Status Review of DSO Unbundling with Reference to Guidelines of Good Practice on Functional and Informational Unbundling for Distribution System Operators

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1 Executive Summary

In July 2008, the European Regulators Group for Electricity and Gas (ERGEG) published Guidelines of Good Practice on Functional and Informational Unbundling for Distribution System Operators (GGP FIU-DSO). These Guidelines (which are voluntary in nature) focus on unbundling rules for network companies which are "legally unbundled". In most Member States this refers to DSOs with more than 100,000 customers. In general, more than 80% of all consumers are served by DSOs of this size. The GGP set out what ERGEG considers as necessary to put in place effective DSO unbundling as required by law. For example, the DSO should ensure non discriminatory access to networks by excluding any possibility of discrimination of network users and by removing any (commercial) incentive for the network operators to give preferential treatment to related companies. The DSO should also act in full independence of any commercial interests in the market to avoid any conflict of interest, and also effectively monitor and enforce unbundling.

The European Commission invited ERGEG to present to the 2nd meeting of the Citizens' Energy Forum in London (29-30 September 2009), a status report on the degree of adherence to the guidelines on functional and informational unbundling for DSOs. The present status report reflects the situation of DSO unbundling in both electricity and gas on the basis of a questionnaire issued to national regulatory authorities (NRAs).

The questionnaire deals with different elements of (a) functional and (b) information unbundling including whether legal unbundling provisions have been transposed into national law; whether the DSO is required to be physically separated from the competitive parts of the business; whether the DSO can "share services" with the vertically integrated utility; and whether there is separate branding and communication strategies for the network business and the other competitive aspects of the mother company.

DSO unbundling is key for the further development of retail competition
In most Member States, historically it was vertically integrated companies who supplied customers in a regionally defined area. The 2nd Liberalisation Package (2003 Directives) required the legal unbundling of DSOs with more than 100,000 customers by 1st of July 2007. The objective was for the DSO to serve as a neutral market facilitator of retail competition for example by ensuring non-discrimination access to networks. Consequently, DSO unbundling is relevant to the liberalisation of retail markets in Member States and achieving competition where consumers are actively participating in the market.

Separation of Information remains the biggest challenge
Whilst NRAs have noted a positive development towards effective unbundling, this ERGEG status review shows that many shortcomings remain in effective DSO unbundling in both electricity and gas.

The report finds a very diverse situation of unbundling across the 22 European countries who provided answers. In general integrated companies are still quite free to set up their own unbundling regimes. There appears to be a lack of consumer information on the requirement of DSO unbundling; consumers still find identical branding by the DSO and the rest of the integrated company; consumers still expect "integrated behaviour"; and only in 5 countries do consumers complain. ERGEG also found that network users/competitors do not trust the neutrality of integrated DSOs. The separation of information remains the biggest problem. Non-discrimination requires well-trained staff on the DSO side, which tends to be in place. However, very often the distribution and supply businesses employ the same persons - ERGEG considers informational unbundling cannot be guaranteed in such circumstances. ERGEG further considers that compliance programmes, which are widely in place, are important tools.

As a further result of the analysis, it seems that mature markets depend less on strict implementation of some aspects of DSO unbundling than infant markets. Especially at the beginning of liberalisation, issues of branding and communication may be highly relevant, whereas at later stages of market development, they might seem less important. In major parts of the European Union markets are at a very early stage of development. Therefore the following findings relate to a situation where consumers are not yet used to having free choice of suppliers and do not fully understand their rights.

Finally, a comparison of unbundling in the electricity and gas sectors finds that progress is quite similar in electricity and gas, which contrasts the findings of the last ERGEG's Status Review (Ref: C08-URB-15-04, 10 December 2008), where the gas market was found to be lagging behind in most countries. However, the situation of independence of management is less satisfying in gas than in electricity. On separation of communication strategies, it seems that in gas the situation is better than in electricity.

Consumers still expect "integrated behaviour"

Customers are still used to a situation of integrated businesses. The core idea of liberalisation is to maintain the regional monopoly for distribution but to open the market for the supply business which can only be achieved if consumers are well aware of the different roles of suppliers and distribution companies.

This requires DSOs of vertically integrated companies to make significant structural changes to the day-to-day running of their business to ensure functional and informational unbundling, including continuous and consistent information for consumers on the role of the DSO and the provisions to guarantee fair treatment. ERGEG finds that most consumers still expect "integrated behaviour", i.e. one person responsible for supply and distribution, and therefore may attribute tasks of the DSO (for instance reliability) to the integrated company. Consumers therefore rarely complain. In only 5 out of 21 Member States, regulators report consumer complaints.

