

NORTHERN IRELAND (REGIONAL RATES AND ENERGY) (No. 2) BILL

Memorandum from the Northern Ireland Office to the Delegated Powers and Regulatory Reform Committee

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Northern Ireland (Regional Rates and Energy) Bill (“the Bill”). The Bill was introduced in the House of Commons on 28 February 2019. This memorandum identifies the provisions in the Bill which confer delegated powers. It explains why the powers have been taken and the nature of, and the reason for, the procedure selected.

B. PURPOSE AND EFFECT OF THE BILL

Context to the Bill

2. There has been no Northern Ireland Executive since 9 January 2017, when the then deputy First Minister of Northern Ireland resigned, which also resulted in the First Minister ceasing to hold office. The period for the appointment of ministers to form an Executive after the extraordinary Assembly election in March 2017 was extended to 29 June 2017 (by the Northern Ireland (Ministerial Appointments and Regional Rates) Act 2017)), but no ministers were appointed. That period has been further extended by the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018, but the parties have not yet reached an agreement on the formation of a new Northern Ireland Executive.

3. The Northern Ireland Assembly has not met since its first post-election meeting on 13 March 2017 and, in the months that have followed, the UK Government has legislated on several occasions, most notably with a view to providing budgetary certainty and continued access to public services.

4. As the Assembly is still not sitting, this Bill makes the necessary provision in relation to the collection of regional rates in 2019-20 and the operation of the Non-Domestic Renewable Heat Incentive Scheme. Legislation to similar effect in respect of rates was passed by Parliament in 2017 and 2018, and in respect of the RHI Scheme in 2018.¹

Regional Rates

5. The Regional Rates set out in the Bill enable the collection of more than £600m of local taxation in NI, and thereby safeguarding public revenues in the absence of an Executive. The revenue from the Regional Rates is a significant proportion of the funds available for each year's NI Budget, in addition to that supplied by the block grant. Regional rates are normally set through an order subject to the affirmative resolution procedure in the Assembly and made under Article 7 of the Rates (Northern Ireland) Order 1977, but those for 2017-18 and 2018-19 were set by Parliament in the Northern Ireland (Ministerial Appointments and Regional Rates) Act 2017 and the Northern Ireland (Regional Rates and Energy) Act 2018. In the continuing absence of a functioning Assembly, it is necessary again to proceed by means of primary legislation at Westminster, to ensure that the regional rate can be set and this revenue can be collected.

Non Domestic Renewable Heat Incentive Scheme

6. The genesis of the Non-Domestic Renewable Heat Incentive Scheme (the RHI Scheme) lies in the Renewable Energy Directive 2009/28/EC which imposed legally binding obligations upon Member States to ensure that, by 2020, they achieved targets for the total amount of energy consumption derived from renewable sources.

7. Within the United Kingdom each of the devolved administrations agreed a separate target, taking account of the renewable energy consumption levels within each area and the potential for change. A target to increase the level of renewable heat to 10% by 2020 was included in Northern Ireland's Strategic Energy Framework and an interim target of 4% renewable heat by 2015 was included in the then Programme for Government.

¹ The Northern Ireland (Ministerial Appointments and Regional Rates) Act 2017 and the Northern Ireland (Regional Rates and Energy) Act 2018.

8. The RHI Scheme is sponsored by the Department for the Economy (DfE). It was introduced on 1 November 2012, on foot of the Renewable Heat Incentive Scheme Regulations (Northern Ireland) 2012 (the **Principal Regulations**). A similar scheme was introduced in the domestic sector on 9 December 2014 on foot of the Domestic Renewable Heat Incentive Scheme Regulations (Northern Ireland) 2014. Each set of regulations was made under the powers conferred by section 113 of the Energy Act 2011.

9. Under the RHI Scheme periodic payments must be made to accredited installations. The Principal Regulations set out the criteria for eligible installations in the non-domestic sector. An owner of an eligible installation can apply for accreditation and, once an installation has been accredited, DfE must make periodic support payments to the owner in accordance with the prescribed tariffs, subject to the owner's compliance with the ongoing obligations of the Scheme.

