

Annex C – Correspondence with DSO

Joanne,

I do not wish to give the impression of "avoidance", but I do not think there is very much I can add to my previous advice. The final decision is one for the Department to make and that represents, properly in my view, the division between our respective roles here. I acknowledge that the decision to be made involves a consideration of various factors, legal advice being merely one such factor. The weighing up of the various factors and the decision as to where the line is drawn can only be made by the Department. As I previously expressed, the proper interpretation of regulation 23 of the 2012 Regulations precludes accreditation if the applicant is the recipient of an interest free loan from the Carbon Trust.

As you have pointed out, and I agree, the burden of risk appears to come with adopting a position that the RHI and CT loans are incompatible. No one is going to complain if they receive RHI's, however the Department would have to be conscious of the possibility of subsequent enquiries on the part of the European Commission, in terms of State Aids. I believe the Department is currently looking at this.

I am happy to discuss.

Kind regards

Pat Millen

Departmental Solicitors Office

Ext: 51210

From: McCutcheon, Joanne
Sent: 09 December 2013 14:53
To: Millen, Patrick
Cc: Hutchinson, Peter
Subject: RE: RHI Scheme - Carbon Trust Interest Free Loans - Statutory Review

Patrick

Many thanks for your note below; I know you also subsequently spoke to Peter Hutchinson regarding the matter. Since then we have had prolonged discussions with Ofgem and have also consulted with colleagues in GB. The Statutory review decision is due on this Friday (13th).

It is not easy to reach a clear cut solution to the problem. The situation is particularly complicated by the fact that Ofgem had been advising potential installers that the RHI and CT loans were compatible prior to making the decision not to accredit an installation on the basis that it had availed of a CT loan.

If we confirm the original Ofgem decision, then an unquantifiable number of businesses that have proceeded with a renewable investment on the basis that they expected to receive RHI funding for 20 years will not be eligible. It is highly likely that some, if not all, of these businesses would not have made their investment decision if it was not for the prospect of receiving the RHI. We are conscious therefore that if we uphold the Ofgem decision then these businesses are likely to seek redress or at the very least take the matter to the NI Ombudsman (which is the next stage in the dispute resolution process). In addition, it would mean that installations in NI and GB would be treated differently and it is possible that a rejected applicant would raise this with the European Commission. It would certainly result in some bad publicity for the RHI scheme which is still in its infancy and has a vital role to play in the achievement of European renewable targets.

We are therefore moving towards the second option you highlighted below i.e. Adopt a restrictive interpretation of the term "*provided by*", so that it refers only to the body directly providing the support. We have obtained confirmation from the Carbon Trust legal team that they do not consider themselves to be a public authority. We have also discussed this restricted interpretation with Ofgem. The main advantage of this option is that installations could continue to receive the Carbon Trust loan and the RHI. This would provide a solution to the current problem but we also believe that this is vital from a policy perspective, as businesses often find it difficult to raise the initial capital costs for renewable projects from more traditional funding sources. In addition, this option maintains equity with the position in GB where installers can avail of both schemes. We have discussed the State Aid implications of the option with DETI colleagues in European Division who have outlined how this could be managed under the SA regulations. As far as I can see, the only potential disadvantage of the option is that someone could dispute the Department's interpretation of Regulation 23; however, my feeling is that there would be a low risk of this happening since no-one is being disadvantaged. Therefore this option, while not ideal, appears to carry the least risk to the Department.

Grateful for any comments you might have.

Regards and once again many thanks for your help.

Joanne

From: Millen, Patrick
Sent: 30 October 2013 13:26
To: Hutchinson, Peter; McCutcheon, Joanne
Subject: RHI Scheme - Carbon Trust Interest Free Loans - Draft

Peter/Joanne,

I refer to the above.

I have received a legal paper from Ofgem, they have pointed out that it is legally privileged so I am precluded from simply forwarding that paper to you - although I can offer DETI my own legal analysis of the issue.

If I can, very briefly, summarise the position:

1. An applicant was refused accreditation for RHI scheme on the basis that they had a Carbon Trust Interest free Loan towards the cost of the installation which was subject of the application.
2. Regulation 23(1)(a) of the Renewable Heat Incentive Scheme Regulations (NI) 2012 provides that the Department must not accredit an eligible installation unless the applicant gives notice "*...that no grant from public funds has been paid...or other public support has been provided...in respect of any of the costs of purchasing or installing the eligible installation*".

The underlined portion of 23(1)(a) is important here i.e. that such loans are "*other public support*".

3. Regulation 23(2) defines "public support" as "*...any financial advantage provided by a public authority*". The question is whether these conditions are satisfied in respect of interest free loans provided by the Carbon Trust. If we can take each in turn:

- (a) It is reasonably clear that interest free loans convey a financial advantage.
- (b) Is the Carbon Trust a "public authority"?

The likelihood is that the Carbon Trust would not be considered a public authority, however I understand the source of the finance for these interest free loan scheme is provided by Invest NI which (as a NDPB of DETI) clearly is a public authority. On account of the source of the finance and the relationship between Invest NI and Carbon Trust (who, I understand, are merely the mechanism for the distribution of such finances) this would be sufficient for it (the financial advantage) to be regarded as having been *provided by a public authority* within the terms of 23(2) of the Renewable Heat Incentive Scheme Regulations (NI) 2012.

In conclusion, it would appear Regulation 23 of the 2012 Regulations preclude accreditation if the applicant is the recipient of an interest free loan from the Carbon Trust.

The question is, how to respond - Ofgem have outlined a number of options:

1. Live with the current interpretation;

2. Adopt a restrictive interpretation of the term "*provided by*", so that it refers only to the body directly providing the support;

3. Amend the 2012 Regulations to remove the reference to "public support" - this will depend on the Department's discussions with the Commission regards State Aid approval; and

4. For the participant to pay back the interest free element of the loans to the Carbon Trust i.e. they would make appropriate interest payments to the Carbon Trust. I should say this doesn't seem realistic (even if participants were prepared to make interest payments in the first place), I doubt the Carbon Trust would be prepared to accept interest payments at the going rate and this would require a significance amendment to the nature of the loan scheme.

Should any matter require clarification, or should anything further be required, do not hesitate to make contact.

Happy to discuss.

Kind regards

Pat Millen

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