On the question of whether DSOs of vertically integrated companies have separate branding and commercial strategies, in most countries, appropriate information on communication policy is not available. Only some DSOs, in a few Member States where regulators have relevant information, have a separate communication policy. It seems fair to say that these findings support the general conclusion of insufficient information for consumers on the different roles of the DSO and competitive parts of the integrated company. In gas, the situation is slightly different. Communication policy, although still not satisfactory, seems to better separate roles of DSOs and competitive parts of integrated companies and gives consumers a better chance to distinguish between network and competitive businesses.

Independence of management most often formally in place, but staff not separated
The report concludes that the formal criteria of independence of the management are most often met. In 16 countries there are adequate legal provisions and only two regulators are not satisfied with the general provisions on the independence of management. However, there is still some improvement to be made:

In almost 60% of the Member States of the European Union incentives are also related to the performance of the integrated company. In this case it is obviously difficult for the management to act independently.

Independence of management and the ability to enforce their decisions requires sufficient power to punish or promote employees. In 14 out of 16 countries DSO employees are not only punished or promoted by the DSO management but also by the management of the vertically integrated company. This sheds some doubts on the real situation of independence of DSO management: such a situation obviously makes it hard for the management to enforce their decisions properly. The main reason might be the extensive workforce sharing, where significant staff numbers are not exclusively employed by the DSO but rather by the mother company or some sister company to the DSO.

Another possible barrier to the independence of the management of the DSO identified in the report is the situation where the DSO is the mother company of an energy supply company. In this case, the DSO has and must have a financial interest in the development of the supply company, which prevents the management from acting independently.

Compliance programmes in place in 90% of Member States
Even though most of the Member States have a legal obligation to publish a compliance programme and an annual report, contents differ widely. All NRAs confirm that the promulgation of the compliance programme and non-compliance incidents is part of their annual report. But it seems that the compliance programme is not yet well integrated in all relevant business processes of the DSOs. The diversity of programmes shows quite well that in many Member States, DSOs decide on their programmes and reports independently. It is therefore not surprising that especially on “softer” aspects of unbundling, such as communication policy, compliance reports do not contain sufficient information. This complicates proper oversight of compliance by national regulators.

Role of compliance officer not clear
In the majority of countries compliance officers do exist, but they are rarely required by national law. As a consequence the role of compliance officers is often not clear enough.

Sometimes it is the management of the DSO which is responsible for implementing the compliance programme and reporting on it. Many of them have “compliance programme specialists”, but they are not compliance officers as defined in the GGP or in the forthcoming 3rd Energy Liberalisation Package. They have therefore no specific mission and are not necessarily independent.

In addition there is a lack of direct access to the senior management of DSOs and vertically integrated companies.

Non-discrimination depends on well-trained staff
On a positive note, the report concludes that information and training of the workforce seem to be well elaborated. Many NRAs observe trainings of employees on unbundling in DSOs.

Non-discrimination hampered by information flows
Separation of information flows touches almost every aspect of every-day business of DSOs. The report shows that formal criteria of non-discrimination can be monitored more easily than informal criteria such as equal access to relevant information regarding time and quality.

The majority of regulators are not dissatisfied with the situation of informational unbundling in general. The report identifies areas where additional measures might be needed. Only 9 out of 21 regulators are satisfied with the handling of commercially sensitive information.

In addition, the distribution and supply businesses very often employ the same people. Informational unbundling cannot be guaranteed under such circumstances, which are quite frequent especially in smaller, but still legally unbundled DSOs. This also corroborates the previous statement on training.

Regulators are sceptical about fair allocation of economies of scale in reality

Economies of scale are frequently cited as the major reason to allow shared services and sharing of personnel. In 80% of responding countries, shared services, i.e. services performed by the integrated company for the DSO, are permitted and regulators have access to the underlying contracts. However, in about 4 out of 5 Member States it has not been demonstrated that sharing services leads to lowering costs. It might be interesting for regulators to investigate this area in order to have a clear idea on the benefits of shared services.

