

Agenda

Non-Domestic Renewable Heat Incentive Steering Group

Meeting 9:00am 28th June 2016

Conference Room C, Netherleigh

1. Minutes of Previous Meetings, 6th and 14th June 2016
2. Action Points Update
3. Draft Project Plan
4. Draft Risk Register
5. Draft Issues Log
6. Any Other Business

MINUTES OF RHI STEERING GROUP MEETING HELD AT 10.30AM ON 6 JUNE 2016 IN CLARENCE COURT

Present: Heather Cousins (HC)
Stephen McMurray (SMcM)
Alison Clydesdale (AC)
David Conliffe (DC)
Iain McFarlane (IMcF)
Michael Woods (MW)
Terry Coyne (TC)

Paul McGinn (PMcG) (DSO)
Stephen Moore (SM)

Apologies: Chris Stewart
Stuart Wightman

Secretariat: Rachel Linton

State Aid

1. SM advised that in order to determine whether there has been any breach of the European Commission's State aid approval the rates of return being attained by users needs to be determined. SM stated that if these rates are higher than those approved in the business case the Department may need to re-notify the scheme to the European Commission. AC advised that based on the data available to date the rates being achieved are consistently above the approved rates.
2. SM stated that based on the rate of return evidence to date it would be advisable to advise the European Commission of the issues and the actions the department is proposing to take to correct the issues and seek their advice and agreement on next steps. MW noted that if the actual rates of return are higher than those approved, this would breach state aid approval and asked who would be responsible for repaying the grant. SM advised that if there has been a breach of the State aid approval, in circumstances where a grant has been paid, the EC would typically require the Member State to claw back from the beneficiary some or all of the that grant that has been paid, plus interest. He added, in this case, where the aid is paid in the form of a tariff, there may be an opportunity to correct overcompensation over the life of the scheme by amending the tariffs.
3. HC requested information on the mechanism in place to engage with the European Commission. SM advised that meetings with the Commission are arranged by UKRep and that BIS and DECC should be made aware that a meeting was being requested.. SM also advised that a paper on the purpose of the meeting would need to be prepared and that a meeting at Head of Unit level would be appropriate at this stage. He reiterated that early engagement is preferable and that only the European Commission or the European Courts can decide if there has been a breach in the State aid approval.

4. AC noted that the NIAO Report does not reference State Aid. MW advised that the current report is for the accounts but that the NIAO is aware of the State aid issues and the next report which will be on VfM will include reference to State aid, therefore it is important to look at the issue now.
5. SM advised that the Commission will most likely expect the Department to bring the rate of return back to the average figure quoted in the approvals of 12%. SMcM asked how this rate of return compares with the rate under the GB scheme, AC advised that the rate of return on the GB scheme is less than 12%.

DSO Advice

6. PMcG stated that the Department has an obligation to make payments as presented in the legislation. PMcG advised that the legislation can be amended by the Department but that any amendments would only apply to future payments, the Department cannot amend the legislation retrospectively. PMcG advised that in order to amend the legislation the Department will first have to carry out a consultation exercise on the proposed changes, allowing sufficient time for people to respond. PMcG stated that, as part of the consultation exercise the Department should clearly set out the arguments in support the changes and should conscientiously consider with an open mind any arguments to the contrary.
7. PMcG advised that a potential obstacle to the Department being able to amend the legislation would be if it was deemed that users had a substantive legitimate expectation to achieve the current rates of return. However cases of this are rare as it would need to be proved that the changes were so unfair they would be considered to be abuse of the Departments power. PMcG advised that if the scheme remains viable and there is no significant financial loss from investments made suffered by participants in the scheme, it would be unlikely that a substantive legitimate expectation claim could be made.
8. PMcG advised that if the scheme is being changed to achieve better VfM, the rationale for this needs to be clear and show the court that the scheme as it stands is too generous and the changes the Department is proposing to make will not have an unfairly adverse effect on the end user. PMcG suggested that the consultation exercise should look at not only the rate of return but also all aspects of the implementation of a cap as it is better to argue one coherent whole case rather than concentrate on one specific aspect because that way it would be easier for someone to argue that relevant considerations had been left out of account.
9. HC asked whether the courts will compare the NI scheme to the GB scheme. PMcG advised that the courts will have regard to other schemes but will be focussed on the specifics of the NI scheme.
10. MW asked whether it would be appropriate to analyse a range of proposals and their impact or choose one preferred option. PMcG

advised that the number of options to be brought to consultation is at the Departments discretion but it is important that consultees be provided with enough information and time to give their input in order to do that effectively it was better to set out all the viable options. There must be analysis of how the changes involved in each option impact on the integrity of the scheme and on businesses.

