

Ofgem's draft guidelines for determining Disputes and Complaints arising under the European Directives 2003/54/EC and 2003/55/EC

Introduction

1. This guidance relates to Article 23 of Directive 2003/54/EC of the European Parliament and of the Council Concerning Common Rules for the Internal Market in Electricity and Article 25 of Directive 2003/55/EC of the European Parliament and of the Council Concerning Common Rules for the Internal Market in Natural Gas¹. It outlines the procedures that Ofgem will generally follow where Article 23(5)/25(5) disputes² and Article 23(6)/25(6) complaints are referred to Ofgem.
2. As the Department of Trade and Industry are currently considering the results of a consultation on the implementation of the European Directives 2003/54/EC and 2003/55/EC, these guidelines are published in draft.

Disputes under Article 23(5) and Article 25(5)

Determination of a Valid Dispute under Article 23/25 (5)

There are a number of existing dispute resolution avenues available, for example the existing Connections dispute procedure³. Ofgem expects that any party raising a dispute under Articles 23(5)/25(5) will have considered these established arrangements before raising a dispute under Articles 23(5)/25(5). Where any party requests Ofgem to resolve a dispute under Articles 23(5)/25(5), Ofgem will expect any party to provide Ofgem with a detailed explanation why the existing arrangements have been deemed inappropriate. Thereafter the following will apply:

3. For a dispute to be considered by Ofgem under Article 23(5) of EU Directive 2003/54/EC or Article 25(5) of EU Directive 2003/55/EC the following conditions must be met:-
 - a. In relation to electricity it is a dispute against a transmission or distribution system operator (this includes interconnectors), and in relation to gas it is a dispute against a transmission, LNG or distribution system operator (this includes interconnectors),
 - b. it clearly identifies itself as a "dispute" for the purposes of either of the Directives and identifies in respect of which Directive the dispute is being raised,
 - c. it is made in writing with sufficient information to detail the nature of the dispute,
 - d. is in relation to the issues mentioned in paragraphs 1,2 and 4 of Article 23/25 of the Directives and Article 19 of EU Directive 2003/55/EC (this is a basic assessment only), and
 - e. the subject matter of the dispute has been raised with the other party and failed to be resolved (otherwise Ofgem will not consider the matter a genuine dispute).

¹ See Appendix 1

² For clarity Ofgem will use the term 'dispute' to refer to complaints made under paragraph 5, where the Authority is acting as a dispute settlement authority, and 'complaint' to refer to complaints made under paragraph 6.

³ The existing Connections dispute procedure is provided for under section 23 of the Electricity Act 1989 and section 27A of the Gas Act 1986.

4. If the subject matter of the dispute raises other concerns, for example matters which may be more properly dealt with under the Competition Act 1998, industry codes or through modification to licences, Ofgem may advise any party to withdraw their dispute and have it considered through the means already established to consider such issues.

Timetable for Handling Disputes under Article 23(5)/25(5)

5. Within 10 working days of receipt of a dispute, Ofgem will inform any party raising the dispute in writing whether the issue will be investigated by Ofgem as a Dispute under Article 23(5)/25(5).
6. If the dispute is not considered valid (for example, it does not relate to issues in paragraphs 1, 2 and 4 of Article 23(5)/25(5) of the Directives and Article 19 of EU Directive 2003/55/EC or does not contain sufficient information) Ofgem will send a letter within 10 working days advising any party of the reasons that Ofgem does not consider their issue as a valid dispute under Article 23(5)/25(5) of the Directive.
7. If the dispute is deemed valid, Ofgem will assess the complexity of the dispute and will advise any party that a decision will be forthcoming, or that further information is required before the dispute can be determined.
8. Ofgem will gather relevant information (requesting further information from any party raising the dispute if necessary) and assess the dispute. Under the Gas Act 1986 and Electricity Act 1989 Ofgem can issue formal information requests if necessary⁴.
9. The decision on the dispute will be issued as soon as possible and at least within two months of it being received, in accordance the European Directives unless Ofgem requires additional information to investigate the dispute. In such a case the decision timeframe can be extended by two months in which case Ofgem will notify any party raising the dispute of any extension to the timeframe. This period may be further extended with the agreement of any party bringing the dispute. The European Directive 23(5) (Electricity) notes that where the dispute concerns connection tariffs for major, new generation facilities, the two month period may be extended by the regulatory authority.

