

**From:** [Hutchinson, Peter](#)  
**To:** [Hepper, Fiona](#); [Clydesdale, Alison](#)  
**Subject:** FW: Renewable Heat Incentive - advice from Paul McGinn  
**Date:** 15 February 2011 17:07:00  
**Attachments:** [McGinn-Hutchinson - Renewable Heat Incentive - 15 2 11.doc](#)

---

Fiona / Alison,

Please see attached response from Paul McGinn in respect to the queries on using either the EU Renewable Energy Directive or the 2003 Energy Order (Article 61) to implement the RHI.

Paul's advice is that using either of these methods are problematic. It could be argued that the RED is wide enough to proceed however Paul believes it to be too vague for RHI powers to be taken. In regards to Article 61 of the Energy Order there is no provision to authorise subordinate legislation and therefore DETI would not be able to impose penalties or powers of recovery if a RHI was to be implemented in this way.

Paul's advice therefore remains that the current course of action, i.e. amending the DECC Energy Bill, is the best approach.

Thanks,

Peter

**Peter Hutchinson**

Sustainable Energy  
Department of Enterprise, Trade & Investment  
Netherleigh  
Massey Avenue  
Belfast, BT4 2JP  
Tel: 028 9052 9532 (ext: 29532)  
Textphone: 028 9052 9304  
Web: [www.detini.gov.uk](http://www.detini.gov.uk)

Victoria Hall  
12 May Street  
**Belfast** BT1 4NL  
Tel: 028 9025 1244  
Fax: 028 9025 1240  
DX464 NR Belfast 1

Peter Hutchinson  
Department of Enterprise, Trade and Investment  
Netherleigh  
Massy Avenue  
**BELFAST**  
BT4 2JP

*Our Ref:* SOL27570/2011/DETI

15<sup>th</sup> February 2011

Dear Peter

### **RENEWABLE HEAT INCENTIVE**

Thank you for your minute of 9 February in relation to this matter.

Section 2(2) of the European Communities Act enables Regulations to be made to:-

1. implement an EU obligation;
2. enable any such obligation to be implemented; or
3. enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised.

The EU obligation in question, as you note, is to meet certain overall targets for the use of energy from renewable resources. Support schemes are one of the measures a Member State may apply to achieve these targets. However, I do not think we can say that a support scheme as such will implement the target in the sense of causing it to be fulfilled or satisfied or carried out. A support measure will depend upon many factors outside of its control for its effectiveness including for example, the rate of take-up. So I do not think that we can say that a support scheme will implement the community obligation in question.

Equally, it is doubtful if we can say that a support scheme would 'enable' the implementation of the obligation. 'Enable' in this context means to render capable or to supply with the means. But if a support scheme depends upon the outside factors that I referred to earlier, then the existence of that support scheme cannot, I think, be said to enable the implementation of the obligation.

This, then, brings us to the third limb of the powers referred to above. This limb is concerned with rights rather than obligations. And at first glance, Article 3(3) of the Renewables

Energy Directive does indeed appear to allow Member States to apply 'support schemes'. But Section 2(2) of the 1972 Act refers not to the exercise of rights as such but merely to 'enabling' rights enjoyed by the United Kingdom to be exercised. In other words, it does not provide for the actual exercise of a right (namely the introduction of a support scheme) but only allows provisions to be made to enable those rights to be exercised. An example of this would be the fulfilment of some sort of condition precedent for the exercise of the right in question. So, for example, if the United Kingdom had the right to receive community assistance for a support scheme on condition that it provided matching funds, then Section 2(2) of the 1972 Act could be used to provide those funds.

Another issue is whether or not a support scheme is a right enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised. This depends upon whether or not it could be said that Article 3(3) was an authorisation to introduce a scheme which would otherwise have been unlawful. I think there are problems about this. The most obvious way in which a support scheme would be unlawful would be if it were a state aid. But if it were, then I do not think that Article 3(3) would constitute an authorisation to pay the state aid. In other words, in order to have a right under the Treaties to introduce a support scheme which was a state aid, the United Kingdom would have to obtain a state aid's decision. And if a support scheme were not a state aid and did not, for example, distort trade, then it would simply fall under the United Kingdom's own domestic legislative powers.

For all of these reasons, I do not think that we can use the powers contained in Section 2(2)(a) of the 1972 Act. This then would leave us with Section 2(2)(b) which confers powers to make provision for the purpose of dealing with matters 'arising out of or related to' the obligations and rights referred to above. The obligation here is to meet certain binding targets. While the introduction of a support scheme cannot be said to implement such targets, it might be said to relate to them. There may, therefore, be an argument that, in principle, such support schemes would be within the terms of Section 2(2)(b) in the 1972 Act.

Having said that, the Directive simply does refer to 'support schemes' in general terms without saying anything about what these should contain, the level of support, the conditions under which support becomes available etc. My own view is that the provision is too vague to be a suitable candidate for the use of the powers contained in Section 2(2)(b) of the 1972 Act. The nature, scope and content of any such Regulations would be entirely decided by the Department itself rather than being founded upon particular provisions of EU law and I do not think that Section 2(2) of the 1972 Act was ever designed to enact legislation of quite such an open and untrammelled nature.

This then leaves us with Article 61 of the Energy (NI) Order 2003. The first thing to say here is that this is not a provision which authorises subordinate legislation. Rather, it is what is referred to as a 'self executing' provision. That is to say it in of itself gives power to the Department to give financial assistance and the details of that financial assistance are left to the administrative discretion of the Department. Essentially, this means that the operation of the scheme would be governed entirely by contract law and the Department would not, for example, have the power to impose financial penalties or have statutory powers of recovery etc.

Another difference is that unlike the scheme under the Energy Act Section 61 is a pure 'financial assistance' provision. That is to say it allows the Department to make payments

but it does not allow the Department to require, for example, an oil company to do so. It cannot impose a levy on oil companies or provide for oil companies to provide information. To that extent, therefore, Article 61 is much more limited.

All in all, the proposal to extend the Energy Act powers here seems the clearest and best approach.

I am happy to discuss.

Yours sincerely

Paul McGinn

**P McGINN**  
**Director Division 2**