

**From:** Joanne McCutcheon  
Energy Division

**Date:** 11 December 2013

**To:** David Thomson

**RENEWABLE HEAT INCENTIVE – COMPATIBILITY WITH CARBON TRUST 0% FINANCE LOANS**

**Issue:** Ofgem rejected an application for the Renewable Heat Incentive (RHI) on the basis that the applicant had availed of a Carbon Trust 0% finance loan and that these loans were not compatible with the RHI. The applicant has requested a Statutory Review under the RHI dispute resolution procedures.

**Timing:** A decision (or update) from DETI is due on 13<sup>th</sup> December 2013.

**Need for referral to the Executive:** None.

**Presentational Issues:** Likely to attract considerably interest from renewable technology installers and the business community.

**Freedom of Information:** Fully disclosable.

**Financial Implications:** None

**Statutory Equality Obligations:** There are no Section 75 implications.

**PFG/PSA implications:** None.

**Legislation Implications:** The RHI is underpinned by legislation; the interpretation of this legislation is an important element of this decision.

**Recommendation:**

**It is recommended that you note the information provided and approve the decision to revoke Ofgem's decision not to accredit.**

**Joanne McCutcheon  
Energy Division  
X29425**

## Background

1. The Northern Ireland Renewable Heat Incentive (RHI) was launched in November 2012; the legislation underpinning the scheme is - the 'Renewable Heat Incentive Scheme Regulations (Northern Ireland) 2012'. Ofgem administers the RHI in Northern Ireland on behalf of DETI under formal 'Administrative Arrangements'. On 30<sup>th</sup> September 2013, Ofgem rejected an applicant on the basis that they were in receipt of a Carbon Trust Zero Interest loan. The rejected applicant has requested a Statutory Review under the RHI dispute resolution procedures. This request was received by DETI on 1 November 2013 and a decision or update is due by Friday 13 December 2013.
  
2. The legislation relevant to the current issue is Regulation 23 which states:-

### **Exceptions to duty to accredit**

**23.** (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 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 that 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.

3. It should be noted that the wording of this regulation is different from the equivalent GB regulation which only states that there must not be other funding from a 'grant from public funds'. The 'tighter' NI regulation was originally drafted on the advice of Ofgem's legal team but the result is that under the NI regulation a greater range of funding sources are excluded i.e. '**other public support**' is excluded, where this public support is defined as '**any financial advantage provided by a public authority**'.

4. Ofgem rejected the application on the basis that ‘soft loans’ (such as zero interest loans) are a ‘financial advantage’ and that they became aware (Aug 2013) that Carbon Trust Zero Interest loans, within Northern Ireland, utilise funds from InvestNI. Prior to becoming aware of this, Ofgem had accredited two installations in possession of the loans; it has so far taken no retrospective action in these cases. Such loans would not be barrier to RHI accreditation in GB but there is a question as to whether they should be a barrier to RHI accreditation in NI.
5. It should be noted that Ofgem had previously provided written and verbal advice to an unquantifiable number of enquirers, and written advice to DETI, which stated that Carbon Trust loans **would not** be incompatible with receiving the RHI. Ofgem has said that it only established that this misleading advice had been given out at the beginning of October 2013.

### **Summary of Issue**

6. There are a number of different aspects to the current issue which can be summarised as follows:-
  - i. An application has been rejected by Ofgem on the basis that the RHI is not compatible with Carbon trust 0% finance loans. The applicant had previously been advised by Ofgem that they were compatible.
  - ii. Ofgem has already accredited two installations which had indicated that they had received a Carbon Trust loan.
  - iii. Ofgem has advised an unquantifiable number of potential installers that the two sources of funding are compatible. As the RHI is claimed retrospectively i.e. after you have installed the technology, we have no way of knowing how many potential applications of this sort there actually are.
  - iv. The Minister has already received 3 correspondence cases, 4 Assembly Questions and a query from the ETI Committee on the matter and Energy Division has received numerous phone calls and emails; there is real potential for bad publicity for the scheme if this issue cannot be resolved.
  - v. The current interpretation of the NI regulation means that installations in NI and GB would be treated differently.

