

## Chapter 43 – New tariff proposals and the 2017 regulations

### Work on further plans to limit the RHI overspend

- 43.1 Despite the amendments to tariffs in November 2015 (including the introduction of tiering) and the closure of the scheme to new entrants in February 2016, expenditure was still well over the allocated budget and discussions continued throughout 2016 and into 2017 about further measures to bring spending within budget. These discussions were informed by the work of DfE’s Internal Audit Service and the NIAO which are discussed in the previous chapter of this Report.
- 43.2 At a meeting between DoF Supply and DfE officials on 17 October 2016, DfE officials indicated that they aimed to have a paper with their Minister by the end of October seeking his approval to consult on new draft regulations that would further amend the tariffs for the scheme.<sup>2184</sup> They also indicated that they intended to undertake a pre-consultation with major stakeholders prior to the main public consultation concerning the new draft regulations.<sup>2185</sup>
- 43.3 Upon being asked by DoF officials whether DfE was under a duty to consult, DfE officials stated that although there was no statutory duty to consult “strong advice from DSO” indicated that they should do so. However, they agreed to seek further legal advice as to whether consultation could be speeded up.<sup>2186</sup> DoF officials indicated that, as a consequence of the challenging nature of the cuts that would be announced, RHI would come under renewed scrutiny and DfE should explore every option available to reduce the overall cost of the scheme and take all actions as necessary moving forward.
- 43.4 At this stage DfE officials enquired as to whether it would be possible to go back to HMT for additional funding in the light of the high take-up of the scheme in Northern Ireland. DoF officials confirmed that this point had been raised with HMT following the Autumn Statement in 2015 but that HMT had confirmed the final position to be as set out in the January 2016 letter, namely that Northern Ireland would have to bear the cost of the overspend.<sup>2187</sup>
- 43.5 On 28 October 2016 Mr Wightman, who had been one of the officials present at the 17 October meeting, advanced a submission to Minister Hamilton and his SpAd, John Robinson.<sup>2188</sup> The submission related to the possible introduction of new controls with regard to the non-domestic RHI scheme in respect of which Mr Wightman advised that it was essential to bear down on future costs as soon as possible and that the aim was to launch a consultation in mid-November.<sup>2189</sup>
- 43.6 Minister Hamilton was reminded that the tariffs under the RHI scheme were subject to the ‘grandfathering principle’, meaning that “scheme participants would be guaranteed the tariff for the lifetime of the scheme.” This was to encourage investment by ensuring that scheme participants would receive the average rate of return of 12% over the 20 year lifetime of the technology, which had been the subject of the scheme’s EU State Aid approval. However,

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2184 DOF-09283 to DOF-09286

2185 DOF-09284

2186 DOF-09285

2187 DOF-09285 to DOF-09286

2188 DFE-137930 to DFE-137934

2189 DFE-137930

Mr Wightman now warned the Minister that many RHI participants who were in receipt of the medium biomass tariff prior to 18 November 2015 were set to receive much higher rates with the average rate of return for 99kW biomass boilers being likely to be between 49% and 109% depending on the initial capital outlay.<sup>2190</sup>

- 43.7 Details of the (then) recent PwC review of installations with regard to potential exploitation of the scheme were provided by Mr Wightman. He explained that the initial view from the European Commission was that any amendments to the tariff would be ‘notifiable’ (meaning that they required notification to be given to the Commission under EU State Aid rules) even if they involved tightening of the criteria for granting State Aid.<sup>2191</sup> He referred to the fact that DfE was developing cost control proposals aimed at bringing rates of return back within reasonable levels in line with the State Aid approval; but no detail regarding those proposals was provided. However, recognising that any reductions in the rate of subsidy were likely to be contentious, Mr Wightman sought approval to engage with two key industry players, the UFU and Moy Park, together with Biomass Energy Northern Ireland (BENI), a body which was heavily involved in the production, marketing and use of biomass, and CAFRE.<sup>2192</sup>
- 43.8 The Inquiry also notes that the submission recorded the view that it would be beneficial to speak to ‘Heatboss’, the energy efficiency company whose representative, Ms Janette O’Hagan, had previously met department officials and whose interactions with DETI at earlier junctures have been discussed in detail earlier in this Report.<sup>2193</sup>
- 43.9 Dr McCormick saw this submission for the first time on 26 October 2016 and did not see any difficulty with the main proposal to engage in pre-consultation with some key stakeholders. He focused primarily upon the hope and expectation that the views of the European Commission would provide a strong argument to reduce the flow of payments to pre-November 2015 scheme participants.<sup>2194</sup> Dr McCormick later changed this view, subsequent to a conversation with Ms Emma Little-Pengelly MLA at a lunch event in Titanic Belfast on 3 November 2016, when he was persuaded by Ms Little-Pengelly that the scheme was so riddled with difficulty that moving directly to closure, with compensation to scheme participants, but without consultation, would be a better approach.<sup>2195</sup>
- 43.10 There does not appear to have been a response from Minister Hamilton to the submission until a telephone call to Dr McCormick on or about 16 November 2016.<sup>2196</sup> Minister Hamilton said that there were weekly meetings with officials in which he asked for updates, although he accepted that he had not laid down a timetable for a paper.<sup>2197</sup> In contrast, Dr McCormick told the Inquiry that:

