

## **On the payment of compensation by Enemalta Corporation for damages caused by power surges**

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### ***The complaint***

Complainant is claiming compensation from Enemalta for damages he suffered as a direct result of a power outage last June that seriously damaged the electrical installation in his residence. Enemalta is disclaiming any responsibility for the incident and payment of consequential damages.

### ***The facts***

1. This is one of a number of cases received by this Office claiming compensation from Enemalta for damages sustained as a result of power cuts, mostly to household electrical appliances and electronic equipment. In this case, when power was restored following the second power blackout in June, the surge was so overpowering that it melted half of the circuit cable of complainant's residence welding it to the piping system. Repairing the damage involved considerable expense because immediate action entailed breaking up the tile works or bypassing to install a new cable. When complainant requested some form of compensation for this damage, he was informed by Enemalta that the Corporation was unable to accept liability for any damage because "*that power cut on that date was totally beyond our control*". Enemalta maintains that it is disclaiming any liability "*in accordance with Enemalta's Act Section 14*".

2. This Office received a number of complaints against Enemalta claiming reimbursement of damages in similar, even if not analogous, circumstances. These cases include .....

### ***Enemalta's reaction***

3. Enemalta's defence in these cases is standard. It is summarised in its letter of 1 March 2010, sent by Mr Gotthard Tabone, Manager Policy and Industrial Relations, which is being fully reproduced hereunder since it sets out the Corporation's position. It follows my request to Enemalta to determine its policy in the light of the stand the European Union is taking for consumer protection in this area and measures being taken by competent authorities in other countries. The Corporation submitted as follows-

*“Reference is made to your letter dated 23<sup>rd</sup> February 2010, whereby the Ombudsman proposed the following action in order for Enemalta to deal more efficiently with damages caused by power surges:*

*‘ The Ombudsman has proposed the setting up of an independent board to examine cases where damages are incurred by power surges. It has also been suggested that the Corporation finds out what stand the European Union is taking and what measures are being adopted by the competent authorities in other countries in dealing with such cases.’*

*In the light of the above recommendation, Enemalta has carried out the following research.*

*Within the general framework of consumer complaints, in the EU there is currently a move to adopt a harmonised methodology of collecting complaints. The Commission has in fact launched a public consultation on the matter through COM (2009) 346 – **Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a harmonised methodology for classifying and reporting consumer complaints and enquiries**. The deadline for comments is 05/10/2009. After collecting and analysing feedback from the consultation, the Commission will recommend the final version of the methodology.*

*Then, within this framework, the Commission requested the European Regulators’ Group for Electricity and Gas (EREG) to develop recommendations on customer complaint collection, handling and reporting in the electricity and gas sectors. Furthermore, the 3<sup>rd</sup> Internal Energy Market Package, adopted by European Union on 13 July 2009, includes new provisions regarding customer protection, and in particular regarding customer complaint handling. As a result, the EREG has issued a **Draft Advice on Customer Complaint Handling, Reporting and Classification [Ref: E09-CEM-26-03, 17 September 2009]**. In this Advice, the EREG examined the procedures in nine countries and subsequently developed 15 draft recommendations on consumer complaint handling. The focus of these recommendations is on complaints regarding household customers. The nine case studies and the draft recommendations are attached to this Report.*

*One of the main provisions quoted in the Advice is Article 3 paragraph 13 of EC Directive 2009/72/EC concerning Common Rules for the Internal Market in Electricity. This states as follows:*

*'Member States shall ensure that an independent mechanism such as an energy ombudsman or a consumer body is in place for an efficient treatment of complaints and out-of-court dispute settlements.'*

*As a result, the Electricity Regulations (Subsidiary Legislation 423.33) provides the following 'Measures on consumer protection for household customers' in Schedule III:*

*'Without prejudice to any other law on consumer protection:*

*(a) Customers have a right to a contract with their electricity service provider that specifies:*

*(i) the identity and address of the supplier;*

*(ii) the services provided, the service quality levels offered, as well as the time for the initial connection;*

*(iii) if offered, the types of maintenance service offered;*

*(iv) the means by which up-to-date information on all applicable tariffs and maintenance charges may be obtained;*

*(v) the duration of the contract, the conditions for renewal and termination of services and of the contract, the existence of any right of withdrawal;*

*(vi) any compensation and the refund arrangements which apply if contracted service quality levels are not met; and*

*(vii) the method of initiating procedures for settlement of disputes.*

*In any case, this information should be provided prior to the conclusion or confirmation of the contract. Where contracts are concluded through intermediaries, the above information shall also be provided prior to the conclusion of the contract.'*

