

Chapter 14 – The development of the NI RHI regulations and the launch of the NI RHI scheme

Developing the NI RHI regulations

- 14.1 Following a competitive tender in the first quarter of 2011 the private law firm of Arthur Cox solicitors was appointed to provide legal advice to DETI on energy matters in Northern Ireland.⁸¹⁶ Arthur Cox had expertise in that area and was able to utilise it in providing general advice to DETI about a number of policy areas. However, in relation to the proposed NI RHI scheme the principal task required of Arthur Cox by DETI was to draft the NI Renewable Heat Incentive regulations based on the equivalent regulations in GB, subject only to any changes that were specifically required for the Northern Ireland jurisdiction.⁸¹⁷
- 14.2 Mr Bissett, who was in charge of the relevant legal team at Arthur Cox, told the Inquiry that, at the first RHI-related meeting with DETI officials in May 2011, he was told that any NI RHI regulations would have to stick very closely to or mirror those in GB in order to benefit from a discount in administration costs from Ofgem.
- 14.3 The DETI team at that meeting was led by Ms Clydesdale and included Ms McCutcheon and Mr Hutchinson.⁸¹⁸ Arthur Cox had not been involved in the policy development described earlier in this Report. They were informed that any diversion from the GB regulations would result in an additional charge by Ofgem, who were to administer the scheme, so they should limit any amendment(s) to details that were relevant to Northern Ireland and to references to relevant Northern Ireland legislation. The DETI team gave specific instructions that DETI would be responsible for any policy diversion from the GB scheme.⁸¹⁹ They were provided with the then current draft of the GB RHI regulations which had been prepared in March 2011.⁸²⁰ Mr Bissett was informed by Ms Clydesdale of the options being considered by DETI, namely a Challenge Fund or an NI RHI and that new regulations would be required if the latter scheme were to be adopted.⁸²¹
- 14.4 DETI also sought assistance from the Northern Ireland Government Legal Service’s Departmental Solicitor’s Office (DSO). On 15 August 2011 Mr Hutchinson emailed Paul McGinn at DSO, copying in Mr McGinn’s DSO colleague Nicola Wheeler, as well as DETI’s Ms Hepper, Ms McCutcheon, and Susan Stewart. Mr Hutchinson provided a general history of the NI scheme to that point and sought confirmation that DSO was content with an enclosed draft of the proposed NI RHI regulations. He also indicated that it would be helpful to have assistance from DSO with regard to facilitating the process of bringing the regulations into force.
- 14.5 The draft had been prepared by Arthur Cox and the Inquiry notes that its schedule of tariffs included the GB provision relating to tiering of the tariff for medium biomass boilers.⁸²² The DSO was not asked to advise on any particular issues or specific provisions within the draft.

816 WIT-28212

817 WIT-28213

818 TRA-02867 to TRA-02868

819 TRA-02871 to TRA-02872

820 TRA-02874

821 WIT-28223 to WIT-28224; DFE-15374

822 WIT-01006 to WIT-01046

The core expertise of DSO lies in the field of public law.⁸²³ Advising as to merits or policy content, such as methods of cost control, was not part of its responsibility given its limited resources.