Decision on Dispute under Article 23(5)/25(5)

10. The Directives state that the dispute resolution body's decision must be binding.

Complaints under Article 23(6) and Article 25(6)

Determination of a Valid Complaint under Article 23(6)/25(6)

A complaint under Article 23(6) of EU Directive 2003/54/EC or Article 25(6) of EU Directive 2003/55/EC must relate to a proposed decision on methodologies taken

⁴ See Section 28 of the Electricity Act 1989 and Section 38 of the Gas Act 1986.

pursuant to paragraphs 2, 3 or 4 of the Article 23/25 (the term methodology incorporates terms and conditions, including rules and tariffs).

11. A complaint will be considered valid under Article 23(6)/25(6) provided the following conditions are met:-
 - a. must be made in writing
 - b. must contain sufficient information/evidence as to the basis of the complaint and the manner in which that party is affected; and
 - c. must be made at the latest within two months following the publication of the proposal for a decision.

Consideration of Complaints

Complaint regarding a Proposed Methodology

12. If the complaint is made following the publication of a **proposal** on methodologies, Ofgem will address the complaint as part of the Impact Assessment (IA) (where an IA is to be undertaken or is in progress) and the complaint will be given due consideration by the Authority in its decision-making process. Where a complaint is in response to an IA but prior to a decision, the complaint will be incorporated in the Authority's decision-making process.
13. If the Authority decides not to approve the proposed methodology in relation to which the complaint was made, the Authority will consider and treat the complaint as having lapsed.

Timetable for Handling Complaints under Article 23(6)/25(6)

14. Within 10 working days of receipt of a complaint, Ofgem will inform the complainant of how the complaint is to be considered and give an indicative timeframe for the matter. The indicative timeframe may need to be extended if additional information is required by the Authority to enable it to consider the complaint.
15. As there are no timeframes specified in Articles 23(6)/25(6) for resolving methodology complaints, the time taken to consider and determine a complaint will depend on the level of complexity of the matters concerning the complaint.

Public Register

16. As required under the Gas and Electricity Acts, Ofgem will place on the public register any decision in relation to complaints raised under paragraphs 5 and 6 of Article 23 and Article 25 of the European Directives.

Appendix 1¹

Article 25 of Directive 2003/55/EC of the European Parliament and of the Council concerning common rules for the internal market in natural gas

Article 25 Paragraph 25 (1) states

1. Member States shall designate one or more competent bodies with the function of regulatory authorities. These authorities shall be wholly independent of the interests of the gas industry. They shall, through the application of this Article, at least be responsible for ensuring non-discrimination, effective competition and the efficient functioning of the market, monitoring in particular:

- (a) the rules on the management and allocation of interconnection capacity, in conjunction with the regulatory authority or authorities of those Member States with which interconnection exists;
- (b) any mechanisms to deal with congested capacity within the national gas system;
- (c) the time taken by transmission and distribution system operators to make connections and repairs;
- (d) the publication of appropriate information by transmission and distribution system operators concerning interconnectors, grid usage and capacity allocation to interested parties, taking into account the need to treat non-aggregated information as commercially confidential;
- (e) the effective unbundling of accounts as referred to in Article 17, to ensure there are no cross subsidies between transmission, distribution, storage, LNG and supply activities;
- (f) the access conditions to storage, linepack and to other ancillary services as provided for in Article 19;
- (g) the extent to which transmission and distribution system operators fulfil their tasks in accordance with Articles 8 and 12;
- (h) the level of transparency and competition.