*Under Article 15(11) and Clause 1.3 of the Fourth Schedule of the Arbitration Act, all disputes arising from the supply of electricity, electrical meter rent or any other service provided by Enemalta Corporation are subject to mandatory arbitration. Furthermore, the Arbitration Tribunal enjoys exclusive jurisdiction in "all disputes arising from the supply of electricity, electrical meter rent or any other service provided by Enemalta Corporation."*

*Before the introduction of this system of mandatory arbitration by means of L.N. 165 of 2006, matters relating to damages caused by the provisions of an electricity supply were dealt with in various fora, for instance local courts and the consumer tribunal. Therefore, if this system is to be removed, it would once again lead to a situation of forum shopping which had existed prior to mandatory arbitration, and consequently, matters would actually take longer to be decided.*

*Therefore, the obligations stated under the Electricity Directive quoted above are satisfied through the system currently in force. Hence, it is not recommended that further remedies to the existing ones be introduced, particularly since the present remedy (mandatory arbitration) is being challenged in the Constitutional Court on the basis of breach of the right to fair hearing, and any amendments at this stage would send a signal that the Government/Corporation is conceding the said fact."*

### ***The investigation***

4. The Ombudsman has focussed his investigation on the principles involved, the measure of protection that consumers should be afforded and the mechanisms available to claim for redress when they have claims for damages against Enemalta in the circumstances under review. The Ombudsman considered that the merits of such claims against Enemalta are often bound to be of a technical nature that requires appreciation and determination by qualified, technical, competent professionals. It was for this reason that as a general comment the Ombudsman had preliminarily suggested to Enemalta that it should consider the setting up of an independent board to determine requests for payment of damages incurred as a result of power surges.

5. That proposal was made during meetings that the Ombudsman had with the Corporation and which were followed by a meeting with the Malta Resources Authority. Enemalta rejected the Ombudsman's suggestion in its letter dated 1 March 2010 reproduced above. Enemalta's submissions in that letter will form the basis of this Final Opinion that will not finally determine the merits of this and other similar cases. It will however establish what procedures should be put in place to adequately protect consumers who feel aggrieved by acts of maladministration by Enemalta.

### ***Considerations***

#### **Section 14 Subsection (2) paragraphs (a), (b), (c) of the Enemalta Act**

6. Enemalta is explicitly disclaiming any responsibility in this and similar cases on the strength of Section 14(2) paragraphs (a), (b), (c) of the Enemalta Act. There have been cases in the past when Enemalta took a different approach, more favourable to consumers. There were cases where compensation was deemed to be due and paid. In recent months however, there seems to have been a hardening of Enemalta's position, seeking protection and immunity on the strength of this Article to

exculpate itself *a priori* from any responsibility. This Section lays down:

*“(2)With respect to the supply of electrical energy by Enemalta, the following provisions shall have effect:*

*(a) Enemalta may reduce as it thinks fit the quantity of energy supplied to any consumer, if, by reason of any unforeseen circumstances beyond the control of the Corporation, it appears that the supply of electrical energy generated is insufficient to enable the full quantity to be conveniently supplied;*

*(b) where the quantity of energy supplied has been reduced as aforesaid no liability shall be incurred by Enemalta in respect of any loss or damage caused by such reduction;*

*(c) Enemalta shall not be liable for any damage to person or property or for any cessation of the supply of energy which may be due to unavoidable accident, fair wear and tear or overloading due to unauthorised connection of apparatus, or to the reasonable requirements of the electrical system, or to the defects in any electrical installation not provided by the Corporation.”*

#### Analysis of Section 14 (2) of the Enemalta Act

7. It should be noted –

a) This Section is an integral part of the Enemalta Act. It expresses the will of the legislator that Enemalta’s responsibility for loss or damage caused in the provision or supply of energy shall be determined within the stated parameters. Though the Ombudsman has the jurisdiction to declare that a provision of law is unjust or unreasonable, he should only do so with great circumspection and in cases where such unreasonableness or unjustness is univocal and manifest. A careful reading of the Article does not lead the Ombudsman to this conclusion.

b) However, blanket disclaimer regulations are not looked upon favourably by the Courts. It is established case law that such clauses in no way derogate from the general principle of law that every person should be held responsible for damages that result from his negligent action or inaction. Clauses purporting to exclude *a priori* responsibility for damage whatsoever the reason that causes it, like the oft quoted “*you travel at your own risk*”, have been judicially declared to be ineffective and non-binding on contracting parties. This, especially when the party disclaiming responsibility is a dominant public authority, enjoying a monopoly and

providing an essential service to the citizen who must necessarily acquire that service from it.

