

**To:** Edmund Ward[Edmund.Ward@ofgem.gov.uk]  
**Cc:** Teri Clifton[teri.clifton@ofgem.gov.uk]; Hutchinson, Peter[Peter.Hutchinson@detini.gov.uk]  
**From:** McCutcheon, Joanne  
**Sent:** 2013-11-18T14:39:20Z  
**Importance:** Normal  
**Subject:** FW: URGENT Carbon Trust and RHI in Northern Ireland  
**Received:** 2013-11-18T14:39:31Z  
 SA.34140 – RHI Northern Ireland.pdf  
 De Minimis Regulation.pdf

Edmund  
 Please see below comments from our colleague who has responsibility for DETI State Aid issues.  
 Conscious that time is ticking on – it has taken 10 of the 30 days for SR to get view on Carbon Trust status – that is assuming your legal team is now content that CT is not a public authority?  
 From what Stephen says we collectively need to work out levels of compensation – assume this will not require legal input?  
 If we show that the cumulation threshold is not breached will your legal colleagues be content to move forward with this approach?  
 Thank you  
 Joanne

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**From:** Moore, Stephen (DETI) [mailto:Stephen.Moore@detini.gsi.gov.uk]  
**Sent:** 18 November 2013 13:51  
**To:** McCutcheon, Joanne  
**Cc:** Hutchinson, Peter; Pauley, Alberta; Brush, Paul; Ryan, Damien  
**Subject:** RE: URGENT Carbon Trust and RHI in Northern Ireland

Joanne  
 These emails below from OFGEM and the Carbon Trust are helpful.  
 I am happy with the proposed way forward in theory. The main issues I see all relate to the process of retrospectively applying the de minimis regulation and how best to minimise the risk of a complaint to the Commission.  
 Unfortunately, I can't think of any direct precedents but I am vaguely aware that there have been times in the past when the UK has decided to operate schemes on a de minimis basis that had previously been notified and the Commission raised no objections to this. We also know InterTradelreland has a couple of programmes in which part of the programme is delivered on a de minimis basis and the rest of the programme is 'notified'. This has never resulted in any issues with the Commission or with DETE colleagues in Dublin.  
 Therefore, in this case, providing we ensure all de minimis funders adhere to the 'checking' and 'declaration' requirements of the de minimis regulation, I wouldn't expect any negative decisions from the Commission, if it was ever to investigate.  
 In relation to whether we need to tell the Commission anything, you will see that paragraph 80 of our decision letter requires us to notify the Commission of any "plans to refinance, alter or change this scheme". In this case, I would argue we are not changing the scheme as such, just the basis on which some of the projects are provided with their State aid cover, so my instinct is that the Commission doesn't need to be notified. If you are not comfortable with my assessment (bearing in mind I don't provide legal advice), I would be happy if you want to take a view from DSO (Brian Doherty or Helen Rogers) in the first instance.

80. The Commission reminds the UK authorities that, in accordance with Article 108(3) of the TFEU, plans to refinance, alter or change this scheme have to be notified to the Commission pursuant to the provisions of Commission Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty.

In relation to the cumulation issue, it is clear that para 46 of our RHI decision does not permit "a *grant* contributing to the *direct costs* of a heat production" [my emphasis]. In this case, if ever challenged, we would certainly argue that the Carbon Trust loan is not a grant. We can also probably argue that this loan is also not contributing to the 'direct costs' of a heat production. Furthermore, as I believe has been highlighted elsewhere, we could argue that it is highly probable that other beneficiaries of the RHI in Great Britain and other similar schemes in Europe, could also be in receipt of subordinated loans.

However, whatever we argue, I suspect the Commission would revert to first principles and the main and fundamental argument in our defence would be that there is simply no over-compensation. In other words, the rate of return will still be within the limits we and the Commission had previously agreed were acceptable, when the 'extra aid' being provided through the Carbon Trust loan is added to the aid being received through the RHI scheme. We could also argue that our decision not to allow any 'grants' (as per para 46) was primarily to simply the administration of the RHI scheme and was not because we were fundamentally concerned about the possibility of other grants leading to 'overcompensation'.

46. The UK authorities clarified that it is not possible for any new installations benefiting from the RHI to receive a grant contributing to the direct costs of a heat production. From the launch of the scheme it will not be possible to receive grant funding that contributes to the direct costs of a heat production installation and to receive RHI tariffs as well, and any installation which is already receiving direct grants in the transitional

period would be smoothly transferred to the new RHI scheme. In particular, no new installation will be allowed to receive both types of support, and those installations which have been commissioned during the transitional period and are already receiving grants from other Department schemes will have to either repay the grant or agree to reduce the payment, either in the size of the tariff or the duration, consistent with the limits set in the RHI scheme. No installation commissioned before 1 September 2010 will be eligible under the RHI scheme.

Next steps?

