



RENEWABLE HEAT
INCENTIVE INQUIRY

WIT-235001

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By post and email: Colette.fitzgerald@ec.europa.eu

21 June 2017

Dear Madam

**Re: The Independent Public Inquiry into the Non Domestic Renewable Heat Incentive (RHI) Scheme
Request for a Written Statement and Documents from the Commission**

I am writing to you in my capacity as Chairman of the Independent Public Inquiry into the Northern Ireland Non Domestic Renewable Heat Incentive (RHI) Scheme (known as 'the RHI Inquiry') which has been set up under the Inquiries Act 2005 to consider matters related to the Renewable Heat Incentive Scheme Regulations (Northern Ireland) 2012.

I enclose a copy of the RHI Inquiry's Terms of Reference for your information. Further information regarding the Inquiry can be accessed on its website: <https://www.rhiinquiry.org>.

You may be aware that the Inquiry is currently investigating the matters set out in its Terms of Reference. This involves the Inquiry obtaining relevant documentation, and witness statements, from various individuals, organisations, and government departments.

As part of this exercise, the Inquiry is investigating the creation of the Non Domestic Renewable Heat Incentive Scheme ('the NI RHI Scheme') and, in particular, the design of the Scheme and any potential flaws in it. The Inquiry's work in this regard involves a consideration of various aspects of the NI RHI Scheme including the tariffs payable under it, the costs controls (if any) within it, the potential for over-compensation under it, the potential for abuse of it, and the salient

Chairman: Rt Hon Sir Patrick Coghlin | Secretary: Andrew Browne | Solicitor: Patrick Butler

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Annotated by RHI

differences between the NI RHI Scheme and its counterpart in Great Britain. This work brings into focus, among other things, the State Aid approval that was sought, and granted, in respect of the NI RHI Scheme and the Commission's consideration of the Scheme in the context of that particular process.

In the circumstances, the Inquiry believes that it would be of considerable assistance to it if the Commission provided a written statement addressing the issues set out in the Schedule enclosed with this letter, along with copies of any documents that are relevant to those issues.

The Inquiry hopes to commence its oral hearings in the Autumn of this year and, given the resulting tight time-frame, I would be grateful if you would provide the information sought as soon as ever possible.

Finally, I would be grateful if you could acknowledge receipt of this correspondence by email to the Solicitor to the Inquiry, Mr Patrick Butler BL, at Patrick.Butler@rhiinquiry.org and, when providing the requested written statement and documents, also furnish them to Mr Butler BL.

Please do not hesitate to contact me to discuss any matter arising.

Yours faithfully



Sir Patrick Coghlin

Chairman of the RHI Inquiry

SCHEDULE*Background*

1. Specify which Directorate, within the Directorate-General for Competition of the European Commission (hereinafter collectively referred to as 'the Commission'), dealt with the UK's application for State Aid approval in respect of the system of operating aid intended to be provided to renewable heat producers in Northern Ireland under the Renewable Heat Incentive Scheme Regulations (Northern Ireland) 2012 (hereinafter referred to as 'the NI RHI Scheme').
2. Specify which case workers or other officials, within the Commission, dealt with the UK's application for State Aid approval in respect of the NI RHI Scheme.
3. Specify the UK and/or Northern Ireland officials with whom the aforementioned Commission officials interacted in respect of the relevant application for State Aid approval.

The Analogous Great Britain Scheme

4. Please confirm that the Commission had, prior to granting approval to the UK in respect of the NI RHI Scheme, already granted approval to the UK in respect of a RHI Scheme for Great Britain (ultimately embodied in the Renewable Heat Incentive Scheme Regulations 2011, and referred to here as 'the GB RHI Scheme')).
5. Summarise the regard (if any) had by the Commission, in the process leading to the approval of the GB RHI Scheme, to the following matters:
 - a. The fact that the GB RHI Scheme involved periodic support payments ('tariffs') to accredited renewable heat installations rather than a capital grant;
 - b. The level of tariffs set under the GB RHI Scheme for payment in respect of heat generated by accredited renewable heat installations;
 - c. The 'tiering' of some tariffs payable under the GB RHI Scheme (e.g. in respect of small and medium commercial biomass heating plant) and, in particular, the

rationale behind such 'tiering' and/or the risks against which such tiering was intended to guard.

6. Explain any reliance upon, or regard to, approval of the GB RHI Scheme by the Commission when it came to consider the NI RHI Scheme.

The NI RHI Scheme – Key Documents

7. Identify the State Aid regime that was in place at all times relevant to the NI RHI Scheme (including any applicable Treaty Provisions, Directives, Regulations, Guidelines, or other analogous documents).
8. List the documents provided, or referred to, by the UK as part of, or in support of, its application to the Commission for State Aid approval in respect of the NI RHI Scheme.
9. List the documents provided to the UK, or referred to, by the Commission as part of the aforementioned process.
10. List the documents relied upon by the Commission when granting approval in respect of the NI RHI Scheme.
11. Specify each and every document through which the Commission's decision to approve the NI RHI Scheme was communicated to the UK including, in particular, every document setting out any conditions to which such approval was subject.