c) Clauses that attempt to limit rights enjoyed under general principles of law, whether through legislation or regulation, have to be interpreted restrictively. In applying such clauses it is the interpretation that is the less burdensome on the party whose rights are being limited that has to be favoured.

d) As stated, Enemalta maintains that in accordance with Section 14 subsection (2) of the Enemalta Act, it cannot be held liable for damages sustained by complainant. It maintains that the power cut on that day was beyond its control and therefore it cannot accept liability for any damage. Complainant submits that his "*claim is not for compensation due to non supply of energy but for damages caused as a direct result of Enemalta's negligence/incompetence when restoring power*". He submits that Section 14 is therefore irrelevant and inapplicable to his case. This submission could be applicable to a number of other complaints referred to above and considered by the Ombudsman.

8. A careful reading of Section 14 (2) shows that complainant is absolutely right in his interpretation of the Section. This does not necessarily mean that his complaint is justified. This remains to be seen when the merits of the case, including its technical aspects, are examined.

### **Interpreting Section 14 subsection 2**

9. An analysis of Section 14 shows that it is intended to authorise Enemalta to reduce, as it thinks fit, the quantity of energy supplied to any consumer. This it cannot do capriciously. It can only do so if this is "*by reason of any unforeseen circumstances*" beyond its control, that shows that the supply of electrical energy generated was insufficient to enable the full quantity to be conveniently supplied. The law provides that, if and when such a situation arises and Enemalta reduces the quantity of energy supplied, it would incur no liability in respect of any loss or damage caused by such reduction. Clearly, Enemalta would not be so liable if it can prove that there were unforeseen circumstances beyond its control that affected the generation of electrical energy. Such an exemption from liability was also extended to Enemalta in the case of any cessation on the supply of energy, which can be due to a number of determined circumstances. These are-

- a) unavoidable accident;
- b) fair wear and tear;
- c) overloading due to -
  - i) unauthorised connection of apparatus;

- ii) the reasonable requirements of the electrical system; or
- iii) the defects in any electrical installation not provided by the Corporation.

10. It is clear that the provision is intended to limit liability to the case of a *reduction* of energy supply or its *cessation*. It is also clear that the avoidance of liability is strictly related to the circumstances that are identified as being provoked either by circumstances beyond the supplier or by the actions of third parties, that is, the unauthorised connection of apparatus or defects in any electrical installation not provided by the Corporation. Nothing in this Section exempts the Corporation from liability in the case of damages that occur as a result of electricity being *supplied* to a consumer. It is presumed that the Corporation has full control on the manner in which the supply of electricity is restored and that its transmission mechanisms and cables are properly maintained and capable of ensuring a smooth and stable supply of electric current. In this respect the legislator did not consider it appropriate to interfere in the general provisions of law that regulate other contracts of service.

11. The restrictive interpretation that should be given to Section 14 does not allow that it be extended to apply to cases like those of complainant and others presently under review. These cases cannot therefore be summarily dismissed by Enemalta. One has to examine the merits of the case to establish whether there was any responsibility on Enemalta's part for the marked upsurge in the supply of electricity current when restored and the consequent damage, which is not apparently contested by the Corporation. It would be up to the Corporation to prove that there are circumstances that would be exonerate it at law from responsibility under the ordinary rules governing contracts. Once the damage is proven and its cause established, it would be incumbent on the Corporation to prove that it was not negligent, that it properly maintained the system supplying the electricity power and that due care and diligence was taken during the process when power was being restored. It would be up to the Corporation to prove satisfactorily these and other technical data needed to justify its actions. The appreciation of this data and other facts relevant to arrive at a just appraisal of whether Enemalta should be held liable for damages suffered, will be at the centre of any process determining a claim for damages by a consumer. It would also be central to any proceedings of alternative dispute resolution at whatever level of effectiveness, including a Final Opinion of the Ombudsman.

#### EU Directive 2009/72/EC

12. In the course of the investigation carried out, the Ombudsman has proposed the setting up of an independent board to examine cases where

damages are incurred as a result of power surges. At that time, he was not aware of developments taking place in this same area within the European Union. He had actually suggested that the Corporation finds out what stand the Union was taking, and what measures were being adopted by competent authorities in other countries when dealing with such cases. Subsequent investigation threw much light on this important area as is evidenced by the facts stated in Enemalta's letter of the 1 March 2010 reproduced above. The attention of the Ombudsman was focussed on Article 3 Paragraph 13 of EC Directive 2009/72/EC concerning common rules for the internal market in electricity which states as follows –

*“Member States shall ensure that an independent mechanism, such as an Energy Ombudsman or a Consumer Body, is in place for an efficient treatment of complaints and out of court dispute settlements”.*

13. When quoting this Article the Corporation rightly highlighted the words ‘independent mechanism’ and ‘an Energy Ombudsman or a Consumer Body’. There is not as yet a harmonised methodology for reporting and classifying consumer complaints on a cross-sectoral basis around the European Union. Enemalta Corporation is fully aware that developments are taking place within the Union in this respect to fine tune recommendations on complaint handling as well as proposals for complaints classification.