The authorities established pursuant to this Article shall publish an annual report on the outcome of their monitoring activities referred to in points (a) to (h).

Article 25 Paragraph 25 (2) states

2. The regulatory authorities shall be responsible for fixing or approving prior to their entry into force, at least the methodologies used to calculate or establish the terms and conditions for:

- (a) connection and access to national networks, including transmission and distribution tariffs. These tariffs, or methodologies, shall allow the necessary investments in the networks to be carried out in a manner allowing these investments to ensure the viability of the networks;
- (b) the provision of balancing services.

Article 25 Paragraph 25 (3) states

3. Notwithstanding paragraph 2, Member States may provide that the regulatory authorities shall submit, for formal decision, to the relevant body in the Member State the tariffs or at least the methodologies referred to in that paragraph as well as the modifications in paragraph 4. The relevant body shall, in such a case, have the power to either approve or reject a draft decision submitted by the regulatory authority.

These tariffs or the methodologies or modifications thereto shall be published together with the decision on formal adoption. Any formal rejection of a draft decision shall also be published, including its justification.

¹ Further information on the EU Directives can be found on the Council of the European Union website on http://ue.eu.int/cms3_fo/index.HTM

Article 25 Paragraph 25 (4) states

4. Regulatory authorities shall have the authority to require transmission, LNG and distribution system operators, if necessary, to modify the terms and conditions, including tariffs and methodologies referred to in paragraphs 1, 2 and 3, to ensure that they are proportionate and applied in a non-discriminatory manner.

Article 25 Paragraph (5) states

Any party having a complaint against a transmission, LNG or distribution system operator with respect to the issues mentioned in paragraphs 1, 2 and 4 and in Article 19 may refer the complaint to the regulatory authority which, acting as dispute settlement authority, shall issue a decision within two months after receipt of the complaint. This period may be extended by two months where additional information is sought by the regulatory authorities. This period may be extended with the agreement of the complainant. Such a decision shall have binding effect unless and until overruled on appeal.

Article 25 Paragraph (6) states

Any party who is affected and who has a right to complain concerning a decision on methodologies taken pursuant to paragraphs 2, 3 or 4 or, where the regulatory authority has a duty to consult, concerning the proposed methodologies, may at the latest within two months, or a shorter time period as provide by Member States, following publication of the decision or proposal for a decision, submit a complaint for review. Such as complaint shall not have suspensive effect.

Article 19 states

Access to storage

1. For the organisation of access to storage facilities and linepack when technically and/or economically necessary for providing efficient access to the system for the supply of customers, as well as for the organisation of access to ancillary services, Member States may choose either or both of the procedures referred to in paragraphs 3 and 4. These procedures shall operate in accordance with objective, transparent and non-discriminatory criteria.

2. The provisions of paragraph 1 shall not apply to ancillary services and temporary storage that are related to LNG facilities and are necessary for the re-gaseification process and subsequent delivery to the transmission system.

3. In the case of negotiated access, Member States shall take the necessary measures for natural gas undertakings and eligible customers either inside or outside the territory covered by the interconnected system to be able to negotiate access to storage and linepack, when technically and/or economically necessary for providing efficient access to the system, as well as for the organisation of access to other ancillary services. The parties shall be obliged to negotiate access to storage, linepack and other ancillary services in good faith.

Contracts for access to storage, linepack and other ancillary services shall be negotiated with the relevant storage system operator or natural gas undertakings. Member States shall require storage system operators and natural gas undertakings to publish their main commercial conditions for the use of storage, linepack and other ancillary services within the first six months following implementation of this Directive and on an annual basis every year thereafter.

4. In the case of regulated access Member States shall take the necessary measures to give natural gas undertakings and eligible customers either inside or outside the territory covered by the interconnected system a right to access to storage, linepack and other ancillary services, on the basis of published tariffs and/or other terms and obligations for use of that storage and linepack, when technically and/or economically necessary for providing efficient access to the system, as well as for

the organisation of access to other ancillary services. This right of access for eligible customers may be given by enabling them to enter into supply contracts with competing natural gas undertakings other than the owner and/or operator of the system or a related undertaking.

