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## Svensk Energi – Swedenergy- AB response to the ERGEG draft guidelines on functional and informational unbundling

Svensk Energi - Swedenergy – AB, the association of the Swedish Electricity Industry, recognises the importance of an effective market for electricity (and gas) within the European Union (EU). Effective unbundling of the regulated and competitive activities is a necessary measure in order to achieve the benefits of the effective market within the EU.

However, Swedenergy strongly recommends ERGEG to explicitly consider, in the guidelines, the possibility to exempt distribution system operators serving less than **100.000 customers** from the most severe rules of legal and functional unbundling. The unbundling rules are always more burdensome to minor system operators from an economical point of view. The regulator should thus always consider the risk of decreasing number of market actors when enforcing rules of functional and legal unbundling on minor system operators within vertically integrated companies. Otherwise the result of the unbundling rules will be less competition in stead of more competition in the electricity markets within the EU.

Furthermore, in applying the guidelines regulators should always consider the economic consequences of unbundling requirements, to distribution companies. Especially where the requirements include structural measures to be undertaken by the system operator, e.g. separation of location, IT-infrastructure etc. The economic consequences for the distribution company should always be compared to the benefits for the customers of the implementation of specific unbundling requirements by the regulator.

Swedenergy underlines the importance of a **proper implementation of the electricity markets directive 2003/54/EC** (directive), in combination with the necessary measures undertaken by the national regulator. Swedenergy believes the directive to be fairly balanced in terms of restrictions put on the system operators in order to achieve the level necessary for effective unbundling.

Swedenergy considers the guidelines to be more **restrictive** to the system operators than the original intention and spirit of the directive. The guidelines, if implemented on a general basis within the EU member states, would thus be disproportional to the purpose sought by the directive.

Swedenergy would like the **application** of the guidelines not to be general in nature, but rather limited to the extent necessary and based on a common understanding by the regulator and the system operators. The common



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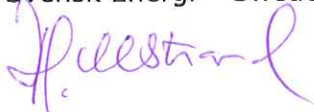
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understanding must consider the maturity of the market and recent and future developments following the implementation of the directive into national legislation. The rationale being the different levels of market maturity as well as disparity between EU member states in terms of implementation of the directive into national legislation and practical implementation by the market operators.

Finally, Swedenergy strongly believes in the **proper implementation and use of compliance programmes** within the system operators, especially in terms of the non-discriminatory handling of commercially sensitive information.

Yours faithfully

Svensk Energi – Swedenergy – AB



Bo Källstrand  
President



## ANNEX: amendment proposals for the guidelines

### Guideline 1 – Unbundling of functions

This guideline appears to be unnecessarily onerous. There is no evidence to suggest that geographically separated structure guarantees the non-discrimination of competitive businesses. Information can easily be shared between management via different ways of communication even where the businesses are geographically separated. The guidelines requirement will not solve the issue but rather have a disproportionate impact from a financial point of view. 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.

### Guideline 2 – Unbundling of functions

It is crucial that system operators have sufficient financial and human resources to conduct their activities. Network companies should – as indicated in the interpretative note of DG TREN on unbundling – have complete independence “within the scope of the approved financial plan. In application of Guideline 15, the financial plan shall be proposed by the system operator and refusals of that plan, by the parent company, shall only be permitted on specific grounds. This should guarantee that the financial plan provides the necessary resources for the system operator.

### Guideline 3 – Unbundling of functions

The content of this guideline follows from the directive itself and needs no further specification.

### Guideline 4 – Unbundling of functions

The guideline describes in more detail one aspect of the requirement on the system operator not to disclose information to the competitive business, within the vertically integrated company, where such information might give a competitive advantage to the competitive business. The guideline rather serves as an advisory instruction on how to practically implement, in the specific situation, the requirement in the directive and should therefore not constitute a general guideline as such. Implementation of guideline 4 as a general guideline to be applied in any case will exclude staff within the system operator from participating in any internal group activity where there is a risk of information being disclosed. The guideline applied in such a general way will not have the effect of preventing information from being shared but rather alienate staff from different departments within the vertically integrated company. This can not be the purpose of the directive since the directive does not prohibit vertically integrated companies. The problem should be dealt with through a proper implementation of the compliance programme and monitoring by the compliance officer. This approach is also more proportionate.

