Evaluation of Responses: Questionnaire on Dispute Settlement for Access to and the Use of Electricity and Gas Networks

MEDREG INS AG

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Background

In 2008 the Institutional Ad-hoc Group (INS AG) undertook a regulatory benchmark on Mediterranean energy regulators and formulated recommendations on the minimum requirements considered as necessary to ensure independence of regulatory authorities. The setting up of a dispute settlement mechanism appears as a shared characteristic in Mediterranean countries.

At the 10th (INS AG) meeting in 2011, it was decided to analyse existing or planned mechanisms to settle disputes regarding access to and use of electricity and gas networks. A questionnaire was sent to INS members with the aim to deliver a state of play on the functioning and role of the national dispute settlement mechanisms. Based on the result of this survey, recommendations can be elaborated in order to improve access to and use of electricity and gas networks.

12 out of 20 Mediterranean Energy Regulators have answered the questionnaire. It has to be noted that in Algeria the creation of a DSM is foreseen by law, but it has not been set up yet.

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Analysis of the responses received

1. Existence of dispute settlement mechanisms (DSM) / bodies (DSB)

In most of the countries a dispute settlement mechanism already exists for conflicts regarding access to and use of electricity and gas networks. With the exception of Portugal (1997) and Spain (1998), most mechanisms have been set up in the years 2000. In France, the DSB within the NRA has been created in 2006 i.e. 6 years after the creation of CRE. Before that date, disputes where settled directly by the Board of CRE. The Maltese and Palestinian DSM were created the latest, namely respectively in 2011 and 2010. In Algeria the DSM is legally foreseen but it has not been put in place yet. In all countries the National Regulatory Authority (NRA) is in charge of settling disputes and in 8 out of 11 a distinct body for this task exists.
In Italy the DSM has been revised recently giving AEEG the full competence\(^1\). Since the 18 of May 2012, the Italian NRA is exclusively responsible (before there was a college of arbiters) for dispute settlement regarding network access.

In Portugal the DSM exists in several organisations, namely in the NRA (since ERSE’s establishment) and in the arbitration courts. However, the courts deal mainly with customer and not network issues.

2. Independence and skills of the members of the dispute settlement mechanism/ body

As the DSM is in most countries part of the NRA, its independence and impartiality is guaranteed by the independence requirement of the NRA. In Algeria, Croatia, France and Portugal the same independence rules as for members of national courts apply to the members of the DSM. In France the members of the DSB are even members of the higher courts and impartiality is guaranteed by nominating a rapporteur who investigates the case independently from the DSB, i.e. a strict separation between judge and party.

In 9 countries the members of the DSM/DSB have at least a legal background but they can come from other academic fields like economics, energy and political science. In 4 countries (Algeria, France, Italy, Portugal) the members are legal professionals. Members of the Palestinian DSM have an energy background and/or are experts for complaints and consumer issues.

In Italy the mandate of the Director responsible for dispute settlement will last at least for the duration of the proceeding. In the other countries no particular mandate is fixed for NRA staff working on dispute settlement. The general employment rules of the NRA apply. In Bosnia and Herzegovina the members of the DSM are appointed for a 5 year term while in Algeria, France and Turkey they have a 6 year mandate. Staff of the DSM of PERC is employed at least on a one year contract.

3. Competences of the dispute settlement mechanism/ body

- Areas of competences

The DSM/DSB in 7 countries (Algeria, Croatia, France, Malta, Portugal, Spain, Turkey) are responsible for both access to and use of the electricity grid and gas networks. In France, Malta, Portugal and Turkey, the DSM/DSB exercises its powers between operators and users of the distribution and transmission networks of electricity and gas, gas storage infrastructure and LNG terminals. The Spanish DSM is only in charge of disputes related to electricity and gas transmission networks but not distribution.

In Italy, the DSM deals with disputes that concern only the access to the electricity and gas networks but not with cases dealing with the use of those networks. The Italian DSM deals exclusively with conflicts linked to the transmission network but not for distribution. It is also competent for other gas infrastructures and disputes arising between electricity TSO and generators of renewable energy.

In Bosnia and Herzegovina, Egypt, and Jordan the DSM are only competent for the power sector (transmission and distribution). In Jordan for instance the DSM deals with issues concerning grid access, quality of supply and tariffs. The DSM of PERC deals exclusively with access to and the use of electricity distribution networks.

The Croatian DSM does not deal with liquefied natural gas (LNG) because there is no LNG terminal yet. It is unclear whether HERA will be competent for such conflicts, when the planned

\(^1\) In the evaluation of responses only the revised rules regarding the DSM in Italy have been taken into account.
LNG terminal for 2016 is operational. In contrast to the other countries HERA deals also with questions regarding the district heating grid.

In Algeria, the planned DSM will not be competent for natural gas storage infrastructure and LNG.

