

From: [Alan Bissett](#)
To: [Stewart, Susan](#)
Cc: [McCutcheon, Joanne](#); [Hutchinson, Peter](#); [Shortt, Alison](#); [David Trethowan](#)
Subject: RE: ACX/RHI 004 - Legal Request on Ofgem Administrative Arrangements
Date: 27 September 2012 18:46:20
Attachments: [image001.png](#)
[Admin Arrangements \(22 Aug\) - AC comments 27.09.12.doc](#)

Susan

We had an opportunity to discuss the draft Administrative Arrangements Agreement (the “AAA”) when we met at Netherleigh to discuss issues on the NI RHI generally on 18th September 2012.

As requested, rather than preparing a mark-up of the AAA, we have prepared a draft with comments for the purposes of your on-going discussions with GEMA and a copy of this is attached for your review.

As mentioned at our meeting, the principal issues on the AAA are as follows:

1. Clause 1.1 – Definitions of “Administration Costs” and “Ancillary Activities”

It should be noted that these definitions give GEMA the right to pass through all costs associated with the scheme without exclusion. It is suggested that GEMA should provide in the AAA an exhaustive list of the type of costs that will be incurred – this information should be available to GEMA as they have been carrying out this function for DECC over the last 2 years. In addition, DETI should ensure that these costs are only those associated with the NI RHI scheme and are not a proportion of the overall cost of administering the schemes in GB and in NI.

2. Clause 5 – Payment of the Administration Costs

It should be noted that billing disputes in relation to Administration Costs (i.e. the costs to GEMA of performing the Conferred Functions and the Ancillary Activities) are not adjudicated by an independent party and are decided by GEMA’s Chief Operating Officer. We would suggest that a dispute as to the amount of Administration Costs payable by DETI to GEMA should be subject to the dispute resolution process set out in Clause 12. To achieve this, we would suggest that Clause 12.1(e) could be subdivided to provide for a dispute as to the amount of Administration Costs payable by DETI to GEMA to be referred to an appropriately qualified auditor and for all other disputes to be referred to Counsel to determine.

3. Clause 13.1 - AAA not legally binding

It should be noted that the AAA does not have the status of a legally binding document. If GEMA were to breach any provision or were to terminate the AAA, the Department will have no legal recourse.

The relevant provision of the Energy Act 2011 that allow GEMA and the Department to enter into these arrangements is section 114 and this provides only as follows:

(1) GEMA and a Northern Ireland authority may enter into arrangements for GEMA to act on behalf of the Northern Ireland authority for, or in connection with, the carrying out of any functions that may be conferred on the Northern Ireland authority under, or for the purposes of, any scheme that may be established, under section 113.

(2) In this section—

“GEMA” means the Gas and Electricity Markets Authority;

“Northern Ireland authority” means—

(a) the Department of Enterprise, Trade and Investment, or

(b) the Northern Ireland Authority for Utility Regulation.

Please let me know if it would assist to have a call or a further meeting to discuss the issues we have raised.

I should be grateful if you would acknowledge receipt.

Regards

Alan

ALAN BISSETT

Partner

Arthur Cox

Capital House

3 Upper Queen Street

Belfast

BT1 6PU

DD: 028 9026 5528

T: 028 9023 0007

M: Personal information redacted by the

RHI Inquiry

E: alan.bissett@arthurcox.com

www.arthurcox.com

From: Stewart, Susan [mailto:Susan.Stewart@detini.gov.uk]

Sent: 03 September 2012 13:53

To: Alan Bissett

Cc: McCutcheon, Joanne; Hutchinson, Peter; Shortt, Alison; David Trethowan

Subject: ACX/RHI 004 - Legal Request on Ofgem Administrative Arrangemnts

Alan

Please see attached a work request for legal advice on the draft Ofgem Administrative Arrangements document which is attached for your convenience. You will also note in the email below from Ofgem that they have asked not to share this document beyond or legal advisers. I would appreciate if you could therefore keep this document within the confines of your company.

