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Environment and energy feature from Burgess Salmon published in
the April 2010 issue of The In-House Lawyer:

Four key developments in regulation shake-up

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Four key developments in regulation shake-up

In what is a particularly interesting and groundbreaking time for environmental and energy regulation in the UK, **Ross Fairley** (left) and **Michael Barlow** (right) lead a discussion about the changes for businesses operating in this sector



THE PAST MONTH HAS SEEN THE publication of some dramatic proposals and legislation that will significantly affect environmental and energy-based businesses. This article is devoted to four of these key developments.

The first one of these is the new civil sanctions regime. It will increase the options available to regulators and will provide alternative sanctions to criminal prosecutions in relation to environmental offences. This may well be a precursor to a change in approach to UK regulation in general and may lead to wider enforcement.

The second is the much-heralded and talked about Carbon Reduction Commitment Energy Efficiency Scheme (the CRC), which is a cap and trade emissions trading scheme that will apply to public and private organisations consuming a certain amount of electricity. The scheme is complex and there are registration requirements on the near horizon that businesses are having to deal with rapidly.

Finally, there are two interlinked and recent developments in the energy sector, namely the Feed-In Tariff Scheme (the FIT Scheme) and the Renewable Heat Incentive (RHI) financial support scheme. The driver

behind the FIT Scheme is to promote small-scale, low-carbon electricity generation and it is designed to work alongside the Renewables Obligation. The RHI financial support scheme aims to motivate the generation of heat from renewable sources on all scales. Both measures are part of the government's overarching renewable energy policy. These last two areas will be of interest to all energy users, individuals and suppliers.

*By Ross Fairley, partner, and head of environment and planning, Burges Salmon LLP.
E-mail: ross.fairley@burges-salmon.com.*

New regulatory regime for environmental offences

NEW CIVIL POWERS, ARE - SUBJECT TO debate in Parliament - now available for use by the Environment Agency (EA) and Natural England.¹ These powers were first conceived by Professor Richard Macrory in his final report, 'Regulatory Justice: Making Sanctions Effective' (Better Regulation Executive, Cabinet Office) (the Macrory Report), in November 2006, and were introduced under the Regulatory Enforcement and Sanctions Act (RESA) 2008 (which came into force on 1 October 2008).

The range of new civil powers will increase the options available to regulators and the sanctions will provide regulators with an alternative to criminal prosecutions for environmental offences. The new civil sanctions regime is designed to be more

proportionate and reflect the fact that most offences committed by businesses are unintentional. We may well be witnessing the beginning of a new approach to UK regulation and not just in relation to environmental offences, although that is the present target. It is anticipated that businesses will welcome the elements of flexibility and negotiation opportunities with regulators, but there are other, more complex features that they will need to fully understand.

BACKGROUND

RESA 2008 is the product of the government's better regulation agenda and incorporates many of the recommendations from two important

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reviews of UK regulation. The first review is Philip Hampton’s ‘Reducing administrative burdens: effective inspection and enforcement’ (HM Treasury, March 2005) (the Hampton Review) and the second review is the Macrory Report. Macrory identified that:

- many regulatory sanctioning regimes were over-reliant on criminal prosecutions;
- they were not sufficiently flexible; and
- they were not always an effective deterrent.

Macrory also noted that regulators frequently took no action following a regulatory breach because they were limited to bringing a prosecution or doing nothing. Macrory called this the ‘compliance deficit’. His recommendation was that regulators should be provided with a flexible tool kit of civil sanctions that are easy to administer in instances where the nature of the offence does not warrant a full criminal prosecution.

Many of the key recommendations from the Hampton Review and the Macrory Report were implemented in RESA 2008, which is made up of four distinct, but linked, parts. The new tool kit of sanctions is contained within Part 3.

NEW CIVIL SANCTIONS

The four new civil sanctions are as follows.

Fixed monetary penalties (FMPs)

FMPs are designed to provide an alternative to prosecution in relation to low-level, minor breaches. They are analogous to fixed penalties for road traffic offences. Recently published (in January 2010) government guidance, ‘Civil sanctions for environmental offences: The Environmental Civil Sanctions Order & Regulations 2010’ (Guidance to regulators in England on how

the civil sanctions should be applied, and draft guidance for Wales) (the Guidance) provides examples, including where there is a failure to meet requirements to monitor or document activities.

The Guidance also explains that FMPs are appropriate where advice and guidance has already been given, and has not been complied with. For those offences currently covered by the regime, companies will be fined £300.

Discretionary requirements

Discretionary requirements are designed for mid to high-level breaches and will include the following:

- a) a compliance notice (CN);
- b) a restoration notice (RN); and
- c) a variable monetary penalty (VMP).

A CN is designed to target the breach and its causes. A written notice is issued by the regulator that requires a person to take specific steps to ensure that the offence does not continue or happen again. The Guidance gives examples of specific steps under a CN including:

- specific investment, such as building a concrete floor and bund to prevent leaks from tanks of chemicals entering the environment;
- a system of maintenance for critical equipment; and
- training of relevant staff.