10. The tariffs were designed to bridge the gap between existing fossil fuel heating systems and the renewable heat alternative, with consideration given to the capital costs, operating costs and non-financial 'hassle' factors that are involved in replacing existing heating systems with renewable heating technologies. Except for solar thermal, the tariffs were intended to provide a rate of return of 12% over the lifetime of the Scheme and that rate was granted State Aid approval.

11. The tariffs were determined by reference to assumptions regarding the cost and performance of heating technologies and the price of the various fuels (electricity, gas, oil and biomass etc). In the event, they proved to be problematic and, by July 2015, there were rising concerns about the levels of expenditure. As a first step in addressing those concerns, the Renewable Heat Incentive Schemes (Amendment) Regulations (Northern Ireland) 2015 introduced a tiered tariff and an annual cap of 400,000kWhth for small and medium biomass installations accredited after 18th November 2015. Following on from that, the RHI was suspended to new entrants on 29 February 2016.

12. The total projected overspend over the 20 year lifetime of the RHI Scheme was £700 million, as the projected level of payments was more than double the expected budget. The untiered and uncapped payments to small and medium biomass installations accredited before 18th November 2015 created an unacceptable pressure on Northern Ireland public expenditure, with an estimated over-spend of £27 million forecast for the financial year 2016/2017. Accordingly the NI Assembly, as one of its last acts, and in

recognition that the payment levels were unsustainable, affirmed the Renewable Heat Incentive Scheme (Amendment) Regulations (Northern Ireland) 2017 [SR 2017 No. 32] (the **2017 Regulations**). This extended the tiered tariffs and annual cap to the pre-November 2015 installations, brought the forecast 2017/2018 payments back in line with the budget and ensured that participants continued to receive payments whilst longer cost control measures were developed.

13. The 2017 Regulations were set to expire on 31 March 2018 and, in the absence of a sitting Assembly and Executive, the cost control measures could not be extended other than by primary legislation at Westminster. Accordingly, the Northern Ireland (Regional Rates and Energy) Act 2018 (the **2018 Act**) provided for the continuation of the 2017-18 cost control measures (with an inflationary uplift) for a further 12 month period (from 1 April 2018 to 31 March 2019) to allow DfE to develop and implement long-term cost control measures.

14. DfE has duly consulted on the policy options in relation to the RHI Scheme and, in addition to devising new long-term tariffs, it would wish to take a power which would allow it to offer participants the possibility of being “bought out”. The voluntary buy-out would offer participants a payment that would be calculated to provide a sum equivalent to a 12% return on the additional capital cost of their biomass boiler, less the amount of RHI payments received.

Purpose of the Bill

15. The objective of the RHI Scheme is to support the generation of renewable heat. In so doing, DfE must balance its obligation to provide a reasonable rate of return on the investment by the Scheme participants, in accordance with State Aid approval, with its duty to safeguard the public interest and public funds.
16. The RHI-related provisions in the Bill provide for the continued application of cost controls by setting out the tariffs for 2019-20 and providing a method for calculating future tariffs. It also allows for the preparation and publication of voluntary buy-out arrangements and requires DfE to produce a report on the operation of the arrangements for each financial year in which arrangements are published.

Brief summary of Bill measures

17. Clause 3 amends regulation 36 of the Principal Regulations and inserts a new Schedule 5. In particular, it inserts a new paragraph (7C) which provides for the tariffs which are out in Schedule 5 to be applied to small or medium biomass installations from 1st April 2019 to 31st March 2020. That paragraph also provides for the tariffs to be rolled over each subsequent year and adjusted by the percentage increase or decrease in the consumer price index for the previous year. The consumer price index is defined in the new paragraph (7D). The Clause also inserts new paragraphs (9B) and (9C) which set out how the tiers within the tariffs will operate. Clause 3 (13) ensures that the relevant tariffs will continue to apply for heat generated prior to the coming into force of the new provisions.
18. Clause 4 inserts a new regulation 23B into the Principal Regulations which will allow DfE to prepare and publish voluntary buy-out arrangements in each of three consecutive financial years, beginning with 1 April 2019. The power to do so may only be exercised if there is no Northern Ireland Executive. If the Northern Ireland Executive returns, DfE would have to use its regulation-making powers, as it has done previously, and take amending legislation through the Northern Ireland Assembly.
19. The arrangement will operate as follows:
- DfE will set out the method for determining whether a participant would qualify for a buy-out payment and, if so, how the amount will be calculated. It is envisaged that participants would be offered a payment that would be calculated to provide a sum equivalent to a 12% return on the additional capital cost of their biomass boiler, less the amount of RHI payments received;
 - the participant will write to DfE seeking information on the proposed payment in respect of their installation;
 - if DfE determines that a participant does not qualify for a payment, it must notify the participant of that fact and must also explain how it made that determination;
 - if DfE determines that a participant does qualify for a payment, it must notify the participant of the amount of the payment, how it was calculated and the consequences of accepting the payment;

