

Chapter 15 – Ofgem arrangements with DETI

- 15.1 At the end of the last chapter mention was made of how, at the time the NI RHI scheme was launched in November 2012, the document formally establishing the relationship between DETI and its NI RHI scheme administrator, Ofgem, had not been executed.
- 15.2 As is inevitably the case on occasions, given the number of intertwining events and issues developing at the same time, it is necessary to look back from the point reached in the overall chronological development of the NI RHI scheme to understand how a specific issue arose.

The 18 April 2012 submission to appoint Ofgem via a contractual Agency Service Agreement

- 15.3 On 18 April 2012 Ms Hepper sent the then DETI Permanent Secretary and Accounting Officer, Mr Sterling, a submission in respect of the appointment of Ofgem to administer the NI RHI scheme.⁸⁵⁸
- 15.4 The submission attached the business case for the appointment, which already contained an approval obtained from the Central Procurement Directorate (CPD), the directorate within DFP that assisted with Government procurement matters. The business case referred to a Direct Award Contract and an Agency Services Agreement with Ofgem.
- 15.5 The submission itself referred throughout to a “contract” with Ofgem and “formal contractual arrangements with Ofgem”, which were to be via an Agency Services Agreement. Ofgem would then be treated by DETI as an External Delivery Organisation.
- 15.6 The submission sought Accounting Officer approval of the business case and his authorisation for the appointment of Ofgem. Mr Sterling provided the required approval and authorisation on the same date.⁸⁵⁹ As mentioned earlier in the Report, the business case submission was then provided to the Minister’s Private Office on 18 April and approved by Dr Crawford on 23 April.⁸⁶⁰ Minister Foster confirmed that she was “content” with the submission on 24 April 2012.⁸⁶¹

Ofgem’s different roles under the GB and NI RHI regulations

- 15.7 The mechanism by which the relationship between DETI and Ofgem was created differed from that between DECC and Ofgem in respect of the GB RHI scheme. Paragraph 2.1 of the explanatory memorandum accompanying the equivalent 2011 GB RHI regulations explained that the GB RHI regulations conferred functions directly on the Gas and Electricity Markets Authority (GEMA) to administer the GB RHI scheme. The GB RHI regulations referred to GEMA (Ofgem for our purposes) as “the Authority”.⁸⁶² The regulations then set out the role, powers and responsibilities that Ofgem had.

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- 15.8 In contrast, although the explanatory memorandum accompanying (and published with) the 2012 NI RHI scheme regulations, said, in paragraph 2.1,⁸⁶³ that the NI RHI regulations would give functions to Ofgem to administer the NI RHI scheme, the regulations did not in fact do that. Instead, the 2012 NI RHI regulations conferred all functions on DETI.
- 15.9 The explanatory note at the end of the 2012 NI RHI regulations (as opposed to the accompanying, and inconsistent, explanatory memorandum) stated that:
- “The Regulations confer functions on the Department in connection with the general administration of the scheme.”⁸⁶⁴
- 15.10 As discussed previously, the 2011 Energy Act was the enabling legislation which had provided DETI with the power to make regulations establishing the NI RHI scheme. Section 113 of the 2011 Energy Act had provided power to DETI to make regulations that would confer various functions on either DETI or the Northern Ireland Authority for Utility Regulations (each was referred to in section 114 as a “Northern Ireland authority”). Section 114 then provided that:
- “GEMA and an NI authority may enter into arrangements for GEMA to act on behalf of the NI authority for, or in connection with, the carrying out of any functions that may be conferred on the NI authority under, or for the purposes of, any scheme that may be established under section 113.”⁸⁶⁵
- 15.11 This meant that a different set of arrangements would be necessary to engage Ofgem to administer the NI RHI scheme. To develop these “arrangements”, between June and September 2012, there were regular teleconferences between Ofgem officials, Mr Hutchinson and Ms McCutcheon.⁸⁶⁶

The development of the Arrangements

- 15.12 The December 2011 Feasibility Study had proposed, in paragraphs 2.5 and 2.6, that the relationship between Ofgem and NIAUR was to be set out in an Agency Services Agreement.⁸⁶⁷ However, even though this was the form of a relationship it already held with the relevant authority in Northern Ireland (NIAUR) in respect of the NIRO, Ofgem adopted a different position in respect of the NI RHI scheme. As discussions ensued, Ofgem became wary of using the term “Services Agreement”, which it felt might compromise its legal obligations and status as an independent regulator. That was despite the fact that Ofgem was not acting as a regulator for the NI RHI scheme. In this regard Ms Hepper pointed out that one of the differences between the GB and NI schemes was that Ofgem did not have a statutory role in NI as it had in GB. She also explained, as the Inquiry has noted, that a service agreement was already in operation for Ofgem’s administration of another renewable energy scheme, the NIRO, on behalf of the NIAUR.⁸⁶⁸
- 15.13 What ultimately emerged from the discussions were a set of bespoke administrative Arrangements, which created a relationship significantly different from that which had been

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867 OFG-126017 to OFG-126018

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set out in the 18 April 2012 DETI submission. They were not intended to be legally binding or to give rise to any legal rights or obligations between the parties. Instead, clause 1.4 provided that:

“...both parties will endeavour to comply with the provisions of these Arrangements.”⁸⁶⁹

The clause then continued in the following terms:

“For the avoidance of doubt, nothing in these Arrangements is intended to, or will be deemed to, give rise to a relationship of agent and principal between the parties or overrides or is intended to pre-empt the ability of either party to discharge any of its powers or duties that arise as a matter of law.”⁸⁷⁰

15.14 DETI’s limited number of retained functions were stated in the Arrangements to be those contained in regulations 36(8), 47(1)(a), 50 and 51 of what was to become the 2012 NI RHI regulations, while Ofgem was to carry out all functions that were not retained.⁸⁷¹

15.15 There remained a conceptual difference between the parties, particularly as regards DETI’s entitlement to oversight of Ofgem’s work. DETI, having given assurances to the March 2012 Casework Committee on setting key performance indicators and ensuring a right to audit Ofgem’s administration of the scheme, was insistent that these should be included in the Arrangements. This was also captured in a letter from Ms Hepper to Mr Harnack in November 2012 wherein she stated:

“As discussed this morning and previously with Joanne, it is vital that performance indicators are included at least in the covering letter to demonstrate the expected service that will be provided by Ofgem on receipt of the agreed funding.”

