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[RHI \(NI\) Administration Arrangement.docx](#)

Marcus

I attach a draft note/framework setting out some preliminary thoughts on the issues and risks arising under the various headings that Keith thought might be suitable for an arrangement made between GEMA and DETI, under which GEMA would administer the NI RHI Scheme.

I am not sure how helpful you will find them, but hopefully the note can be used a starting point for our discussions tomorrow. As I mentioned, I have been working with Elizabeth on ECO, so have not been able to give this as much attention as I would have liked. However, I will have another look at the functions and services sections this evening and consider whether there are any further entries that can usefully be added.

Thanks
Will

William Elliott

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Draft
For discussion purposes only

The Northern Ireland Renewable Heat Incentive Scheme

Draft framework for identifying certain key issues and risk to be addressed/allocated in any arrangement made between GEMA and DETI for the administration of the NI Scheme

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Audience	Marcus Porter Keith Astor
Date	19 June 2012

1. Introduction

1.1. This note provides a framework for identifying the issues to be addressed, and the risk to be allocated, in any arrangement made between GEMA and DETI pursuant to section 114 of the Energy Act 2011, under which Ofgem would administer the Northern Ireland Renewable Heat Incentive Scheme (the "**NI Scheme**").¹

1.2. The framework is intended to be used as a basis for internal discussions and for negotiations with the Department of Enterprise, Trade and Investment ("**DETI**") only. It is not intended to provide a comprehensive analysis of the legal risks associated with administering the NI Scheme.

1.3. For the avoidance of doubt, none of the draft headings or provisions contained in this note shall be incorporated (either explicitly or impliedly) into any arrangement made between GEMA and DETI for the administration of the NI Scheme, and the document shall not otherwise be used as evidence of the parties' intentions when interpreting the terms of any such arrangement.

2. Legal Background

2.1. Under section 114 of the Energy Act 2011, "*GEMA and [DETI] 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 [the NI Scheme²]*" (emphasis added). The underlined text suggests that the scope of activities that GEMA may be authorised to carry out is sufficiently wide to include services ancillary to DETI's primary functions under the NI Scheme. Such services might, for example, include software development and support services for scheme participants, are addressed in greater detail in section 5 below. The definition of "functions" is similarly wide, and includes any "powers and duties" DETI has pursuant to any scheme established under Section 113 Energy Act 2011.

3. Framework Arrangement

3.1. The following headings have been adopted from the agreement made between NIAUR and GEMA dated 1 July 2010 under which GEMA administers certain functions conferred on NIAUR pursuant to Articles 52 to 55 of the Energy (Northern Ireland) Order 2003 (the "**NIRO Agreement**"). Sub-headings and italics have been used to identify specific issues that are likely to be of particular relevance to any arrangement governing the administration of the NI Scheme.

1. Background to the agreement

2. Definition and Interpretation

¹ The framework has been prepared on the basis of revised draft of Renewable Heat Incentive (Northern Ireland) Regulations 2012, provided to Ofgem by DETI on 13 June 2012.

² Being a scheme established under section 113 Energy Act 2011.

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- a. **Commencement date** – *is this to be the date of entry into force of RHI NI Regs or other (earlier) date to allow for e.g. IT systems testing before going live, and for payment/re-imburement by DETI for software/infrastructure development etc.? If the former, would this provide DETI with a sufficient level of comfort in respect of GEMA's commitment to administer the NI Scheme?*
- b. **Use of a long-stop date?** *Where the commencement date precedes the entry into force of the NI Regs, are there any circumstances (eg. a delay in the entry into force of the NI RHI Regs, or material differences in the final form of the NI RHI Regs compared with the GB Regs) such that Ofgem would want to be able to terminate the agreement prior to the go live date? If so, a long stop date would likely provide a better mechanism for terminating the agreement than attempting specifically to address each and every such situation as part of the termination clause.*
- c. **Definition of NI Scheme/Regs** - *where the functions or services to be provided by GEMA/Ofgem are tied to DETI's functions under the RHI NI Regulations, care should be taken to ensure that the definition of the RHI NI Regulations is static, rather than dynamic, such that GEMA is not obliged to undertake functions that were not provided for by the version of the draft NI Regs at the time the parties entered into the arrangement.*

d. **Length of run-off period?**

3. **Appointment**

- a. **The nature of GEMA's Role** - *the language in the NIRO Agreement refers to the appointment of GEMA as its "exclusive agent". Query whether such language is appropriate for describing the role that would be undertaken by GEMA pursuant to section 114, particularly in light of Ruth's comments about the Authority's independence?*

4. **GEMA's Obligations** (see also sections 4-6 below)