- the participant may then serve a notice on DfE accepting or rejecting the buy-out offer and, if it is accepted, DfE will be required to pay the amount quoted, unless the participant's periodic payments have been withheld, reduced or suspended. This may happen if a participant is subject to an investigation for alleged non-compliance with the terms of the RHI Scheme. Where a participant rejects the buy-out offer, they remain accredited on the Scheme and will continue to receive periodic payments.

20. New regulation 23B(3) provides that the method of calculating the buy-out payment must take account of any previous periodic payments made to the participant under the RHI Scheme. Accordingly, this may mean that the participant does not qualify for a buy-out payment.

21. New regulation 23B(4) confers a broad power on DfE with regard to the terms of the buy-out arrangements. For example, DfE may set times or periods within which steps must be taken or may suspend the participant's periodic payments if a buy-out application is being dealt with.

22. New regulation 23B(5) provides that, if a buy-out payment is made, the accreditation of the installation will be extinguished. This means the participant's periodic payments under the RHI Scheme will end.

23. Clause 5 imposes a duty on DfE to produce a report which sets out the number of participants who have received a buy-out payment in the relevant year and the total amount of the buy-out payments made by the Department in that year. If there is no Northern Ireland Executive, the report must be sent to the Secretary of State for Northern Ireland, who will lay the report before Parliament. If there is a Northern Ireland Executive, the report will go to the Executive and be laid in the Northern Ireland Assembly.

C. DELEGATED POWERS

Clause 1(4): Power to vary the specified rate

Power conferred on: Northern Ireland Department of Finance

Power exercisable by: Order

Procedure: Affirmative resolution procedure in the Northern Ireland Assembly

Purpose of the power

24. Power to make the regional rate in Northern Ireland is conferred on the Department of Finance, which must make the rate for each financial year by affirmative order in the Assembly.

25. As it is not possible, at present, for an affirmative resolution to be passed in the Assembly, this Bill makes that rate. It does so without prejudice to the Department's power to vary it at such time as it is able. Specifically subsection (4) provides that the rates specified may be varied by an order made under Article 7 of the Rates (Northern Ireland) Order 1977.

26. The NIO does not believe this is a delegated power in the context of the above. Rather it simply clarifies that, notwithstanding that the rate for 2019/20 is being made by the Bill, the Department may, if NI Ministerial offices are filled, still exercise its power to vary it (and may do so in respect of the whole year). If it does so it will be subject to the affirmative resolution procedure in the Assembly in the usual way.

Justification for the delegation of power

27. As mentioned, the NIO does not believe this is a delegation as such. Rather it confirms that an existing power may be exercised. The purpose of this Bill is to set the regional rate in circumstances in which it cannot, but must, be set. The intention is not that the Department (or the Executive, once one is formed) is deprived of its competence in this matter. Clause 1(4) makes this clear.

Justification for the procedure

28. An order under Article 7 of the Rates (Northern Ireland) Order 1977 is subject to the affirmative resolution procedure in the Assembly. This is an appropriate level of scrutiny for a power such as this, which requires the rate to be set on an annual basis.

Clause 4: Power to establish RHI voluntary buy-out arrangements

Power conferred on: Northern Ireland Department for the Economy

Power exercised by: Publication of buy-out arrangements.

