

MEMORANDUM

To Sam Boileau
Date 14 February 2011
Matter No 16274.00022

Sam

DETI have instructed us on two points in connection with the Renewable Heat Incentive (RHI) in Northern Ireland, as follows:

- (a) draft instructions to Parliamentary Counsel to introduce drafting into the Energy Bill 2011 to extend RHI enabling powers under the Energy Act 2008 (currently only available in GB) to NI¹.
- (b) As a related issue, comment on two options for introducing RHI powers without recourse to primary legislation at all – i.e., under existing powers under the Energy (NI) Order 2003 and Directly under the RED / s 2(2) European Communities Act 1972. Introduction of an RHI using miscellaneous provisions in the Energy (Northern Ireland) Order 2003²

This note provides an overview of the Renewable Heat Incentive schemes, both in GB and in Northern Ireland, and considers the current state of implementation. It also comments on the various legislative options for implementing an RHI in NI.

1 Policy and strategy relating to renewable heat

- 1.1 Under the 2009 Renewable Energy Directive, the UK has a legally binding commitment to obtain 15% of its overall energy use from renewable sources by 2020. The wider EU target is 20%, but the UK's lower target takes into account the fact that the UK's renewable energy share was very low (1.3%) in the baseline year of 2005.
- 1.2 The UK Government is taking a number of steps to help it meet the 15% target, including:
 - (a) feed-in tariffs (FITs) for small-scale generation of renewable electricity;
 - (b) Renewables Obligation (requires electricity suppliers to source a specified and increasing proportion of their electricity from renewable sources); and

¹ DETI work request DWS/RH1001 dated 1 February (approved on 3 Feb)

² E-mail from Peter Hutchinson dated 8 February

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- (c) RTFO - Renewable Transport Fuel Obligation (requires suppliers of fossil fuel for road transport to prove that a specified percentage of the fuel they supply for use in the UK comes from renewable sources).
- 1.3 The Renewable Energy Strategy, published in 2009, sets out how the Government intends to implement these and other measures. In relation to heat specifically, the Strategy anticipates that 12% of heat used in the UK could be generated from renewable sources by 2020 (as opposed to less than 1% currently). However, DECC believes that this could only be achievable with financial incentives. The Strategy proposes the introduction of a Renewable Heat Incentive (RHI) to encourage households, businesses and communities to use renewable heat. Further details on this are set out below.
- 1.4 In terms of jurisdiction, the Renewable Energy Strategy is a UK-wide strategy, although there are complexities associated with this due to devolution. DECC has agreed with the Devolved Administrations that each part of the UK will complete an evidence-gathering exercise to assess renewable electricity and heat potential and barriers, and propose a level of ambition for renewables deployment based on that assessment for renewable energy delivery by 2020. The UK Government and Devolved Administrations will then agree a common set of criteria for the assessment exercises in each part of the UK.

2 Energy Act powers

- 2.1 Section 100 of the Energy Act 2008 gives the Government the power to introduce financial incentives for the generation of heat using renewable sources. The powers granted are broad, and it is intended that the detail of the scheme would be contained in secondary legislation.
- 2.2 Section 100 is set out in full below:

100 Renewable heat incentives

(1) The Secretary of State may make regulations— (a) establishing a scheme to facilitate and encourage renewable generation of heat, and (b) about the administration and financing of the scheme.

(2) Regulations under this section may, in particular—

- (a) make provision for the Secretary of State or the Authority to make payments, or to require designated fossil fuel suppliers to make payments, in specified circumstances, to—*
- (i) the owner of plant used or intended to be used for the renewable generation of heat, whether or not the owner is also operating or intending to operate the plant;*
 - (ii) a producer of biogas or biomethane;*
 - (iii) a producer of biofuel for generating heat;*
- (b) make provision about the calculation of such payments;*
- (c) make provision about the circumstances in which such payments may be recovered;*
- (d) require designated fossil fuel suppliers to provide specified information to the Secretary of State or the Authority;*