This is a first draft of this document and would ask that you factor in that there is likely to be iterative communication and re-drafts concerning this document between DETI, Ofgem and DSO. We are requesting a quote only at this stage and once you have considered the

estimated cost will need to obtain the necessary approval from the Director of Energy for you to proceed with this work.

If you require any further information, please do not hesitate to contact me

Thanks

Susan

Susan Stewart

Sustainable Energy
Department of Enterprise, Trade & Investment
Netherleigh
Massey Avenue
Belfast, BT4 2JP
Tel: 028 9052 9212 (ext: 29212)
Textphone: 028 9052 9304
Web: www.detini.gov.uk

The new website for the European Sustainable Competitiveness Programme for NI is now available - visit www.eucompni.gov.uk



www.ni2012.com

Please consider the environment - do you really need to print this e-mail?

From: William Elliott [<mailto:William.Elliott@ofgem.gov.uk>]
Sent: 22 August 2012 20:31
To: Hutchinson, Peter; McCutcheon, Joanne
Subject: NI RHI Arrangements

Strictly in confidence/restricted

Dear Joanne, Peter

Further to Paul's email below I attach a copy of the draft Administrative Arrangements for your review. I apologise that it has taken longer than anticipated to get this to you.

At this stage, I would ask you not to share this beyond DETI and DETI's legal advisers as the Arrangements are only being provided in draft. In particular, they are still subject to our own internal review processes and therefore may not represent the Authority's final position on the issues that are addressed. You will also, of course, have your own comments on the Arrangements that will need to be incorporated before the Arrangements can be agreed.

Please note that there are a number of draft provisions that remain intentionally incomplete. The majority of such instances are where we have felt that it was unhelpful to proceed further with your input, or where we are awaiting input internally. I understand that we have a conference call scheduled for next week, but if you have any queries about the intended operation of the Arrangements in the meantime, please do let me know.

Kind regards

Will

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Comments of Arthur Cox: 27.09.12

These Arrangements are entered into on [date]

BETWEEN:

- (1) [REDACTED]; and
- (2) The Gas and Electricity Markets Authority (“GEMA”), a body corporate established under section 1 of the Utilities Act 2000, whose principal address is 9 Millbank, London, SW1P 3GE.

Comment [AB1]: The Department of Enterprise, Trade and Investment (“DETI”), a government department established under section 21 of the Northern Ireland Act 1998, whose principal address is Netherleigh, Massey Avenue Belfast BT4 2JP; and

BACKGROUND

- (A) Section 114 of the Energy Act 2011 provides that DETI and GEMA may enter into arrangements for GEMA to act on behalf of DETI for, or in connection with, the carrying out of any functions that may be conferred on DETI under, or for the purposes of a scheme established under section 113 of the Energy Act 2011.
- (B) Certain functions are conferred on DETI under the scheme established by the Renewable Heat Incentive Regulations (Northern Ireland) 2012. This document sets out the arrangements in accordance with which GEMA intends to carry out certain of those functions.
- (C) The parties enter into these Arrangements intending to honour them. However, these Arrangements are not intended to be legally binding, and no legal obligations or legal rights shall arise between the parties from these Arrangements. In particular, nothing in these Arrangements overrides or is intended to pre-empt the ability of either party to discharge any of its powers, obligations or duties that arise as a matter of law.

Comment [AB2]: The following should be added here after “arrangements” (“referred to herein as the “Arrangements”)” and all other references to “arrangements” should be amended to “Arrangements”.

Comment [AB3]: See comments on this issue at Clause 13.1

ARRANGEMENTS

1. DEFINITIONS AND INTERPRETATION

- 1.1. The definitions and rules of interpretation in this Clause are intended to apply throughout this document:

“Administration Costs” means the costs to GEMA of performing the Conferred Functions and Ancillary Activities *howsoever incurred*.

“Ancillary Activities” means the activities that GEMA considers are necessary or desirable for the proper performance of the Conferred Functions.

“Commencement Date” means [date].

“Conferred Functions” means all of the Functions other than the Retained Functions.