### Guideline 5 – Unbundling of functions

This guideline is disproportionate and calls into question the integrity of the persons working in the electricity sector in a manner that is difficult to accept. The guideline interferes with general ownership rights within national legislation which is protected by the EC Treaty. Furthermore, it is very difficult to see how the requirements could be implemented in practice.

Provided independence can be guaranteed through compliance with the compliance programme, employees and management of the system operator should be able to hold and buy shares in the holding company or any affiliated company.

### Guideline 6 – Unbundling of functions

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.

Furthermore, the right of the parent company to exercise its rights as a shareholder follows from national provisions of company law and should not be subject to regulatory supervision by the regulator but rather the rules of competition law and the competencies of the national competition authorities.

Swedenergy proposes the following wording of the guideline. "Activities and rights of the parent company on the system operator have to be limited to securing the supervisory function of the parent company as the owner of the subsidiary, as follows from competition law."

### Guideline 7 – Unbundling of professional interest

Swedenergy does not see the purpose of guideline 7 in relation to the purpose of the guidelines in terms of functional and informational unbundling. The role of the system operator as an employer and the terms and conditions applicable to employment contracts is subject to national labour law.

The regulator should at most use employment contracts as relevant facts on a case-by-case basis on breach of the unbundling rules, not as a general provision on how the system operator should organise itself in its role as employer.

### Guideline 8 – Unbundling of professional interest

General national provisions on data protection and labour law should be applied to the specific situations mentioned in the guideline, to the extent necessary in order to achieve the purpose of the directive. However, Swedenergy finds it very disproportionate to introduce specific guidelines and



specific applications of national provisions, to staff within the system operator. Especially where the guidelines and applications are deviant from general rules of data protection and labour law in the EU member states.

Swedenergy therefore suggests the following wording of paragraph (b), (d) and (f) and of guideline 8, whereas paragraph (g) should be deleted.

b. Wages and incentives are not linked directly to the performance of generation or supply company affiliates.

d. The management of the system operator shall not be dismissed without prior justification, in accordance with labour law.

f. For the implementation of point 3e, the employment contract shall foresee that if the employee had access to commercially sensitive information, compliance training shall be given to him when leaving his position in the system operator. Retraining of the employee leaving the system operator to the competitive businesses should prove sufficient assurance that commercially sensitive information obtained during the course of his job in the system operator is not passed on.

#### Guideline 9 – Unbundling of professional interest

Swedenergy considers the guideline to be very disproportionate in order to achieve the purpose of the directive. It is important to separate the unbundling rules from the competition law. Following EC competition law, as well as national competition law, system operators are prohibited from interfering with or in any other way distorting competition. Under the terms of competition law there is nothing to say that similar brands, contact routes, telephone numbers, call centres and home pages, in itself imply distortion to competition. This can only be decided upon on a case by case basis by the competition authorities.

To the opposite, there are great benefits from a customer point of view, as far as possible under the rules of unbundling and competition law, to simplify the communication and contacts between the customer and market players. Some of the proposals in the guideline may cause even more confusion for the customers and would also imply great costs, especially for minor system operators.

#### Guideline 10 – Unbundling of decisions

The guideline follows from the general requirement that the system operator shall have the necessary financial and other resources as well as decision making powers in order to operate on an independent basis. There is no need to go into further detail in a guideline on this issue. The guideline should therefore be deleted.

### Guideline 11 – Unbundling of decisions

Swedenergy does not see the need for further detailed guidelines on how the system operator shall operate its daily business in terms of human and physical resources. If the system operator has nothing but management employed, thus having to rely on the cooperation of the parent company and its staff in order to execute the operational decisions of the system operator, the system operator will have to prove that it meets the requirements of independence. If this is possible under such circumstances there should be no problem with the staff being employed by the parent company.

Again, the specific guideline should not be applied in a general manner but rather on a case by case basis and to the extent it is found necessary.

### Guideline 12 – Unbundling of decisions

There should be no restrictions for the system operator on the personnel leasing from affiliated companies. Naturally, staff managed by the system operator operates under the management of the system operator to the extent necessary for the system operator to fulfil its obligations under the unbundling requirements. The system operator shall always be responsible for satisfying this obligation following from the directive. There is thus no need to more specifically regulate this on a national basis. Rather, the guideline should be part of the regulatory decision making process, the most important issue being cross-subsidisation.

### Guideline 13 – Unbundling of decisions

Swedenergy considers the guideline to be too detailed as a general provision/guideline as it follows from the general requirement of the directive. Rather, the decision making powers of the system operator and the terms and conditions of contracts regarding assets etc. should constitute relevant facts within the regulatory decision making process.