- (e) *require the payment of a levy by designated fossil fuel suppliers to the Secretary of State or the Authority;*
- (f) *make provision about the calculation of the levy;*
- (g) *make provision for payments to fossil fuel suppliers in specified circumstances;*
- (h) *make provision about the enforcement of obligations imposed by or by virtue of the regulations (which may include a power for the Secretary of State or the Authority to impose financial penalties);*
- (i) *confer functions on the Secretary of State or the Authority, or both.*

(3) In this section—

“Authority” means the Gas and Electricity Markets Authority;

“biofuel” means liquid or gaseous fuel which is produced wholly from biomass;

“biogas” means gas produced by the anaerobic conversion of organic matter;

“biomass” means material, other than fossil fuel, which is, or is derived directly or indirectly from, plant matter, animal matter, fungi or algae;

“biomethane” means biogas which is suitable for conveyance through pipes to premises in accordance with a licence under section 7 of the Gas Act 1986 (c. 44) (gas transporter licences);

“designated fossil fuel suppliers” means—(a) if the regulations so provide, a specified class of fossil fuel suppliers, and (b) in any other case, all fossil fuel suppliers;

“fossil fuel” means—(a) coal; (b) lignite; (c) natural gas (within the meaning of the Energy Act 1976 (c. 76)); (d) crude liquid petroleum; (e) petroleum products (within the meaning of that Act); (f) any substance produced directly or indirectly from a substance mentioned in paragraphs (a) to (e);

“fossil fuel supplier” means a person who supplies fossil fuel to consumers for the purpose of generating heat;

“owner”, in relation to any plant which is the subject of a hire purchase agreement, a conditional sale agreement or any agreement of a similar nature, means the person in possession of the plant under that agreement

“plant” includes any equipment, apparatus or appliance

“renewable generation of heat” means the generation of heat by means of a source of energy or technology mentioned in subsection (4).

(4) The sources of energy and technologies are— (a) biomass; (b) biofuels; (c) fuel cells; (d) water (including waves and tides); (e) solar power; (f) geothermal sources; (g) heat from air, water or the ground; (h) combined heat and power systems (but only if the system's source of energy is a renewable source within the meaning given by section 32M of the Electricity Act 1989 (c. 29)).

(5) Regulations may— (a) modify the list of sources of energy and technologies in subsection (4); (b) modify the definition of “biogas” or “biomass” in subsection (3).

(6) Regulations may make provision, for the purposes of subsection (2)(a)(iii) and the definition of "fossil fuel supplier", specifying that particular activities do or do not constitute generating heat.

(7) Before making regulations under this section which extend to Scotland, the Secretary of State must—

- (a) if the regulations contain any provision which would be within the legislative competence of the Scottish Parliament if it were contained in an Act of that Parliament, obtain the consent of the Scottish Ministers;
- (b) in any other case, consult the Scottish Ministers.

2.3 Section 100 of the Energy Act covers England and Wales and Scotland only (Section 112). It does not extend to Northern Ireland.

2.4 The Explanatory Note to the Energy Act states that the purpose of the RHI is to stimulate a market for renewable heat by making support payments to the owners of renewable heat generation systems, proportionate to the amount of measured heat output delivered. It is in some senses a 'feed-in-tariff'. However, UK heat is usually produced for immediate local use, and as there is no national heat network, it is not generally 'fed in' to a network and certainly not a nationwide one.

2.5 The Explanatory Note states that the RHI will be funded via a levy on designated suppliers of fossil fuels supplied for the purpose of generating heat. It goes on to state that enabling powers are broad enough to allow the detail of the scheme to be developed fully at a later stage following consultation. The provisions also allow flexibility to determine payment processes, levels of payments and to further identify who will be eligible to receive RHI payments.

2.6 Regulations made under the RHI power in Section 100 are subject to affirmative resolution by virtue of section 105 of the Act. This requires that regulations made under the Section 100 power are approved by both Houses of Parliament (or, in the case of regulations prepared for Scotland, the Scottish Parliament). There is no power for the regulations to be amended under either the negative or affirmative procedures. It is simply an opportunity to reject or accept.

