



# Briefing

## NI RHI Administrative Arrangements

An overview of the key characteristics of the draft Administrative Arrangements pursuant to which Ofgem will administer the NI RHI scheme on DETI's behalf	From	Will Elliott
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### 1. Aim

- 1.1. Section 114 of the Energy Act 2011 provides that DETI and the Authority may enter into "arrangements" for the Authority to administer the NI RHI scheme on DETI's behalf. These arrangements have been set out in draft form in the attached document (hereafter referred to as the "**Arrangements**").
- 1.2. This briefing is intended:
  - (i) to provide an overview of the key characteristics of the Arrangements; and
  - (ii) to enable a decision to be made as to whether the Arrangements are in sufficiently complete and satisfactory form that they can now be shared with DETI.

### 2. Background

#### *Form of the Arrangements*

- 2.1 The key concern in drafting the Arrangements was that their form should not be such as to compromise the Authority's independence. Given the relationship between DETI, the Authority and HM Treasury, it was also generally felt that the risk that either party would bring legal proceedings against the other was minimal, not least because of the reputational and political damage that such action would cause. Finally, it was noted that no formal agreement existed between DECC and the Authority for the administration of the GB RHI scheme.
- 2.2 In light of these, and other, considerations it was agreed that the Arrangements should be non-contractual. It was felt that this would provide a number of benefits, including the following:
  - Non-contractual therefore unlikely to compromise the Authority's independence;
  - The Energy Act 2011 refers to "arrangements" rather than to "an agreement" or "a contract", therefore non-contractual arrangements appear to be more in keeping with the legislative intent;
  - Flexibility with respect to the manner in which the Authority can administer the NI RHI Scheme;
  - Likely to require less extensive negotiations with DETI in order to finalise the Arrangements, resulting in lower legal costs and less risk that the parties fail to reach agreement before the October delivery date;
  - Matters that are intended to be legally binding, such as DETI's provision of an indemnity and payment of the Administration Cost, could be provided for by way of legally binding side letter; and

- Fosters a co-operative approach to resolving disputes.

#### *Negotiations with DETI*

- 2.3 To date, DETI have not been provided with a draft of the Arrangements, and have only been informed that the Arrangements are intended to be less contractual in nature than the arrangements under e.g. the NIRO Agreement.
- 2.4 While a number of provisions in the arrangement require further consideration, it is important that DETI confirm that they are happy with the general form of the Arrangements and are able to provide specific input on the drafting of provisions at the earliest opportunity. This will help to ensure that the parties can finalise and agree the arrangements in advance of the commencement of the NI RHI scheme.

### **3. The Arrangements**

3.1. The Arrangements have the following key characteristics:

- Non-contractual/not intended to have legal effect.
- To reflect the Authority's independent regulator status and the wording of section 114 of the Energy Act 2011, no mention of "services".
- Subordinates the Authority's responsibilities under the Arrangements to the Authority's common law and statutory obligations.
- The default position under the Arrangements is that the Authority is not responsible for carrying out functions under the NI Regulations other than those initially provided for in the Regulations at the date they come into force. This is consistent with the fact that, absent the Arrangements, the Authority has no obligations under the Regulations - DETI rather than the Authority is named in the Regulations and it is the Arrangements that effectively transfer DETI's powers and duties to the Authority. Where the Authority is happy to take on additional functions/activities following amendments to the NI Regulations, these can be agreed by the Parties through revisions to the Arrangements and reflected in the administration costs paid by DETI.
- No indemnity - DETI to indemnify the Authority by way of a separate legally binding side letter.
- DETI retain responsibility for enforcement activities (the precise scope of such retained activities is still to be defined).
- The Authority to carry out all other functions arising under the NI Regulations.
- The Authority will carry out "ancillary activities" it considers necessary for the proper performance of DETI's functions under the Regulations. These activities are not currently specified so as to provide the Authority with flexibility in respect of the activities it provides, though consideration is being given to whether specifying any of these may be appropriate.
- Disputes, other than disputes about the Administration Costs, to be resolved where possible by agreement between the parties, failing which by Counsel's opinion. Disputes about the Administration Costs to be resolved by the Authority's Chief Operating Officer.
- Formula for calculating the Administration Costs, which the Arrangements oblige DETI to pay, can be included in a schedule to the Arrangements and the

definition of Administration Costs amended accordingly. This formula is still to be drafted, and might need to reflect the potential for divergence of the NI and GB schemes in terms of scope and enactment dates to impact on the operational costs of the NI Scheme.

- Draw-down provisions to ensure that the Authority is in funds prior to making periodic support payments to scheme participants are still to be drafted.
- Termination on notice by either party. Notice period yet to be agreed.