



# Briefing

## Northern Ireland Renewable Heat Incentive – Administrative Arrangements

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To provide the RHI Implementation Board with an update on progress to deliver the Northern Ireland RHI Development phase workstreams	From Keith Avis To Bob Hull cc Matthew Harnack, Ruth Lancaster, Mary Smith, Jacqueline Balian, Marcus Porter, Will Elliott Date 5 October 2012
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### 1. Summary

- 1.1. To discuss and seek your approval to the Ofgem stance on responding to the comments from the Department of Enterprise Trade and Investment (DETI) on the draft Administrative Arrangements for the Northern Ireland Renewable Heat Incentive Scheme provided by Ofgem Legal.

### 2. Background

- 2.1. The NIRHI scheme is set to go-live on 1 November. Underpinning the scheme will be the agreement between DETI and Ofgem that makes clear the administrative arrangements. Will Elliott from Ofgem Legal produced an initial draft of the arrangements on 22 August 2012. Need to add date when it was sent to DETI This can be found at **Annex A**. DETI passed back comments on the draft on 3 October. Following discussions with Ofgem legal our views and proposed approach in responding to the DETI points can be found at **Annex B**. We would like to discuss these points with you before offering a response to DETI. We have emphasised to DETI that this arrangement needs to be in place before scheme go live on 1 November or at any rate before we can agree to administer the scheme on DETI's behalf. This is both because we could not prudently commit to administration of the scheme on DETI's behalf without the arrangements as there is simply no available legal basis for us to do so. Given the need for some further amendment to the draft irrespective of DETI's points below and the need for internal clearances on both sides, there is some risk that the arrangements will not be in place by that date.

### 3. Next Steps

- 3.1. The process following the surgery session as we see it to secure agreement on the arrangements is as follows:
  - 08/10 Legal to have worked up document scoping out suggested draft response to DETI's comments.
  - 10/10 Initial discussion of issues at Bob's surgery
  - 12/10 Draft agreement to be sent to RHI Implementation Board
  - 16 /10 Special RHI Implementation Board meeting (if required)
  - 18/10 Formal response to DETI on agreement
  - 22/10 Response from DETI
  - 23/10 Formal clearance process starts
  - 01/10 Scheme Launch – we would not want to administer the NI scheme without reaching agreement on the form of the arrangements
- 3.2. We would also like to use the surgery session to be clear on your preferences for the final sign-off process within Ofgem.

Keith Avis

## **Annex A - Draft Administrative Arrangements Sent to DETI on 22 August 2012**

These Arrangements are entered into on [*date*]

### **BETWEEN:**

- (1) The Department of Enterprise, Trade and Investment ("DETI"), a body corporate established under [\*], 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.

### **BACKGROUND**

- (A) 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.
- (B) Certain functions are conferred on DETI under the scheme established by the Renewable Heat Incentive Regulations (Northern Ireland) 2012. This document sets out the arrangements in accordance with which GEMA intends to carry out certain of those functions.
- (C) The parties enter into these Arrangements intending to honour them. However, these Arrangements are not intended to be legally binding, and no legal obligations or legal rights shall arise between the parties from these Arrangements. In particular, nothing in these Arrangements overrides or is intended to pre-empt the ability of either party to discharge any of its powers, obligations or duties that arise as a matter of law.

### **ARRANGEMENTS**

#### **1. DEFINITIONS AND INTERPRETATION**

- 1.1. The definitions and rules of interpretation in this Clause are intended to apply throughout this document:

"Administration Costs" means the costs to GEMA of performing the Conferred Functions and Ancillary Activities *howsoever incurred*.

"Ancillary Activities" means the activities that GEMA considers are necessary or desirable for the proper performance of the Conferred Functions. "Commencement Date" means [*date*].

“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 [*Title(s)*], published in accordance with regulation 51 of the Regulations on [*date*], 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 “regulation” is reference to a specific regulation in the Regulations;

“Retained Functions” means the powers and duties conferred on DETI pursuant to:

- Regulation 36(8).
- Regulation 47(1)(a);
- Regulation 51; and
- Part 10 of the Regulations.

- 1.2. Words used in these Arrangements and in the Regulations shall have the meaning given to them in the Regulations, unless otherwise defined herein.
- 1.3. Clause headings shall not affect the interpretation of these Arrangements.

