

From: [McCutcheon, Joanne](#)
To: [Moore, Stephen \(DETI\)](#)
Cc: [Hutchinson, Peter](#)
Subject: FW: URGENT Carbon Trust and RHI in Northern Ireland
Date: 25 November 2013 09:54:59
Attachments: [image001.gif](#)
[image002.gif](#)

Stephen

Please see below. Would you be happy to engage in the first instance and then we can involve DSO (or other legal expertise) if necessary?

Regards

Joanne

From: Edmund Ward [mailto:Edmund.Ward@ofgem.gov.uk]
Sent: 22 November 2013 19:06
To: McCutcheon, Joanne; Hutchinson, Peter
Cc: Teri Clifton
Subject: RE: URGENT Carbon Trust and RHI in Northern Ireland

Joanne, Peter

Further to our discussion yesterday Joanne, I have engaged with our lawyers to explore the mechanism by which we could ensure compliance with state aid provisions in practice.

Having shown Stephen Moore's state aid analysis to our lawyers here, they are keen to explore with him and DETI lawyers whether any additional constraints are applied by the Community Guidelines on state aid for environmental protection (EP), under which state aid approval for the RHI Non-Domestic scheme was given.

Their current reading of the cumulation provisions of those guidelines suggests that we can only "cumulate" aid approved under the EP Guidelines with *de minimis* aid if the total of both remains within the thresholds set in the Guidelines. In other words, if the aid ceiling for the EP Guidelines is less than the *de minimis* threshold, we would be constrained by the former.

They are very keen to engage both with your state aid expert and DETI lawyers to discuss this further as a matter of urgency, so that we can agree a mutually acceptable solution that does not create longer-term precedent problems in applying the rules to Carbon Trust loans

I appreciate that this may require a further briefing to your Departmental Solicitor. Do you think this is something it would be possible to take forward? It seems this may be central to determining if we can achieve the narrower reading approach with regard to Carbon Trust loans.

Many thanks for your continued engagement on this.

Kind regards,

Edmund

Edmund Ward
Senior Technical Manager, RHI
New Scheme Development
9 Millbank
London

SW1P 3GE
Tel: 0207 901 7168
www.ofgem.gov.uk



From: McCutcheon, Joanne [<mailto:Joanne.McCutcheon@detini.gov.uk>]
Sent: 20 November 2013 13:59
To: Edmund Ward; Teri Clifton
Cc: Hutchinson, Peter
Subject: RE: URGENT Carbon Trust and RHI in Northern Ireland

Edmund
Any update on RHI issue ? Also any word from lawyers on website statement – it will be two weeks tomorrow since we sent it. Or a change control and supporting info to cover your proposal on the finances? Thanks.
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From: Edmund Ward [<mailto:Edmund.Ward@ofgem.gov.uk>]
Sent: 11 November 2013 13:16
To: Hutchinson, Peter; McCutcheon, Joanne
Cc: Teri Clifton
Subject: FW: URGENT Carbon Trust and RHI in Northern Ireland

Joanne, Peter,

I hope you are well; it was good to meet you last week. Thanks also for the tip on lunch venue.

Please see below advice from the Carbon Trust lawyers on the status of Carbon Trust. I've shared with our lawyers, and will provide a further update on that tomorrow. I hope to be able to respond on the website statement by the end of the day – apologies for the delay in this.

Kind regards,
Edmund

From: Janine Cobain [<mailto:Janine.Cobain@CarbonTrust.com>]
Sent: 11 November 2013 09:31
To: Edmund Ward
Subject: FW: URGENT Carbon Trust and RHI in Northern Ireland

Good Morning Edmund,

Please find below response from our legal team, if you require any further details please do not hesitate to contact me

Regards

Janine Cobain
Loans Manager
Carbon Trust Loan Scheme

Tel : 028 9073 4398

The Carbon Trust - Making Business Sense of Climate Change

From: Claire Williams

Sent: 09 November 2013 16:04

To: Janine Cobain

Subject: RE: URGENT Carbon Trust and RHI in Northern Ireland

Janine

As discussed, the following may be helpful to you :-

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It may also be useful to note that the Carbon Trust:

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- does not exercise functions of a governmental or public nature;
- was not created by statute and has no statutory powers or regulatory functions and does not exercise any such powers or functions;
- is not accountable to the public for its activities;
- is not subject to judicial review;
- designs and owns its programmes of activity and the intellectual property that it generates, with the result that its activities could not be transferred to another organisation without its consent; and
- is not subject to the Freedom of Information Act.

As the Carbon Trust receives public funding to support various of its low carbon or renewable energy programmes, its status has been considered over the years at various times. On each occasion, all bodies have accepted that it is not a public body.

Regards

Claire

Claire Williams

Head of Legal & Company Secretary

The Carbon Trust – Making Business Sense of Climate Change

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Fax: +44 (0) 20 7170 7020

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From: Janine Cobain
Sent: 05 November 2013 10:42
To: Claire Williams; Stephanie Hanson
Cc: Geoff Smyth; Abigail Hermon
Subject: URGENT Carbon Trust and RHI in Northern Ireland

Good Morning Claire, Steph

With reference to the email below, could you please provide clarification for Edmund Ward from Ofgem (email address below) on the points listed below as requested and also provide a copy of Section 2, State Aid Declaration from the Interest Free Loan Scheme agreements.

This matter is causing concern for a number of our clients within Northern Ireland and I would be grateful if we could facilitate a speedy response to the specified timescale.