14. This is a technical field in which the Ombudsman will tread very carefully. He limits himself to referring to the public consultation on the Draft advice on Customer Complaint Handling Reporting and Classification, prepared by the European Regulators Group for Electricity and Gas (ERGEG), (Ref: E09/CEM/26/03 dated 17 September 2009) to which reference was made by Enemalta –

*“The 3<sup>rd</sup> Internal Energy Market Package, adopted by European Union on 13 July 2009, includes new provisions on customer protection, and in particular regarding customer complaint handling. Member States are invited to set up new protections for household customers among which:*

- *Single points of contact to provide information on their rights;*
- *Information on bills about the means of dispute settlement;*
- ***Creation of independent mechanisms for the treatment of complaints and disputes; [my bold]***
- *Financial compensation for customers;*
- *Complaint Monitoring.”*

*ERGEG's draft advice ... aims to provide Member States and national regulators with an input on how to translate these new legal provisions into operational modalities".*

15. Among the main recommendations made in this authoritative report there are the following –

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- *Customers should be able to choose between various channels to submit a complaint;*
- *Alternative dispute settlement should be made available for all household customers, preferably without charge or as inexpensively as possible, irrespective of the financial amount of the dispute;*
- *Statutory complaint handling standards for the energy sector should be in place including:*
  - *Written complaint handling procedures (within supplier and third parties) should be available to all customers;*
  - *Information on the alternative dispute settlement body should be provided with the first acknowledgment of a complaint;*
  - *The use of a common complaint classification would permit national regulatory authorities (NRAs) that wish to do so, to make comparison between suppliers' quality of service performances;*
  - *Final answer from a service provider should be issued as soon as possible and preferably within two months.*
- *Redress schemes should be in place to allow for compensation in defined cases; ....”*

#### No uniform means of redress

16. The study on which the ERGEG report is based shows clearly that there is no uniformity in the systems chosen by different countries to provide out of court settlement of claims by consumers on the level of service provided by suppliers, both regarding billing and also in regards to claims for damages resulting from faulty service. Each country has chosen its own path. There is however one common factor. Procedures always provide for out of court consideration of claims that is intended to culminate either in an amicable settlement of the claim or its determination, generally leaving recourse to Court action as a final option of last resort open to the parties. This information is very revealing in so far as it shows how other members of the European Union have reacted to the implementation of the EC Directive and also how this compares to its implementation by Enemalta through the Electricity Regulations (Subsidiary Legislation 423.33) reproduced in the Corporation's letter of 1 March 2010.

Appendix 1 attached to this report summarises the systems of customer protection mechanisms in nine countries chosen by ERGEG. This background information is being provided to illustrate how customer protection in Europe is developing and the positive change of mentality towards an effective system of alternative dispute resolution of claims to encourage out of court settlement. The full text of the document can be accessed at <http://www.energy-regulators.eu/portal/>.

### Enemalta's position is unsatisfactory

17. It is my opinion that if the Electricity Regulations (Subsidiary Legislation 423.33) are meant to satisfy the requirements of EU Directive 2009/72/EC concerning common rules for the internal market in electricity, the Corporation's stand is wholly unsatisfactory. While the regulations provide that consumers have a right to a contract that specifies "*any compensation and the refund arrangements which apply if contracted service quality levels are not met*", it only specifies that consumers were to be informed of "*the method of initiating procedures for settlement of disputes*". Nowhere do the regulations state that this method has to be provided through an independent mechanism, such as an Energy Ombudsman or a consumer body, that is in place for an efficient treatment of complaints and out of court dispute settlements. The letter and spirit of the Directive explicitly require that Member States should ensure that –

- a) a mechanism **independent of the energy service provider** has to be permanently in place;
- b) such a mechanism has to be **extraneous to the Court**;
- c) it should be capable of **effectively treating** complaints and **settling disputes**; and
- d) it should have the **characteristics** of an Energy Ombudsman or consumer body or the like.