“Simon Hamilton made it clear to us that we should not be using issues meetings to nag him about submissions that had not been cleared.”<sup>2198</sup>

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2190 DFE-137931

2191 DFE-137932

2192 DFE-137933

2193 DFE-137933

2194 WIT-26443 to WIT-26444

2195 WIT-10531

2196 WIT-26444 – although Dr McCormick stated in this part of his witness statement that he believed the telephone call took place on 17 or 18 November 2016 it must in fact have taken place on or before 16 November as that was the date on which he withdrew the submission, as discussed later in this Report.

2197 TRA-16158 to TRA-16161

2198 WIT-26444

- 43.11 Minister Hamilton told the Inquiry that, given the need for urgent action, he had not been impressed with the proposals contained within the submission and, in particular, the suggestion that there should be yet further pre-consultations when no specific recommended cost controls or cost-limiting proposals had been suggested. Minister Hamilton felt that the submission was an unsatisfactory piece of work in that it did not fulfil his expectation of spelling out one or two solutions to solve the overspend problem and did not contain any specific preferred cost control, such as the buyout with compensation which had been discussed.<sup>2199</sup> The submission was duly withdrawn by an email from Dr McCormick, following his discussion with Minister Hamilton, on 16 November 2016.<sup>2200</sup>
- 43.12 On 6 December 2016 the BBC Spotlight programme on the non-domestic NI RHI scheme by Conor Spackman was broadcast. This is the programme which is referred to in the Introduction to this Report and which, amongst other matters, brought to light some of the email communication to the Department from Ms O’Hagan.
- 43.13 On the following day Dr McCormick visited Brussels for a meeting with the European Commission’s Directorate General for Competition (‘DG Comp’) regarding the possibility of DfE effecting a one-off ‘buyout’ of scheme members. According to Dr McCormick, the Commission preferred this closure option as the cleanest solution to the problem faced by DETI. They told him that:
- “If a compensation payment was calculated on a basis which would in effect be the equivalent of the applicant’s entitlement under UK law, there would be no State Aid issue and no State Aid notification would be required.”<sup>2201</sup>
- 43.14 DETI then sought formal advice from the Attorney General, which supported the choice of the closure option.
- 43.15 On the evening of 15 December 2016 the interview of Minister Bell by Stephen Nolan was broadcast by the BBC, adding to the public concerns generated by the Spackman investigation.<sup>2202</sup>
- 43.16 On the morning of 16 December 2016 DETI sent a paper to Mr Sterling at DoF setting out some of the cost control options for the NI RHI scheme.<sup>2203</sup> The purpose of the paper was to inform DoF, at a high level, of the merits of amending the scheme to achieve greater value for money.<sup>2204</sup> Three options were identified as potential solutions to the budgetary issues. These were:
- Option A: to place all medium biomass installations onto the post-November 2015 tariff (6.5p/kWh reducing to 1.5p/kWh after 1,314 hours and capped at 400,000kWh per annum);
  - Option B: to place all medium biomass installations onto a flat 1.5p/kWh tariff (capped at 400,000kWh per annum) and provide a single annual capital payment; and
  - Option C: a buyout of the capital expenditure by participants plus an uplift for a return on their investment.<sup>2205</sup>

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2199 TRA-16163 to TRA-16164

2200 DFE-302263

2201 WIT-10531

2202 DFE-228963 to DFE-228988

2203 DOF-43971 to DOF-43978

2204 DOF-43972

2205 DOF-43974

43.17 A table was provided illustrating the impact on the NI RHI scheme costs of adopting the various options.<sup>2206</sup> The conclusion noted that the results were very dependent on a small number of high-impact assumptions regarding actual and projected heat demand. Any small variation in the assumed demand would be likely to have a major impact on the projected cost of the scheme. The paper then stated:

“Indeed, it has become evident that the problems with the scheme’s budget appear to be related to an assumption in the original modelling relating to the assumed heat demand – the 17% load factor assumption. This assumption fed through to the tariffs offered under the scheme and the resulting budgetary difficulties.

Given the difficulty with forecasting costs and to reduce onerous task [sic] of examining individual boiler characteristics at this stage, the modelling has relied on various assumptions, which if changed could have a material effect on the results.

