



Briefing

NI RHI Administrative Arrangements (cont.)

An overview of the functions that it is intended DETI should retain under the Arrangements

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To	Matthew Harnack
cc	Luis Castro, Keith Avis
Date	15 August 2012

1. Aim

1.1. This briefing is intended:

- (i) to provide an overview of the functions that DETI will retain under the Arrangements; and
- (ii) to enable a decision to be made as to whether it is right and proper that Ofgem should exercise the majority of DETI's enforcement powers under the NI RHI Regulations.

2. Background

2.1. The NI RHI Regulations provide for the following powers of enforcement, which replicate the powers available to Ofgem under the GB scheme:

1. 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;
2. 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);
3. where DETI/Ofgem is satisfied that there has been a material of 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
4. 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** (effectively excluding the participant from the scheme).

2.2. There is also a number of ancillary functions that are related to enforcement, including:

5. **the power to revoke any sanctions imposed;**
6. **the right of a participant to request a statutory review of any decision to impose a sanction;** and

- 7. 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.**
- 2.3. In principle, the Arrangements could make provision for any of these powers and functions to be carried out either by DETI or by Ofgem, and DETI have previously suggested that they should retain responsibility for “enforcement” generally. In practice, however, this would still require Ofgem to provide DETI with the information necessary for DETI to decide whether to take enforcement action, and to effect the suspension or withholding of a participant’s payments. In effect, DETI would simply be making the decision as to whether or not a sanction should be imposed. This is unlikely to be satisfactory for a number of reasons:
 - **Additional administrative burden/cost** – in order for DETI to authorise the imposition of a sanction, it will need to have sight of the underlying case material. This will create an additional flow of information between Ofgem and DETI. Moreover, Ofgem would need to ensure that the form and presentation of the information will need to be suitable for DETI’s readership. These are all functions that Ofgem currently undertakes in respect of the GB scheme. Where DETI is responsible for authorising enforcement action, it would therefore be necessary to have in place different internal processes to those in place for GB.
 - **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.

3. The position under the draft Arrangements

Enforcement Powers

- 3.1. It is proposed that DETI should only retain the following “enforcement” function:
 - **the power to require a participant to return the payment as a civil debt.**
- 3.2. Such function could ultimately require DETI to commence legal proceedings for recovery of the debt in the NI courts. Given the potential reputational and jurisdictional issues, this function would seem to fit more naturally with DETI.
- 3.3. 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.

Other Functions

- 3.4. It is proposed that DETI should also retain responsibility for the following functions:
 - The publication of the Guidance;

Comment [01]: Marcus, would our status as public authority require us to reach an independent decision as to whether to contact the PPSNI/CPS in relation to a potential incident of fraud, even where DETI advised against such action?

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- The publication on DETI's website of information in aggregate form as to the number of accredited RHI installations/the amount of heat they have generated etc.; and
- The annual calculation and publication of updated RHI tariffs.

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