1. You will need to work out how much aid is in the Carbon Trust loans and ensure this does not push the rate of return outside the limits we considered were acceptable;
2. You will need to ensure the requirements of the de minimis regulation are now satisfied for all the RHI projects that have received Carbon Trust loans;
3. You will need to communicate carefully with these 'Carbon Trust' projects to minimise the risk of a complaint to the European Commission.

NB - If there was a complaint, even though I suspect the Commission is not really going to be that interested in the RHI scheme, it is procedurally bound to investigate and once opened complaints are hard to close.

4. You will need to ensure OFGEM tell us precisely the annual amount of RHI funding is being paid out under (a) the de minimis regulation and (b) the RHI State aid decision.

This is because we do not yet report de minimis State aid on an annual basis. We just report back the amounts of notified State aid. While I suspect no one would actually notice in we reported everything, we are expecting the Commission to start requiring us to also report on de minimis aid from about 2015 onwards, so it would be good practice to start as we may need to go on.

Happy to discuss further as necessary.

Stephen

PS – I am also attaching a copy of the de minimis Regulation and would be happy to walk you through its requirements when you are ready.

**Stephen Moore**

European Support Unit  
 Department of Enterprise, Trade & Investment  
 Netherleigh  
 Massey Avenue  
 Belfast, BT4 2JP  
 Tel: 028 9052 9415 (ext: 29415)  
 Mob: Personal information redacted by the RHI Inquiry  
 Textphone: 028 9052 9304  
 Web: [www.detini.gov.uk](http://www.detini.gov.uk)

Visit the website for the European Sustainable Competitiveness Programme for NI - [www.eucompni.gov.uk](http://www.eucompni.gov.uk)



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**From:** McCutcheon, Joanne [<mailto:Joanne.McCutcheon@detini.gsi.gov.uk>]  
**Sent:** 18 November 2013 12:42  
**To:** Moore, Stephen (DETI)  
**Cc:** Hutchinson, Peter  
**Subject:** FW: URGENT Carbon Trust and RHI in Northern Ireland

Stephen

We have discussed the issue of RHI and Carbon trust loans on a couple of occasions - please see below from Ofgem. The suggestion is that we would treat the RHI as de minimis aid, ensuring that when combined with any other de minimis State Aid the recipient has received, the cumulation threshold (200,000 euros over 3 years?) would not be breached. Do you see any issues with taking this approach?

Thanks for your help.  
 Joanne

Received from Ofgem on 15/11/2013  
**From:** Edmund Ward [<mailto:Edmund.Ward@ofgem.gov.uk>]  
 Annotated by RHI Inquiry

**Sent:** 15 November 2013 09:17  
**To:** McCutcheon, Joanne  
**Cc:** Teri Clifton; Hutchinson, Peter  
**Subject:** RE: URGENT Carbon Trust and RHI in Northern Ireland

Joanne,  
Sorry I didn't reach you yesterday; I've just missed you again by phone this morning; I'll try again later but you can reach me on 0207 901 7168 at most points today.

It would be good to discuss, but by way of a summary:

- (a) While acknowledging there are some risks to any public statement on the Carbon Trust matter, if DETI are minded to publish something of the form you suggest, we will support that and can publish an accompanying statement on our website
- (b) The response from the Carbon Trust looks quite helpful in terms of regarding the CT as not a public authority
- (c) In line with an approach that led on from that interpretation, we do feel that we would need to satisfy ourselves that the risk of state aid cumulation rules being breached would be low
- (d) To progress that, we would welcome any further update from your state aid expert, prior to incurring any further legal costs

Kind regards,  
Edmund

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**From:** McCutcheon, Joanne [<mailto:Joanne.McCutcheon@detini.gov.uk>]

**Sent:** 14 November 2013 10:54  
**To:** Edmund Ward  
**Cc:** Teri Clifton; Hutchinson, Peter  
**Subject:** RE: URGENT Carbon Trust and RHI in Northern Ireland

Edmund  
Any update since Monday? We had set yesterday as target for getting decision on CT status. Also web statement?  
We have had further correspondence to the Minister and just yesterday received an AQ (assembly question) – so this is gaining momentum.  
Joanne

**Joanne McCutcheon**

Renewable Heat  
Department of Enterprise, Trade & Investment  
Netherleigh  
Massey Avenue  
Belfast, BT4 2JP  
Tel: 028 9052 9425 (ext: 29425)  
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**From:** Edmund Ward [<mailto:Edmund.Ward@ofgem.gov.uk>]  
**Sent:** 11 November 2013 13:16  
**To:** Hutchinson, Peter; McCutcheon, Joanne  
**Cc:** Teri Clifton  
**Subject:** FW: URGENT Carbon Trust and RHI in Northern Ireland

Joanne, Peter,  
I hope you are well; it was good to meet you last week. Thanks also for the tip on lunch venue.  
Please see below advice from the Carbon Trust lawyers on the status of Carbon Trust. I've shared with our lawyers, and will provide a further update on that tomorrow. I hope to be able to respond on the website statement by the end of the day – apologies for the delay in this.  
Kind regards,  
Edmund

