



21st June 2007

Position of VEÖ to the “Draft ERGEG Guidelines of Good Practice on Functional and Informational Unbundling“

General

The second Electricity Directive (2003/54/EC) and its **unbundling requirements were already implemented in Austria in the year 2004, far earlier than in the other member states.** The Austrian electricity industry has **fulfilled this legal requirement and a non-discriminatory access to the grid is thus ensured for all market participants.** The **framework conditions for a well functioning market are guaranteed through clearly defined functions of the market participants and through harmonised market rules as well as standardized market- and data exchange processes.**

A well functioning switching process is far more beneficial for competition than an over-regularised unbundling. This is also proven by the **marginal number of problem cases** (with some 5 million customers in Austria in 2006 only 166 cases were submitted to the arbitration board of the regulatory authority, mostly pure misunderstandings).

ERGEG ties its guidelines up to the interpreting notes for the implementation of the Electricity Directive of the European Commission from January 2004 which are not binding for the member state. Insofar **the proposal of ERGEG therefore has a case law and not an exegetical character.** This kind of **case law would however have – as in the past – to follow a formal legislative procedure with the inclusion of the member states.**

In particular with the background that the implementation rules made or to still be made in many member states could not yet develop their effects, the necessity of additional measures is completely unclear.

A part of the suggestions from ERGEG is much too expansive and would have as an effect a reaching of the goals with disproportional measures. Much more it is **desired that all European member states implement the requirements of the second Electricity Directive to the same extent.**

The lack of investment activities criticised by the sector inquiry which in the opinion of the commission was **caused through insufficient unbundling cannot be detected within Austria.** A main barrier for investments in the area of the development of the networks can be attributed much more to the **Austrian authorisation situation with large construction projects.**

The **proposal of ERGEG represents an unnecessary interference in the existing and well functioning rules** since **on the one hand the unbundling requirements are fulfilled in Austria**. On the other **a part of the suggested unbundling-provisions has to be regarded as being exorbitant** with a **distinctive tendency to over-regulation**. In addition the suggested **measures are partially so detailed** that a **standard implementation** through the 27 EU members with their extremely different legal systems and methods of implementation is **not possible**.

Therefore the suggestions of ERGEG for the implementation of informational and functional unbundling are not necessary and for this reason rejected.

On the suggestions of the ERGEG paper, we note in detail:

In advance it is noted that a **series of suggestions (e.g. G 01, G 03, G 24) would be bound to disproportionate high costs and synergy losses, in particular with smaller companies**. For this reason the **lowering of the de-minimis threshold of 100,000 customers (which affects a market share of only 5% in Austria)** which was discussed by the commission is **emphatically rejected**.

On the chapter Introduction p. 3 – 9:

On pp. 5 – 7, in the sense of showing the motives for this Guidelines- draft, a series of (liberalisation) risks are mentioned which result from the insufficient unbundling of the network activities from the commercial activities (production, trade, sales). The **competition problems claimed here are either unreliably generalising and do not take into consideration the measures taken by the individual countries or the accusations are partially incorrect**.

Thus on page 5 cross subsidies, high network fees and increasing costs for new providers due to expensive network connections and the likes are traced back to insufficient unbundling. This is unfounded because especially the **check of the costs and investments of the network operators is one of the core functions of the regulatory authorities** and in Austria this **competence of the regulator is also extremely stringently handled**. In connection with the problem of low investment activities an explicit recommendation can be directed to ERGEG of being aware that **lacking investment incentives in the regulation system can also be a very essential blockage to investments**.

Also the claimed preferential treatment of integrated companies compared to third party providers through the network operators in view of allocation of capacity, forwarding of information, executing the switching processes etc. (p. 6) does not apply. In Austria the network operators and commercial areas have agreed with the competition and regulatory authorities on a competition stimulation program due to which the market partners voluntarily oblige themselves to the measures for the promotion of competition which exceed the requirements of the Electricity Directive.

The **measures for the functional and information unbundling** suggested in the guideline are considered to be **the second best solution by ERGEG**. The

commission suggestions of an **obligation for ownership unbundling are considered to be the ideal solution by ERGEG.**

Ownership unbundling is emphatically rejected for the following reasons:

- **Ownership unbundling does not help in achieving the goal of improving the security of supply. The coordination between power plant and network operation is a basic element in the complex task to maintain supply-security. The Commissions' increasingly massive interferences in the management structures have extensive impacts on the internal control procedures in the electricity companies and, thus, jeopardize the security of supply.**

OU would even have a negative effect on investments, particularly in power plants, as the quasi asset stripped companies would be downgraded by financial analysts due to a reduction of cash flow and credit worthiness. There are also considerable legal concerns about OU, which represents a de facto expropriation. The Electricity Directive 2003/54/EC concerning common rules for the internal market in electricity still needs to be fully implemented in several member states, which means that an assessment of the impacts of the existing liberalisation steps is not possible at this stage. **The necessary investments in the transmission networks – particularly cross-border – cannot be achieved through ownership unbundling. Today's obstacles can mainly be attributed to environmental, legal and, not least, regulatory barriers.**

As can be seen with the following detailed position to the individual unbundling proposals from ERGEG, Austria's **existing legal framework which includes provisions on company law, functional and accounting unbundling ensures the reaching of the goals of the European internal electricity market.**

On chapter 2 Unbundling Functions:

On G 01:

We doubt that in the age of modern information and communication technologies intentional infringements against the discretion obligation can be prevented through geographically separate offices. The Austrian **network operators advocate a strict and well structured separation within a building** which has to be considered as **completely sufficient to achieve the intended effects.** ERGEG's proposal would thus result in an **unnecessary increase of the administration costs**, in particular with smaller companies, which in the end would be passed on to the network customers via increased tariffs.