3 Implementation - Renewable Heat Incentive

3.1 On 1 February 2010, DECC published a consultation on a proposed RHI scheme, with a stated aim of introducing the scheme in April 2011. On 20 October 2010, as part of the Spending Review, the Chancellor confirmed that the RHI would still be launched in 2011. The April deadline has been postponed to June 2011, although there are suggestions implementation may be even later (the RHI has been dogged by speculation since Chris Huhne admitted to forgetting about the RHI when writing the coalition agreement).

3.2 The proposed RHI will provide financial support for those who install renewable heating, which qualifies for support under the scheme. Details of the scheme are set out below, although these have not yet been finalised, and may change depending on consultation responses.

3.3 Under the proposed RHI, owners of renewable heat equipment will be eligible for a fixed payment, over a number of years, for every unit of renewable heat generated in a year (calculated in units of kilowatt hours (kWh)). Renewable heat installations of any size will be

eligible, whether in homes, commercial buildings, public sector buildings or for community groups. Payments will be made annually for installations below 45 kW and quarterly for those above 45 kW.

- 3.4 The technologies and fuel sources which will be supported include the following: (a) air and ground-source heat pumps, (b) solar thermal, (c) biomass boilers, (d) renewable combined heat and power, (e) use of biogas and bioliquids, and (f) the injection of biomethane into the natural gas grid.
- 3.5 For small and medium-scale installations, the amount of heat generated per year will be estimated at the time of installation. For large installations, the amount of heat generated per year will be metered, so that the payment is based on the actual amount of heat generated.
- 3.6 Payments will be made for a period between ten and 23 years, depending on the type of installation.
- 3.7 Installers and equipment of small and medium-sized installations must be certified under the Microgeneration Certification Scheme (or equivalent).
- 3.8 Tariff levels will consist of three elements. They will:
- (a) cover the financial gap between the costs of conventional and renewable heat systems;
 - (b) compensate for certain additional non-financial costs, for example, inconvenience; and
 - (c) provide a 12% rate of return of on the additional capital cost of renewables (although solar thermal will only have a 6% rate of return).
- 3.9 Renewable heat equipment installed after 15 July 2009 but before the start of the RHI will also benefit from the scheme. Ofgem will administer the scheme.
- 3.10 Although it is clear that secondary legislation will be required to implement the scheme (which would be subject to parliamentary approval as described above), draft regulations have not yet been published.

4 Renewable Heat Incentive in Northern Ireland – Policy and Strategy

- 4.1 As mentioned above, Section 100 of the Energy Act extends to England, Wales and Scotland only. The DECC Consultation document on RHI in GB states that "Northern Ireland has the power to introduce its own primary legislation in respect of renewable heat, and is beyond the remit of the RHI."
- 4.2 DETI mentioned the need for an incentive mechanism for renewable heat in its Strategic Energy Framework in 2009. DETI subsequently commissioned out a study in 2010 examining the potential for renewable heat in Northern Ireland. The full report has not been published, but an Executive Summary has been published on the DETI website. The study concluded that Northern Ireland has the potential to obtain 10% of its heat energy from renewable sources by 2020, and recommended the development of an RHI, providing it is economically viable. It also noted that the Northern Ireland heat market is very different to the market in GB and that any RHI would need to be tailored to that market.

- 4.3 In November 2010, DETI advertised a tender for a service provider to undertake an independent economic appraisal of the level of support that could be introduced through an RHI to encourage the roll-out of renewable heat technologies in Northern Ireland.
- 4.4 The tender states that the budget allocation for an RHI in Northern Ireland is £25m from 2011/12 – 2014/15. This funding has been provided by HM Treasury and is only available to Northern Ireland for an RHI.
- 4.5 Peter Hutchinson of DETI has confirmed to us that the policy objective is for an RHI scheme which is a separate scheme to the RHI scheme in GB. Whilst there may be synergies in terms of administration, there will be a need for there to be different tariff levels, and different eligibility requirements.
- 4.6 The current plan, which DETI understands DECC is agreeable to, is for an amendment to be introduced to the current Energy Bill to extend / introduce (as appropriate) RHI enabling powers to NI. DETI has accordingly obtained a Legislative Consent Motion to enable the Secretary of State to legislate in this area for Northern Ireland.