While recognising the dependence on these assumptions it is clear that option C is best in terms of NPC and by some margin. As a next step it would be helpful to conduct sensitivity analysis on the key assumptions used and the impact that has on option ranking.”<sup>2207</sup>

43.18 During the afternoon of the same day, 16 December 2016, Dr McCormick had a long telephone conversation with DoF officials as well as Minister Ó Muilleoir (who had become Minister responsible for the Department of Finance in May 2016 when Minister Hamilton assumed responsibility for DfE) and the DoF SpAd. Those DoF officials expressed a preference for an option that would continue to make use of the AME budget available from HMT i.e. that continued periodic payments rather than simply ending the scheme by means of a buyout.<sup>2208</sup>

43.19 The Inquiry notes in passing that it was in the evening on the same day, when according to a ‘Note for the Record’ produced by Dr McCormick for the purposes of the Inquiry, he and Mr Stewart took part in a telephone call with Mr Cairns who said that it had been Dr Crawford who had sought to influence a postponement of the RHI changes during 2015; and Dr McCormick confirmed that account of this telephone call in the course of his oral evidence.<sup>2209</sup>

43.20 Returning to DfE’s options paper, on 18 December Dr McCormick sent an email to Minister Hamilton explaining that his preference for option C was because it was the only option that brought to an end instantly all of the abuse of the scheme which may be ongoing; it was also the option with respect to which EU Commission confirmation had been agreed and the option that had stood up to the legal advice.<sup>2210</sup> He also sent an email to Mr Sterling expressing the opinion that any course of action other than option C would require a Ministerial Direction on the grounds of irregularity. He added that there was good reason to hope that HMT would agree to help in the circumstances.<sup>2211</sup>

43.21 Dr McCormick also emphasised the need to ensure that the public should not become aware of the proposal for scheme closure until the Department was ready to answer specific

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2206 DOF-43974

2207 DOF-43978

2208 WIT-10531

2209 IND-02100; TRA-15315 to TRA-15320

2210 WIT-10820

2211 WIT-10821

questions about any compensation scheme which might be put in place.<sup>2212</sup> On 18 December Minister Ó Muilleoir met Minister Hamilton at Belfast City Hall in the absence of officials to discuss the way forward.<sup>2213</sup> It seems that Minister Ó Muilleoir was very clear that all options needed to be considered but accepted that there should be no announcement in advance of HMT engagement.

- 43.22 According to Mr Sterling, there were close working relationships between officials at DfE and DoF which, in his view, helped the process of making provision for the future of the RHI scheme during the latter part of 2016. However, he believed that tension was increasingly evident at ministerial level within the Executive from around 16 December 2016 (after Minister Bell’s interview with Stephen Nolan) until the collapse of the institutions in January 2017. Mr Sterling considered that such tension was a factor which played in to the work which was being done by the two Departments at that time to address the cost overrun.<sup>2214</sup>
- 43.23 It seems clear from internal Sinn Féin emails which have been seen by the Inquiry that, by 16 December, the view was developing that, despite efforts by DoF over some 6 months, the DfE Minister Simon Hamilton was culpable for inaction since the problem with regard to RHI had become clear; and there was concern that the next line of questioning would be directed to DoF.<sup>2215</sup>

### First Minister Foster’s Assembly statement

- 43.24 On 19 December 2016 First Minister Foster made a statement to the Assembly (which she has accepted had not been cleared or approved by the deputy First Minister).<sup>2216</sup> She explained that she felt it was important to come before the House at the earliest possible opportunity since, for almost two weeks, there had been a “barrage of media coverage” of the RHI scheme including “wild claims and allegations, many of which have been based on spin rather than reality”.<sup>2217</sup> The First Minister conceded that there had been:
- “Shocking errors and failures in the RHI scheme and a catalogue of mistakes all of which coincided to create the perfect storm, resulting in the position in which we now find ourselves.”<sup>2218</sup>
- 43.25 During the course of her address the First Minister suggested that the “crucial mistake” in the RHI scheme was setting the tariff for the most commonly used boilers at a level higher than the market price of the relevant fuel, namely wood pellets.<sup>2219</sup>
- 43.26 Amongst other things, she offered a sincere apology to Janette O’Hagan and accepted that Ms O’Hagan had sent an email to her constituency office raising concerns about the way in which the scheme was being used.<sup>2220</sup> She also rejected the various allegations made by Minister Bell during the course of his interview with Mr Nolan.<sup>2221</sup> At the conclusion of her speech the

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2212 WIT-10822

2213 TRA-16300 to TRA-16302; POL-10305

2214 WIT-05226

2215 POL-10053 to POL-10064

2216 INQ-100218 to INQ-100226

2217 INQ-100218

2218 INQ-100218

2219 INQ-100219

2220 INQ-100220

2221 INQ-100221 to INQ-100223

First Minister maintained that she had been working hard to keep Northern Ireland moving forward and continued:

“That is why, rather than whipping up a media storm, I have actually been dealing with the problem along with my ministerial colleague, Simon Hamilton and the Finance Minister, working on a practical solution, because that is what responsible politicians do. That is what government is about.”<sup>2222</sup>

43.27 On the same day Minister Ó Muilleoir sent a text to Mr Sterling, his Permanent Secretary, drawing his attention to the fact that:

