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**Subject:** RHI Consultation  
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**SOL 55667/2016/DFE**

Dear All,

I refer to the above.

Obviously, we are at a very early stage in the development of the consultation document - as such its difficult, at this stage, to give the draft consultation document a clean bill of health. Please consider this as my initial look at the draft. My comments are based on the most recent document kindly passed to me by Stuart (25<sup>th</sup> August), I have ignored the previous draft sent to me on the 12<sup>th</sup> August.

There are a number of comments that occur to me:

(a) Para 1.34, technically it is correct that payments which could be seen as being in breach of the State Aid approval may have to be recovered from the recipients. You need only look at the State Aid approval to see that a constant feature of that approval is to ensure the absence of “overcompensation”. The Department may wish to give some consideration to introducing the language of the State Aid approval when it refers to “overcompensation”, perhaps as a mean of linking the action now being taken to the State Aid approval.

Possibly it might help when we get on to para 1.34 to list under separate sub-sections those reasons which are leading the Department to consider revising the tariffs (pre 18th November 2015), to a certain extent the Department’s reasoning tends to get lost. I think these reasons should be identified more clearly, possibly (as I mention) in their own sub-sections.

(b) As regards para 1.35 – 1.36 “Inefficient Heating Practices”, I have to confess I have something of a lingering doubt about this – are the examples identified by the Department not matters the Department would have been aware of when it granted accreditation? Further, even if a building/pipe work is poorly insulated or the heating system is poorly designed does this inevitably lead to the conclusion that the heat generated is not “useful heat” i.e. it would not be met by fossil fuels? Presumably, in these circumstances the heat would have to be met by fossil fuels (poor insulation or design notwithstanding)?

Para 1.36 refers to “the Department will have to introduce controls through the tariffs...” (My emphasis). I think the language should be toned to reflect the Department is giving “consideration to”, otherwise there may be a suggestion that the consultation outcome is already decided.

Did the use of installations for excess hours not form part of “inefficient heating practices” identified by the Department?

(c) Para 1.39 Grandfathering and Reasonableness. In para 1.39 the Department indicates that it continues to support the principle of grandfathering but then we go on to set out the options for installations completed before 18 November 2015. To a certain extent there is a contradiction here, I just point this out because (as the Department is no doubt already aware) we cannot have it both ways - we are departing from the Grandfathering principle, departing from a substantive legitimate expectation. As long as that point is acknowledged.

I would remove the reference to “reasonableness” I don’t think it adds much. I would also at 1.39 insert some reference that the grandfathering principle must be seen in the context of compliance with State Aid approval.

Having read Mr. McGinn’s advice to the Department 8<sup>th</sup> June I think this sums up the position as regards the possible unreasonableness and arbitrary nature of a tariff cap – I’m not convinced I can usefully add to what has already been said here. As for departing from a substantive legitimate expectation the courts have variously stated that before a public authority may lawfully resile from a substantive legitimate expectation, there must be “a sufficient overriding interest” that “outweighs the representation relied upon or which justifies the change in policy” *Coughlan*, paras 52, 57, 58, 8 or there must be “sufficiently powerful supervening factors” *Niazi*, para 69. The court is going to make this assessment for itself. In terms of the likelihood of challenge, I wouldn’t be at all surprised if the potential loss of generous payments wouldn’t be enough to stir someone into action - as I often advise, any case will have to be dealt with as it arises. There’s no 100% risk free route to chart here. The one thing that distinguishes this case from other involving substantive legitimate expectations is the fact that while the tariffs may end up being amended the substantive benefit is not removed/extinguished altogether – current beneficiaries will still be receiving a rate of return in line with the State Aid approval. To this end, I wonder whether the rate of return was discussed in any of the scheme guidance?

I am happy to discuss.

Kind regards

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