



GEODE POSITION ON ERGEG GUIDELINES FOR GOOD PRACTICE ON FUNCTIONAL AND INFORMATIONAL UNBUNDLING

ERGEG PUBLIC CONSULTATION PAPER

I.- Introduction.-

The European Regulatory Group for Electricity and Gas (ERGEG) has launched a Public Consultation on its Paper "Guidelines for Good Practice on Functional and Informational Unbundling". **GEODE** welcomes the opportunity to contribute.

GEODE considers that **effective unbundling** of regulated activities (transmission and distribution) and of competitive activities (generation and sales) is necessary in order to achieve competitive, well functioning European electricity and gas markets. By **effective unbundling**, transparent and non-discriminatory access to information and to the grid must be guaranteed.

II.- Existing legal framework.-

According to the Introduction of the ERGEG Guidelines (page 4), the basis of the Guidelines are the provisions of the Electricity (2003/54/EC) and Gas Directives (2003/55/EC) and the two interpretation notes of the European Commission on the unbundling regime and role of regulators from January 2004.

GEODE underlines the importance of effective implementation of the existing Directives. The provisions of the Directives regarding legal and functional unbundling in combination, if needed, with the necessary measures introduced by national regulators are sufficient to put conditions on network operators to assure effective unbundling, especially in terms of non-discriminatory handling of commercially sensitive information.

While ERGEG Guidelines could contribute to create a level playing field from vertically integrated companies, **GEODE** considers them to be more restrictive for network operators than functional unbundling provisions contained in the existing Directives. Then the proposed Guidelines are disproportional with the aim and spirit of the Directives and not necessary to ensure effective unbundling as mentioned in the paragraph above.

III.- Scope of ERGEG Guidelines. Exemptions.-

The Guidelines should apply to vertically integrated companies and network companies obliged to functional and information unbundling according to the existing Directives.

However **GEODE** emphasizes the importance that the Guidelines explicitly envisage the **exemption introduced by existing Directives in the application of legal and functional unbundling provisions**, for vertically integrated companies serving less than 100.000



connected customers. It's important to point out that the exemption regarding functional unbundling has been implemented by a majority of Member States, as it is the case for instance in Denmark, Finland, France, Germany, Italy, Spain and Sweden.

Functional unbundling rules are always more of a burden to minor operators from a financial, human and material resources point of view. In that case, the implementation of stronger unbundling rules to small network operators has to be balanced with the risk of reducing the number of market operators, leading to a higher level of market concentration and less competition as a consequence.

IV.- Application of ERGEG Guidelines.-

The application of the measures contained in the Guidelines **impose high costs on network operators** and the measures are far-reaching, specially where the requirements include structural measures to be undertaken by network operators as the geographical separation of location (G01), IT infrastructure (G24), separate branding strategies (G09) etc... At the end, it will lead to higher prices for consumers while by contrast, these measures will not always lead to a more competitive market.

GEODE recommends to limit the application of the guidelines to the necessary extent and based on a common understanding by the national regulator and network operators. The different circumstances of the European energy markets and expected developments as a result of the effective implementation of existing Directives, especially with regard to unbundling provisions, should be carefully taken into account before the application of the Guidelines.

GEODE believes that functional unbundling has to be guaranteed, but this can be fully secured through the use of internal **Compliance Programmes**, establishing protocols, instructions and controls, especially regarding non-discriminatory handling of commercially sensitive information.

V.- ERGEG concrete questions.-

1. Do you think that these guidelines are sufficient to guarantee a level playing field in view of vertically integrated companies?

The guidelines are sufficient to create a level playing field in view of vertically integrated companies.

GEODE would like to comment to some of the proposed Guidelines as follows:

a) Unbundling of Functions:

G01: Geographically separated structure: information can easily be shared between management from the regulated and competitive business in many different ways, independent



of location. In this case, the measure is not proportional to the economic impact it represents when there is no evidence of the benefits of a geographical separated structure.

G05: Management of the system operator must neither own shares of the competitive business nor of the vertically integrated company:

This Guideline interferes with general ownership rights within national legislation that are protected by the EC Treaty.

b) Unbundling of professional interest

G09: Branding. Network companies shall have their own identity. This involves clear separate branding strategies, etc... : effective application of national and European competition Law would render this guideline unnecessary. For small DSOs separate branding will incur significantly higher costs than for TSOs, since the public perception does not separate between network operation and distribution. TSOs are not directly dealing with end-customers. Consequently establishing a different brand for a TSO will not impose similar costs. ERGEG should therefore be aware of the danger of discriminating DSOs. At the same time, from the customers point of view, the guideline could create confusion to customers.

G11: The network company shall have enough human and physical resources would contribute to ensure effective decision making rights. However, ERGEG should also be aware of the fact that strict adherence to this guideline once again imposes additional costs.

c) Unbundling of decisions

G12: Personnel leasing from an affiliated company: there should be no restrictions for the network operator on the hiring of personnel from an affiliated company.

G13 ad G14: Decision making rights: the Guidelines are too detailed. Decision making powers of the network operator and terms and conditions of contracts should constitute relevant facts within the regulatory decisions making process.

d) Unbundling of information

G24: Separated databases: If the network operator limits database access to licensed staff employed by the network operator only, there is no need for separation of databases. Provided that terms and conditions of licensing are known to and can be checked by the national regulator.

e) Compliance programme

G25: Design: the compliance programme should not cover processes other than those involving the network operator, as the compliance programme is part of the unbundling rules.



G26: Implementation: the processes should not be applied to employees within the vertically integrated company if they are not involved in any day-to-day business of the network operator.

G29: Reporting: the network operator should be free to delegate any internal obligation, as well as to draw up an annual report, to staff of its choice and it should not be limited to the compliance officer.

2. Are unbundling requirements already today included in Corporate Governance Guidelines or your Quality Management Systems? Do you think that these measures may harmonize implementation of unbundling in Europe?

As far as **GEODE** can see, unbundling requirements are not yet included in Corporate Governance Guidelines or Quality Management Systems.

3. Does unbundling in your view necessitate a restriction of information flows to the mother company further than those necessary for a pure financial investor? Do you experience conflicts of governance in your country with unbundling requirements? 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?

As regards G06, **GEODE** would like the term “financial interest” to be replaced by the term “legitimate interests”. **GEODE** believes that the information flow to the mother company should not be further restricted than in the case of a purely financial investor. The installment of trustees would indeed be advisable, where appropriate. However, for small DSOs the engagement of trustees would impose high costs without significant benefit. Therefore trustees should only be engaged on TSO level.

4. G08: Do you think that these rules can guarantee the independence of the management and employees? Or do you think that the possibility for management and employees to be assigned to the network company and the back of the competitive business after some time as part of the internal career should be prohibited?

GEODE considers G08 sufficient to guarantee the independence of the management and employees. However there are other less restrictive measures to be applied to prevent employees transferring information from the competitive business to the regulated business, like concrete provisions in the employment contract. At the same time legislation on data protection and labour Law should be applied to the specific situation. In case of small DSOs and suppliers the restriction could lead to a permanent loss of quality since well trained personnel would not be promoted accordingly.

Barcelona, 25.06.07