If you have any queries please do not hesitate to contact me

Regards

Janine Cobain
Loans Manager
Carbon Trust Loan Scheme
Tel : 028 9073 4398

The Carbon Trust - Making Business Sense of Climate Change

From: Edmund Ward [<mailto:Edmund.Ward@ofgem.gov.uk>]
Sent: 04 November 2013 18:13
To: Janine Cobain
Subject: Carbon Trust and RHI in Northern Ireland

Hi Janine

Thanks for your time on the phone, and for your email. I'm glad we managed to make contact.

I've been discussing with DETI our approach to Carbon Trust loans and RHI eligibility in NI, and one aspect that may affect our decisions on this matter going forward relates to whether the Carbon Trust would be regarded as a 'public authority'.

I would appreciate any help or context you could give to enable us to reach a view on this.

Our lawyers have suggested I might seek clarification on the following aspects in particular:

- (a) The nature of the function of the Carbon Trust;
- (b) The degree of state or government control (including commenting on membership and decision making process);
- (c) The degree of government funding.

We also briefly discussed the declaration regarding State Aid funding and de minimis limits that Carbon Trust loan recipients must complete, and you mentioned you might be able to send a copy of that (which I believe may be Section 2 of the loan agreement form).

I appreciate that it may take some time to provide a response. However, I do note that I'll be meeting with DETI again on Wednesday, and any information you were able to provide by then, even if only an initial response, would be very useful.

Kind regards
Edmund

Edmund Ward
Senior Technical Manager, RHI
New Scheme Development
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London
SW1P 3GE
Tel: 0207 901 7168
www.ofgem.gov.uk



From: Janine Cobain [<mailto:Janine.Cobain@CarbonTrust.com>]
Sent: 04 November 2013 15:02
To: Edmund Ward
Subject: missed call

Hi Edmund

Just seen I've missed a call from you – I'm in a meeting and should be free in an hour or so, I will call you back then unless I can help over email?

Regards

Janine Cobain
Loans Manager
Carbon Trust Loan Scheme
Tel : 028 9073 4398

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From: Moore, Stephen (DETI)
To: ["McCutcheon, Joanne"](#)
Cc: [Hutchinson, Peter](#); [Pauley, Alberta](#); [Ryan, Damien](#)
Subject: RE: URGENT Carbon Trust and RHI in Northern Ireland
Date: 25 November 2013 12:06:00
Attachments: [image005.gif](#)
[image006.gif](#)
[2008 Environmental aid guidelines.pdf](#)
[SA_34140 – RHI Northern Ireland.pdf](#)
[image001.jpg](#)

Joanne

Yes.

I was going to say, no problem, but I'm not sure that will be the case.

What OFGEM is saying about cumulation is interesting and appears to be correct. See para 191 from the 2008 Environmental Guidelines (EAG).

(191) Aid for environmental protection must not be cumulated with *de minimis* aid in respect of the same eligible costs if such cumulation would result in an aid intensity exceeding that fixed in these Guidelines.

The problem for us is that the RHI scheme was assessed against point 109, option 1, of the 2008 EAG. This option specifically excludes cumulation with investment aid and I suspect the Carbon Trust *de minimis* aid 'might' be seen as being 'investment aid'.

In this case, what I would like to do is suggest we try to avoid this difficult 'EAG and *de minimis*' cumulation question altogether and, alternatively, suggest that if the total amount of aid will be below the *de minimis* ceiling, we operate the RHI scheme (in certain projects) on the basis of the *de minimis* regulation and cumulate (RHI) *de minimis* aid with (other) *de minimis* aid.

If we do exactly as OFGEM seems to be proposing this could be problematic as, first, we would need to find another compatibility basis under the 2008 EAG which would allow the *de minimis* 'investment' aid but then we would have to either 'notify' this change to the Commission or 'register' a new scheme, under the 2008 General Block Exemption Regulation. Whilst both of these steps may be theoretically possible, it is probably not as good as my cumulate (RHI) *de minimis* with (other) *de minimis* proposal above.

Importantly, to run with my cumulate (RHI) *de minimis* with (other) *de minimis* proposal, we would need to agree:

1. That it is legally possible, from a National and European perspective, to simultaneously operate the RHI scheme on the basis of both the RHI decision (SA.34140) and the *de minimis* regulation.

I think it is possible – but, I am not a lawyer.

2. That OFGEM can administer this approach (i.e. that OFGEM can actually determine which approach to apply when it receives an application for RHI support).

I think this should be possible

3. That OFGEM is prepared to do the necessary administration (i.e. calculate the amount of RHI de minimis aid, check what other de minimis aid is being received etc.)

Again, I see no reasons why OFGEM should not be able to cannot do this.

Finally, in relation to DETI lawyers, the main points of contact on State aid matters in DSO are Brian Doherty and Helen Rogers.

Stephen

Stephen Moore

European Support Unit
Department of Enterprise, Trade & Investment
Netherleigh
Massey Avenue
Belfast, BT4 2JP
Tel: 028 9052 9415 (ext: 29415)
Mob Personal information redacted by the RHI Inquiry
Textphone: 028 9052 9304
Web: www.detini.gov.uk

Visit the website for the European Sustainable Competitiveness Programme for NI - www.eucompni.gov.uk



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From: McCutcheon, Joanne [mailto:Joanne.McCutcheon@detini.gsi.gov.uk]
Sent: 25 November 2013 09:55
To: Moore, Stephen (DETI)
Cc: Hutchinson, Peter
Subject: FW: URGENT Carbon Trust and RHI in Northern Ireland

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