
Chapter 48 – Ofgem’s interpretation of the regulations

48.1 In this chapter the Inquiry examines four particular issues that arose on the NI RHI scheme as a result of Ofgem’s interpretation of the NI RHI regulations: multiple boilers, wasted heat, installations heating domestic properties on the non-domestic RHI scheme, and a particular matter relating to alternative financial support that produced a State Aid issue. Ofgem has maintained that it was its responsibility to interpret the NI RHI regulations, having been appointed the scheme administrator by DETI. Questions of legal interpretation are matters for Courts. It is therefore not the job of the Inquiry to substitute its own interpretations for those adopted by Ofgem. Rather, the Inquiry, in this chapter, having explained the issue, examines Ofgem’s handling of the matters that arose from the interpretations it adopted.

Multiple boilers

48.2 Multiple boilers emerged as a significant theme during the course of the Inquiry, particularly in circumstances in which the efficient use of heat indicated installation of a boiler(s) above 99kW in capacity which qualified for lower subsidy than a boiler(s) below that capacity. As demonstrated in several of the Invest NI technical consultancy reports considered earlier in this Report, by altering the design and operation of their renewable heat installations, users could maximise their income by targeting the highest available tariffs. The following sections analyse how this became a major contributory factor to subsidy payments under the NI RHI scheme being much higher than had been originally intended, with the result that many scheme members were overcompensated, and causing much greater overall spending on the scheme than might otherwise have been the case.

The policy intent

48.3 Similar to the approach adopted by DECC in GB, a clear intention to prevent exploitation through multiple installations was set out publicly by DETI in the July 2011 consultation document for the NI RHI scheme. Paragraphs 3.6, 3.9 and 3.26 of that document said:

“The proposed RHI is not designed as a reward but as an incentive to increase the uptake. The non-domestic market presents the greatest opportunity for large-scale deployment of renewable heat, this will provide a high level of renewable heat at a cost-effective rate.

In order to prevent situations where a number of smaller installations are installed to provide heat for one heat source in order to avail of higher tariff levels, installations will be defined as one or multiple technologies connected to the same heating system. ***Where multiple installations of the same technology are installed to serve a single heating system the combined capacity will be considered for the eligible tariff.***²⁴⁴⁸ (the Inquiry’s emphasis)

48.4 The tariff structure was clearly banded to provide higher levels of support for smaller installations, with the level of subsidy dropping rapidly as installations increased in size to a point, as shown below, that there was no support for installations above 1MW in capacity for biomass boilers (2012 tariff levels):

>1MW	0 p/kWh
100 – 999kW	1.5 p/kWh
20 – 99kW	5.9 p/kWh
0 – 19kW	6.2 p/kWh

48.5 Taken together, this indicated a recognition by DETI that larger users benefit from economies of scale and, compared to smaller users, need lower tariffs, or indeed no support at all. DETI also saw that the approach could lower the cost of the RHI scheme and was clearly aware that there was a risk to this if larger users exploited higher tariffs by installing multiple, smaller units – something that it wanted to prevent.

48.6 DETI, as DECC had done, endeavoured to reflect this in the 2012 NI RHI regulations, where as well as setting out the banded tariffs, specific references to multiple installations were made in regulation 14, which stated that a plant does not meet the eligibility criteria if the plant is comprised of more than one plant (regulation 14(1)), but went on to state that where two or more plants use the same source of energy and technology, and form part of the same heating system, those plants are then to be considered as a single plant and consequently would meet the eligibility criteria (regulation 14(2)).²⁴⁴⁹ Thus, multiple plants that were part of the same heating system had to be treated as one plant to be eligible for accreditation, and their individual capacities combined to ascertain the tariff to which the deemed single installation was entitled. With the benefit of hindsight the Inquiry accepts that this was not an easy regulation to interpret and would have benefited from more focused attention, both legal and technical.

Ofgem’s interpretation of ‘heating system’

48.7 For the Northern Ireland Renewables Obligation (NIRO), which Ofgem was already administering on behalf of DETI, Ofgem had adopted an approach to multiple generating stations whereby the total installed capacity was used to determine the appropriate banding and payment level (e.g. Appendix 1, paras 1.8-1.15 of Renewables Obligation: Guidance for Generators, 1 May 2013).²⁴⁵⁰

48.8 In accordance with DECC/DETI’s RHI policy intent as well as the NIRO, various parts of Ofgem initially pursued an aggregated capacity approach to multiple RHI installations. For example, in February 2011 in advice to DECC, Ofgem suggested the following definition:

“An RHI installation is one or multiple units of the same heating technology where one or more of the following apply: they are located on the same premises; they are connected to a common heating system; they share engineering features, such as common civil works, pipes, etc.”²⁴⁵¹

2449 LEG-00001 to LEG-00035

2450 INQ-15970 to INQ-16085

2451 OFG-265637 to OFG-265639

- 48.9 Further, in Ofgem’s RHI Fraud Prevention Risk Register from March 2011 it was stated that the tariff would be set on the basis of total installed capacity.²⁴⁵² This approach persisted until at least September 2012 where the same entry was still in the risk register.²⁴⁵³
- 48.10 The November 2011 Legal Review provided by Ofgem to DETI contained a number of relevant recommendations:
- Addressing the draft regulation 2, which set out the NI RHI scheme definitions, Ofgem indicated that it had a considerable number of concerns about the definitions in the GB RHI regulations (or the omission of such definitions), which were set to be replicated in the NI RHI regulations. It said it was “critical” that these concerns were addressed as, without clear definitions, Ofgem would not be able to advise appropriately and would be unable to administer the scheme without serious risk of legal challenge.²⁴⁵⁴ At the same point it suggested that the regulation 14 ‘heating system’ term may require definition, and referred to specific comment on regulation 14.
 - DETI should redraft regulation 14 (to do with plants comprised of more than one plant) to make the policy intent in this area clearer.²⁴⁵⁵
 - ‘Heating system’ should be defined, as this concept was said to be a key determinant of whether multiple plants should be treated as a single installation, something which fed through into the calculation of payments. Ofgem also noted that it was not acceptable for it to be left to be clarified in the guidance document.²⁴⁵⁶
 - In a section in the Legal Review headed “Potential Perverse Outcomes” Ofgem suggested that some participants may install additional pipework and multiple, smaller units in order to meet the eligibility criteria or tariff thresholds.²⁴⁵⁷ Ofgem then suggested that DETI consider “tightening” the definition and imposing a requirement that where the systems serve the same end use, they should be regarded as part of the same system.²⁴⁵⁸
- 48.11 The above statements demonstrate an awareness, at least within some parts of Ofgem, in 2011 of the policy intent to prevent exploitation of higher tariffs through multiple installations or manipulation of the capacity. They also show an awareness and concern about the potential for abuse and that weaknesses in the definitions may lead to legal challenge of decisions.
- 48.12 However, as discussed elsewhere in this Report, DETI did not make any changes to the regulations and Ofgem made no further serious representations to DETI on this topic, instead developing and implementing its own interpretation of the term “heating system” and approach to multiple boilers.
- 48.13 Ofgem could provide no evidence to the Inquiry of any formal process followed by it to develop and evaluate its interpretation of the definition of ‘heating system’ contained in regulation 14. A working interpretation evolved – paragraphs 42 and 43 of Ofgem’s first witness statement to the Inquiry of 29 March 2019 state:

2452 OFG-134852

2453 OFG-134921

2454 WIT-01247

2455 WIT-01241

2456 WIT-01252

2457 WIT-01243 to WIT-01244

2458 WIT-01243 to WIT-01244

“Ofgem’s interpretation of ‘heating system’ was identified during the development of the GB RHI Regulations...”²⁴⁵⁹

“Ofgem’s interpretation focussed upon the presence of a hydraulic connection when assessing the extent of a ‘heating system’.”²⁴⁶⁰

48.14 In 2012 a number of Ofgem staff indicated some uncertainty about the clarity and consistency of its approach to this definition and the appropriate response to be adopted to multiple boiler installations:

- In April 2012 Pharoah Le Feuvre, an assistant manager in the RHI team in Ofgem, discussing a multiple installation question, stated:

“Yes they form part of the same heating system. Although it appears there is not [sic] set definition for this.”²⁴⁶¹

- In May 2012 Ofgem wrote to AECOM with a request for technical consultancy on this and other issues and stated:

“Currently, a number of operational decisions involve the definition of a ‘heating system’. At present we do not have a consistent approach in dealing with applications where this definition comes into question.”²⁴⁶²

- In a response in June 2012 AECOM summarised their understanding of Ofgem’s concern that this term was ambiguous and was being interpreted inconsistently.²⁴⁶³
- The risk register for the RHI Fraud Prevention Strategy still contained reference to total installed capacity in September 2012.²⁴⁶⁴ However earlier in 2012 Ofgem had adopted its working definition of ‘heating system’ which had the effect of altering the accumulation approach that had been recorded in the Ofgem risk and fraud documentation referred to above. It did not tell DETI of the working definition it had adopted, nor any of the potentially unwanted consequences that could flow from it (some of which had been the subject of warnings in the Ofgem 2011 Legal Review, albeit in the context of the absence of any definition of ‘heating system’).

48.15 As RHI Senior Technical Manager from early 2013, Dr Ward was a key figure in Ofgem with regard to technical questions in respect of the GB and NI RHI schemes. In his written evidence to the Inquiry he confirmed that his role included making final decisions on RHI scheme applications, including those for the NI RHI scheme.²⁴⁶⁵ In his oral evidence to the Inquiry he related how Ofgem approached its interpretation of the meaning of heating system:

“...in the absence of a definition of heating system in the regulations, we have ultimately adopted what...a heating engineer or a man on the street might consider...constitutes a heating system. ...what would a plumber say? Where

2459 WIT-95410

2460 WIT-95411

2461 OFG-218493. Any claim for legal privilege in the text of the document OFG-218493 quoted in this report, or any claim for legal privilege in the copy document from which the quote is taken (and which is published by the Inquiry along with this Report), is waived by Ofgem purely for the purposes of the Inquiry, but not otherwise. In addition, it is not intended that any confidentiality or legal privilege in any other related material is waived as a result of the limited waiver in respect of the subject material.

2462 OFG-260460

2463 WIT-114584

2464 OFG-134921

2465 WIT-114045

is the heating systems? [sic] Well, it’s whatever pipework is connected to that boiler. That’s what forms part of the heating system. So this concept of physical connection or hydraulic connection is one which...forms the...core of Ofgem’s... interpretation of the regulations.”²⁴⁶⁶

48.16 The Inquiry notes that Dr Ward used both the concept of hydraulic and physical connection in the context of Ofgem’s working definition of heating system, but the approach applied in practice related only to hydraulic connection.

48.17 It appears that the approach being taken was not regarded as satisfactory by Ricardo/AEA, the company carrying out the RHI installation audits for Ofgem. As referred to previously, in November 2013, in Ricardo/AEA’s audit themes presentation to Ofgem, it explained what it described as “a number of unintended developments”²⁴⁶⁷ that it had encountered in respect of multiple installations under the GB RHI scheme. Ricardo/AEA stated that what it found represented a “significant financial cost to the programme in terms of RHI payments”. It then went on to recommend that:

“- The definition of site boundary should be changed. Multiple installations on one site/property should be regarded as a single RHI installation. Applicant retains flexibility of multiple or individual boiler, total capacity of boilers sets tariff payment levels.

- Defining site boundary would negate the need to define a heating system in further detail, i.e. to amend regulations for hydraulically separated systems in Hereford case. This would be regarded as one installation as it is on the same site.”

48.18 The Inquiry notes that the Ricardo/AEA 2013 recommendation was actually how DECC’s original draft GB RHI regulations from 2011 had approached this issue, and that it was on Ofgem’s advice that the use of “site” was changed. The Inquiry did not see any evidence as to what Ofgem did in response to Ricardo/AEA’s recommendation. There is no evidence DETI was informed about it, nor about why Ricardo/AEA had made such a recommendation.

48.19 The Inquiry also saw evidence of emerging concern and uncertainty within Ofgem itself about the working definition as evidence of exploitation mounted. During the latter part of 2014, some staff within Ofgem tried to put forward an interpretation of ‘heating system’ to deal with the exploitation of which they were now aware. The approach put forward was, in effect, the same approach indicated in the earlier 2012 Ofgem risk and fraud documentation described above. For example:

- In April 2014, in an internal Ofgem email exchange about the definition of a heating system, Atika Ashraf stated:

“Ofgem currently have an informal definition of a heating system. This is not detailed in our guidance but means when accrediting an installation it is the hydraulic heating system which defines the boundary of the installation.”²⁴⁶⁸

2466 TRA-09006 to TRA-09007

2467 OFG-87882

2468 OFG-260163

- In October 2014 a “layman’s type guide...based on the RO interpretation” was suggested in an internal Ofgem email exchange between Joseph Grice and Dr Ward.²⁴⁶⁹ This went on to say that:

“If heat generating equipment is located on the same premises and provides space heating to the same volume of space or water then we would deem this to be one plant, even if the systems are not hydraulically linked.”²⁴⁷⁰
- Later in October 2014 a paper was prepared by Ofgem’s Valerio Pelizzi on the subject of the “Definition of one Heating System”.²⁴⁷¹ This outlined the issues and recorded that:

“Basically they [participants] split the existing heating system into two different hydraulically separated systems, even if these two applications are related to the “same” eligible use, i.e. both the heating systems feed the same poultry shed; this behaviour is allowed because it is not against the current Regulations Those behaviours seem to be a clear example of gaming the scheme, made to increase the periodic support payments but the legal team stopped us to chase those participants because we have no [sic] enough power to investigate and stop those requests and there is no specific Regulation that can support us against them.”²⁴⁷²
- In November 2014 the inconsistency between the new recommendations and the existing approach was discussed in an internal email exchange between Katy Read, senior policy manager at Ofgem from 2014,²⁴⁷³ and Dr Ward. On 10 November Dr Ward wrote:

“An eligible biomass boiler feeding a water/air direct heat exchanger. This supplies a space which also has a wet heating system fed from a second independent biomass boiler. One plant-both systems feed a common space.”