An RN is a written notice issued by the regulator that requires a person to take steps to restore the position to what it would have been if no offence had been committed. These are specifically aimed at situations where environmental damage

has occurred, whether it is temporary or a sustained loss of environmental quality (for example in air, water or soil quality). RNs will not be appropriate where action is taken under the Environmental Damage (Prevention and Remediation) Regulations 2009. Typical restoration actions might include:

- removal and/or treating contaminants to reduce impacts on natural resources or local communities;
- restocking or reintroductions of damaged species (eg fish); and
- developing and implementing strategic management plans.

An RN must clearly identify the damage or losses, the actions required to restore the position and the period within which those actions should be taken. The Guidance also states that the regulator may wish to specify the outcomes to be obtained and any monitoring requirements.

The last one of the discretionary requirements is the VMP. These are designed for the more serious cases where the regulator decides that prosecution is not in the public interest. VMPs are used to remove any financial benefit that may exist from a breach and to adequately deter future breaches. There is a three-step process to working out the appropriate penalty and this is considered in more detail on pg. These are capped at £250,000.

Stop notices (SNs)

SNs are designed to prevent a business continuing an activity until it has taken steps to become compliant and they therefore resemble injunctions. SNs can also be served in combination with steps leading to a criminal prosecution. An SN can only be served if a person is carrying on (or is likely to carry on) an activity that the regulator reasonably believes:

- is causing (or will cause) serious harm or presents (or will present) a significant risk of causing serious harm to human health or to the environment; or
- involves (or will involve) or is likely to involve (or will be likely to involve) committing an offence for which an SN is available.

Enforcement undertakings

In many ways the most novel of the new sanctions, enforcement undertakings are a voluntary agreement by a person to take steps that would make amends for a breach and its effects. The Guidance states that an enforcement undertaking will be appropriate where a proactive approach is taken, including measures that proportionately and appropriately address the breach and the issues it raises. Enforcement undertakings can also be offered, if sufficiently full and unreserved, as soon as the regulator signals their intention to impose a civil sanction. There needs to be a clear recognition of any failings or harm caused, and the regulator will usually look for director or board-level commitment to restoration and future compliance. The enforcement undertakings should set out the actions to be taken and the timetable should be agreed with the regulator. The enforcement undertakings will be a written agreement by the party to take action. A further discussion of the implications of enforcement undertakings is considered later in this article.

SCOPE OF THE NEW REGIME

The first regulators to have the new powers are the EA and Natural England. The new powers will only apply to certain environmental offences through secondary legislation.² A selection of some of the key offences to be covered is set out in the table on p10. Significantly, section 85 (water pollution) offences of the Water Resources Act 1991 are not included. Neither are section 34 (waste duty of care) offences of the Environmental Protection

‘Civil sanctions have the potential to lead to negative publicity and the loss of reputation. These are key issues for all businesses concerned about their image and public profile.’

Act (EPA) 1990. Additionally, not all civil sanctions apply to all of the offences included. For example, the only possible civil sanction for section 33 (waste) offences of EPA 1990 is an SN. Section 33 offences cover many low-level offences, as well as the more serious offences and yet for these more minor offences (such as minor technical breaches of environmental permits) the failure to apply civil sanctions other than SNs means that criminal sanctions will be the only sanction available. That being said, it is also worth noting that in due course, environmental permitting offences under the Environmental Permitting (England and Wales) Regulations 2010 will be included.

SOME KEY FEATURES OF THE NEW REGIME

Calculation of VMPs

There has been much discussion about the subject of VMPs and specifically over the basis of their calculation.

The methodology is not straightforward. The regulator applies a three-step process to working out the penalty. First, an estimate of the financial benefit of the breach (normally the costs avoided, so for example, in a waste packaging prosecution this would be the amount of costs saved in failing to register). Secondly, by adding an appropriate deterrent component. Thirdly, by deducting any other costs incurred (ie the costs of any actions taken voluntarily in response to the offence).

The deterrent component requires the regulator to choose a starting sum (either by reference to the restoration costs, financial benefit (once again) or the maximum criminal fine that a Magistrates’ Court could impose). The Guidance allows the regulator to choose the starting sum according to which one they feel most ‘characterises the offence’. The Guidance states that this may be the highest one in practice. To make the deterrent component proportionate to the breach, the regulator will apply an adjustment based on aggravating and mitigating factors.

Regulators will be able to obtain information to assist with their calculations and failure to comply with such requests may influence regulators to prosecute rather than serve a civil sanction.

It is very likely that there will be challenges to VMPs, certainly in the early years, based on the subjective elements in calculating the components. It must be remembered that there is often a risk that VMPs may result in a higher fine than criminal prosecutions.

Calculation of enforcement undertakings

While the concept of an enforcement undertaking provides a welcome degree of flexibility for those who have committed an offence and want to work with the regulator to remedy the problems caused by the breach, it should be appreciated that any failure to comply with the terms of an enforcement undertaking may result in a criminal prosecution. Enforcement undertakings will therefore have to be drafted very carefully to create certainty.