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**From:** Janine Cobain [<mailto:Janine.Cobain@CarbonTrust.com>]

Annotated by RHI Inquiry

**Sent:** 11 November 2013 09:31  
**To:** Edmund Ward  
**Subject:** FW: URGENT Carbon Trust and RHI in Northern Ireland

Good Morning Edmund,  
Please find below response from our legal team, If you require any further details please do not hesitate to contact me  
Regards

Janine Cobain  
**Loans Manager**  
**Carbon Trust Loan Scheme**  
Tel : 028 9073 4398  
**The Carbon Trust - Making Business Sense of Climate Change**

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**From:** Claire Williams  
**Sent:** 09 November 2013 16:04  
**To:** Janine Cobain  
**Subject:** RE: URGENT Carbon Trust and RHI in Northern Ireland

Janine  
As discussed, the following may be helpful to you :-  
The Carbon Trust is a private company limited by guarantee. It is a not for dividend company with an independent board of directors drawn wholly from the private sector.  
It may also be useful to note that the Carbon Trust:

- does not have any government directors or other government representatives sitting on its board or involved in its management. It has decision making autonomy and is not controlled by government.
- does not exercise functions of a governmental or public nature;
- was not created by statute and has no statutory powers or regulatory functions and does not exercise any such powers or functions;
- is not accountable to the public for its activities;
- is not subject to judicial review;
- designs and owns its programmes of activity and the intellectual property that it generates, with the result that its activities could not be transferred to another organisation without its consent; and
- is not subject to the Freedom of Information Act.

As the Carbon Trust receives public funding to support various of its low carbon or renewable energy programmes, its status has been considered over the years at various times. On each occasion, all bodies have accepted that it is not a public body.

Regards  
Claire  
Claire Williams  
Head of Legal & Company Secretary  
**The Carbon Trust – Making Business Sense of Climate Change**  
4th Floor, Dorset House  
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[www.carbontrust.co.uk](http://www.carbontrust.co.uk)  
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**From:** Janine Cobain  
**Sent:** 05 November 2013 10:42  
**To:** Claire Williams; Stephanie Hanson  
**Cc:** Geoff Smyth; Abigail Hermon  
**Subject:** URGENT Carbon Trust and RHI in Northern Ireland

Good Morning Claire, Steph  
With reference to the email below, could you please provide clarification for Edmund Ward from Ofgem (email address below) on the points listed below as requested and also provide a copy of Section 2, State Aid Declaration from the Interest Free Loan Scheme agreements.

This matter is causing concern for a number of our clients within Northern Ireland and I would be grateful if we could facilitate a speedy

response to the specified timescale.

If you have any queries please do not hesitate to contact me

Regards

Janine Cobain

**Loans Manager**

**Carbon Trust Loan Scheme**

Tel : 028 9073 4398

**The Carbon Trust - Making Business Sense of Climate Change**

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**From:** Edmund Ward [<mailto:Edmund.Ward@ofgem.gov.uk>]

**Sent:** 04 November 2013 18:13

**To:** Janine Cobain

**Subject:** Carbon Trust and RHI in Northern Ireland

Hi Janine

Thanks for your time on the phone, and for your email. I'm glad we managed to make contact.

I've been discussing with DETI our approach to Carbon Trust loans and RHI eligibility in NI, and one aspect that may affect our decisions on this matter going forward relates to whether the Carbon Trust would be regarded as a 'public authority'.

I would appreciate any help or context you could give to enable us to reach a view on this.

Our lawyers have suggested I might seek clarification on the following aspects in particular:

- (a) The nature of the function of the Carbon Trust;
- (b) The degree of state or government control (including commenting on membership and decision making process);
- (c) The degree of government funding.

We also briefly discussed the declaration regarding State Aid funding and de minimis limits that Carbon Trust loan recipients must complete, and you mentioned you might be able to send a copy of that (which I believe may be Section 2 of the loan agreement form).

I appreciate that it may take some time to provide a response. However, I do note that I'll be meeting with DETI again on Wednesday, and any information you were able to provide by then, even if only an initial response, would be very useful.

Kind regards

Edmund

**Edmund Ward**

Senior Technical Manager, RHI

New Scheme Development

9 Millbank

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SW1P 3GE

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**ofgem e-serve**

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**From:** Janine Cobain [<mailto:Janine.Cobain@CarbonTrust.com>]

**Sent:** 04 November 2013 15:02

**To:** Edmund Ward

**Subject:** missed call

Hi Edmund

Just seen I've missed a call from you – I'm in a meeting and should be free in an hour or so, I will call you back then unless I can help over email?

Regards

Janine Cobain

**Loans Manager**

**Carbon Trust Loan Scheme**

Tel : 028 9073 4398

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