“Arlene says she has been working with me on a solution. Has she had any contact with the Department? She had none with me.”<sup>2223</sup>

43.28 Mr Sterling replied that there had been no such contact, to his knowledge, and that the only ministerial contact that he was aware of had been Minister Ó Muilleoir’s meetings with Minister Hamilton.<sup>2224</sup>

### Interaction between the DfE and DoF Ministers

43.29 It seems that at the meeting between Minister Ó Muilleoir and Minister Hamilton on 18 December there was a discussion about the options for closing down the RHI scheme. Minister Ó Muilleoir reported on his meeting and that DfE favoured a solution which would enable it to buy out users or have them continue at lower tariffs under which there would be costs to London and none to the Executive.<sup>2225</sup>

43.30 In his oral evidence to the Inquiry Minister Ó Muilleoir explained that his responsibility, as Minister for DoF, was to press DfE to come forward with a solution which his Department would then test with regard to value for money and protection of the public purse.<sup>2226</sup> In an email to a Sinn Féin official on 21 December, a few days after the meeting, Minister Ó Muilleoir added:

“That gives us a certain distance from the DUP attempts to say we are all in this together.”

The same email recorded in its final paragraph:

“The Dept of [sic] Economy leaked details of the solution options to the media which were carried today to give the impression that they are working towards a swift solution.”<sup>2227</sup>

43.31 Minister Ó Muilleoir emphasised to the Inquiry that the fact that the two Ministers had met in the City Hall confirmed that both were working to find a solution but, at this stage, he was advised by his own officials that none of the proposed solutions would work.<sup>2228</sup> When the Inquiry panel raised the apparent lack of a cooperative approach between the two ministers, Minister Ó Muilleoir said:

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2222 INQ-100223

2223 IND-06504

2224 IND-06504

2225 POL-10305

2226 TRA-16301 to TRA-16302

2227 POL-10305

2228 TRA-16302 to TRA-16303

“No. At this stage, you know, and with respect, at this stage, the DUP had become a by-word for less-than-appropriate behaviour in relation to RHI. The DUP is clearly managing its own internal problems around revelations, which are almost on a daily basis, around their advisers, so, with respect, I was making sure that we made them do their work, but I didn’t want them saying that ‘listen, its Sinn Féin holding this up.’”<sup>2229</sup>

- 43.32 In his oral evidence to the Inquiry Minister Hamilton stated that the buyout option (option C) had been favoured by Dr McCormick, whereas his own preference would have been for reduction of the tariffs.<sup>2230</sup> When asked by the panel whether the latter was a means of maximising the ongoing payments from HMT, which represented a business and economic benefit to Northern Ireland, Mr Hamilton accepted:

“It was a point that was being considered. How much weight that had over – I mean, it didn’t have more weight applied to it, in my mind and my thought process, than turning off the tap and stopping the flow.”<sup>2231</sup>

- 43.33 As referenced above in Minister Ó Muilleoir’s email of the same date, on 21 December 2016 the buyout option was leaked to the media and became the subject of a significant and adverse public reaction. As a consequence, that option was no longer pursued.<sup>2232</sup> The Inquiry was not able to make a determination from the evidence as to the identity of any individual or party responsible for the leaking, although it is clear that both Sinn Féin and the DUP were suspicious of each other.<sup>2233</sup> Minister Hamilton believed that it was leaked by Sinn Féin and in his oral evidence stated:

“There was [sic] other examples of briefings to media where a flavour of a meeting was given which wasn’t actually what happened in the meeting. So, I had a bit of [sic] a fear and a bit of a concern, and I thought that they were trying to undermine any solution, even though they were saying something different publicly. And the reason I thought that was because this was clearly an issue where the pressure was on the DUP – we were under immense pressure at that time – and that, if a solution was to come forward, Sinn Féin wanted to be in the middle of finding that solution and to be seen as the, sort of, saviours of the whole scenario, but, if it didn’t, well then the DUP were to blame.”<sup>2234</sup>

- 43.34 Minister Hamilton accepted that the fact that the option was leaked altered the course of departmental decision-making.<sup>2235</sup> As mentioned earlier, in his email dated 21 December 2016 Minister Ó Muilleoir had stated that “The Department of [sic] the Economy leaked details of the solution options to the media...”.<sup>2236</sup> However, in oral evidence he told the Inquiry that he did not know who leaked the document; but denied that it was anyone acting upon his behalf or with his knowledge.<sup>2237</sup>

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2229 TRA-16304

2230 TRA-16192 to TRA-16194

2231 TRA-16197 to TRA-16198

2232 WIT-26295 to WIT-26296

2233 TRA-16199

2234 TRA-16200

2235 TRA-16202

2236 POL-10305

2237 TRA-16302

43.35 On 4 January 2017 Minister Ó Muilleoir tweeted that he was “bemused at DUP ‘solution’ to RHI being trailed on media before any plan was shared with the Department of Finance.” He continued:

“I am alert to the dangers of allowing the person who was the architect of the RHI scheme – the DUP leader – to come up with a solution to this debacle. That is why I will ensure my officials rigorously test any plan which comes from the DUP. I will be guided solely by what is in the interests of the public purse. The DUP are in a hole and should stop digging.”