Parliamentary Procedure: None

Context and Purpose

29. The regulation-making power in section 113 of the Energy Act 2011 is subject to the affirmative procedure and, in the absence of a Northern Ireland Executive and sitting Assembly, there are constraints on the ability of Northern Ireland departments to exercise their existing statutory powers.

30. The tariffs for which the 2018 Act provides will expire on 31 March 2019 and, in the absence of new tariffs, there will be no basis for making payments to the participants in the RHI Scheme. DfE must, therefore, look to Westminster for the required statutory authority. This is also true of the power to provide a voluntary buy-out opportunity to participations which are required to accompany the tariff changes, reflecting that the lower tariff levels may unduly impact a small subset of scheme participants. The justification for the voluntary buy-out is outlined in greater detail in paragraphs 31-33.

Justification for taking the power

31. The proposed changes to the tariffs are intended to achieve a prospective, long-term rate of return of 12% for small and medium biomass boilers, which account for the vast majority of the installations accredited on the RHI Scheme.

32. Whilst the typical small or medium sized installation is expected to achieve a return of 12% under the revised tariffs, there will be a small group of atypical installations that, for whatever reason, have higher capital costs or lower ongoing usage. As those participants may see an unacceptably low return in comparison to the initial intent of the scheme, DfE would wish to offer the possibility for these installations to be “bought out”. The buy-out will be entirely voluntary, with no obligation whatsoever on participants to apply for an offer or accept any buy-out offer, if made.

33. DfE’s power to prepare and publish voluntary buy-out arrangements is limited in scope and can only be exercised if the customary legislative route remains unavailable i.e. upon the return of the Northern Ireland Executive. In those circumstances, this power will

not be able to be exercised by DfE and it will be for the NI Executive and Assembly to bring forward further regulations to give effect to further voluntary buy-out opportunities should it wish to. Moreover, if the power is exercised DfE will, in accordance with section 3 of the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018, have to apply a public interest test and have regard to the Secretary of State's Guidance on Decision Making. The Guidance sets out the principles that are to be taken into account when exercising a departmental function during the period for forming an Executive. These decisions (under NI (EFEF) Act) are themselves subject to reporting requirements to the Secretary of State and Parliament.

Justification for the procedure

34. The uncertainty of the current political situation in Northern Ireland has been recognised in statute, by the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018. While in normal circumstances the Department would act to introduce these provisions via subordinate legislation laid before the NI Assembly, the current political situation means that the customary legislative route is not available to the Department.
35. The power to introduce the voluntary buy out arrangements is being delegated to the Department because it will be necessary to retain a degree of flexibility in the event that any amendments are required. For instance representations may be made with regard to the timing of steps in the process, the information requirements or the verification checks. If those details were set out on the face of the Bill and inserted into the Principal Regulations, the Department would have no option, in the continued absence of the Northern Ireland Assembly, but to seek further amendments by way of primary legislation. That would inevitably take time and would delay the intended positive outcome for participants. If the Department has a power to prepare and publish the arrangements in advance of the operation of the buy-out it will be able to take account of any concerns or issues that participants raise before commencing the operation of the buy-out. Moreover, the delegation is considered appropriate where the process is entirely voluntary, as it will be in this instance.
36. The power to suspend the RHI Scheme to new applicants was also activated in a similar way by notice (regulation 23A(2) of the Principal Regulations refers). The Renewable Heat Incentive Schemes (Amendment) Regulations (Northern Ireland) 2016, which introduced the power to suspend, were subject to the affirmative procedure and were approved by the Northern Ireland Assembly. There is, therefore, an Assembly approved

precedent in terms of proceeding by way of notice and, as the Bill will insert new provisions into the Principal Regulations, it is considered appropriate to adopt a consistent approach.

37. It is intended that separate voluntary buy-out arrangements will be published on an annual basis, allowing the Department scope to refine the arrangements in line with the learning from the previous year. Being a novel process, it is important that a level of flexibility is maintained with regard to the specific details of the arrangements. This will ensure that the Department can act, both to optimise the process to better meet the needs of those participants who may wish to apply, and to respond to any changes prompted by external factors. Moreover, the publication of the buy-out arrangements will ensure transparency and allow for representations to be made.

6 March 2019