“Confidential Information” means information which has been designated as confidential by either of the Parties, whether, if it is passed to the other

Comment [AB4]: DETI to note that this gives GEMA the right to pass through all costs associated with the scheme without exclusion. It is suggested that GEMA should provide here an exhaustive list of the type of costs that will be incurred – this information should be available to GEMA as they have been carrying out this function for DECC over the last 2 years.

Comment [AB5]: GEMA is given an unfettered right to perform any activities which it deems appropriate, without DETI approval. This will impact on the costs which are passed through to DETI (see above comment regarding Administration Costs). Again, it is suggested that GEMA should provide here an exhaustive list of the type of costs that will be incurred.

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party, at the time it is so passed or at a later stage, or is of a confidential nature concerning DETI, GEMA or any third party.

"Functions" means the duties and powers conferred on DETI under the Regulations.

"Guidance" means [the document(s) entitled [*Title(s)*], published in accordance with regulation 51 of the Regulations on [*date*], as amended from time to time.

"Local Regulations" means the laws and regulations of Northern Ireland applicable to performance of the Functions.

"Party" means DETI or GEMA as a party to these arrangements, and "Parties" shall be construed accordingly.

"the Regulations" means the Renewable Heat Incentive Scheme Regulations (Northern Ireland) 2012, and reference to a "regulation" is reference to a specific regulation in the Regulations;

"Retained Functions" means the powers and duties conferred on DETI pursuant to:

- (i) Regulation 36(8).
- (ii) Regulation 47(1)(a);
- (iii) Regulation 51; and
- (iv) Part 10 of the Regulations.

1.2. Words used in these Arrangements and in the Regulations shall have the meaning given to them in the Regulations, unless otherwise defined herein.

1.3. Clause headings shall not affect the interpretation of these Arrangements.

2. GEMA'S RESPONSIBILITIES

2.1. GEMA shall carry out the Conferred functions and the Ancillary Activities and shall at all times do so in a manner which is consistent with any applicable obligations that arise as a matter of law.

2.2. Subject to clause 2.1, GEMA shall be responsible for, and hereby intends:

- (a) to carry out the Conferred Functions and Ancillary Activities –
 - (i) in such manner as it thinks best in order properly to carry out those functions and activities; and
 - (ii) in accordance with the Regulations;
- (b) subject to legal constraints, to provide DETI with:
 - (i) [*such information as is necessary to enable DETI to carry out the Retained Functions in a proper manner*];

Comment [AB6]: It should be noted that GEMA's power to carry out the activities are only restricted by the terms of the scheme. DETI does not have a right to determine or have input in respect of how the functions are undertaken.

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- (ii) *[include description of info included in automated monthly reports that are provided to DECC]; and*
- (iii) *[on request, any other information under GEMA's control relating to the performance by GEMA of the Conferred Functions and the Ancillary Activities].*
- (c) to inform DETI of any complaint or request for a formal review that is received by GEMA in connection with its performance of the Conferred Functions or the Ancillary Activities;
- (d) to provide such assistance as DETI may reasonably request in connection with any court or proceedings or other dispute with third parties in connection with the performance of the Functions on condition that any costs incurred by GEMA are charged to DETI at a daily rate to be agreed in advance of the provision of such assistance;
- (e) to nominate a person as a contact point for the purposes of these Arrangements and inform DETI of the identity of that person;
- (f) to take all reasonable steps to ensure that wherever possible it will facilitate the ability of DETI to operate effectively in relation to the Regulations. *[This may mean providing briefing or attending meetings with industry].* Furthermore, GEMA will consult DETI on matters of common interest and common concern relating to the exercise by GEMA of the Conferred Functions or the Ancillary Activities prior to any public consultation whether formal or informal;
- (g) that any information it requests from DETI should be relevant to the Administration Costs, the Functions, the Regulations, the Guidance, Local Regulations, or any legislation made under section 113 of the Energy Act 2011;
- (h) that where it requests information from DETI under these Arrangements, it will specify the information or nature of the information it requires, the format in which it requires it, the deadline for receiving it and the reason it is required; and
- (i) to give DETI reasonable notice of information it requires, wherever possible.