Process for issue

Before imposing a CN, RN or VMP, a regulator must serve a notice of intent containing specific information, including the grounds for imposing the sanction, and the right to make representations and objections. On receipt of the notice there is a right to make representations and objections within 28 days. At that stage the regulator must decide whether to impose the sanction (with or without modification) or, where they have the power, to impose a different sanction. There is no set time period for this response. If a decision is made to impose a CN, RN and/or a VMP, the regulator must serve a final notice.

There is a similar process for FMPs, except that there is no option either to modify the amount or to replace it with an alternative sanction. There are reductions for early payments and penalties for late payments.

NOTES

- 1) The Regulatory Enforcement and Sanctions Act 2008 requires regulators to consult on revised enforcement policies and guidance on the use of sanctions. The Environment Agency has recently launched its own 12-week public consultation that closes on 7 May 2010. Natural England’s consultation will follow.
- 2) The new powers will only apply to certain environmental offences through the Environmental Civil Sanctions (England) Order 2010 and The Environmental Civil Sanctions (Miscellaneous Amendments) (England) Regulations 2010.

For SNs there is no requirement to serve a notice of intent, although there is the right to appeal directly to the tribunal within 28 days of receipt.

Appeals process

There is scope for all civil sanctions (including SNs) to be appealed to the General Regulatory Chamber of the First-Tier Tribunal under the new tribunal rules. The First-Tier Tribunal has the power to award costs against a party, but only where that party has acted unreasonably in bringing, defending or conducting the proceedings.

Any party to a case has a right to appeal a decision of the First-Tier Tribunal on a point of law arising from the Tribunal's decision, providing that permission is granted by the First-Tier Tribunal or Upper Tribunal. Where permission is given the further appeal will be heard by the Upper Tribunal.

There has been much debate over the status of these new civil sanctions and whether they are truly civil or criminal. On the one hand they have some of the features of civil sanctions (they are designed as an alternative to criminal sanctions and they can be pursued through the civil courts as debts). On the other hand they have the punitive and deterrent features of a criminal penalty. The significance of this distinction relates to the protection that is given to defendants under the European Convention on Human Rights (ECHR). If they are to be classified as criminal sanctions then there is an argument that Article 6(2) of the ECHR is being breached in that the issuance of a notice of intention would seem to amount to a criminal charge and a sanction will follow unless the regulator is persuaded not to impose the penalty.

Although there is a right to appeal the decision, by that point the penalty would have already been imposed. In relation to the

appeal mechanisms themselves, the burden is on the recipient of the sanction to prove a ground of appeal and that is contrary to the presumption of innocence under Article 6(2).

Some particular issues to think about

While FMPs only apply to minor offences, there is a real risk that companies will not fully consider the circumstances of a particular incident or alleged breach. Companies may choose to pay up (and take advantage of the reduction for early payments) to avoid further action. Although the fines themselves are minor, companies need to be aware of the implications. There may well be procurement issues further down the line. There is also the publicity angle to consider.

Regulators will be required to publish the details of any enforcement action taken using civil sanctions (which will include FMPs, enforcement undertakings and their terms) and regulators will be encouraged to

KEY ENVIRONMENTAL OFFENCES AFFECTED BY THE NEW CIVIL SANCTIONS

Legislation	Fixed monetary penalties	Variable monetary penalties	Compliance notices	Restoration notices	Stop notices	Enforcement undertakings
Environmental Protection Act 1990 s33(6) (unlawful deposit, treatment or disposal of waste)	No	No	No	No	Yes	No
Water Resources Act 1991 s24(4)(a) (breach of water abstraction licence)	Yes	Yes	Yes	Yes	Yes	Yes
Hazardous Waste (England and Wales) Regulations 2005 Regulation 19 (mixing hazardous waste without a permit)	Yes	Yes	Yes	Yes	Yes	Yes
Producer Responsibility Obligations (Packaging Waste) Regulations 2007 Regulation 40(1)(a) (duty to register)	Yes	Yes	No	No	No	Yes
Regulation 40(1)(b) (obligation to recover and recycle packaging waste)	No	Yes	No	No	No	Yes
Regulation 40(1)(c) (obligation to provide a certificate of compliance for recovery and recycling obligations)	Yes	No	No	No	No	No

set up a public register on their websites. Civil sanctions have the potential to lead to negative publicity and the loss of reputation. These are key issues for all businesses concerned about their image and public profile.

There is also a real risk that VMPs may result in higher fines than through criminal prosecutions.

Enforcement undertakings and their terms will need to be drafted very carefully, bearing in mind the potential implications if these are breached.

The timescales are tight and companies will need to have in place appropriate teams, both internally and externally, to deal with the sanctions as they come in.

CONCLUSION

There are some new features to this regime and there will undoubtedly be a significant period of bedding down while regulators get to grips with how their new powers function. In short, companies need to understand the new regime and the implications of going down the civil sanctions route, as opposed to the criminal prosecution route. Finally, the adjacent table outlines the key features of each of the civil sanctions so that a proper comparison can be made.