43.36 He closed this tweet by saying: “I will not be bounced into signing off on any new plans simply to save Arlene Foster’s skin.”<sup>2238</sup>

43.37 On the same date Minister Ó Muilleoir emailed Mr Ted Howell, who was a member of the Sinn Féin ard chomhairle (National Executive) and who had been brought out of retirement by the late Martin McGuinness, deputy First Minister, to chair a Sinn Féin ‘crisis committee’ to deal with the crisis engulfing the Stormont institutions and political process at that time.<sup>2239</sup> The email contained the following:

“DUP believe they now have a solution based on bringing all boiler owners back to a reduced payment which has been in place since November 15 2015 for those who applied to the scheme late. Problem is that Department of Finance told them last month that we believe that scheme is also badly designed and is already paying out almost twice as much as they intended. If they move all 3,000 boilers to the post-November 15 tariff and present that as a solution, you can see that they are only rearranging deckchairs on the Titanic.”<sup>2240</sup>

43.38 A further meeting between Minister Ó Muilleoir, Minister Hamilton and officials took place on 5 January 2017 when details of the DfE proposal were discussed, namely that as an interim measure all scheme participants would be moved onto the November 2015 tariffs as a stage 1 measure.<sup>2241</sup> On the following day, 6 January 2017, Minister Ó Muilleoir sent a formal email to Minister Hamilton in the following terms:

“Since taking up office my officials and I have repeatedly pressed the Department for Economy to produce a concrete plan to address the devastating financial impact of the RHI scheme. It is extremely disappointing that seven months on I have yet to receive such a plan.

Although you expect to provide me with a business case proposal in the coming days you indicated that this will only propose an ‘interim’ measure. Let me be clear; a piecemeal approach is not sufficient.

The handling of this scheme – from the stripping out of the cost controls contained in the equivalent British legislation, through to the failure to close the scheme promptly when the threat posed by the absence of cost controls materialised – has been characterised at least by incompetence and possibly by corruption.

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2238 POL-10432 to POL-10433

2239 TRA-16313 to TRA-16314

2240 POL-10431

2241 DOF-44619

In this context the only solution that is acceptable to me and to the wider public is a comprehensive one that deals with all elements of this disastrous scheme. It must be a robust solution that stacks up financially and protects the public purse. It must be legally sound and it must be future-proofed from further abuse.

As Finance Minister I will not allow the botched management of this scheme to be exacerbated by a botched solution. A stop-gap approach is a grave mistake. I urge you to bring forward a comprehensive plan.”<sup>2242</sup>

- 43.39 In a covering email to colleagues, including Mr Howell, Minister Ó Muilleoir indicated that the draft letter was to be made public and warned that the DUP would come back to defend their plan and accuse Sinn Féin of sabotaging it on political grounds. In the circumstances he advised that it was essential that Mr Brennan of DoF should be asked to update a ‘one-pager’ which he had produced highlighting potential shortcomings of Minister Hamilton’s approach.<sup>2243</sup>
- 43.40 On 9 January 2017 Martin McGuinness resigned as deputy First Minister and Mr Sterling noted that it was becoming increasingly clear that the devolved institutions were unlikely to be in operation again until well after the Assembly elections on 2 March 2017.<sup>2244</sup> In such circumstances there was only a limited window in which to legislate to reduce the cost overrun.

### The 2017 DfE business case

- 43.41 On 11 January 2017 the DfE business case for ‘addressing the deficiencies in the non-domestic RHI’ was submitted to DoF.<sup>2245</sup> The business case was signed off by Mr Stephen McMurray, then Head of the RHI Task Force, on behalf of the Departmental Accounting Officer. At section 2.7 of the business case there was a discussion of ‘Undesirable Behaviour’, as a result of which the Department had commissioned PwC to provide an opinion on the design of the scheme, the robustness of the controls in place to ensure that applicants met the scheme eligibility criteria and that participants continued to operate within the scheme guidelines, and to provide an opinion on whether there was evidence to support or refute a number of allegations received.<sup>2246</sup>
- 43.42 In the course of its work, PwC had identified two fundamental differences from the GB scheme, namely the absence of tiered tariffs to discourage heat waste and the lack of a suspension or degression mechanism to act as a cost control measure.<sup>2247</sup> In terms of value for money the business case recorded at paragraph 2.11:

“With the pre-November 2015 Medium Biomass Tariff Installations being on a path towards over-compensation to a significant degree, with the problems of such installations and the incentives for undesirable and/or abusive behaviours there are clearly significant VFM concerns with the continuance of the scheme, and its Grandfathered Tariffs, without any amendment to bring it back much more in line with the originally intended outcome of the scheme.”<sup>2248</sup>

