

ofgem e-serve

For Information

Title:	NI RHI and Carbon Trust loans
Purpose:	To update MC on the current position regarding the incompatibility of Carbon Trust Zero Interest loans and RHI accreditation in Northern Ireland. Protect: refers to legally privileged material Annexes have not been circulated; a verbal update will be provided to cover relevant aspects
Project:	Non-Domestic RHI
Timing:	
Project sponsor:	Martin Crouch
Author and contact:	Edmund Ward, x 7168

For attention of
Management Committee

Date of meeting
29/10/2013

Date of submission
25/10/2013

Security level
Protect

Security descriptor

Previous papers

1 Summary and recommendation

Overview:

- 1.1 Ofgem E-Serve administers the Renewable Heat Incentive (RHI) in Northern Ireland on behalf of the Department of Enterprise, Trade and Investment (DETI) under formal but non-legally-binding 'Administrative Arrangements'.
- 1.2 The RHI Regulations for Northern Ireland (NI) differ from those for Great Britain (GB) in several respects, including on the treatment of a grants.
- 1.3 In GB, we must not accredit where certain purchase and installation costs have been provided by a 'grant from public funds'.
- 1.4 In NI, a greater range of funding sources are excluded as the costs must not be provided by a '**grant from public funds**' or '**other public support**', where this public support is defined as '**any financial advantage provided by a public authority**'.
- 1.5 One implication of this is that 'soft loans' (such as zero interest loans), which we do not view as a grant but we do consider a financial advantage, are not a barrier to RHI accreditation in GB but can be a barrier to RHI accreditation in NI, if they are provided by a public authority.
- 1.6 We recently became aware (August 2013) that some Carbon Trust Zero Interest loans within Northern Ireland utilise funds from "Invest Northern Ireland", which is a fund provided by Northern Ireland government.

Actions taken by Ofgem prior to August 2013:

- 1.7 In March and June of this year, we accredited two installations in possession of Carbon Trust Zero Interest loans. We have so far taken no retrospective action in these cases. [This approach is analogous to the National Lottery

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matter affecting the RHI, where we did not take retrospective action on 8 accredited installations previously accredited out of line with our current legal interpretation].

- 1.8 We also provided written and verbal advice to an unquantifiable number of enquirers, and written advice to DETI, which stated that Carbon Trust loans would not be incompatible with receiving the RHI. We only established that this misleading advice had been given out at the beginning of October 2013. Note that this advice was in line with our position for applicants in Great Britain (as 'soft loans' are not caught by the GB regulations), but on the basis of the source of funding of these loans this is now called into question for Northern Ireland.

Actions taken since August 2013:

- 1.9 We have provided additional training to a core team of RHI review staff who specialise in Northern Ireland-specific cases.
- 1.10 Since identifying in October that misleading messages on this topic were released by some of our team, we have reinforced our internal procedures, and clarified the standard lines which are used by our staff handling external enquiries, on this specific topic.
- 1.11 We have also instigated a wider programme of training to reinforce the importance of sticking to standard lines and published resources, and emphasised the significance of the legal risk associated with any response to a public enquiry and the safeguards that should be employed in all cases.

Current issue (October 2013):

- 1.12 On 30th September 2013, we rejected an applicant in Northern Ireland on the basis of receipt of an affected Carbon Trust Zero Interest loan.
- 1.13 The rejected applicant has informed us that he invested (c. £40k) on the basis of advice from ourselves that his grant would be compatible with the RHI. He has also contacted DETI, who have advised us that this position is not in line with their policy intent, or their previous understanding of the current regulations.
- 1.14 The rejected applicant is entitled to request a review of our decision. Under the Administrative Arrangements between Ofgem and DETI, the review could either be carried out by Ofgem (a 'Formal Review') or by DETI (a 'Statutory Review'). Following a discussion with the rejected applicant on 23rd October, we understand a Statutory Review (and not a Formal Review) is likely to be requested. This would need to be in advance of the 27th October 2013 deadline for such a request, which must be made within 28 days of receipt of notification of our decision. Further information on the review process is summarised in Annex 2.
- 1.15 We are currently aware of 5 out of 50 Northern Ireland applications (10%) in receipt of Carbon Trust loans, with total anticipated RHI payments (if all were accredited) of around £0.25M. We understand there are likely to have been a significant number of further investments in Northern Ireland made on the basis of RHI-Carbon Trust loan compatibility, many of which may not yet have reached the RHI application stage.
- 1.16 DETI have asked for a clarification of the basis on which our decision to reject was made. As a result of a legal review of this position, we have considered an alternative approach based on a narrower reading of the phrase 'provided by a public authority' in the NI RHI Regulations. This risk-

based approach might allow us to accredit recipients of Carbon Trust loans under the RHI, but only if (a) we were satisfied that the Carbon Trust would not be regarded as a public authority, and (b) we could be satisfied that the result of our decision would not lead to a breach of EU State aid de minimis provisions.

- 1.17 We have conducted initial legal research on these points, but before reaching a decision on the possibility of taking this approach, further investigation will be required, and as part of this we would benefit from further information that could be provided direct from the Carbon Trust.

Our proposals:

- 1.18 We intend to:

1.18.1 Continue to engage with DETI as a matter of urgency, to:

- (a) Confirm whether they have a common legal understanding of the issue in line with our current interpretation
- (b) Discuss the approach we could take under alternative regulatory scenarios [should they wish to pursue regulatory changes]
- (c) Reach a common understanding of the impacts of the review process
- (d) Agree a public statement that clarifies this matter for stakeholders

1.18.2 As an important (but slightly less urgent) action, we will conduct a lessons learned exercise to identify mitigations, including those relating to administering similar but non-identical regulations

2 Communications implications

- 2.1 While we confirm our position going forward, our current line is that: loans are an area under review; interested parties are requested to provide details of their situation in writing and we will respond in due course.
- 2.2 Subject to urgent resolution of the issue with DETI, we will prepare a statement for the Ofgem website and to be circulated to relevant stakeholders. However, we are keen to reach a conclusion with DETI before publishing this.

3 Next steps

- 3.1 We will act in line with the proposals above, taking on board further suggestions from Management Committee (MC), and keep MC informed of significant developments.
- 3.2 Should we seek to adopt an alternative interpretative approach, we would seek to ratify this decision at MC level.

4 Options that have been considered

- 4.1 Three key approaches under consideration, alongside their associated benefits and risks, are summarised in Annex 1. In brief, these are:
- 4.2 Option A: maintain the current interpretation

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- 4.3 Option B: adopt the alternative approach
- 4.4 Option C: amend the regulations to remove reference to other forms of public support
- 4.5 We will provide a verbal summary of the options and associated risks at the Board.

5 Legal implications

- 5.1 Legal implications associated with alternative options are summarised in Annex 1.
- 5.2 The Review processes (conducted by either Ofgem ('Formal Review') or DETI ('Statutory Review') are summarised in Annex 2.

6 Resource implications

- 6.1 The alternative approach would imply a significant additional legal and operational resource requirement when determining the level and nature of state support received by applicants.

7 Risk

- 7.1 Risks associated with alternative options are summarised Annex 1.
- 7.2 There are also risks to our relationship with DETI associated with our approach to this matter.

8 List of annexes

Annex 1 – Legal Options Paper – *legally privileged – not circulated*

Annex 2 – Review Processes under the NI RHI regulations – *legally privileged – not circulated*