

From: [Wightman, Stuart](#)
To: [McGinn, Paul](#)
Cc: [Robinson, Susan](#); [Clydesdale, Alison](#)
Subject: RE: Non-Domestic Renewable Heat Incentive Scheme - CAP
Date: 08 June 2016 15:32:56

Paul

Thanks very much for your written advice and support at Monday's meeting.

Stuart

From: Robinson, Susan
Sent: 08 June 2016 15:09
To: Wightman, Stuart
Subject: Non-Domestic Renewable Heat Incentive Scheme - CAP

Please see attached from Mr Paul McGinn.

Many thanks.

Susan

Susan Robinson

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From: [Wightman, Stuart](#)
To: [Clydesdale, Alison](#); [Stewart, Chris \(DFE\)](#)
Cc: [Marten, Lucy](#); [Hughes, Seamus](#); [Willis, Adele](#)
Subject: FW: Non-Domestic Renewable Heat Incentive Scheme - CAP
Date: 08 June 2016 15:33:57
Attachments: [McGinn-Wightman - Non-Domestic Renewable Heat Incentive Scheme - CAP.docx](#)

fyi

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Our Ref: SOL54849/2016/DfE

8th June 2016

Dear Stuart

NON-DOMESTIC RENEWABLE HEAT INCENTIVE SCHEME POTENTIAL ANNUAL CAP ON PAYMENTS

Thank you for your letter of 27th May in relation to this matter.

In that letter you referred to my previous advice on the Department's powers to control costs in relation to the above Scheme. I do not propose to repeat that advice. Nevertheless a broad summary would be as follows.

1. Where participants are owners of an accredited RH Installation, the Scheme requires the Department to make 'periodic support payments'.
2. In principle, it is open to the Department to amend the Scheme to qualify this duty.
3. However, such an amendment would constitute a clear change of policy and in making such a change, the Department is constrained by its legal duty to act fairly. In particular, participants appear to me to have a clear legitimate expectation that periodic payments will continue.
4. There are two types of legitimate expectation:-
 - procedural on the one hand; and
 - substantive on the other.
5. If the participants were held to enjoy a substantive legitimate expectation that the payments would have to continue as they are presently constituted and the Department would be precluded from introducing a cap. However, substantive legitimate expectations of this sort are exceptional. If the Department is able to demonstrate that any reduction in the amount of payments being made will not reduce

incentives to a level which would bring into question that the participant's ability to make a sufficient return on their investment or even result in a significant loss, then it is highly unlikely that anyone would be able to establish breach of substantive legitimate expectation.

6. Procedural legitimate expectations are different. This means that the participants have a right to be heard before a new decision is taken. Given both the mandatory nature of the present legislation and the past history of consultation, in my view the Courts will not allow the Department to affect any changes without notice or consultation.

In carrying out the consultation, the Department will have to explain to participants not only what it proposes to do, but why it proposes to do it and share with them the underlying analysis indicating that payments are overly generous. In particular, in the context of the proposed cap, the Department will have to first of all explain the nature of the problem it perceives in some participants exceeding what it considers a reasonable number of 'eligible hours'. It should then also explain why the cap is the most appropriate option, and, if possible, identify other options in dealing with the difficulty and explain why it has rejected these. The Department must then give full consideration to any contrary case put forward by the participant.

This, however, does bring me to what I perceive to be the key issue here and this is not really a matter of breach of legitimate expectation, but is rather a matter of classic *Wednesbury* irrationality. Irrationality or unreasonableness is a notoriously imprecise concept. Lord Greene addressed the issue in the following terms:-

“It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise the statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of all things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may be truly said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd no sensible person would ever dream that it lay within the powers of the authority. Warrington LJ in *Short -v- Poole Corporation* gave the example of a red-haired teacher dismissed because she had red hair. This is unreasonable in one sense. In another it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and in fact, all of these things run into one another.”

In short, 'irrationality' is something of a protean concept, but in the present context, I would expect the issues to be as follows.

The idea behind a cap appears to be derived from the proposition that there are a certain number of 'eligible hours' that are reasonable in at least some businesses and that these hours are being exceeded. This in turn appears to be based on the proposition that some businesses

are operating plant for longer than is justified in business terms, simply to increase the value of the periodic payments that they are receiving. If that is the case, then in my view that is a clear abuse of the system and the Department would be justified in amending the legislation to deal with that abuse, but the onus would be on the Department, on balance of probabilities, to establish to the satisfaction of the Court that that was what was happening. In other words, the Department would have to produce statistical and other evidence to support its argument.