*By Simon Stuttaford, solicitor,
Ross Fairley, partner and
Michael Barlow, partner,
Burges Salmon LLP.*

*E-mail:
simon.stuttford@burges-salmon.com;
ross.fairley@burges-salmon.com;
michael.barlow@burges-salmon.com.*

USE AND APPLICATION OF CIVIL SANCTIONS IN PRACTICE			
Type of civil sanction	Standard of proof	Sanction for non-compliance	Option to combine with other civil sanctions
Fixed monetary penalty (FMP)	Regulator must be satisfied beyond reasonable doubt that an offence is committed	Late payment penalty Civil debt	No: FMPs are stand-alone civil sanctions
Compliance notice (CN)	Regulator must be satisfied beyond reasonable doubt that an offence is committed	Without a variable monetary penalty (VMP), prosecution or potential prosecution for original offence With VMP, no prosecution allowed for original offence Regulator can impose non-compliance penalty (NCP) notice (failure to pay NCP enforced as debt)	Yes: can be used either independently or in any chosen combination with RNs and VMPs
Restoration notice (RN)	Regulator must be satisfied beyond reasonable doubt that an offence is committed	Without VMP, prosecution or potential prosecution for original offence With VMP, no prosecution allowed for original offence Regulator can impose NCP (failure to pay NCP enforced as debt)	Yes: can be used either independently or in any chosen combination with CNs and VMPs
Enforcement undertaking	May be accepted where regulator has reasonable grounds to suspect that an offence has been committed	Regulator can extend period of enforcement undertaking, impose a different civil sanction or pursue a criminal prosecution for an original offence	No: no other civil sanction may be imposed or prosecution brought if the regulator accepts the enforcement undertaking and it is carried out
Stop notice (SN)	Where regulator has reasonable belief that a person is carrying on a harmful activity and is committing or is likely to commit an offence	Normally criminal prosecution	Yes: an SN may be issued with any other civil sanction except an FMP (SNs can also be served in combination with steps leading to a criminal prosecution (no requirement to serve a notice of intent first))
Variable monetary penalty (VMP)	Regulator must be satisfied beyond reasonable doubt that an offence is committed	Where VMP imposed and failure to pay, no prosecution can be brought for the original offence (unpaid penalty enforced as debt)	Yes: can be used in conjunction with CNs or RNs (also possible to impose VMPs for more than one offence)

What is the CRC and why is everyone talking about it?

THE CARBON REDUCTION COMMITMENT Energy Efficiency Scheme (the CRC) is a cap and trade emissions trading scheme that commenced on 1 April 2010. The CRC will be mandatory for public and private organisations that consumed at least 6,000 MWh of electricity through a half-hourly meter during the 2008 calendar year (the qualification criteria).

Participants under the scheme will be required to:

- monitor their energy use;
- submit reports on that energy use; and

- purchase and surrender sufficient allowances to cover emissions created by specific supplies.

Participants will be judged against each other in a published league table. A participant's position in this league table will help to determine the value of revenue recycling payments that they will receive at the end of each compliance year.

Although full participation in the scheme will be mandatory for those organisations that meet the qualification criteria, the CRC also requires any organisation that received a supply of electricity through a half-hourly

meter during 2008 to make an information disclosure. This information disclosure will include details of the organisation, a list of the half-hourly meters that supply electricity to that organisation, and where supply during the qualification year equalled or exceeded 3,000 MWh, the amount of that supply.

The CRC is a complex scheme. This article seeks to highlight the broad principles that will be applicable across the whole spectrum of CRC participants. Organisations should review the detail of the scheme to assess how it will apply to their own particular arrangements.

POINTS OF CLARIFICATION

The CRC order was laid before parliament on 19 January 2010. Having previously undergone several rounds of government consultation, the publication of the order has enabled organisations to determine whether they are covered by the CRC, to what extent, and if so, what now needs to be done. Commencement of the CRC means that organisations should follow three steps to ensure compliance.

STEP ONE: WHAT IS MY ORGANISATION?

Any organisation that anticipates that it may qualify for participation under the CRC will first need to determine where the boundaries of its organisation are for CRC purposes.

Private sector organisations

Private sector organisations covered by the scheme will be those caught by the CRC's definition of an undertaking, which is the Companies Act 2006 definition of the same term, slightly expanded to include organisations with charitable purposes.

The CRC takes a top-down approach to private sector participation under the CRC. Undertakings will be grouped for participation with any other undertaking in its group that carries out some form of activity within the UK. Liability for non-compliance with the scheme will be joint and several among all undertakings that form part of a group.

The order does allow for the disaggregation of some group members (significant group undertakings (SGUs)) from their parent groups in certain circumstances. SGUs are subsidiaries within groups that would meet the qualification criteria in their own right. Where an SGU is

disaggregated, its performance under the scheme will be judged separately from its parent. Liability for a disaggregated SGU will be limited to that SGU alone.