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2242 DOF-44761 to DOF-44763

2243 POL-10440

2244 WIT-05233

2245 DOF-45052 to DOF-45083

2246 DOF-45057

2247 DOF-45057

2248 DOF-45058

43.43 As a consequence, it was noted that there was very clearly significant public concern about the non-domestic RHI scheme. The business case recognised that a comprehensive consultation approach would ensure that whatever actions were taken would be ones that would command clear public confidence and be as legally defensible as possible.<sup>2249</sup> The following available options were identified at paragraph 4.11:

- Option 1 – No action with the pre-November 2015 tariffs remaining at 6.5p/kWh for all heat output for the duration of the scheme;
- Option 2 – all recipients of the pre-November 2015 tariff for medium biomass boilers would be moved to the post-November 2015 tiered tariffs, with the 6.5p/kWh falling to 1.5p/kWh after the first 1,314 metered hours and overall payments capped at 4,032 hours per annum;
- Option 3 – all biomass boilers would receive a payment of 1.5p/kWh, with payments capped at 4,032 hours per annum after which no payment would be made for heat generated;
- Option 4 – the scheme and payments to medium biomass boilers would be suspended until a lasting solution was developed; and
- Option 5 – there would be an arbitrary reduction in tariffs, without any origin in the rate of return analysis, simply budget driven in order to increase the prospect of living within the projected AME budget.<sup>2250</sup>

43.44 The business case accepted that further work was needed to be undertaken to develop the options into concrete workable proposals including legal and State Aid issues, the impact on individual participants, setting appropriate tariff levels, the viability of operating administration and IT requirements, financial and budgetary implications and programmes of inspection.<sup>2251</sup> The business case considered Option 2 to represent the best-value, practical approach for 2017-18 with indications that such an approach would substantially manage costs back to the £22.3 million AME allocations in that year.<sup>2252</sup> Option 1 was not considered to be an affordable or viable option.<sup>2253</sup>

43.45 On 13 January 2017 the final version of the PwC Heat 1 Report was provided to DfE and, on 16 January 2017, the Assembly debate on the draft 2017 amendment regulations was adjourned until 23 January 2017.<sup>2254</sup>

43.46 On 19 January 2017 Mr Brennan, as Budget Director of the Public Spending Directorate of DoF, responded to a number of concerns that Minister Ó Muilleoir had raised with regard to the DfE business case.<sup>2255</sup> He began by pointing out that the business case presented was one that he would term “sub-optimal”, in that it did not present a solution that would result in an immediate and permanent cessation of a call upon the Executive’s DEL budget. Mr Brennan continued:

“However, in light of the legal advice that Option 2 is a robust defensible position and the need to have some further time to collate more usage data, I must

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2249 DOF-45062

2250 DOF-45062

2251 DOF-45158

2252 DOF-45162

2253 DOF-45160 to DOF-45161

2254 DFE-05530 to DFE-05612; INQ-100329 to INQ-100333

2255 DOF-50657 to DOF-50659

conclude that the proposed way forward is indeed the only practicable action that can be taken immediately to significantly reduce the current irregular expenditure. I take the view that in our current circumstances this is an essential first step in implementing a sustainable and permanent solution. However that solution will only work if DfE delivers on the commitments set out in the business case.”<sup>2256</sup>

43.47 Mr Brennan agreed with Minister Ó Muilleoir that the role of Ofgem and the planned inspection programme continued to be matters of concern; and he emphasised that the critical issue of successfully delivering on the business case objective was to expedite the inspection process of all installations. He also reassured the Minister that work was in hand to assist in putting in place a robust contract management regime.<sup>2257</sup> At paragraph 8 Mr Brennan noted:

“In relation to your wider concern about approving what might be deemed later to be a ‘botched’ plan, I can only say that this proposed way forward does:

- Immediately constrain tariff payments through the introduction of a tiered tariff and usage cap
- Offers [sic] a strong legal defence to challenge
- Puts [sic] in place an inspection and audit process that should drive down long term costs
- Offers [sic] best possibility of being State Aid compliant.”<sup>2258</sup>

### Economy Committee consideration of the draft 2017 regulations

43.48 On the same date, 19 January 2017, there was a meeting of the Assembly Economy Committee to discuss the draft 2017 regulations, which had been produced to give legal effect to Option 2 from paragraph 4.11 of the business case (discussed previously in this Report).<sup>2259</sup> Shane Murphy, DfE’s chief economist, explained to the Committee how the original scheme had been based upon the assumption of a 17% load factor with a return on investment at 12%. He said that about 15% of applicants were currently running their boilers at load factors of 15% or less and earning not more than a return of 12% or so. The remaining 85% of participants ranged from minor or marginal overcompensation up to earning multiple rates of return.

