

Chapter 36 – Implementing the changes

Preparation for Assembly debate on amendment regulations

- 36.1 Following DFP approval of the revised scheme, DETI took forward the proposals and developed the necessary amendment regulations. This took more time than had originally been planned and the additional delay from 4 November 2015 (the implementation date agreed at the 24 August meeting between officials and Minister Bell and referenced in the resulting amended ministerial submission which was approved by the Minister on 3 September) until 17 November 2015 was later attributed to “the necessary legal and financial clearances”.¹⁹⁶⁵
- 36.2 It seems that this phrase came from an explanation provided to the ETI Committee by DETI officials. In Mr Stewart’s evidence he noted that, as the rate of applications had by that time risen very sharply, even a two week delay had very significant implications for the cost of the scheme.¹⁹⁶⁶ In view of this, on 12 December 2016 Dr McCormick asked him for an explanation for this additional delay. Mr Stewart’s reply was to the effect that it arose from the time required to draft and clear the regulations.¹⁹⁶⁷
- 36.3 Mr Stewart further explained that it took five iterations before DSO clearance of the draft regulations was obtained on 28 October 2015 (other evidence to the Inquiry also suggested that DSO was required to deal with work on urgent NIRO regulations at the same time).¹⁹⁶⁸ Strenuous efforts were then made to expedite approval by the Examiner of Statutory Rules (who gave the regulations prior informal consideration), which then required some further changes, with DSO approval of the final draft on 3 November 2015. Ministerial approval for the draft regulations was then sought in a submission of 6 November and obtained on 10 November 2015 (meaning that Minister Bell was never in a position to approve the draft regulations in time for debate on 4 November, as originally intended). This timescale meant that the earliest date for ETI Committee consideration was 17 November.
- 36.4 Mr Stewart informed Dr McCormick that, with hindsight, the Department ought to have decoupled the tariff changes made in the regulations and pursued them separately, in order to minimise the risk of such delay. Although he considered that the need to do so may not have been as clearly understood in July 2015 as it was later, he nevertheless considered that this was a missed opportunity.
- 36.5 In his written evidence to the Inquiry Mr Stewart further explained that:
- “The fundamental reason for the delay was that the legislation had taken longer to draft than had been expected, due to the inclusion of a range of measures in addition to the powers to change tariffs. This added to the complexity of the task. With hindsight, it would have been preferable to concentrate on the tariff changes alone, leaving other provisions for another day.”¹⁹⁶⁹

1965 DFE-122029

1966 WIT-11539

1967 WIT-11731

1968 See, for instance, TRA-11711

1969 WIT-11539

- 36.6 Mr Stewart also said that he was not directly involved in the oversight or drafting of the legislation, and was not aware of delays in the drafting until an advanced stage; but that, had he been aware of the delay and of the risk of a spike in demand, he would have asked that the legislation focus solely on the introduction of controls.¹⁹⁷⁰
- 36.7 Mr Mills also attributed the additional two week delay from 4 November to 17 November to the time taken to obtain legal clearance of the regulations from DSO.¹⁹⁷¹ In his oral evidence to the Inquiry, he said that he thought there was “some justice” in Mr Stewart’s view as to how clearance of the regulations might have been expedited and that it might have been wise to leave almost everything else out of the regulations, other than the introduction of tiering; although he said that when the other measures (such as the inclusion of CHP and the increase in the upper limit of the medium biomass band) were proposed in June 2015, it was so the Department could say that it was not merely constricting the scheme but improving it.¹⁹⁷²
- 36.8 Mr Stewart’s ultimate position on this additional two week delay in introducing the scheme changes was that “it may well have been that it was unavoidable and that the original timescale was too optimistic” but that it should not have been left to chance and the Department should have taken further steps to have “minimised the risk” of additional delay.¹⁹⁷³
- 36.9 As noted above, on 16 November, the day before the Assembly was to consider the amendment regulations which had been laid before it in draft, Minister Bell was presented with a submission from Mr Wightman in preparation for the Assembly debate, including a draft opening speech and speaking notes.¹⁹⁷⁴ In these materials, the increased uptake over the previous 12 months was portrayed as a successful reduction of CO² emissions and producing £23 million of annual investment in Northern Ireland. A caveat that was added to this apparent success was suggested in the following terms:
- “Of necessity this will include measures to curtail the scheme should Treasury funding be restricted.”¹⁹⁷⁵
- 36.10 In a pre-prepared answer to an anticipated question as to the cause of the increase in uptake, Mr Wightman suggested that the Minister should refer to the increase in demand from the poultry sector and say that that had led to an increase in the order of 100% over the previous six weeks.¹⁹⁷⁶
- 36.11 When questioned by Senior Counsel to the Inquiry as to why he did not interrogate officials about the failure to provide him earlier with this information, including putting himself on record in this regard by email or otherwise, Minister Bell accepted that perhaps he “should have pressed”.¹⁹⁷⁷ He also agreed that he should have raised the increase in uptake with Mr Cairns, his SpAd, who had sought the extension in which, at the relevant time, he had expressed no interest.¹⁹⁷⁸