48.20 Ms Read responded by observing that it seemed to go against what Ofgem had been saying about “...two different combustion units via separate pipework NOT making it one plant,” and it was decided to “stick with the previous line for now.”²⁴⁷⁴

- The Ofgem note prepared for a teleconference call with DETI officials on 27 January 2015 included, with reference to regulation 14 (1) of the GB RHI regulations:

“On the GB scheme Ofgem allows applicants to apply separately for installations which are hydraulically separate from each other, even if they generate heat for the same heat use (e.g. heat the same building/premises). This risks applicants abusing the system by deliberately installing two or more smaller boilers which are hydraulically separate, instead of installing a larger boiler which would potentially be more efficient but would be accredited on a lower tariff.”²⁴⁷⁵

2469 OFG-260760

2470 OFG-260762

2471 OFG-260761 to OFG-260766

2472 OFG-260764

2473 OFG-260790 to OFG-260792

2474 OFG-260789

2475 OFG-31160

- 48.21 In the course of making a note of the contents of the call Mr Hughes of DETI recorded “‘More than one boiler’, working definition needed.”²⁴⁷⁶
- 48.22 Even in 2019, there still appeared to be open questions about what is meant by the term ‘heating system’. In its written statement to the Inquiry of 29 March 2019, Ofgem stated that the NI RHI regulations which it had to interpret were not internally consistent in terms of the interaction between a heat generating installation and a heating system. Due to the inconsistencies throughout the regulations as to whether a heat generating installation was part of, or discrete from, a heating system, Ofgem’s interpretation of ‘heating system’ had to be capable of accommodating both approaches.²⁴⁷⁷

Definitions in guidance

- 48.23 Despite the Ofgem warning against clarifying the term in guidance, the formal ‘NI RHI Guidance Document, Volume 1: Eligibility and How to Apply from November 2012’, produced by Ofgem for the NI RHI scheme,²⁴⁷⁸ provided direction regarding multiple plant.
- 48.24 This guidance appeared to be focused upon administration issues, such as how many applications to make. For instance, in the section of the guidance entitled “How to apply when you have multiple plants” the document states at paragraph 2.27:

“Applicants should apply only once for each installation for which they wish to claim NIRHI support. If you have multiple plants, then you need to know whether these need to be applied for separately or if they should be considered together as a single installation.”²⁴⁷⁹

- 48.25 And further at paragraph 2.28:

“As provided in the Regulations, an installation can consist only of one plant unless two or more plants making up an installation meet the following criteria:

- o the component plant meets the eligibility criteria
- o the plants use the same source of energy and technology (e.g. ground source heat pump)
- o the plants form part of a common heating system, and
- o none of the plants has already been accredited as an NIRHI installation.

In these cases, two or more component plants will be regarded as a single plant for NIRHI purposes if, in addition, the eligibility criteria referred to in the Regulations are also satisfied and you should make one application for that single plant.”²⁴⁸⁰

2476 IND-04414

2477 WIT-95410

2478 INQ-30020 to INQ-30182

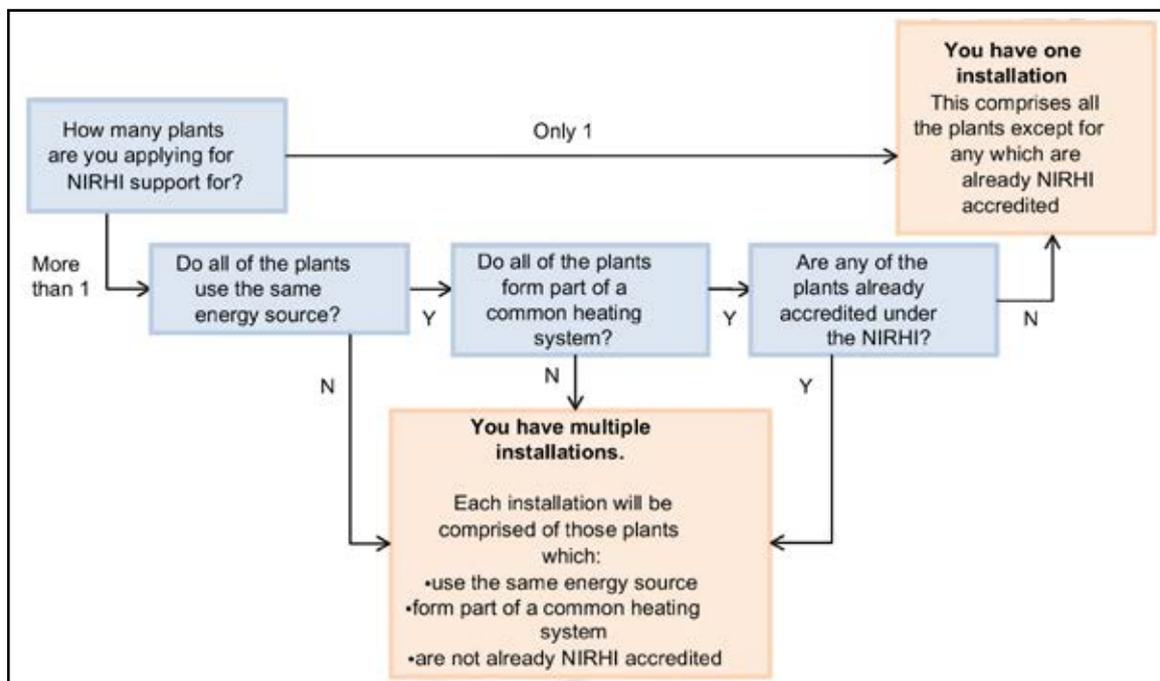
2479 INQ-30036

2480 INQ-30036

48.26 An explanatory flowchart, set out in Figure 3 of the guidance, is also included:

Figure 5 – NI RHI Guidance Document on Multiple Plant Application

Figure 3: Do I need to submit a single application for NIRHI support or multiple applications?



48.27 In paragraph 2.32 there is a reference to the combined installation capacity, but in relation to eligibility criteria like metering arrangements.²⁴⁸¹

48.28 The Inquiry concludes from this that the guidance is primarily concerned with how many applications were needed. There is no mention of how the tariff for multiple installations would be determined.

Ofgem’s consideration of its interpretation

48.29 Ofgem stated in written evidence to the Inquiry that:

“In this context, the interpretation of what ‘a plant’ means in paragraph (1) [of regulation 14] is key. To date it has been interpreted by Ofgem as meaning an installation which is the subject of an application for accreditation.”²⁴⁸²

48.30 This suggests that whatever the application happened to cover was the basis used by Ofgem in determining the eligibility of the application. It appears to the Inquiry that Ofgem therefore only considered regulation 14 when it received a specific application with explicit reference to multiple units.²⁴⁸³

48.31 In April 2012 an internal Ofgem email exchange took place between Marcus Porter, Lindsay Goater and Pharoah Le Feuvre in which consideration was given to the interpretation of

2481 INQ-30037

2482 WIT-95415

2483 WIT-95414 to WIT-95417

regulation 14 in the context of an application for a multiple plant installation to be included in the GB RHI scheme.²⁴⁸⁴ In this exchange the primary concerns appeared again to be administrative.

48.32 Ofgem lawyer Marcus Porter suggested that if there was a problem with a single application for multiple plant:

“Following considerable discussion of the matter last Autumn (including with DECC) it was concluded that it should still be permissible in this situation to make separate applications for accreditation in respect of the individual component plants.”²⁴⁸⁵

48.33 In the given example, concerned with three component heating plants, Lindsay Goater, an Ofgem E-Serve RHI manager, stated:

“There are several administrative hurdles to the treatment of them as 3 HPs, which I appreciate do not allow any violation of the law! They will have the same address, which the IT system does not allow, and we have 3 times the work, almost (1 lot of thinking!).”²⁴⁸⁶

48.34 He went on to suggest that if the individual plants were to receive a higher tariff than the combined one “a further implication *could* be over-compensation” (Mr Goater’s emphasis). He thought that this was “arguably not the policy intent” and that “**Reg. 14 is there in fact to group such plants.**”²⁴⁸⁷ (Mr Goater’s emphasis)

48.35 Marcus Porter responded that:

“This is a really difficult situation and it makes plain that Reg. 14 arguably does not achieve DECC’s declared intention for it (to prevent the gaming of the tariff structure) or at any rate doesn’t do so in clear terms.”

48.36 Marcus Porter accepted that the objective of DECC was to try to avoid gaming of the tariff structure but he repeated that if, due to the application of both the requirements of regulation 14, a single application made up of other plants failed, then separate applications would be necessary and that might, in some cases, result in a higher tariff being payable. He added:

“This does not seem in keeping with the apparent policy objective and for this reason DECC may wish to review the provision at the earliest opportunity with a view to amending it in a suitable fashion.”²⁴⁸⁸

48.37 The Inquiry notes that no consideration was given to informing DETI, at a time some six months prior to the coming into force of the NI RHI regulations, of the fact Ofgem was dealing with a concrete example on the GB RHI scheme which provided evidence as to why there was a crucial need to consider properly and resolve the multiple plant issue.

48.38 As discussed above, in May 2012, Ofgem consulted AECOM on a technical definition of ‘heating system’. However, this was in relation to issues of metering regarding regulations 16 and 17

2484 OFG-218489 to OFG-218493. Any claim for legal privilege in the text of the document OFG-218489 to OFG-218493 quoted in this report, or any claim for legal privilege in the copy document from which the quote is taken (and which is published by the Inquiry along with this Report), is waived by Ofgem purely for the purposes of the Inquiry, but not otherwise. In addition, it is not intended that any confidentiality or legal privilege in any other related material is waived as a result of the limited waiver in respect of the subject material.

2485 OFG-218492 (See footnote 2484)

2486 OFG-218490 (See footnote 2484)

2487 OFG-218490 (See footnote 2484)

2488 OFG-218489 (See footnote 2484)

and not accreditation or tariff determination under regulation 14.²⁴⁸⁹ The definition of a heating system that emerged from this process was:

- The heating system comprises all heat sources, equipment, distribution systems and heat uses necessary for the safe and controlled generation and delivery of heat from the heat sources to the heat uses.
- Heating plants/installations, heat uses or heat distribution are considered part of the same heating system whenever there is a physical connection linking them to the system.²⁴⁹⁰

48.39 The Inquiry notes that Ofgem’s approach, based only on whether there was “hydraulic” connection rather than “physical” connection, had the effect of allowing many more boilers to accredit as single installations than would have been the case under the AECOM definition, had it been adopted. However, Ofgem has not produced any material to the Inquiry to establish that any technical or legal consideration was given internally to the AECOM report²⁴⁹¹ when it was received, nor any material to show how its working definition came to be adopted. Of even greater import in the present context was the fact that this process, and the definition that resulted from it, was being conducted by Ofgem without any recourse to DETI. Indeed, DETI was not provided with the AECOM report about ‘heating system’ until this Inquiry was conducting its investigations.

48.40 Ofgem could not provide evidence that any alternative technical or legal consideration had been given to its own interpretation and application of regulation 14 in connection with heating systems until July 2017, a year and a half after the NI RHI scheme had been closed to new applicants.²⁴⁹²

Evidence of problems with multiple boilers

48.41 The Inquiry considered many examples of the problems caused by multiple boiler accreditations which Ofgem’s November 2011 Legal Review had foretold for the NI RHI scheme. This included the November 2013 presentation from Ricardo/AEA, Ofgem’s audit sub-contractor, from its experience of audits of the GB RHI scheme.²⁴⁹³ In its presentation Ricardo/AEA highlighted:

- Hydraulically separate multiple boilers are heating the same space.²⁴⁹⁴
- Systems are designed to maximise RHI benefits that would not have been designed this way without the RHI.²⁴⁹⁵
- Multiple installations represent a significant financial cost to the programme.²⁴⁹⁶
- Multiple installations on one site should be regarded as a single installation.²⁴⁹⁷

48.42 As mentioned previously in this Report, Ofgem did not provide DETI with that presentation, or even a summary of the issues arising from it. However, the problem was not just being brought

2489 WIT-95402

2490 WIT-114584 to WIT-114596

2491 WIT-95409

2492 WIT-95415

2493 OFG-87862 to OFG-87887

2494 OFG-87874

2495 OFG-87882

2496 OFG-87882

2497 OFG-87882

to Ofgem’s attention through the GB RHI scheme. In an email to Dr Ward dated 15 August 2013 Alastair Nicol, a consultant working for Invest NI (and whose concerns about the operation of the NI RHI scheme were expressed in his reports for Invest NI and its client businesses, which have been dealt with earlier in this Report), stated:

“I seek urgent advice on the interpretation of the RHI as applied in Northern Ireland. We work for a quasi-Governmental Organisation in Northern Ireland and in one particular project they are adamant a multiple boiler solution may be used to maximise RHI benefits. This is at odds with my reading and understanding but perhaps you or Jacqui could consider and clarify. The situation is probably best summarised by the three cases below - I’ve exaggerated the values to illustrate the case clearly. The question is one of aggregation. Would you be kind enough to advise.”²⁴⁹⁸

48.43 Details of the three cases were provided. This communication seems to have generated an internal discussion in Ofgem, with Dr Ward then confirming to Mr Nichol that what was proposed was acceptable.

