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From: Matthew Harnack [mailto:Matthew.Harnack@ofgem.gov.uk]
Sent: 19 April 2013 17:00
To: Hepper, Fiona
Cc: McCutcheon, Joanne; Hutchinson, Peter
Subject: RE: Admin Arrangements

Fiona,

Thank you for sharing your legal advice on 12 February, and my apologies for such a slow reply. [redacted] disrupted getting this advice to you, as has Easter and the annual leave I took last week and on Monday.

Our views on this advice are marked up in red below. I'd be grateful if you could consider these points and feed back DETI's views. I agree that it's important to try and reach a common view on this issue.

Regards

Matthew

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From: Hepper, Fiona [mailto:Fiona.Hepper@detini.gov.uk]
Sent: 12 February 2013 16:29
To: Matthew Harnack
Cc: Mary Smith; McCutcheon, Joanne; Hutchinson, Peter
Subject: Admin Arrangements
Importance: High

Dear Matthew

Further to our recent tele-conference, and with regard to Keith's e-mail, I provide below the advice of our Departmental Solicitor. The main points made by our Solicitor are as follows:-

Relationship between DETI and GEMA

- It is right to say that the legislative intention (as reflected in the express language of the Renewable Heat Incentive Regulations (NI) 2012 (the 2012 Regulations)) is to refer to DETI. That is not surprising given the 2012 Regulations are Regulations made by DETI and the power to make such Regulations is exclusively reserved to DETI. agreed
- It's important not to consider the 2012 Regulations in isolation, but to look at those Regulations in the context of the powers contained in the Energy Act 2011 which provide DETI with the enabling powers to make the 2012 Regulations. agreed Section 113 wholly vests DETI (not GEMA) with the powers to make a scheme, section s114 then goes on to provide:

"(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—
- the Department of Enterprise, Trade and Investment..." agreed

- The language of section 114 makes it clear that within any arrangement (for powers conferred on DETI under a scheme established by section 113 to be carried out by GEMA) GEMA acts *"on behalf of"* DETI not to the exclusion/replacement of it. It is true that, in practical terms, GEMA may carry out those functions which have been transferred on a day-to-day basis, but in so doing it acts on behalf of DETI (whether or not the view is taken that one now interprets the references to DETI in the 2012 Regulations as references to GEMA - those 2012 Regulations will always have to be read subject to the primary powers under which they have been made i.e. subject to section 114). Agree that the Regulations must be read in the light of the primary powers.

As to the remaining points - although it may be a sterile debate (given that, as the Departmental Solicitor states, GEMA are in practice carrying out the day to day administration of the NI scheme without reference to DETI) the apparent view of the Solicitor as regards "on behalf of" is not shared.

For one thing, purely as a matter of language that term appears capable of having the effect that, during the subsistence of the section 114 arrangements, GEMA steps into DETI's shoes and effectively replaces DETI in relation to the functions concerned.

Secondly, it seems that must anyway have been the intent: If it were anything *less* than that, it begs the question – what would that be? and the answer to that, presumably, would be that the Section empowered DETI to enter into a contractual relationship with GEMA whereby GEMA assisted DETI by undertaking specified activities on behalf of DETI as DETI's agent, but with DETI retaining the full responsibility for the functions conferred on it by the Regulations. However if that were the case it is doubtful that it would be necessary to rely on section 114, as DETI would have the power to do that anyway without the need for express statutory authority. Moreover the arrangements declare that there is no intention to create legal relations (as is necessary for there to be a contract) and that no agency is intended. Indeed it's suggested that the use in section 114 of the term "arrangements" indicates that the Parliamentary draftsman likewise did not envisage that any contract would be entered into.

Thus the Section must have had some other purpose: It appears that it is included in the Act because it was recognised by the Parliamentary draftsman that, without such a provision, it would not have been lawful to do that which it was contemplated it might be thought necessary/desirable to do, namely for

GEMA to have transferred to it the responsibility for carrying out functions which, by virtue of the Scheme, are allocated to and would otherwise fall in law to be undertaken by, DETI.

Why would it not have been lawful to do that? The reason seems to be that, but for Section 114, any such transfer of responsibilities would offend against the rule outlawing "legislative sub-delegation" not sanctioned by an express statutory provision permitting that, i.e. DETI, having been designated under Section 113 as the Authority responsible for administering the Regulations, could not lawfully have divested itself of that responsibility by purporting to pass it on to GEMA.

Thirdly if, as suggested above, DETI does not in effect *replace* DETI when it comes to exercising the functions GEMA undertakes (i.e. those referred to in the Arrangements as the "conferred functions", as opposed to those referred to therein as "the retained functions" – which remain with DETI) then it has to be asked what rôle DETI retains in relation to the conferred functions? Does it share those functions with GEMA and, if so, what is the division of responsibilities between the two and how is that determined?Alternatively, does DETI somehow retain a supervisory role such that, in carrying out the conferred functions, GEMA is answerable to DETI for the way in which it does so or as regards the decisions it takes or obliged to act on any directions issued by DETI in regard to those matters?

