

From: Hutchinson, Peter
To: [Hepper, Fiona](#)
Cc: [McCutcheon, Joanne](#)
Subject: FW: RHI Scheme - Carbon Trust Interest Free Loans
Date: 30 October 2013 17:23:00

Fiona,

See emails below between myself and Pat Millen (DSO) re the Carbon Trust loan / RHI / Ofgem situation. I have also spoken to Pat about this.

If you have time it might be useful to have a quick meeting at some stage to discuss.

My brief take on it is there are two options;

1. We agree with the current Ofgem interpretation of the Regulations (Regulation 23) that the RHI and the Carbon Trust loan are not compatible. This will result in applicants that were previously advised by Ofgem that the two schemes were compatible to be rejected from the RHI, this could lead to legal cases with applicants challenging both DETI and Ofgem regarding the fact that incorrect guidance was given.
2. A narrow interpretation of “provided by a public authority” is taken. The regulations define public support (things that aren’t grants) as “any financial advantage provided by a public authority”. It is our understanding that as the Carbon Trust are not a public authority and as the loan is provided by them then they RHI and the loan are compatible.

Ofgem are likely to come over either next Monday or Wednesday to meet to discuss. The issue is becoming more pressing, I have spoken to a number of people today with projects on hold because of it and the NI Carbon Trust are informing applicants about the ongoing issue.

If you were free to meet for 20 mins at some stage over the next couple of days I could brief you fuller on the options and take your view on the way forward.

Thanks,

Peter

From: Millen, Patrick
Sent: 30 October 2013 15:58
To: Hutchinson, Peter
Subject: RE: RHI Scheme - Carbon Trust Interest Free Loans

SOL 40192/2013/DETI

Peter,

I did ask Ofgem to clarify whether they made any representations to applicants about the compatibility of Carbon Trust loans with RHI and whether they have (in the past accredited installations) notwithstanding the fact that the applicant might also have had such a loan - silence. This is probably

something I would need more information on.

If I can run down through your comments on the options, using the same sequencing:

1. No, Ofgem provided no information on how systems already accredited by Ofgem under RHI (despite being in receipt of Carbon Trust loans) would be treated. However, my feeling is that effectively such applicants would be entitled to enjoy the benefit of that accreditation - I don't think it is something Ofgem can now remove from them.

2. Yes, your understanding is correct. In essence, one would ignore the underlying relationship between Invest NI and the Carbon Trust, focusing directly instead on who actually makes the payments.

They seem to think that this would only work if:

(a) if Carbon Trust was not itself a public authority, I believe it isn't but they appear to reserve their position here subject to receipt of more information from the Trust as to its status; and

(b) taking the loan and the RHI together there is no breach of State Aid rules.

However, it seems to me that this approach completely ignores the reality of the relationship between Invest NI and the Carbon Trust. In terms of a proper interpretation of regulation 23 it doesn't appear particularly convincing.

3. Agreed. In any event, there are issues whether any such an amendment would be permissible under State Aid rules.

4. Agreed. In any event, I could not see why an applicant for an interest free loan scheme would voluntarily undertake to make interest payments.

Your closing paragraph is absolutely correct, it is all going to come down to whether we can realistically argue that "provided by" was a reference to the body making the payment - as I said above I do think this tends to ignore the realities of the situation here. I have to confess this seems to be an artificial interpretation of the provision in order to avoid the difficulty that it otherwise presents. Ofgem did not express a preference for one option over the other, neither have I - I told Ofgem I wanted to pause at this point and go back to DETI, I was conscious that the Department may not have fully appreciated the issue in light of Ofgem's refusal to share their paper. Once the Department has had an opportunity to consider I would be happy to discuss the various options further.

Kind regards

Pat Millen

Departmental Solicitors Office

Ext: 51210

From: Hutchinson, Peter

Sent: 30 October 2013 15:07

To: Millen, Patrick; McCutcheon, Joanne

Subject: RE: RHI Scheme - Carbon Trust Interest Free Loans - Draft

Pat,

Thanks for providing the advice below and for taking the time to speak to Ofgem lawyer's on this matter.