Special purpose vehicles (SPVs) set up for private finance initiative (PFI) projects and joint ventures (JVs) are grouped under the CRC with their parent undertaking, as any other undertaking would be. Where a PFI SPV or JV has no parent undertaking (eg where it is owned 50:50 by two shareholders) and the qualification criteria are met, that undertaking will be required to participate in the scheme alone.

In addition to the grouping of undertakings, the CRC requires franchisors to be responsible for their franchisees' energy use under the CRC. The CRC order sets out what will constitute a franchise agreement for the purposes of the CRC. The definition used may capture scenarios not normally understood to be a franchise and needs to be reviewed carefully.

Public bodies

Public bodies under the CRC are those defined as such by the Freedom of Information Act 2000 Order 2003. Public bodies will be required to participate where they fulfil the qualification criteria, with the exception of central government departments that must participate regardless of size. To further demonstrate public sector leadership, the government has retained the ability to mandate public bodies to participate in circumstances where the qualification criteria are not met.

Unlike private sector organisations, the grouping of public bodies will be limited and will only occur in certain circumstances. The head of a group of public bodies will generally be either a government department or a local authority (which will be grouped with the maintained schools, academies and city colleges in its area). This figurehead will be responsible for scheme compliance on behalf of its group and will be singularly liable for any civil penalties that either it or any member of its group incurs.

Where a PFI SPV's controlling shareholder is a public body, that SPV will also be treated as a public body for the scheme. The SPV will be required to participate alone where it meets the qualification criteria and will not usually be grouped with another public body (other than schools, academies and any colleges as mentioned above).

STEP TWO: WHO HAS RESPONSIBILITY FOR SUPPLY?

Having defined the boundaries of an organisation, the next step will be to assess the energy for which that organisation is responsible under the CRC. An organisation will be accountable for energy use under the CRC where the following definition of supply is met:

- it has an agreement with a supplier to purchase either electricity, gas or another fuel source;
- it does in fact receive such a supply; and
- that supply (whether gas or electricity) is measured using a fiscal meter.

Organisations' responsibility for supply will be qualified by the exclusions that apply to electricity supplied for electricity generation, transmission or distribution purposes, domestic energy use, or energy used for transport purposes. In addition, the CRC has been designed to sit alongside the existing EU Emission Trading System and Climate Change Agreement regimes. As such, there are provisions in the order dealing with the exclusion of such emissions from the CRC and exemptions from the CRC in particular circumstances.

Unconsumed supply

The rules of supply allow the recipient of a supply to be absolved of responsibility for that supply where they do not in fact consume some or all of that supply. However, this exclusion does not apply where that unconsumed supply is consumed by a third party who occupies premises with the permission of the recipient. This is the manner in which the order places obligations for a tenant's use on its landlord, which has been an area of focus through several iterations of the scheme.

STEP THREE: REGISTRATION

Registration for the CRC must be made by 30 September 2010. It should be noted that the Environment Agency (EA) (the scheme's administrator) will only consider an application made on its issuing of a registration certificate and not on the submission of an application. Indications from the EA are that its verification process to issue a certificate of registration may take up to two months, meaning that it will be

advisable for applications to be submitted no later than the end of July 2010.

Registration will require the submission of a list of all half-hourly electricity meters through which the organisation received a supply of electricity during the qualification year (2008) and the total amount of that electricity.

STEP FOUR:

FOOTPRINTING AND REPORTING

The CRC will be split into phases, with performance over the course of a phase assessed against a participant's footprint at the outset of that phase. Each phase will require submission of a footprint report, containing a more detailed breakdown of an organisation's energy use. The introductory phase's footprint report must be submitted prior to 29 July 2011.

Participants will also have to produce and register annual reports, detailing energy use in compliance years to assess performance

'The publication of the Carbon Reduction Commitment (CRC) order has enabled organisations to determine whether they are covered by the CRC, to what extent, and if so, what now needs to be done.'

against their footprint benchmark. It should be noted that participants will have to submit both a footprint and an annual report for the first compliance year, running from April 2010 to March 2011.

STEP FIVE: ONGOING CONSIDERATIONS

Indications are that, regardless of a possible change in government, the CRC is here to stay. Organisations will therefore need to comply with the registration and start-up provisions. In addition to the immediate

requirements of compliance, the CRC will have far-reaching impacts on an organisation's commercial arrangements and transactions, both existing and in the future.

*By Lucie Drummond, solicitor,
Ross Fairley, partner and
Michael Barlow, partner,
Burges Salmon LLP.*

*E-mail: lucie.drummond@burges-salmon.com;
ross.fairley@burges-salmon.com;
michael.barlow@burges-salmon.com.*

Summary of the forthcoming Feed-In Tariff Scheme

IN JULY 2009 THE GOVERNMENT PUBLISHED its Consultation on Renewable Electricity Financial Incentives, which sought responses to the proposed design and tariff levels for the Feed-In Tariff scheme (the FIT Scheme). This consultation closed on 15 October 2009 and the government published its formal response on 1 February 2010. This article provides a brief summary of the FIT Scheme.

