

From: [Moore, Stephen \(DETI\)](#)
To: ["McCutcheon, Joanne"](#)
Cc: [Hutchinson, Peter](#); [Pauley, Alberta](#)
Subject: RE: Draft record of recent DETI-Ofgem discussions on Carbon Trust matter
Date: 04 December 2013 16:24:00
Attachments: [image004.gif](#)
[Record of Policy Discussions between DETI and Ofgem on NI RHI and Carbon....docx](#)
[image003.jpg](#)

Joanne

I would be happy to send DSO (Brian Doherty and Helen Rogers) the Ofgem document and seek their view on the 'de minimis' proposal.

But, I do wonder is all the information in the Ofgem paper relevant to this 'de minimis' discussion?

I have had a quick chat with Peter and he has given me a overview of the discussion with Pat Millen in DSO and, perhaps, to ensure Brian and Helen understand the full picture, perhaps we should be asking for Brian and Helen's view through Pat?

I should be in tomorrow around 9.15.

Stephen

Stephen Moore

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From: McCutcheon, Joanne [mailto:Joanne.McCutcheon@detini.gsi.gov.uk]
Sent: 04 December 2013 14:50
To: Moore, Stephen (DETI)
Cc: Hutchinson, Peter; Pauley, Alberta

Subject: FW: Draft record of recent DETI-Ofgem discussions on Carbon Trust matter

Stephen

I have spoken again to Edmund and he has sent this over as a summary of the situation. I would have some minor issues with his record of events but think it is a good broad summary.

Would you be happy to run this past your State Aid contact in DSO?

Edmund mentions lawyer to lawyer talks. I'm not sure that this is necessary from our point of view – what do you think? If you are content and DSO is content following your discussion (and BIS is already content) and the Statutory Review decision is DETI's decision to take – I'm not sure why Ofgem's lawyers would need to speak to DSO?

Let me know what you think and once again thank you for your help – it is invaluable.

Joanne

From: Edmund Ward [mailto:Edmund.Ward@ofgem.gov.uk]

Sent: 04 December 2013 14:09

To: McCutcheon, Joanne

Subject: Draft record of recent DETI-Ofgem discussions on Carbon Trust matter

Dear Joanne

Thanks for your time on the phone.

As discussed, please find attached record of Ofgem-DETI discussions over recent weeks, including a focus on one particular approach.

Please do note the context and scope, and note that this is intended as an update between policy teams – although you are, of course, welcome to base any briefing to your lawyers on such of the attached as you may choose.

Very happy to discuss further.

Separate response to follow later on your email of this morning.

Kind regards

Edmund

Edmund Ward

Senior Technical Manager, RHI

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Record of Policy Discussions between DETI and Ofgem regarding the Northern Ireland Renewable Heat Incentive (RHI) and applicants in possession of loans from the Carbon Trust

Context and Scope

- 1.1 This note contains a description of discussions between DETI and Ofgem regarding a possible approach to the consideration of Carbon Trust Zero Interest loans and their treatment with regard to the RHI in Northern Ireland.
- 1.2 DETI and Ofgem officials have had several discussions on this matter over the past two weeks.
- 1.3 This note has been authored by Edmund Ward, Senior Technical Manager, Ofgem, but has not yet been subject to peer review.
- 1.4 This note should therefore be viewed as draft, and comments on content, context, accuracy or relevant omissions are welcomed.
- 1.5 The document sets out an approach that may be considered, based on those discussions described above.
- 1.6 It should be noted that this paper does not endorse the approach, or present an analysis of any risks associated with adopting the approach, and does not represent a formal Ofgem position or preferred solution.
- 1.7 However, Ofgem would be happy to discuss the impacts of the approach or issues laid out here, on a policy or lawyer-lawyer basis, as appropriate.