## Options for Way Forward

7. There is no easy solution; the crux of the problem is that Ofgem advised potential installations that the two sources of funding were compatible but then rejected an applicant on the basis that they were not. DETI and Ofgem officials have had discussions over a number of weeks. They have also had discussions with other affected parties, including affected applicants, enquirers, the Carbon Trust, Invest NI, DECC, BIS and DSO in order to find a way forward. There appears to be two options.

### Option 1

8. The first option would be to confirm Ofgem's decision not to accredit the installation. Under this option the applicant would not receive the RHI and Ofgem would need to consider asking the two previously accredited applicants to make repayments. In addition, potential applicants who have already started an installation, on the basis of the advice given by Ofgem, would not be eligible for RHI funding upon completion. The advantage of this option is that it clearly adheres to Regulation 23 and has no State Aid implications. The major disadvantage is that an unquantifiable number of businesses have proceeded with a renewable investment on the basis that they can expect to receive RHI funding on a quarterly basis for 20 years; it is highly likely that some, if not all, might not have made the investment decision if it was not for the prospect of receiving the RHI. In addition, it would mean that installations in NI and GB would be treated differently.
9. Proceeding with this option would certainly attract bad publicity for the scheme and may result in installers querying the GB/NI discrepancy with the EU Commission. In addition, if the rejected applicant is not content with the decision, the next stage would be to refer the complaint to the NI Ombudsman or take legal action towards the Department and / or Ofgem. It should be noted, that the Regulations do not allow applicants to simply return the loan amount to the Carbon Trust to become eligible for the RHI.

Option 2

10. The second option would be to take an alternative reading of Regulation 23 to that originally taken by Ofgem. It is clear that the Carbon trust loan must be repaid and so it is obviously not a ‘grant’. However, consideration could be given as to whether it is properly considered as ‘other public support’ i.e. ‘*any financial advantage provided by a public authority.*’
11. The two elements are: (i) whether the loan conveys a financial advantage and (ii) whether it was provided by a public authority. With regard to (i), it is clear that the CT loan does convey a financial advantage, in that the rate of interest paid on the loan is zero compared to a commercial rate of 5-10%. In respect of (ii), information has been received from lawyers at the Carbon Trust on the status of the organisation (Annex A). On the basis of this information, it would seem reasonable to conclude that the Carbon trust is **not a public authority**,
12. The approach taken by Ofgem in reaching the original decision was to interpret the word “provided by”, in the public support definition, to include the original source of the loan (InvestNI) as well as the provider. We have discussed an alternative approach with Ofgem, which would be to take an alternative interpretation of the words “provided by” so that it refers only to the person providing it directly to the applicant, in this case the Carbon Trust. The consideration of state aid compatibility would be central to moving forward with this interpretation. We have discussed the issue in depth with Stephen Moore (European Division) who has set out an approach to the problem from a State Aid perspective (Annex B). This approach has been endorsed by Irrelevant information redacted by the RHI Inquiry (who has also spoken to a policy official at DECC with responsibility for the GB RHI scheme) and also colleagues in the DSO. The proposed approach involves operating the RHI scheme in Northern Ireland on the basis of the de minimis regulation for the projects in which the Carbon Trust has provided an interest free loan and, simultaneously, on the basis of the RHI NI decision (SA.24140) for the remainder of projects, in which we expect there will not be any cumulation issues.
13. We have also discussed the regulation interpretation with colleagues in the DSO and the advice provided is in Annex C. In summary, they say that the proper interpretation of Regulation 23 precludes the accreditation of an installation if the applicant is in

receipt of a Carbon Trust Loan. However, they also point out that the final decision is one for DETI to take and agree that the burden of risk appears to come with adopting a position that the RHI and CT loans are incompatible.