BASIS OF THE FIT SCHEME

Objective

The Renewables Obligation (RO) is currently the main financial support scheme within the UK for increasing renewable electricity generation by awarding renewable generators with RO Certificates (ROCs). However, the form of incentive for small-scale, low-carbon electricity generation (ie up to and including 5MW) will change in April 2010 with the introduction of the FIT Scheme. The RO will remain the primary mechanism to promote large-scale renewable generation (ie above 5MW), while the Renewable Heat Incentive (RHI) (when introduced in April 2011) will apply to the generation of heat from renewable sources at all scales. A wide range of businesses and householders potentially stand to gain from the FIT Scheme and its effect should not be underestimated.

Scope

The FIT Scheme will apply to new anaerobic digestion, hydro, solar photovoltaic and wind projects, with a generation capacity of 5MW or less. The scheme will also support the first 30,000 micro-combined heat and power installations (those with an electrical capacity of 2kW or less). The FIT Scheme will not apply to solid or liquid biomass, to which the RO will continue to apply at all scales.

KEY POINTS OF THE FIT SCHEME

Tariff structure

The FIT Scheme will consist of two tariff payments, which have been calculated to provide an expected rate of return of 5%-8%. Both tariffs will be adjusted for inflation (in accordance with RPI):

- 1) A **generation tariff** will be paid for each kWh of electricity generated and metered by a FIT generator. The level of tariff and the lifetime during which payment will be made varies depending on:
 - i) technology type; and
 - ii) generator capacity (the initial generation tariffs are set out in the table on p15).

'A wide range of businesses and householders potentially stand to gain from the Feed-In Tariff (FIT) Scheme and its effect should not be underestimated.'

‘The FIT Scheme is to be primarily implemented via modification to electricity supply licences, which will require electricity suppliers to make FIT payments to eligible generators.’

The tariff will be paid regardless of whether the electricity is used on-site or exported to the local electricity network. However, a degression rate will be applied to certain technologies, whereby the generation tariff for projects will, from April 2012, decrease year on year. The reduced rate will only apply to new installations applying for FITs and therefore installations will continue to receive the relevant tariff at the time of application.

- 2) An **export tariff**. All FIT generators will be entitled to opt to receive a guaranteed market and price for any electricity generated and exported to the local electricity network. This tariff has initially been set at 3p per kWh, with payment lifetime tracking the generation tariff. It is the intention that the level of tariff will remain uniform across the technology types. However, the government has reserved the right to change the future level, therefore no guarantee can be provided that the export tariff will not subsequently change for individual installations. In contrast, any change made to the level of generation tariffs will not be retrospective. A generator will be entitled to opt in or opt out (ie sell their electricity on the open market) of the export tariff regime on an annual basis.

Ability to assign

A generator may assign the benefit of its FIT payments to a third party (subject to certain controls to ensure that the risk of fraud and abuse is minimised). This is of obvious benefit if a generator is seeking debt financing of a FIT project.

Implementation and interaction with the RO

From 1 April 2010:

- 1) all new FIT microgenerators (projects of 50kW or below) will be entitled to apply for FITs (the RO will not apply); and

- 2) all new FIT small generators (projects above 50kW, up to and including 5MW) will be entitled to opt for RO or FIT support for the lifetime of the project.

With respect to any existing generators that have applied for RO accreditation before 1 April 2010, the guidelines outlined in the table below shall apply.

Definition of an ‘installation’

The maximum generation capacity of an installation capable of applying for FITs is 5MW. Careful consideration therefore needs to be given to what constitutes an installation. No strict definition is provided. However, the government’s formal response supplies the following guidelines:

- If a generator installs two different technologies on one site, they will be classed as two different installations and the relevant generation tariffs will apply.
- If a generator fits multiple installations of the same technology on one site, they will be classed as one installation and therefore a total capacity across all installations will be calculated to assess FIT eligibility.

- Any capacity expansion of an installation within 12 months of the installation’s registration in the central FIT register will be treated as an increase in capacity of the installation and if this expansion results in a capacity greater than 5MW, the installation will no longer be eligible for FITs (and, instead, will need to revert to the RO).

- Any capacity expansion of an installation after 12 months of the installation’s registration in the central FIT register will be treated as a separate installation. However, the original installation will be treated as having continued in the same tariff band, while the new installation will be rated at the aggregated capacity of the two installations (meaning a lower tariff may apply as, for certain technologies, rates decrease as generation capacity increases).

- A ‘site’ shall be defined by reference to several factors, including address, map reference and electricity meter identification. This may open up the possibility of arranging individual metering to separate projects and installations.