Background

- 1.8 Ofgem E-Serve administers the Renewable Heat Incentive (RHI) in Northern Ireland on behalf of the Department of Enterprise, Trade and Investment (DETI) under formal but non-legally-binding 'Administrative Arrangements'.
- 1.9 The RHI Regulations for Northern Ireland (NI) differ from those for Great Britain (GB) in several respects, including on the treatment of a grants.
- 1.10 In GB, Ofgem must not accredit where certain purchase and installation costs have been provided by a 'grant from public funds'.
- 1.11 In NI, a greater range of funding sources are excluded as the costs must not be provided by a **'grant from public funds'** or **'other public support'**, where this public support is defined as **'any financial advantage provided by a public authority'**.
- 1.12 One implication of this is that 'soft loans' (such as zero interest loans), which Ofgem do not view as a grant but do consider a financial advantage, are not a barrier to RHI accreditation in GB but there is a question as to whether they would be a barrier to RHI accreditation in NI, if they are provided by a public authority.
- 1.13 Ofgem recently became aware (August 2013) that some Carbon Trust Zero Interest loans within Northern Ireland utilise funds from "Invest Northern Ireland", which is a fund provided by Northern Ireland government.
- 1.14 Prior to becoming aware of this, in March and June of 2013, we accredited two installations in possession of Carbon Trust Zero Interest loans. We have so far taken no retrospective action in these cases.

- 1.15 We also provided written and verbal advice to an unquantifiable number of enquirers, and written advice to DETI, which stated that Carbon Trust loans would not be incompatible with receiving the RHI. We only established that this misleading advice had been given out at the beginning of October 2013.

Current Issue

- 1.16 On 30th September 2013, Ofgem rejected an applicant in Northern Ireland on the basis of receipt of an affected Carbon Trust Zero Interest loan.
- 1.17 The rejected applicant has requested a Statutory Review, and this was received by DETI on 1 November 2013.
- 1.18 DETI are keen to reach a decision by 12th December 2013, in line with their publically stated timeframe for reaching a review decision.

Discussions between DETI and Ofgem

- 1.19 DETI and Ofgem officials have had discussions between the two organisations on a number of areas.
- 1.20 DETI and Ofgem have also had discussions with other affected parties, including affected applicants, enquirers, the Carbon Trust, and DETI.

Potential 'narrow reading option'

- 1.21 One option that has been discussed relates to an alternative reading of regulation 23 of the NI RHI Regulations.
- 1.22 Under the NI Regulations (Regulation 23), DETI (in practice Ofgem, by virtue of the Administrative Arrangements) must not accredit an installation if:

'a grant from public funds has been paid or will be paid or other public support has been provided or will be provided in respect of any of the costs of purchasing or installing the eligible installation;'

- 1.23 In the case of the rejected applicant, their Loan makes clear that it must be repaid and as such should not be considered a grant for the purposes of the NI Regulations. If the Loan can be considered as 'other public support' then the installation in question will not be eligible for RHI accreditation.
- 1.24 'Other public support' is defined in the NI Regulations as: *'any financial advantage provided by a public authority.'*
- 1.25 Two elements to be considered are, therefore: (i) whether the Loan conveys a financial advantage to the applicant and (ii) whether it was provided by a public authority.
- 1.26 On (i), our discussions have not dwelled on whether the Loan conveys a financial advantage, but we have felt that it is likely that it would be considered as such.
- 1.27 On (ii), whilst the Carbon Trust itself was not considered to be a public authority, the approach taken by Ofgem in reaching the original decision was to interpret the word "provided by" in the public support definition to include the original source of the loan that is being distributed by the Carbon Trust.
- 1.28 We have discussed an alternative approach, which would be to take a narrow interpretation of the words "provided by" so that it refers to the person providing it directly to the applicant (in this

case the Carbon Trust) rather than the original source of the “support”.

- 1.29 We have discussed the issue of whether the Carbon Trust would be regarded a public authority, and have received information from lawyers at the Carbon Trust on this matter. [Annex A]
- 1.30 We have also discussed that consideration of state aid compatibility would be central to any adoption of such a reading.
- 1.31 We have sought clarification from BIS on a possible approach, as set out by Stephen Moore of DETI, and received a response from Kate Porter of BIS [Annex B]. Kate Porter of BIS has also spoken to a policy official at DECC with responsibility for the RHI scheme.
- 1.32 The proposed approach involves operating the RHI scheme in Northern Ireland on the basis of the de minimis regulation for the projects in which the Carbon Trust has provided an interest free loan (on the basis of the de minimis regulation) and, simultaneously, on the basis of the RHI NI decision (SA.24140) for the remainder of projects, in which we expect there will not be any cumulation issues.

