

**To:** Luis Castro[Luis.Castro@ofgem.gov.uk]; Keith Avis[Keith.Avis@ofgem.gov.uk]  
**From:** Rita Chohan  
**Sent:** 2012-07-17T13:41:31Z  
**Importance:** High  
**Subject:** FW: NIRHI: Matthew's surgery  
**Received:** 2012-07-17T13:41:33Z

Hello Both

If you get time before Checkpoint today can you please read the covering note outline below from legal. This was an action from last week's meeting to put before Mathew in order to steer which document we develop to agree the administration arrangements of NIRHI. I can then gather your thoughts at the meeting.

Thanks  
 Rita

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**From:** William Elliott  
**Sent:** 17 July 2012 10:34  
**To:** Rita Chohan  
**Subject:** NIRHI: Matthew's surgery

Rita

I've had a look for you on the first floor, but haven't managed to locate your desk. I just had a couple of questions about the cut-off for submitting documents for Matthew's surgery and whether they should be emailed to him or sent in hard copy. As we discussed, I have drafted a covering email below setting out the pros and cons of the two versions of the administration agreement. If you think something more formal is called for please let me know. I am waiting for Ruth's sign off on the text in yellow, and Marcus is just reviewing the two versions of the agreement (focusing on the memorandum of understanding) at the moment.

Kind regards

Will

Dear Matthew,

Ahead of the Northern Ireland RHI Team's meeting with you on Thursday, I attach two documents for your review, each containing a set of draft arrangements for the administration of the Northern Ireland RHI Scheme. Though not yet finalised, the two documents reflect very different approaches to providing DETI and Ofgem with certainty as to the scope of their respective duties and obligations under the arrangements. The first version of the draft agreement is not intended to be legally binding and is similar in form to a memorandum of understanding (MOU). The second version is based on the Northern Ireland Renewables Obligation Services Agreement (the "NIRO Agreement") and adopts contractual (legally binding) language of the kind found in a typical administration services agreement between two private entities, or a private and public entity.

The decision to prepare a non-legally binding form of the administration arrangements arose from Ruth Lancaster's concern that the administration arrangements should avoid contractual language (lest the arrangements be construed as a private law Administration Services Agreement (with implied terms as to performance standards etc.) and compromise the Authority's independence). (In particular, in relation to Ofgem's administration of the GB RHI Scheme, I understand that DECC has sought to measure Ofgem's performance against its internal KPIs, and to set standards by reference to those values. DECC's advances were rejected by the Authority on the basis that such performance setting would compromise the Authority's independence.)

DETI is yet to see these documents, and there is still a fair amount of input we will need to receive from DETI before things like termination clauses and administration costs can be finalised. However, even at this stage there is a significant decision to be made with respect to which of the two versions of the agreement we take forwards with DETI. To inform Thursday's discussions, I have therefore set out below what I consider to be the pros and cons of the two approaches:

MOU/Non-legally binding arrangements

Pros:

- Non-legally binding therefore very unlikely to compromise the Authority's independence;
- The Energy Act 2011 refers to "arrangements" rather than to "an agreement" or "a contract", therefore relatively informal MOU-style 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;
- Less extensive negotiations required with DETI to finalise the arrangements, resulting in lower legal costs;
- Matters that are intended to be legally binding, such as DETI's provision of an indemnity and payment of the Administration Cost, can be done by way of legally binding side letters; and
- Fosters a co-operative approach to resolving disputes.

Cons:

- Less certainty in respect of the extent of the parties' respective obligations under the NI RHI Scheme.

Administration Services Agreement/legally binding arrangements

Pros:

- Legal certainty in respect of extent of parties' obligations under the NI RHI Scheme;

Cons:

- May potentially be seen as compromising the Authority's independence;
- Lack of flexibility when addressing unforeseen circumstances/divergence between the GB and NI schemes;
- Fosters a rights-based/litigious approach to resolving disputes;
- If either party were to bring legal proceedings against the other to enforce its rights under the arrangements this would potentially give rise to significant reputational damage;and
- More time/monetary costs in negotiating agreement with DETI; and
- Does not appear to be in keeping with the reference in the Energy Act 2011 to "arrangements".

If you have any queries about the draft arrangements before Thursday, please do give me a call.

Kind regards

Will

**William Elliott**

Seconded

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