- **Issues dealt with by the DSM/DSB**

In 7 countries a compliant can refer to the DSM/DSB when the issue concerns transmission and distribution tariffs, discrimination and balancing services. The mandate of the Italian DSM is the largest as it is competent for all infringements of the 3rd energy package obligations by TSO, DSO, Storage System Operators and LNG Terminals Operators. The DSM of Portugal deals with cases concerning transmission and distribution tariffs and other issues related to the use of and access to networks. The Spanish one, on the contrary, is competent for discrimination and balancing services but not for tariffs. In Egypt the DSM does not investigates disputes concerning balancing services. PERC deals with cases concerning distribution tariffs and balancing services but not with complaints regarding discrimination.

While 4 countries (Egypt, Jordan, Malta, Turkey) deal exclusively with the financial and technical aspects of the dispute, the DSM/DSB in 8 countries (Algeria, Bosnia and Herzegovina, Croatia, France, Italy, Occupied Palestinian Territories, Portugal, Spain) have a larger mandate including mostly legal, commercial and technical aspects.

The decision taken by the DSM/DSB are generally binding but can also be non-binding (e.g. recommendations) depending on the case. With the exception of Spain, where the decisions of the DSM/DSB only concern access to the network, most of the countries can also take precautionary measures, impose sanctions and fines.

Some Illustrative examples for decisions taken by the DSM/DSB concern third party access to the network, tariffs, gas transit, grid access and expiration of payment.

4. Procedure

- **Referral to the DSM/DSB and rejection of a referral by the DSM/DSB**

In all countries examined only operators and users can refer to the dispute settlement mechanism, i.e. NRA and ministries do not have this possibility.

In Algeria the procedure regarding referral to the DSM, rejection of a request, investigation of a case and decision making has not been defined yet. In all other countries, the compliant has to address a formal written request to the competent authority for dispute settlement, including e.g. providing evidence of proof, a description of the dispute, relevant documents and contact details. In 7 countries, the DSB/DSM can reject a referral if it is not the competent authority for this case or if the request is unfounded and incomplete. In the countries where a DSM exists, staff of the NRA (e.g. appointed expert or commissioner(s)) is in charge of preparing and investigating the case. In Portugal, if the DSM seized is not the NRA but the arbitration court, a member of the court prepares and investigates the case.

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2 Regarding disputes concerning tariffs, it should be noted due to the political and institutional complexity of Israeli and Palestinian relations, the investigations on price levels need a close cooperation between those authorities. PERC revises the price level of distribution tariffs every 6 month according to the price for electricity imported from Israel.

3 Due to new legislation, CNE is undergoing some changes. Its competencies regarding the setting of tariffs will be reinforced which will impact the scope of the disputes that the DSM will tackle once these changes are implemented.

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Procedural aspects of the decision making: delays and publication

In the majority of countries the procedure is both written and oral (e.g. hearings, advocacy) and the adversarial principle is guaranteed by law ensuring consultation of the parties involved, allowing them to submit all documents they consider necessary for the procedure and to make observations. The final decision is generally taken by the Board of the NRA (composed of Directors/Commissioners). In France the final decision is not taken by the Board of the NRA but by the members of the independent DSB. Interestingly, in Egypt the parties sign bilateral contracts at the end of the procedure which are approved by the Board.

The final decision has to be motivated except in Jordan where this is decided on a case by case basis. In 6 countries the decision has to be taken within 2 months after receipt of the complaint, with the possibility to extend the delay for 2 or 4 months. In Croatia, there is a fast track procedure for special cases where the decision has to be taken within 30 days. In Bosnia and Herzegovina a decision needs to be adopted no later than 6 months after filing of the application. In Turkey general delays for administrative procedures apply; the final decision has been taken within 60 days. For cases in which sanctions and fines are to be imposed the maximum time limit is 5 years. The deadline for the DSM within ERSE differs according to the nature of the dispute.

In 8 countries the decision is published. In Portugal it can be published on request by one of the parties. In Croatia, Egypt and Turkey the decisions are not disclosed.

Number of disputes settled

Some countries registered only very few disputes or none in the last years (Bosnia and Herzegovina, Egypt, Malta, Italy), while others took between 30 (Croatia) since the establishment of the mechanism up to 153 (France) and 225 (Portugal) only for the year 2011. Spain indicated that the numbers of disputes settled varies widely along the past years. In Italy the procedure has changed recently so that the number is not representative for the new rules. About 90% of the disputes referred to PERC are settled; the remaining 10% are either rejected or solved finally between the operator and the consumer.

5. Appeals against a decision taken by the dispute settlement mechanism/body

In most of the countries the decision of the DSM can be overturned by national courts mainly in appeal procedures.

In 11 countries, the parties have the possibility to appeal against the decision taken by the DSM/DSB before national courts. In Algeria, there is a legal incoherence between national law and regulations providing for the establishment of a DSM and the Algerian constitution. While the first does not foresee an appeal procedure, the latter does. As the DSM is not in place yet, this incoherence has still to be solved by a court decision.