11. TC asked whether a PAC hearing could prejudice any legal proceedings. PMcG stated that the Department must be able to prove that it has taken into account the consultees but that if the situation arose whereby the Department was under criticism from the PAC it could lead to suggestions that the Department had not done so but was caving in to political pressure. PMcG advised that all published material will be reviewed therefore the Departments approach must be consistent. AC noted that most of the responses to the consultation are likely to be to not make changes to the scheme. PMcG stated that even if all responses were against the changes the Department can implement the changes provided it has dealt with the responses fairly.
12. SMcM asked whether legal advice on implementing a cap has been provided. PMcG advised that implementing a cap would require a change to the legislation and the Department needs to produce evidence to justify this. PMcG added that it is not possible to implement a cap retrospectively.
13. AC stated that the Department does not yet have enough evidence to be able to justify implementing a cap as they need a full years data for a variety of users, including seasonal variances, to be able to get a complete picture. PMcG confirmed that it would be preferable to have a full years data over a range of users in order to keep assumptions to a minimum. HC stated that obtaining the necessary evidence is a priority.
14. AC asked whether a user have an argument that 'grandfathering' was built into the legislation. SM stated that in the original approval of the scheme it was clear that the average rate of return was expected to be 12% over 20 years. However, he also noted that the State aid approval also mentions the grandfathering principle would only apply to new tariffs. PMcG advised that grandfathering is linked to the legitimate expectation argument in that as long as the changes are not unfair or oppressive there should not be an issue.
15. HC expressed thanks to PMcG and SM and they left the meeting.

Action 1: AC to review data available to date with a view to assessing when the consultation can be commissioned

Action 2: AC to begin process of alerting European Commission

Minutes and Action Points of previous meeting

16. HC referred to the minutes of the previous steering group meeting which took place on 31 May 2016. The Steering Group agreed the minutes as

final. Attendees provided a progress update on each of their respective Action Points recorded in the minutes of the previous meeting.

17. HC referred to the meeting with NIAO scheduled for 2pm on 6 June and noted that a suggestion should be made to delay a PAC hearing until after consultation. DC requested an estimate of when the evidence will be available to enable the consultation to take place. AC advised that in order to provide an estimate of this the Energy Economist will first need to carry out an equality impact assessment.
18. HC referred to the proposed site inspections and requested an update on contact with Ofgem to date. MW stated that the Ofgem position is not strong enough and suggested they should be treating this as an investigation rather than standalone 'site inspections' as this should be an investigation into whether fraud or abuse is taking place, not whether there is a working system. MW raised concerns that the Ofgem auditors are not independent enough to carry out the rigorous and robust level of inspections required and that there appears to be reluctance to express an opinion on whether fraud or abuse is occurring. MW also stated that the timelines need to be accelerated and suggested that it would be useful for the Department to carry out their own inspections in parallel with Ofgem as soon as possible.

Action 3: AC to arrange teleconference with Ofgem to discuss the proposed site inspections.

Draft ToR

19. DC suggested that the new Energy Efficiency Grade 7, Lucy Marten, should be added to the Steering Group membership. AC confirmed. MW stated that Andrew McCormick will attend Steering Group meetings when he is available. HC added that Chris Stewart should also be invited to all meetings. HC confirmed that other than the addition of Lucy Marten to the Steering Group membership there are no further changes required to the ToR and it can be finalised.

Action 4: MW to add Lucy Marten to the Steering Group membership and arrange for finalisation of the ToR

Update on NIAO Report

20. HC advised that a request should be made to NIAO to remove the annual rate of return example which assumes 24 hours a day, seven days a week use on the basis that this sort of usage does not adhere to the principles of the scheme.
21. SMcM advised that Andrew McCormick has requested that copies of the emails in relation to AME allocations referenced in the report in paragraphs 47 and 54 should be provided to NIAO.

Action 5: AC to check what documentation NIAO has been provided with to date and ensure emails referenced in the report are included in this

Preparation for Audit Committee

22. TC confirmed that AC is going to provide an update on timelines to Audit Committee. TC requested an update on the draft Internal Audit Reports. MW advised that David Beck is aware of the reports and that if NIAO request sight of the reports they will be provided. TC confirmed that David Back has had sight of the NIAO Report.

AOB

23. There being no further business the meeting was adjourned.