48.44 In February 2014, after attending an industry event in GB, Jacqueline Balian of Ofgem, who was then in charge of RHI operations, told DECC that:

“However, one thing that you need to be aware of is the amount of noise about the multiple...boiler issue. Many of those present mentioned it, one saying ‘I know quite a few people in our local farming community who are saying they’re giving up sheep and just raking in the money from the RHI.’ Others saying that they are being asked all the time about putting in multiple installations and that reasons for fitting multi biomass boilers are being sought far and wide. One or two ask if this can possibly be right and saying that they don’t agree with it but all their clients are asking for it. Others asking how long they have before the loophole is closed...”²⁴⁹⁹

48.45 In July 2014 a director of an English private company involved in the sale of heating systems had emailed Ofgem saying that:

“I am growing increasingly frustrated by the obvious oversizing of boilers we hear about on a regular basis, with 199kW boilers apparently being installed by some Companies as though there is no other size of boiler available...

1 – As a taxpayer I object to seeing tax revenues wasted

2 – It is incredibly frustrating to see an excellent incentive scheme which is designed to help reduce greenhouse gases being misused and consumers actively encouraged to generate heat that serves no useful purpose purely in order to generate RHI income

3 – Every £ of the RHI budget that is wasted in this way is a £ less to be spent on genuine installations, and means we hit depression far faster than we would otherwise.”²⁵⁰⁰

48.46 In November 2014 feedback from an agricultural conference in Scotland, which was again attended by Ms Balian, included information that returns were so high that farmers were

2498 OFG-164264 to OFG-164266

2499 OFG-260635

2500 OFG-260645

planning installations without an existing or planned heat requirement. Another farmer had sold his herd of cows in order to prepare his sheds for RHI installations without having decided what the heat produced would be used for, and farmers were generating heat for drying until they had used up their tier one allowance when the boiler would be turned off and other technologies that appeared very energy inefficient were turned on.²⁵⁰¹

48.47 In order to illustrate the scale of the problem the Inquiry has included a real-life example. The picture below²⁵⁰² is of eight 199kW boilers installed in a single building. It was sent to Ofgem by DECC in December 2014. DECC had received it from a private sector energy company. It was described by DECC as providing “an interesting case study from the poultry sector” in GB.²⁵⁰³

48.48 To the Inquiry, and no doubt to most people, it looks like a single energy centre or single heating system. The reader might reasonably have assumed that the accumulated output value of the eight boilers would be used to determine the RHI tariff to which the owner was entitled. Instead, the pipework had been configured without hydraulic connection between the various boilers in order to facilitate accreditation on the GB RHI scheme as eight individual installations. Each accredited boiler attracts the higher tariff, as compared to the tariff to which the owner would have been entitled had the boilers been treated as one single heating system.

Figure 6 – A Multiple Boiler Installation



2501 OFG-261209

2502 OFG-260198

2503 OFG-260197

- 48.49 Ofgem’s approach, as with this example, was to accept a series of separate applications and accredit each individual boiler rather than accumulating their capacity. The result was, and is, that each individual boiler was able to access the highest tariff, requiring approximately four times the subsidy than would have been payable if the tariff had been based on accumulated capacity (whether or not such a system ought to merit any tariff from public funds is another matter). For example, the total capacity of the plant in the illustration was 1,592kW, in excess of the 1,000kW banding threshold. In GB, on an accumulated basis, this would only have received a subsidy of 2.25p/kWh, rather than 9.92p/kWh on the basis of individual boilers (at 2019-20 tariff rates).
- 48.50 It is not within the Inquiry’s terms of reference to make findings in relation to the GB non-domestic RHI scheme or Ofgem’s management of that scheme. However, it is apparent from the evidence that, as far back as 2012, information was available within Ofgem on the use of multiple boilers in the GB RHI scheme that suggested that the risks identified in Ofgem’s earlier warnings to DETI were materialising. In addition, by 2014 that information was reinforced by what some Ofgem staff were hearing at conferences and by the emergence of individual case studies. It is clear that during 2014 Ofgem had received emails from industry relating to instances of oversizing and wasting heat for higher payments.²⁵⁰⁴ None of this material was shared with DETI, thus depriving it of an opportunity to act sooner to clamp down on exploitation of the NI RHI scheme by multiple boiler usage.
- 48.51 As mentioned previously, Ms Katy Read was a senior policy manager with Ofgem. According to Dr Ward she was responsible for Ofgem’s engagement on regulation changes and how such changes would be administered.²⁵⁰⁵ When she was enrolled as a part-time student at Birkbeck College, University of London, she conducted a number of interviews with installers in preparation for a paper entitled ‘The Non-Domestic Renewable Heat Incentive; The Roles and Perspectives of Installers’.²⁵⁰⁶ She presented that paper as an academic dissertation for her MSc in Climate Change Management in September 2014. The interviews with installers had been conducted in the spring of 2014. The majority of interviewees (12 in total) brought up the practice of oversizing biomass boilers in order for customers to earn a higher GB RHI income. In her subsequent paper of January 2015, ‘Gaming – Wasting Heat’,²⁵⁰⁷ Ms Read noted that there had been a general view that projects were being “designed around the RHI to maximise their revenue essentially rather than it being designed to meet the demand on the site”.²⁵⁰⁸
- 48.52 Valerio Pelizzi, another member of the Ofgem team, produced a paper in December 2014 entitled ‘Gaming Multiple Heating Systems’²⁵⁰⁹ in which the risk of overcompensation on the GB RHI scheme, by running boilers up to the 1,314 working hours at full capacity for Tier 1 and then switching to another boiler, was recognised. The examples of a poultry shed and grain drying were analysed in order to illustrate the potential for excessive payments. Later in the same paper Mr Pelizzi estimated the potential financial overpayment of permitting separate applications in respect of 436 poultry sheds to be in the region of £92 million over 20 years

2504 OFG-260772

2505 TRA-09097

2506 WIT-114709 to WIT-114784

2507 WIT-114696 to WIT-114708

2508 WIT-114703

2509 OFG-260805 to OFG-260807; WIT-114693

under the GB scheme. As noted previously, Mr Pelizzi had provided a summary document in October 2014 which recorded that:

“If heat generating equipment is located on the same premises and provides space heating to the same volume of space or water then we would deem this to be one plant even if the systems are not hydraulically linked. Any equipment which meets the criteria set out in regulation 14 and shares common primary or secondary pipework would be deemed as one plant.”²⁵¹⁰

48.53 Ms Read’s paper entitled ‘Gaming – Wasting Heat’, was circulated internally to Ofgem staff, including Dr Ward, on 6 January 2015. It related to different forms of gaming thought to be occurring in the non-domestic GB RHI scheme. According to Dr Ward the core of Ms Read’s January 2015 paper was drawn from the earlier December 2014 paper from Mr Pelizzi. Mr Pelizzi’s work was referred to at page 5 of Ms Read’s paper for further analysis of the cost implications of multiple smaller boilers on separate heating systems.²⁵¹¹

48.54 Ms Read’s 2015 paper was to be furnished to DECC and commenced with the following background:

“OFGEM are aware of scenarios where participants may be gaming the non-domestic RHI by wasting heat in order to increase their RHI payments. Some of these have been discussed with our legal team and with DECC on previous occasions, but without a clear view on how to proceed with dealing with these issues. Since the scale of these issues is likely to increase over time and external attention appears to be growing, the associated risks are becoming more significant.”²⁵¹²

48.55 Examples of wasting heat included designing the installation in such a way that RHI payments were maximised either by the installation of an incorrectly sized boiler/boilers or a heat use created because of the existence of the RHI payments or simply wasting heat following accreditation to the RHI, through actions such as designing particularly inefficient processes, venting more than necessary, opening doors and windows etc. In the context of the GB RHI scheme, upon which the analysis was based, the paper recorded:

“Heating systems may be split up in order to have multiple smaller boilers on separate heating systems instead of one large boiler, in order to meet the heat demand of the site... If so, this presents bad value to the tax payer. It may also mean that the overall efficiency is lower, reducing the amount of carbon savings. The separate analysis of split heating systems with 199kW boilers shows that the wasted heat could be worth around £211,469.00 over the lifetime of the scheme per accreditation. We think there are roughly 60 examples of this so far for poultry sheds alone, so the total overpayment would be £12,688,113.00.”²⁵¹³

48.56 The paper revealed that in October 2014 Ofgem had been advised by a heat pump installer that installations were being oversized with the aim of increasing Tier 1 payments on the GB RHI scheme. This was not new information for Ofgem. The paper also indicated that Ofgem was aware of the November 2014 article in the *Daily Mirror* newspaper, referred to previously

2510 OFG-260762

2511 WIT-114700

2512 WIT-114696

2513 WIT-114700

in this Report, which said that the GB RHI scheme was facilitating the rich to enjoy free fuel and taxpayers’ millions through the use of multiple boilers. Under the heading “Conclusion” Ms Read highlighted the following:

- “There is potentially a significant amount of heat waste occurring on the RHI.
- The Regulations do not allow OFGEM to address these issues as described in the paper.
- The example provided appeared to go against the intent of Regulation 34 (p) [Regulation 33 (p) in the NI Regulations] and the overarching intent of UK energy policy to reduce carbon emissions by replacing fossil fuel use with renewable energy.
- There are risks to Ofgem and DECC as there is growing attention on the potential payment of taxpayer funds to people wasting heat and there may be the perspective that nothing is being done to address this. This also presents a risk to the achievement of carbon savings.”²⁵¹⁴

48.57 It seems that it did not occur to anyone in Ofgem who was familiar with Ms Read’s January 2015 paper to furnish a copy of that paper to DETI. Dr Ward told the Inquiry that the paper had been shared with DECC and that he had discussed the conclusions expressed in Ms Read’s papers with Mr Wightman and Mr Hughes in a meeting in January 2015. He also said that a summary of the paper was shared with DETI by Ms Read later in 2015.²⁵¹⁵ However, it does not appear that any part of the papers themselves was made available to DETI; instead, in response to an enquiry from Mr Hughes about interpretation in respect of multiple boilers, Ms Read supplied him with an extract from the conclusions of her January paper.²⁵¹⁶

Impact and cost of allowing multiple boilers

48.58 Ofgem accepted in its closing written submission to the Inquiry that its interpretation of ‘heating system’ permitted gaming of the regulations, although it qualified that acceptance by stating that it had no choice but to comply with the regulations.²⁵¹⁷ This resulted in the design and operation of installations that would not have been so configured in the absence of the RHI scheme. The approach undermined both banding and tiering, with a considerable number of users under or over-sizing boilers to maximise the tariff that they could access.

48.59 Almost two-thirds of all biomass accreditations in Northern Ireland across the life of the non-domestic RHI scheme were in respect of installations that form part of multiple boiler configurations.²⁵¹⁸ Furthermore, in the financial years 2016-17 and 2017-18 almost three-quarters of all payments made in respect of biomass installations were in respect of those that form part of multiple boiler configurations.²⁵¹⁹

48.60 Until the introduction of tiered tariffs and amended banding in November 2015, three-quarters of all boilers were also exactly 99kW in capacity. However the fundamental problem of multiple boilers was not resolved in November 2015. After the changes in November 2015, which included the introduction of tiering and extending the upper capacity of boilers eligible for the medium band to 199kW, the Inquiry found very clear evidence of how a new set of design and

2514 WIT-114707

2515 TRA-09103

2516 DFE-310157

2517 SUB-01005

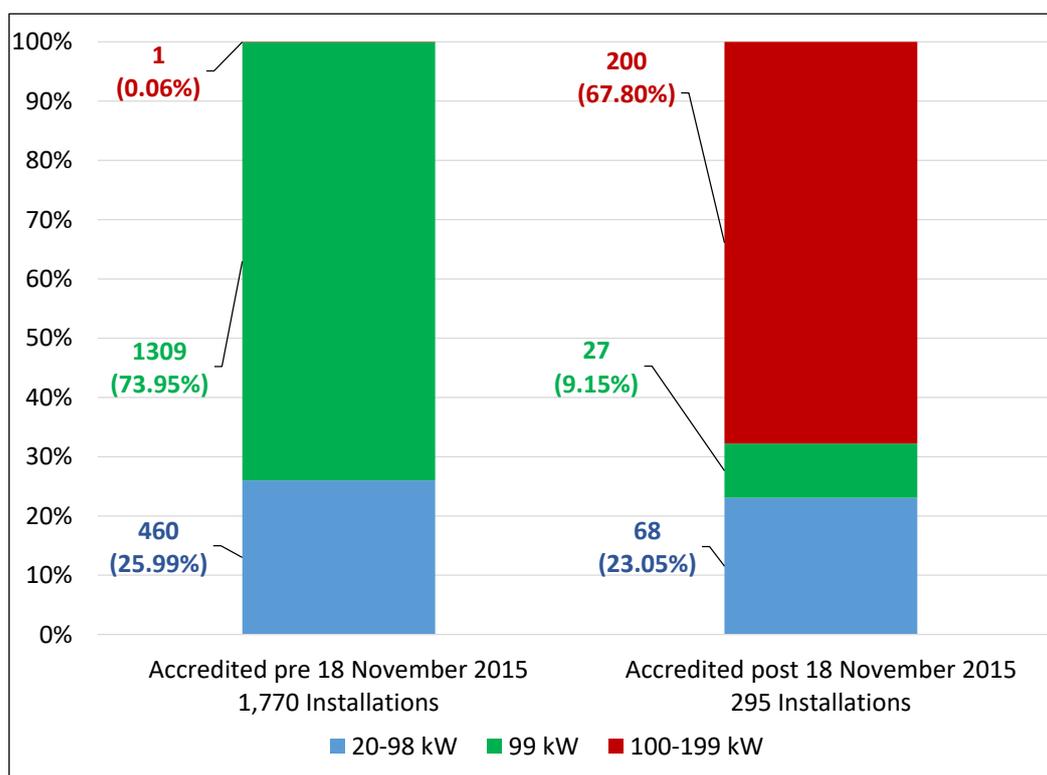
2518 OFG-137208

2519 OFG-137205; OFG-137208

operation characteristics developed by still using multiple boilers. Figure 7 below, provided to the Inquiry by DfE, shows the impact the November 2015 changes had on installation patterns and demonstrates a switch away from the previously ubiquitous 99kW boilers to much larger ones, many at or near the new medium biomass upper limit of 199kW.²⁵²⁰

Figure 7 – Comparison of Installation Patterns

Comparison of Installation Patterns of 20-199kW Solid Biomass Boilers Accredited Pre and Post 18 November 2015



48.61 As the above figure illustrates, post-November 2015, the share of the market for 99kW boilers fell to less than 10% within three months (it had previously been in excess of 70%).

