

**European Regulators Group  
for Electricity and Gas**

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Brussels, 6<sup>th</sup> July 2007  
GG/JL/nh

Dear Madam,  
Dear Sir,

Effective unbundling is a fundamental pre-requisite for well-functioning gas and electricity markets. Preventing conflicts of interest between regulated and competitive activities, it is a means of removing the risk of privileged treatment by the network operators of those generation and supply businesses that form part of an integrated electricity undertaking through efficient managerial and informational separation of activities. In particular, it can prevent cross-subsidisation and preferential access to both networks and network-related information that could favour these competitive businesses affiliated to the network operator.

Overall, EURELECTRIC agrees with ERGEG on the risks associated with ineffective unbundling as outlined in the introduction of the draft guidelines<sup>1</sup> and reiterates that Directive 2003/54/EC, when properly implemented and enforced at national level, should appropriately address these concerns<sup>2</sup>. The Directive has found the correct balance, allowing companies to retain ownership of their networks while putting in place strict rules to ensure the independence of network operators in relation to the networks they operate, maintain or develop. This can be clearly shown in some markets where implementation of the EU unbundling requirements, well monitored through clear compliance programmes, has proven to be effective and sufficient.

Accordingly, we believe that the guidelines should stay within the scope of the existing EU legislation on unbundling and, as an implementation tool, propose “an appropriate way to realise functional unbundling under the **present** legal framework”.

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<sup>1</sup> See pp.5 & 6.

<sup>2</sup> A coherent set of rules both in terms of company structure and regulatory supervision is enshrined in the Directive in relation to unbundling. Companies are requested to ensure the separation and independence of their network management from generation and supply and to adopt a compliance programme while regulators have the authority to control application of unbundling provisions and to act as dispute settlement bodies in case of disputes on possibly discriminatory network access terms and conditions.

We acknowledge ERGEG's intention to bring the clear but rather general terms of Directive 2003/54/EC to a more detailed meaning and to provide guidance to regulators on how to implement them in practical terms. However, proposing in very prescriptive terms the implementation through national or EU corporate governance codes of rules that go well beyond the scope of the Directive is not appropriate and would not be proportionate to the goals of unbundling.

Furthermore, the draft guidelines should provide useful options and ideas to the national regulators on how to interpret the unbundling requirements instead of being as prescriptive as proposed by ERGEG. It is important to balance the detailed unbundling measures with the overall regulatory framework applicable in each market as the cost and benefits of each specific measure (or guideline) are likely to be different for each Member State and for transmission and distribution.

Fundamentally, EURELECTRIC believes that the key to effective unbundling of network operators under the present EU regulatory framework is a robust compliance programme within each network business. The compliance programme, an essential part of which must be clear procedures for the appropriate handling of commercially sensitive information, is the most appropriate means to strengthen the culture of unbundling of integrated electricity companies.

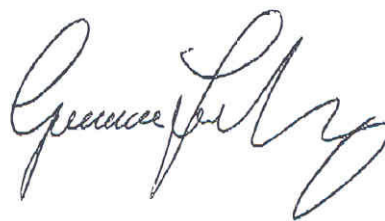
In view of all these elements, we want to make clear that our comments, and the ERGEG guidelines, only relate to the current EU legislation for functional and informational unbundling (Directive 2003/54/EC). They do not apply to possible further developments of the EU legislation on unbundling.

Looking forward to a continued dialogue with you,

Yours Sincerely,

Handwritten signature of Joao Baptista in black ink.

Joao BAPTISTA  
Networks Committee Chairman

Handwritten signature of Gunnar Lundberg in black ink.

Gunnar LUNDBERG  
Markets Committee Chairman

**ANNEX: amendment proposals for the guidelines**

<b>Unbundling of functions</b>	
<b>Guideline 1</b>	
<b>Draft ERGEG Guideline</b>	<b>EURELECTRIC Amendment</b>
The management of the system operator shall work in a geographically separated structure from the competitive business structures.	The <del>management of the</del> system operator <b>shall should be located in such a way to ensure its independence from work in a geographically separated structure from the competitive businesses structures.</b>
<i>Justification</i>	
<p><i>This guideline appears to be unnecessarily onerous. The risk that the behaviour of the DSOs is affected by the sharing of a same building with generation/ supply is low. It is much more important to ensure the independence of the network operation through the adoption and monitoring of a clear, detailed and enforced compliance programme.</i></p>	