14. Taking this alternative approach would have number of practical implications. Firstly, there would be an additional administrative burden (which would translate into costs) associated with conducting the necessary state aid analyses where the impacts of the de minimis regulation need to be considered. Basically, Ofgem would need to confirm that the total value of state aid in the 3 year fiscal period, in which the RHI accreditation decision would be taken, would not exceed the relevant threshold.
15. It should also be noted that in adopting this approach in this case, it would be likely to set a precedent that would need to be followed in subsequent cases, possibly including those with other, unrelated sources of funding.
16. The main advantage of Option 2 is that installations could continue to receive the Carbon Trust loan and the RHI. This would not only offer a solution to the current problem but I believe that this is vital from a policy perspective, as businesses often find it difficult to raise the initial capital costs for renewable projects from more traditional funding sources. In addition, option 2 maintains equity with the position in GB where installers can avail of both schemes. The potential disadvantage is that someone could dispute the Department's interpretation of Regulation 23; this is considered to be a low risk since no-one is being disadvantaged (there is scope to revise this Regulation in the future if required). The other drawback is that there will be an additional administrative burden which will incur costs.

### **Next Steps**

17. As per the Statutory Review guidelines, a decision (or update) is required by Friday 13 December. A delay in providing a decision i.e. just providing an update, would add to the growing concern amongst installers and could result in bad publicity or in an escalation of the complaint. It is also unlikely that additional time would result in DETI/Ofgem finding any alternative way forward.
18. The review decision is DETI's decision to take. If DETI is comfortable that the alternative interpretation of the regulation is the preferred approach to the issue, then

we can write to the applicant and advise that the original Ofgem decision has been varied.

19. The applicant would then need to re-engage with Ofgem to proceed with their application. It should be noted, that irrespective of the Carbon Trust issue, the application is not yet suitable for accreditation, as it has an incorrect capacity stated (700kW rather than 70kW). The application would also need to be considered in light of the outlined 'de minimus' guidelines.
20. The outcome of the reversal of the decision would also need to be communicated to all affected parties, and published on DETI and Ofgem websites prior to the scheme guidelines being formally updated to clarify the position.

**Recommendation**

21. It is recommended that you consider the information provided and approve the decision for DETI to revoke the original Ofgem decision under the RHI dispute resolution procedures.

**Joanne McCutcheon**

**Energy Division**

**Annex A****Information Provided by Carbon Trust lawyers**

The Carbon Trust is a private company limited by guarantee. It is a not for dividend company with an independent board of directors drawn wholly from the private sector.

It may also be useful to note that the Carbon Trust:

- does not have any government directors or other government representatives sitting on its board or involved in its management. It has decision making autonomy and is not controlled by government.
- does not exercise functions of a governmental or public nature;
- was not created by statute and has no statutory powers or regulatory functions and does not exercise any such powers or functions;
- is not accountable to the public for its activities;
- is not subject to judicial review;
- designs and owns its programmes of activity and the intellectual property that it generates, with the result that its activities could not be transferred to another organisation without its consent; and
- is not subject to the Freedom of Information Act.

As the Carbon Trust receives public funding to support various of its low carbon or renewable energy programmes, its status has been considered over the years at various times. On each occasion, all bodies have accepted that it is not a public body.

**Annex B – Emails re RHI and State Aid**

Brian / Helen

Energy Division colleagues have run into a cumulation of State aid with de minimis aid difficulty in relation to the Renewable Heat Incentive scheme.

I have proposed a solution to get around this difficulty and (as you will see below) BIS have no objections to this.

However, Ofgem, which administers the RHI scheme for us, have asked that we also run my proposed solution past our 'State aid legal advisors' to confirm you are also content.

I (with support from Energy Division colleagues) would be happy to discuss further to fill in any gaps but the bare bones of the issue and my proposed 'de minimis' solution are as follows.