2 Introduction

In July 2008, the European Regulators Group for Electricity and Gas (ERGEG) published Guidelines of Good Practice on Functional and Informational Unbundling (GGP FIU) for DSOs[1] (Ref: C06-CUB-12-04b, July 2008). These Guidelines (which are voluntary in nature) focus on unbundling rules for network companies which are "legally unbundled". In most Member States this refers to DSOs with more than 100,000 customers. In general, more than 80% of all consumers are served by DSOs of this size. The GGP set out what ERGEG considers as necessary to put in place effective DSO unbundling as required by law. For example, the DSO should ensure non discriminatory access to networks by excluding any possibility of discrimination of network users and by removing any (commercial) incentive for the network operators to give preferential treatment to related companies. The DSO should also act in full independence of any commercial interests in the market to avoid any conflict of interest, and also effectively monitor and enforce unbundling.

The European Commission invited ERGEG to present to the 2nd meeting of the Citizens' Energy Forum in London (29-30 September 2009), a status report on the degree of adherence to the guidelines on informational and functional unbundling for DSOs. The present status report reflects the situation of DSO unbundling in both electricity and gas on the basis of a questionnaire issued to national regulatory authorities (NRAs).

The present report monitors the status and real implementation of DSO unbundling. Where appropriate, reference to the GGP issued by ERGEG has been made, in order to clarify the objective of unbundling and to get criteria for its assessment. The report does NOT assess the implementation of the GGPs but tries to give an assessment of the present status of unbundling. ERGEG collected information on the present status of unbundling through the questionnaires which were filled in by national regulatory authorities based on their present level of information. (Therefore, no specific additional collection of information by NRAs is requested.)

The questionnaire was composed of 75 questions. The questionnaire deals with different elements of (a) functional and (b) information unbundling including whether legal unbundling provisions have been transposed into national law; whether the DSO is required to be physically separated from the competitive parts of the business; whether the DSO can "share services" with the vertically integrated utility; and whether there is separate branding and communication strategies for the network business and the other competitive aspects of the mother company.

ERGEG assessed the status of unbundling within legally unbundled DSOs following the provided data. The questions refer only to DSOs with more than 100,000 customers, as the GGP are restricted to legally unbundled DSOs.

[1] There are two exceptions [to the implementation of the GGP] though: where there is full **ownership unbundling** or where the NRA, acting independently (from the industry as well as politically), can show that the objective of a specific guideline is already met through demonstrable and verifiable means, such as **license conditions**.

Two different questionnaires were sent out to ERGEG members and observers, one concerning electricity and one concerning gas. The response rate was 21 for electricity and 19 for gas, by the countries: Austria, Belgium, Czech Republic, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Lithuania (only electricity), Luxembourg, Norway (no gas market), Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Netherlands and UK.

3 General issues[2]

Regulators were asked the following questions regarding market situation, concentration and the 100,000 costumer exemption:

1. Is it possible that the DSO is the owner of the supplier?
2. Number of DSOs in the country.
3. Number of DSOs with less than 100,000 costumers in the country.
4. What is the market share covered by the electricity DSOs serving more than 100,000 customers (number of connected customers proportional to all connected customers) in your country?

3.1 Electricity

A total of 23 countries answered the questionnaire regarding DSO unbundling.
To get an impression of their present unbundling situation, regulators were asked if they have transposed the Directive into national law. All countries participating in this survey have fully or partly (in 3 MS) transposed the unbundling provisions of Directive 2003/54/EC of the European Parliament and of the Council concerning common rules for the internal market in electricity into the country's national legislation.

	1. DSO owner of the supplier	2. Number of DSOs in the country	3. Number of DSOs with less than 100,000 costumers	4. Market share of DSOs > 100,000 costumers
AUSTRIA	No	130	119	88%
BELGIUM (Walloon Region)	No	13	7	90%
BELGIUM (Flemish Region)	No	16	8	92,8%
CZECH REPUBLIC	No	3	277	almost 100%
ESTONIA	Yes	40	39	86,5%
FINLAND	Yes	88	82	49
FRANCE	Yes	148	143	97%
GERMANY	No	862	769	approximately 78%
HUNGARY	No	6	0	100%
IRELAND	No	1	0	100%
ITALY	Yes	149	99	90%
LITHUANIA	No	2	5	99%
LUXEMBOURG	Yes	7	6	66%
NORWAY	No	161	155	66.1 %
POLAND	No	20	6	99,72%
PORTUGAL	No*	13	10	approximately 99%
ROMANIA	No	35	27	99%
SLOVAK REPUBLIC	Yes	159	92	N/A
SLOVENIA	---	1	0	100%
SPAIN	No	329	323	96
THE NETHERLANDS	No	8	2	ca. 98%
GREAT BRITAIN	No	14	0	>99%

Figure 1 - Market concentration and 100,000 customer exemption in electricity

* The rule that DSOs are not allowed to be the owner of the supplier only applies to market suppliers but not to suppliers of last resort (which are regulated).