### Guideline 14 – Unbundling of decisions

Swedenergy considers the guideline to be too detailed as a general provision as it follows from the general requirement of the directive. Rather, the decision making powers of the system operator and the terms and conditions of contracts regarding assets etc. should constitute relevant facts within the regulatory decision making process.

Also, see the proposed amendment for guideline 6.

### Guideline 15 – Unbundling of decisions

There should be other possible reasons for the parent company to refuse the financial plan proposal of the system operator, e.g. where the total amount of investment does not reach the objective of the incentive regulation in place.



Swedenergy suggests the following wording of the guideline.

"The financial plan shall be proposed by the system operator. Any refusal of that plan must only be based on a reasonable justification in line with internal requirements and capital market conditions. For investment under Third Party Access (TPA) the return on capital is usually set by the regulatory authority."

#### Guideline 16 – Unbundling of decisions

Swedenergy suggests the following wording of the guideline.

"The supervisory board may approve the global amount of investments but must not be consulted on any individual investment, whatever its cost as long as it is in line with the financial plan."

Should the individual investment not be 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" meaning that the investment is accepted whichever the amount provided it stays within the limits of the financial plan.

#### Guideline 18 – Unbundling of information

The system operator should always include data protection and data management clauses in the contracts with customers. Such measures are useful and necessary in order to fulfil the commitments towards the customers as well as regarding unbundling rules.

#### Guideline 23 – Unbundling of information

Swedenergy sees no need, for the purposes of unbundling, to make available to the regulator the information processes applied within the system operator. Rather, the compliance programme should be incorporated into the internal quality systems of the system operator.

The information processes should constitute relevant facts in the regulatory decision making process on a case by case basis.

#### Guideline 24 – Unbundling of information

Swedenergy would like for the guidelines to consider the fact that not all problems of informational unbundling will be dealt with by various IT-solutions. Only, the organisation of the system operator together with relevant IT-solutions will achieve the purpose sought by the directive. Hence, the regulator must not always require the system operator to separate the databases. Such a measure is useless if the staff employed by the system operator as well staff employed by the competitive businesses can access the databases. Further, should the system operator limit database access to licensed staff employed by the system operator only, there is no need for separation of databases.

### Guideline 25 – Compliance programme - Design

Unbundling rules are part of the provisions regarding the regulated system operator. The system operator undertakes the regulated system operator. Since the compliance programme is part of the unbundling rules the guideline should not cover processes other than those involving the system operator. Thus, processes of affiliates within the vertically integrated company not involving the system operator shall not be examined within the compliance programme.

### Guideline 26 – Compliance programme – Implementation

Guideline 26 must not be applicable to employees within the vertically integrated company where the employees are not involved in any day-to-day business with the system operator.

### Guideline 28 – Compliance programme - Development

The role of the compliance officer is to execute the compliance programme decided by the system operator. However, the compliance programme should be decided by the system operator, perhaps in cooperation with the compliance officer. The compliance officer should also be provided with the necessary tools, competencies and relative independence necessary to execute his task.

Furthermore, 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 system operator.

### Guideline 29 – Compliance programme – Reporting

The directive puts the obligation, to draw up an annual public report, publish it and submit the report to the regulatory authority, on the system operator. The system operator may delegate any internal obligations to staff of its choice, be it the compliance officer or someone else. Swedenergy does not find any reason to change this guideline following from the directive.

### Guideline 31 – Compliance programme

Swedenergy proposes the following wording of the guideline. "The compliance officer shall be guaranteed the necessary independence by the management through the compliance programme. He shall be trained properly in all aspects necessary for his task. He shall be equipped with the resources necessary to accomplish his mission"



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.

## Recommendation and Issues for Consultation

Regarding the questions posed under chapter 8 of the public consultation, Swedenergy would like to add the following.

1. Swedenergy finds the guidelines to be more than sufficient to guarantee a level playing field within vertically integrated companies.

4. Swedenergy does not see the need to specifically prohibit staff from moving from one department to another within a vertically integrated company. There are other less restricting measures to apply in order to prevent employees in the competitive businesses to abuse information received when employed by the system operator. The measures might be applied to the employment contract or in any other way. The proposed measure might, to the contrary, restrict the willingness of qualified staff to leave their employment within the competitive businesses for the system operator.