1970 Again, see WIT-11539

1971 WIT-26035 to WIT-26036

1972 TRA-11168 to TRA-11169

1973 TRA-11716

1974 DFE-122020 to DFE-122041

1975 DFE-122026

1976 DFE-122032

1977 TRA-12461

1978 TRA-12463

Enquiry from Minister Foster about potential delay of the amendment regulations

- 36.12 On 13 November 2015 Minister Foster, then DFP Minister, telephoned the appropriate SpAd, whom she took to be Mr Cairns, and arranged for him to enquire, on behalf of a constituent of hers in Fermanagh, whether it would be possible to postpone implementation of the 2015 amendment regulations.¹⁹⁷⁹ She told the Inquiry that at the time she was not aware of the spike in demand or the overspend.¹⁹⁸⁰
- 36.13 In his oral evidence on this issue Mr Cairns stated that, when he passed the request on to Dr McCormick by telephone, it was in the nature of a “courtesy call”¹⁹⁸¹ and he did not believe there was any realistic prospect of officials acceding to it.¹⁹⁸² Similarly, he stated that his belief was that “Mrs Foster’s not expecting the request to be acceded to.”¹⁹⁸³
- 36.14 As to the detail of his conversation with Dr McCormick, Mr Cairns stated:
- “...that it was very much, from my end, like, ‘This isn’t happening. This is a courtesy call, Andrew. You know, you know the way these things go. Just tell me no, and I’ll get back to Arlene’.”¹⁹⁸⁴
- 36.15 However, Dr McCormick in his oral evidence stated that he perhaps failed to pick up on Mr Cairns’ “intonation or demeanour on this”¹⁹⁸⁵ and took the request “more seriously than [he] should’ve done”, thereby causing him some anxiety over the weekend between Friday 13 and Monday 16 November 2015.¹⁹⁸⁶
- 36.16 In any event, the matter was discussed by officials and Dr McCormick was advised by Mr Stewart that the current rate of applications was around 130 a week and that, in light of that, a postponement of one week would cost about £2.6 million per year for 20 years.¹⁹⁸⁷
- 36.17 That information was duly passed on to Minister Foster by Mr Cairns who told Dr McCormick that he “awaited her instructions.” On 16 November, he replied to Dr McCormick: “I think we are back from the brink! I think all will be well and let’s get this through tomorrow.”¹⁹⁸⁸ Before the Inquiry Mr Cairns described his use of the phrase “back from the brink” as a light-hearted attempt to reference what he perceived to be Dr McCormick’s very formal, military style and not in any way an acknowledgment that they had, in fact, been on the brink of an extension of the un-amended scheme.
- 36.18 Minister Foster gave evidence that her request to Mr Cairns was a fairly standard constituency enquiry, which she immediately dropped when informed of the cost.¹⁹⁸⁹

1979 WIT-20522

1980 TRA-13655 to TRA-13660

1981 TRA-12894

1982 TRA-12895; TRA-12898

1983 TRA-12897

1984 TRA-12895

1985 TRA-15428

1986 TRA-15428

1987 IND-02004

1988 IND-00005

1989 TRA-13658

36.19 Ultimately, Dr McCormick offered the following assessment of this episode: “I don’t think this amounts to anything at all in the great scheme of things.”¹⁹⁹⁰

Approval of the amendment regulations

36.20 The draft amendment regulations were laid before, and approved by, the Assembly on 17 November 2015. The Renewable Heat Incentive Schemes (Amendment) Regulations (Northern Ireland) 2015 came into operation on 18 November 2015.¹⁹⁹¹ Regulation 10 and Schedule 4 applied a tiered tariff to medium biomass installations between 20kW and 199kW (increasing the upper limit of the medium biomass band from 99kW to 199kW), with tier 1 of 6.4p/kWh reducing to 1.5p/kWh after 1,314 hours and an overall cap of 400,000kWh in any 12-month period.¹⁹⁹²