[2] Information from additional regulators (such as DERA and PUC, the Danish Energy Regulatory Authority and resp. the Public Utilities Commission in Latvia) has been included to be used in the general assessment of the situation of DSO unbundling in the EU.

Most of the countries use the 100,000 customer exemption. Only five countries follow the rigorous path of unbundling for all DSOs. Although in most countries the number of companies that exceed 100,000 costumers is small compared to the overall number of DSOs, their market share usually is about 90% or higher. Interestingly, there are no small DSOs in countries without exemption. It seems that unbundling is a huge barrier for small companies.

One interesting case is the retail market in Flanders, where there are no active vertically integrated companies anymore, as ownership of DSOs by electricity suppliers or electricity producers is legally limited to 30%. This is crucial to a correct analysis and interpretation of the Flemish answers to the questionnaire.

3.2 Gas

21 countries answered the questionnaires regarding DSO unbundling in gas. All countries have fully or partly (3 Member States) transposed the unbundling provisions of Directive 2003/55/EC of the European Parliament and of the Council concerning common rules for the internal market in natural gas into the country's national legislation.

	1. DSO owner of the supplier	2. Number of DSOs in the country	3. Number of DSOs with less than 100,000 costumers	4. Market share of DSOs > 100,000 costumers
AUSTRIA	No	19	14	51%
BELGIUM Flemish Region	No	11	4	91%
Walloon Region	No	7	5	76%
CZECH REPUBLIC	No	8	83	almost 100%
ESTONIA	Yes	27	26	92%
FINLAND	---	28	28	0%
FRANCE	Yes	24	21	99%
GERMANY	No	686	633	approximately 42%
HUNGARY	No	11	6	97%
IRELAND	No	1	0	100%
ITALY	Yes	342	306	80%
LUXEMBOURG	Yes	4	4	0%
POLAND	No	6	0	100%
PORTUGAL	No*	11	7	approximately 90%
ROMANIA	No	39	37	94%
SLOVAK REPUBLIC	Yes	50	49	N/A
SLOVENIA	Yes	17	17	0%
SPAIN	No	22	16	95,39%
THE NETHERLANDS	No	13	2	ca. 99%
GREAT BRITAIN	No	8	0	approximately 95%

Figure 2 - Market concentration and 100,000 customer exemption in gas

* The rule that DSOs are not allowed to be the owner of the supplier only applies to market suppliers but not to suppliers of last resort (which are regulated).

The '100,000 customer exemption' is used in almost all countries' national legislation, except in 5 countries. This means that companies with less than 100,000 customers are exempted from unbundling rules. On the gas markets, concentration is lower than in electricity. The spread varies from 0% to 100%.

4 Unbundling of functions

The relevant Guidelines are No 1 & 2 (see Annex)

Electricity

In the electricity sector, the Council of European Energy Regulators (CEER) observes that only in 6 out of 21 countries DSOs are required to be physically separated from competitive business structures by law or regulation. In some countries separation is understood to occupy different offices within the same building, whereas other countries require not only different buildings but even different town locations.

CEER also observes that in the view of most regulators, DSOs have sufficient financial and personnel resources under their immediate control to ensure real decision-making power and independence in their work.

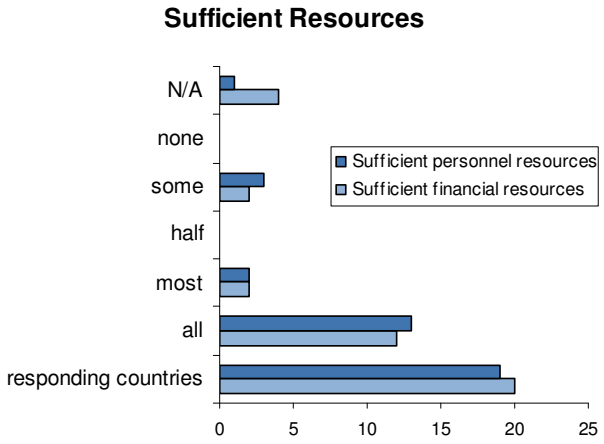

Figure 3 - Endowment with financial and personnel resources - electricity

Sufficient personnel resources are mostly ensured by law or regulation. 4 countries are lacking obligations on this point. The majority of regulators (70%) are quite satisfied with the resource situation of the companies in their countries and only 25% think that the current circumstances are problematic. As expected, the majority of unsatisfied regulators are those from countries where no obligation is in place.