It appears clear that these questions have to be answered in the negative. Otherwise it is difficult to see how GEMA could possibly comply with its administrative law obligation to exercise its discretion independently in relation to the functions conferred on it. Moreover it is not at all clear how, in practical terms, such a cumbersome arrangement could possibly work effectively and consequently GEMA could surely not have agreed to enter into the arrangements on that basis.

The terminology used in the administrative arrangements supports that conclusion –e.g. "conferred functions" and (in DETI's case) "retained functions".

Finally it seems relevant to point out that, in the case of the GB Scheme, there is no doubt that GEMA has an unfettered right, and indeed obligation, to carry out its functions independently of DECC. Of course in that case the functions are specifically allocated to GEMA in the Regulations, but it would surely be odd if GEMA's position under the NI scheme were different to that which pertains under the GB Scheme and that does not appear to be the case. It is simply that the legal mechanism whereby that is brought about is different; i.e. in the case of the GB Regs it is the Regs themselves that bring it about, whereas in the case of the NI Scheme it is the arrangements that do so.

- DETI ultimately remains responsibility for the Scheme, it and the DETI Minister remain solely accountable to the NI Assembly for the Scheme. Agreed, but this doesn't detract from the comments above.

Data Protection Act 1998

- In terms of data protection the Solicitor failed to see how there was any problem with DETI being provided with the names of applicants. The rationale for his conclusion was:

➢ DETI is and remains, despite any processing of personal data by GEMA, the "data controller" for the purposes of the Data Protection Act 1998 (DPA). As a result there is no disclosure for the purposes of the DPA between GEMA and DETI; or see comments below

➢ In any event, even if GEMA was to be considered the "data controller" any disclosure between it and DETI would satisfy the requirements of the DPA. ditto

- The DPA defines the term "data controller" as:

"data controller" means, subject to section (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be processed; agreed

- Who is the "data controller" (as opposed to a "data processor") will be determined by the exact nature of the relationship between DETI and GEMA. GEMA has absolutely no control or discretion over the *"purpose"* for which the data they received is to be processed. It is DETI which is ultimately answerable here, the statutory responsibilities for the making of a scheme have been placed squarely upon it (s113 Energy Act 2011), the scheme has been made by it in exercise of the powers available under s113 of the Energy Act 2011, responsibility for achieving the statutory objectives and it is ultimately accountable to the NI Assembly for how the scheme operates. Deciding where the line is crossed between "data controller" and a "data processor" is often never easy, but it seems to me that a more than respectful argument could be made that DETI remains the "data controller".

This view is not shared by Ofgem: It would be most surprising if, in relation to the GB Scheme, it were seriously to be suggested (and it seems not to have been) that (merely because DECC retains ultimate responsibility for strategic matters, policy and the Regulations) GEMA was not a "data controller" for the purposes of that scheme. GEMA administers that scheme independently of DECC. In practice this means that GEMA is the authority to which applications to join the scheme are made; GEMA makes plain to potential applicants that data submitted by them to it will be handled and processed *by it* in accordance with GEMA's privacy policy and that applicants are deemed to accept that by virtue of submitting their application. If applications are made, GEMA then processes them and, as part of that process, requests from applicants any further information that it requires, decides whether applications are in the proper form, whether eligibility to join the scheme has been established and whether there is any reason prescribed in the Regulations why accreditation should not be granted. It then either accredits or declines to do so. Post accreditation, GEMA checks for compliance with ongoing obligations and, in the event of contravention of any such, considers what enforcement action may be appropriate and takes it. It also of course calculates and makes payments under the scheme.

Against that background (from which it is clear that GEMA's remit under the GB scheme is very considerable) it would surely be extraordinary if GEMA were not a "data controller" for the purposes of the GB Scheme and the DPA and, given that GEMA's duties under the NI arrangements are very largely the same and almost as extensive, it's not clear how the position can be any different in relation to the NI Scheme – notwithstanding that, as discussed above, it is entirely on the strength of the arrangements that GEMA has acquired its NI Scheme responsibilities. For as long as those arrangements subsist, GEMA's position under the NI RHI is for present purposes no different to its position under the GB RHI.