Role of the supplier

The FIT Scheme is to be primarily implemented via modification to electricity supply licences, which will require electricity suppliers to make FIT payments to eligible generators. The overall costs of the FIT Scheme will be shared by all suppliers in

IMPLEMENTATION AND INTERACTION WITH THE RENEWABLES OBLIGATION (RO)		
Form of generation	Applied for RO accreditation on or after 15 July 2009 and before 1 April 2010	Applied for RO accreditation before 15 July 2009
Microgenerators: capacity of 50kW or below and of FIT technology	Transfer to FIT at the appropriate tariff level for their technology and capacity, and will receive support for 20 years (25 years for solar photovoltaic)	Transfer to FIT at a generation tariff of 9p per kWh and receive support until 2027
Small generators: capacity above 50kW, up to and including 5MW and of FIT technology	Ability to elect whether to transfer to FIT If wishing to transfer as of 1 April 2010, the generator must notify Ofgem as soon as possible before this date Or, if wishing to transfer as of 1 April 2011, the generator must notify Ofgem by no later than 31 August 2010 Failure to notify within these timescales will result in the generator remaining in the RO	Will remain in the RO and will not be eligible for FIT

proportion to their share of the electricity supply market (via a process of 'levelisation', which will be undertaken by Ofgem on an annual basis). Note, an 'opt out' is available for suppliers with less than 50,000 customers, which enables such suppliers to decline provision of FITs to generators.

CONCLUSION

The FIT Scheme has the potential to open up the deployment of small, renewable projects, and to provide the support needed for many technologies that are and have been struggling under the RO regime. The burden remains, however, on the small generator to decide whether to opt in or opt out. It is also interesting to note that the Conservatives support the FIT Scheme, and the future may even see a Tory government expanding FITs to larger plants and wider technologies.

*By James Phillips, senior associate,
Ross Fairley, partner and
Michael Barlow, partner,
Burges Salmon LLP.
E-mail: james.phillips@burges-salmon.com;
ross.fairley@burges-salmon.com;
michael.barlow@burges-salmon.com.*

INITIAL GENERATION TARIFFS			
Technology	Scale	Tariff: year 1	Tariff: lifetime (in years)
Anaerobic digestion	<500kW	11.5	20
Anaerobic digestion	>500kW	9.0	20
Hydro	<15kW	19.9	20
Hydro	>15kW-100kW	17.8	20
Hydro	>100kW-2MW	11.0	20
Hydro	>2MW-5MW	4.5	20
Micro-combined heat and power pilot	<2kW	10.0	10
Photovoltaic (PV)	<4kW (new build)	36.1	25
PV	<4kW (retrofit)	41.3	25
PV	>4kW-10kW	36.1	25
PV	>10kW-100kW	31.4	25
PV	>100kW-5MW	29.3	25
PV	Stand alone system	29.3	25
Wind	<1.5kW	34.5	20
Wind	>1.5kW-15kW	26.7	20
Wind	>15kW-100kW	24.1	20
Wind	>100kW-500kW	18.8	20
Wind	>500kW-1.5MW	9.4	20
Wind	>1.5MW-5MW	4.5	20
Existing microgenerators transferred from the RO	—	9.0	To 2027

Summary of the Renewable Heat Incentive proposals

THE DEPARTMENT OF ENERGY AND Climate Change has recently published its consultation on the proposed Renewable Heat Incentive (RHI) financial support scheme.

The consultation outlines the government's proposals on the design and operation of the RHI scheme, which is intended to provide financial support for individuals, communities and businesses to encourage a switch from using fossil fuel for heating to certain renewable technologies and sources.

This article summarises the key proposals of the RHI scheme, which the government aims to implement in April 2011.

KEY ASPECTS OF THE PROPOSED RHI SCHEME

Technology types

The RHI scheme aims to support the following types of eligible heat-generating technology (RHI technology) at all scales of generation:

- bioenergy, being solid biomass and biogas (including heat produced from

on-site combustion of biogas and injection of biomethane into the natural gas grid);

- bioliquids;
- air and water source heat pumps;
- ground source heat pumps and geothermal sources;
- solar thermal; and
- renewable combined heat and power (CHP).

The RHI scheme is proposed only to apply to RHI technology installations completed after 15 July 2009, although where an increase in capacity of an existing RHI technology installation occurs, the additional capacity will be eligible for RHI support as if it were a new installation. The RHI scheme proposes to remain open to new installations until at least 2020.

Regular reviews of the RHI scheme's scope and tariff levels will be undertaken so as to adapt to new technology types and cost changes.

Basis of RHI scheme tariffs

The basis for the tariffs payable under the RHI scheme is to provide:

- compensation for the additional financial costs associated with the installation and ongoing operation of RHI technologies (when compared to an appropriate fossil fuel alternative);
- compensation for a limited number of non-financial elements of installation, eg the excavation of land to install a ground-source heat pump; and
- an investment return of 1.2% across all RHI technologies, except solar thermal (6%).

The rate of return is higher than that available under the Feed-In Tariff (FIT) Scheme for electricity generation (5%-8%), due to the government's need for a higher rate of growth of renewable heat generation.