Gas

For comparison, in the gas sector CEER observes that only in 5 out of 17 countries DSOs are required to be physically separated from competitive business structures by law or regulation. In some countries operation in different buildings or town locations is required, in some different offices within the same building are sufficient. Similar to the electricity market, most regulators consider the financial and personnel resources under the immediate control of DSOs suffice to ensure real decision-making power and independence in their work.

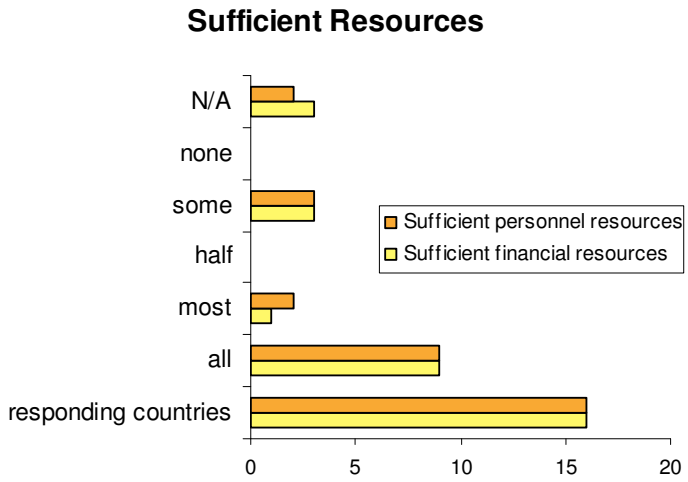

Figure 4 - Endowment with financial and personnel resources - gas

In most of the countries DSOs are given enough resources to fulfil their mission, but there is no definition of what exactly is sufficient. In some countries law and regulation secure sufficient resources.

Sufficient personnel resources are mostly ensured by law or regulation, except in 3 countries, where there is no obligation in place. The majority of regulators (73%) are quite satisfied with the resource situation of the companies in their countries and just 20% think that the current circumstances are problematic. As expected, most regulators that are dissatisfied with the situation are from countries where no obligation is in place.

4.1 Shared services

4.1.1 Electricity

To enable synergy effects between the DSO and its mother company, 16 out of 20 responding countries permit the DSO to use services performed by the competitive units of its company. Although in every country the competent body has access to the contracts to monitor the behaviour of the firms, the cost-reducing effect seems to be doubtful.

In principle, one would expect that sharing services in economies of scale result in lower costs. But Figure 5 indicates that shared services could lead to cross-subsidisation and indicates the need to further investigate this issue.

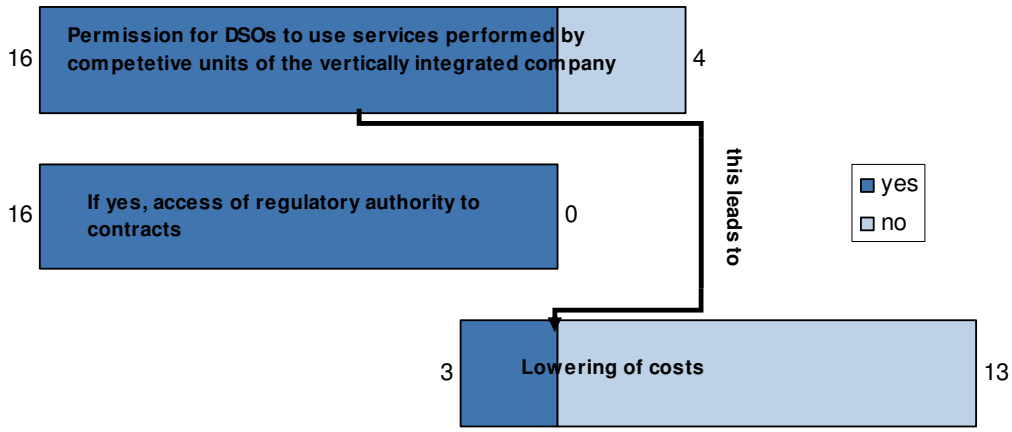

Figure 5 - Use of shared services - electricity[3]

The effective power of NRAs over these contracts varies from simply publishing the findings to the point of requiring changes or excluding some of the resulting costs when calculating network charges.