We are scheduled to meet with Ofgem next week to discuss policy options and how we proceed with this matter. I'm not sure if this was raised by Ofgem in your discussions but the issue is clouded somewhat by the fact that Ofgem had previously advised DETI and applicants that the Carbon Trust loan and the RHI were compatible and therefore a number of consumers who received this advice have proceeded to purchase and install renewable heat technologies, at considerable expense, only to now be rejected by Ofgem. We are receiving a high number of calls from consumers, suppliers and installers regarding this issue because of stalled projects.

Just to quickly clarify the four options you kindly outlined;

1. *Live with the current interpretation* – i.e. the Carbon Trust loan and RHI are not compatible and therefore anyone who has received the Carbon Trust loan is ineligible for RHI. Did Ofgem lawyers provide any guidance on how systems that have already been accredited by Ofgem under the RHI despite receiving the Carbon Trust loan would be treated under this scenario?
2. *Adopt a restrictive interpretation of "provided by"* – Just wanted to confirm my understanding of this option, it would mean Ofgem interpret that as the loan is administered by the Carbon Trust, who are not in themselves a public authority, then it is compatible with the RHI? Do you have any legal opinion on this option, is it appropriate? There are of course benefits to it as projects that were previously advised that they would be eligible could go ahead as planned.
3. *Amend the Regulations* – this is fairly self-explanatory, however would be take time and probably require public consultation.
4. *Pay back interest free element* – agree with your analysis that this is unrealistic, would be administratively difficult for CT and also I personally don't see how it would be within the scope of the Regulations as they are clear that if a grant / public support has been awarded then the system is ineligible – there is no option for repayment unless the technology was commissioned between 1 September 2010 and 1 November 2012. Therefore this isn't a realistic option.

My reading of the analysis is that it is all down to the interpretation of "provided by a public authority". If the restrictive interpretation is used (option 2) then systems could receive both Carbon Trust loan and RHI but if a more general (the current) interpretation is taken then the two are not compatible. If the current interpretation is used and projects are ineligible then DETI would need to consider policy options and consider the need to amend regulations (in line with state aid) given the inconsistency in Ofgem guidance to consumers previously. Do you (or did Ofgem) have a preference for any option or any

concerns about any option?

Thanks again for your time on this and the analysis provided.

Regards

Peter

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

Departmental Solicitors Office

Ext: 51210

From: Hutchinson, Peter
To: [Hutchinson, Peter](#); "[Edmund Ward](#)"
Cc: "[Teri Clifton](#)"; [McCutcheon, Joanne](#)
Subject: RE: RHI and Carbon Trust interest free loan
Date: 31 October 2013 16:45:00
Attachments: [image001.gif](#)

Edmund,

I have spoke to Pat Millen and he has given me an overview and analysis of the advice he has received from your lawyer's. I have discussed the potential options with Pat and our Director of Energy, Fiona Hepper, and think we might be able to move forward with one of the options.

Given the increased local interest in the event and the need for a resolution, Fiona has asked that we consider having a teleconference earlier in the week rather than waiting until Wednesday to meet in person. If this was an option at all we could have the telecon on Monday afternoon or anytime on Tuesday? If you aren't available or already booked flights we could proceed with Wednesday but have preliminary discussions beforehand?

Let me know what suits and whether a telecon earlier in the week would be preferable?

Thanks,

Peter

From: Hutchinson, Peter
Sent: 31 October 2013 12:34
To: 'Edmund Ward'
Cc: Teri Clifton; McCutcheon, Joanne
Subject: RE: RHI and Carbon Trust interest free loan

Edmund,

11am on Wednesday would be fine with us, let me know when confirmed.

Happy for you to pass my contact details on to Connel (or anyone else you happen to speak with who wants to speak with DETI also), I spoke to someone else from Alternative Heat yesterday. Think we are using similar lines in terms of "the issue is under review and we are working with Ofgem to understand the issue and consider how to go forward" etc.

Thanks,

Peter

From: Edmund Ward [<mailto:Edmund.Ward@ofgem.gov.uk>]
Sent: 31 October 2013 11:38
To: Edmund Ward; Hutchinson, Peter
Cc: Teri Clifton; McCutcheon, Joanne
Subject: RE: RHI and Carbon Trust interest free loan