On G 02

This specification is existing standard in Austria and can be considered to be **extensively fulfilled.**

On G 03

In Austria this suggestion can be seen as **extensively fulfilled** for companies which are obliged to legal unbundling

On G 04

This specification is existing standard in Austria and can be considered to be **extensively fulfilled**.

On G 05

In this general form this suggestion is **unrealistic** as it means a **limitation of the right to ownership which is questionable in terms of the basic constitutional law**. This however does not exclude the exclusion of shares of the mother company on a contractual level.

On G 06

This specification is existing standard in Austria and can be considered to be **extensively fulfilled**.

On Chapter 3 Unbundling of professional interest:**On G 07:**

This suggestion is **fulfilled in Austria according to labour law**.

On G 08

These suggestions (lit. a, b) are **fulfilled in Austria according to labour law**.

c)

This suggestion is **contrary to the Austrian Temporary Work Act (AÜG)**.

d)

A **reason for termination / firing follows business and labour law limitations** and can therefore **not be limited solely to the network operation related reasons**. The demanded **information to regulatory authorities is rejected** since there is no regulatory authority competence in the narrow sense. In Austria the **licensing authority** is responsible for this.

e)

According to the provisions of the labour law, the **employee is obliged to keep business and operation secrets to himself**; his qualifications however belong to his intellectual property.

f)

This demand impinges up on legal limitations. The **economic ability of the employee to work may not be intensified further through competitive clauses**. At any rate the **general labour law competition ban regulations as they are valid for the entire remaining economy** should not be limited.

g)

The information to regulatory authorities is **rejected** since the regulatory authorities have no formal powers there in the narrow sense. In Austria the **licensing authority** is responsible for this.

On G 09

Measures affecting the identity of the network companies should be proportionate as well as the resulting increase of **costs**. As already listed in the general part above,

the **competition is not ensured through excessive unbundling measures** but rather due to a discrimination free network access and the creation of suitable framework conditions with harmonic market rules and processes.

However **measures to improve an independent corporate image of the network operators are conceivable.**

On Chapter 4 Unbundling of decisions

On G 10

This requirement is existing standard in Austria and is **fulfilled** by the network operators.

On G 11

This – also legal – requirement should **in principle be fulfilled.** However certain **transitional periods for the implementation of adaptation measures** of this often very complex process are necessary.

On G 12

This demand is **too extensive.** The freedom of purchasing services must not be limited as this **would contradict the free market economy.** In addition this request **is impossible to be implemented in a standard manner throughout Europe** as it affects pure micro-organisational aspects of each individual company.

On G 13

This specification has **in principle been fulfilled** in Austria, this kind of regulation must however not only be covered by the ordinances, but also through leasing or company management contracts.

On G 14

This legal requirement is **fulfilled** in Austria.

On G 15

This requirement is **fulfilled** in Austria as far as the companies have an influence on it. The demands pertaining to **return on capital** can not be fulfilled **to a proper extent due to regulatory framework conditions.**

On G 16

This legal requirement is **fulfilled** in Austria.

On Chapter 5 Unbundling of Information

On G 17 to G 19 pertaining to the information of third parties

These legal requirements are fulfilled in Austria.

On G 20 to G 21 pertaining to network information

These legal requirements are fulfilled in Austria.

On G 22

Due to a lack of clarity, no direct position can be taken on this suggestion in view of the management system and organisational aspects. The transmission of data to third parties is also comprehensively regulated in Austria. **No excessive implementation requirements** should be generated.

On G 23

This suggestion can be assessed as **critical in view of the scope and the administrative expense**. It is not clear to which extent information can be considered sensitive and due to the concrete experiences when dealing with regulatory authorities it must be **feared that this demand goes overboard**.

On G 24

This demand is **excessive, not necessary and is rejected**. The **existing barriers and access conditions are sufficient**. The transmission of data to third parties is legally regulated in Austria. In addition the Austrian network operators have resorted to additional voluntary measures.

On Chapter 6 Compliance programme:

The **suggestions G 25 – G 33** are the legal standard in Austria which is **fulfilled** by all affected network operators.

Chapter 8**1.**

As already mentioned, the **competition conditions in Austria are comprehensively regulated by the law and further regulatory bodies**. ERGEGs approach of **using detailed regulation across Europe in order to create a harmonised framework conditions for vertically integrated companies represents a classic infringement of the European basic principle of subsidiarity as it neglects** the fact that the energy sector in the individual European countries is not congruently structured due to differing national and historic developments and represents

Aside from this basic objection it is also administratively and **legally not possible to uniformly implement such detailed specifications**.

2.

Unbundling requirements are **already today partially provided** for in the corporate governance guidelines. The **harmonisation of the electricity markets** in Europe will above all be ensured through an **equitable level with the market regulation**. Here we especially refer to the corresponding suggestions from ETSO.

3.

The ERGEG suggestion for the denomination of a trustee allows us to assume that **apparently also the regulators have the apprehension that with extensive unbundling there will no longer be sufficient investments**. At any rate it must be taken into consideration that an **investor would be frightened away through such**

measures. A pure network owner in this case would virtually no longer have authority to make decisions, which would be **bound with corresponding negative consequences in view of network investments.**

4.

This **suggestion is rejected.** In view of (fundamental) legal considerations, we refer to the detailed explanation above. We demand that the **management and the personnel in the electricity industry basically also should have the possibility in future to be able to be active in all operational areas of the electricity industry.**

On Chapter 9 Next Step

In the sense of the pleading above **both variations (integration of the unbundling requirements in the corporate governance code and as well as in the quality assurance processes) are rejected.**