Figure 6 shows the whole range of possible shared services used by companies; in some countries, almost all of them are shared.

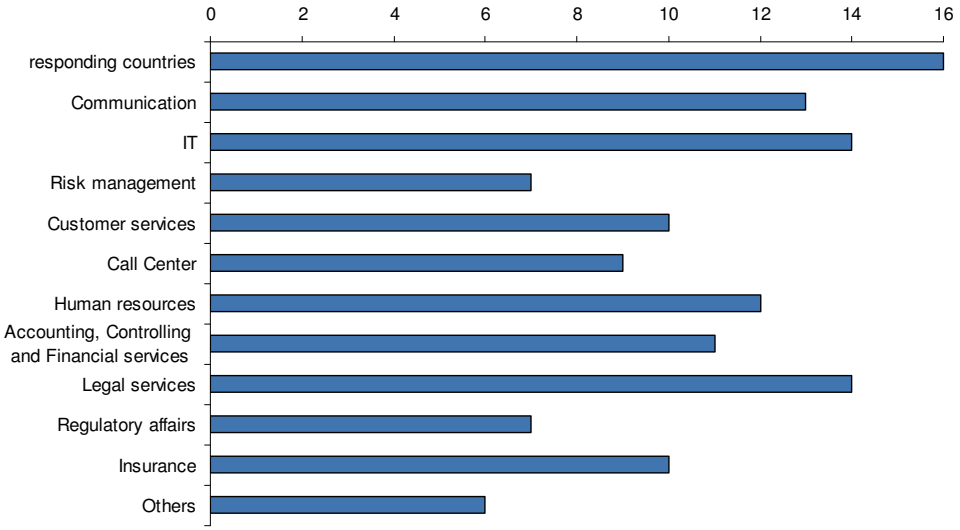

Figure 6 - Shared services - electricity

[3] For more detailed information, see Annex 1, questions 19 to 22.

4.1.2 Gas

On the gas markets, 12 out of 17 countries permit the DSO to use services performed by competitive units of its company to enable synergy effects. In every country the competent body has access to the contracts to monitor the behaviour of the firms, but there are doubts about the actual cost reduction achieved.

Similarly to the electricity sector, cost reductions would be expected from shared services in economies of scale, but again, Figure 7 shows that there is a possibility for cross-subsidisation and the need for further investigation.

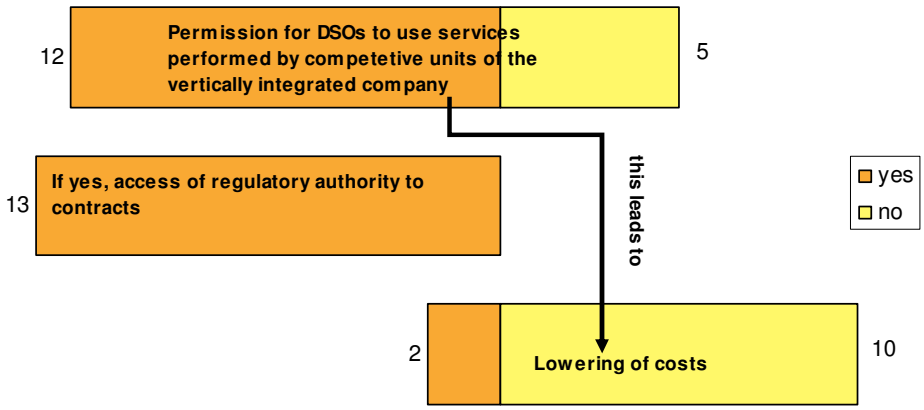

Figure 7 - Use of shared services - gas[4]

The effective power of NRAs over these contracts varies from simply publishing the findings to the point of notification and requiring changes or excluding some of the resulting costs when calculating network charges. Some NRAs have the power to allow only market-based costs. Other NRAs are entitled to access any information concerning the activities performed by regulated entities, or to impose sanctions on regulated entities in case of violation of its decisions.

As shown in Figure 8, companies use a wide array of different kinds of shared services.

[4] For more detailed information, see Annex 1, questions 19 to 22.

