

## NI RHI: Enforcement and the statutory review mechanism

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Dividing the enforcement and review functions under the NI RHI Regulations between DETI and the Authority	From To cc Date	Will Elliott The RHI Implementation Board Luis Castro, Keith Avis 7 September 2012
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### 1. Aim

- 1.1. This briefing is intended:
- (i) to identify the powers and duties of (i) enforcement; and (ii) review under the NI RHI Regulations; and
  - (ii) to enable a decision to be made as to which, if indeed any, of such powers and duties should be exercised by DETI rather than by Ofgem.

### 2. Executive Summary

- 2.1. Ofgem is in the process of negotiating and agreeing arrangements with DETI ("the Arrangements") pursuant to which Ofgem will administer the NIRHI scheme on DETI's behalf.<sup>1</sup> These Arrangements will establish (as a matter of law) which of the powers and duties provided for by the NIRHI Regulations are to be carried out by Ofgem and which are to be carried out by DETI. In order that these Arrangements can be finalised, the Authority and DETI must first agree where this division of responsibilities lies, including, in particular with respect to enforcement and review.
- 2.2. As currently drafted, the Arrangements propose that:
- (i) Ofgem should be wholly responsible for imposing sanctions in respect of a breach by a participant of the NI RHI Regulations, save that DETI would retain responsibility for requiring overpayments to scheme participants to be repaid "as a civil debt";
  - (ii) DETI should be responsible for undertaking the statutory review function; but that
  - (iii) Ofgem should make available to participants a complaints and formal internal review process.
- 2.3. From preliminary discussions with DETI, we understand that they are generally amenable to the above proposals. However, we are currently awaiting comments on the draft Arrangements from DETI's legal advisors. DETI are also aware that these proposals are subject to Ofgem's internal review.
- 2.4. This paper is therefore intended to provide an analysis of the proposals and options (as to the latter, please refer to Appendix B), and ultimately to enable a decision to be made as to which, if indeed any, of such powers and duties should be exercised by DETI rather than by Ofgem.

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<sup>1</sup> Section 114 of the Energy Act 2011 provides that DETI can enter into arrangements for the Authority "to act on behalf of [DETI] for, or in connection with, the carrying out of any [of DETI's powers and duties under the Regulations]".

### 3. Enforcement and sanctions

- 3.1. The provisions in the NI RHI Regulations relating to enforcement replicate those in the GB RHI Regulations and are summarised in detail in Appendix A. They empower DETI or, if the relevant powers and duties are transferred to the Authority pursuant to the Arrangements, Ofgem, to take a range of enforcement actions against participants who are breach of their obligations under the scheme. Such actions range in severity from the temporary withholding of RHI payments to the permanent revocation of an installation's accredited status.
- 3.2. In principle, the effect of the underlying primary legislation is that there is nothing to preclude Ofgem from carrying out, on DETI's behalf, virtually all of the powers and duties provided for by the NI RHI Regulations, including all the enforcement functions, save that mentioned above relating to recovery of overpayments. Conversely, enforcement functions could be retained by DETI or, on the basis purely of the legislation at any rate, there could be some division of enforcement responsibility between DETI and Ofgem. However, in the case of enforcement, we consider that there are a number of reasons why it is preferable for Ofgem to be wholly responsible for imposing sanctions on participants. In particular, there is a risk that any involvement by DETI in the decision-making process could:
- (a) cause divergence between the GB and NI schemes;
  - (b) prevent necessary enforcement action from being sufficiently quickly;
  - (c) impact on the robustness of the decision-making process;
  - (d) give rise to additional data protection issues;
  - (e) if the imposition by DETI of one or more sanctions were made contingent on information provided by/an act of Ofgem, give rise to procedural impropriety/improper fettering of DETI's discretion, in contravention of administrative law requirements; and
  - (f) increase Ofgem's administrative costs and burden.
- (These issues are discussed in greater detail in Appendix B).
- 3.3. From preliminary discussions with DETI, we understand that they are generally content for Ofgem to undertake all of the enforcement functions available under the NI RHI Regulations. However, it is suggested that DETI should retain responsibility for recovering overpayments as a civil debt as such recovery could ultimately require DETI to commence legal proceedings in the NI courts. Given the potential reputational and jurisdictional issues, this function would seem to fit more naturally with DETI.
- 3.4. Also,, it should be noted that any action in respect of fraud falls outside the scope of the functions conferred by the Regulations, and is ultimately a matter for the Public Prosecution Service Northern Ireland. Again, given the reputational and jurisdictional issues arising in such cases, DETI are likely to want to take responsibility for liaising with the police/PPSNI.
- 3.5. This above proposed division of responsibilities was reflected in the draft version of the Arrangements that were sent to DETI on 22 August 2012 and expressed as being subject to internal review. We are currently waiting for comments on the draft from DETI's legal advisors.