Comment [AB7]: GEMA or DECC should be asked to provide a list of all information provided by GEMA to DECC in relation to the GB RHI scheme. DECC should be asked to confirm whether any further information would be desirable.

Comment [AB8]: DETI should be aware that GEMA assistance in disputes/proceedings will be charged to DETI. It may be advisable to agree the daily rate in this document rather than when DETI is in dispute with a third party and requires GEMA's assistance.

Comment [AB9]: It should be established whether GEMA intends to charge DETI for briefings/meeting attendances. If not, this should be stated here.

3. DETI'S RESPONSIBILITIES

3.1. DETI shall be responsible for and hereby intends:

- (a) to pay the Administration Costs, on a pass through basis, in accordance with Clause 5;
- (b) to make available to GEMA, in accordance with Clause 6, the monies necessary for payment of the periodic support payments;
- (c) to nominate a person as a contact point for the purposes of these Arrangements and to inform GEMA of the identity of that person;
- (d) to take all reasonable steps to ensure that wherever possible it will facilitate the ability of GEMA to operate effectively in carrying out the

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Conferred Functions and Ancillary Activities. This may mean providing briefing or attending meetings with industry. Furthermore, DETI will consult GEMA on matters of common interest and common concern prior to any public consultation whether formal or informal;

Comment [AB10]: DETI should be aware of this on-going requirement.

- (e) to share information with GEMA (subject to legal constraints) necessary to enable GEMA to carry out the Conferred Functions and the Ancillary Activities in a proper manner. In doing so, DETI will comply with all relevant legislation and have respect for any personal or commercial confidentiality. Where DETI is made aware of such information, it will notify GEMA that it holds the information and provide it to GEMA on request;
- (f) to only request information from GEMA under these Arrangements which is relevant to the Administration Costs, the Functions, the Regulations, the Guidance, or any legislation made under section 113 of the Energy Act 2011;
- (g) to provide GEMA with all information necessary to ensure that GEMA is aware of any Local Regulations that will impact upon GEMA's performance of the Conferred Functions or the Ancillary Activities, and to give GEMA as much advance notice as possible of any prospective or actual changes in the Local Regulations if such would impact upon GEMA's performance on those functions or activities in any way;
- (h) where it requests information from GEMA under these Arrangements, to specify what information it requires, in what format, by when and why it needs it;
- (i) where it requests information from GEMA under these Arrangements, wherever possible to give GEMA reasonable notice of the information required; and
- (j) where GEMA provides DETI with information under these Arrangements, prior to the publication of that information, not without GEMA's express consent to circulate that information outside [the Northern Ireland Executive] until after the date of publication by GEMA and to treat such information as Confidential Information, unless otherwise agreed.

Comment [AB11]: DETI should be aware of the conditions attached to information requests.

4. AMENDMENT TO THE SCOPE OF THE CONFERRED FUNCTIONS AND THE ANCILLARY ACTIVITIES

- 4.1 The Parties anticipate that the Regulations and/or the Guidance may be amended from time to time.
- 4.2 Where either Party becomes aware of any actual or proposed amendments to the Regulations or the Guidance, it shall be responsible for informing the other Party as soon as reasonably practicable.
- 4.3 Subject to Clause 4.4, the Parties shall amend these Arrangements to reflect any changes to the Regulations or the Guidance.
- 4.4 For the avoidance of doubt, GEMA shall be under no obligation to perform any Functions other than the Conferred Functions in operation at the date on which the Regulations came into operation.

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5. PAYMENT OF THE ADMINISTRATION COSTS

5.1 The Parties agree that, during the term of these Arrangements, GEMA shall invoice DETI on a monthly basis in respect of the Administration Costs incurred by GEMA in the immediately preceding month, and that DETI shall pay GEMA the amount of each invoice within 30 days of the date of the invoice.

5.2 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.

Comment [AB12]: It should be noted that billing disputes in relation to Administration Costs (i.e. the costs to GEMA of performing the Conferred Functions and the Ancillary Activities) are not adjudicated by an independent party. As noted at Clause 12, we would suggest that a dispute as to the amount of Administration Costs payable by DETI to GEMA should be subject to the dispute resolution process.