- 14.6 Ms Wheeler became the solicitor primarily concerned on behalf of DSO and she understood that her role would be to check the legal implications for the Northern Ireland jurisdiction, while assistance with policy advice would be a matter for Arthur Cox, which had the relevant energy expertise.⁸²⁴ She made it clear in her response of 3 October 2011 to Mr Hutchinson, enclosing her notes on the draft regulations, that she could not comment on the technical nature of the document as she did not have the requisite experience. She was merely checking the drafting to ensure that the conventions commonly used in Northern Ireland were applied and that Northern Ireland legislative definitions and references were correct.⁸²⁵
- 14.7 On 15 May 2012 Ms Wheeler provided some advice on the use of the term “Authority” in the regulations and she was sent a further draft by Mr Hutchinson in October that he explained had been produced in conjunction with Arthur Cox and Ofgem.⁸²⁶ The Inquiry notes that the draft schedule of tariffs now contained a single tariff of 5.9p/kWh for medium biomass boilers, which was not subject to tiering.⁸²⁷
- 14.8 During the development of the various drafts of the regulations DETI passed on to Arthur Cox comments and suggestions from the legal department of Ofgem and the DSO. These were then incorporated by Arthur Cox. Arthur Cox was told that in the light of Ofgem’s role in administering the scheme their comments should be incorporated and that DSO would have the final sign-off on the form that the regulations were to take.⁸²⁸ Mr Bissett told the Inquiry that Arthur Cox was not furnished with a copy of the Ofgem legal review document of 26 November 2011 until March 2012.⁸²⁹ Mr Bissett was told that DETI wanted to “follow behind GB not lead GB” and that there was no scope to move away from GB. His task was simply to review any item that applied specifically to Northern Ireland and advise whether it could be quickly completed.⁸³⁰
- 14.9 Mr Bissett told the Inquiry that his firm produced a number of drafts of the regulations incorporating amendments to the GB regulations and the comments from Ofgem and DSO.⁸³¹ He believed that the first draft they prepared and supplied to DETI in early July 2011 was to be published as part of the documentation for the DETI public consultation in July 2011. That draft followed the GB regulations by including tiering of tariffs (regulation 37(9) and Schedule 3 of the GB Regulations of 2011). He later discovered that the Arthur Cox draft had not been used for the consultation. Instead a draft compiled by Mr Hutchinson had been published which did not include the tiering provision (or tiering of the tariffs in the draft tariff schedule). That provision was also absent from a further draft in October 2011, again compiled by Mr Hutchinson. The tiering provision was also removed by Energy Division from an Arthur Cox draft of 18 May 2012.⁸³² Upon that occasion Mr Bissett received an email from Susan Stewart of DETI

823 WIT-28617 to WIT-28619

824 TRA-02810 to TRA-02812

825 WIT-01185 to WIT-01236

826 DSO-01047 to DSO-01048; DSO-00690 to DSO-00727

827 DSO-00721

828 WIT-28220

829 TRA-02884 to TRA-02885; DFE-66112

830 TRA-02895

831 WIT-28217

832 TRA-02875 to TRA-02878

informing him that the tariffs and banding provisions should be treated as “restricted” and were not to be disseminated.⁸³³ Mr Bissett told the Inquiry that, prior to Ms Stewart’s email, the Arthur Cox team had not been informed of these developments and that no discussion had taken place about the use of the DETI drafts or the omission of the tiering provisions.⁸³⁴

- 14.10 In March 2012 Ms Hepper emailed Jim McManus, Clerk to the ETI Committee, informing the Committee of the intention to bring the draft regulations into force.⁸³⁵ The SL1 was sent to Mr McManus on 13 April and the Minister signed the relevant Regulatory Impact Assessment on the same date.⁸³⁶ On 18 April Ms Hepper sent a submission to the Minister, her SpAd and the Permanent Secretary seeking approval for the appointment of Ofgem as the administrator of the scheme, which was endorsed by the Minister on 24 April.⁸³⁷
- 14.11 Mr Bissett told the Inquiry that he did not see a copy of the GB RHI amendment regulations of July 2012 until September 2012, nor was he told of the warning from Ofgem delivered during the 26 June 2012 teleconference (discussed in chapter 12 of this Report). Upon seeing the GB RHI amendment regulations, he noticed the interim cost control provision and assumed that the provisions had not been seen by DETI and he sent them a copy by email, dated 11 September, asking whether, in keeping with the established policy of consistency with GB, the changes should be incorporated into the draft NI RHI regulations.⁸³⁸ It appears that he then received an email from Ms Stewart informing him that DETI was being pressed on finalising these regulations as soon as possible and asking him to attend a meeting to discuss various RHI issues.⁸³⁹
- 14.12 The meeting took place on 18 September 2012 at DETI’s offices at Netherleigh, Belfast and Mr Bissett told the Inquiry that the GB RHI amendment was the first item he discussed. He said that he was told, as far as he can recollect by Mr Hutchinson, that, because it was an interim measure and DETI knew that DECC was going to consult on a long-term measure for cost control, they wanted to await the outcome of that consultation and, in the meantime, skip the step of having interim cost controls. He was told that DETI intended to introduce permanent cost controls as part of Phase 2 of the RHI scheme. Mr Bissett told the Inquiry that this struck him as a “plausible” reason which he accepted, although he was surprised in that it seemed contrary to the approach based on following and benefitting from GB and DECC experience, which had been the requirement for the past 18 months.⁸⁴⁰
- 14.13 Ms Wheeler at DSO was asked to check a further draft of the proposed regulations in October 2012, which she did, once more confirming that commenting upon the technical nature of the provisions was outside her remit.⁸⁴¹ She was not provided with the July 2012 GB RHI Amendment Regulations, which contained an interim system of cost control and which had been the subject of discussion between Ofgem and DETI, and between Arthur Cox and DETI. She told the Inquiry that, had she been so provided, she would have pointed out that any significant deviation from GB would have required a “very good reason.” She added that,