The EU Directive therefore requires that Member States should put in place independent mechanisms that can quickly, cheaply and efficiently investigate complaints and recommend redress. The service provider will be expected to implement recommendations made to rectify injustices and provide redress also in the form of compensation or refund if it results that the contractual service quality levels are not met. The essential element to be ensured when setting up such mechanisms is that they should not be judicial in nature. The Directive specifically provides that disputes have to be settled out of court.

### Compulsory Arbitration

18. Enemalta maintains that the independent mechanism required by the Directive is satisfied through the provision of Section 15(11) and Clause 1.3 of the Fourth Schedule of the Arbitration Act which requires that all disputes arising from the supply of electricity, electrical meter rent or any other service provided by Enemalta Corporation are subject to mandatory arbitration. It submits that the Arbitration Tribunal enjoys exclusive jurisdiction in "*all disputes arising from the supply of electricity, electrical meter rent or any other service provided by Enemalta Corporation*". By implication it is insisting that all claims by consumers, including those for damages resulting from power surges, can only be determined by the Arbitration Tribunal. Management is insisting that it need not, and indeed should not justify the Corporation's actions in defence of the claims made, since this could prejudice their case before the Arbitration Tribunal. There have been occasions where Enemalta explicitly took this line of defence, substantially claiming that the Ombudsman had no jurisdiction to investigate claims since this could only be determined by the Arbitration Tribunal. A position, which is in my view, completely untenable.

#### Mandatory Arbitration

19. I will not enter into the merits of the issue whether mandatory arbitration as a means of determining civil rights and obligations, is constitutionally correct or not. This matter is being challenged before the Constitutional Court on the grounds that it violates Article 6 of the European Convention of Human Rights that guarantees the right to a fair hearing. This issue is not directly relevant to the merits of this opinion. It is my view, however, that mandatory arbitration is by definition a judicial process since both Enemalta and the consumer are bound by law to submit themselves to the jurisdiction of the Tribunal and they are bound to abide by its award that has the force at law of an executive title, like any other judgement of the Courts. The decision of the Tribunal is final and it can only be appealed, in certain specified cases, before the Court of Appeal.

Mandatory arbitration is costly, time consuming, confrontational and adversarial. It is an exercise to determine rights and obligations. It is a judicial process and it certainly is not a process before an independent body to attempt to reach an out of court settlement. Mandatory arbitration is certainly not meant to identify administrative failings that the Corporation should be prepared to readily acknowledge and promptly remedy, irrespectively of whether it was legally bound to do so. Enemalta seems to be missing the main thrust of the EU Directive that aims at ensuring that customers are treated fairly and with respect, that they are given their due when they suffer damage as a result of administrative

failings and that such redress should be given readily and without undue delay or unnecessary cost.

### Alternative Dispute Resolution

20. Methods of alternative dispute resolution are today acknowledged tools to ensure an efficient and transparent public administration. Corporations providing a service should be accountable for their actions. They should be prepared to reimburse customers for damages suffered through negligent actions or inaction, undue delay or outright inefficiency. In short, public authorities should be prepared to submit themselves to an independent enquiry into the way their service is provided, to abide by the findings of such enquiry, to apologise for failings or discomfort caused and to provide adequate and prompt compensation when this is required, irrespective of the cost. It is about time that public authorities and corporations in Malta recognise this new culture that has thankfully taken root in the European Union and that is finding its way in the public administration and sanctioned by the case law of our Courts.

The Ombudsman institution is a positive manifestation of this culture. Other regulatory bodies, on a national basis, serve the same purpose and propagate the same salutary administrative law principles.

### EC Directive not satisfied

21. These considerations lead the Ombudsman to the conviction that the stand taken by the Corporation, that statutory referral to mandatory arbitration satisfies the requirements of the obligations imposed by the Electricity Directive, is not correct. Nor could it be validly argued that customers have the possibility of referring their claim to a Consumer Tribunal, because the Arbitration Act gives the Arbitration Tribunal exclusive jurisdiction on disputes arising on the supply of electricity, electrical meter rent or any other service provided by Enemalta Corporation. Any claim filed before a Consumer Tribunal would automatically be thrown out because of this jurisdiction clause.

### The Malta Resources Authority

22. It would appear that the same objection could presumably be raised in the case of a consumer who refers his complaint to the Malta Resources Authority. Technically speaking the exclusive jurisdiction clause in the Arbitration Act could be pleaded in an attempt to divest the Malta Resources Authority from its function to protect consumers in this area. The clause in the Arbitration Act was enacted after the Malta Resources Authority Act came into force as Act XXV of the year 2000 (Chapter 423 of

the laws of Malta). It is a special provision that superseded and has precedence over the general provisions of the Malta Resources Authority Act. There is however one basic essential difference that distinguishes this Authority from judicial or quasi-judicial bodies. It is not a tribunal established by law.

