Ownership unbundling

What is unbundling?

Historically, energy markets in Europe have been vertically integrated. Hence, a prerequisite for regulated common access to the network is unbundling the network services from other business fields. Unbundling may come in three (or four) degrees:

1. Accounting/functional unbundling: The firm remains integrated but reorganizes its book-keeping so that the costs of the network services can be identified.

2. Legal unbundling: The network services are provided by a separate firm. It is still connected with the production and trade activities of the previous integrated firm via a holding structure.

3. Ownership unbundling: In addition to legal unbundling, the holding company has to sell either its network or both its production and trade arm.

Unbundling in EU energy market

The chronological order of unbundling stages developed by the Energy EU Regulatory based on Art. 114 TFEU follows:

   - Partial market opening, limited to selected customers, choice for Member states between regulated and negotiated TPA (Third Party Access), but different transposition and application in Member states lead to distortions of competition

   - Complete market opening for business customers in 2004 and all customers in 2007
   - Regulated TPA to transmission and distribution networks at cost-reflective prices becomes mandatory, regulators have to be set up
   - Structural and organizational unbundling between gas/electricity networks and transport activities

   - To be transposed into national law by March 2011
   - Ownership unbundling for transmission (not for distribution) system operators (or alternatively ISO (Independent System Operator) or ITO (Independent Transmission Operator) model)

Why is ownership unbundling needed?

Without effective separation of networks from activities of production/generation and supply (effective unbundling), there is a risk of discrimination not only in the operation of the network but also in the incentives for vertically integrated undertakings to invest adequately in their networks.

The rules on legal and functional unbundling as provided for in Directives 2003/55/EC and 2003/54/EC (acceleration Directives) have not, however, led to effective unbundling of the transmission system operators.

Only the removal of the incentive for vertically integrated undertakings to discriminate against competitors as regards network access and investment can ensure effective unbundling. Ownership unbundling, which implies the appointment of the network owner as the system operator and its independence from any supply and production/generation interests, is clearly an effective and stable way to solve the inherent conflict of interests and to ensure security of supply. For that reason, the European Parliament, referred to ownership unbundling at transmission level as the most effective tool by which to promote investments in infrastructure in a non-discriminatory way, fair access to the network for new entrants and transparency in the market.

What are the general requirements for ownership unbundling?

Under ownership unbundling, Member States should therefore be required to ensure that the same person or persons are not entitled to exercise control over a production/generation or supply undertaking and, at the same time, exercise control or any right over a transmission system operator or transmission system. Conversely, control over a transmission system or transmission system operator should preclude the possibility of exercising control or any right over a production/generation or supply undertaking. Within those limits, a production/generation or supply undertaking should be able to have a minority shareholding in a transmission system operator or transmission system.

Any system for unbundling should be effective in removing any conflict of interests between producers, suppliers and transmission system operators, in order to create incentives for the necessary investments and guarantee the access of new market entrants under a transparent and efficient regulatory regime and should not create an overly onerous regulatory regime for national regulatory authorities.
Since ownership unbundling requires, in some instances, the restructuring of undertakings, Member States that decide to implement ownership unbundling should be granted additional time to apply the relevant provisions. In view of the vertical links between the electricity and gas sectors, the unbundling provisions should apply across the two sectors.

Under ownership unbundling, to ensure full independence of network operation from supply and production/generation interests and to prevent exchanges of any confidential information, the same person should not be a member of the managing boards of both a transmission system operator or a transmission system and an undertaking performing any of the functions of production/generation or supply. For the same reason, the same person should not be entitled to appoint members of the managing boards of a transmission system operator or a transmission system and to exercise control or any right over a production/generation or supply undertaking. According to the Directive 2009/72/EC, ‘control’ means rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by: (a) ownership or the right to use all or part of the assets of an undertaking; (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking;

The setting up of a system operator or a transmission operator that is independent from supply and production/generation interests should enable a vertically integrated undertaking to maintain its ownership of network assets whilst ensuring an effective separation of interests, provided that such independent system operator or such independent transmission operator performs all the functions of a system operator and detailed regulation and extensive regulatory control mechanisms are put in place.

