

Regulatory Issues and Public Procurement Policy

Peter Feehan
Partner – Pinsent Masons LLP

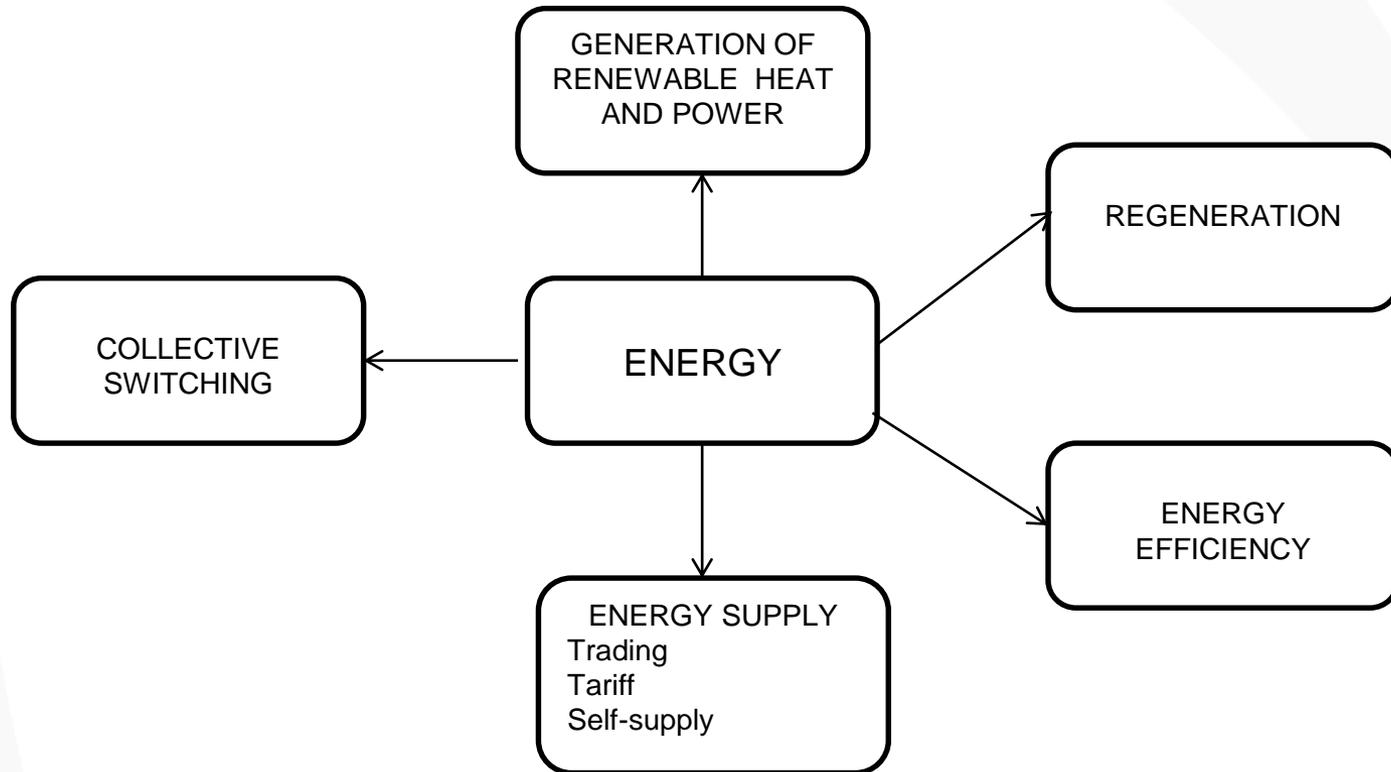


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Overview

- Why is the local authority interested in creating energy?
- What are the drivers for looking at this agenda?
 - Income generation
 - Assistance of the fuel poor and vulnerable groups
 - Sustainability and low carbon agenda

What do we mean by municipal energy?



Renewable electricity

- The Sale of Electricity by Local Authorities (England and Wales) Regulations 2010 (SI 2010/1910) allowed for the sale of renewable electricity without heat.
- Previously Councils could only sell electricity *if* it was combined with the heat load: Local Government (Miscellaneous Provisions) Act 1976 – part of the privatisation measures.
- Covers: wind, solar, aerothermal, geothermal, hydrothermal and ocean energy, hydropower and biomass.
- Local authorities have been caught out by the comprehensive review of tariffs (particularly in the solar market).