### The functions of the Malta Resources Authority

23. This Office is aware that the Malta Resources Authority has in the past considered and decided claims by consumers against Enemalta Corporation on various aspects of its administration, including damages resulting from power surges.

It is informed that the Malta Resources Authority has the technical competence and structures to investigate power cut accidents, to establish their cause and identify responsibility. Malta Resources Authority actually investigates every power cut within the normal course of its operations. While it is acknowledged that the Malta Resources Authority has a very wide remit of regulatory functions regarding resources relating to water, energy and mineral resources and that its functions include the duty to regulate, monitor and keep under review all practices, operations and activities relating to these areas of economic activity, it is clear from a careful reading of the Act, that Consumer Protection has to be one of the main objectives of the Authority. There are a number of provisions in the Act that refer to consumer protection. It is enough for the purpose of this opinion to highlight paragraphs (p) and (q) of Section 4(1) of the Act that outlines the functions of the Authority. These provide that it shall be the function of the Authority to:

*“p) promote the interests of consumers and other users in Malta, particularly vulnerable consumers, especially in respect of the prices charged for, and the quality and variety of the services and, or products regulated by or under this Act;*

*q) to determine disputes in relation to matters regulated by or under this Act.”*

24. Apart from its general regulatory and advisory functions on the wider plane of general policy and price control, the Authority is therefore also charged with the specific duty of protecting consumers and determining disputes between consumers and service providers. The Act also provides for mechanisms of review of decisions taken by the Malta Resources Authority. An appeal from them lies in certain cases to the Resources Appeals Board, when it is alleged that there was a material error as to fact or law or that the rules of due process were not correctly

observed or when there was some material illegality, including unreasonableness or lack of proportionality.

25. The Act further provides that any person who feels aggrieved by the decision of the Appeals Board or the Authority itself, may appeal to the Court of Appeal on a question of law. It is not immediately clear to what extent the service provider, in this case Enemalta Corporation, is obliged by the Act to comply with the decisions of the Malta Resources Authority on individual complaints or whether it can, even in this forum, contest the claim and insist on referral to mandatory arbitration. It would also appear that the procedure to be followed before the Appeals Board still has to be fine-tuned and regulations have to be made regarding the form in which an appeal is to be lodged and the time limits to be observed.

These considerations lead the Ombudsman to the conviction that the complaints procedure established under the Malta Resources Authority Act would satisfy the requirements of EU Directive 2009/72/EC. It is an independent mechanism that is in place for an efficient treatment of complaints and out of court dispute settlement.

It is a mechanism that is operated by an Authority that has the technical know-how, that is in a position to establish facts relevant to the determination of the complaint and that, given adequate human resources, should provide a speedy, efficient, fair, equitable and out of court resolution of complaints at minimal costs. If it is well managed, the system should be acceptable to Enemalta Corporation in that it would provide adequate protection to its consumers.

### ***Conclusion***

26. Leaving aside the thorny issue of mandatory arbitration and the judicial determination of claims of consumers against Enemalta, it is the Ombudsman's opinion that the surest and safest way in which to satisfy the requirements of EU Directive 2009/72/EC is to strengthen the structures of the Malta Resources Authority in its important role as an effective tool in consumer protection in this vital area.

27. Having established that mandatory arbitration can only be equated to court proceedings and cannot be considered to be a mechanism for an efficient treatment of complaints and out of court dispute settlement, the solution rests with utilising existing structures within the Malta Resources Authority, rather than with the creation of yet another Consumer Body or Energy Ombudsman. As stated, the MRA has the technical know-how and competence to identify whether Enemalta Corporation has to assume liability for damages claimed by the consumer.

It is incumbent on the Corporation to declare its readiness to accept, as a matter of principle, the reasoned decision of the Malta Resources Authority on whether a consumer's claim that the service provider was responsible for the damages he suffered is justified.

If, following that decision, the consumer and Enemalta fail to reach agreement on the quantum of damages due, that matter could be referred to **voluntary** arbitration to which both Enemalta and the consumer would have preventively subscribed.