48.62 As a consequence of the introduction of tiering in November 2015, which limited the higher Tier 1 tariffs in the small and medium biomass bands to the first 15% of renewable heat produced, the previously high average annual load factor of biomass boilers dropped from about 45% to almost exactly 15%. However, users continued to benefit from Ofgem’s approach to multiple boilers by installing multiple larger units which could produce the same amount of renewable heat at much lower load factors but continue to attract the highest tariff payments. As a result, and despite DETI’s expectations, the average tariff paid out to users after the changes only reduced by 6%.²⁵²¹

48.63 In its evidence to the Inquiry CEPA estimated that avoiding the problems with multiple boilers could have saved about half of the projected lifetime cost of the scheme.²⁵²²

2520 DFE-467804

2521 DFE-467803

2522 WIT-107931

48.64 Based on the NIAO Report, produced by the Comptroller and Auditor General for Northern Ireland, on DfE’s Resource Accounts for 2018-19,²⁵²³ the Inquiry notes that by 2016-17 annual RHI scheme costs were running at £42 million – equivalent to roughly £840 million over a 20-year period. About two-thirds of these payments were, and are, being made in respect of multiple boiler installations - equivalent to about £560 million over 20 years. The following table, produced by the Inquiry based on figures supplied by the NIAO, shows the potential savings that could have resulted from paying the large biomass tariff of 1.5p/kWh (if multiple boilers had been accumulated), rather than the higher medium biomass tariff of 6.0p/kWh (for each separate boiler), based on a given proportion of the multiple boilers.

Table 5 – Potential Savings

Proportion of multiple ‘ineligible’ boilers on lower tariff	A = Cost of lower tariff	B = Cost of higher tariff	Potential savings £560m – A – B
100%	£140m	£0m	£420m
75%	£105m	£140m	£315m
50%	£70m	£280m	£210m
25%	£35m	£420m	£105m

48.65 Therefore, prior to further corrective measures since taken by DfE to reduce costs, the impact of Ofgem’s interpretation of multiple boilers has been to increase the lifetime costs of the scheme by a sum that, subject to the caveat below, the Inquiry estimates to be measurable in the hundreds of millions of pounds.

48.66 The Inquiry heard representations which suggested that some multiple boiler users had valid reasons for their design and were not exploiting the scheme. It is important to record that the Inquiry accepts that this is likely to be the case in some instances, but, even if there was a good technical reason for some multiple rather than single installations, the Inquiry questions whether compensation of these larger users who had economies of scale and chose such a design for their own further benefit should have been paid at the highest rate out of public expenditure.

DETI’s understanding of the interpretation

48.67 Ofgem claimed that the approach to multiple boilers which it had adopted was based upon DETI’s policy intent as reflected in the 2012 NI RHI regulations. DETI was not to become properly aware of Ofgem’s approach until December 2014 or January 2015 when a meeting was called between Ofgem and DETI to discuss the matter.

- 48.68 Mr Hutchinson of DETI told the Inquiry that his original belief was that if two or more boilers were used to heat the same building/space their capacities should be viewed as cumulative for the purpose of assessing the appropriate tariff.²⁵²⁴ In his written evidence to the Inquiry he stated that he believed that he derived that understanding from discussions with Ofgem officials during consultations on the DETI/Ofgem RHI guidance documents in 2012, and he gave that advice in response to enquiries from applicants with the caveat that Ofgem was the final arbiter of accreditation.
- 48.69 Mr Hutchinson told the Inquiry in written evidence that if he, or other colleagues in Energy Division’s Renewable Heat Branch, had been informed of the relevant working definition adopted by Ofgem, DETI would have advised that it did not appear to be consistent with the policy intent of the NI RHI scheme. He said DETI would have sought an explanation from Ofgem as to how the definition had arisen, and the potential implications for the scheme, and required an assessment of the potential financial impact. If necessary, legislative amendments might have been discussed.²⁵²⁵
- 48.70 In his oral evidence to the Inquiry Mr Hutchinson accepted that his understanding was different from Ofgem’s approach in practice and it was possible that he had not fully understood the term “hydraulically separate”, and that in the circumstances his understanding in 2012 was wrong. He acknowledged that Ofgem had given a warning about the need to have a clear definition of ‘heating system’ in the 2011 Legal Review of the regulations.²⁵²⁶
- 48.71 As noted earlier in this Report, in December 2014 Mr Hughes received an enquiry from David Hamilton, a potential applicant, relating to the appropriate tariff for five hydraulically separate 99kW boilers heating a common airspace. Mr Hughes responded that it was really a matter for Ofgem which administered the scheme. However, Mr Hughes did indicate “What I can say, however, is that RHI tariff would be based on the total heat requirement in this instance 500kW...”.²⁵²⁷
- 48.72 Mr Hughes said that he would raise the matter with Ofgem. The issue was discussed during the course of a teleconference with Ofgem on 27 January 2015. The note of the discussion made by Mr Hughes confirmed that he was told that the working technical definition of a heating system in GB was that boilers had to be hydraulically connected to form a single system and there was no specific definition in NI.²⁵²⁸ He was unhappy with Ofgem’s interpretation, stating that “this was never the policy intent” and he and his colleagues then attempted, unsuccessfully, to agree the necessary changes to the regulations and/or their interpretation with Ofgem.²⁵²⁹
- 48.73 In Ofgem’s communication setting up the conference call on 27 January 2015 it confirmed that its approach to multiple boilers risked applicants “abusing the system”.²⁵³⁰

2524 WIT-09313

2525 WIT-09312 to WIT-09315

2526 TRA-04862 to TRA-04867

2527 DFE-106803 to DFE-106810

2528 DFE-385810

2529 DFE-120640

2530 OFG-31155 to OFG-31161

Findings

261. The Inquiry concludes that DETI’s policy intent was for the RHI to provide an incentive, not to reward. This was explicit in paragraph 3.24 of the July 2011 DETI consultation document.²⁵³¹
262. As part of the intention to incentivise and not reward, DETI’s policy intent for multiple installations, as reflected in paragraph 3.26 of its 2011 RHI consultation document,²⁵³² was to avoid a number of smaller installations being installed to provide heat for one heat source in order to avail of higher tariff levels. This was to be achieved by multiple installations being regarded as one heating system with the accumulated capacities of the various installations determining the payable tariff.
263. In November 2011 Ofgem had warned of the need to define properly the term ‘heating system’ in the NI RHI regulations as there was a risk, without a proper definition, that, amongst other things, some participants may install multiple smaller units in order to avail of higher tariff. Ofgem also said it was not acceptable for the term to be clarified in guidance.
264. DETI did not take Ofgem’s advice, repeating a similar course taken by DECC, and the NI RHI regulations were introduced with no definition of ‘heating system’. The regulations should not have been introduced without a proper definition of the term ‘heating system’, if this was to be the means to achieve the policy intent relating to multiple installations as set out in July 2011.
265. The policy intent expressed in the 2011 consultation document was not adequately reflected in the form in which the 2012 regulations were drafted and implemented.
266. During 2012 Ofgem adopted a working interpretation of ‘heating system’ based on the concept of ‘hydraulic separation’. The effect of that interpretation, however unintended, was to facilitate (as Ofgem said itself in the context of the 2015 teleconference) abuse of the RHI scheme. It did so without recourse to DETI; it should not have done.
267. Ofgem should have told DETI in 2012 of the interpretation Ofgem was adopting, as soon as it adopted it. Ofgem should also have told DETI of the potential consequences of the interpretation that Ofgem was adopting.
268. Ofgem should have told DETI each time Ofgem became aware of an actual instance of Ofgem’s ‘heating system’ interpretation facilitating the introduction of multiple boilers, thereby exploiting the tariffs.
269. Ofgem should have provided DETI with the findings of Ricardo/AEA as set out in its November 2013 presentation, and drawn DETI’s specific attention to the fact that, in respect of multiple installations, Ricardo/AEA had found unintended developments that represented a significant financial cost to the RHI scheme. Ofgem should also have informed DETI of Ricardo/AEA’s recommendations as to how to deal with the problem it found in respect of multiple installations.

2531 DFE-29670

2532 DFE-29670

- 270. Ofgem should have provided DETI with the feedback that Ofgem was getting about the abuse of the RHI schemes through the installation of multiple boilers. The information should have been conveyed quickly to DETI as and when it was received by Ofgem.**
- 271. As Ofgem has acknowledged in its representations to the Inquiry, its interpretation of the term ‘heating system’ was a key contributing factor to the multiple boiler problem. Ofgem’s failure to communicate with DETI about that interpretation, and how it facilitated the fruition of the risk Ofgem had identified and warned DETI about in November 2011 (together with Ofgem’s failure to consider the potential consequences of that interpretation and its failure to share scheme data that demonstrated multiple boiler installations on the NI RHI scheme), deprived DETI of an opportunity to receive additional material. Such material would have supported the need to take appropriate steps to prevent the significant waste of public money that was occurring in the NI RHI scheme each time multiple installations were accredited by Ofgem without accumulation for tariff setting purposes, as well as to address the risk of overcompensation and potential breaches of State Aid. In these circumstances, and given the loss of this opportunity to DETI, the Inquiry is unable to accept Ofgem’s claim that there was no causal link between its failings and the NI RHI scheme overspend.²⁵³³**

Heat waste

The policy intent

48.74 The main reservation about revenue support mechanisms for heat is that there could be an incentive to produce the heat simply for the purpose of receiving the payments and to ‘open the windows’ to get rid of the excess heat, there being no ready means of transporting it to others or any market for it. The risk of this perverse incentive could arise at any time if the payments exceed the costs of producing heat. There is an added risk with heat systems that rely on fuel, as opposed to solar power, geothermal or air and ground-sourced heat, since the price of fuel may change at any time, potentially impacting on this perverse effect, even if initial tariffs are calculated correctly. Both DECC and DETI recognised these risks from the outset.

48.75 There was a clear policy intent by DETI to reward only the production of useful and efficient heat for eligible purposes and to avoid wasting heat or producing it simply to increase payments. This was embodied, at least to some degree, in the NI RHI regulations, especially 33(o) and (p) which set out the ongoing obligations of scheme users:

“(o) they must, if requested, provide evidence that the heat for which periodic support payments are made is used for an eligible purpose;

(p) they must not generate heat for the predominant purpose of increasing their periodic support payments.”²⁵³⁴

Evidence of exploitation

48.76 Many examples of installations not meeting the policy intent and/or involving exploitation were brought to Ofgem’s attention from within the GB RHI scheme.

48.77 An internal presentation to the Ofgem RHI Implementation Board on 9 July 2013 warned that Ofgem E-Serve might shortly have to approve a large heat pump on the GB RHI scheme being used to heat a recreational lake which would be “against DECC policy intent”. The presentation also recorded that Ofgem E-Serve would have to approve applications from a poultry farm arguably installing separate heating networks “in order to maximise RHI payments by exploiting the tiered tariff”.²⁵³⁵

48.78 In its November 2013 presentation, referred to earlier in this Report, Ofgem’s site audit subcontractor Ricardo/AEA, provided an overview of its experience of RHI auditing of installations on the GB scheme at that point and drew attention to “Challenging Audits” including an example of an installation using multiple hydraulically separate systems heating the same space to maximise RHI benefits. Ricardo/AEA saw this as an:

“Example of a participant reading the guidance documentation and identifying loopholes...this installation is an example of a system designed to maximise RHI benefits, [it] would not have been designed this way without RHI.”²⁵³⁶

48.79 That presentation also gave the examples of drying biomass to be used in RHI installations and claiming RHI on the heat used for drying, noting that these were some of a number of practices that represented a significant financial cost in terms of RHI payments. The presentation was also critical of the failure of the current regulations to provide a definition of “useful heat”.