Renewable Heat

- Local authorities are investing hard in heat networks across the UK.
- Investment has been fuelled by changes to planning requirements in BREEAM standards and ECO monies and RHI.
- Significant private sector investment is coming into heat networks.
- Requirement for local councils to consider reasons for becoming involved:
 - Improving access to affordable warmth
 - Achieving city wide impact
 - Potential catalyst for inward investment into UK cities
 - Contributes to government carbon and green targets

Using an ESCO: Powers

- The Local Government Act (“**LGA**”) 2003, section 95 provides a power to trade for commercial purposes (providing there is no statutory duty to provide the services and no other statutory power to trade)
- Repealed The Local Government Act 2000 s.2 (1) of the LGA (so called wellbeing power). If a local authority is establishing ESCO now **it** would need to use section 1 of LA 2011 – general power of competence.
- There are also other powers which may be useful:
 - LGA 1972 s.111 – incidental powers
 - LGA 2003 s.12 – investment powers
- The Sale of Electricity by Local Authorities (England and Wales) Regulations 2010 (SI 2010/1910).

Using an ESCO: Governance

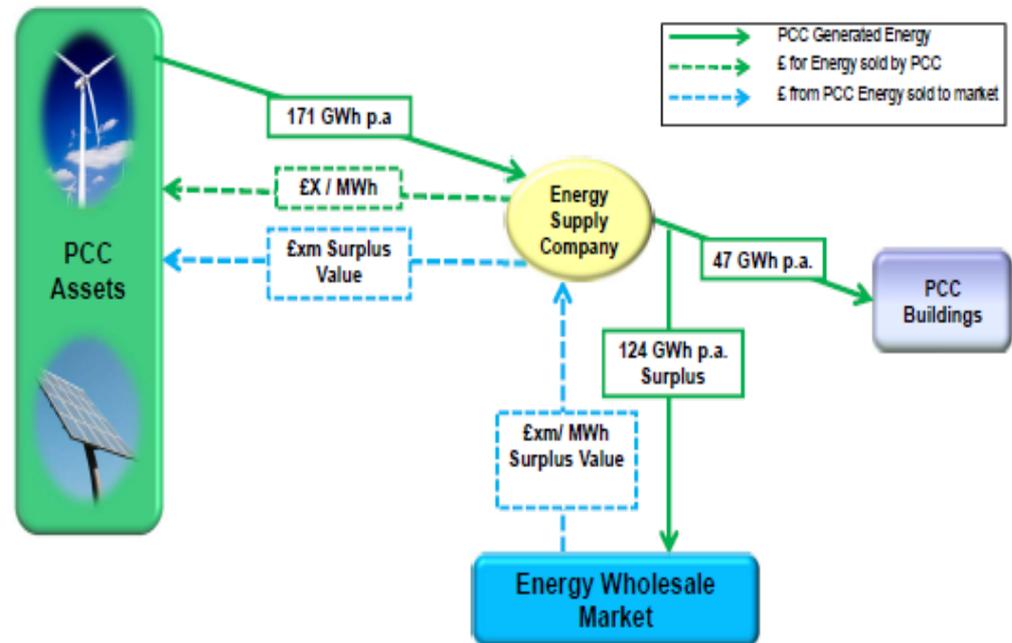
- The ESCO is a corporate vehicle with its own legal identity.
- It has the ability to hold assets and trade in its own name. A local authority should consider the application of *Teckal* when establishing the vehicle
- The identity of the corporate directors should be considered – perhaps creating a mix of executive officers and members
- The directors have commercial and fiduciary duties to BSP and recognise the need to establish clear lines to avoid conflicts.
- Governance training should be provided to directors.

Using and ESCO: Power solution

Licensing requirements will wholly depend upon focus of ESCO
Requirements for power sale and are set out in the Electricity Act 1989 (“EA”) – the relevant requirements are set out in section 4-10 (inclusive) of the EA.

Licensing requirements require separation between:-
Generation
Distribution; and
Supply (retail)

The approach of the ESCO is to joint venture with license holders to avoid un-necessary regulation.



ESCOs: Utility Regulations

- Where a party is deemed to be a “**relevant person**” or a “**contracting authority**” then an entity can be classed as a utility: Regs 6(i)(a) and 6(i)(f) Public Contract Regs 2006 (“**PCR**”) and Reg 9 of Utility Contract Regs 2006 (“**UCR**”).
- The distinction is important for the purposes of buying and selling energy – clearly for the PCRs this would require a public procurement - not so for utilities.
- There may be instances where it’s appropriate to rely on the PCR e.g. *Teckal* exemption – which is now very similar to the *affiliated undertaking* exemption where services are being provided back to the relevant authority by the ESCO



ESCOs: State aid

- Local authorities need to consider how investment in heat and power networks will be funded.
- The role of the local authority in providing funding to the ESCO must be in accordance with Market Economy Investor Principles (meaning that the rate of interest which the authority charges the ESCO must be deemed to be a market rate)
- If the local authority seeks to pass on the benefit of lower rate of interest to the ESCO then state aid exemption will need to be acquired.



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