The NI RHI Scheme – Key Dates

12. Specify, by reference to precise dates if possible, the period during which the UK's State Aid approval application in respect of the NI RHI Scheme was extant.

The NI RHI Scheme – Approval

13. Clarify whether the Commission, during the NI RHI Scheme State Aid approval process, ever indicated that approval was unlikely to be forthcoming or that changes would be required to the Scheme in order for it to gain approval, and, if the Commission did so

indicate, provide full details of each such instance including the date of same and the reasoning for the position adopted in each case.

14. Explain the reasoning behind the decision, on or about 12 June 2012, to grant approval of the NI RHI Scheme.

15. Set out:
 - a. any conditions upon which the said State Aid approval was based or to which the said State Aid approval was subject (e.g. that there would be no over-compensation);

 - b. any assumptions upon which the said State Aid approval was based (e.g. that the load factor of eligible biomass installations would not generally or significantly exceed the percentage used in the calculation of the relevant tariff);

 - c. any representations upon which the said State Aid approval was based (e.g. that the UK would monitor the operation of the Scheme and/or review the Scheme and/or notify the Commission if any key assumptions proved to be incorrect or if any conditions upon which approval was based were not satisfied).

16. Explain:
 - a. the relevance (if any) to the State Aid approval process of the fact that the proposed NI RHI Scheme involved periodic support payments ('tariffs') to accredited renewable heat installations rather than an initial capital grant;

 - b. the regard (if any) had by the Commission to the fact that an economic assessment undertaken by Cambridge Economic Policy Associates Ltd and AEA Technology in respect of a potential NI RHI Scheme, dated June 2011, recommended a capital grant scheme known as a 'challenge fund', rather than a periodic payment scheme, as the incentive scheme for Northern Ireland which, *inter alia*, was likely to be the least costly of the options available (other than a 'do nothing' option) as well as delivering the greatest amount of renewable heat, and set out the efforts (if any) on the part of the Commission to address this issue with

- the UK and to seek a satisfactory explanation for its choice of a periodic payment incentive scheme in the circumstances;
- c. the regard (if any) had by the Commission to the fact that the NI RHI Scheme, unlike the GB RHI Scheme, did not incorporate tiering of tariffs in respect of small and medium commercial biomass installations, and set out the efforts (if any) on the part of the Commission to address this difference between the two Schemes and to seek a satisfactory explanation for it;
 - d. the Commission's understanding of the concept of a 'load factor' used in the calculation of tariffs under the NI RHI Scheme (and, in particular, biomass tariffs) including, if applicable, whether (and, if so, why) the Commission considered the fact that each tariff had been calculated by reference to a 'load factor' to be a tool for controlling costs, preventing over-compensation, or preventing abuse under the NI RHI Scheme;
 - e. the Commission's understanding (if any), during the State Aid approval process, of the fact that the proposed small commercial biomass tariff payable under the NI RHI Scheme (in pence per kilowatt hour – 'p/kWh') would exceed both the cost of the relevant fuel and the cost of production of a unit of the relevant heat (both in p/kWh), and the steps (if any) taken by the Commission to ensure that this did not incentivise waste or lead to the generation of non-useful heat in the circumstances.
17. Explain the obligations placed upon the UK by the State Aid approval decision in respect of the NI RHI Scheme including the following:
- a. the obligation (if any) to ensure that any conditions upon which approval was based, or to which it was subject, were met and/or continued to be met;
 - b. the obligation (if any) to ensure that any assumptions upon which approval was based were correct and/or continued to be correct;
 - c. the obligation (if any) to ensure that any representations upon which approval was based were correct and/or continued to be correct;

and, if the Commission and/or European Law required the UK to take certain steps or classes of step so as ensure compliance with such obligations (such as periodic monitoring and review of the NI RHI Scheme or notification to the Commission of any significant breaches of such obligations or otherwise), please also provide full details of same.

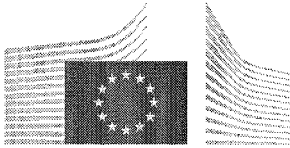
18. Without prejudice to the generality of the foregoing paragraph, specify the periodic and/or reactive monitoring, review, reporting, and/or notification obligations that the Commission and/or European Law placed upon the UK in respect of the operation of the NI RHI Scheme.
19. Explain the action (if any) that the UK was required to take under European Law in respect of the NI RHI Scheme in each of the following situations:
 - a. if the estimated net present value of the total subsidy being made available under the NI RHI Scheme varied significantly from that set out in the UK's Notification(s) for State Aid approval;
 - b. if the funding actually provided for the NI RHI Scheme, expressed as a percentage of the funding made available for the GB RHI Scheme, varied significantly from that set out in the UK's Notification(s) for State Aid approval;
 - c. if the UK became aware of the *potential* for significant widespread over-compensation occurring under the NI RHI Scheme;
 - d. if the UK became aware of *actual* significant widespread over-compensation occurring under the NI RHI Scheme;
 - e. if the UK became aware of the *potential* for significant widespread abuse of the NI RHI Scheme;
 - f. if the UK became aware of *actual* significant widespread abuse of the NI RHI Scheme;