- The DPA does not absolutely prohibit the disclosure of personal data, it simply requires any disclosure, if it is to happen, to adhere to the data protection principles. agreed In terms of disclosures the focus tends to be on the first data protection principle, agreed but the second principle is being relevant here too. this principle requires any "processing" (which includes "disclosure") agreed to be:

a) lawful,

b) fair,

c) satisfy a Schedule 2 condition; and

d) in the case of "sensitive personal data" a Schedule 3 condition. All agreed

- We can ignore (d), the data does not relate to individuals physical/mental health, sexual life, political opinion, religious beliefs, membership of trade unions, the commission of a criminal offence or the existence of criminal proceedings. agreed

- A consideration of "fairness" looks at the circumstances of the case part II of Schedule 1 to the DPA also makes it clear that reference is to made to the method by which information is obtained, whether persons

have been deceived to provide the information or have been mislead as to the purposes for which the information is to be processed. In circumstances in which applicants are making the conscious decision to apply to a DETI scheme, I cannot see any unfairness to those persons if their details are subsequently passed to DETI. See comments below In fact, it's hard to understand how the scheme could operate without such information being passed to DETI. It is doubtful that routinely supplying names and addresses of individuals is necessary for this purpose – see the comments at the end of the next para in relation to how information sharing with DECC is working in practice.

By way of general perspective - there appears to be no question of DETI receiving *no* information (Ofgem is required, under the arrangements, and subject to any overriding legal requirements, to provide information to DETI in accordance with reasonable requests for same made by DETI) and indeed it is anticipated that DETI may end up receiving (on request being made by DETI) information of a similar kind and quantity to that which is supplied to DECC under the GB scheme. In that regard it should be noted, as regards legal constraints, that these apply in relation to the GB scheme also and that, as a result, we in particular do not routinely disclose to DECC names and addresses of individuals and, should we receive an *ad hoc* request for those from DECC, we would first need to be persuaded that to supply it would be compatible with the DPA and section 105(1) of the Utilities Act 2000. Despite this, the information sharing arrangements that have been put in place for the purposes of that scheme (which went live a year before the NI Scheme and under which the total number of accreditations is increasing steadily) are working perfectly satisfactorily and certainly DECC receives information which appears adequate to enable it effectively to conduct strategic oversights of the scheme.

As to the first principle and fairness, Ofgem are not as confident as the Departmental Solicitor that disclosure of names and addresses would not be regarded as unfair. Although the privacy policy does not specifically rule this out and mentions that certain information may be passed to DETI, it does not state specifically that names and addressed may be supplied either and whilst to do so might, in an appropriate case, conceivably be squared with the DPA, it seems doubtful that that would be the case if the request from DETI was made, for example, purely for the purposes of satisfying Departmental curiosity as to the identity of applicants.

- In relation to a Schedule 2 condition, the matter of obtaining consent appears at paragraph 1, however obtaining consent in every case is going to be time-consuming and burdensome, agreed DETI does not need to seeks consent in every case. An alternative condition is that contained in paragraph 6, this provides:

"The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of the prejudice to the rights and freedoms or legitimate interests of the data subject"

- This balances the legitimate purposes pursued by DETI against any harm that would be caused to the applicants i.e. whose personal data is sought to be disclosed. Agreed Again, in circumstances in which it is the applicant (of their own motion) making the application to the scheme I do not believe there would be any prejudice caused to those applicants in having their details disclosed to DETI.

That seems too simplistic. The applicant, if s(he) wishes to join the scheme, has *no choice* but to make an application and supply any information required by GEMA for the purposes of processing that information. Moreover, whether or not any subsequent disclosure of that information causes prejudice to the applicant surely cannot be determined by reference simply to the fact that the applicant supplied it at the outset.

Furthermore, it has not been explained what would be the "legitimate purposes" here for which the

processing would be *necessary*. This seems quite a high threshold to meet and it is doubtful that doing so would be straightforward, especially if a considerable amount of *other* information has been made available. In particular. it must surely be very doubtful, again, that merely satisfying curiosity would constitute such a purpose.

- Our view is that there is no issue with the requirement of "lawfulness", a disclosure by GEMA to DETI would not be unlawful. It would neither constitute a breach of private life guaranteed by Article 8 of the European Convention on Human Rights or the common law duty of confidence. This would need to be assessed on a case by case basis. It is not possible to lay down hard and fast principles. There is also the question of section 105(1) of the Utilities Act 2000 to consider. Whilst this does not appear to be engaged in relation to the DETI scheme, it would be interesting to hear whether the departmental solicitor agrees with that and in any case whether, to his knowledge, there is any equivalent NI legislation.
- In these circumstances a disclosure between GEMA and DETI would be fully capable of satisfying the requirements of the DPA. See comments above

As mentioned above, it seems that the second part of the second data protection principle is also relevant: That provides that, to determine whether disclosure of personal data is compatible with the purpose(s) for which the data was obtained, regard is to be had to the purpose or purposes for which the personal data are intended to be "processed" (defined very widely in the Act) by any person to whom they are disclosed. This bears out the view that GEMA should not routinely disclose personal data and that, before doing so, a case by case assessment would be necessary in order to determine whether a disclosure of personal details to DETI was lawful.

I would be grateful if you could consider each of these arguments and provide us with your response. I feel it is very important that we address these issues so that, going forward, we each have a clear understanding of the legal relationship between us and what that means in terms of the exchange of data and the administration of the Northern Ireland scheme.

Regards
Fiona

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