Administration of this approach in practice

- 1.33 We discussed how the administration, analysis and reporting might be achieved in practice in this approach.
- 1.34 We agreed that there would be an additional burden, which would translate into costs, associated with conducting state aid analyses where the impacts of the de minimis regulation needed to be considered.
- 1.35 We discussed that one approach to collecting the information required to conduct this analysis would be a variant on the approach already adopted for this purpose by the Carbon Trust when assessing *de minimis* thresholds. [Annex C]
- 1.36 We would then need to confirm that the total value of state aid in the 3 year fiscal period in which the RHI accreditation decision would be taken, would not exceed the relevant threshold.
- 1.37 We discussed several approaches to calculating the value of the RHI payments, but were of the initial view that the value would not be higher than the maximum possible RHI payments associated with the first 3 years of participation on the RHI scheme. We also noted that an alternative approach would be to consider this as the ‘expected’ value of RHI payments associated with the first 3 years of participation in the RHI scheme, and that this might be calculated on a ratio basis based on expected payments in the participant’s first year in the scheme.
- 1.38 We would also need to take care in drafting Guidance to accurately reflect the situation with regards to particular cohorts, for whom the de minimis threshold over 3 fiscal years might not fall to be the normal EUR200k value.
- 1.39 We noted that adopting this approach in one case would be likely to set a precedent that would need to be followed in subsequent cases, possibly including those with other, unrelated sources of funding.

Next steps

- 1.40 As noted above, it might be beneficial to both Ofgem and DECC for lawyer-lawyer discussions to take place between the two organisations, to discuss the implications of any approach that might be taken in this matter.

[Annex A] – Information Provided by Carbon Trust lawyers

The Carbon Trust is a private company limited by guarantee. It is a not for dividend company with an independent board of directors drawn wholly from the private sector.

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

- does not have any government directors or other government representatives sitting on its board or involved in its management. It has decision making autonomy and is not controlled by government.
- 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.

[Annex B] – Email correspondence between Stephen Moore (DETI) and Kate Porter (BIS)

OK, well I agree with what you say below, I see no problem with providing RHI and grants under cover of the de minimis regulation (alongside the rest of the RHI scheme which would operate under its approval) from a state aid perspective. I think this is probably the safest and simplest way of handling this.

As you know, we are struggling to get cases through the state aid approval process at present due to the review of the state aid guidelines and wider case load so I would not want to ask the Commission about this or submit a notification unless absolutely essential.

Kate

Kate Porter | State Aid | Department for Business, Innovation & Skills | 1 Victoria Street | London | SW1H 0ET | Tel: 44 (0) 20 7215 2298 | Fax: 44 (0) 20 7215 0357 | kate.porter@bis.gsi.gov.uk | <https://www.gov.uk/government/organisations/department-for-business-innovation-skills>

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From: Moore, Stephen (DETI) [<mailto:Stephen.Moore@detini.gsi.gov.uk>]
Sent: 29 November 2013 09:39
To: Porter Kate (CCP)
Cc: Pauley, Alberta; McCutcheon, Joanne; Hutchinson, Peter; Edmund.Ward@ofgem.gov.uk; Cathryn.Scott@ofgem.gov.uk; Ruth.Lancaster@ofgem.gov.uk; Omolade.Barker@ofgem.gov.uk; teri.clifton@ofgem.gov.uk; Ryan, Damien
Subject: RE: Carbon Trust de minimis loans and the Renewable Heat Incentive

Kate

I've just had a quick chat with Peter Hutchinson, as Joanne McCutcheon doesn't work on Fridays.

I think we should let this sit until Monday when Joanne is back in.

I don't think we would have a problem with your suggestion, quite the reverse, but, I am also aware that Joanne has been discussing the issue with DECC and it might be best if you first knew who Joanne has been talking to in DECC before contacting them.

Stephen

Stephen Moore
European Support Unit

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www.eucompni.gov.uk



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From: Porter Kate (CCP) [<mailto:Kate.Porter@bis.gsi.gov.uk>]
Sent: 29 November 2013 09:30
To: Moore Stephen ()
Cc: Pauley, Alberta; McCutcheon, Joanne; Hutchinson, Peter; Edmund.Ward@ofgem.gov.uk; Cathryn.Scott@ofgem.gov.uk; Ruth.Lancaster@ofgem.gov.uk; Omolade.Barker@ofgem.gov.uk; teri.clifton@ofgem.gov.uk; Ryan, Damien
Subject: RE: Carbon Trust de minimis loans and the Renewable Heat Incentive

Thanks for this note - do you mind if I run this by the policy team in DECC too?

