

**MINUTES OF RHI STEERING GROUP MEETING HELD AT 9.30AM ON 31  
MAY 2016 IN CLARENCE COURT**

**Present:** Heather Cousins (HC)  
Stephen McMurray (SMcM)  
Alison Clydesdale (AC)  
David Conliffe (DC)  
Iain McFarlane (IMcF)  
Michael Woods (MW)  
Terry Coyne (TC)

Paul McGinn (PMcG) (DSO)  
Stephen Moore (SM)

**Apologies:** Chris Stewart  
Stuart Wightman

**Secretariat:** Rachel Linton

**State Aid**

1. SM advised that in order to determine whether there are any state aid issues the rates of return being attained by users needs to be determined. SM stated that if these rates are higher than those approved in the business case the Department will have to re-notify the scheme to the European Commission. AC advised that based on the data available to date the rates being achieved are consistently above the approved rates.
2. SM stated that based on the rate of return evidence to date it would be advisable to notify the European Commission of the issues and the actions being taken to correct and also seek their advice on next steps. MW noted that if the actual rates of return are higher than those approved, this would breach state aid approval and asked who would be responsible for repaying the grant. SM confirmed and stated that grant already paid would be recovered from the beneficiary but that there is an opportunity to correct overcompensation over the life of the scheme by amending the tariffs.
3. HC requested information on the mechanism in place to engage with the European Commission. SM advised that contact is made via UKRep and BIS who arrange all meetings with the Commission. SM advised that a paper on the purpose of the meeting would need to be prepared and a meeting at Head of Unit level would be appropriate at this stage. SM reiterated that early engagement is preferable and that only the European Commission or the European Courts can decide if there has been a breach in the LoO.
4. AC noted that the NIAO Report does not reference State Aid. MW advised that the current report is for the accounts but that the NIAO is aware of the State Aid issues and the next report which will be on VfM will include reference to State Aid, therefore it is important to look at the issue now.

5. SM advised that the Commission will most likely expect the Department to bring the rate of return back to the average figure quoted in the approvals of 12%. SMcM asked how this rate of return compares with the rate under the GB scheme, AC advised that the rate of return on the GB scheme is less than 12%.

### **DSO Advice**

6. PMcG stated that the Department has an obligation to make payments as presented in the legislation. PMcG advised that the legislation can be amended by the Department but that any amendments would only apply to future payments, the Department cannot amend the legislation retrospectively. PMcG advised that in order to amend the legislation the Department will first have to carry out a consultation exercise on the proposed changes, allowing sufficient time for people to respond. PMcG stated that the consultation exercise should clearly support the changes and provide a recent set of arguments grounding the decision.
7. PMcG advised that a potential obstacle to the Department being able to amend the legislation would be if it was deemed that users had a substantive legitimate expectation to achieve the current rates of return, however cases of this are rare as it would need to be proved that the changes were so unfair they would be considered to be abuse of the Departments power. PMcG advised that if the scheme remains viable and there is no significant financial loss suffered by those who have invested in the scheme, it would be unlikely that a substantive legitimate expectation claim could be made.
8. PMcG advised that if the scheme is being changed to achieve better VfM, the rationale for this needs to be clear and show the court that the scheme as it stands is too generous and the changes the Department is proposing to make will not have an adverse effect on the end user. PMcG suggested that the consultation exercise should look at not only the rate of return but also the implementation of a cap as it is better to argue one coherent whole case rather than run two arguments as each change is affected by the other.
9. HC asked whether the courts will compare the NI scheme to the GB scheme. PMcG advised that the courts will have regard to other schemes but will be focussed on the specifics of the NI scheme.
10. MW asked whether it would be appropriate to analyse a range of proposals and their impact or choose one preferred option. PMcG advised that the number of options to be brought to consultation is at the Departments discretion but it is important that consultees be provided with enough information and time to give their input and that there must be analysis of how the changes impact on the integrity of the scheme and on businesses.
11. TC asked whether a PAC hearing could prejudice any legal proceedings. PMcG stated that the Department must be able to prove that it has taken into account the consultees but that if the situation arose whereby the

Department was under criticism from the PAC it could lead to applications for judicial review. PMcG advised that all published material will be reviewed therefore the Departments approach must be consistent. AC noted that most of the responses to the consultation are likely to be to not make changes to the scheme. PMcG stated that even if all responses were against the changes the Department can implement the changes provided it has dealt with the responses fairly.

