

Northern Ireland Renewable Heat Incentive Scheme: Status Report on Securing Agreement on the Administrative Arrangements

To highlight to the board the ongoing efforts to secure joint sign off of the NIRHI's Administrative Arrangements.	From	Keith Avis New Schemes Development 1M9 9 Millbank
	To	Ofgem E-Serve Management Committee
	cc	
	Date	29 November 2012

1. Aim

1.1. To update Management Committee and give them the opportunity to register views on Ofgem's proposed position as it continues to attempt to resolve the issue of auditing of the Northern Ireland Renewable Heat Incentive Scheme. This is the one remaining issue we have with the Northern Ireland Department of Enterprise Trade and Investment (DETI), before the Administrative Arrangement, which underpins the operation of the scheme, can be signed.

2. Background

2.1. In September 2011 DETI asked Ofgem to undertake a feasibility study into Ofgem administering the £25m NI RHI scheme alongside the GB RHI scheme. Following the completion of the Feasibility Study, GEMA agreed to Ofgem administering the Northern Ireland RHI, subject to appropriate funding and resolution of remaining uncertainties. DETI formally confirmed on 4 May that they wished to enter into an agreement with Ofgem for the administration of NIRHI. The scheme closely mirrors the GB RHI scheme, although there are differences, specifically in how solid biomass and large heat pumps are dealt with.

2.2. Amendments to DETI guidance, following consultation, were approved by Ofgem and supplementary guidance documents have been published on the Ofgem website. Internal Ofgem procedural documents have been updated, the RHI operations team have been trained and the manual operational solution has been put in place, which will run until IT changes are delivered.

2.3. The scheme went live on 1 November. The Administrative Arrangements (**Annex A**), which include the responsibilities of the respective parties and dispute resolution process, have been sent to DETI for signature, along with a baseline scope document and a formal request for a revised funding amount for 2012/13. DETI did not feel that they were in a position to sign off on the arrangements. While there has been an active exchange between ourselves and DETI, which has resolved the majority of differences, the question of audit remains the final stumbling block to agreement.

3. Key Issues

3.1. DETI's stance on audit flows from their view that they consider that they have an agency agreement with Ofgem, and as such can dictate the terms of any audit. However, we believe that our obligations run in parallel as Section 114 of the Energy Act provides that DETI may enter into "arrangements" with GEMA to provide for GEMA to carry out nearly all the functions conferred on DETI by the NI scheme.

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3.2. As part of the scheme development phase we have made clear to DETI that Ofgem has a robust annual audit programme that is approved by Audit Committee. The findings are reported to Audit Committee with clear accountabilities and regular reviews of recommended actions. In addition, Ofgem E-Serve commissions independent risk assessments of new schemes, including for the Renewable Heat Incentive.

3.3. DETI's Audit Committee have been taking a firm line, being that they require access to Ofgem's process information and data and a right to enter Ofgem premises to undertake ad-hoc audits. To find a way forward we have indicated to DETI that we would be prepared to send them all information that we are legally able to share with them, but we would not be prepared to provide right of access to Ofgem premises.

3.4. Most recently DETI have sought agreement on an additional request from their Audit Committee which seeks information from us in connection with the ongoing costs associated with Ofgem's development and operations team. In particular, they have asked for a detailed breakdown of staff costs (contract of employment, payroll records, timesheets etc), recruitment costs (advertising costs, timesheets), training costs (staff attendance sheets, course material etc.), consultancy documentation, IT costs and overheads. We have made clear that this is far too onerous for Ofgem. For one, we cannot share salary details and/or personal information. Equally extra resource would be needed to provide this information, tracking NIRHI separately would contradict the principles of Ofgem's charging methodologies and we will not be able to capitalise on the efficiencies of operating both the GB and RHI schemes together.

3.5. DETI's Audit Committee has thus far been unprepared to take a different stance, while we have remained steadfast in our view that we do not feel able to compromise our ability to self audit and self governance. The DETI Head of Internal Audit and Director of Finance were due to meet on 3 December to discuss their position.

4. Recommendations

4.1. We remain hopeful that DETI's Audit and Finance top management will be able to offer some form of compromise. However, we feel that it would unduly weaken Ofgem's position if we were to give them the ability to dictate the level and timing of audits and the power for DETI auditors to visit Ofgem's premises as they wish. Should neither party be prepared to move from their respective positions it would bring into question Ofgem's ability and/or willingness to administer the scheme. We will provide a further submission with options to Management Committee should this situation arise.