43.49 Mr Murphy estimated that about 70% of participants were outside the range (of acceptable rates of return) that had been specified to the European Commission.<sup>2260</sup> Mr Murphy pointed out that the objective of the recent DfE business case was to undertake a legally defensible course of action that, starting in the following year, could remove the perverse incentive to produce excessive heat.<sup>2261</sup>

43.50 Some work had been done on longer-term options but they did not appear yet to be sufficiently developed. Against that backdrop Mr Murphy advised the Committee that it was important to bear in mind that they were not yet at a stage where there was full assurance in legal

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2256 DOF-50657

2257 DOF-50658

2258 DOF-50658

2259 ETI-05339 to ETI-05354

2260 ETI-05342 to ETI-05343

2261 ETI-05344

terms, incentive terms or budgetary terms that a solution had been reached which could be maintained for 18 to 20 years.<sup>2262</sup>

- 43.51 Dr McCormick told the Committee that DfE had been examining a range of options, including closure. That option had been exposed publicly before Christmas and attracted a lot of criticism and concern about potential loss of future AME. He observed:

“We do not want to lose out. It is still beneficial to Northern Ireland to have the flow of that resource; it is our 3% share of what is going on for renewable heat across the water and its right to try to continue to make use of that.”<sup>2263</sup>

### Assembly approval of the 2017 regulations

- 43.52 On 23 January 2017 the Assembly debated the draft 2017 regulations.<sup>2264</sup> During the course of that debate considerable frustration was expressed at the lack of evidence provided to, and consultation with, the Assembly, while the Sinn Féin/DUP “Iron Curtain”, as Sinéad Bradley MLA described it, prevented other members of the Assembly from being privy to RHI developments.<sup>2265</sup>

- 43.53 At the conclusion of the debate, notwithstanding the absence of DoF approval of the business case, the Assembly resolved to approve the draft Renewable Heat Incentive Scheme (Amendment) Regulations (Northern Ireland) 2017.<sup>2266</sup> Those regulations amended the original Renewable Heat Incentive Scheme Regulations (Northern Ireland) 2012, as amended by the 2015 Amendment Regulations, with regulation 5(5) providing for the insertion of a new regulation 36(7B) that:

“The tariffs for installations accredited before 18 November 2015 and falling within the small or medium biomass tariffs set out in schedule 3A are the tariffs set out in the schedule adjusted by the percentage increase or decrease in the retail price index for 2016.”<sup>2267</sup>

- 43.54 The schedule specified that medium biomass boilers (20-199kW) would be subject to a first tier of 6.5p kWh reducing to 1.5p kWh after 1,314 hours with an annual cap of 400,000 kWh.<sup>2268</sup> The regulations provided that they should come into operation on 1 April 2017 or the day after the European Commission gave approval that the provision made by the regulations, to the extent that it constituted the granting of aid to which any of the provisions of Articles 107 or 108 of the Treaty on the Functioning of the European Union applied, was, or would be, compatible with the internal market, within the meaning of Article 107 of that Treaty, whichever was later.<sup>2269</sup>
- 43.55 The regulations were duly made on 24 January 2017.<sup>2270</sup> On that same date, Minister Ó Muilleoir made a statement to the Assembly establishing this Public Inquiry.

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2262 ETI-05344

2263 ETI-05346 to ETI-05347

2264 INQ-100382 to INQ-100432

2265 INQ-100382 to INQ-100383

2266 INQ-100432

2267 DFE-321783

2268 DFE-321784

2269 DFE-321782

2270 DFE-321782 to DFE-321785; DOF-18080 to DOF-18087

## Belated DoF approval of the DfE business case in relation to the 2017 regulations

43.56 Later that evening, 24 January 2017, Minister Ó Muilleoir sent an email to Ted Howell informing him of a meeting that he was to have with Minister Hamilton on the following day with regard to the business plan in respect of the interim solution for RHI.<sup>2271</sup> As noted previously, he had been in previous contact with Mr Howell by email with regard to Minister Foster’s statement to the Assembly and the delay in providing the DfE proposed solution.<sup>2272</sup> Minister Ó Muilleoir indicated that there was now no further reason to delay holding up the business plan and his email continued:

“I have concerns about the business plan for the inspections, which is separate to this business plan, but have received repeated assurances from my staff that it is coming to me and will be robust. I accept those assurances.

I also raised the issue of State Aid. However we have NO flexibility about the requirement that the solution not kick in until State Aid is approved as that was a condition of the Regulations the DUP passed on Monday night. It may be that turns out to be a mistake if Europe holds up State Aid permission but for now, it is out of our hands.