From: Moore, Stephen (DETI) [<mailto:Stephen.Moore@detini.gsi.gov.uk>]
Sent: 28 November 2013 15:54
To: Porter Kate (CCP)
Cc: Pauley, Alberta; McCutcheon, Joanne; Hutchinson, Peter; Edmund.Ward@ofgem.gov.uk; Cathryn.Scott@ofgem.gov.uk; Ruth.Lancaster@ofgem.gov.uk; Omolade.Barker@ofgem.gov.uk; teri.clifton@ofgem.gov.uk; Ryan, Damien
Subject: Carbon Trust de minimis loans and the Renewable Heat Incentive

Kate

Many thanks for discussing the Renewable Heat Incentive (RHI) problem with me and Peter Hutchinson yesterday.

Many thanks for also confirming our assessment there will probably be no problem with us operating the RHI scheme in Northern Ireland on the basis of the de minimis regulation for the projects in which the Carbon Trust has provided an interest free loan (on the basis of the de minimis regulation) and, simultaneously, on the basis of the RHI NI decision (SA.24140) for the remainder of projects, in which we expect there will any cumulation issues.

As we discussed, the RHI scheme is administered by Ofgem and the problem has come about because some of these companies who have applied for support under the RHI scheme have had

their applications rejected by Ofgem, because they are receiving other State support in the form of a interest free loan from the Carbon Trust.

Following Ofgem's rejection of one of these applications, DETI received a formal request from the applicant, under the dispute resolution process, that it reviews Ofgem's rejection decision.

The issue in question is whether the installation that has availed of a Carbon Trust 0% finance loan is also eligible to receive the Northern Ireland RHI.

The issue is further complicated by the fact that applicants were previously told that the Carbon Trust loan scheme and the RHI were compatible and also that under the GB RHI applicants can receive both.

DETI's assessment of the problem and proposed solution

As you will see in para 46 of the NI RHI decision, DETI had indicated to the Commission that there would be no other 'grant' support for the renewable heat equipment.

There was an identical commitment in relation to the GB RHI scheme (SA.32125).
http://ec.europa.eu/competition/state_aid/cases/240943/240943_1368451_125_1.pdf

While it could be argued that the UK was excluding the possibility of specific GB 'grants' (see SA.32125 para 37) and not all types of aid (including the Carbon Trust interest free loans), we suspect that if the Commission was ever to examine this issue, they would dismiss this argument and revert to the fact that operating aid (through the RHI scheme) is being cumulated with investment aid (through the interest free Carbon trust loan) and assess the compatibility of this aid with the 2008 Environmental Aid Guidelines (EAG).

If so, then we have a two problems.

First we have a problem with para 191 of the 2008 EAG..."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."

In this case, we might find it very difficult to prove that cumulation would not result in an aid intensity exceeding that determined in the EAG, as there is no aid intensity ceiling for operating aid specified in para 109 of the EAG.

The second problem is that para 109 (b) of the EAG details that where operating aid is granted in accordance with para 109 (a), any investment aid granted to the undertaking in question in respect of the new plant must be deducted from production costs when determining the amount of operating aid.

In this case, we would not want to be forced to reduce the RHI tariffs to adjust for the investment aid being provided via the interest free Carbon Trust loans.

Therefore, a solution based on para 191 of the EAG would not be preferable.

Furthermore, even if we were to decide to go this direction, we would probably have to notify the change to the Commission, which could result in the Commission also asking questions about how

the RHI scheme operates in GB and well as resulting in a delay in dealing with the requested review of Ofgem's rejection decision, which could trigger a complaint to the Commission etc.

However, when we look at how little aid is likely to be present in these Carbon Trust cases, our assessment is that it will be well below the industrial de minimis ceiling.

Therefore, what we are proposing is that we revise the operating procedures for the RHI scheme so that RHI aid in such de minimis cumulation cases will be provided on the basis of the de minimis regulation.

In other words, de minimis aid from the Carbon Trust loans will be cumulated with de minimis aid from the RHI scheme, which would meet the requirements of the de minimis regulation.

I would be happy to discuss further as necessary.