Keith Avis

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Annex A

**DRAFT ADMINISTRATIVE ARRANGEMENTS FOR THE NORTHERN IRELAND
RENEWABLE HEAT INCENTIVE SCHEME**

These Arrangements are entered into on [*date to be the date when the last to sign signs*]

BETWEEN:

- (1) The Department of Enterprise, Trade and Investment ("**DETI**"), whose principal address is Netherleigh, Massey Avenue Belfast BT4 2JP; 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

1. BACKGROUND AND STATUS OF THESE ARRANGEMENTS

- 1.1 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.
- 1.2 Certain functions are conferred on DETI under the scheme established by the Renewable Heat Incentive Regulations (Northern Ireland) 2012.
- 1.3 This document sets out the arrangements in accordance with which GEMA intends to carry out certain of those functions on behalf of DETI.
- 1.4 These arrangements are not intended to be legally binding and no legal obligations or legal rights will arise between the parties from these Arrangements. However both parties will endeavour to comply with the provisions of these Arrangements. 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.

2. DEFINITIONS AND INTERPRETATION

- 2.1 The definitions and rules of interpretation in this Paragraph are intended to apply throughout this document:

"Administration Costs" means the costs to GEMA of carrying out the Conferred Functions and Ancillary Activities and any other activities under these Arrangements, howsoever incurred. The budget and charging methodology for calculating the Administration Costs, and the types of activity which can contribute to the Administration Costs, will be agreed separately between the parties in advance of the Administration Costs being incurred.

"Ancillary Activities" means the activities that GEMA considers are necessary or desirable for the Conferred Functions to be carried out properly.

"Commencement Date" means [**date same as date of second signature**].

"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 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 "Northern Ireland Renewable Heat Incentive Guidance Volume 1, eligibility and how to apply" and Northern Ireland Renewable Heat Incentive Volume 2, ongoing obligations, payments" , published in accordance with regulation 51 on [**date date will need to be inserted**], 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 particular "regulation" is reference to that 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 50; and
- (iv) regulation 51.

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

2.3 Paragraph headings will not affect the interpretation of these Arrangements.

3. GEMA'S RESPONSIBILITIES

3.1 GEMA will carry out the Conferred Functions and the Ancillary Activities and will at all times act in a manner which is consistent with any applicable obligations that arise as a matter of law, including any requirement to respect any personal or commercial confidentiality.

3.2 Subject to paragraph 3.1, GEMA will:

- (a) provide DETI with –
 - (i) such information as is necessary to enable DETI to carry out in a proper manner the powers and duties imposed on DETI by regulations 47(1)(a) and 50; and

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- (ii) such other information as DETI may reasonably request, which GEMA may hold in relation to the Conferred Functions;
- (b) inform DETI of any complaint or request for a formal review that is received by GEMA in connection with the carrying out by it of the Conferred Functions or the Ancillary Activities;
- (c) provide such assistance as DETI may reasonably request in connection with any court proceedings or other dispute with third parties in connection with the carrying out 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;
- (d) nominate a person as a contact point for the purposes of these Arrangements and inform DETI of the identity of that person;
- (e) 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, providing resources are available to do this. GEMA will communicate with DETI on matters of common interest and common concern as appropriate;
- (f) share in advance with DETI proposals for public announcements relating to or impacting on the scheme established by the Regulations when appropriate;
- (g) ensure that any information it requests from DETI should be relevant to the Administration Costs, the Functions, the Ancillary Activities, the Regulations, the Guidance, Local Regulations, or any legislation made or proposed to be made under section 113 of the Energy Act 2011;
- (h) ensure 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 providing it and the reason it is required; and
- (i) give DETI reasonable notice of the date by which it requires information, wherever possible.

4. DETI'S RESPONSIBILITIES

4.1 DETI will:

- (a) pay the Administration Costs, on a pass through basis;
- (b) transfer to GEMA the monies necessary for payment of the periodic support payments;
- (c) nominate a person as a contact point for the purposes of these Arrangements and inform GEMA of the identity of that person;
- (d) take all reasonable steps to ensure that wherever possible it will facilitate the ability of Ofgem to operate effectively in relation to the Regulations. This may mean providing briefing or attending meetings with industry, providing resources are available to do this. DETI will communicate with

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GEMA on matters of common interest and common concern as appropriate;