6. PERIODIC SUPPORT PAYMENTS

6.1 The Parties agree that, during the term of these Arrangements, GEMA shall on a monthly basis calculate the sum of the periodic support payments that are to be paid to participants in the period beginning the [first day and ending on the last day of the calendar month immediately subsequent to the month in which the calculation is carried out]; and GEMA shall notify DETI of the same by no later than [*].

Comment [AB13]: DETI to advise on a suitable time period.

6.2 On receipt of the notice in Clause 6.1, DETI shall transfer to GEMA the sum specified in the notice as soon as reasonably practicable, and in any event by no later than the [27th day] of the [calendar month in which the notice in 6.1 is provided to DETI].

Comment [AB14]: DETI to confirm if it has a date preference.

6.3 Any monies transferred to GEMA pursuant to Clause 6.2 shall be held in a bank account established solely for the purpose of making periodic support payments.

6.4 Where these arrangements are terminated, either in accordance with Clause 7 or otherwise, GEMA shall arrange for any monies (including any interest that may have accrued thereon) held in the account referred to in Clause 6.3 to be returned to DETI as soon as reasonably practicable.

6.5 For the avoidance of doubt, GEMA shall not use funds made available to it under this Clause other than for the purpose of making periodic support payments.

7. DURATION AND TERMINATION

7.1 These Arrangements shall come into effect on the Commencement Date and shall continue in force indefinitely until terminated by either Party giving prior written notice to the other Party in accordance with clause 7.2.

7.2 Termination of these Arrangements shall take effect following expiry of the notice period specified in the written notice referred to in clause 7.1.

7.3 For the purposes of clause 7.2, the notice period shall not be less than [*] days from the date of the written notice, unless otherwise agreed by the Parties.

Comment [AB15]: If a scheme year runs from 1st April to 31st March, it is suggested that either party should only be able to terminate the Agreement with effect from 31st March in any given year and that DETI should consider the amount of notice of such termination it would require.

7.4 On termination of these Arrangements, the Parties intend that GEMA should (subject to applicable legal constraints) provide DETI with access to all information held by GEMA on DETI's behalf at GEMA's premises in connection with the performance of the Conferred Functions and the

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Ancillary Activities on condition that at least one week's notice is provided in advance to GEMA by DETI.

8. ASSETS

8.1. The Parties intend that any assets, including but not limited to intellectual property rights, created or purchased by GEMA in connection with its performance of the Conferred Functions and Ancillary Activities, shall vest in GEMA following termination of these Arrangements.

Comment [AB16]: Query whether these intellectual property rights should instead vest in DETI following termination. If the Agreement is terminated, DETI will need to find another party to carry out the functions of GEMA and this intellectual property will be required. Query also why GEMA would require the intellectual property rights in these circumstances.

8.2. Subject to Clause 8.1, any materials, plant or equipment owned or held by DETI and provided by DETI for use by GEMA in performing the Conferred Functions or Ancillary Activities shall be returned to in DETI following termination of these Arrangements.

9. CONFIDENTIALITY

9.1. Each Party agrees to be responsible for ensuring (both during the term of these Arrangements and after its termination) that the Confidential Information is kept confidential, is not used other than strictly for the purposes of these Arrangements and is not disclosed to any third party without the prior written consent of the other Party, unless the information:

Comment [AB17]: DETI to note the on-going requirement to keep confidential certain information.

- (a) was public knowledge at the time of disclosure;
- (b) subsequently becomes public knowledge other than by breach of this clause;
- (c) subsequently comes lawfully into the possession of the Party in question from a third party without any restrictions regarding confidentiality attaching to such information; or
- (d) is required by law to be disclosed, as set out in 9.2.

9.2. Each Party recognises that disclosure of the Confidential Information may be required by law, in particular under the duties imposed on GEMA and DETI under Freedom of Information Act 2000 and/or the Environmental Information Regulations 2004 and any subordinate legislation or codes of practice issued in accordance with such legislation ("the Legislation") as amended from time to time. Where disclosure of Confidential Information is required by law, each Party agrees to consult with the other in advance of making any disclosure of information which is held in relation to the subject matter of these Arrangements. Each Party agrees to offer all reasonable assistance to the other in handling any requests for information made under the Legislation which relate to the subject matter of these Arrangements and to transfer any information requests received by that Party to the other Party if appropriate.