In this context, I have to emphasise that financial motives on the part of the Department can be something of a trap. The purpose of the Scheme is to encourage the use of renewable heat plant so as to, in particular, reduce the use of fossil fuels and combat climate change. It is entirely appropriate that, in pursuing these objectives, the Department ensure that public money is not wastefully used or used in a way which constitutes an abuse of the public purse. But it cannot lawfully exercise its powers simply to save money if in doing so that compromises the effectiveness of the scheme in achieving its objectives.

Secondly, even if the Department were able to establish that there was an abuse of the Scheme, it would also have to show a Court that the method it adopted for dealing with that problem was an appropriate one. In particular, there is an issue about whether or not the Department's imposition of a cap can be described as an indiscriminate action. In R -v- Paddington Rent Tribunal, a London Borough Council had made it a rule to refer to the Rent Tribunal all of the tenancies in any block of flats where two or more reductions of rent had been awarded. Although the legislation under which is exercised this power contained no express restriction on the Council's power to reduce the rent, it was held that it was an abuse to make a single block reference of over 300 tenancies without any consideration of the individual cases and without any specific complaint against the landlord. The disputed reference in fact, contained so many inaccuracies that it was not a genuine exercise of the power and furthermore the Council had taken into account the irrelevant consideration that the flats were allegedly below the highest building standards. Even if the Department were, therefore, able to show that in some cases participants were running up over 4,000 eligible hours in an unjustified way simply to increase their periodic payments, the Department is going to have to establish the accuracy of the criteria it applied in making this determination. Moreover, there may well be other cases in which exceeding the 4,000 eligible hours was entirely justified from a business point of view. Any decision on a cap would, therefore, have to take into account the differences between these cases and adopt a way of distinguishing between them. And if the Department's concerns were directed at abuses of the system, then realistically this may mean that a cap could not be applied across the board.

There may be a difference, however, between a situation in which the Department was motivated by a desire to avoid abuse on the one hand and a situation in which the Department considered that periodic payments in relation to 4,000 eligible hours constituted an appropriate level of public support. Again, in the latter case the Department would have to justify that decision, but a cap implemented on that basis may not need to distinguish between those cases where there was a genuine business need for plant to be run for over 4,000 eligible hours and those where there was not such a need.

Obviously, at this stage the Department is in the very early stages of formulating proposals and I do not think that there is much that I can usefully add. I am, of course, happy to discuss further.

Yours sincerely

Paul McGinn

P McGINN
Director Division 2

From: [Wightman, Stuart](#)
To: [Stewart, Chris \(DFE\)](#); [Clydesdale, Alison](#)
Cc: [Marten, Lucy](#); [Hughes, Seamus](#); [Willis, Adele](#); [McIlwrath, Linda](#)
Subject: RE: Non-Domestic Renewable Heat Incentive Scheme - CAP
Date: 08 June 2016 19:46:00

Chris

I agree. However, a tiered tariff might be the most appropriate way of reducing the rate of return. We'll therefore start to consider options (tiering / cap) on this basis. We will however probably have to consider the installations in tranches depending on when they joined the scheme as those who joined the scheme early on will have paid considerably more for their boilers and will have a lower rate of return – we could therefore end up with different tiers/caps according to when the installations were completed (i.e. 2013/14, 2014/15, etc).

Stuart

From: Stewart, Chris (DFE)
Sent: 08 June 2016 15:43
To: Wightman, Stuart; Clydesdale, Alison
Cc: Marten, Lucy; Hughes, Seamus; Willis, Adele; McIlwrath, Linda
Subject: RE: Non-Domestic Renewable Heat Incentive Scheme - CAP

Stuart

This is thoughtful and helpful (as ever from Paul) and would appear to me to direct us away from a cap for the purposes of reducing / preventing abuse (although that may be an additional benefit); and towards a cap for the purposes of ensuring an appropriate rate of return, i.e. bringing the scheme back into line with the legitimate expectation created when it was established.

C

From: Wightman, Stuart
Sent: 08 June 2016 15:34
To: Clydesdale, Alison; Stewart, Chris (DFE)
Cc: Marten, Lucy; Hughes, Seamus; Willis, Adele
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fyi

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Susan