- (e) share in advance with GEMA proposals for public announcements and consultations relating to or impacting on the scheme established by the Regulations when appropriate;
- (f) share information with GEMA 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;
- (g) only request information from GEMA under these Arrangements which is relevant to the Administration Costs, the Functions, the Ancillary Activities, the Regulations or the Guidance;
- (h) provide GEMA with all information necessary to ensure that GEMA is aware of any Local Regulations that will impact upon the carrying out by GEMA 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 in any way upon the carrying out by GEMA of those functions or activities, provided that DETI could reasonably be expected to be aware of these Local Regulations. Should there be any Local Regulations that impact upon the carrying out by GEMA of the Conferred Functions or the Ancillary Activities which DETI has not notified GEMA of, GEMA will not be liable for any loss which arises as a result of not taking into account the requirements of those Local Regulations;
- (i) where it requests information from GEMA under these Arrangements, specify what information it requires, in what format, by when and why it needs it;
- (j) where it requests information from GEMA under these Arrangements, wherever possible give GEMA reasonable notice of the date by which it requires the information;
- (k) where GEMA provides DETI with information under these Arrangements, prior to the publication of that information, not without GEMA's express consent circulate that information outside the Northern Ireland Executive until after the date of publication by GEMA and treat such information as Confidential Information, unless otherwise agreed; and
- (l) provide such assistance as GEMA may reasonably request in connection with any court proceedings or other dispute with third parties in connection with the carrying out of the Functions.

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

- 5.1 The Parties anticipate that the Regulations and/or the Guidance may be amended from time to time.
- 5.2 Where either Party becomes aware of any actual or proposed amendments to or re-enactments of the Regulations or the Guidance, or that there is a need to

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effect such amendments or re-enactments, it will be responsible for informing the other Party as soon as reasonably practicable. For the avoidance of doubt such amendments are not covered by these Arrangements.

- 5.3 The Parties will discuss in good faith amendment of these Arrangements to reflect any changes to the Regulations or the Guidance.
- 5.4 In the event that the Regulations are amended or re-enacted but the parties have not been able to agree amendments to these Arrangements to reflect the same by the end of the date on which the amending or re-enacting Regulations come into force, these Arrangements will be deemed to be terminated with effect from the next day.

6. DURATION AND TERMINATION

- 6.1 These Arrangements will come into effect on the Commencement Date and will continue indefinitely until terminated by either Party giving prior written notice to the other Party in accordance with paragraph 6.2 or, as the case may be, until termination in accordance with paragraph 5.4.
- 6.2 Termination of these Arrangements other than in accordance with paragraph 5.4 will take effect on expiry of the period specified in the written notice referred to in paragraph 6.1.
- 6.3 For the purposes of paragraph 6.2, the notice period will not be less than 60 days from the date of the written notice, unless otherwise agreed by the Parties.
- 6.4 On termination of these arrangements, the Parties intend that (subject to applicable legal constraints, including any requirements to respect personal or commercial confidentiality) provide DETI with all information reasonably requested by DETI and held by GEMA on DETI's behalf at GEMA's premises in connection with the carrying out of the Conferred Functions and the Ancillary Activities, on condition that at least one week's notice is provided in advance to GEMA by DETI. The parties envisage that this would include all data that the applicant/participant had provided, such as application forms, meter readings and original drawings.

7. ASSETS

- 7.1 The Parties intend that any assets, including but not limited to intellectual property rights, created or purchased by GEMA in connection with the carrying out by it of the Conferred Functions and Ancillary Activities, will vest in GEMA following termination of these Arrangements.
- 7.2 Subject to paragraph 7.1, any materials, plant or equipment owned or held by DETI and provided by DETI for use by GEMA in carrying out the Conferred Functions or Ancillary Activities will be returned to DETI following termination of these Arrangements.

8. CONFIDENTIALITY

- 8.1 Each Party agrees to be responsible for ensuring (both during the term of these Arrangements and after their termination) that the Confidential

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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:

- (a) is public knowledge at the time of disclosure;
- (b) has become public knowledge other than by breach of this paragraph;
- (c) has come 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 paragraph 8.2.

8.2 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 where possible 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.

8.3 GEMA may disclose Confidential Information to any relevant governmental or other authority or regulatory body, and to any employees or contractors of GEMA or of any of the above, provided that before any such disclosure GEMA will make those persons aware that the information is confidential and of these Arrangements. Where GEMA discloses such Confidential Information to another body under this paragraph, it will have notified DETI prior to doing so, subject to any legal constraints on its ability to do so.

8.4 Both Parties intend, both during the term of these Arrangements and after their termination, to ensure that any employee or contractor to whom Confidential Information is disclosed is made aware that the information is confidential and of these Arrangements.

9. VARIATION

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

10. NOTICES

10.1 Any notice to be given pursuant to these Arrangements should be in writing and sent by electronic mail to the relevant contact point nominated by the parties under these Arrangements.

11. DISPUTE RESOLUTION PROCESS

11.1 In the case of a dispute between GEMA and DETI about the interpretation or implementation of these Arrangements, the parties intend to comply with the following process:

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- (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 will 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 will then each escalate the dispute to the Senior Civil Service or Director level of each of the organisations for final resolution.

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