- a. **Generally** – *obligations must be such as to avoid conflicts of interests and to preserve GEMA's independence.*
- b. **Applicable standards, if any?**
- c. **Providing information to DETI.** *We will need to consider quite carefully how Marcus' internal advice in respect of the provision of information from Ofgem to DECC under the GB Scheme, applies in respect of providing information to DETI.*

5. **DETI Obligations**

- a. **Information to Ofgem** – *provision/requests from GEMA through DETI. Need to ensure that DETI is obliged to provide information that it has been provided with by prospective, existing, or former participants, even in absence of a request from GEMA. Arguably, a participant would be complying with its ongoing obligations under the regulations where it provided relevant information to DETI rather than to GEMA, as any arrangement entered into under section 114 does not affect the nature of the obligations on participants under the Regulations, or the manner in which they are to be discharged.*
- b. **Scope of DETI's Indemnity**

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6. Amendment to the Services and Administration fee

- a. Whether available only as a consequence of a change in the Functions?** *Note the way in which the Administration fee has been calculated in the NIRO Agreement is not appropriate here.*

7. Payments

- a. Date of first instalment?** *Ensure sufficient time/sum to provide for the development of software systems and the carrying out of stress-testing/benchmarking exercises etc before go-live date?*
- b. Separate dispute resolution procedure for administration fee disputes?** *Cf. NIRO Agreement, clause 6.3.*

8. Compliance with laws and regulations

9. Duration and Termination

- a. Duration - Until terminated?**
- b. Scope of Review provisions?** *Annual review?*

10. Effects of Termination

- a. Assets - what happens to assets, including in particular, intellectual property, and information/data?** *Should we seek to resist any compulsory assignment/licensing provisions?*
- b. Secure disposal of confidential information?**
- c. Access to information - Query whether wording of NIRO Agreement is suitable here. In particular, it should be made clear that GEMA will not disclose/ provide DETI with access to information contrary to applicable legislation (DPA etc.).**

11. Confidentiality

- a. Freedom of Information Carve Out - where DETI receives a FOIA request in respect of information provided to it by GEMA, we should ensure that DETI is obliged to inform and engage with us in respect of their response and decision to disclose/withhold**
- b. Data Security Requirements**

12. Force Majeure

13. Entire Agreement

14. Amendments

15. Assignment

- a. Sub-contract - under the scheme DETI has the power and may need to do undertake certain functions that GEMA cannot perform, such as fuel testing, and would need to sub-contract out. Care should be taken to carve out such**

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situations from any prohibition against such-contracting. Other examples include, provision of bank accounts, site inspections and other auditing functions.

16. Freedom of Contract

- a. Declaration as to GEMA's ability to perform obligations under arrangement** - *Cf. NIRO Agreement. Should this clause properly reflect the fact that the performance by GEMA of certain of its obligations under the arrangement is conditional on the fulfilment by DETI of certain of DETI's obligations?*

17. Waiver

18. Severability

19. Rights of Third Parties

- CROTPA?

20. Notices

- By email to specified addressee?

21. Dispute Resolution

- *The language in the NIRO Agreement at 20(1)(e) should be clarified. How many Counsel? Who appoints? Joint opinion? What happens where conflicting opinions?*
- *Query whether Judicial Review is available in principle? To the extent it is, or possibly might be, should we seek to oust it?*

22. Governing Law and Jurisdiction

- *Law of England and Wales*
- *English courts*

4. DETI's functions under the NI Scheme

1. Establishing and maintaining a central information database
2. Preliminary accreditation of eligible installations
3. Accreditation of eligible installations
4. Registration of producers of biomethane for injection
5. Payments Processing - Calculating and administering payment of periodic support payments to (a) owners of accredited RHI installations for generating heat used in a building for an eligible purpose (Reg 3(2)); and (b) participants who are producers of biomethane for injection
6. Determining use of municipal waste/fossil fuel
7. Fuel sampling
8. Fraud Prevention [*How does this differ to Audit and Assurance?*]
9. Site inspections
10. Participant Notification
11. Audit and Assurance
12. Enforcement
13. Review/dispute resolution procedures
14. Reporting to DETI

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15. Administration Fee/financing

16. [Relevant legislation]

5. Ancillary services/functions

1. Customer Relationship Management, including a telephone and/or email-based customer support service
2. Contract Management
3. Establishing and maintaining information input/output systems, including:
 - a. Consumer website(s); and
 - b. software for data/payment processing.
4. Publication of guidance documents
5. Undertaking a consultation exercise on guidance and possible amendments to scheme
6. Establishing and complying with DPA/cookie and privacy policies
7. Resolving FOIA requests
8. Public Relations: promotion/marketing efforts?

6. Retained Functions

6.1. **Publication of anonymised information/data** - *as drafted, the reporting obligations under Regulation of the NI Regs are sufficiently imprecise that Ofgem should have a real concern about assuming responsibility for these functions.*