9.3. To the extent necessary to implement the provisions of these Arrangements (but not further or otherwise), GEMA may disclose Confidential Information to any relevant governmental or other authority or regulatory body, and to any employees of GEMA or of any of the above, provided that before any such disclosure GEMA shall make those persons aware of its obligations of confidentiality under these Arrangements.

Comment [AB18]: DETI should consider whether it wishes to be informed before such releases of information are made and whether its consent is to be required. Also, DETI should consider whether the provisions of Clause 9.3 should apply to the disclosure of Confidential Information by both GEMA and DETI.

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9.4. Both Parties intend to use all reasonable endeavours to ensure that any employee or sub-contractor to whom Confidential Information is disclosed is made aware that the information is confidential and of the obligations on the Parties under these Arrangements.

10. VARIATION

10.1. These Arrangements may only be varied by written agreement of the Parties.

11. NOTICES

11.1. Any notice required to be given pursuant to these Arrangements should be in writing and sent by electronic mail to the electronic mail address agreed by the Parties at the time of signing of these Arrangements or such other address as either Party notifies to the other from time to time.

12. DISPUTE RESOLUTION PROCESS

12.1. In the case of a dispute between GEMA and DETI about the interpretation or implementation of these Arrangements, except in respect of a dispute as to the amount of Administration Costs payable by DETI to GEMA, the parties intend to comply with the following process:

- a) the dispute will first be discussed by the contact points from GEMA and DETI, with a view to resolving the dispute at that level;
- b) if the contact points are unable to resolve the dispute amongst themselves within two weeks of first being notified thereof, they shall each escalate the dispute to a more senior staff member within their respective organisation;
- c) senior staff members should arrange an informal resolution meeting;
- d) if the senior staff members are unable to resolve the dispute within four weeks of being notified thereof, they shall then each escalate the dispute to the Senior Civil Service or Director level of each of the organisations for final resolution; and
- e) if Senior Civil Service or Director parties are unable to resolve the dispute within two weeks of being notified of it then GEMA will select appropriate Counsel and will instruct Counsel jointly with DETI setting out the details of the dispute in question and both parties intend that Counsel's opinion shall be final and binding.

13. STATUS OF THESE ARRANGEMENTS

13.1. These arrangements are not intended to be legally binding, and no legal obligations or legal rights shall arise between the parties from these Arrangements. The parties enter into these Arrangements intending to honour all their obligations and to fulfil their responsibilities. For the avoidance of doubt, nothing in these Arrangements is intended to, or shall be deemed to, give rise to a relationship of agent and principal between the parties.

14. GOVERNING LAW AND JURISDICTION

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Comment [AB19]: As mentioned at Clause 5, it should be noted that billing disputes in relation to Administration Costs (i.e. the costs to GEMA of performing the Conferred Functions and the Ancillary Activities) are not adjudicated by an independent party. We would suggest that a dispute as to the amount of Administration Costs payable by DETI to GEMA should be subject to the dispute resolution process. To achieve this, we would suggest that Clause 12.1(e) could be subdivided to provide for a dispute as to the amount of Administration Costs payable by DETI to GEMA to be referred to an appropriately qualified auditor and for all other disputes to be referred to Counsel to determine.

Comment [AB20]: The Counsel appointed should be agreed between GEMA and DETI with provision made as to how Counsel will be selected if they fail to agree.

Comment [AB21]: DETI to note that this document is not given the status of a legally binding document. If there is a breach of any provision by GEMA or the Agreement is terminated by GEMA, DETI will have no legal recourse.

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14.1. These Arrangements shall be governed by and construed in accordance with English law and each party hereby irrevocably submits to the jurisdiction of the English Courts.

Signed by [])

for and on behalf of)
The Department of Enterprise, Trade and)
Investment)

Signed by [])

for and on behalf of)
The Gas and Electricity Markets Authority)

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