Article 23 of Directive 2003/54/EC of the European Parliament and of the Council Concerning Common Rules for the Internal Market in Electricity

Article 23 Paragraph 25 (1) states

Regulatory authorities

1. Member States shall designate one or more competent bodies with the function of regulatory authorities. These authorities shall be wholly independent from the interests of the electricity industry. They shall, through the application of this Article, at least be responsible for ensuring non-discrimination, effective competition and the efficient functioning of the market, monitoring in particular:

- (a) the rules on the management and allocation of interconnection capacity, in conjunction with the regulatory authority or authorities of those Member States with which interconnection exists;
- (b) any mechanisms to deal with congested capacity within the national electricity system;
- (c) the time taken by transmission and distribution undertakings to make connections and repairs;
- (d) the publication of appropriate information by transmission and distribution system operators concerning interconnectors, grid usage and capacity allocation to interested parties, taking into account the need to treat non-aggregated information as commercially confidential;
- (e) the effective unbundling of accounts, as referred to in Article 19, to ensure that there are no cross-subsidies between generation, transmission, distribution and supply activities;
- (f) the terms, conditions and tariffs for connecting new producers of electricity to guarantee that these are objective, transparent and non-discriminatory, in particular taking full account of the costs and benefits of the various renewable energy sources technologies, distributed generation and combined heat and power;
- (g) the extent to which transmission and distribution system operators fulfil their tasks in accordance with Articles 9 and 14;
- (h) the level of transparency and competition.

The authorities established pursuant to this Article shall publish an annual report on the outcome of their monitoring activities referred to in points (a) to (h).

Article 23 Paragraph (2) states

2. The regulatory authorities shall be responsible for fixing or approving, prior to their entry into force, at least the methodologies used to calculate or establish the terms and conditions for:

- (a) connection and access to national networks, including transmission and distribution tariffs. These tariffs, or methodologies, shall allow the necessary investments in the networks to be carried out in a manner allowing these investments to ensure the viability of the networks;
- (b) the provision of balancing services.

Article 23 Paragraph (3) states

3. Notwithstanding paragraph 2, Member States may provide that the regulatory authorities shall submit, for formal decision, to the relevant body in the Member State the tariffs or at least the methodologies referred to in that paragraph as well as the modifications in paragraph 4. The relevant body shall, in such a case, have the power to either approve or reject a draft decision submitted by the regulatory authority. These tariffs or the methodologies or modifications thereto shall be published together with the decision on formal adoption. Any formal rejection of a draft decision shall also be published, including its justification.

Article 23 Paragraph (4) states

4. Regulatory authorities shall have the authority to require transmission and distribution system operators, if necessary, to modify the terms and conditions, tariffs, rules, mechanisms and methodologies referred to in paragraphs 1, 2 and 3, to ensure that they are proportionate and applied in a non-discriminatory manner.

Article 23 Paragraph (5) states

Any Party having a complaint against a transmission or distribution system operator with respect to the issues mentioned in paragraphs 1, 2 and 4 may refer the complaint to the regulatory authority which, acting as a dispute settlement authority, shall issue a decision within two months after receipt of the complaint. This period may be extended by two months after receipt of the complaint. This period may be extended by two months where additional information is sought by the regulatory authority. This period may be further extended with agreement of the complainant. Such a decision shall have binding effect unless and until overruled on appeal.

Where a complaint concerns connection tariffs for major new generation facilities, the two-month period may be extended by the regulatory authority.

Article 23 Paragraph (6) states:

Any party who is affected and who has a right to complain concerning a decision on methodologies taken pursuant to paragraphs 2, 3 or 4 or, where the regulatory authority has a duty to consult, concerning the proposed methodologies, may at the latest within two months, or a shorter time period as provide by Member States, following publication of the decision or proposal for a decision, submit a complaint for review. Such as complaint shall not have suspensive effect.