5 RHI in Northern Ireland

- 5.1 We are asked to advise DETI on the following three legislative options for implementing an RHI in NI:
- (a) Amending the Energy Bill 2011 to extend renewable heat powers currently provided in the Energy Act 2008 to cover NI;
 - (b) Introduction of an RHI using miscellaneous provisions in the Energy (Northern Ireland) Order 2003;
 - (c) Introduction of an RHI via regulations made under section 2(2) of the European Communities Act 1972 (with reference to the Renewable Energy Directive 2009).
- 5.2 The devolution settlement established by the Northern Ireland Act 1998 provides for a Northern Ireland Assembly and executive authorities headed by a First Minister and deputy First Minister.
- 5.3 The Northern Ireland Assembly has the power to legislate within its legislative competence. There are three categories of matters under Northern Ireland devolution –
- (a) Excepted matters – the Assembly cannot legislate in respect of anything which is an excepted matter unless it is ancillary to a reserved or transferred matter;
 - (b) Reserved matters – the Assembly can legislate in respect of reserved matters, but only with the consent of the Secretary of State;
 - (c) Transferred matters – everything else. The Assembly is free to legislate in respect of them.
- 5.4 The UK parliament retains the power to legislate for all purposes, but by convention will not normally legislate with regard to devolved matters except with the agreement of the devolved legislature in the form of a Legislative Consent Order.

5.5 Energy and renewables related matters are not Excepted or Reserved Matters and so the Northern Ireland Assembly would be free to introduce primary legislation giving the powers to DETI to introduce an RHI.

5.6 However, we understand that this is currently not an attractive option for DETI. Therefore we have been asked to consider other options as an alternative to primary legislation being introduced by the Northern Ireland Assembly.

Option 1 - Energy Bill 2011

5.7 Considering first the Energy Bill option.

5.8 The Energy Bill, which is currently going through Westminster, has three principal objectives: tackling barriers to investment in energy efficiency; enhancing energy security; and enabling investment in low carbon energy supplies. In particular, it includes:

- (a) **Measures to improve energy efficiency** – including the **Green Deal** (a new financing framework to enable the provision of fixed improvements to the energy efficiency of households and non-domestic properties) and the **Energy Company Obligation** (to take over from the existing obligations to reduce carbon emissions (the Carbon Emissions Reduction Target (CERT) and Community Energy Saving Programme (CESP)), which expire at the end of 2012);
- (b) **Measures to improve energy security** – including amendments to the Network Code and addressing what happens if a major supplier becomes insolvent; and
- (c) **Measures to enable low carbon technologies** – in particular in relation to offshore generation.

5.9 On 8 December 2010, the Energy Bill was introduced into the House of Lords with its First Reading. The Second Reading was held on 22 December 2010.

5.10 The Lords committee sessions ran between 17th January and 8th February. Report stage and Third Reading will be the next stages in the Lords before it is introduced into the House of Commons.

5.11 Under this option, legislative counsel would be asked to draft amending provisions to extend the Energy Act 2008 powers to NI.

Option 2 - Miscellaneous provisions in the Energy (Northern Ireland) Order 2003

5.12 This Order provides for the establishment and functions of the Northern Ireland Authority for Energy Regulation and an energy group of the General Consumer Council for Northern Ireland. It also amends the legislation regulating the electricity and gas industries.

Miscellaneous provisions are set out in section 61.

[F30Financial assistance for energy purposesN.I.61.—

(1) The Department may give financial assistance to any person if, in the opinion of the Department—

(a) the form and amount of the assistance is reasonable having regard to all the circumstances; and

(b) the giving of the assistance is likely to achieve one or more of the purposes set out in paragraph (2).