2534 LEG-00018 to LEG-00019

2535 OFG-59175 to OFG-59176

2536 OFG-87874

- 48.80 Mr John, who from January 2014 led the Ofgem teams responsible for the operational delivery of the GB and NI non-domestic RHI schemes, was unable to say whether that Ricardo/AEA presentation had been supplied either to DECC or to DETI.²⁵³⁷ The Inquiry found no evidence that DETI was ever provided with a copy of the presentation. Despite the fact that the presentation took place at a relatively early stage in the operation of the NI RHI, it appears that such documents were not shared with DETI although Mr John could not think of any reason why that should have been the case. The Inquiry also notes that Mr John has told the Inquiry that he personally had no knowledge of ‘gaming’ issues in the GB RHI scheme until the middle of 2014,²⁵³⁸ when he became aware there was potentially: “like a looseness in the regulations or an opportunity for applicants/participants to enjoy a reasonable return.” However, he added that he had not seen any economic or policy analysis from which he could conclude that the return was unreasonable until much later.
- 48.81 Industry feedback about the GB RHI scheme emailed to the non-domestic RHI team in Ofgem in June 2014 recorded that “This topic keeps coming up, not least at Ofgem Industry Forums, where there has been much concern over the potential gaming on technologies which have a tiered tariff.”²⁵³⁹ The same email recorded that there did not appear to be anything stopping the installation of over-sized equipment in order to increase the allowable kWh before a reduced tier payment was invoked and referred to a potential “perverse incentive to waste heat”. The topic of gaming was included in the agenda for the Ofgem Industry Advisory Group meeting on 30 October 2014 as a discussion topic and there was discussion about oversizing boilers and wasting heat.²⁵⁴⁰
- 48.82 The November 2014 article in the *Daily Mirror*,²⁵⁴¹ referred to earlier, and referenced in Ms Read’s paper of January 2015, was followed by two similar articles in *The Guardian* in January 2015²⁵⁴² which covered the same subject matter. In the second *Guardian* article, the scheme was described as one that “encourages as much waste as possible” producing astonishing returns sometimes in the region of 20%, 30% and even 40%. These articles have been dealt with in further detail earlier in this Report.

Ofgem’s approach to scheme exploitation or ‘gaming’

- 48.83 It is important to emphasise that the Inquiry takes the view that the rather neutral term ‘gaming’ should not be permitted to detract from any activity that was clearly designed to exploit and maximise the financial profit from a scheme supported by public funds and conceived as being value for money.
- 48.84 On 19 January 2012, when discussions between Ofgem and DETI were at an early stage, Mr Cook, then Managing Director of Ofgem E-Serve, was sent an internal email from his deputy, Robert Hull, relating to the costs of administering the NI RHI scheme. The final sentence said:

“On strategy, a key value add which is not really mentioned is the benefit we provide in terms of fraud, error and gaming prevention and detection. This is of far greater value than any efficiency savings of us operating the scheme.”²⁵⁴³

2537 TRA-08967

2538 TRA-08869

2539 OFG-260793

2540 OFG-260767

2541 MED-05966 to MED-05970

2542 MED-05947 to MED-05951; MED-05956 to MED-05960

2543 OFG-03036

- 48.85 In the course of giving oral evidence to the Inquiry, Ofgem Chief Executive Dr Nolan accepted this January 2012 email, sent at a time before the NI RHI scheme came into existence, as indicating that the plan was for Ofgem E-Serve to add value in the area of reducing scheme exploitation.²⁵⁴⁴ Documents from as early as 2011 clearly showed Ofgem’s intention to deal with ‘gaming’. The Ofgem RHI Fraud Prevention Strategy from March 2011 stated at paragraph 3.2:
- “This Fraud Prevention Strategy has a wider scope than activities that fall within the strict definition of fraud. Gaming opportunities and abuse of the system by participants are also considered.”²⁵⁴⁵
- 48.86 A later version of the Fraud Prevention Strategy from December 2013, which purported to apply to both the GB and NI RHI schemes,²⁵⁴⁶ at Section 3.2, provided that:
- “This Fraud Strategy has a wider scope than activities that fall within the strict definition of fraud. Gaming opportunities and abuse of the system is also considered... our power to investigate, request information and take enforcement action is limited to participants.”
- 48.87 In section 7 of the document, paragraphs under a title of “Gaming Opportunities” pointed out that:
- “Participants may generate heat for eligible purposes but which do not meet the spirit of the RHI Regulations (e.g. heating empty buildings or empty greenhouses, using inappropriately sourced fuel), or may waste heat in a compliant manner by using heat in a non-energy efficient way.”²⁵⁴⁷
- 48.88 The same document continued to lay out options for prevention at section 7.3:
- “To help combat this, the RHI Regulations stipulate what constitutes eligible heat and give Ofgem the power to ask participants for evidence to demonstrate that the heat they are claiming RHI for is being used for eligible purposes. The Regulations also clearly state that participants should not generate heat purely for the purpose of increasing RHI payments. In addition, the tiered tariff for biomass (meaning a higher tariff rate is paid for the first 15% of annual heat generation hours) reduces the incentive to purposefully generate then waste heat.”²⁵⁴⁸
- 48.89 Despite being entitled as a strategy for the GB and **NI Non-Domestic Renewable Heat Incentive Scheme** (the Inquiry’s emphasis) that policy/strategy document, which was said to have “set out the means by which Ofgem will fulfil its responsibility to manage fraud, non-compliance and abuse within the GB and NI Non-Domestic Renewable Heat Incentive Scheme”,²⁵⁴⁹ was not provided to DETI.
- 48.90 However, at an earlier RHI Implementation Board in July 2013 Ofgem considered that its powers were limited in applying sanctions to anyone who was “generating heat for the predominant purpose of increasing their periodic data support payments.”²⁵⁵⁰ It explained that, in most

2544 TRA-16366 to TRA-16368

2545 OFG-134842

2546 OFG-88519

2547 OFG-88523

2548 OFG-88523

2549 OFG-88518

2550 OFG-59176

cases, participants would be using the heat and that establishing the “predominant purpose” would not be straightforward. The line taken was:

“We have alerted the Government to this issue. However, this is a Government scheme that we administer, and only ministers can make the necessary changes to prevent this happening.”²⁵⁵¹

48.91 An ever more passive approach to exploitation then appears to emerge over time, and the version of the RHI Fraud Prevention Strategy document from January 2015 sets out at paragraph 3 the scope and limitations of the RHI Fraud Prevention Strategy and, at paragraph 3.3, it contained a reference to ‘gaming’ opportunities stating that “We are aware that, as with many schemes, the design may allow for ‘gaming’ opportunities” followed by the words:

“It is important to note that such occurrences are not fraud as they are not in breach of the Regulations, however if we become aware of gaming activity we will report it to the NDRHI Development team so they can make DECC aware of areas where a legislation amendment might be considered.”²⁵⁵²

48.92 The Inquiry notes that, once again, there was no suggestion of a similar report to be made to DETI, which was purportedly part of a strategy applicable to both GB and NI RHI schemes.

48.93 The Inquiry also notes the contribution of Charles Hargreaves, who by 2019 led all of Ofgem’s RHI activities, to the Ofgem ‘Lessons Learned’ workshop at Millbank on 5 January 2017. He advanced the view at paragraph 6 of his contribution with regard to language that:

“We should have controlled the use of ‘gaming’ and been firmer in saying it was not appropriate for auditors to use this language – it’s either within the regulations or not.”²⁵⁵³

48.94 The Inquiry found it difficult to reconcile this view with the emphasis that Mr Hull had given in his January 2012 email to the “key value” which included gaming prevention and detection as well as the detailed late 2014 and early 2015 papers from Mr Pelizzi and Ms Read. The view expressed by Mr Hargreaves would appear, if implemented, to inhibit the flow of advice/warning from one Government Department to another which, if the advice/warning is provided, could lead to a reconsideration of relevant legislation in the interest of protecting public funds.

48.95 It is also difficult to reconcile such a view with the nature and quantity of material brought to the attention of Ofgem about the extent of the problem, or with the clear wording of paragraph 3.3 of the Ofgem RHI Fraud Prevention Strategy document of January 2015 quoted above. As noted earlier in this Report, as a result of the retrospective tariff changes introduced by DfE since 2017, which removed the perverse incentive to generate waste heat above 1,314 hours of operation, heat production has declined by 44% and scheme payments have halved.²⁵⁵⁴

2551 OFG-59176

2552 OFG-134226

2553 OFG-131065

2554 INQ-115005 to INQ-115006

Findings

- 272.** Ofgem should, at the time of introduction, have provided DETI with a copy of the RHI Fraud Prevention Strategy it had adopted after the NI RHI scheme was added to the Strategy. It should also have provided DETI with any subsequent version of the policy, together with an explanation for any changes to the approach being adopted.
- 273.** Each time Ofgem became aware of an allegation of exploitation of the RHI schemes it ought to have informed DETI about it immediately, and, as appropriate, made recommendations about how the exploitation said to be occurring could be addressed.

Mixed domestic and non-domestic use

- 48.96 When the non-domestic NI RHI scheme was introduced in November 2012 installations generating heat solely for the use of one domestic premises were not eligible (see regulation 15(1)).²⁵⁵⁵ The Renewable Heat Premium Payment scheme (RHPP) had been introduced much earlier in May 2012 by DETI and was to remain available for domestic premises until the domestic RHI scheme was launched.
- 48.97 The support levels under the non-domestic RHI scheme were higher than under the RHPP, and even when the domestic RHI scheme was introduced the non-domestic scheme offered more attractive returns, being available for twenty years rather than just seven.
- 48.98 The availability of more attractive returns meant that there was an incentive for individuals to explore the possibility of arranging for the heating of their domestic premises to be included in the non-domestic scheme. There were certain circumstances under which this might be permissible, often referred to as mixed use scenarios.
- 48.99 In the Northern Ireland context, the rules of the NI RHI scheme concerning what constituted “domestic” and “non-domestic” premises took on particular importance given the rural nature of the economy and the fact that many potential applications were to come from applicants engaged in agricultural activities of one type or another upon farms comprising both domestic and non-domestic premises requiring heat.

The policy intent

- 48.100 Regulation 4 of the 2012 NI RHI regulations specified that a plant met the criteria to be an eligible installation for the non-domestic RHI scheme provided that, amongst other things, regulation 15 did not apply.
- 48.101 Regulation 15 (1) of the 2012 NI RHI regulations provided that:
- “Excluded Plants
- (1) This regulation applies where the plant –
- (a) is generating heat solely for the use of one domestic premises;
- (b) is, in the department’s opinion, generating heat solely for an ineligible purpose.
- (2) For the purposes of this regulation –
- ‘domestic premises’ means single, self-contained premises used wholly or mainly as a private residential dwelling where the fabric of the building has not been significantly adapted for non-residential use.”
- 48.102 The NI RHI scheme guidance repeated that installations heating one single domestic premises were ineligible. It went on at paragraph 4.43 to state that:
- “Accordingly, where a premises consists of a main property and other buildings such as outhouses, pool-houses, lean-tos etc. which are together treated as one self-contained unit in single occupation for Domestic rates, this would be likely to be treated as a ‘single self-contained’ premises for NI RHI purposes. Where such premises are ‘used wholly or mainly as a private residential dwelling where the

fabric of the building has not been significantly adapted for non-residential use,’
the premises will therefore be treated as ‘domestic’ for the NI RHI.”²⁵⁵⁶

Ofgem’s interpretation and approach

- 48.103 In order to understand how Ofgem approached the question of mixed domestic and non-domestic use in practice, the Inquiry has considered the illustrative example of how Ofgem dealt with Mr Brimstone’s installation. Mr Brimstone was a DUP Special Adviser (between August 2008 and November 2016) when he applied to the non-domestic NI RHI scheme. The Inquiry was considering Mr Brimstone’s application in any event, given his position and alleged involvement in relevant decision making about the scheme. His application was one in respect of which there was considerable debate within Ofgem as to the question of mixed use, which is dealt with in the section below.
- 48.104 It is important for the Inquiry to take into account its duty to be fair to both Mr Brimstone and Ofgem. In so doing the Inquiry wishes to acknowledge that Ofgem and Mr Brimstone were dealing with poorly drafted legislation which left open the possibility of domestic premises benefitting from the more generous subsidy paid for non-domestic use by reason of a minimal use of heat for non-domestic purposes and thereby opening the way to potential gaming/exploitation. In addition, while Mr Brimstone would have been aware of the non-domestic RHI subsidy being more generous than the domestic subsidy, the Inquiry acknowledges that the outcome of the enquiries/investigations referred to in this section of the Report have not resulted in any findings adverse to Mr Brimstone.
- 48.105 Mr Brimstone installed a biomass boiler on 6 August 2015 in a stand-alone shed, accessed from the back yard of his dwelling house, to heat both the shed and his domestic home premises. He applied for accreditation under the non-domestic RHI scheme, which was granted by Ofgem in April 2016. That accreditation was backdated to the date of application in August 2015. In the application letter the space within the shed was said to be “used as an agricultural workshop/storage and shed for both machinery and at times animal pens.” The shed was said to be used as “non-domestic” and to have been exempted from rates by the Land and Property Services (LPS) on the ground that its use was agricultural.
- 48.106 On 10 May 2016 Ofgem received an anonymous allegation of fraud on the part of Mr Brimstone which alleged that the installation by Mr Brimstone of a wood pellet boiler in the shed was fraudulent in that the use of the shed was not agricultural and that the installation was being used to obtain the more lucrative non-domestic subsidy for the domestic premises than would be available under the domestic scheme. Teri Clifton, then Ofgem Head of RHI Operations, immediately forwarded the anonymous allegation to the Ofgem Counter Fraud Team.²⁵⁵⁷ Internal emails show a discussion took place about whether this “borderline case” merited a site audit.
- 48.107 It is clear that Ofgem were also aware that “it could be politically sensitive given that the installation’s authorised signatory is a Special Adviser to the First Minister of Northern Ireland”.²⁵⁵⁸ Ms Clifton referred to the ensuing investigation as “our special case”.²⁵⁵⁹ In her

2556 INQ-30050

2557 OFG-128251

2558 OFG-65218

2559 OFG-113892

written evidence to the Inquiry she emphasised that while the case was treated with “additional sensitivity”, and consideration of it was “escalated to a greater extent than would ordinarily be the case”, it was subject to normal processes as regards a compliance and counter fraud investigation.²⁵⁶⁰

48.108 Within Ofgem E-Serve, in addition to the RHI Operations Team, there was both an RHI Audit and Compliance Team and a separate E-Serve Counter Fraud Team. The audit team had responsibility for setting up and receiving audits as well as deciding whether any further information was required in order to determine whether an installation was compliant. The Counter Fraud Team had responsibility for all fraud prevention and detection activity across Ofgem E-Serve.