<b>Unbundling of functions</b>	
<b>Guideline 2</b>	
<b>Draft ERGEG Guideline</b>	<b>EURELECTRIC Amendment</b>
The system operator must have enough financial and personnel resources to ensure real decision making power and his independence. He must also be free to choose his. The system operator that employ personnel of the vertically integrated company must before define the profile of the employees he needs and must not accept the personnel sent by the vertically integrate company that don't match with this profile.	The system operator must have enough financial and personnel resources to ensure real decision making power and his independence. He must also be free to choose <del>his</del> <b>them in the respect of the financial plan approved by the parent company (in the respect of guideline 15)</b> . The system operator that employ personnel of the vertically integrated company must before define the profile of the employees he needs and must not accept the personnel sent by the vertically integrate company that don't match with this profile.
<i>Justification</i>	
<p><i>It is crucial that system operators have sufficient financial and human resources to conduct their activities. DSOs should thus have complete independence so long as they remain within the scope of the approved financial plan. In application of Guideline 15, it is important to note that the financial plan shall be proposed by the</i></p>	

*DSOs and refusals of that plan shall only be permitted on specific grounds. This should guarantee that the financial plan provides the needed resources for the network company to perform its activities appropriately.*

<b>Unbundling of functions</b>	
<b>Guideline 4</b>	
<b>Draft ERGEG Guideline</b>	<b>EURELECTRIC Amendment</b>
<p>The management and the employees of the system operator shall not participate in any internal group activities of the vertically integrated company, in which information can be disclosed and give an advantage to the competitive business.</p>	<p>The management and the employees of the system operator shall not participate in any <del>internal group activities</del> <b>company structure</b> of the vertically integrated company <b>that is responsible for the day-to-day operation of generation or supply.</b> <del>in which information can be disclosed and give an advantage to the competitive business.</del></p>
<p><u>Justification</u></p> <p><i>The proposed guideline goes much further than the text of the Directive (see article 15.2a) in proposing that both management and employees be excluded from almost any group activity. Here also, the role of a compliance programme and compliance officer can prove more effective and proportionate.</i></p>	

<b>Unbundling of functions</b>	
<b>Guideline 5</b>	
<b>Draft ERGEG Guideline</b>	<b>EURELECTRIC Amendment</b>
<p>The management of the system operator must neither own shares of the competitive businesses nor shares of the vertically integrated company as this would undermine his independence.</p>	<p><b>Delete.</b></p>
<p><u>Justification</u></p> <p><i>This measure is disproportionate and calls into question the integrity of the persons working in the electricity sector in a manner that is difficult to accept. It moreover interferes with general ownership rights and it is very difficult to see how it could be implemented in practice.</i></p> <p><i>Provided independence can be guaranteed through the compliance programme, employees and management of the system operator should be able to hold and buy</i></p>	

shares in the holding company.

<b>Unbundling of functions</b>	
<b>Guideline 6</b>	
<b>Draft ERGEG Guideline</b>	<b>EURELECTRIC Amendment</b>
Activities and rights of the mother company on the system operator have to be limited to secure her financial interest (supervisory function). Interference by the mother company outside this supervisory function in the network business and knowledge of the day-to-day network business in not allowed.	Activities and rights of the mother company on the system operator have to be limited to <b>secure her financial interest</b> (supervisory function). Interference by the mother company outside this supervisory function in the network business and knowledge of the day-to-day network business <b>is</b> not allowed.
<i>Justification</i>	
<p><i>The supervisory function of the parent company is not restricted to securing its financial interest. A number of other activities are also associated with this function, e.g. the assignment of management, the fulfilment of statutory obligations such as health and safety and the adoption of strategic decisions such as on how to fulfil the requirements of incentive regulations.</i></p>	

<b>Unbundling of professional interest</b>	
<b>Guideline 8 b, d, f and g</b>	
<b>Draft ERGEG Guideline</b>	<b>EURELECTRIC Amendment</b>
<p>The assignment conditions of the management and employees of the system operator shall in particular, specify the following items:</p> <ol style="list-style-type: none"> <li>a. [...]</li> <li>b. Wages and incentives are exclusively based on the results of the system operator.</li> <li>c. [...]</li> <li>d. The management of the system operator shall not be dismissed without prior justification. The justification is based on network issues and shall be notified to the regulator.</li> <li>e. [...]</li> <li>f. For the implementation of point 3e, the employment contract shall</li> </ol>	<p>The assignment conditions of the management and employees of the system operator shall in particular, specify the following items:</p> <ol style="list-style-type: none"> <li>a. [...]</li> <li>b. <b>Wages and incentives are not linked directly to the performance of generation or supply company affiliates.</b></li> <li>c. [...]</li> <li>d. The management of the system operator shall not be dismissed without prior justification, <b>in accordance with the relevant legislation, notably labour law. The justification is based on network issues and shall be notified to the regulator.</b></li> </ol>

