Lessons learned in unbundling and certification
Experiences and views of a compliance officer and advisor
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# Aims and Realities

<table>
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<th>Unbundling Aims</th>
<th>Market Realities</th>
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<tr>
<td>Ensure confidentiality of sensitive commercial information of network users</td>
<td>Greater market transparency</td>
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<td>No influence of affiliated suppliers in capacity allocation by TSO</td>
<td>Limited influence on capacity allocation through NC CAM and allocation platforms (e.g. PRISMA)</td>
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<td>Reduction of barriers of third party access to capacity</td>
<td>Reducing interest in capacity bookings</td>
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<td>Challenge to validity of own capacity bookings by network users</td>
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<td>Reduction of limitations placed on investment into development and expansion of network</td>
<td>Investment incentives under tariff regulation are key driver; non supply affiliated shareholders have also commercial incentives and considerations to limit available capacity</td>
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Certification Conditions

- There are good reasons for the final say by the relevant NRA
  - Knowledge of the local market that colour the unbundling aims in relation to the specific TSO in question
  - Choice of implementation measures that the NRA can actively supervise
  - Combination of unbundling structures with tariff regulation
- Findings of non-compliance do usually not give sufficient guidance on how a structure could be made compliant
- All ITO and ISO certifications usually require further steps to be taken
  - TSOs usually face a 'chicken and egg' problem on structure
  - Some concerns are only identified during unbundling process
  - Unbundling processes take usually more time than the certification process
  - Balance between an existing structure capable of ITO or ISO compliance and conditions to be place to bring TSO in full compliance
Certification Conditions

- Examples of conditions:
  - The TSO no longer receives services from related entities which have connections to upstream activities
  - The TSO is contracting partner on all insurance agreements, as opposed to parent company which may have interests in other sections of the energy value chain
  - The TSO must demonstrate that it has civil law ownership over all infrastructure
  - The TSO must demonstrate that it possesses the necessary personnel to fulfil its obligations
  - The TSO has its own legal and accountancy departments
  - The TSO has an employee equal treatment programme (as required under national law)
Third Country Owners

- If certification requested by transmission system owners/operators from non-EU/EnC "third" countries, certification may be granted under a number of conditions:
  - TSO must comply with unbundling provisions
  - Security of energy supply will not be put at risk by certification. NRA must consider:
    - Rights and obligations of EnC with respect to that third country arising under international law,
    - Rights and obligations of the EnC Contracting Party with respect to that third country arising under international law,
    - Rights and obligations arising from association/trade agreements between EU and EnC Contracting Party, and
    - Other specific facts and circumstances of the case and third country involved
- For Energy Community, recent consideration in Yugorosgaz decision
State-owned Entities

- Article 345 TFEU: "The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership."

- Article 9(6) of Directives 2009/72/EC and 2009/73/EC: if TSO and generation/supply operations are controlled by "two separate public bodies", ownership unbundling requirement satisfied

- The Commission recognises State ownership of entities under the Treaty on the Functioning of the European Union (TFEU)

- However potential conflict of interest where state is both owner/operator of transmission systems and NRA or generator/supplier - how can these two bodies be separated?
  - Sufficient degree of separation (legal, political and budgetary independence from one another, including from Head of Government)
  - Safeguards to prevent influence and discriminatory behaviour from other public body
State-owned Entities

- Examples of cases where Commission decided on unbundling of State-owned entities:
  - Energienet.dk
  - Vorarlberger Ubertragungsnetze
  - Svenska Kraftnat
  - ČEPS
  - Augstsprieguma tikls (AST)
  - Terna
  - TenneT and GTS
  - Lietuvos Dujos and LitGas
  - SEPS
Financial Investors

- The European Commission produced a working document on Ownership Unbundling in 2013, "The Commission's practice in assessing the presence of a conflict of interest including in case of financial investors"

- Key issue in certification is the removal of any conflict of interest between generators/producers, suppliers and TSOs

- Particular issue where participations are held by financial investors
  - Advantage in that funding is provided for TSO infrastructure development and/or expansion
  - Despite potential violation of unbundling rules, where there is no incentive for investor to favour interests in generation, production and/or supply to detriment of other network users, deemed to be no conflict of interest
  - The "Commission has taken the view that a refusal to certify such a TSO given the fact that such participation in generation, production and/or supply activities does not lead to a situation which the unbundling rules seek to prevent"
Financial Investors

- **Swedegas (Swedish gas TSO)**
  - Ultimate controller of Swedegas also controlled waste disposal company generating electricity in neighbouring Denmark
  - Held that this was not a conflict of interest, as electricity generation was a by-product of the undertaking

- **50 Hertz Transmission (German electricity TSO)**
  - Financial investor with controlling participation had non-controlling participation in Dalkia Polska, a Polish heat provider which generated electricity as a by-product
  - German NRA: was there incentive for investor to favour interests in Dalkia Polska or to discriminate against competitors?
  - Held that this was not a conflict of interest
Financial Investors

- Società Gasdotti Italia (SGI, Italian gas TSO)
  - Financial investor additionally had participations in:
    - Two solar companies in Spain – however, interfacing between Italy and Spain limited, thus held not to be a conflict of interest
    - Waste management company in UK with two small electricity generators – geographical distance between UK generators and SGI´s gas network prevented discrimination, thus held not to be a conflict of interest
    - Waste management company in Italy which produced electricity as a by-product – however, small size of generators, regulated price of electricity sold, and distance between generators and SGI gas network prevented discrimination, thus held not to be a conflict of interest
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