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By email

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Ihr Zeichen / Ihre Nachricht von

Unser Zeichen

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Datum

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Position of the Association of Gas- and District Heating Supply Companies on the ERGEG Guidelines of Good Practice on Functional and Informational Unbundling (Draft April 2007)

Dear Mrs. Geitona,

we are pleased to enclose our remarks on the "Draft ERGEG Guidelines of Good Practice".

I. General remarks:

We consider the proposed Guidelines as a sign of an increasing tendency to excessive regulation. In particular, since the laws passed by many member states could not yet display their effectiveness it is completely unclear what effect additional measures are going to have or whether they are necessary at all. ERGEG bases the necessity of its recommended measures not on observed actual conduct of companies but on perceived or suspected misbehaviour.

Many of the shortcomings listed in the paper are due more to an insufficient implementation of the provisions of the Gas Directive and not due to inherent flaws of the existing legislation. New European regulation should be contemplated only if shortcomings persist despite complete and adequate transposition into national law by all Member States which, unfortunately, is not yet the case. The main provisions of the second Gas Directive 2003/55/EC and in particular the unbundling provisions (unbundling of information and decisions, compliance programme etc.) have been pre-emptively implemented in Austria already with the Gas Act of 2002. Since that time all market participants enjoy non-discriminatory access to the network. Not only have the overall objectives stipulated in the Guidelines been met, but many of the recommendations in the Draft have already been implemented, without resorting to ownership unbundling or similarly incisive interferences with the ownership structure. The proposals of ERGEG, therefore, represent an unnecessary interference in existing and efficient rules.

We do not agree with ERGEG that the Guidelines are an appropriate way to realise functional unbundling under the present legal framework. As noted on page 8, *"the goal is to mimic as closely as possible the effects of ownership unbundling on TSO and DSO behaviour"*. The

ERGEG's Guidelines are not an act of mere interpretation but have in fact the character of creating new law. This, however, requires the involvement of the member states. The recommendations of ERGEG are based on the interpretation notes of the European Commission/DG TREN (from January 2004) which are not legally binding documents because they are not adopted by the European Parliament and by the Council.

A directive is a cooperative legislative instrument, which assigns to the member states alone the right to decide on the way they transform the objectives and requirements in the directive into national law. To decide on whether this transformation has happened correctly is subject only to the ex post control of the European Court of Justice (Art 226, Art 234 EC-Treaty).

In contrast to the findings of the Sector Inquiry, we are not aware of any impediments to investment activity on account of insufficient unbundling, nor are we aware of a negative effect of the current state of unbundling on competition (the conclusions of the 2005 benchmarking report are in many ways not comprehensible, in particular because of inconsistencies in the database). We are, quite the contrary, rather apprehensive of the negative effects tightened unbundling provisions might have on investments. As to competition, from our point of view an efficient switching process is more conducive to competition than an over-regulated unbundling.

For encouraging investment in gas infrastructure, the regulatory authorities should establish a stable and predictable framework, including an appropriate return on Investment, when fixing or approving the tariffs.

The attribution of the risks enumerated on pp. 5 – 6 to insufficient unbundling of the network activities from the commercial activities is much too generalising and partially simply incorrect. The subject of the draft Guidelines is functional and informational unbundling. Undesirable phenomena such as cross subsidies, high grid charges and increasing costs for competitors, however, do not result from insufficient (functional and informational) unbundling but from insufficient regulatory oversight. Checking the costs and investments of network operators – in connection with the unbundling of accounts – is one of the core functions of the regulatory authorities. Also, the claimed preferential treatment of integrated companies compared to third party providers through the network operators with regard to allocation of capacity, forwarding of information, implementation of the switching process etc. cannot be diagnosed mono-causally as inevitable consequence of insufficient unbundling.

The Guidelines show an unrestrained bias towards establishing ownership unbundling. However, the Commission and the regulatory bodies should note that ownership unbundling with good reason is not the preferred solution for the majority of member states. In our opinion the absence of ownership unbundling is not the reason for the short-comings (discriminatory behaviour, lack of investment ...) allegedly besetting the European gas-markets, nor will its introduction be the panacea for them or create the benefits expected from a competitive internal market, such as increased investment or greater security of supply.

For all these reasons, we object in principle to the recommendations of ERGEG's Guidelines on Functional and Informational Unbundling.

II. Ref to the individual issues:

There is no cost-benefit analysis. Some of the ERGEG recommendations will inevitably lead to disproportionate high costs for companies (e.g. G 01, G09, G24) but have no positive

effect for the customer. We see only the perceived positive effects of unbundling reflected in the paper and no mentioning of the unavoidable negative aspects like cost increases, loss of information and synergies, which for us is a very biased approach. The paper should put unbundling in the right context and also list in a separate section the assumed practical benefits, ideally on a country-by-country or regional basis, for gas and electricity separately.

The suggestions in their current wording (e.g. G01, G03, G04) conveniently neglect the provision in the Gas Directive 2003/55/EC, which leaves it in the discretion of the member states to apply the provisions for legal and functional unbundling (Art. 13 paragraph 1 and 2) to companies with less than 100,000 customers. Introducing even more stringent unbundling provisions through the backdoor of the Guidelines is not only inadmissible (see arguments under "General remarks") but for the companies affected also economically damaging. The resulting pressure to merge into large entities is tantamount to forcefully changing the structure of the gas industry.

Chapter 8:

1. In our view the guidelines are excessive, in particular relating to the following points:

G04: That information can be disclosed should never be relevant.

G05: What about shares of competitors? Would that undermine independence as well? This suggestion is unacceptable, because it is based on an assumption of improper behaviour.

G12: The freedom of purchasing services may not be limited; this would contradict the free market economy.

G22, 24: The transmission of data is legally regulated in Austria. The existing barriers are sufficient, a further tightening of the provisions is not necessary.

2. The unbundling requirements are included not in the Corporate Governance Guidelines in the way specified.
3. We think that in some instances there is a beneficial impact of information flowing from the network to the competitive business. The decisive factor is not formalistic unbundling regulation but rather whether the market model allows free switching of suppliers combined with rules that assure non-discriminatory access. The trustee solution seems very cumbersome.
4. In our view these rules (G08) are excessive and are therefore rejected. For instance the management and the personnel in the gas industry should also have the possibility in future to be active in all areas of the gas industry. But as regulatory agencies collect and store sensitive information as well, rules need to be defined on how their staff are supposed to deal with unbundling issues in relation to matters as diverse as press releases or change of employment.

Chapter 9:

In light of the above considerations we reject an integration of the proposed unbundling requirements in the Corporate Governance Codes and as well as in the Quality Management Processes.

Association of Gas- and District Heating Supply Companies