## 2. GEMA'S RESPONSIBILITIES

- 2.1. GEMA shall carry out the Conferred functions and the Ancillary Activities and shall at all times do so in a manner which is consistent with any applicable obligations that arise as a matter of law.
- 2.2. Subject to clause 2.1, GEMA shall be responsible for, and hereby intends:
  - (a) to carry out the Conferred Functions and Ancillary Activities –
    - (i) in such manner as it thinks best in order properly to carry out those functions and activities; and
    - (ii) in accordance with the Regulations;
  - (b) subject to legal constraints, to provide DETI with:
    - (i) [*such information as is necessary to enable DETI to carry out the Retained Functions in a proper manner*];

- (ii) *[include description of info included in automated monthly reports that are provided to DECC]; and*
- (iii) *[on request, any other information under GEMA's control relating to the performance by GEMA of the Conferred Functions and the Ancillary Activities].*
- (b) to inform DETI of any complaint or request for a formal review that is received by GEMA in connection with its performance of the Conferred Functions or the Ancillary Activities;
- (c) to provide such assistance as DETI may reasonably request in connection with any court or proceedings or other dispute with third parties in connection with the performance 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) to nominate a person as a contact point for the purposes of these Arrangements and inform DETI of the identity of that person;
- (e) to 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. Furthermore, GEMA will consult DETI on matters of common interest and common concern relating to the exercise by GEMA of the Conferred Functions or the Ancillary Activities prior to any public consultation whether formal or informal;
- (f) that any information it requests from DETI should be relevant to the Administration Costs, the Functions, the Regulations, the Guidance, Local Regulations, or any legislation made under section 113 of the Energy Act 2011;
- (g) 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 receiving it and the reason it is required; and
- (h) to give DETI reasonable notice of information it requires, wherever possible.

### 3. DETI'S RESPONSIBILITIES

#### 3.1. DETI shall be responsible for and hereby intends:

- (i) to pay the Administration Costs, on a pass through basis, in accordance with Clause 5;
- (j) to make available to GEMA, in accordance with Clause 6, the monies necessary for payment of the periodic support payments;
- (k) to nominate a person as a contact point for the purposes of these Arrangements and to inform GEMA of the identity of that person;
- (l) to take all reasonable steps to ensure that wherever possible it will facilitate the ability of GEMA to operate effectively in carrying out the Conferred Functions and Ancillary Activities. This may mean providing briefing or attending meetings with industry. Furthermore, DETI will consult GEMA on

matters of common interest and common concern prior to any public consultation whether formal or informal;

- (m) to share information with GEMA (subject to legal constraints) 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;
- (n) to only request information from GEMA under these Arrangements which is relevant to the Administration Costs, the Functions, the Regulations, the Guidance, or any legislation made under section 113 of the Energy Act 2011;
- (o) to provide GEMA with all information necessary to ensure that GEMA is aware of any Local Regulations that will impact upon GEMA's performance 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 upon GEMA's performance on those functions or activities in any way;
- (p) where it requests information from GEMA under these Arrangements, to specify what information it requires, in what format, by when and why it needs it;
- (q) where it requests information from GEMA under these Arrangements, wherever possible to give GEMA reasonable notice of the information required; and
- (r) where GEMA provides DETI with information under these Arrangements, prior to the publication of that information, not without GEMA's express consent to circulate that information outside [the Northern Ireland Executive] until after the date of publication by GEMA and to treat such information as Confidential Information, unless otherwise agreed.

#### 4. AMENDMENT TO THE SCOPE OF THE CONFERRED FUNCTIONS AND THE ANCILLARY ACTIVITIES

- 4.1. The Parties anticipate that the Regulations and/or the Guidance may be amended from time to time.
- 4.2. Where either Party becomes aware of any actual or proposed amendments to the Regulations or the Guidance, it shall be responsible for informing the other Party as soon as reasonably practicable.
- 4.3. Subject to Clause 4.4, the Parties shall amend these Arrangements to reflect any changes to the Regulations or the Guidance.
- 4.4. For the avoidance of doubt, GEMA shall be under no obligation to perform any Functions other than the Conferred Functions in operation at the date on which the Regulations came into operation.

#### 5. PAYMENT OF THE ADMINISTRATION COSTS

- 5.1 The Parties agree that, during the term of these Arrangements, GEMA shall invoice DETI on a monthly basis in respect of the Administration Costs incurred by GEMA in the immediately preceding month, and that DETI shall pay GEMA the amount of each invoice within 30 days of the date of the invoice.