### ***Recommendations***

28. In the light of these considerations the Ombudsman recommends that:

i) The Malta Resources Authority and Enemalta Corporation should within the limits of their respective competences, revisit the provisions of EU Directive 2009/72/EC with a view to ensuring that the review of the complaints mechanism of the Authority is strengthened and rendered more effective for out of court settlement of disputes. This review should also undertake a fine tuning of the regulations necessary to render the process undertaken by the Malta Resources Authority effective through all stages, including procedures before the Appeals Board;

ii) Both the consumer who opts to have recourse to the Malta Resources Authority and Enemalta bind themselves to abide by the decision of the Authority on whether Enemalta is to be held responsible for the damages claimed by the consumer. They should also undertake that, if no agreement is subsequently reached on the quantum of damages, that matter should be referred to voluntary arbitration. The liquidation of damages often entails complex legal issues that would be outside the remit of the Authority and that, in case of disagreement, should best be left to a competent arbitral tribunal specifically chosen for the purpose;

iii) It is recommended that a protocol or agreement setting out the procedures to be followed when considering consumers claims, be entered into between the Malta Resources Authority and Enemalta Corporation; and

iv) Complaints arising from the supply of electricity, electrical meter rent or any other service provided by Enemalta Corporation received by the Parliamentary Ombudsman, should in the first place, be referred to the Malta Resources Authority for investigation and determination.

Meanwhile, it has been agreed with the Malta Resources Authority that this and other complaints of a similar nature presently pending before the Parliamentary Ombudsman are to be referred to it for investigation, on a trial basis, in anticipation of a favourable response by the competent authorities to the recommendations made in this Final Opinion.

Finally, the attention is drawn to all complainants that they should take appropriate steps to ensure that their rights of action to have their claims judicially determined are properly safeguarded against the running of prescriptive periods.

**J Said Pullicino**  
**Ombudsman**

**11 August 2010**

## APPENDIX 1

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Customer complaints are considered a top-level indicator, which can contribute to monitoring markets from a customer perspective and identifying market malfunctioning.

As part of the European Union's initiative to monitor the performance of markets from a customer perspective and identifying market malfunctioning in the electricity and gas sector, the European Commission requested the European Regulator's Group for Electricity and Gas (EREG) to develop recommendations on customer complaint collection, handling and reporting in the sector. This is so because customer complaints are one of the top-level indicators for screening markets, regarding economic or social outcomes for customers and identifying where intervention may be needed.

To design these draft recommendations aiming at providing a set of best practices, nine (9) energy regulators, with relevant experience on how to handle customer complaints, shared their experiences and good practices and developed a case study which was then attached to EREG's report. These regulators came from the following countries – Austria, France, Italy, Poland, Romania, Spain, Sweden, the Netherlands and the United Kingdom.

EREG then issued a Draft Advice on Customer Complaint Handling, Reporting and Classification<sup>1</sup>.

The following is a summary of the examination of the systems adopted in the nine countries chosen by EREG.

### **1. Austria**

E-Control has a legal mandate to implement an Alternative Dispute resolution Board (ADR) and has also established an 'Energy Hotline' where customers may receive information and advice.

Although about 80% of complaints and inquiries are solved at the Energy Hotline, the other cases are transferred to the ADR Board which negotiates with the customer and the supplier to reach a mutually agreed solution for both parties involved. If this is not sorted then an official ADR procedure can be initiated.

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<sup>1</sup> E09-CEM-26-03 – 17/09/2009

The solutions of the ADR are only suggestions to both parties and are not binding and either party may go to Court if it is not satisfied with the outcome of the ADR procedure.

## **2. France**

The breakdown of responsibilities for customer complaints/inquiries on electricity is the following –

- The General Directorate for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF – Ministry for the Economy) takes care of infringements of legal obligations before contracting;
- The Energy Ombudsman is responsible if the complaint is related to contractual obligations;
- NRA has jurisdiction if the complaint is related to access to the grid.

The outcome of the Ombudsman's complaint handling is a non-binding written recommendation to the parties (the supplier and/or DSO and the customer). Each part may go to court if dissatisfied with the recommendation and even before the end of the dispute settlement.

## **3. Italy**

The Italian regulatory authority for Electricity and Gas, AEEG is entrusted with the function of evaluating complaints, appeals and reports from users or consumers, individually or as a body, related to quality standards and tariffs by energy operators.

The complaint settlement procedure is divided in two parts –

- Initially the Authority can request information and relevant documents from the supplier;
- If the case is not settled, proceedings could follow where the authority can even impose fines on the supplier when it is not abiding with regulations.

The Regulator however, cannot prescribe compensation for damages – these can only be ordered by a Court.

The major suppliers are developing ADR procedures in agreement with consumer associations.