Regards

Stephen

Stephen Moore

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From: Porter Kate (CCP) [<mailto:Kate.Porter@bis.gsi.gov.uk>]

Sent: 26 November 2013 17:16

To: Moore Stephen ()

Subject: RE: Renewable Heat Incentive

I haven't heard from Ofgem or DECC about this.

15.30?

From: Moore, Stephen (DETI) [<mailto:Stephen.Moore@detini.gsi.gov.uk>]

Sent: 26 November 2013 15:38

To: Porter Kate (CCP)

Cc: McCutcheon, Joanne; Hutchinson, Peter; Pauley, Alberta; Irrelevant information redacted by the RHI Inquiry

Subject: Renewable Heat Incentive

Kate

Ofgem have encountered a difficulty with the operation of the Renewable Heat Incentive scheme in Northern Ireland and we have been in discussion with them to find a workable solution. In a telephone conference today one of their legal team (Catherine Scott) asked that we run the proposed solution by BIS State Aid Branch. She also indicated that she had been in discussions with someone from the BIS legal team, but we don't know who.

She would also be keen to run the proposed solution past the Commission, but, because of the possible ramifications this would have for the UK RHI scheme, I would be very reluctant to do this unless you think it is absolutely necessary.

If possible, could you give me a call tomorrow afternoon (after 2.30pm) to discuss.

Many Thanks

Stephen

Stephen Moore

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*[Annex C] Carbon Trust Loan State Aid Declaration***SECTION 2****STATE AID DECLARATION**

The assistance you will receive from the Carbon Trust (0% Loan) operates under Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid (the de minimis block exemption to EU state aid regulations) published in the EU Official Journal on 28th December 2006, L379/5.

To proceed with your assistance we must receive a declaration, by your signing below, that your undertaking has not received 'de minimis' aid exceeding €200,000 in the previous three years and will not, as a result of any Carbon Trust funding, receive 'de minimis' aid exceeding €200,000 in any 3 year rolling period that overlaps the period of the funding.

To help you assess if your undertaking will exceed the €200,000 (c.£170,000) limit we have calculated the amount of state aid that your Energy-Efficiency Loan represents is:

State Aid - this represents the total De-minimis value of your £LoanAmount (copy 1) Loan over a Case Details (Term) month loan period

If you have already had a 0% loan from Carbon Trust, we will have told you the value of the De-minimis state aid in the loan agreement. Please call 028 9073 4394 if you need a reminder of this value.

STATE AID DECLARATION

Has your undertaking received any publicly funded financial support that has been identified as 'de minimis' State Aid within the last 3 fiscal years or are you about to receive any such support?

Yes No

(If you don't know if the financial support received was 'de minimis' State Aid, please contact the body who provided the support).

If you answered Yes to the question above please identify all 'de minimis' State Aid received in the last three fiscal years:

Item	Amount (£)	Body Providing Aid	Date received
1			
2			

Is your undertaking categorised as involved in any of the following sectors: coal sector, agricultural production, fisheries or aquaculture products, or export related activities¹?

Please tick one box only Yes No

If you answered Yes to the question above, please indicate which sector and nature of activity in that sector.

4. Please note that if your organisation has received financial support under the General Block Exemption Regulation No. 800/2008 ('GBER') or under an individual decision of the European Commission ('Commission Decision') it will not be eligible for *de minimis* aid from the Carbon Trust covering the same costs if this would result in the total sum of all the financial assistance received being above the approved threshold under the GBER or Commission Decision (and the excess could be recovered).

Please indicate whether the receipt of funding provided by the Carbon Trust would result in the approved threshold under an approved GBER scheme or Commission Decision being exceeded

Yes No

Statement I understand that an Energy-Efficiency Loan will be 'de minimis' State Aid. I confirm that the information I have provided above is complete and accurate. I understand that failure to disclose relevant information may lead to a requirement to refund the value of the aid provided plus interest at the rate set by the European Commission for the period from the date that the aid was received. I also understand that I must keep any Energy-Efficiency Loan offer letter for 10 years and produce it on request from a UK public authority or the European Commission.

Signed: on behalf of:.....

Print name:

Position:.....Date:

This does not preclude you from applying for a Loan merely because you export goods or services. Under EU law we are not permitted to give aid which is directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current expenditure linked to export activity.