833 DFE-17570 to DFE-17571

834 TRA-02880

835 DFE-70014 to DFE-70019

836 ETI-05984 to ETI-05988; DFE-67455 to DFE-67466

837 DFE-143899 to DFE-143920; DFE-32178 to DFE-32180

838 TRA-02913 to TRA-02914; DFE-67951

839 DFE-19648

840 TRA-02914 to TRA-02918

841 DSO-00690; DSO-00777 to DSO-00778

normally, she would ask a client Department for the most up-to-date legislation and in any event check the legislation website herself. She regretted that she had not done so in this case.⁸⁴²

- 14.14 Mr Bissett emphasised that throughout all of his work for DETI on the NI RHI scheme the timescales were very short and everything had to be done very quickly, often at “breakneck” speed.⁸⁴³

The November 2012 launch of the NI RHI scheme

- 14.15 On 17 October 2012 Ms McCutcheon lodged a submission with the DETI Private Office relating to the Assembly Motion that the Minister needed to move for the approval of the NI RHI regulations.⁸⁴⁴ The Minister was informed that all approvals were in place for the NI RHI, that the draft NI RHI regulations had already been laid at the Assembly on 9 October 2012, and that the Minister was to present the draft NI RHI regulations for affirmative resolution to the Assembly on 22 October 2012.
- 14.16 Along with the submission the Minister was provided (as a series of annexes to the submission) with draft speeches, a briefing document on questions and answers on the NI RHI, the draft NI RHI regulations and the Explanatory Memorandum, and a draft press release. Paragraph 3 of the submission explained that Ms McCutcheon and Mr Hutchinson would be in attendance at the Assembly to provide briefing for the Minister on the NI RHI regulations and on any wider energy issues that might arise during the debate.
- 14.17 The submission, and its accompanying documents, did not contain any reference to Ofgem’s warnings about the NI RHI regulations replicating flaws from GB. Nor was there any mention of the issue of budget control, in any form. For instance, the questions and answers briefing document prepared for the Minister did not pose any question about the GB RHI interim budget control introduced in GB in July 2012, nor consequently suggest any corresponding answer as to why DETI’s draft NI RHI regulations did not have any such or similar mechanism. If some Assembly Member had known of those GB developments, and posed questions on the floor of the Assembly during the debate, the Minister would not have had the answer in the material with which she was briefed.
- 14.18 As it turned out, when the Minister did move the draft NI RHI regulations for approval before the Assembly on 22 October 2012 no such question was posed. All those who spoke in the Assembly debate broadly welcomed the proposals and the Assembly approved the draft NI RHI regulations.
- 14.19 The Minister herself admitted in her oral evidence to the Inquiry that she did not believe that she had actually read the draft NI RHI regulations by the time she was moving the Assembly motion, rather that she would probably have read the accompanying explanatory note.⁸⁴⁵
- 14.20 The Inquiry considers that the decision by Ms Hepper and her team not to adopt relevant developments from GB, but to await the outcome of the development of a more permanent form of budget control, was certainly a high-risk strategy in light of the well-reasoned DECC consultation document of March 2012 dealing with interim budget control, the warning from

