication for the DEL budget. The 26 June 2012 warning was being given by the administrator of the GB RHI scheme in respect of which interim cost controls were being proposed a short time after the scheme came into operation, a public consultation had taken place and controls were shortly to be implemented. DECC had formed the view that such interim controls were necessary in order to safeguard public funds. If the conversation between Ms Hepper and the Minister did take place the Inquiry finds that the warning was not highlighted as Ms Hepper maintained. It is the view of the Inquiry that if such a warning were being raised with the Minister it should have been the subject of a careful minute or record setting out the advice that Ms Hepper had provided to the Minister and the Minister's response thereto. This would have provided objective evidence of a significant policy decision by a Minister of the Northern Ireland Executive and the grounds upon which such a decision had been reached. From Ms Hepper's own point of view such a record would have provided objective evidence confirming the circumstances of the decision.

795 TRA-02696 to TRA-02697

796 WIT-00902

80. Whether or not the June 2012 conversation between Ms Hepper and Mrs Foster did take place, and whether or not Ms Hepper downplayed the warning from Ofgem with regard to the advisability of waiting for the outcome of the GB RHI cost control consultation, this important development about the introduction of an interim cost control for the GB RHI should have been the subject of a formal submission, especially as it had been considered important enough for Ms Hepper to seek the advice of the Deputy Secretary, Mr Thomson.
81. Ultimately, the Inquiry found that the absence of any such submission/minute/record was significant evidence in support of the conclusion that the warning had not been highlighted by Ms Hepper. If it had been highlighted, the Inquiry is satisfied that the Minister and/or her SpAd, if he had been present, should have then ensured that there was an appropriate minute or record; and that Energy Division officials would have wished there to have been such a record in order to demonstrate that any additional risk had been assumed by the Minister upon an informed basis.
82. The need for expediency and early delivery of a novel and volatile scheme cannot be used retrospectively to justify or explain the absence of a record of a conversation in which the Minister was said to have been referred to the emphatic warning from Ofgem. The absence of any written record was said to reflect the normal, but what the Inquiry considers unacceptable, practice of the time.
83. The failure to record what the Inquiry was told were interactions with the Minister over the June 2012 Ofgem warnings must be seen in the context of previous warnings about financial risks received by the relevant DETI officials engaged on the NI RHI scheme. Key messages appear to have been lost and not escalated to the Minister. The messages contained in the Parker, Clydesdale and Brankin email exchanges of April and May of the previous year were still highly relevant but had disappeared from view. So too with the messages from the 8 June 2011 email exchange between Mr Patel of DECC and Mr Hutchinson advising of the “large financial risk” posed by the nature of the funding.<sup>797</sup> This risk had persuaded DECC to proceed with interim cost controls and, ultimately, degeneration. Quite apart from the obvious practical danger of such details being left to the recollection of the respective individuals it seems to the Inquiry that the omission to put forward a relevant submission and keep a minute or record of the advice given and decision made placed Ms Hepper in breach of the requirements contained in paragraphs 13 to 18 and 37 to 39 of the then operative DETI Private Office Guidance.