- 5.2 If any dispute arises as to the amount of Administration Costs payable by DETI to GEMA in relation to a given month, the same shall be referred to GEMA's Chief Operating Officer for settlement and the adjudication of GEMA's Chief Operating Officer shall be final.

## 6. PERIODIC SUPPORT PAYMENTS

- 6.1 The Parties agree that, during the term of these Arrangements, GEMA shall on a monthly basis calculate the sum of the periodic support payments that are to be paid to participants in the period beginning the [first day and ending on the last day of the calendar month immediately subsequent to the month in which the calculation is carried out]; and GEMA shall notify DETI of the same by no later than [\*].
- 6.2 On receipt of the notice in Clause 6.1, DETI shall transfer to GEMA the sum specified in the notice as soon as reasonably practicable, and in any event by no later than the [27th day] of the [calendar month in which the notice in 6.1 is provided to DETI].
- 6.3 Any monies transferred to GEMA pursuant to Clause 6.2 shall be held in a bank account established solely for the purpose of making periodic support payments.
- 6.4 Where these arrangements are terminated, either in accordance with Clause 7 or otherwise, GEMA shall arrange for any monies (including any interest that may have accrued thereon) held in the account referred to in Clause 6.3 to be returned to DETI as soon as reasonably practicable.
- 6.5 For the avoidance of doubt, GEMA shall not use funds made available to it under this Clause other than for the purpose of making periodic support payments.

## 7. DURATION AND TERMINATION

- 7.1 These Arrangements shall come into effect on the Commencement Date and shall continue in force indefinitely until terminated by either Party giving prior written notice to the other Party in accordance with clause 7.2.
- 7.2 Termination of these Arrangements shall take effect following expiry of the notice period specified in the written notice referred to in clause 7.1.
- 7.3 For the purposes of clause 7.2, the notice period shall not be less than [\*] days from the date of the written notice, unless otherwise agreed by the Parties.
- 7.4 On termination of these Arrangements, the Parties intend that GEMA should (subject to applicable legal constraints) provide DETI with access to all information held by GEMA on DETI's behalf at GEMA's premises in connection with the performance 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.

## 8. ASSETS

- 8.1. The Parties intend that any assets, including but not limited to intellectual property rights, created or purchased by GEMA in connection with its performance of the Conferred Functions and Ancillary Activities, shall vest in GEMA following termination of these Arrangements.
- 8.2. Subject to Clause 8.1, any materials, plant or equipment owned or held by DETI and provided by DETI for use by GEMA in performing the Conferred Functions or

Ancillary Activities shall be returned to in DETI following termination of these Arrangements.

## 9. CONFIDENTIALITY

9.1. Each Party agrees to be responsible for ensuring (both during the term of these Arrangements and after its termination) that the Confidential 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) was public knowledge at the time of disclosure;
- (b) subsequently becomes public knowledge other than by breach of this clause;
- (c) subsequently comes 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 9.2.

9.2. 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 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.

9.3. To the extent necessary to implement the provisions of these Arrangements (but not further or otherwise), GEMA may disclose Confidential Information to any relevant governmental or other authority or regulatory body, and to any employees of GEMA or of any of the above, provided that before any such disclosure GEMA shall make those persons aware of its obligations of confidentiality under these Arrangements.

9.4. Both Parties intend to use all reasonable endeavours to ensure that any employee or sub-contractor to whom Confidential Information is disclosed is made aware that the information is confidential and of the obligations on the Parties under these Arrangements.

## 10. VARIATION

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

## 11. NOTICES

11.1. Any notice required to be given pursuant to these Arrangements should be in writing and sent by electronic mail to the electronic mail address agreed by the Parties at the time of signing of these Arrangements or such other address as either Party notifies to the other from time to time.

## 12. DISPUTE RESOLUTION PROCESS

- 12.1. In the case of a dispute between GEMA and DETI about the interpretation or implementation of these Arrangements , except in respect of a dispute as to the amount of Administration Costs payable by DETI to GEMA, the parties intend to comply with the following process:
- (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 shall 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 shall then each escalate the dispute to the Senior Civil Service or Director level of each of the organisations for final resolution; and
  - (e) if Senior Civil Service or Director parties are unable to resolve the dispute within two weeks of being notified of it then GEMA will select appropriate Counsel and will instruct Counsel jointly with DETI setting out the details of the dispute in question and both parties intend that Counsel's opinion shall be final and binding.