842 TRA-02844 to TRA-02845

843 TRA-02918 to TRA-02919

844 DFE-33111 to DFE-33166

845 TRA-07874

Ofgem in June 2012, and the GB RHI amendment regulations of July 2012, none of which, as discussed earlier in this Report, featured in a submission to the Minister at any stage.

- 14.21 Minister Foster accepted in her evidence to the Inquiry that her approach had been that the NI RHI scheme should proceed “as soon as possible” because it was lagging behind its GB equivalent and it had a budget available.⁸⁴⁶ She stated that she trusted the combination of DETI officials, including departmental economists, and Ofgem to put into effect robust measures of cost control to ensure that budgets were not exceeded.⁸⁴⁷ There had been some slippage of the anticipated commencement of the NI RHI scheme from April to October 2012 and the Minister was aware of DETI’s limited resources but, even in that context, she emphasised in her evidence to the Inquiry that she would not have anticipated that officials would ignore warnings or proceed with a scheme that was inherently flawed. Minister Foster would have expected the Ofgem warnings to have been “clearly and straightforwardly” brought to her attention in a formal submission, which she could have brought to the attention of her SpAd, so as to enable her to reach a properly informed decision as to whether the scheme was fit for purpose.⁸⁴⁸
- 14.22 Equally, Minister Foster accepted in her oral evidence that she could have been more curious. She could have asked for a follow-up note or submission on the back of a conversation with an official and that does not appear to have happened in this case, most probably because she did not feel the subject required it.⁸⁴⁹ As discussed previously, she had no recollection of the telephone conversation that Ms Hepper said had taken place in June 2012 or of being clearly told about the Ofgem legal review of November 2011, or the warning about GB’s intention to adopt interim cost control.⁸⁵⁰
- 14.23 The NI RHI regulations duly came into force on 1 November 2012.⁸⁵¹ They established a system under which applications to benefit from subsidy were to be made after installation and, if properly made, **must be accredited** (the Inquiry’s emphasis). They created an unpredictable, volatile, demand-led scheme in which demand might increase with little or no warning. Nevertheless, the NI RHI regulations did not include any budgetary cost controls or tiering of subsidies. There was no statutory obligation to review the scheme and no emergency stop mechanism. There was no definition of “useful heat”. Nor was there any definition of a “heating system” that would serve to exclude multiple, small separate boilers being used in the same space/area to take advantage of the most lucrative tariff in a scheme in which DETI was subject to a statutory obligation to pay participants once an installation was accredited.
- 14.24 When the NI RHI scheme launched on 1 November 2012 the Arrangements for the administration of the scheme between DETI and Ofgem had still not been finalised. The Arrangements were not in fact executed until 28 December 2012. The development of the Arrangements is discussed in the next chapter.
- 14.25 In December 2012 Ms Hepper confirmed to the DETI Top Management Team and the RHI Casework Committee that Ofgem had revised upwards its annual administrative costs forecasts, and the revised total operating costs of administering the NI RHI scheme during the first four years would be in the region of £870,000, assuming an uptake in NI of 3-5% of the GB RHI

846 WIT-20580

847 WIT-20579

848 WIT-20580

849 TRA-07829 to TRA-07830

850 TRA-08238 to TRA-08263

851 LEG-00001 to LEG-00035

scheme.⁸⁵² This was an increase of some 16% from the forecast operating costs that had been set out in the December 2011 Feasibility Study, and advised to the Casework Committee. Ofgem had previously also required DETI to underwrite a legal contingency fund of £1 million per year during the operation of the scheme.⁸⁵³

