

NOTE OF DG ENERGY & TRANSPORT ON DIRECTIVES 2003/54/EC AND 2003/55/EC ON THE INTERNAL MARKET IN ELECTRICITY AND NATURAL GAS

THE UNBUNDLING REGIME

ORIGINAL TEXT

PROPOSED CHANGES

4.3.1 Basic Principles

All commercial and operational decisions related to the operation, maintenance and development of the network must be made within the network business, without involvement of the related supply business or holding company of the integrated company.

*All commercial and operational decisions related to the operation, maintenance and development of the network must be made within the network business, without involvement of the related supply business or holding company of the integrated company **provided that they are within the scope of the annual financial plan or equivalent instrument.***

Comment: This safeguards the legitimate interest of the parent company.

4.3.3 Supervision Rights of the Parent Company

As regards the composition of the supervisory board of the network company, at least two members should ideally be independent from the interests of the mother company.

Nothing is said in the Directive as regards the composition of the supervisory board of the network company, but in order to demonstrate compliance with Article 13.2c on independent decision-making, at least two members should ideally be independent from the interests of the mother company although this is not an absolute requirement.

Comment: The way the paragraph is drafted could imply that the Directive refers to the composition of the supervisory board.

4.4 Compliance Programme

4.4.1 Contents of the Compliance Programme

It shall also refer to the penalties imposed under national legislation in case of non-respect of confidentiality rules contained in the Directive.

*It shall also refer to the ~~penalties~~ **appropriate measures** imposed under national legislation in case of non-respect of confidentiality rules contained in the Directive replace with*

Measures intended to exclude discrimination would also encompass prohibitions, or limitations, of access for personnel not involved in the network business to the network operator's premises, or part of it, and – most importantly- access to systems for the recording, processing or storage of sensitive data.

Measures intended to exclude discrimination would also encompass prohibitions, ~~or limitations~~, of access for personnel not involved in the network business ~~to the network operators premises or part of it, and – most importantly – access to systems for the recording, processing or storage of sensitive data~~ to commercially sensitive information.

Comment: This is less draconian and prescriptive, but still makes explicit that personnel not involved in the network business should not be given access to any parts of the network business where such personnel could gain access to sensitive information.

This could clearly include the network business, network billing and user account management.

4.4.2 Enforcement of the compliance programme

Such policies should consist, inter-alia, of the following elements.

*Delete. **Replace with It is the responsibility of System Operators to implement the compliance programme in line with the criteria of national legislation which implements the Directive but they could consist inter alia of the following elements.***

Comment: While elements listed by the Commission may be appropriate requirements of an effective compliance programme ultimately system operators should decide.

4.7 Implementation of the rules on functional unbundling into national law

The provisions of the directive on functional unbundling need further specification, at Member State level, in order to be fully operational in practice.

*The provisions of the Directive on functional unbundling **might** need further ~~specification~~ clarification*

Comment: Member States have the responsibility for implementing and they will have to decide whether or not further clarification is needed.

Specify the functional unbundling requirements in the license for network operators.

***Where a license system exists**, specify the functional unbundling requirements in the license for network operators.*

Comment: The Directive does not require licences.

5.2 Application in practice – Two basic scenarios

5.2.1 Distribution and supply/generation are done in one single company

In such a case of a single legal entity the application of the 100.000 rule is straightforward: If the undertaking has less than 100.000 customers, i.e. if less than 100.000 customers are connected to the distribution network of the undertaking in question, an exemption is possible, in which case the company can continue to operate the network and supply/generation within the same legal entity. In contrast, if the number of customers is above 100.000, a separate network company has to be created.”

In such a case of a single legal entity the application of the 100.000 rule is straightforward: If the undertaking has less than 100.000 customers, i.e. if less than 100.000 customers are connected to the distribution network of the undertaking in question, an exemption is possible, in which case the company can continue to operate the network and supply/generation within the same legal entity. **In deciding whether or not companies are exempt from a particular form of unbundling Member States should take care that the resultant decision is taken in a non-discriminating way and the consequences do not distort market opening.** In contrast, if the number of customers is above 100.000, a separate network company has to be created.”

Comment: It is important that the discretion which Member States have on this point is exercised with due regard for market consequences.

Furthermore, Member States shall normally opt for a differentiated approach and not systematically exempt all smaller DSOs from both legal and functional unbundling. A gradual approach would foresee for the “bigger” small DSO an exemption from legal unbundling, while maintaining functional unbundling, or at least certain elements of functional unbundling.

*Furthermore, Member States ~~shall normally opt~~ **could differentiate approach** and not systematically exempt all smaller DSOs from both legal and functional unbundling. A gradual approach would foresee for the “bigger” small DSO an exemption from legal unbundling, while maintaining functional unbundling, or at least certain elements of functional unbundling.*

Comment: DG TREN cannot foretell the actions of Member States.