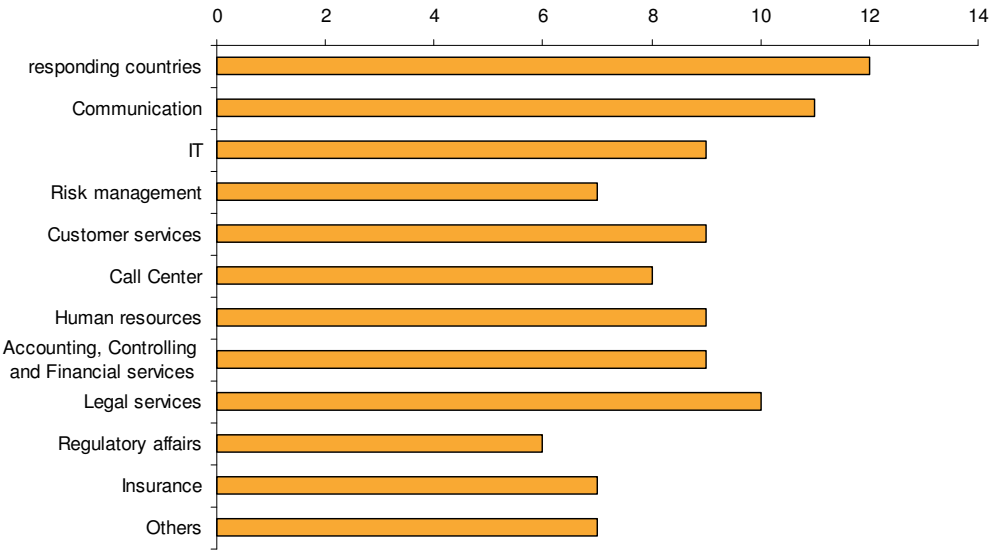

Figure 8 - Shared services - gas

4.2 General prohibitions for managers and employees

The relevant Guidelines are No 3 & 4 (see Annex)

4.2.1 Electricity

While in 81% of the answered questionnaires NRAs indicate that the DSO management is prohibited from holding any position in the upper and middle management or supervisory board of a vertically integrated company, this same provision for employees only applies in 33% of the countries.

Interestingly, in 12 out of 21 countries DSO management is allowed to have incentives that relate to the performance of the vertically integrated company. This situation contradicts the principles of unbundling in a very basic way and will hardly improve the aspired independence of DSOs.

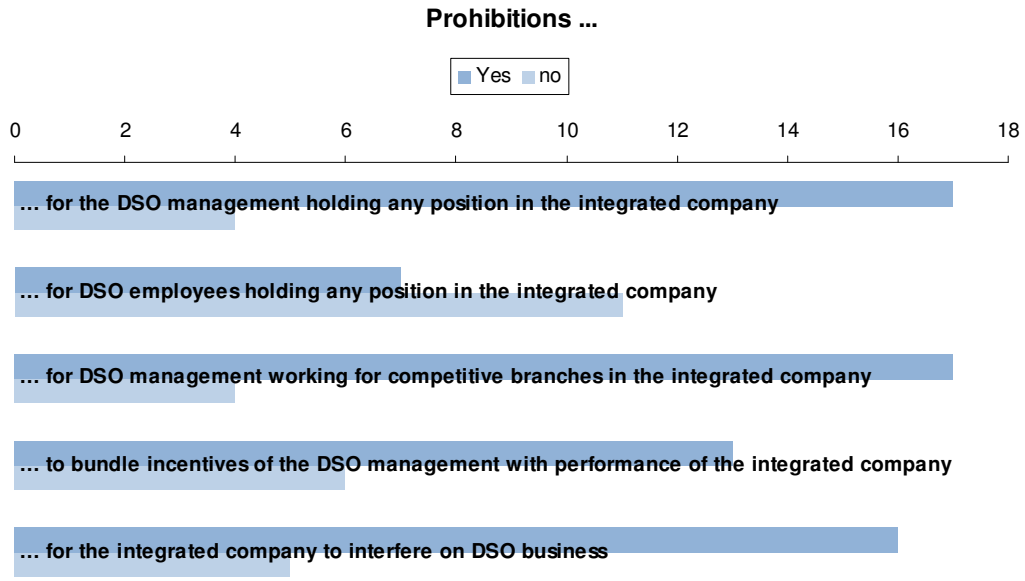

Figure 9 - General prohibitions for managers and employees - electricity

Figure 10 below indicates whether for some NRAs the actual situation is satisfactory or not.