36.21 The Inquiry notes that the amendment regulations did not include the suggestion from Mr McGinn, the DSO lawyer whose advice had been sought by DETI officials, for a specific amendment to allow the Department power to suspend operation of the scheme where it did not have, or was not likely to have, sufficient funds to accredit new installations.¹⁹⁹³ Trevor Cooper also raised the question as to what process and timescale would be involved to stop additional commitments under the RHI scheme.¹⁹⁹⁴ Mr Wightman sent an email to Mr Mills expressing support for the inclusion of such a power in the proposed regulations but pointed out that Ofgem had advised that they would need time to review such a power and in Mr Wightman’s opinion “time is something that we don’t have.” However he added that it would be worthwhile delaying the debate by a week if it meant that they could incorporate a provision to suspend or stop the scheme. It seems that Mr Mills raised the need to secure ministerial and ETI Committee clearance and he felt that there would not be time. Accordingly Mr Wightman told Mr Hughes that they would try to secure such approval in the New Year following DECC or HMT clarification over future funding.¹⁹⁹⁵

36.22 Meanwhile, some 800 applications had been received in the previous six weeks in contrast to the earlier departmental forecast of 150. Prior to the 2015 amendment regulations being made, Mr Wightman emailed Mr Stewart on 13 November informing him that the NI RHI had now “exceeded all expectations” and that this might result in an increase in NI RHI expenditure to more than £30 million in 2015-16 and over £40 million in 2016-17. The email continued:

“I feel that in the light of this situation regardless of what impact the amendment regulations might bring there is no choice now but to move to close both RHI schemes from 31 March 2016.”¹⁹⁹⁶

36.23 At least the perverse incentive had been reduced to some degree by the introduction of the 1,314 hour limit to the higher medium biomass tariff payments. However, by the time the 2015 amendment regulations started to be implemented the sheer scale of the market response to the attractiveness of the scheme and the resultant spike in applications was becoming very clear.

1990 TRA-15428

1991 DFE-107666 to DFE-107672

1992 DFE-107668; DFE-107671

1993 DSO-01408 to DSO-01409

1994 DFE-121289 to DFE-121290

1995 DFE-121289

1996 DFE-149917

36.24 At the Departmental Audit Committee meeting held on 2 December Mr Wightman presented a paper outlining the history and current position of the non-domestic NI RHI scheme and confirmed that amendments to the legislation had been brought into effect in November introducing tiering of tariffs and an annual cap on payments. He agreed that the GB RHI scheme had more flexibility through automatic degeneration. He also pointed out that officials had been working with DETI Finance and DFP to regularise matters and that retrospective approval was still being sought from DFP in respect of the period of irregular expenditure. He also informed the Committee that DFP had indicated that the RHI AME funding was likely to be capped in future and that discussions were taking place with HMT.¹⁹⁹⁷ The result of those discussions is dealt with in the following chapter.

Findings

- 200.** The Inquiry carefully considered the evidence relating to the telephone enquiry from a constituent to Minister Foster, in her capacity as MLA, including the oral evidence of Mr Cairns, and, having done so, finds it was not unreasonable of Ms Foster to ask a question on behalf of her constituent regarding postponement of scheme changes.¹⁹⁹⁸ The Inquiry finds that the response from officials upon this occasion was timely, effective and accepted.
- 201.** At the point the amendment regulations were implemented no review was carried out to confirm whether the revised tariffs were appropriate or with a view to including a method of overall budgetary control, such as degression or the suspension mechanism suggested by Mr McGinn of DSO. Calculations carried out for the purpose of the Inquiry by the DfE Task Force demonstrated that, after the amendment regulations came into force in November 2015, there was in reality little change in the average scheme subsidy for heat – from 6.3p/kWh down to 5.9p/kWh.¹⁹⁹⁹ As a result of the alteration of the medium biomass banding in the amended regulations however, the market's preference rapidly shifted from 99kW to 199kW boilers, thereby effectively doubling the amount of heat that would attract the higher Tier 1 subsidy. This shows the ineffectiveness of the measures taken to reduce spending levels.

1998 TRA-12893 to TRA-12899

1999 DFE-467803