48.109 Later in May 2016 a counter fraud case relating to Mr Brimstone was opened within Ofgem, stating that:

“From our initial assessment of the available information, it appears that the party in question might have dishonestly made a false representation and through this act intends to make a gain for themselves or another.”²⁵⁶¹

A site audit was directed.

48.110 The audit of Mr Brimstone’s installation was carried out by Ricardo/AEA, on Ofgem’s behalf, on 30 June 2016.²⁵⁶² At section 3.1.2.4. of the subsequent report the auditor noted the description of the building that had been provided in Mr Brimstone’s application, namely that “It is used for both machinery & at times animal pens for out-farm livestock (namely sheep) that require close monitoring & heat during lambing season. The water heating will also be used to wash the farm and farm areas.” The audit report recorded that:

“During the audit the auditor identified that the building accommodated a tractor, some shelving, temporary fencing posts and a number of tools. However there were also children’s toys being stored. There was no sign of animals having been stored there or any adaptation for that purpose.”

48.111 With regard to non-compliance the report recorded that “The auditor could find limited evidence of the building described as agricultural/storage being used for agricultural purposes. Action; Ofgem were to investigate”. The Executive Summary of the report included the observation that:

“The auditor could find no evidence of the building described as an agricultural workshop/storage being used as a workshop or for animal pens as described in the non-domestic questionnaire.”²⁵⁶³

48.112 The initial version of the audit report recorded the above lack of evidence of agricultural use as not amounting to non-compliance but after communication between Ofgem and Ricardo/AEA that was amended to a positive finding of non-compliance (see version 2 of the report).²⁵⁶⁴

48.113 Mr Brimstone was on holiday at the material time and the audit was attended by a relation. Mr Brimstone was notified of the outcome of the audit by letter dated 5 August 2016 signed by Shaneigh Turner, Ofgem non-domestic RHI Audit Manager. That letter drew attention to the auditor’s observation of non-compliance and sought evidence of the workshop/storage being

2560 WIT-285207

2561 OFG-69067

2562 OFG-113661 to OFG-113684; OFG-42549 to OFG-42572

2563 OFG-42549

2564 OFG-42549 to OFG-42572

used for agricultural purposes. Mr Brimstone replied on the same day pointing out that the audit had been carried out in his absence, despite the audit company having been notified that he would be on holiday. He sought assistance in providing the information required by Ofgem.²⁵⁶⁵

48.114 On 10 August 2016 Mr Brimstone provided photographic evidence demonstrating use of the shed and confirmed that it may be used to accommodate sheep during lambing²⁵⁶⁶ stating that “In the Spring this shed does be used to accommodate sheep during lambing if weather conditions demand so pens are not constructed until they are needed.”

48.115 On 19 August after a video conference involving Teri Clifton, Dr Ward, Mark George and a number of other Ofgem officials it was decided, by Mark George, after collective discussion on the evidence provided, that the shed was being heated as a workshop and farmhouse and would not be regarded as using heat solely for domestic purposes.

48.116 On 22 September 2016 Ofgem senior managers confirmed that they were now satisfied with Mr Brimstone’s response to the various email and letter exchanges that resulted from the audit and that there should be no restrictions of payments. The next day Mr Brimstone was sent a letter confirming that he was now compliant. It does not appear that any notification was provided to DfE. In written evidence Ms Clifton stated:

“I do not believe that the views of DfE were sought on the question of interpretation at this time. I do not consider that it would have been appropriate to seek such input given the respective responsibilities of Ofgem and DETI/DfE i.e. **it was Ofgem’s job to administer the Scheme.**”²⁵⁶⁷ (the Inquiry’s emphasis).

48.117 Ms Clifton instructed the team that:

“Based on the Regulations and the evidence supplied we (those concerned in the decision of 19 August) are satisfied that the site meets the eligibility criteria and ongoing criteria. Please can you go ahead and close this off as no further action needed.”²⁵⁶⁸

48.118 The non-compliance investigation having been completed, Ofgem was in the process of closing the parallel counter fraud investigation when a further anonymous allegation came to Ofgem’s attention.

48.119 In October 2016 this further anonymous letter was passed on to Ofgem by Jim Allister QC MLA, who had also supplied a copy of the letter to the police and the NIAO.²⁵⁶⁹ On 14 October an officer from the Police Service of Northern Ireland (PSNI) contacted Ofgem with regard to this second anonymous letter, which again alleged that Mr Brimstone was claiming non-domestic RHI subsidy when he should have been limited to the domestic RHI subsidy. The officer noted that the matter was under investigation by Ofgem and sought a meeting.²⁵⁷⁰ On 18 October, during a telephone conversation with Ms Samantha Turnbull, from Ofgem E-Serve Counter Fraud, the officer asked for “any relevant information.”²⁵⁷¹

2565 OFG-41980

2566 OFG-200002

2567 WIT-285216 to WIT-285217

2568 OFG-67801

2569 OFG-200012

2570 OFG-200013

2571 OFG-68077 to OFG-68078

- 48.120 This second anonymous complaint was also brought to the attention of DfE by the NIAO. Lucy Marten from DfE emailed Dr Ward at Ofgem and asked for the findings that led to Mr Brimstone being deemed eligible.²⁵⁷² That was followed by a further email on 11 October 2016 from DfE’s Mr Wightman on behalf of Dr McCormick, Permanent Secretary at DfE (successor department to DETI from May 2016), who was shortly to meet the DfE Minister and was planning to provide him with a letter confirming the case was currently under investigation.
- 48.121 Mr Wightman’s communication stated that it was “very difficult to justify that there is an eligible heat use” and that it looks “very like the Category 4 installations that PwC identified. We therefore need assurances that Ofgem’s decision not to proceed with further enforcement has been based on robust evidence.”²⁵⁷³
- 48.122 Mr Wightman then emailed Dr Ward on 14 October seeking an explanation as to why DfE had not been informed of the previous May 2016 allegation, citing paragraph 3.2 (b) of the Arrangements.²⁵⁷⁴ That paragraph in the Arrangements provided that Ofgem would: “Inform DfE of any complaint, request for a formal review...that is received by GEMA [Ofgem] in connection with the carrying out by it of the Conferred Functions or the Ancillary Activities”.
- 48.123 Dr Ward responded stating that the allegations had already been investigated, Mr Brimstone was found to be compliant and the matter did not fall into any section of the Arrangements.²⁵⁷⁵ In the light of this exchange it appears to the Inquiry that it was Ofgem’s policy not to inform DETI that an allegation of fraud relating to the scheme had been received.
- 48.124 On 25 October 2016 Ofgem responded to the email from PSNI by asking PSNI for a formal application for information.²⁵⁷⁶
- 48.125 An internal email exchange over 27 and 28 October 2016 involved Ofgem officials questioning whether or not to send the 1 July 2016 audit report and the compliance team’s assessment to PSNI.²⁵⁷⁷ On 27 October John Jackson, an Ofgem lawyer, emailed Ms Turnbull and Ms Clifton advising that the PSNI information request only enquired whether any application had been made by Mr Brimstone to join the scheme and:
- “Therefore, although it might not seem right to withhold the audit report and the compliance team’s assessment, if we were to furnish them [PSNI] with the audit report, in my view, to do so would go beyond the scope of the actual request”.²⁵⁷⁸
- 48.126 Ms Turnbull responded on the following day explaining that:
- “When I spoke to the police officer, she was keen to understand if we had done any investigations, in order to prevent the duplication of the work, so I think the audit report and subsequent documents will be critical to them.”
- 48.127 Further internal exchanges on 31 October in Ofgem between Ms Turnbull and Mr Jackson concluded with the latter advising that with regard to the audit: “I still feel, having regard to the

2572 OFG-68077 to OFG-68078

2573 OFG-68077

2574 OFG-68080 to OFG-68081

2575 OFG-68075 to OFG-68077

2576 OFG-68332

2577 OFG-68328; OFG-210236

2578 OFG-68328

nature of their request for information, that we shouldn’t share it [the audit report] unless they ask for it.”²⁵⁷⁹

48.128 He went on to suggest that the PSNI should be informed that Ofgem had completed its investigation and that there wasn’t any cause for concern and that PSNI might then conclude its own investigation. In such circumstances he advised that only a copy of Mr Brimstone’s application to join the scheme should be shared.²⁵⁸⁰ Mr Jackson relied upon section 29 of the Data Protection Act 1998 as limiting Ofgem to disclosure of only such information and/or its existence as was specifically requested by PSNI.

48.129 On 1 November 2016 the PSNI made a formal request for disclosure of the results/evidence of the audit for an RHI fraud investigation, in accordance with the provisions of the Data Protection Act 1998.²⁵⁸¹ In the meantime Ofgem had emailed a copy of the application to the PSNI on 31 October.²⁵⁸² The PSNI then accepted Ofgem’s assertion that there was no cause for concern in relation to the application and that no further action was needed on the part of the PSNI. Ofgem treated that communication as justifying not dealing further with the 1 November PSNI request.

48.130 In a written statement of evidence to the Inquiry Mr Jackson restated his belief that Ofgem was “well placed to determine whether the police had good reason to be investigating Stephen Brimstone” and “it was entirely appropriate for the Authority [Ofgem] to satisfy itself about the veracity of the police fraud investigation” before disclosing the material in question.²⁵⁸³ He added that “Ofgem could rightly consider that the police request for information could be viewed as ‘Speculative’”.²⁵⁸⁴

48.131 The Inquiry notes that Michael Knight, a more senior Ofgem lawyer than John Jackson, who was on leave at the material time, subsequently confirmed to Mr Jackson that he “probably” would have provided the audit report to the PSNI.²⁵⁸⁵

48.132 The Inquiry notes that at this point Ofgem had:

- (i) The material that it had received from Mr Brimstone including the further information that he had supplied after he had received correspondence from Ofgem post the May 2016 audit.
- (ii) The May 2016 anonymous fraud allegation that had not been supplied to the police by Ofgem.
- (iii) The two versions of the Ricardo/AEA May 2016 audit report that had been considered by Ofgem and in respect of which the non-compliance of the shed as used for agricultural purposes had been upgraded by Ofgem from negative to positive.
- (iv) An Ofgem Counter Fraud investigation which had been open since May 2016 and had not been closed despite the compliance investigation having been completed and Mr Brimstone being reconfirmed as a member of the scheme.

2579 OFG-210231
2580 OFG-210231
2581 OFG-128555
2582 OFG-128558
2583 WIT-286025
2584 WIT-286026
2585 WIT-286027

48.133 In November 2016 Ms Turnbull prepared a summary of the Brimstone investigation to be supplied to DfE.²⁵⁸⁶ A second document, Ofgem Counter Fraud’s internal ‘Suspected Fraud Case Closure Report’ was also under preparation. The draft Case Closure Report had been approved by the Head of Ofgem Counter Fraud on 8 November 2016 and included the observation that:

“While the audit reported that there was no evidence of the premises being non-domestic, the participant provided further photographic evidence to support the non-domestic eligibility.”²⁵⁸⁷

48.134 The report went on to record that the site was found to meet eligibility requirements and no further action was required. The draft did not contain any reference to the PSNI/Ofgem exchanges. Ms Turnbull sent an internal email setting out a summary of the Case Closure report which included the statement that:

“The auditor could find no evidence of the building described as agricultural workshop/storage being used as a workshop or for animal pens as described in the application.”²⁵⁸⁸

48.135 Mr Knight confirmed that disclosure of the summary to DfE would be consistent with the Arrangements in place between DfE and Ofgem, adding:

“My advice is also that once the summaries are disclosed then given recent events we should anticipate that DfE will press us to take some action in terms of the scheme administration regarding these participants or explain why we are not.”²⁵⁸⁹

48.136 On 8 December 2016 Ms Turnbull emailed Ms Clifton to confirm Mr Knight’s approval to share the summary with DfE. That email contained the following passage:

“To complete the action from the previous board, I wondered if you’re happy to share the below wording on the Brimstone case...Also, please let me know what you think about removing the crossed-out line.”²⁵⁹⁰

The “crossed-out line” effectively removed the reference to the auditor being unable to find any evidence of the building being used as a workshop or for animal pens.

48.137 On 9 December in an email to Ms Clifton, Ms Turnbull expressed concern as the summary did not “give the full picture.”²⁵⁹¹ On the same day James Robinson, Ofgem E-Serve Acting Legal Director, emailed Ms Turnbull confirming that, in terms of data protection compliance and the Arrangements he was content to share the information with DfE.²⁵⁹² On 12 December Dr Ward supplied the amended draft to Lucy Marten at DfE.²⁵⁹³

48.138 In written evidence to the Inquiry Ms Turnbull stated that the reason for removal of the reference to the auditor finding no evidence of agricultural/workshop use was that:

“The inclusion of a sentence that suggested that the auditor could find no evidence could create confusion and lead to further questions. The auditor’s report had been

2586 OFG-70511
2587 OFG-49265
2588 OFG-210218 to OFG-210219
2589 OFG-210217
2590 OFG-210217
2591 OFG-210217
2592 OFG-210225
2593 OFG-70652

superseded by the further information provided by the applicant which had been considered ‘sufficient to determine compliance’.

