



Lessons learned in unbundling and certification

Experiences and views of a compliance officer and advisor

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Aims and Realities

Unbundling Aims

Ensure confidentiality of sensitive commercial information of network users

No influence of affiliated suppliers in capacity allocation by TSO

Reduction of barriers of third party access to capacity

Reduction of limitations placed on investment into development and expansion of network

Market Realities

Greater market transparency

Limited influence on capacity allocation through NC CAM and allocation platforms (e.g. PRISMA)

Reducing interest in capacity bookings

Challenge to validity of own capacity bookings by network users

Investment incentives under tariff regulation are key driver; non supply affiliated shareholders have also commercial incentives and considerations to limit available capacity

Certification Conditions

- There are good reasons for the final say by the relevant NRA
 - Knowledge of the local market that colour the unbundling aims in relation to the specific TSO in question
 - Choice of implementation measures that the NRA can actively supervise
 - Combination of unbundling structures with tariff regulation
- Findings of non-compliance do usually not give sufficient guidance on how a structure could be made compliant
- All ITO and ISO certifications usually require further steps to be taken
 - TSOs usually face a 'chicken and egg' problem on structure
 - Some concerns are only identified during unbundling process
 - Unbundling processes take usually more time than the certification process
 - Balance between an existing structure capable of ITO or ISO compliance and conditions to be place to bring TSO in full compliance

Certification Conditions

- Examples of conditions:
 - The TSO no longer receives services from related entities which have connections to upstream activities
 - The TSO is contracting partner on all insurance agreements, as opposed to parent company which may have interests in other sections of the energy value chain
 - The TSO must demonstrate that it has civil law ownership over all infrastructure
 - The TSO must demonstrate that it possesses the necessary personnel to fulfil its obligations
 - The TSO has its own legal and accountancy departments
 - The TSO has an employee equal treatment programme (as required under national law)

Third Country Owners

- If certification requested by transmission system owners/operators from non-EU/EnC "third" countries, certification may be granted under a number of conditions:
 - TSO must comply with unbundling provisions
 - Security of energy supply will not be put at risk by certification. NRA must consider:
 - Rights and obligations of EnC with respect to that third country arising under international law,
 - Rights and obligations of the EnC Contracting Party with respect to that third country arising under international law,
 - Rights and obligations arising from association/trade agreements between EU and EnC Contracting Party, and
 - Other specific facts and circumstances of the case and third country involved
- For Energy Community, recent consideration in Yugorosgaz decision

State-owned Entities

- Article 345 TFEU: "*The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.*"
- Article 9(6) of Directives 2009/72/EC and 2009/73/EC: if TSO and generation/supply operations are controlled by "*two separate public bodies*", ownership unbundling requirement satisfied
- The Commission recognises State ownership of entities under the Treaty on the Functioning of the European Union (TFEU)
- However potential conflict of interest where state is both owner/operator of transmission systems and NRA or generator/supplier - how can these two bodies be separated?
 - Sufficient degree of separation (legal, political and budgetary independence from one another, including from Head of Government)
 - Safeguards to prevent influence and discriminatory behaviour from other public body

State-owned Entities

- Examples of cases where Commission decided on unbundling of State-owned entities:
 - Energienet.dk
 - Vorarlberger Übertragungsnetze
 - Svenska Kraftnat
 - ČEPS
 - Augstsprieguma tīkls (AST)
 - Terna
 - TenneT and GTS
 - Lietuvos Dujos and LitGas
 - SEPS

Financial Investors

- The European Commission produced a working document on Ownership Unbundling in 2013, "*The Commission's practice in assessing the presence of a conflict of interest including in case of financial investors*"
- Key issue in certification is the removal of any conflict of interest between generators/producers, suppliers and TSOs
- Particular issue where participations are held by financial investors
 - Advantage in that funding is provided for TSO infrastructure development and/or expansion
 - Despite potential violation of unbundling rules, where there is no incentive for investor to favour interests in generation, production and/or supply to detriment of other network users, deemed to be no conflict of interest
 - The "*Commission has taken the view that a refusal to certify such a TSO given the fact that such participation in generation, production and/or supply activities does not lead to a situation which the unbundling rules seek to prevent*"

Financial Investors

- Swedegas (Swedish gas TSO)
 - Ultimate controller of Swedegas also controlled waste disposal company generating electricity in neighbouring Denmark
 - Held that this was not a conflict of interest, as electricity generation was a by-product of the undertaking
- 50 Hertz Transmission (German electricity TSO)
 - Financial investor with controlling participation had non-controlling participation in Dalkia Polska, a Polish heat provider which generated electricity as a by-product
 - German NRA: was there incentive for investor to favour interests in Dalkia Polska or to discriminate against competitors?
 - Held that this was not a conflict of interest

Financial Investors

- Società Gasdotti Italia (SGI, Italian gas TSO)
 - Financial investor additionally had participations in:
 - Two solar companies in Spain – however, interfacing between Italy and Spain limited, thus held not to be a conflict of interest
 - Waste management company in UK with two small electricity generators – geographical distance between UK generators and SGI's gas network prevented discrimination, thus held not to be a conflict of interest
 - Waste management company in Italy which produced electricity as a by-product – however, small size of generators, regulated price of electricity sold, and distance between generators and SGI gas network prevented discrimination, thus held not to be a conflict of interest

For further questions, please contact:



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