1. The RHI scheme is administered by Ofgem and the problem has come about because some of these companies who have applied for support under the RHI scheme have had their applications rejected by Ofgem.
2. These applications were rejected because the applicants are receiving other State support in the form of a interest free loan from the Carbon Trust.
3. Following Ofgem's rejection of one of these applications, under the RHI scheme dispute resolution process, on 1 November 2013, one of the applicants has asked DETI to review Ofgem's rejection decision.
4. Given the time that has elapsed since the request for a review was received, DETI would like to take a decision ASAP and preferably next week.
5. The State aid issue is whether (or not) the installation that has availed of a Carbon Trust 0% finance loan can also eligible to receive the Northern Ireland RHI.
6. The issue is further complicated by the fact that applicants were initially told (by Ofgem) that the Carbon Trust loan scheme and the RHI were compatible and that under the GB RHI applicants can receive both loans and RHI support.

DETI analysis and proposed solution

7. As you will see in para 46 of the NI RHI decision (see attached), DETI had indicated to the Commission that there would be no other 'grant' support for the renewable heat equipment. There was an identical commitment in relation to the GB RHI scheme (SA.32125).  
[http://ec.europa.eu/competition/state\\_aid/cases/240943/240943\\_1368451\\_125\\_1.pdf](http://ec.europa.eu/competition/state_aid/cases/240943/240943_1368451_125_1.pdf)
8. While it could be argued that the UK was only excluding the possibility of specific GB 'grants' (see SA.32125 para 37) and not other types of aid (e.g. Carbon Trust interest free loans), I suspect that if the Commission was ever to examine this issue, they would dismiss this argument and revert to the fact that operating aid (through the RHI scheme) is being cumulated with investment aid (through the interest free Carbon trust loan) and assess the compatibility of this aid against para 109 of the 2008 Environmental Aid Guidelines (EAG).

9. If so, then we have two problems. First we have a problem with the 'maximum aid intensity' allowable. Para 109 of the 2008 EAG states..."Aid for environmental protection must not be cumulated with de minimis aid in respect of the same eligible costs if such cumulation would result in an aid intensity exceeding that fixed in these Guidelines." In this case, we might find it very difficult to prove that cumulation would not result in an aid intensity exceeding that determined in the EAG, as there is no aid intensity ceiling for operating aid specified in para 109 of the EAG.
10. The second problem is that para 109 (b) of the EAG details that, where operating aid is granted in accordance with para 109 (a), any investment aid granted to the undertaking in question in respect of the new plant must be deducted from production costs when determining the amount of operating aid. In this case, DETI would not want to be forced to reduce the RHI tariffs to adjust for the investment aid being provided via the interest free Carbon Trust loans.
11. Therefore, a solution based on para 109 of the EAG would not be preferable.
12. Furthermore, even if DETI were to decide to go this direction, it would probably have to notify the change to the Commission, which would not be helpful. First, it would probably result in the Commission also asking questions about how the RHI scheme operates in GB. Second, it would probably take the Commission a long time to deal with this issue, which may result in negative publicity for the scheme and could even trigger a formal complaint to the Commission etc.
13. However, when you consider how little 'extra' aid is likely to be present in these Carbon Trust cases, my assessment is that the total aid (i.e. 3 years of RHI aid plus the aid in the Carbon Trust loan) is likely to be well below the industrial de minimis ceiling.
14. Therefore, what I have proposed is that DET and Ofgem revise the operating procedures for the RHI scheme so that RHI aid *in these 'de minimis cumulation cases'* is provided on the basis of the de minimis regulation.
15. In other words, de minimis aid from the Carbon Trust loans will be cumulated with de minimis aid from the RHI scheme, which would meet the requirements of the de minimis regulation.
16. In all other cases, in which there should be no cumulation, State aid cover will continue to be provided by the RHI decision.

As indicated above, I would be grateful if you could cast your eye over my proposed solution and indicate whether you agree that this should be a viable way of addressing the problem.