Would you be content if I were to sign off the business plan on Wednesday afternoon? It remains a flawed plan, but it is the only show in town with a strong chance of saving £27 million to the public purse.”<sup>2273</sup>

43.57 It was put to Minister Ó Muilleoir by Inquiry Counsel that in this email he was asking Mr Howell whether he was content that he, a Minister who was democratically responsible to the Assembly and the Northern Ireland electorate, should comply with the advice that he had received from departmental officials.<sup>2274</sup> Minister Ó Muilleoir rejected such a suggestion, emphasising that the decision was his alone and stating:

“I’m telling Ted Howell that my decision has now been made. We have probed this. We have exhausted it. I have come to the conclusion that, while there are still risks inherent in it, risk to the public purse, risks to my reputation, risks to Sinn Féin if we signed off on a botched solution which was challenged and which would turn out in three weeks’ time to dissemble. And I’m telling him, as someone who is heading up a crisis committee dealing now with the collapse of government and all that that entails, that this is what is going to happen.”<sup>2275</sup>

43.58 He added that he was giving Mr Howell his place as the head of a “crisis committee” and letting him know the proposed way forward in case, for reasons unknown to Minister Ó Muilleoir, it may have implications for the peace process.<sup>2276</sup> When asked how that could be reconciled with the wording “would you be content if I were to sign off the business plan on Wednesday afternoon?” Minister Ó Muilleoir maintained that he was asking Mr Howell about the “timing” rather than whether he wished the business plan to be signed off. He further explained:

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2271 POL-10501

2272 POL-10440 to POL-10445

2273 POL-10501

2274 TRA-16332

2275 TRA-16333

2276 TRA-16333

“This is a political world, and we cannot divorce what was happening from the collapse of the Executive, from all the things that are happening outside the confines of Clare House.<sup>2277</sup> It was my decision, but I think it was appropriate and prudent to say to the Sinn Féin chair of the crisis committee this is when it was going to happen.”<sup>2278</sup>

- 43.59 In the interests of fairness, the Inquiry has reminded itself of the evidence given by Sir Malcolm McKibbin about the history of “advisers” being given passes to Stormont Castle and his acceptance of the fact that they could equally have operated from Party HQ,<sup>2279</sup> further detail of which is considered at chapter 54 of this Report.
- 43.60 Special Advisers are recognised as having a legitimate and valuable function in government. They are paid as civil servants from public funds but they are expected to form a trusted relationship with the Minister to whom they are allocated. They are not subject to the civil service duty of impartiality and they may liaise between Ministers and party members and officials in order to offer advice on party political policy from a standpoint that is more politically aware and committed than would be available from the professional civil service. They occupy influential positions and, accordingly, the Northern Ireland Assembly has enacted legislation to clearly define their status and provide a mandatory code to govern their activities in order to ensure that there is clarity about their tasks and limitations. If Ministers are to seek approval for decisions from advisers who neither hold electoral office nor are subject to the Special Advisers legislation and code, the Inquiry considers that they should only do so in accordance with transparent and accountable procedures.
- 43.61 On 25 January 2017 DoF granted approval of the DfE business case and on 16 March the approval of State Aid was received from the Commission. On 1 April 2017 therefore the 2017 amendment regulations came into operation.
- 43.62 The RHI Taskforce has confirmed that the tiered tariff introduced for all participants by the 2017 regulations has reduced the potential for gaming by the production of unnecessary heat.<sup>2280</sup> In his most recent report on DfE’s 2018-19 Resource<sup>2281</sup> the Comptroller and Auditor General reports that the heat produced under the NI RHI scheme has now reduced by 44% from 684GWh in 2016-17 to 383GWh in 2018-19; and that payments have almost halved from £42 million to £21.1 million in the same period.

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2277 Clare House is where DoF and Minister Ó Muilleoir were based.

2278 TRA-16333 to TRA-16334

2279 TRA-16723 to TRA-16727

2280 WIT-23920

2281 INQ-115003 to INQ-115010

## Findings

- 224.** The Inquiry emphasises that it heard no detailed personal evidence about Mr Howell or his role in the Sinn Féin Party other than that he was the chair of the Sinn Féin “crisis committee”. He did not hold accountable elected office. The Inquiry finds that the wording of the 24 January email was not limited to approving the timing but also encompassed seeking Mr Howell’s consent to the proposed course of action by an Executive Minister.<sup>2282</sup> The Inquiry is conscious that the evidence that it received from Minister Ó Muilleoir was received in the course of an Inquiry instituted in order to restore public confidence in the workings of Government. Transparency and accountability are key elements in maintaining such confidence.
- 225.** Ultimately, the Renewable Heat Incentive Scheme (Amendment) Regulations (NI) 2017 came into force on 1 April 2017. However, the Inquiry finds that the heightened degree of suspicion, lack of co-operation and lack of trust between the political parties with respective responsibility for DfE and DoF during the period from late 2016 to early 2017 did not facilitate the particular and pressing need for the achievement of a timely solution of the RHI problem in the public interest.
- 226.** In this context, the Inquiry notes the wording of the ministerial pledge of office contained in the Belfast Agreement and referred to in sections 16, 18 and 19 of the Northern Ireland Act 1998 “...to serve all the people of Northern Ireland equally...” and “to promote the interests of the whole community represented in the Northern Ireland Assembly towards the goal of a shared future.”<sup>2283</sup>

2282 POL-10502

2283 WIT-04072

