

DETI

RED Implementation

RHI in Northern Ireland

Questions for Peter Hutchinson for the purposes of drafting instructions

1 Background issues which will need to be clarified in instructions

- 1.1 Has the introduction of RHI been specifically consulted on in NI? We are aware that the incentivisation of Renewable Heat was discussed briefly in the Draft Strategic Energy Framework for Northern Ireland 2009 (paras 7.9 – 7.11). The concept of renewable heat incentive was also examined in a DETI commissioned report by Cambridge Economics, and public support for RHI was voiced by NI Energy Minister Arlene Foster in September 2010. However we are not aware of any specific consultation on an RHI.

No the RHI has not been formally consulted on – though the concept of an RHI was introduced in the 2009 SEF consultation which was adopted in September 2010. The position is as outlined above.

- 1.2 Why are the powers being pursued through the Westminster route? NI has legislative competence to produce its own legislation for these purposes. This point is made in the DECC consultation on the RHI in February 2010 ("Northern Ireland has the power to introduce its own primary legislation in respect of renewable heat, and is beyond the remit of the RHI"). Is the Westminster route being pursued to achieve consistency with Scotland / England & Wales? Or because, with DECC's co-operation, this route is the most efficient given that there is already a Bill which has been introduced into the legislative process in Westminster which can be conveniently used?

This is primarily a timing issue. If NI were to pursue the legislation through NI Assembly route, there would be an 18 month process to go through, and there would be a danger that NI would miss the £25m funding secured from HM treasury for this financial year coming. If that happened, NI industry would be disadvantaged as compared with GB industry. Also, DETI Departmental Solicitor is of the view that there are insufficient powers available under either the miscellaneous provisions in the Energy Order or the European Communities Act / RED to enable DETI to introduce a RHI scheme under existing powers.

- 1.3 In your e-mail dated 8 February, you state that DETI would like to "explore" two legislative methods in terms of the Energy Bill amendment, as follows:
- (a) the powers could be extended to NI by way of an amendment to the Energy Act 2008; or
 - (b) the powers could be introduced for DETI by a free standing clause in the Energy Bill in "equivalent" terms to the Energy Act 2008.

In our view this question is best dealt with by Parliamentary Counsel in terms of coming to his own decision on the most appropriate legislative approach. Do you agree?

Agreed.

- 1.4 In your e-mail dated 8 February he also asks for our thoughts on whether existing powers, e.g. under the Energy Order 2003 or the RED / European Communities Act might be sufficient

to allow the RHI to be introduced directly by way of secondary legislation in NI. This is something we propose to comment on directly to DETI rather than seek Parliamentary Counsel's views on. Do you agree?

We discussed this over the phone. SEB and HAB gave their preliminary views that neither the miscellaneous provisions in article 61 of the Energy Order nor the RED / European Communities Act 1972 afforded appropriate powers for DETI to introduce the proposed RHI directly. This was for a number of reasons which we discussed.

In terms of the Energy Order powers, these have a number of deficiencies, e.g. no power to make secondary legislation (self executing), no power to raise a levy (just to make grants).

In terms of the European Communities Act 1972 / RED, the Departmental Solicitor's view is that RED is too vague to be useful in terms of giving DETI the ability to introduce its own legislation directly. SEB made the point that it was not uncommon for environmental legislation to be enacted in this way (through the European Communities Act) and that wide powers might be available under the RED / ECA. However there is a consistency point here – the same route would have been available in GB and it would be inconsistent in terms of UK implementation if in NI the RED / ECA approach were adopted. SEB agreed to have a quick look at the RED provisions and comment further if appropriate, but PH made the point that he does not require written advice on these points.

2 Details of the proposed RHI

2.1 We understand that Cambridge Economics are still working on how the scheme will be designed, but we have some questions about the detail of how the scheme is going to work in case these need to be dealt with in the instructions as follows:

- (a) Have you any views on whether – broadly speaking – the powers available in GB as set out in the Energy Act 2008 are suitable for the purposes of the proposed RHI if "mirrored" in NI?

Yes. PH confirmed that the powers needed were all included, and subsequently confirmed this by e-mail.

The only point which PH has raised which as far as he is concerned may need to be treated differently is that they may need some flexibility on the definition of "biofuel", i.e., to allow this definition to be amended (see PH's separate e-mail).

PH also explained that in some respects the scheme is likely to be the same as and mirror the GB scheme – for example in relation to how payments are made. In other respects, the NI RHI scheme may vary from the GB scheme to reflect differences in the energy market. For example tariff levels may differ, and support for particular technologies may differ to reflect different market conditions.

- (b) Will the NI RHI levy fund by self contained (i.e., levied from and distributed within NI with no need for any consolidated funds or payments out of / into NI)?

Despite the fact that the Energy Act 2008 provisions include powers to introduce a levy, it has been decided as a matter of policy that the RHI will not now be funded, at least at the outset, by way of a levy. Rather it will be funded by way of central funds already secured from HM Treasury (£25m has been secured by way of Annually Managed Expenditure - £2m in the first year, then £4m, £7m and £12m). £850m has

been allocated to GB. Notwithstanding this policy decision NI would like to have the power to introduce a levy to mirror the power available to the Secretary of State in GB.

- (c) Who will administer and regulate the fund – we assume NIAUR?

It is envisaged that, as with the Renewables Obligation, the NI RHI scheme will be administered on a day to day basis by Ofgem (e-serve). NIAUR would have its regulatory function under the RHI written into its licence, but as with the Renewables Obligation the scheme would be operated in practice by Ofgem. SEB commented that under the RO, NIAUR is given the legislative function of regulator, but there are provisions written into the legislation to allow NIAUR and Ofgem to enter into agreements / arrangements to allow Ofgem to perform NIAUR's functions on its behalf. SEB commented that he considered similar provisions would be needed here.

- (d) Will there be any role which DETI wants Ofgem (rather than NIAUR) to perform?

See above. It is envisaged that Ofgem will administer the scheme, will hold the funds centrally, will deal with eligibility issues, and will make payments to eligible parties.

- (e) Will there more generally be a need for some (or all) of the administrative functions to be given to or shared with Ofgem (cf the function sharing between NIAUR and Ofgem under the Renewables Obligation arrangements, which would require specific provision in legislation e.g. s121 Energy Act 2004)

See above.

- (f) Will DETI require its administrative costs in running / regulating the RHI to be paid for out of sums raised by the levy? (cf s321 Electricity Act 1989)

Such drafting will not be needed – it would be inconsistent with the powers available to GB, and in any event as the funding will not be raised by way of a levy then even if such a power is required in future this can be introduced at a later stage.