Many Thanks

Stephen

**Stephen Moore**

European Support Unit  
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Visit the website for the European Sustainable Competitiveness Programme for NI -  
[www.eucompni.gov.uk](http://www.eucompni.gov.uk)



**Please consider the environment - do you really need to print this e-mail?**

**From:** Porter Kate (CCP) [<mailto:Kate.Porter@bis.gsi.gov.uk>]

**Sent:** 29 November 2013 16:08

**To:** Moore Stephen ()

**Cc:** Pauley, Alberta; McCutcheon, Joanne; Hutchinson, Peter; [Edmund.Ward@ofgem.gov.uk](mailto:Edmund.Ward@ofgem.gov.uk); [Cathryn.Scott@ofgem.gov.uk](mailto:Cathryn.Scott@ofgem.gov.uk); [Ruth.Lancaster@ofgem.gov.uk](mailto:Ruth.Lancaster@ofgem.gov.uk); [Omolade.Barker@ofgem.gov.uk](mailto:Omolade.Barker@ofgem.gov.uk); [teri.clifton@ofgem.gov.uk](mailto:teri.clifton@ofgem.gov.uk); Ryan, Damien

**Subject:** RE: Carbon Trust de minimis loans and the Renewable Heat Incentive

OK, well I agree with what you say below, I see no problem with providing RHI and grants under cover of the de minimis regulation (alongside the rest of the RHI scheme which would operate under it's approval) from a state aid perspective. I think this is probably the safest and simplest way of handling this.

As you know, we are struggling to get cases through the state aid approval process at present due to the review of the state aid guidelines and wider case load so I would not want to ask the Commission about this or submit a notification unless absolutely essential.

Kate

Kate Porter | State Aid | Department for Business, Innovation & Skills | 1 Victoria Street | London | SW1H 0ET | Tel: 44 (0) 20 7215 2298 | Fax: 44 (0) 20 7215 0357 | [kate.porter@bis.gsi.gov.uk](mailto:kate.porter@bis.gsi.gov.uk) | <https://www.gov.uk/government/organisations/department-for-business-innovation-skills>

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**Annex C – Correspondence with DSO**

Joanne,

I do not wish to give the impression of "avoidance", but I do not think there is very much I can add to my previous advice. The final decision is one for the Department to make and that represents, properly in my view, the division between our respective roles here. I acknowledge that the decision to be made involves a consideration of various factors, legal advice being merely one such factor. The weighing up of the various factors and the decision as to where the line is drawn can only be made by the Department. As I previously expressed, the proper interpretation of regulation 23 of the 2012 Regulations precludes accreditation if the applicant is the recipient of an interest free loan from the Carbon Trust.

As you have pointed out, and I agree, the burden of risk appears to come with adopting a position that the RHI and CT loans are incompatible. No one is going to complain if they receive RHI's, however the Department would have to be conscious of the possibility of subsequent enquiries on the part of the European Commission, in terms of State Aids. I believe the Department is currently looking at this.

I am happy to discuss.

Kind regards

Pat Millen

Departmental Solicitors Office

Ext: 51210

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**From:** McCutcheon, Joanne  
**Sent:** 09 December 2013 14:53  
**To:** Millen, Patrick  
**Cc:** Hutchinson, Peter  
**Subject:** RE: RHI Scheme - Carbon Trust Interest Free Loans - Statutory Review

Patrick

Many thanks for your note below; I know you also subsequently spoke to Peter Hutchinson regarding the matter. Since then we have had prolonged discussions with Ofgem and have also consulted with colleagues in GB. The Statutory review decision is due on this Friday (13<sup>th</sup>).

It is not easy to reach a clear cut solution to the problem. The situation is particularly complicated by the fact that Ofgem had been advising potential installers that the RHI and CT loans were compatible prior to making the decision not to accredit an installation on the basis that it had availed of a CT loan.

If we confirm the original Ofgem decision, then an unquantifiable number of businesses that have proceeded with a renewable investment on the basis that they expected to receive RHI funding for 20 years will not be eligible. It is highly likely that some, if not all, of these businesses would not have made their investment decision if it was not for the prospect of receiving the RHI. We are conscious therefore that if we uphold the Ofgem decision then these businesses are likely to seek redress or at the very least take the matter to the NI Ombudsman (which is the next stage in the dispute resolution process). In addition, it would mean that installations in NI and GB would be treated differently and it is possibly that a rejected applicant would raise this with the European Commission. It would certainly result in some bad publicity for the RHI scheme which is still in its infancy and has a vital role to play in the achievement of European renewable targets.