Those purposes are—

(a) to secure a diverse and viable long-term energy supply;

(b) to promote the development and maintenance of an efficient, economic and co-ordinated gas industry in Northern Ireland;

(c) to promote efficiency and economy on the part of persons engaged in the generation, production, transmission, distribution or supply of energy;

(d) to promote the efficient use of energy;

(e) to promote the development or the bringing into use of—

(i) energy from renewable sources, or

(ii) technologies for the production of energy from such sources;

(f) to promote research and development in relation to other matters connected with energy supply;

(g) to promote the generation, production, transmission, distribution or supply of energy from renewable sources;

(h) to promote the production, distribution or use of renewable transport fuels;

(i) to limit or reduce emissions of greenhouse gases, or other effects on the environment, resulting from the generation, production, transmission, distribution, supply or use of energy;

(j) to conduct research, or to raise awareness, about matters referred to in sub-paragraph (i);

(k) any other purpose prescribed by regulations made by the Department with the approval of the Department of Finance and Personnel.

Financial assistance under this Article may be given— (a) in respect of particular activities carried on or supported by the recipient; or (b) generally in respect of all or some part of the activities carried on or supported by the recipient.

Financial assistance under this Article shall be given— (a) in such form, and (b) subject to such conditions, as the Department considers appropriate.

Without prejudice to the generality of paragraph (4), financial assistance under this Article may be given in one or more of the following forms— (a) by making grants (whether or not repayable) or loans; (b) by giving indemnities; (c) by making investments in bodies corporate; (d) by incurring expenditure for the benefit of a person; (e) by providing services, staff or equipment for the benefit of a person.

Without prejudice to the generality of paragraph (4), financial assistance under this Article may be given subject to conditions—

(a) as to repayment; (b) requiring payments to be made to the Department (which need not be limited by reference to the value of the assistance given).

In this Article—

“greenhouse gases” has the meaning given by section 82(9) of the Energy Act 2004;

“renewable sources” means sources of energy other than fossil fuel, peat or nuclear fuel, and includes waste (and for this purpose, “fossil fuel” and “peat” have the meaning given by Article 52(7));

“renewable transport fuel” means—

(a) liquid or gaseous fuel that is produced wholly or mainly from biomass; or

(b) any other description of fuel specified in an order made by the Department;

and for this purpose “biomass” means the biodegradable portion of a specified product, waste or residue.]

- 5.13 [discuss with CWCW and RZP whether these powers could extend to an RHI – fine if only giving out money, but how will it be funded? If a levy on fossil fuel suppliers, could be challenged].

Option 3 - Introduction of an RHI via regulations made under section 2(2) of the European Communities Act 1972 using the Renewable Energy Directive

- 5.14 The third option relies on general powers set out in the European Communities Act 1972. Section 2(2) provides that:

“Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may [by order, rules, regulations or scheme]2 , make provision—

(a) for the purpose of implementing any [EU obligation]1 of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or

(b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above;

and in the exercise of any statutory power or duty, including any power to give directions or to legislate by means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the [objects of the EU]1 and to any such obligation or rights as aforesaid.”

- 5.15 DETI have suggested that these general powers could be relied upon to introduce regulations implementing an RHI, to implement “EU obligations” set out in the Renewable Energy Directive (2009/28/EC). The Directive establishes a common EU framework for the promotion of renewable energy and sets legally-binding targets on member states for the use of renewable energy. It also sets out broad measures that member states must implement to promote renewable energy, including guarantees of origin, streamlined administrative procedures, information and training, and access to the grid.

[discuss with SEB whether RED gives specific enough powers to member states to introduce an RHI?]

6 Questions for DETI

- (a) Have DETI consulted on the RHI, and do they intend to do so? (I could not find any evidence of DETI having carried out any public consultations on renewable heat, but this is a question worth putting to DETI for clarification).
- (b) DETI has stated that the RHI will need to be quite different in NI to the GB approach. Does the broad approach set out in the Energy Act 2008 meet DETI's requirements, or would amendments be needed to substantive provisions to make it fit with the NI market?