#### 4. The statutory and formal review processes

- 4.1. The NI RHI Regulations effectively replicate the statutory review mechanism provided for in the GB RHI Regulations. Specifically, the NI RHI Regulations provide that any prospective, current or former participant affected by a decision made by DETI/Ofgem may have that decision reviewed by DETI/Ofgem; and that on review, DETI/Ofgem may, among other things, revoke any decision or vary any sanction that has been imposed.
- 4.2. Again, if DETI, rather than Ofgem, were to undertake the statutory review this could cause divergence between the GB and NI schemes; increase Ofgem's administrative costs and burden; and impact on the robustness of the decision-making process and the integrity of the scheme.
- 4.3. However, in contrast to the position in relation to enforcement, there are number of factors to recommend such approach. In particular, it would arguably go some way towards ensuring that the review was independent (Article 6 ECHR compliant), and the timeframe in which a decision would need to be made is likely to be more commensurate with DETI's capacity and experience. Moreover, before judicial review proceedings can be commenced, a claimant must have exhausted any available statutory remedies. Consequently, DETI's involvement at this level would necessarily mean that any judicial review challenge would be in respect of a decision that had already been independently ratified by DETI. This would likely go some way to mitigating against any potential reputational damage to Ofgem resulting from a successful judicial review challenge.
- 4.4. Regardless of whether DETI or Ofgem undertakes the statutory review, it is intended that Ofgem should provide the same complaints process and 'formal' review mechanism that it has made available to participants under the GB scheme.
- 4.5. As drafted, the Arrangements currently propose that DETI should undertake the statutory review function, while Ofgem will make available a complaints process and formal review mechanism. Although we are still awaiting comments on the draft Arrangements, DETI appear amenable to this division of responsibilities.

## Appendix A

### Enforcement powers

1. The NI RHI Regulations provide for the following powers of enforcement. These replicate the powers available to Ofgem under the GB scheme:
  - (i) where there are reasonable grounds to suspect that participant has failed or is failing to comply with its (ongoing) obligations under the Regulations, **the power to temporarily withhold periodic support payments for up to six months** pending the outcome of an investigation into the suspected non-compliance. The decision to withhold payments must be reviewed every 30 days;
  - (ii) where DETI/Ofgem is satisfied that a participant is failing to comply with its (ongoing) obligations under the Regulations, **the power to suspend that participant's periodic support payments for up to a year**. (Suspended payments are only recoverable by the participant at DETI's/Ofgem's discretion);
  - (iii) where DETI/Ofgem is satisfied that there has been a material or repeated failure by a participant to comply with its (ongoing) obligations during any quarterly period, **the power to withhold a proportion of the participant's payments for that quarter (up to 100%), and/or to reduce the payment due to the participant in respect of the next quarter up to a maximum of 10%**; and
  - (iv) where DETI/Ofgem is satisfied that there has been a material or repeated failure by a participant to comply with its (ongoing) obligations, **the power permanently to revoke accreditation of one more of the participant's accredited RHI installations/a biomethane producer's registered status** and to refuse to accredit/register in the future (effectively excluding the participant from the scheme)
  - (v) where DETI/Ofgem is satisfied that a participant has received a payment which exceeds the participant's entitlement, **the power to require a participant to return the payment as a civil debt, or to offset such payment against future payments made to the participant**.

## Appendix B

### Enforcement: options and risks

1. There are three ways in which enforcement decisions under the NIRHI Regulations could be exercised and which require consideration:
  - (i) by DETI autonomously of Ofgem;
  - (ii) by Ofgem having responsibility for enforcement other than for the enforcement mechanism specified at paragraph (iv) in Appendix A; or
  - (iii) by Ofgem autonomously of DETI.

A number of these approaches are considered below in the context of enforcement. The approach that has been proposed as part of the draft Arrangements is detailed in the main body of this paper.