What choices do the Member States have?

Where, on 3 September 2009, an undertaking owning a transmission system is part of a vertically integrated undertaking, Member States should therefore be given a choice between ownership unbundling and setting up a system operator or transmission operator which is independent from supply and production/generation interests.

To preserve fully the interests of the shareholders of vertically integrated undertakings, Member States should have the choice of implementing ownership unbundling either by direct divestiture or by splitting the shares of the integrated undertaking into shares of the network undertaking and shares of the remaining supply and production/generation undertaking, provided that the requirements resulting from ownership unbundling are complied with.

The full effectiveness of the independent system operator or independent transmission operator solutions should be ensured by way of specific additional rules. The rules on the independent transmission operator provide an appropriate regulatory framework to guarantee fair competition, sufficient investment, access for new market entrants and the integration of markets. Effective unbundling through the independent transmission operator provisions should be based on a pillar of organizational measures and measures relating to the governance of transmission system operators and on a pillar of measures relating to investment, connecting new production/generation capacities to the network and market integration through regional cooperation. The independence of the transmission operator should also, inter alia, be ensured through certain ‘cooling-off’ periods during which no management or other relevant activity giving access to the same information as could have been obtained in a managerial position is exercised in the vertically integrated undertaking.

The implementation of effective unbundling should respect the principle of non-discrimination between the public and private sectors. To that end, the same person should not be able to exercise control or any right, in violation of the rules of ownership unbundling or the independent system operator option, solely or jointly, over the composition, voting or decision of the bodies of both the transmission system operators or the transmission systems and the production/generation or supply undertakings. With regard to ownership unbundling and the independent system operator solution, provided that the Member State in question is able to demonstrate that the requirement is complied with, two separate public bodies should be able to control production/generation and supply activities on the one hand and transmission activities on the other.

Obligation of Member States — contents of ownership unbundling:

Member States shall ensure that from 3 March 2012:

(a) Each undertaking, which owns a transmission system, acts as a transmission system operator;

(b) The same person or persons are entitled neither:

(i) directly or indirectly to exercise control over an undertaking performing any of the functions of production/generation or supply, and directly or indirectly to exercise control or any right over a transmission system operator or over a transmission system; nor

(ii) directly or indirectly to exercise control over a transmission system operator or over a transmission system, and directly or indirectly to exercise control or any right over an undertaking performing any of the functions of production/generation or supply;

(c) the same person or persons are not entitled to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking, of a transmission system operator or a transmission system, and directly or indirectly to exercise control or any right over an undertaking performing any of the functions of production/generation or supply; and

(d) the same person is not entitled to be a member of the supervisory board, the administrative board or bodies legally representing the undertaking, of both an undertaking performing any of the functions of production/generation or supply and a transmission system operator or a transmission system.
The rights referred to above shall include, in particular:

(a) the power to exercise voting rights;
(b) the power to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking; or
(c) the holding of a majority share.

The obligation, that each undertaking, which owns a transmission system, shall act as a transmission system operator, shall be deemed to be fulfilled in a situation where two or more undertakings which own transmission systems have created a joint venture which acts as a transmission system operator in two or more Member States for the transmission systems concerned. No other undertaking may be part of the joint venture, unless it has been approved as an independent system operator or as an independent transmission operator.

Where on 3 September 2009, the transmission system belongs to a vertically integrated undertaking a Member State may decide not to apply ownership unbundling. In such case, the Member State concerned shall either set up an independent system operator or an independent transmission operator (see the Directives for further details). Vertically integrated undertakings which own a transmission system shall not in any event be prevented from taking steps to ownership unbundling.

Sources:


Dr. R. Klotz, Fundamentals of Regulatory Law, lecture notes for MBL-masterclass 6-7 May 2011.