- g. if there was a significant change in renewable heat production costs or in any of the other variables used to calculate the levels of tariff payable under the NI RHI Scheme;
 - h. if any tariff payable under the NI RHI Scheme exceeded the cost of the relevant fuel and/or cost of producing a unit of the relevant heat, thereby creating a potentially perverse incentive for accredited installations to burn fuel wholly or mainly for the purpose of earning tariff under the Scheme;
 - i. if the UK failed to monitor and/or review the NI RHI Scheme as it had represented, promised, or undertaken to the Commission, during the State Aid approval process, that it would do.
20. Set out each and every notification provided by the UK to the Commission in respect of issues of the type listed at paragraph 19 above following the grant of State Aid approval in respect of the NI RHI Scheme including, in each case, details of the precise issue that had arisen, the date of the relevant notification, and the Commission's response.
21. Explain:
- a. the mechanism (if any) used by the Commission to ensure compliance with its State Aid approval decision in respect of the NI RHI Scheme;
 - b. the steps (if any) taken by the Commission to ensure such compliance (such as enforcement action against the UK and/or any persons accredited under the Scheme) or to penalise any relevant non-compliance;
 - c. the steps (if any) taken by the UK to ensure such compliance.
22. Summarise every notification given by the UK to the Commission regarding amendments to the NI RHI Scheme.
23. Set out each and every respect in which the Commission considers that the UK has been guilty of any failing in respect of its European Law obligations in respect of the NI RHI Scheme. In particular, but without prejudice to the foregoing, summarise any breaches of the relevant State Aid approval and/or the relevant State Aid rules that the Commission

believes have occurred and set out the options open to the Commission in respect of same (whether by way of action against the UK, action against individual applicants under the Scheme, or otherwise).

General

24. Provide any further evidence within your knowledge or belief which is relevant to the matters which the RHI Inquiry is investigating as set out in the RHI Inquiry's Terms of Reference.



EUROPEAN COMMISSION
Competition DG

Markets and cases I: Energy and Environment
Director

Brussels, 02. 10. 2017
B2/MGA/ad D* 2017/091374

Sir Patrick Coghlin
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RHI Inquiry
1st Floor, Waterfront Plaza,
8 Laganback Road
BELFAST BT1 3LY

Subject: The independent Public Inquiry into the Non Domestic Renewable Heat Incentive (RHI) Scheme – Request for a Written Statement and Documents from the Commission

Dear Sir Coghlin,

Thank you for your letter. We understand your interest in the State aid approval process for both the Great Britain and the Northern Ireland renewable heat incentive schemes respectively approved in 2011 and 2012. To this end I attach a copy of Commission Decision *SA.32125 United Kingdom Renewable Incentive (RHI) scheme* which approved the renewable heat incentive scheme in Great Britain in September 2011, and Commission Decision *SA.34140 Renewable Heat Incentive (RHI) scheme (Northern Ireland)* subsequently adopted in June 2012. Both of these decisions are published in the Official Journal of the European Union and their texts are publically accessible via the DG Competition website.

As you are doubtless already aware, the United Kingdom also notified a change to the renewable heat incentive scheme in Northern Ireland 2017. These changes, largely enacted to reduce the tariff levels for small and medium biomass installations, were deemed compatible with State aid rules in Commission Decision *SA.47501 Northern Ireland Renewable Heat Incentive Scheme 2017-18*, also attached, and published in the Official Journal and on the DG Competition website.

The Commission's assessments of the respective measures' compatibility with EU State aid rules is enunciated in each of these Decisions, including any conditions upon which such assessments were based.

In respect of the particular questions posed in your witness statement request, requests for information on the conduct of communications between a Member State and the European Commission should be first addressed to the Member State's relevant authorities and, where appropriate, the Member State's Representation to the European Union, who I trust should be able to assist you.

As you may know, State aid cases are covered by the obligation of professional secrecy and business secrets are not to be disclosed to third parties. Before proceeding to the publication of State aid decisions, the Commission assesses the request by Member States, as addressees of State aid decisions, to consider parts of such decisions as covered by the obligation of professional secrecy and thus not to be disclosed when the decision is published. The Commission therefore considers that the United Kingdom authorities have addressed or will address these concerns when transmitting documents to you.

Inasmuch as any documents disclosed to you may contain names and other personal data of Commission staff, I would like to recall that such data must be processed in accordance with the national law transposing Directive 95/46/EC **on the protection of individuals with regard to the processing of personal data and on the free movement of such data**¹. As a consequence, it cannot be further communicated to any third parties.

Yours faithfully,



Céline GAUER

¹ OJ L 281, 23.11.1995, pp. 31-50.