### 13. STATUS OF THESE ARRANGEMENTS

- 13.1. These arrangements are not intended to be legally binding, and no legal obligations or legal rights shall arise between the parties from these Arrangements. The parties enter into these Arrangements intending to honour all their obligations and to fulfil their responsibilities. For the avoidance of doubt, nothing in these Arrangements is intended to, or shall be deemed to; give rise to a relationship of agent and principal between the parties.

### 14. GOVERNING LAW AND JURISDICTION

- 14.1. These Arrangements shall be governed by and construed in accordance with English law and each party hereby irrevocably submits to the jurisdiction of the English Courts.

Northern Ireland Renewable Heat Incentive –  
Administrative Arrangements

Briefing

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                    )

## Annex B - Administrative Arrangement Response sent from DETI with Ofgem Comments

### Ofgem Issues with current content

1. **DETI view** We note that it is an informal agreement without the status of a legally binding document. That being the case, if GEMA was to breach any provision or were to terminate the Agreement, DETI would have no legal recourse. We are not entirely comfortable with this position. Grateful if you could outline your reasoning for adopting this informal approach and also advise us of the position for the GB RHI and for the NIRO (as you are aware we have not been able to have sight of either of these Agreements).

**OFGEM Response** We are not sure why DETI haven't been able to consider the GB Regulations, given that they can readily be accessed via the internet. It's correct that they haven't had access to NIRO. This is because NIAUR declined to agree to them having access! It is true that the arrangements are specifically expressed not to be legally binding. This was done because –

- (a) the relevant primary legislation (section 114 of the Energy Act 2011) uses the term "arrangements" rather than "contract" and, whilst it might be argued that the term "arrangements" is wide enough to embrace "contract", the latter word or similar would probably have been used had that been envisaged. Thus the assumption is that it was *not* envisaged and that "arrangements" implies something less formal. (There is certainly no *requirement* for a contract and it may be doubted whether any such would have been compatible with EU procurement requirements) That must mean something short of a contract and on that basis the provision specifying that the arrangements are not legally binding appears entirely appropriate;
- (b) the parties to the agreement are two government departments who are seeking to reach agreement, pursuant to statute, as to the terms on which one will carry out on behalf of the other functions arising under that legislation and which that other Department would otherwise have to carry out itself, there being no lawful third possibility. Thus the relationship is not commercial in nature (it is grounded rather in legislation) and the parties are essentially not operating "at arm's length" in the sense that one would expect in a commercial context. The relationship is far more collaborative in nature and, in such cases, it is common practice for government departments to enter into relatively informal arrangements to reflect the nature of the relationship between them.[Indeed the relationship arising from the administration by the Authority on behalf of DECC of the GB RHI is governed not by contract, but by correspondence]. Square bracketed text needs checking for accuracy.
- (c) On a related note, therefore, it would seem somewhat anomalous if the Authority's relationship with DECC was dealt with in the above informal manner but that was not the case for the NI RHI scheme;
- (d) The NIRO arrangements were more formal in nature but the primary powers in the Energy Act 2004 were cast in virtually the same terms as section 114 EA 2011 so there was no more a legal requirement that the relationship be based on contract than under the 2011 Act. It was nevertheless one possibility and it was decided to deal with matters in that way. Why is not known but there may have been factors in play that do not arise in relation to NI RHI or, alternatively, it may simply have been assumed (incorrectly) that a contract was required.
- (e) Given the nature of the relationship described in (b) above, it is not envisaged that either party would ever be minded to take legal action against the other and

that any dispute would be resolved instead in a different fashion and in a non-confrontational spirit.

Whilst it is true that DETI would not have no “legal recourse” in the sense meant by DETI, in the event of a “breach” by us of the arrangements they would nevertheless be able to terminate the arrangements in the event that the matter could not be resolved amicably. The Authority would have the same right in the event that DETI were in breach, which leads on to DETI’s point that they would have no remedy if the Authority terminated. That is true but presumably the Authority could not agree to enter into arrangements for the administration of the scheme were it not able to extricate itself from the obligation to do so with relative ease. It is proposed that the statutory review role will be allocated to DETI. There could therefore be situations where DETI effectively overturns decisions made by the Authority – i.e. where the review procedure is invoked by a participant.

1. **DETI View Clause 1.1 – Definitions of “Administration Costs” and “Ancillary Activities”** This appears to give GEMA the right to pass through all costs associated with the scheme without exclusion. We are not content with this position. Firstly we need clarity in exactly how NI costs are going to be calculated going forward. For example, we would like a list of the various costs you anticipate and precise information on how DETI costs will be calculated - will it be actuals relating to the NI installations, or will it be a percentage of overall costs? We consider this to be an important area given recent conversations between Fiona and Matthew which have highlighted the unreliability of the estimates contained in the feasibility study and the current difficulty in providing robust projections. Just to be clear, we are going to need some degree of certainty going forward. I am sure you can appreciate we would be unable to agree to a ‘carte blanche’ on charging which this currently appears to be.