We are therefore moving towards the second option you highlighted below i.e. Adopt a restrictive interpretation of the term "*provided by*", so that it refers only to the body directly providing the support. We have obtained confirmation from the Carbon Trust legal team that they do not consider themselves to be a public authority. We have also discussed this restricted interpretation with Ofgem. The main advantage of this option is that installations could continue to receive the Carbon Trust loan and the RHI. This would provide a solution to the current problem but we also believe that this is vital from a policy perspective, as businesses often find it difficult to raise the initial capital costs for renewable projects from more traditional funding sources. In addition, this option maintains equity with the position in GB where installers can avail of both schemes. We have discussed the State Aid implications of the option with DETI colleagues in European Division who have outlined how this could be managed under the SA regulations. As far as I can see, the only potential disadvantage of the option is that someone could dispute the Department's interpretation of Regulation 23; however, my feeling is that there would be a low risk of this happening since no-one is being disadvantaged. Therefore this option, while not ideal, appears to carry the least risk to the Department.

Grateful for any comments you might have.

Regards and once again many thanks for your help.

Joanne

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**From:** Millen, Patrick  
**Sent:** 30 October 2013 13:26  
**To:** Hutchinson, Peter; McCutcheon, Joanne  
**Subject:** RHI Scheme - Carbon Trust Interest Free Loans - Draft

Peter/Joanne,

I refer to the above.

I have received a legal paper from Ofgem, they have pointed out that it is legally privileged so I am precluded from simply forwarding that paper to you - although I can offer DETI my own legal analysis of the issue.

If I can, very briefly, summarise the position:

1. An applicant was refused accreditation for RHI scheme on the basis that they had a Carbon Trust Interest free Loan towards the cost of the installation which was subject of the application.
2. Regulation 23(1)(a) of the Renewable Heat Incentive Scheme Regulations (NI) 2012 provides that the Department must not accredit an eligible installation unless the applicant gives notice "*...that no grant from public funds has been paid...or other public support has been provided...in respect of any of the costs of purchasing or installing the eligible installation*".

The underlined portion of 23(1)(a) is important here i.e. that such loans are "*other public support*".

3. Regulation 23(2) defines "public support" as "*...any financial advantage provided by a public authority*". The question is whether these conditions are satisfied in respect of interest free loans provided by the Carbon Trust. If we can take each in turn:

- (a) It is reasonably clear that interest free loans convey a financial advantage.
- (b) Is the Carbon Trust a "public authority"?

The likelihood is that the Carbon Trust would not be considered a public authority, however I understand the source of the finance for these interest free loan scheme is provided by Invest NI which (as a NDPB of DETI) clearly is a public authority. On account of the source of the finance and the relationship between Invest NI and Carbon Trust (who, I understand, are merely the mechanism for the distribution of such finances) this would be sufficient for it (the financial advantage) to be regarded as having been *provided by a public authority* within the terms of 23(2) of the Renewable Heat Incentive Scheme Regulations (NI) 2012.

In conclusion, it would appear Regulation 23 of the 2012 Regulations preclude accreditation if the applicant is the recipient of an interest free loan from the Carbon Trust.

The question is, how to respond - Ofgem have outlined a number of options:

1. Live with the current interpretation;

2. Adopt a restrictive interpretation of the term "*provided by*", so that it refers only to the body directly providing the support;
3. Amend the 2012 Regulations to remove the reference to "public support" - this will depend on the Department's discussions with the Commission regards State Aid approval; and
4. For the participant to pay back the interest free element of the loans to the Carbon Trust i.e. they would make appropriate interest payments to the Carbon Trust. I should say this doesn't seem realistic (even if participants were prepared to make interest payments in the first place), I doubt the Carbon Trust would be prepared to accept interest payments at the going rate and this would require a significance amendment to the nature of the loan scheme.

Should any matter require clarification, or should anything further be required, do not hesitate to make contact.

Happy to discuss.

Kind regards

Pat Millen

Departmental Solicitors Office

Ext: 51210