<p>foresee that if the employee had access to commercially sensitive information a period of work without access to such information shall be imposed. If necessary, some functions in the vertically integrated company can be temporarily forbidden depending on the task he will have to deal with.</p> <p>g. If the duration of the assignment of the executive director of the regulated department/entity is modified, the modification must sent by the regulated department/entity to the regulator for an <i>a priory</i> opinion.</p>	<p>e. [...]</p> <p>f. For the implementation of point 3e, the employment contract shall foresee that if the employee had access to commercially sensitive information, <b>a compliance training shall be given to him when leaving his position in the network business to such information shall be imposed. If necessary, some functions in the vertically integrated company can be temporarily forbidden depending on the task he will have to deal with.</b></p> <p>g. <del>If the duration of the assignment of the executive director of the regulated department/entity is modified, the modification must sent by the regulated department/entity to the regulator for an <i>a priory</i> opinion.</del></p>
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Justification

*b, d and g. The issues concerned would only provide a very weak incentive for discrimination, while it would be more important to ensure that employees feel that they belong to one same group as this would help the DSO attract and retain good quality staff. Furthermore, these provisions should not conflict with national legislations on data protection and employment legislation.*

*f. Retraining of the employee leaving the network company to the competitive businesses should prove sufficient assurance that commercially sensitive information obtained during the course of his job in the distribution business is not passed on. General provisions of labour law should be applicable to all industrial sectors.*

### Unbundling of professional interest

#### Guideline 9

Draft ERGEG Guideline	EURELECTRIC Amendment
<p>Network companies shall have their own identity; nothing shall imply a link form the system operator to the supply business. This involves clearly separate branding strategies, communication policies, and separate contact routes to</p>	<p>Network companies shall have their own identity; <b>nothing shall imply a link form the system operator to the supply business.</b> This involves <b>clearly separate branding strategies, communication policies, and</b> separate contact routes to</p>

the network and supply business such as separate telephone numbers, separate call centres and home pages (including transparent linking policies).	the network and supply business such as separate telephone numbers, <del>separate call centres</del> and home pages (including transparent linking policies).
<p style="text-align: center;"><i>Justification</i></p> <p><i>This guideline does not appear to be proportionate or necessary to meet the goal pursued by unbundling. Rebranding in particular can bring further confusion for customers and would be costly to perform. Provided network businesses are prohibited from distorting competition, similar brands are not an issue.</i></p> <p><i>Whereas the DSO must be able to refer to the supplier of last resort in its call center or webpage, reference to other competitive businesses should be forbidden. Suppliers as for them should always be allowed to inform customers about the DSO that is responsible for their distribution of electricity.</i></p>	

<b>Unbundling of decisions</b>	
<b>Guideline 12</b>	
<b>Draft ERGEG Guideline</b>	<b>EURELECTRIC Amendment</b>
Personnel leasing from an affiliated company should be strictly limited to pure maintenance work. The network company has to fully “manage” the work force which operates the grid. This shall include training, rewards, layoffs etc.	<del>Personnel leasing from an affiliated company should be strictly limited to pure maintenance work.</del> The network company has to fully “manage” the work force which operates the grid. This shall include training, rewards, layoffs etc.
<p style="text-align: center;"><i>Justification</i></p> <p><i>The most important in relation to leasing is that it does not to lead to cross-subsidisation (i.e. leasing should take place at market based prices). There is no need to restrict leasing, under those terms, to pure maintenance.</i></p>	

<b>Unbundling of decisions</b>	
<b>Guideline 14</b>	
<b>Draft ERGEG Guideline</b>	<b>EURELECTRIC Amendment</b>
[...] At the same time the competencies of the supervisory boards have to be limited to financial supervision. [...]	[...] <del>At the same time the competencies of the supervisory boards have to be limited to financial supervision.</del> [...]

<u>Justification</u>	
<i>See justification to the proposed amendment for guideline 06.</i>	
<b>Unbundling of decisions</b>	
<b>Guideline 15</b>	
<b>Draft ERGEG Guideline</b>	<b>EURELECTRIC Amendment</b>
The financial plan shall be proposed by the network company. Any refusal of that plan must only be based on a pre-defined risk adjusted return on capital in line with internal requirements and capital market conditions. For investment under Third Party Access (TPA) the return on capital is usually set by regulatory authority.	The financial plan shall be proposed by the network company. Any refusal of that plan must only be based on a <b>pre-defined reasonable justification in line with</b> internal requirements and capital market conditions. For investment under Third Party Access (TPA) the return on capital is usually set by regulatory authority.
<u>Justification</u>	
<i>There should be other possible reasons for the parent company to refuse the financial plan proposal of the DSO such as for example when the total amount of investment does not reach the objective of the incentive regulation in place. These reasons must however be sound enough (“reasonable justification”).</i>	