**Ofgem Response** The concern is noted. Presumably though DETI are not saying that they reject the principle outright but rather that, if they are to accept it, there will need to be clear agreement as to the basis on which the costs are calculated and the elements included in the calculation. The answer to this will become clear once the proposed method of calculation etc. is shared with DETI. The change request element to be embraced in this should provide additional peace of mind for DETI.

2. **DETI View** Under ‘ancillary activities’ GEMA appears to have an unfettered right to perform any duties it deems appropriate. This would not be acceptable and we would need to see a list of anticipated ancillary activities and would have thought that any additions to this list in the future would need agreement of both parties (and would need to be costed in advance).

**Ofgem Response** On the basis that there will indeed be at least some ancillary activities that are “necessary” to the performance of the functions that the Authority will be carrying out on behalf of DETI and some that are “desirable”, it seems necessary to provide in the agreement for the Authority to undertake the ancillary activities. Otherwise there would be no power for it to do that which was merely desirable and, arguably at least, none to do what was necessary.

As to the principle otherwise of the Authority being given power to do what is necessary - given that, as the relevant clause makes clear, this means necessary *for the proper performance of the conferred functions* and that it seems beyond dispute that the Authority should be able to do what is necessary to “properly” (i.e. lawfully in the main) undertake the DETI functions, the provision should stay as it is - to the extent that it relates to “necessary” activities. It is not, though, sensible to try to list these necessary activities in the agreement as we could not be sure that the list

was comprehensive. We might, however, be able to provide some examples and the Ops team should be asked to input to this process.

As regards “desirable”, again it should be kept in mind that this is for “proper performance” of the DETI functions so the principle should ultimately be acceptable to DETI. Again, not sensible to include a list in the agreement (for the reason already mentioned) but could provide an indicative list with assistance of Ops Team.

We could commit to discussing with DETI the need for any additional ancillary activities arising in the future but the decision as to these should remain with the Authority. Wrong in principle to agree to anything less for “necessary” and unwise, probably, from the Authority’s point of view, for “desirable”

One example of a “necessary” ancillary activity would seem to be making the necessary procurement arrangements with third parties and a desirable one would be running an enquiry line for potential applicants.

### 3. **DETI View Clause 2.2 GEMA’s responsibilities**

Under (a) (i) – ‘in such a manner as it thinks best’ – this should presumably be with the agreement of DETI.

**Ofgem Response** It wouldn’t be our “thought” and it needs to be - since the obligation is again linked to “proper” performance by the Authority of the DETI functions and a significant element in propriety is lawfulness. After all the Authority, notwithstanding that it will not be named in the NI regulations, will effectively stand in DETI’s shoes and will be answerable to the courts for the lawfulness of the decisions it takes in administering the scheme, no less than in relation to the GB Regs. Indeed our administration of the Scheme would not be viable if it were necessary to seek to DETI’s agreement before taking any decision (howsoever significant) under the Regulations, which is what DETI’s suggested amendments seem to imply should be the case.

### 4. **DETI View Clause 3 (e)** – grateful for clarity on what is meant by ‘matters of common interest and common concern’ – we are content to consult GEMA on matters relating to the administration of the NI RHI. Are you thinking wider than this?

**Ofgem Response** Firstly, the reference should be to 2.2(f) not (e). An almost identical provision was included in NIRO. We acknowledge that this clause could be drafted more clearly. To clarify, the provision is intended to commit the Authority to consulting with DETI on “matters of common interest and common concern” prior to, and solely in respect of the potential subject matter of, any public consultation. We are not committing to consulting with DETI on (i.e. seeking DETI’s agreement to) each and every one of our proposed actions when carrying out the Conferred Functions and Ancillary Activities –as identified above, any other approach would effectively hamstring our administration.

Reassuring to hear that DETI are happy to consult the Authority in relation to the administration of the RHI. We are not thinking wider than that - as the inclusion in the clause of the words “relating.....activities” makes clear. However the consultation referred to in this provision is *public* consultation and any public consultation re amendment of the NI Regulations or guidance would be undertaken by DETI. We are thus undertaking here to consult DETI on “matters of common interest and common concern” prior to any such public consultation and this should be welcome to DETI as our input may inform their subsequent public consultation.