## **4. The Netherlands**

In terms of Dutch energy law, suppliers and operators are responsible for having an internal dispute resolution procedure – but legislation does not define what the dispute resolution procedure should look like, nor is there

an obligation to use a mandatory uniform definition. Consequently, the company can determine when a complaint is a complaint and in what way it is to be dealt with. However, once the institution has given a decision with which a customer disagrees, a complaint can be filed with an independent dispute settlement body which, in almost all cases, is the *Stichting Geschillen Commissie*. Alternatively consumers can go to Court. In both cases the decision is binding.

## **5. Poland**

Polish energy consumers can address their complaints to the energy sector supplier or operator they have a contractual relationship with and if they are unsatisfied they can present a case to a third party body.

Where a customer is not satisfied with a company's procedure of handling a complaint – e.g. if a discount or compensation is not granted to the customer – a court of law is the body competent to resolve the dispute.

Since there is no clear division of responsibilities for customer inquiries/complaints customers may refer to the Regulator, or a local Consumer Ombudsman or consumer organisations (governmental or NGO's).

The Energy Consumer's Ombudsman deals with the majority of complaints/inquiries and its opinions are not legally binding.

The Regulator's decision finalising a dispute is final, but each party has a right to appeal to a court.

There is no Alternative Dispute Resolution board dedicated to energy consumers.

## **6. Romania**

The treatment of petitions is regulated by a variety of laws, government decrees and subsidiary legislation, and petitions regarding electricity supply services can be addressed to one of various institutions –

- The Romanian Government
- The Ministry of Economy
- The Agency for Consumer Protection Rights
- The national Energy Regulatory Authority (ANRE)
- The state local authorities (Municipalities)
- The Ombudsman
- The Competition Council

- The National Customer Protection Authority
- The electricity or gas companies that provide the service
- The customers' non governmental associations.

The breakdown of responsibilities amongst these bodies is not easy to define.

The service provider is required to have an internal complaint handling procedure and pre-contractual dispute solving procedure.

There is no alternative settlement body.

## **7. Spain**

Here, the Autonomous Communities (Energy and Consumption Directorates) are responsible for customer complaints or inquiries related to electricity supplies, such as quality servicing, invoicing, inspections, charges etc. Nevertheless the National Energy Commission (CNE) watches over Spanish energy consumers.

The CNE collects and sends complaints and inquiries to the Autonomous Communities if they are responsible for the subjects concerned and informs the consumer on the applicable legislation and that it has forwarded his complaint to the region where the point of supply is located. CNE has the responsibility to resolve disputes related to third party access.

Each Autonomous Community is independent and has its own dispute resolution procedure. The parties have to adopt the solution proposed - but have the right to go to Court.

A voluntary procedure (arbitration) exists to resolve conflicts between consumers and suppliers but no supplier has as yet decided to join the procedure.

## **8. Sweden**

In Sweden there are several third party bodies that can be involved in customer complaints/inquiries depending on the issue.

- The National Body for Consumer Complaints is a public authority that functions roughly like a court. Its main task is to impartially try disputes between consumers and companies, provided these have not already been dealt with in Court. Petitions are filed by the consumer. Its decisions are not binding but the majority of the

companies nonetheless follow them. Companies that do not follow the board's recommendations get blacklisted.

- The Energy Markets Inspectorate (EI) provides information and handles some disputes (e.g. metering and electricity quality, network connection).

The larger energy companies also have a complaint handling mechanism called the Energy Ombudsman and customers who are unhappy with an issue can turn to the Ombudsman within the company to have the issue dealt with again. If the customer still remains unsatisfied, he can turn to the National Body for Consumer Complaints.

It is not compulsory for a customer who wishes to complain to any third party body, to first refer his complaint to his supplier or operator, although this is always suggested to the customer.

## **9. UK (England, Scotland and Wales)**

As of October 2008 a new complaint handling procedure was set up in terms of the Consumer, Estate Agents and Redress Act of 2007 for the energy sector.

This process involves the following third party bodies with specific responsibilities –

- Consumer Direct – a helpline giving advice on consumer rights and signposting how and where to make a complaint. It can also refer complainants directly to the companies;
- Consumer Focus – a referral body for vulnerable customer complaints and disconnection cases;
- Energy Ombudsman – a backstop for unresolved complaints whose ruling is binding on the energy company but not on the customer who may seek further redress through the courts. However, before this office deals with the complaint, it is necessary that it had been submitted to the company, except in the case of vulnerable customers or when the complaint is regarding disconnection, in which case Consumer Focus may deal directly with the energy company on behalf of the customer.

Energy supply companies and network operators are required to be a member of the statutory redress scheme (the Ombudsman), which can award compensation up to £5000 payable by the energy company. This

institution is also funded by the energy industry through the payment of a membership fee and fees per case.

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