48.139 She thought that there was a desire from her operational colleagues “not to create confusion” which could result in further questions for the RHI team to manage when (in their view) it was Ofgem’s responsibility to make compliance decisions.²⁵⁹⁴ To be fair to Ms Turnbull, as noted above, she did express concern that the amended version of the Case Closure Report did not “disclose the full picture” when emailing the draft to Ms Clifton on 9 December 2016. In her own written evidence Ms Clifton expressed the view that the removal of the reference to the auditor’s finding would have been to avoid confusion. She said:

“If the DfE summary had contained a reference to an audit which stated that it had found no evidence of non-domestic status I believe that this could have resulted in confusion as to why the installation was determined to be compliant.”²⁵⁹⁵

48.140 The problem for the Inquiry is why full disclosure could not have been made in the interest of openness and transparency, with the auditor’s findings included, indicating non-compliance, as well as the Ofgem investigative response thereto.

48.141 Ofgem directed a second audit of Mr Brimstone’s installation. On 30 March 2017 this second audit of Mr Brimstone’s installation was carried out by Ricardo/AEA and the report was finalised in May.²⁵⁹⁶ That report noted non-compliance issues and concluded that the site audit class was “unsatisfactory” on the basis that major eligibility issues had been identified and/or there were suspicions of abuse, misuse or fraud.²⁵⁹⁷ The “workshop/livestock birthing area” appeared to be a workshop/garage and contained an old tractor reported to be a renovation project, a large log pile for use in the house, children’s toys, a workshop area/benches and some soiled wood shavings. The report also recorded that the participant stated that there was a biomass boiler installed previously which heated the house but not the workshop.²⁵⁹⁸

48.142 There were differing views amongst the Ofgem officials about the significance of this audit report and a meeting was held on 4 July 2017. Ms Clifton presented the RHI view, Karen Boyle presented the Counter Fraud view and Michael Knight presented the legal view.

48.143 Also at the meeting was Sarah Cox, who joined Ofgem in May 2016 in the newly created role of Chief Operating Officer (COO). She commissioned a report from Ofgem’s auditors, Deloitte,²⁵⁹⁹ into how Ofgem had handled the Brimstone application. She received the report in May 2017 and then engaged with officials involved with the case. In her written evidence to the Inquiry she said that during the course of the internal Ofgem meeting on 4 July 2017 she had:

“Expressed concern that it might not be in the interest of protecting the public purse to allow Mr Brimstone to continue to claim under the Scheme...where the evidence pointed to minimal compliance.”²⁶⁰⁰

48.144 She discussed this with Dermot Nolan, the Ofgem Chief Executive, and repeated her public interest concern but ultimately concluded that such a consideration was not relevant for the

2594 WIT-284726 to WIT-284727

2595 WIT-285226

2596 OFG-200388

2597 OFG-200389

2598 OFG-200389

2599 OFG-200494 to OFG-200516

2600 WIT-282319 to WIT-282320

purposes of the decision to permit Mr Brimstone to continue to claim under the scheme.²⁶⁰¹ On 24 July 2017 she emailed Gareth John, referring to her meeting with Dr Nolan and stating that:

“We [herself and Dr Nolan] talked about other issues and my nagging concern remains the fact that we should always apply the public duty/public purse argument....With the case in question (Mr Brimstone) we should still ensure that PSNI have been given all the information they should have received following their request some time ago.”²⁶⁰²

- 48.145 Another attendee at the 4 July meeting was Patricia Dreghorn, who joined Ofgem in September 2016 as E-Serve Chief Operating Officer (E-Serve COO) and took over from Mr Poulton as Managing Director of Ofgem E-Serve in April 2018. She stated in her written evidence to the Inquiry that she was critical of the decision-making process whereby the RHI team made the decisions without the involvement of the Counter Fraud team.²⁶⁰³ She noted in relation to this 4 July 2017 meeting that the two teams had conflicting views with regard to the accreditation of Mr Brimstone’s installation.²⁶⁰⁴
- 48.146 On 24 July she sent an email relating to the transfer of information to the PSNI in which she stated “CF (Ofgem’s Counter Fraud team), RHI (Ofgem’s RHI team) and Legal (Ofgem Legal) should have collated all evidence and findings and issued one comprehensive pack to PSNI.”²⁶⁰⁵
- 48.147 In her evidence to the Inquiry she qualified the view expressed in the email by stating that she was not aware at the time that there were any issues relating to the provision of information to the PSNI adding that, in general terms, she would expect disclosure of information to be in accordance with Ofgem’s legal obligations.²⁶⁰⁶
- 48.148 On 24 July 2017 Ms Turnbull contacted the PSNI informing them that Ofgem’s legal team had reviewed the Brimstone case and now believed that Ofgem should have supplied further documentation (e.g. audit reports) at the time. She offered the opportunity to view the further material. However, Ms Turnbull added that Ofgem’s opinion remained unaltered in that, in Ofgem’s view, the participant was entitled to claim under the scheme.²⁶⁰⁷
- 48.149 The Ricardo/AEA audit reports of July 2016 and May 2017 were made available to the PSNI via a secure sharing network by Craig Johnstone, an Ofgem Counter Fraud manager, on 28 July 2017.²⁶⁰⁸ Unfortunately the PSNI appear to have encountered some difficulty in obtaining access to the secure sharing network²⁶⁰⁹ and the Inquiry cannot be sure that the PSNI received the 2016 audit report as well as the 2017 report. The PSNI response to Mr Johnstone referred to only the 2017 report²⁶¹⁰ and that was the only audit report annexed to the detailed PSNI report of 27 November 2017.²⁶¹¹

2601 WIT-282320 to WIT-282321

2602 OFG-200296 to OFG-200297

2603 WIT-284512

2604 WIT-284516

2605 OFG-200842

2606 WIT-284516 to WIT-284517

2607 OFG-201419

2608 OFG-200874

2609 OFG-200448 to OFG-200449

2610 OFG-200447 to OFG-200448

2611 OFG-201410

- 48.150 On 30 August 2017, after Mr Brimstone replied to various further information requests, Ofgem reaffirmed that the installation was compliant and reinstated payments.²⁶¹²
- 48.151 During August through to November 2017 the PSNI continued to ask questions of Ofgem, referring back to Ofgem’s initial response in October 2016 that there was no cause for concern. However on 27 November 2017 the PSNI, having read the 2017 audit report rather than just the application form that Ofgem originally sent in 2016, raised a number of concerns, e.g. that the agricultural shed appeared to be a domestic garage and that the farming activities were only documented by a picture of five sheep in an adjacent field. The PSNI concluded by informing Ofgem that it was seeking pre-prosecutorial advice and believed that despite the Ofgem findings there might be a case of fraud by false representation.²⁶¹³ The PSNI then pursued external lines of enquiry as well as seeking further material from Ofgem.²⁶¹⁴ The police met with Ofgem in March 2018 and shared a detailed November 2017 report of its investigation with Ofgem at that time. The report concluded by stating that its purpose was to ascertain whether Ofgem intended to make any complaint to the PSNI.
- 48.152 On 11 May 2018, Ofgem formally replied to the PSNI and indicated that due to the potential for police action, it did not wish to take any steps as part of a review of this accreditation in case that might prejudice the PSNI actions and asked to be kept informed of matters by the PSNI.²⁶¹⁵
- 48.153 In the same detailed letter, by way of explaining its approach to interpreting such mixed use cases, Ofgem pointed out:
- “Support is available in cases in which there are mixed uses of heat, as between one domestic premises and other premises. In such cases, there is no requirement in the 2012 regulations I mentioned above about the proportions that the two types of heat use should bear to one another. Neither are there requirements that the scheme participant should also be the user of heat that is supported under the scheme, or about the size, turnover or scale of any business making use of the heat.”²⁶¹⁶
- 48.154 With regard to the question about the allowable proportions of domestic and non-domestic heat production the Inquiry notes the earlier evidence of Dr Ward from Ofgem to the Assembly’s Public Accounts Committee hearing into the RHI problems on 28 October 2016 where he confirmed that Ofgem would accredit under the non-domestic RHI scheme even if the domestic usage was as much as 99% of the total.²⁶¹⁷

2612 IND-25925

2613 OFG-201410 to OFG-201413

2614 OFG-201411

2615 OFG-201406 to OFG-201409

2616 OFG-201407

2617 PAC-05498 to PAC-05500

Findings

- 274.** The Inquiry notes that Ofgem responded to a PSNI information request in October 2016 by withholding relevant information. Some of this was subsequently provided after a significant delay, but other relevant material, like the 2016 audit report, was not disclosed until more than a year after the audit had taken place. The Inquiry finds this approach by a Government Department towards a police service unacceptable. The Inquiry accepts the importance of ensuring receipt of a lawful request for information and of complying with the provisions of the Data Protection Act 1998 but, in the particular circumstances of the case under consideration, such requirements should not have been allowed to inhibit a Government Department from properly and fully assisting a police investigation and disclosing full information both supportive of and inconsistent with compliance with the NI RHI scheme.
- 275.** The Inquiry finds it unacceptable that a conscious decision was made by Ofgem officials in December 2016 to withhold relevant material about audit findings from DfE to avoid further questions from it.
- 276.** The regulations relating to non-domestic/domestic use appear to have allowed the higher levels of support under the non-domestic scheme as long as Ofgem was satisfied that there was any evidence of heat being used for non-domestic purposes, no matter how little, and regardless of whether it was for the benefit of the applicant or of any other third party.
- 277.** The Inquiry accepts the difficulty of interpreting the regulations on mixed domestic and non domestic use and the problem of deciding eligibility where an installation was not solely used for domestic heating. However, it was also necessary to consider the need to protect the public purse and achieve value for money. Those considerations heightened the need for Ofgem to have clearly and, if necessary, repeatedly, informed DfE of the approach that it was taking and the perverse outcome that it might produce. Had it done so, DfE would have had greater opportunity to consider whether it should have taken steps to deal with the problem.

Carbon Trust loans

48.155 Prior to, and during, the lifetime of the RHI scheme, Invest NI created a fund to promote energy efficiency, low carbon and renewable energy technologies to businesses. These interest free loans were provided and administered by the Carbon Trust on behalf of Invest NI. These loans constituted State Aid, which created a potential conflict with the RHI scheme, itself also constituting a form of State Aid. The central problem which emerged was whether a recipient of a Carbon Trust loan could also be a recipient of subsidy payments from the NI RHI non-domestic scheme. The Inquiry gave consideration to the relevant regulations.

48.156 Regulation 23 of the 2012 NI RHI regulations originally provided that:²⁶¹⁸

“(1) The Department must not accredit an eligible installation unless the applicant has given notice (which the Department has no reason to believe is incorrect) that, as applicable —

(a) no grant from public funds has been paid or will be paid or **other public support** [the Inquiry’s emphasis] has been provided or will be provided in respect of any of the costs of purchasing or installing the eligible installation; or

(b) such a grant or support was paid in respect of an eligible installation which was completed and first commissioned between 1st September 2010 and the date on which these Regulations come into force, and has been repaid to the person or authority who made it.

(2) In this regulation, ‘grant from public funds’ means a grant made by a public authority or by any person distributing funds on behalf of a public authority and ‘public support’ means any financial advantage provided by a public authority.”

48.157 The inclusion of the phrase “or other public support” in the regulations had been upon the advice of Ofgem. The intent had been to make ineligible for RHI any applicant who had acquired their installation with the assistance of the type of public loan of which, although not specifically referred to in the regulation, the Carbon Trust loan was a particular example.

48.158 On 10 December 2012 Wayne Cullen of BS Holdings Ltd emailed Ofgem’s ‘RHI Enquiries’ email account asking:

“If a new biomass installation capital cost is funded by means of the carbon trust interest free type loans can the RHI funding still be applied for and achieved assuming all other criteria is [sic] eligible.”²⁶¹⁹

48.159 Despite the fact that it had advised the insertion of “other public support” into the 2012 NI RHI regulations (so as to render this type of loan incompatible with the NI RHI scheme – a provision not in the GB RHI regulations), Ofgem responded:

“The Carbon Trust interest free loan is not defined as a grant from ‘public funds’ under the RHI regulations and therefore, it is compatible with the RHI.”²⁶²⁰

2618 LEG-00011

2619 OFG-14622

2620 OFG-14622

48.160 When Mr Cullen posed the same question to DETI in January 2013, DETI referred the matter to Ofgem, having said that the Carbon Trust loan was not compatible with the RHI scheme. Ofgem responded by repeating the incorrect advice that it had given to Mr Cullen, namely that the Carbon Trust loan was compatible with the RHI.²⁶²¹

48.161 Six months later on 28 June 2013 Mr Hendle, an Assistant Fraud and Compliance Manager in Ofgem, identified Ofgem’s previous mistake.²⁶²² He highlighted the difference in the wording between regulation 23 in the Northern Ireland regulations and the similar regulation 23 of the GB regulations. Whilst both provisions excluded from their respective RHI schemes installations which had benefited from a grant from public funds, the Northern Ireland regulation 23 went further and also excluded installations which have benefited from “other public support”. There was then debate within Ofgem over the summer and the uncertainty continued into September.²⁶²³ A decision was eventually made culminating in the following email from Dr Ward to Ms Clifton on 1 October 2013:

“This [application] was rejected on the basis of a soft loan from the Carbon Trust, which would be accepted in GB but not in NI. Applicant had spoken to our team and was under the impression it was fine to take the loan.