“...we just need to be clear about what DETI Audit will expect to see. On a high level, we will need to be able to confirm that the monies paid to you on a monthly basis to fund tariff payments for accredited installations are being transferred correctly and accurately to the appropriate installer. To confirm this, we will need sight of the records showing this money trail.”⁸⁷²

15.16 DETI was clear that Ofgem was acting on its behalf to provide a service. Ms Hepper summarised her view on this in her oral evidence to the Inquiry:

“We were dealing with ... a service delivery wing of Ofgem, so they were delivering a service to us that we were paying for. Therefore, we wanted to see aspects of performance and how it was being taken forward in a set of KPIs.”⁸⁷³

“It still to me, to this day, seems peculiar that there is a wing called E-Serve, which is a service delivery function, which sits slightly separately from their regulatory side, and, yet, they put the umbrella over the two.”⁸⁷⁴

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871 LEG-00020 to LEG-00028

872 OFG-09924

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15.17 However, Ofgem sought to maintain what it considered to be the necessity of its independence and, although it agreed to provide some data regularly, fought against being subject to any performance indicators set by DETI, (see also chapter 47 of this Report). It also objected to its activities being subject to independent audit by DETI. Ofgem emphasised that its role endowed it with “ownership” of all functions that were not specifically reserved to DETI under the terms of the 2012 NI RHI regulations. This was summarised by Ofgem lawyer Marcus Porter, who stated that Ofgem had stepped:

“...into the shoes of DETI and taken over their role completely – no less than would have been the case had we been appointed directly in the legislation and there had been no mention of DETI at all.”⁸⁷⁵

15.18 Ofgem’s belief that it had now taken over the role and was “at the helm” was clearly embodied in the draft Arrangements with regard to paragraph 5.2, where it proposed a very one-sided process for dispute resolution regarding administration costs:⁸⁷⁶

“If any dispute arises as to the amount of Administration Costs payable by DETI to GEMA in relation to a given month, the same shall be referred to GEMA’s Chief Operating Officer for settlement and the adjudication of GEMA’s Chief Operating Officer shall be final.”⁸⁷⁷

15.19 The development of the administrative Arrangements therefore proved difficult and, at times, bordered on the fractious and consequently were not executed until 28 December 2012. In an email to his Ofgem colleagues on 6 November 2012 Keith Avis, the project manager, remarked:

“I appreciate that the Northern Ireland renewable heat incentive was more of a petulant teenager than the cute baby brother of the GB regs.”⁸⁷⁸

15.20 In giving oral evidence to the Inquiry, Mr Poulton, who in 2014 became Ofgem E-Serve’s Deputy Managing Director, later Managing Director, described the relationship with DETI as that of “a customer” but that there was “also a partnership element”, thereby further reflecting the ambiguities contained in the administrative Arrangements.⁸⁷⁹

15.21 Looking back at this time, DETI’s Internal Audit Service report on the scheme, issued on 4 August 2016, noted that:

“...DETI was reliant on Ofgem for the administration and control of the Scheme that had inadequate oversight arrangements in place which lacked specific assurance on the management of risks in the NI Scheme.”⁸⁸⁰

15.22 DETI Internal Audit also noted that key performance indicators were not agreed between Ofgem and the Department for the administration of the scheme.⁸⁸¹

15.23 Price Waterhouse Coopers (PwC) recorded in January 2017 at paragraph 4.24 in their ‘Heat 1’ report analysing the failings of the NI RHI scheme, that:

875 WIT-104774

876 OFG-215625

877 DSO-04585

878 OFG-10183 to OFG-10184

879 TRA-09652

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881 DFE-05387

“Significant weaknesses have been identified in the governance arrangements between the Department and Ofgem. While there are Administrative Arrangements in place between the Department and the Gas and Electricity Markets Authority, Ofgem’s governing body, the Administrative Arrangements do not define responsibility for key elements of service delivery by Ofgem, including the provision of management information.”⁸⁸²

15.24 In paragraphs 4.25 to 4.30 of the same report PwC identified what it said were the following weaknesses:

- (i) a lack of documentation relating to monthly meetings between DETI and Ofgem;
- (ii) a lack of agreed key performance indicators for work undertaken by Ofgem;
- (iii) a lack of consideration of the specific risk profile associated with the Northern Ireland scheme and the need for additional controls; and
- (iv) a lack of periodic communication between DETI and Ofgem in respect of the audit process, specifically with regard to the results of site inspections undertaken and the impact of Ofgem resource constraints.⁸⁸³

882 DFE-05553

883 DFE-05553 to DFE-05554

Findings

96. The fact DETI began with the intention to enter into a direct award contract with its scheme administrator, in the form of an Agency Services Agreement, but ended up with a form of what was said to be non legally binding administrative Arrangements reflected significant differences in how DETI and Ofgem regarded their relationship in respect of the administration of the NI RHI scheme. The effect of this conceptual difference of view would continue to be felt during Ofgem’s administration of the NI RHI scheme, (see for example chapters 45 to 48).