The adjacent table details the proposed tariff levels and payment lifetimes for each RHI technology. In summary, however, it is proposed that:

- tariff payments are calculated on the annual amount of heat output (kWh);
- separate tariffs have been proposed for each RHI technology (ranging from 1.5p-18p per kWh), with each technology split into various heat generation capacity bands;
- tariff payments are made over a defined period (between 10-23 years), depending on the expected useful life of the RHI technology and in regular instalments (annually for installations below 45kW and quarterly for those above 45kW);
- tariff payments are to be claimed by and made to the owner of the RHI technology;
- degression of tariff payments will not initially be implemented, but future

implementation will be considered at the first regular RHI scheme review; and

- once an installation has secured its rights to an RHI tariff, the tariff level will remain fixed (grandfathered) for the applicable tariff lifetime (other than in respect of biomass, as further detailed below).

Measurement of heat output

Tariff payments will be calculated on the annual amount of heat output (kWh). The method by which heat output is measured will vary depending on RHI technology type and size.

Interaction with other government renewable schemes and proposals

1) Renewables Obligation (RO) interaction

Since April 2009, the RO has provided an uplift of (in most cases) 0.5 per MWh of electricity produced from a renewable CHP plant over that generated by an electricity-only plant of the same technology. Under the RHI scheme, CHP installations will be eligible for an RHI tariff for their heat output. A one-off choice will therefore be provided for RO-eligible CHP plants installed after 15 April 2009

and before the review of the RO in 2013, deciding whether to claim:

- 1) RO plus uplift; or
- 2) RO (without uplift) plus RHI.

After 2013, the RO uplift will be unavailable for new CHP installations and only the basic RO tariff plus RHI will apply.

2) FIT Scheme interaction

The FIT Scheme does not offer any compensation or uplift for heat output by FIT-eligible CHP plants. Instead, the normal RHI eligibility criteria will apply to any such heat output and the CHP plant may also claim a FIT for electricity generation if the FIT Scheme eligibility criteria are fulfilled.

Mixed fuel use

Where an installation can generate heat from both renewable and non-renewable fuels, the RHI tariff will only reward the certified renewable component. With respect to the generation of heat from municipal waste, the mixed waste can be combusted in a single boiler (ie no separation of biomass content is required)

PROPOSED RENEWABLE HEAT INCENTIVE TARIFF LEVELS TO APPLY FROM APRIL 2011			
Installation type	Scale	Tariff (pence per kWh)	Tariff lifetime (years)
Small installations			
Solid biomass	Up to 45kW	9	15
Biodiesel	Up to 45kW	6.5	15
Biogas on-site combustion	Up to 45kW	5.5	10
Ground source heat pumps/geothermal	Up to 45kW	7	23
Air source heat pumps	Up to 45kW	7.5	18
Solar thermal	Up to 20kW	18	20
Medium installations			
Solid biomass	45kW-500kW	6.5	15
Biogas on-site combustion	45kW-200kW	5.5	10
Ground source heat pumps/geothermal	45kW-350kW	5.5	20
Air source heat pumps	45kW-350kW	2	20
Solar thermal	45kW-100kW	17	20
Large installations			
Solid biomass	500kW and above	1.6-2.5	15
Ground source heat pumps/geothermal	350kW and above	1.5	20
Biomethane injection	All scales	4	15

and, subject to establishing sufficient evidence for Ofgem that the fossil fuel content is unlikely to exceed 50%, a generator can agree with Ofgem that 50% of the full RHI biomass tariff will be payable.

Value of heat sold to third parties

Where heat is sold by an RHI-eligible generator to a third party, the government is not intending to regulate the sale price. Generators will therefore be free to secure their heat sale price in the marketplace.

CONCLUSION

In designing the RHI scheme, the government is trying to learn from the lessons provided by the implementation of the RO and, consequently, they have adopted a simpler approach, which is similar to the FIT Scheme. Notwithstanding this, it is clear that several key areas require further clarification, particularly with respect to the manner in which heat output is to be measured.

For small to medium-sized RHI installations, the attractiveness of the

‘For small- to medium-sized Renewable Heat Incentive (RHI) installations, the attractiveness of the RHI scheme will depend on the accompanying administrative burden, which the government is attempting to ease.’

RHI scheme will, arguably, depend on the accompanying administrative burden, which the government is attempting to ease (at least in part) by allowing the deeming of heat output in certain cases. In contrast, new CHP installations constructed before 2014 will need to carefully compare the financial support offered by the RHI scheme and the RO to ensure that the correct one-off choice is made regarding whether to receive the RO uplift or an RHI tariff for heat generation.

Finally, a key issue that is not addressed in the consultation is the

method by which the RHI scheme will be funded. The consultation notes that the government is currently considering its position and intends to make a further announcement in the 2010 Budget.

*By James Phillips, senior associate,
Ross Fairley, partner and
Michael Barlow, partner,
Burges Salmon LLP.
E-mail: james.phillips@burges-salmon.com;
ross.fairley@burges-salmon.com;
michael.barlow@burges-salmon.com.*