- 14.26 Ms McCutcheon and Mr Hutchinson had responsibility for management of the relationship with Ofgem in order to ensure service was delivered and within the agreed budget. During the initial operation of the scheme they received a weekly spreadsheet with information provided by Ofgem including data on applications/accreditations, the type of technology, and eligibility standards. On a monthly basis, information was provided indicating the submitted heat data from meter readings and the payments required but, as discussed in chapter 45 of this Report, crucially this did not include sufficient data about ownership and location of applicants to monitor and analyse the scheme for exploitation issues, like multiple boilers.⁸⁵⁴

852 DFE-144168 to DFE-144169; WIT-09187 to WIT-09189

853 WIT-09158 to WIT-09159

854 WIT-06092 to WIT-06093

Findings

87. Drafting of the regulations was divided between three organisations: DETI and two sets of legal advisers, Arthur Cox and the Departmental Solicitor's Office. Advice and comments had also been provided by Ofgem. DETI's poor co-ordination and management of communication between those involved created a significant risk of important information falling between the cracks.
88. Arthur Cox, the external solicitors, had included a provision for tiering of tariffs as part of their wider remit to mirror the GB scheme. They were not informed that this provision had been removed from their draft by DETI officials until 18 May 2012. This was not discussed with Arthur Cox; it ought to have been.
89. Mr Bissett of Arthur Cox told the Inquiry that he and his team did not receive a copy of the Ofgem legal review of November 2011 until March 2012. DETI ought to have provided it to Arthur Cox at an earlier stage.
90. The reasons given for decisions not to adopt important DECC GB RHI amendments appear to have been a commitment to the Minister to bring the NI RHI regulations into force by the autumn of 2012 and an associated concern about a potential adverse impact of delay upon access to HMT funding.
91. It is clear that DETI, no doubt in company with other Departments of the devolved administration, was anxious to ensure that any funds available to encourage technological development and employment in Northern Ireland should not be lost but, by way of balance, proper precautions should have been taken to ensure that such funds were effectively managed and protected.
92. The lack of resources in Northern Ireland, particularly in comparison to DECC, actually justified or enhanced the need to "mirror" GB. Successive amendments to the GB scheme from 2012 onwards had the benefit of DECC's scale and scrutiny arising from their greater resources – technical, legal, economic and otherwise.
93. The Inquiry accepts that DETI had a small RHI team, without any real degree of relevant specialist expertise, subject to serious pressure of work and lack of resources. However, a number of issues of scheme design, for example the changes referred to in the Ofgem legal review (November 2011) and DECC's interim cost control proposal (March 2012), were undoubtedly of such significance in the context of a new, volatile, unpredictable and unusually funded policy that they clearly required to be escalated to the highest level for transparent, fully informed and appropriately recorded decisions.⁸⁵⁵
94. Energy Division officials gave priority to speed. They pressed on with the scheme, putting off dealing with Ofgem's recommendations and justifying that as due to pressure from the Minister without explicitly obtaining Mrs Foster's written agreement to this approach and its associated risks.

95. Minister Foster told the Inquiry in her oral evidence that she did not read the regulations, although she did read the explanatory notes.⁸⁵⁶ The Inquiry considers that the Minister, in presenting the regulations to the Assembly and asking for their approval, should have read them herself, not least because in the Inquiry’s view to do so is a core part of a Minister’s job. If she and/or her SpAd had read the regulations, this might well have made no difference to the outcome; but if they had done so, or taken a more active interest in the development of the regulations, this would have provided an opportunity for each of them to see that, particularly with regard to the submission that she had received on 16 March 2012, there were no reviews ‘built-in’ to the regulations (as had been the case in the NIRO regulations), there was no definition of ‘useful heat’, and no form of budget control had been included.⁸⁵⁷

856 TRA-07874

857 DFE-31747 to DFE-31772