#### *DETI autonomously of Ofgem*

2. At first glance, the benefits of such an approach appear to lie in limiting the Authority's exposure to legal challenge - in theory, DETI, not Ofgem, would be the defendant in respect of any legal challenge against a decision that DETI had made to impose a sanction. This would be because, when the need for enforcement action arose, Ofgem would pass the matter in its entirety to DETI to determine.
3. However, in practice any such decision would, in the first instance, be based on information provided by Ofgem as part of its monthly reports, and would ultimately have to be actioned by Ofgem if RHI payments were affected. Given this relationship, Ofgem would likely want to be joined as an interested party to any action, and the claimant might well be able to establish a claim against both DETI and Ofgem.
4. Moreover, under certain circumstances this approach might give rise to additional legal risks to Ofgem, including in particular, if Ofgem failed to provide sufficient information to enable DETI to determine whether a participant's breach warranted a certain enforcement action.
5. Further consideration suggests that such approach is unlikely to be satisfactory for a number of additional reasons:
  - (A) **Additional administrative burden/cost** – in order for DETI to authorise the imposition of a sanction, it would need to have sight of the underlying case material. This would create an additional flow of information between Ofgem and DETI (as to which see *Data Protection* below). Moreover, Ofgem would need to ensure that the form and presentation of the information would be suitable for DETI's readership. Ofgem currently undertakes all enforcement actions in respect of the GB scheme. Were DETI to undertake such actions in respect of the NIRHI, it would be necessary to have in place different internal processes to those in place for GB.
  - (B) **Capacity** – DETI's NIRHI team is comprised of two individuals, neither of whom works full time. We have built up considerable knowledge through our work with DECC on development of the GB RHI scheme and subsequently and that knowledge is now reflected in the robustness of our decision-

making. At least initially, DETI will not have the benefit of such knowledge, which, when combined with the limited capacity of their team, may impact on the robustness of their decision-making. This could potentially impact on the integrity and reputation of the scheme.

- (C) **Data Protection** – the nature of the information that we would be sharing with DETI would likely engage the Data Protection Act. It would require further consideration of whether such sharing gave rise to data protection issues additional to those that will be engaged by monthly reporting and/or those engaged by the GB scheme. This could potentially give rise additional legal (and potentially security) input and costs.
- (D) **Divergence** – where DETI retain ultimate responsibility for imposing sanctions this could in theory lead to divergent enforcement action being taken by the Authority under the NI and GB schemes in respect of near identical breaches of participants' obligations. Such divergence could damage the integrity and reputation of both schemes and increase the risk of a successful legal challenge.
- (E) **System delay** - under the GB scheme, in order to suspend a payment in respect of a quarterly period, Ofgem needs to be able quickly to take a decision as to whether there is reason to suspect that a participant is failing to comply with its obligations. DETI's NIRHI team is comprised of two individuals, neither of whom works full time. It is therefore unlikely that they will have sufficient capacity to react quickly to suspected cases of non-compliance. The additional process and data flow between Ofgem and DETI will cause further delay.

*DETI retains responsibility for revocations etc.*

6. It is assumed that participants will be more likely to challenge a decision to impose a sanction, the greater the severity of the sanction being imposed. Given that the revocation etc. enforcement mechanism is the most drastic of the enforcement actions available under the NI RHI Regulations, this approach might go some way to reducing the risk that a participant brings a judicial review against Ofgem. However, such approach would be subject to all the drawbacks specified in paragraph 5 and would also give rise to a further legal objection as follows: Ofgem's wider role under the scheme and the fact that most enforcement mechanisms would remain within Ofgem's remit would in effect mean that the initial assessment as regards whether the revocation etc. enforcement mechanism might be appropriate would be made by Ofgem and that it would be only in cases where Ofgem concluded that such action might be warranted that DETI would become involved at all. Thus, in respect of any given breach of a participant's obligations, consideration of whether it is appropriate to take the most drastic form of enforcement would potentially be an issue that engaged both DETI and Ofgem. Legal's concern would be that such blurring of the boundaries might constitute an improper fetter on DETI's freedom of action and trespass into an area falling within their remit, i.e. a procedural impropriety and hence contravention of administrative law requirements.

*Ofgem autonomously of DETI*

7. Whilst this would of course leave greater scope for enforcement activity of Ofgem to be made subject to legal challenge, it would appear to entail none of the drawbacks described above and it is believed acceptable to DETI. Consequently it seems the most suitable option.