12. SMcM asked whether legal advice on implementing a cap has been provided. PMcG advised that implementing a cap would require a change to the legislation and the Department needs to produce evidence to justify this. PMcG added that it is not possible to implement a cap retrospectively.
13. AC stated that the Department does not yet have enough evidence to be able to justify implementing a cap as they need a full years data for a variety of users, including seasonal variances, to be able to get a complete picture. PMcG confirmed that it would be preferable to have a full years data over a range of users in order to keep assumptions to a minimum. HC stated that obtaining the necessary evidence is a priority.
14. AC asked whether a user have an argument that 'grandfathering' was built into the legislation. SM stated that in the original approval of the scheme it was clear that the average rate of return was expected to be 12% over 20 years. PMcG advised that grandfathering is linked to the legitimate expectation argument in that as long as the changes are not unfair or oppressive there should not be an issue.
15. HC expressed thanks to PMcG and SM and they left the meeting.

**Action 1: AC to review data available to date with a view to assessing when the consultation can be commissioned**

**Action 2: AC to begin process of alerting European Commission**

### **Minutes and Action Points of previous meeting**

16. HC referred to the minutes of the previous steering group meeting which took place on 31 May 2016. The Steering Group agreed the minutes as final. Attendees provided a progress update on each of their respective Action Points recorded in the minutes of the previous meeting.
17. HC referred to the meeting with NIAO scheduled for 2pm on 6 June and noted that a suggestion should be made to delay a PAC hearing until after consultation. DC requested an estimate of when the evidence will be available to enable the consultation to take place. AC advised that in order to provide an estimate of this the Energy Economist will first need to carry out an equality impact assessment.
18. HC referred to the proposed site inspections and requested an update on contact with Ofgem to date. MW stated that the Ofgem position is not strong enough and suggested they should be treating this as an investigation rather than standalone 'site inspections' as this should be an

investigation into whether fraud or abuse is taking place, not whether there is a working system. MW raised concerns that the Ofgem auditors are not independent enough to carry out the rigorous and robust level of inspections required and that there appears to be reluctance to express an opinion on whether fraud or abuse is occurring. MW also stated that the timelines need to be accelerated and suggested that it would be useful for the Department to carry out their own inspections in parallel with Ofgem as soon as possible.

**Action 3: AC to arrange teleconference with Ofgem to discuss the proposed site inspections.**

#### **Draft ToR**

19. DC suggested that the new Energy Efficiency Grade 7, Lucy Marten, should be added to the Steering Group membership. AC confirmed. MW stated that Andrew McCormick will attend Steering Group meetings when he is available. HC added that Chris Stewart should also be invited to all meetings. HC confirmed that other than the addition of Lucy Marten to the Steering Group membership there are no further changes required to the ToR and it can be finalised.

**Action 4: MW to add Lucy Marten to the Steering Group membership and arrange for finalisation of the ToR**

#### **Update on NIAO Report**

20. HC advised that a request should be made to NIAO to remove the annual rate of return example which assumes 24 hours a day, seven days a week use on the basis that this sort of usage does not adhere to the principles of the scheme.
21. SMcM advised that Andrew McCormick has requested that copies of the emails in relation to AME allocations referenced in the report in paragraphs 47 and 54 should be provided to NIAO.

**Action 5: AC to check what documentation NIAO has been provided with to date and ensure emails referenced in the report are included in this**

#### **Preparation for Audit Committee**

22. TC confirmed that AC is going to provide an update on timelines to Audit Committee. TC requested an update on the draft Internal Audit Reports. MW advised that David Beck is aware of the reports and that if NIAO request sight of the reports they will be provided. TC confirmed that David Back has had sight of the NIAO Report.

#### **AOB**

23. There being no further business the meeting was adjourned.