Part of the root cause is that the Carbon Trust appear to be giving out advice which is not consistent with the NI regs.”²⁶²⁴

48.162 Ofgem was now claiming that “part of the root cause” was the Carbon Trust telling people this – despite the fact that Ofgem itself had emphatically told both BS Holdings and DETI that Carbon Trust loans were compatible with the NI RHI scheme. This ‘U-turn’ by Ofgem was not greeted well by DETI officials. On 9 October 2013 Ms McCutcheon stated in an email to Ms Clifton and Dr Ward:

“This is of great concern to me and I will need to speak to Fiona Hepper as to how we move forward as I think this has serious implications for the reputation of the NI RHI and our Department. Members of the public have gone ahead in good faith on the basis of information provided directly from Ofgem and also from ourselves (on the basis of advice Ofgem gave us) and are now considered to be ineligible for the incentive.”²⁶²⁵

48.163 The email also pointed out to the Ofgem officials that it was in fact Ofgem who advised DETI during the drafting of the regulations to expand the wording of regulation 23 to include “other public support”.²⁶²⁶

48.164 At this relatively early stage in the NI RHI scheme, in October 2013, only two applicants with Carbon Trust loans had been accredited. Ms Hepper in her oral evidence told the Inquiry:

“We would’ve been quite happy with the interpretation at the very start that, ‘No, they are not compatible’ and if that had been consistently applied.”²⁶²⁷

She explained that changes after accrediting the first applicants would have been a problem.

2621 DFE-86968
2622 OFG-207063
2623 OFG-23906
2624 OFG-14428
2625 OFG-126830
2626 OFG-126844
2627 TRA-05312

- 48.165 Subsequently, DETI, Ofgem and the Carbon Trust all received calls from applicants who had benefited from Carbon Trust loans and prospective applicants who were seeking to utilise Carbon Trust loans. Minister Foster was also apprised of the situation via a submission on 1 October 2013 and on 25 October 2013.²⁶²⁸ During this period one of the applicants whose accreditation had been refused by Ofgem, because he had used a Carbon Trust loan to finance his installation, exercised his statutory right of appeal to DETI under regulation 50 of the 2012 NI RHI regulations.²⁶²⁹
- 48.166 DETI and Ofgem were faced with essentially two problems. The first related to the Northern Ireland regulations, namely whether interest free loans from the Carbon Trust did indeed fall within the prohibition in regulation 23. If it was considered that Carbon Trust loans did not fall within regulation 23 and, therefore, recipients of the loans were not excluded from the RHI scheme, this then raised a second question of whether the addition of the Carbon Trust loans to some RHI recipients had an impact on the State Aid clearance for either the RHI scheme as a whole or for the individual recipients who were benefiting from both RHI and Carbon Trust support.²⁶³⁰
- 48.167 In relation to overcoming the regulation 23 issue, DETI and Ofgem were encouraged by the fact that the Carbon Trust’s own lawyers did not consider it, the Carbon Trust, was a ‘public authority’.²⁶³¹ However, the Departmental Solicitors Office (DSO) was of the opinion that the relationship between Invest NI and the Carbon Trust was such that the loans would be regarded as having been “provided by a public authority” within regulation 23.²⁶³²
- 48.168 In relation to the second issue regarding the impact of a recipient getting both a Carbon Trust loan and RHI payments on the State Aid approval, Mr Moore from DETI’s State Aid unit proffered the solution whereby DETI would notionally extract the Carbon Trust/RHI cases from the RHI State Aid approval achieved using an exemption under paragraph 109 of the 2008 Community Aid Guidelines on State Aid for Environmental Protection (2008/c 82/01) and instead categorise them for example under the State Aid ‘*de minimis*’ exemption.²⁶³³ The *de minimis* rule was contained in Commission Regulation (EU) No 1407/2013.²⁶³⁴ In essence this rule provided a ceiling of EUR 200,000 in respect of the amount of aid that a single undertaking could receive over a three-year period without the need for the State having to notify the Commission for approval. At recital (3) the regulation provided that:
- “It is appropriate to maintain the ceiling of EUR 200,000 as the amount of *de minimis* aid that a single undertaking may receive per Member State over any period of three years. That ceiling remains necessary to ensure that any measure falling under this Regulation can be deemed not to have any effect on trade between Member States and not to distort or threaten to distort competition.”
- 48.169 The appeal by the applicant against the decision by Ofgem to reject his application culminated in a submission from Ms McCutcheon to DETI Deputy Secretary, Mr Thomson, on 11 December 2013. In order to assist Mr Thomson to make the decision Ms McCutcheon set out two options for him.²⁶³⁵

2628 DFE-242315 to DFE-242319; DFE-33697 to DFE-33701

2629 LEG-00027

2630 DFE-240482 to DFE-240483

2631 OFG-14966 to OFG-14967

2632 DSO-04764 to DSO-04765

2633 DFE-240444 to DFE-240445

2634 DFE-241313 to DFE-241320

2635 DFE-240928 to DFE-240943

48.170 The first option was to affirm Ofgem’s revised legal interpretation of regulation 23 and refuse the application to the NI RHI scheme, which would also be in accordance with DSO’s legal definition on the regulation. This, however, would have the consequential effect of depriving all businesses which had used a Carbon Trust loan to buy their boilers from availing of the RHI scheme. In addition that would mean installations in NI and GB would be treated differently.

48.171 The second option was to reject DSO’s legal advice on the interpretation of the regulation and grant the application to avail of the RHI scheme, despite having obtained a Carbon Trust loan, subject to the State Aid *de minimis* regulations, thus adopting an interpretation which was vital from a policy perspective as businesses often encountered difficulty in raising the initial capital for renewable projects from more traditional funding sources.²⁶³⁶

48.172 Ms McCutcheon recommended to Mr Thomson that Ofgem’s recent decision should be overturned and he agreed to the second option.²⁶³⁷

48.173 Ofgem subsequently drafted a ‘factsheet’ giving guidance to applicants on grants and public support and also a State Aid declaration template for *de minimis* aid for use by persons in receipt of Carbon Trust loans.²⁶³⁸ However, it became apparent in April 2014 that Ofgem were still not accrediting Carbon Trust loan recipients on the RHI scheme despite that decision. Ofgem considered that processing applications under the State Aid *de minimis* regulation rather than the Commission notification in respect of the RHI scheme fell outside the powers conferred upon it by the Arrangements.²⁶³⁹

48.174 Following a meeting with Ofgem on 18 June 2014, Mr Moore emailed a DETI colleague observing:

“Ofgem meeting quite difficult. *De minimis* only a possible solution in 4 of the 8 cases. Energy Division going to have to take a least loss decision, possibly having to ask the Minister to give a Direction, on the others. The decision may also destabilise the situation in GB. Some in Ofgem looking to wriggle out of the hole, others seem intent on making the hole deeper.”²⁶⁴⁰

48.175 The culmination of all the debate and negotiation was reached on 10 July 2014 with a letter from DETI’s Mr Wightman to Ofgem’s Mr Poulton detailing DETI’s proposals on how to proceed:²⁶⁴¹

“Category 1 covers applicants currently not in receipt of a Carbon Trust loan or any other public support. These applications are provided for under the existing regulations as approved in our original submission to the European Commission. This could include applicants who have paid off previous carbon trust loans (before the RHI regulations came into force).

Category 2 covers applicants whose relevant state aid funding (including carbon trust loans) and likely RHI income would not exceed the relevant *de minimis* amount over three rolling years. Subject to meeting other eligibility requirements, these applicants would be able to access the RHI.

2636 DFE-240932 to DFE-240934

2637 DFE-240935; DFE-240965

2638 DFE-241137 to DFE-241141

2639 DFE-241143 to DFE-241145

2640 DFE-241232

2641 OFG-28827 to OFG-28831

Category 3 covers applicants whose relevant state aid funding (including carbon trust loans) and likely RHI income would exceed the relevant *de minimis* amount over three rolling years. These applicants are not able to access the RHI under the current regulations.”

- 48.176 Nadia Carpenter of Ofgem responded on 20 August 2014 indicating Ofgem was only prepared to make decisions in relation to Category 1 applications; for Category 2 and 3 applications the decision-making power would “transfer” to DETI. Mr Hughes and Mr Wightman agreed to this course.²⁶⁴²
- 48.177 This agreement was reflected in revised Arrangements between DETI and Ofgem of 13 October 2014, which amended the ‘Retained Functions’ section.²⁶⁴³
- 48.178 Mr Hutchinson in his oral evidence told the Inquiry that, even though the situation was not resolved before he left in May 2014, it “really took a lot of our time” and “a lot of the engagement with Ofgem was really around the Carbon Trust issues.”²⁶⁴⁴ He also explained that they had had to park work on data sharing to work on the Carbon Trust loan issue.
- 48.179 Mr Hughes, who joined DETI on 30 June 2014, told the Inquiry that alongside working on the domestic RHI and Ofgem data sharing, dealing with the Carbon Trust loans was one of the three priorities set for him by Mr Wightman when he joined DETI.²⁶⁴⁵ The Inquiry notes that this work was taking precedence over matters that ought to have been occupying the minds of DETI officials, such as cost controls and tariff reviews in relation to the non-domestic RHI scheme.
- 48.180 It seems that the problem was ultimately resolved by amending the 2012 NI RHI regulations to allow Carbon Trust loans to be paid back, thereby enabling Ofgem to accredit a relevant application. The change was effected through regulation 61(2) of the 2014 NI Domestic RHI regulations.

2642 OFG-29591 to OFG-29592

2643 OFG-59975 to OFG-59976

2644 TRA-04929

2645 TRA-05810 to TRA-05811

Findings

- 278.** Ofgem advised DETI to provide in its regulations for the exclusion of those applicants availing of “other public support.” That was intended to rule out those applicants who had availed of loans such as those provided by the Carbon Trust. Ofgem then gave the opposite advice to potential applicants (and DETI) that Carbon Trust loans were compatible with the NI RHI scheme. This led to the accreditation on the NI RHI scheme of applicants in receipt of Carbon Trust loans. Ofgem later changed its position and refused to accredit any further applicants who had received Carbon Trust loans.
- 279.** Ofgem’s initial failure to consider properly and take account of the amendment it had suggested to regulation 23 of the NI RHI regulations, and the subsequent reversal of its advice regarding Carbon Trust loans created a difficult and unnecessary situation for DETI to manage. The prolonged work necessary to deal with Ofgem over this issue, in the context of DETI’s limited resources, meant that less time was available to effectively deal with other, more fundamental, challenges of scheme management.

Ofgem’s assertion of no causal link between its failings and what went wrong with the RHI scheme

48.181 Ofgem, in its closing written submissions to the Inquiry, stated that:²⁶⁴⁶

“Ofgem’s position that there is no causal link between its failings and what went wrong with the Scheme is not to detract from the clear failings by Ofgem. Ofgem was the expert administrator, in sole possession of important primary material relating to the Scheme. Ofgem had a special responsibility to share that information and accepts that it is a serious failing not to have done so. However, this is materially different to an acceptance that Ofgem caused the overspend of public funds. Ofgem’s position is that it did not.”

48.182 Ofgem maintained that position during the Inquiry’s representations process in respect of the Inquiry’s finding set out below. The reasons given for the position taken by Ofgem are that: Ofgem was obliged to interpret the NI RHI regulations and that, as there is only one correct lawful interpretation of legislation, Ofgem did not have discretion as to the interpretation it could adopt. Further, by reason of the above, Ofgem further contended that any analysis of the impact of the interpretation adopted by Ofgem was simply irrelevant to its work, and it ought not to be criticised for failing to carry it out. Ofgem also said that as it did not have competence to correct or amend the NI RHI regulations and had warned DETI about problems with the legislation, it (Ofgem) could not be said to have had a causative role in respect of something that was beyond its control.

48.183 The Inquiry has carefully considered all that Ofgem has said in evidence, by way of submissions and during the representations process in relation to this, including that its submission as to lack of causal effect was not made to detract from the clear failings of Ofgem in respect of the NI RHI scheme, which have been outlined in the previous two chapters of this Report in particular (and many of which Ofgem accepted during the Inquiry’s hearings). However, the Inquiry considers that the position that Ofgem has taken on the causation issue is too simplistic. Whilst there is only one correct legal interpretation of legislation, what that correct interpretation is, at least in the United Kingdom, can only be conclusively established by a Court of competent jurisdiction. If a public body adopts an interpretation of legislation which it considers to be the correct interpretation, but which it knows, or becomes aware, raises issues of potential exploitation and value for money, then it cannot be correct to say that the public body is entitled to ignore those issues, to fail to analyse their impact, or fail to communicate about that impact with the person (in this case DETI) with the power to take remedial action. As previously indicated in this Report, the Inquiry considers Ofgem should have properly explained to DETI the approach it was taking to matters of interpretation (examples of which have been considered in this chapter), and should have informed DETI of each of the relevant instances of exploitation of which Ofgem became aware. The repeated failure to do so (whatever previous warnings had been given) deprived the scheme owner, in this case DETI, of being confronted with and/or reminded of the need to take action to deal with issues. Therefore, in that sense, Ofgem’s failings may well have contributed to what went wrong with the NI RHI scheme since, in the absence of those failings, corrective steps may have been taken by DETI at an earlier point. At the very least, the Inquiry does not consider that it can be positively asserted that Ofgem’s failings had no causative effect on, or link to, what went wrong with the scheme.

2646 SUB-01005 to SUB-01006

Finding

280. The Inquiry disagrees with Ofgem that there was no causal link between its failings and what went wrong with the scheme. It was Ofgem’s interpretation and application of the regulations to the accreditation process which it administered that contributed to considerably more public money being spent on incentives than was the original and clear policy intent. Having previously warned that this might occur, it is not only a failing that this was not communicated to DETI when it did happen, but also that Ofgem had not analysed the financial consequences of its interpretation of the regulations and how they were being implemented.