<b>Unbundling of decisions</b>	
<b>Guideline 16</b>	
<b>Draft ERGEG Guideline</b>	<b>EURELECTRIC Amendment</b>
The supervisory board may approve the global amount of investments but must not be consulted on any individual investment, whatever its cost.	The supervisory board may approve the global amount of investments but must not be consulted on any individual investment, whatever its cost <b>so long as it is in line with the financial plan.</b>
<u>Justification</u>	
<i>If an individual investment is not in line with the financial plan due to its cost, it has to be approved separately by the supervisory board. The general clause “whatever its costs” must thus be clarified to mean that investment is accepted whichever its amount, provided it stays within the limits of the financial plan.</i>	



<b>Unbundling of information</b>	
<b>Guideline 20</b>	
<b>Draft ERGEG Guideline</b>	<b>EURELECTRIC Amendment</b>
The network company shall define commercially advantageous information on network business where the network company is the data owner.	The network company shall define <b>non-</b> commercially advantageous information on network business where the network company is the data owner.
<i><u>Justification</u></i>	
<i>Listing the information that is not commercially sensitive (such as information on health and safety, on environment, on human resources etc.) would be much clearer and simpler since the list would be much shorter than a list of all commercially sensitive information.</i>	

<b>Unbundling of information</b>	
<b>Guideline 23</b>	
<b>Draft ERGEG Guideline</b>	<b>EURELECTRIC Amendment</b>
All commercially advantageous and sensitive pieces of information have to be part of well defined information processes in written form, which have to be sent to regulators together with the compliance programme. These written processes have to be updated whenever a change occurs.	<b>Delete.</b>
<i><u>Justification</u></i>	
<i>To avoid extra bureaucracy, compliance programmes should be integrated into company quality systems.</i>	

<b>Compliance programme</b>	
<b>Guideline 28</b>	
<b>Draft ERGEG Guideline</b>	<b>EURELECTRIC Amendment</b>
The compliance officer sets objectives and creates a schedule for the measures to be taken to correct any deviations detected in attaining the planned results and contributing to improve the processes.	The compliance officer <del>sets objectives and creates a schedule for the</del> <b>advises on the measures and a reasonable schedule</b> to be taken to correct any deviations detected in attaining the planned results and contributing to

	improve the processes. <b>It is up to the network company to implement the necessary measures.</b>
<u>Justification</u>	
<i>It is not for the compliance officer to take the corrective measures regarding any areas of non compliance with the compliance programme that he might identify. The corrective measures themselves are a matter for the DSO.</i>	

<b>Compliance programme</b>	
<b>Guideline 31</b>	
<b>Draft ERGEG Guideline</b>	<b>EURELECTRIC Amendment</b>
The compliance officer shall be guaranteed the necessary independence by the management in his employment contract and through the compliance programme. He shall be trained properly in all aspects necessary for the job. He shall be equipped with the resources necessary to accomplish his mission.	The compliance officer shall be guaranteed the necessary independence by the management <del>in his employment contract and</del> through the compliance programme. He shall be trained properly in all aspects necessary for the job. He shall be equipped with the resources necessary to accomplish his mission.
<u>Justification</u>	
<i>Adapting the employment contract of the person who becomes compliance officer (when taking on this position and leaving this position) would represent an unnecessary complexity. It should be sufficient to ensure means for his independence through the compliance programme.</i>	

Finally, EURELECTRIC wishes to comment specifically on questions 3 and 4 in ERGEG's consultation.

Question3: "Would it be possible to install trustees who act on behalf of the mother company (investor) in supervisory boards and who are to protect financial interests of the investor without disclosing commercial information to the mother company?". In EURELECTRIC's view, this represents an unnecessary complexity and it should be permitted for shareholders to sit in the supervisory board of the network operator.

Question 4: "Do you think that the possibility for management and employees to be assigned to the network company and back to the competitive business after some time as part the internal career should be prohibited?". For EURELECTRIC, the movement of staff between competitive businesses and the network should be permitted on the same basis as staff from the regulatory agencies is allowed to quit their functions to go to the industry and have the possibility to return to these functions in the regulatory agencies afterwards. The movement of staff belonging to the regulatory agencies is potentially even more sensitive and the ERGEG guidelines should thus not go beyond the restrictions imposed on the movement of regulators'

staff by law. Essentially, a compliance training (see amendment to the proposed guideline 8f) should serve to ensure that commercially sensitive information is not misused.