

**From:** [O"Kelly, Brendan](#)  
**To:** [Hutchinson, Peter](#)  
**Cc:** [Hepper, Fiona](#); [McCutcheon, Joanne](#); [Wheeler, Nicola](#)  
**Subject:** FW: Renewable Heat Incentive Regulations - EU Directive on technical standards  
**Date:** 11 September 2012 10:53:47  
**Attachments:** [image001.png](#)  
[RHI - uk-notification-form-a FINAL 170311.pdf](#)

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Mr. Hutchinson

Your email of 5 July 2012 to Nicola Wheeler has been passed to me.

I do not know whether DETI, since it wrote to Nicola, has decided to notify the draft NI Regulations to the European Commission under Article 8 of Directive 98/34/EC ("the Directive") but, in my view, it is under a legal obligation to do so. My reasons are as follows.

"[T]echnical specification" is defined, for the purposes of the Directive, as, among other things, a specification contained in a document which lays down the characteristics required of a product, product being, among other things, "any industrially manufactured product". "Technical regulation" is defined, among other things, as technical specifications...including the relevant administrative provisions, the observance of which is compulsory, de jure or **de facto**, in the case of use in a Member State. De facto technical regulations include-

"technical specifications... **which are linked to** fiscal or **financial measures** affecting the consumption of products...by encouraging compliance with such technical specifications..." (emphasis added).

My understanding of the draft Renewable Heat Incentive Scheme Regulations (NI) ("the draft NI Regulations") is that they will establish a subsidy for owners of plant which generates heat from specified renewable sources for use in heating buildings etc.. In order for a subsidy to be payable, a plant must meet the the criteria in Chapters 2 and 3 of Part 2 of the draft Regulations (draft dated 14 March 2012 on Nicola's file). In principle, therefore, the draft NI Regulations are de facto technical regulations for the purposes of the Directive.

Article 8 of the Directive provides-

"Subject to Article 10, Member States shall immediately communicate to the Commission any draft technical regulations, except where it **merely** transposes **the full text** of an international or European standard, **in which case information regarding the relevant standard shall suffice...**"(emphasis added).

Four points arise on this. First, even if a draft technical regulation **merely** transposes **the full text** of an European standard, information regarding the relevant standard has still to be communicated to the Commission. Second, the full text of the standard has to be transposed which is not the case here. Thirdly, it is not clear whether the Microgeneration Certification Scheme ("the MCS") is accredited under EN 45011 but, even if it is, it is only accredited under the Standard and is not a restatement of the Standard itself. Fourthly, Chapters 2 and 3 of Part 2 of the draft NI Regulations (draft dated 14 March 2012) appear to require eligible installations to have "characteristics " other than those laid down in the MCS- see, for example, draft regulation 8(c).

Article 10.1 of the Directive provides that the notification shall not apply to those laws, regulations and administrative provisions of the Member States by means of which Member States comply with binding Community acts which result in the adoption of technical specifications. Although Chapter 3 of Part 2 of the draft NI Regulations (draft dated 14 March 2012) requires the installation of a class 2 heat meter in certain circumstances (a class of meter complying with Directive 2004/22/EC) there are other technical specifications in Chapters 2 and 3 of Part 2, the requirement, for example, in draft regulation 17(2)(b) for steam measuring equipment.

It appears that the corresponding GB Regulations- SI 2011/2860- were notified in draft to the European Commission. The balance of risk is firmly in favour of notifying the draft NI Regulations. Technical regulations which Member States are obliged to notify but have failed to notify are, as a

matter of EU law, unenforceable in national courts.

If you wish to discuss, please do not hesitate to contact me.

Regards

Brendan O'Kelly

**From:** Clarke, Helen  
**Sent:** 07 September 2012 12:09  
**To:** O'Kelly, Brendan  
**Subject:** FW: Renewable Heat Incentive Regulations - EU Directive on technical standards

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**From:** Hutchinson, Peter  
**Sent:** 05 July 2012 17:21  
**To:** McGinn, Paul  
**Cc:** Hepper, Fiona; McCutcheon, Joanne  
**Subject:** FW: Renewable Heat Incentive Regulations - EU Directive on technical standards

Paul,

In Nicola's absence, grateful if you could consider the query below.

Many thanks,

Peter

**Peter Hutchinson**  
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*The new website for the European Sustainable Competitiveness Programme for NI is now available - visit [www.eucompni.gov.uk](http://www.eucompni.gov.uk)*



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**From:** Hutchinson, Peter  
**Sent:** 05 July 2012 17:13  
**To:** Wheeler, Nicola

**Cc:** Hepper, Fiona; McCutcheon, Joanne; Stewart, Susan

**Subject:** Renewable Heat Incentive Regulations - EU Directive on technical standards

Nicola,

Grateful for consideration on a matter relating to the Northern Ireland Renewable Heat Incentive regulations that you recently considered for DETI.

We are currently working to develop a final draft of these regulations and that has involved work with Ofgem as the scheme's administrators. Ofgem have now raised an issue relating to the regulations and EU Directive 98/34/EC regarding notification requirements for good and electronic services. Ofgem have advised that DECC, when finalising the regulations for the GB scheme, notified the EU Commission under this Directive, I attach for information the GB notification, it relates to MCS standards, heat meter standards and a couple of other issues. This is not a requirement that we are familiar with and indeed the regulations relating to the Northern Ireland Renewables Obligation, that includes requirements for MCS standards, have not previously been notified under this scheme.

From looking through existing guidance it is difficult to understand why the Renewable Heat regulations would need to be notified under this Directive. The MCS standards are a EU standard that were notified separately in 2007 and the heat meters in question again are of a EU standard.

I would be grateful if you could consider the guidance on this Directive and the potential relevance to the RHI regulations and provide advice on whether DETI need to notify in this way. Given that the notification process includes a 3 month 'standstill' period, I would be grateful if you could consider this issue with some urgency.

For ease of reference I have attached the GB notification paper and a link to guidance on the aforementioned directive

<http://www.bis.gov.uk/policies/innovation/standardisation/tech-standards-directive>

If you need anything further please let me know.

Thanks in advance,

Peter

**Peter Hutchinson**

Renewable Heat

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