Timeframe for appeals

In Italy the appeal body and the timeframe for appeal is indicated in the decision taken by the NRA in charge of the DSM. While in 5 countries (Bosnia and Herzegovina, Egypt, Jordan, Spain, Turkey) the parties can appeal within two months from notification of the decision, the timeframe is shorter (one month or less) in Croatia, France, Malta and the Occupied Palestinian Territories. In France, the delay for appeal against an interim measure is 15 days from notification of the decision. In Portugal, the timeframe for referring to the appellate body depends on the nature of the dispute, e.g. commercial or administrative.
6. Enforcement and sanction powers

- Powers of the DSM/DSB

In all countries surveyed, the decisions of the DSM/DSB are binding upon the parties. In Portugal ERSE’s decisions on administrative questions and the decision of the DSM within the arbitration courts are binding. Regarding commercial disputes, ERSE issues non-binding recommendations. In 6 countries (Bosnia and Herzegovina, Egypt, France, Malta, Italy, the Occupied Palestinian Territories; Portugal, Turkey) the decision making authority of the DSM can issue a warning notice, impose penalties, prohibit temporarily access to a certain network/utility, and suspend or even withdraw the license.

The Portuguese DSM can also adopt social sanctions to publicly “name and shame” the behaviour of the concerned party.

Spain has not yet taken a dispute settlement decision as this competence has been conferred to the NRA only recently (March 2012).

In Croatia the authority in charge of the DSM cannot enforce its decision but can request the court to take enforcement action. As the DSM still needs to be established in Algeria, the decisions that it can take are not defined yet.

- Powers of other authorities with regard to enforcement and sanctions

In half of the countries examined, the competent national courts can also enforce and impose sanction in case of non-compliance with the decision of the DSM/DSB. In Portugal, the Occupied Palestinian Territories and Spain, a ministerial body can adopt sanctions on undertakings to enforce the decision of the authority in charge of the DSM. In 5 countries, the competent national court can impose financial sanctions.

The calculation, criteria and limits of the amount of the penalties are defined by law. In Portugal, the law determines also the distribution of the income between the central administration and the authority in charge of the dispute to be settled. In Egypt, for instance, the calculation of the amount is based on the damage caused and cannot exceed 1% if the total capital of the licensee.

7. Staff and budget resources

As regards financial and human resources, in all countries analysed, there is no special budget line dedicated to dispute settlement. The resources necessary are provided from the general NRA
budget. In Croatia, Italy and Turkey, there is staff dedicated to the DSM/DSB working on access to and use of electricity and gas networks which is not the case for the other countries. All staff working on DSM/DSB is part of the staff of the NRA.

**Conclusions**

The survey showed that DSM/DSB are well established in 10 countries. They follow a formal procedure, issue binding decisions and most of them have sound sanction and enforcement powers. This can be seen as a confirmation of the expertise of the NRA on energy issues.

The areas of competences of the DSM/DSB differ according to national specificities (e.g. no gas infrastructure). Some DSM deal exclusively with electricity but not with gas or with distribution but not transmission networks. Others investigate cases regarding grid access but not the use of the networks or vice versa. 6 out of 11 respondents indicated to be competent for the use of and access to electricity and gas networks. The DSM/DSB do not deal with all disputes arising but only with those referred to them.

The dispute settlement procedures in place respect in general important legal principles, namely the independence of the DSM, the adversarial principle and the possibility for appeal.

In 3 countries out of 11 the DSM/DSB have recently undergone important changes, increasing their competence.

All respondents indicated that no special budget is dedicated to dispute settlement and rarely special staff is employed only for DSM/DSB. The necessary financial and human resources are drawn from the general NRA budget. It is important for a well-functioning DSM/DSB that the NRA has sufficient resources to ensure this task.

**Recommendations**

Despite the positive results regarding existing DSM/DSB, there is room for improvement, notably with regard to transparency and accountability.

1. **Final decisions should be published.**
   
   For transparency reasons the publication of the decisions of the DSM/DSB should be the general rule. This allows the parties concerned and all other interested parties to access information on precedent cases. The publication of final decision is without prejudice to the protection of commercially sensitive information. Prior to publishing the final decision the parties should be granted the possibility to indicate whether certain information mentioned in the decision is confidential.

2. **The decision should be motivated.**
   
   The decisions of the DSM/DSB should be motivated in order to give the parties concerned or interested the possibility to follow the argumentation of the DSM/DSB.

A final decision should contain at least:

- the date when the decision was taken
- the names of the members of the DSM/DSB and of the parties who have taken part in the proceedings
- a summary of facts
- the grounds on which the decision is based.
3. The distinction between judge and party could be improved. In some DSM/DSB safeguard principles to distinguish between judge and party could be improved. To improve the credibility of the DSM/DSB persons who investigate a case or have a personal interest should not be involved in the decision making process. However, the separation between judge and party depends also on the human and financial resources available for dispute settlement. In any case, the members taking part in the proceedings of the DSM/DSB shall act independently and shall indicate any direct or indirect interest which might be considered prejudicial to their independence.

Next steps

MEDREG members are invited to follow the recommendations. Furthermore, the issues of dispute settlement investigated concern the access and use of the networks but not consumer complaints regarding billing or metering for instance. These questions could be addressed by the MEDREG task force on consumer issues (CUS TF).