We can't identify in advance what issues might be "of common interest and common concern". This will vary from case to case. The term is an umbrella one designed to cover any eventuality that might arise.

5. **DETI View Clause 5 – Payment of the Administration Costs**

We note that you propose that any billing disputes in relation to Administration Costs (i.e. the costs to GEMA of performing the Conferred Functions and the Ancillary Activities) are not adjudicated by an independent party and are decided by GEMA's Chief Operating Officer. This causes us concern particularly when read in conjunction with Clause 1.1. We would require some form of dispute resolution process iro Administration costs and would wish third party involvement where agreement cannot be reached.

**Ofgem's Response** An identical provision is included in NIRO and as identified above we will be providing DETI with a detailed breakdown of the proposed method of calculation, which may allay some of DETI's concerns. Such calculations will also include provisions relating to change requests and, in principle, we could propose not to incur any costs other than those covered by the calculation without DETI's prior agreement.

Whilst we could in theory agree to what DETI propose, it is assumed that we will not want to be in any less secure position than under NIRO and we would be if we agreed to this as the scope for a dispute arising with DETI as to costs levels would be enhanced and there would be the prospect of our position being overturned by a third party.

6. **DETI View Clause 7 & 8**

We will obviously need to agree review dates, breakpoints/notice for termination. Meanwhile, grateful if you could advise exactly what you are suggesting we would have a right of access to in terms of - data, metadata, systems, documentation etc., in the event of termination. Given our investment we would want to be clear on what we can expect.

**Ofgem Response** DETI would presumably need to have access to everything, given that termination would entail that they themselves would have to assume responsibility for administering the scheme thereafter. There is also the question of whether such access would entail access to the software, forms, standard operating procedures or any other IP that we have developed as part of GB RHI and adapted for use in the NI scheme, and whether we would have concerns about sharing such information. There is a further question as to how we deal with the property rights attaching to any IP developed for the purpose of administering the NI scheme, either from the ground-up, or by adapting GB processes/IP, on termination of the arrangements.

7. **DETI View Clause 9.3**

Have you some specific examples in mind? DETI would probably want to be informed before such disclosure.

**Ofgem Response** The inclusion of this was prompted by the fact that it is in NIRO and that should the need to apply the corresponding NIRO provision ever occur there it might occur in relation to NIRO too. We do not have any specific examples in mind and it is assumed that the provision is unlikely to be invoked. It should be retained therefore in case needed and does no harm if it is *not* needed. It is belt and braces in other words.

8. **DETI View Clause 12.1 e**

DETI would wish the appointment of Counsel to be agreed between GEMA and DETI. Is there any reason why GEMA would be unhappy with this?

**Ofgem View** Yes. This part of clause 12 shouldn't be included at all. It might not prove possible to reach agreement. Agreed that, in view of that, it would seem sensible to stipulate instead that we should endeavour to reach agreement but that deadlock should be resolved by GEMA deciding.

### **Issues not covered by current Agreement**

9. **DETI View** We would need the Agreement to include some detail on performance targets, remedies and safeguards in place for underperformance. I cannot see anything on these issues in the current draft.

**Ofgem Response** The "remedy" for underperformance would ultimately be termination of the agreement by DETI. Moreover a "safeguard" can be found in the fact that the statutory review role will reside with DETI, meaning that there could potentially be cases where a decision of the Authority is overturned by DETI.

As to KPIs, these exist in relation to GB RHI but *are not being provided to DECC* as the view is taken that this would be incompatible with Ofgem's role as administrator of the GB Scheme. We will be exercising under statute functions that would otherwise have to be carried out by DETI and the effect is in essence that we *replace* DETI for as long as the arrangements are in place in relation to those functions that we agree with them we will carry out. Accountability to DETI should not be a feature because, in order to comply with administrative law requirements, we should, when carrying out the functions concerned, exercise our judgement independently and without our performance being scrutinised by DETI. Accountability in this context is a broad concept that would certainly embrace the kind of scrutiny that KPIs would encompass.

10. **DETI View** We will also require a right of audit entry to be included – this was discussed some months ago.
11. **Ofgem View** In principle the same analysis applies as in relation to KPIs. However it may be acceptable for DETI to *request* our agreement to an audit, so long as we were free to decline if we considered it inappropriate.

Northern Ireland Renewable Heat Incentive –  
Administrative Arrangements

Briefing