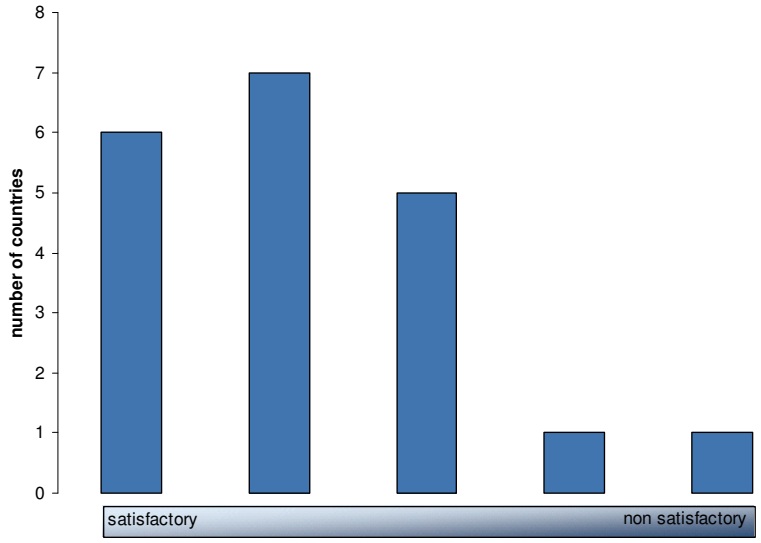

Figure 10 - NRA's satisfaction with actual situation - electricity

4.2.2 Gas

Figure 11 shows that restrictions for the upper and middle management are stricter than for employees. Whereas in 53% of the answered questionnaires NRAs indicate that the DSO management is prohibited from holding any position in the upper and middle management or supervisory board of a vertically integrated company, only 23% state so for employees. It is interesting that the figure for DSO management is higher in the electricity than in the gas sector.

In 5 out of 15 countries DSO management is allowed to have incentives that relate to the performance of the vertically integrated company. This situation contradicts the principles of unbundling in a very basic way and will hardly improve the aspired independence of DSOs.
Even though in some countries there is no legal obligation to avoid incentives for DSO employees related to the performance of the mother company, some NRAs make an effort to restrict this.

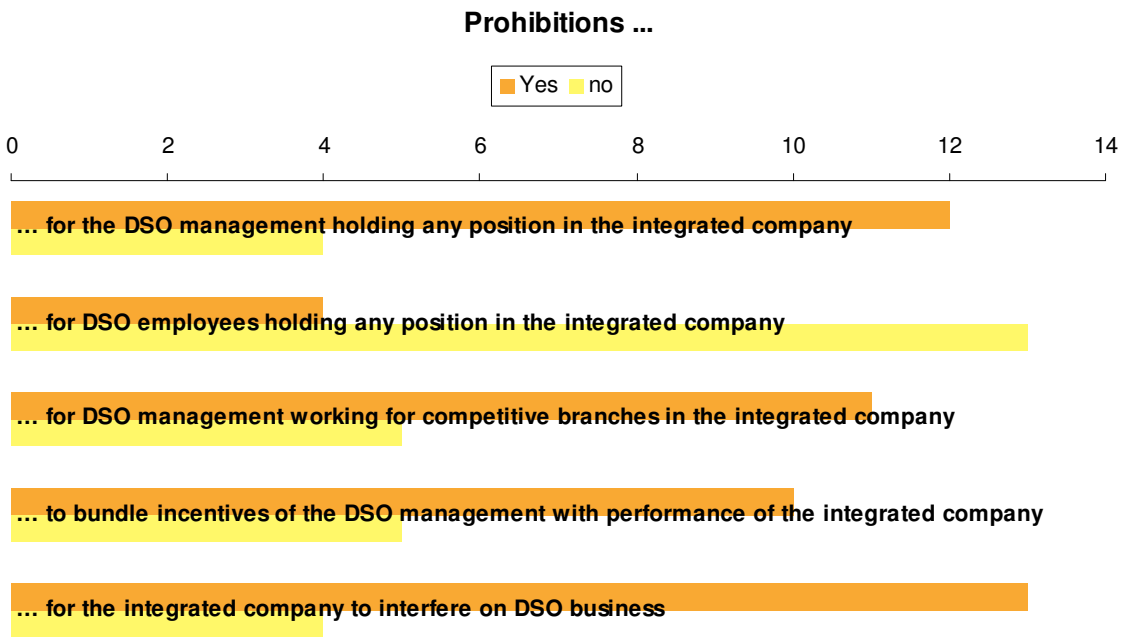

Figure 11 - General prohibitions for managers and employees - gas

Figure 12 below indicates whether the actual situation is satisfactory or not. Especially in countries where basic unbundling principles are not implemented a high degree of dissatisfaction is noticeable.

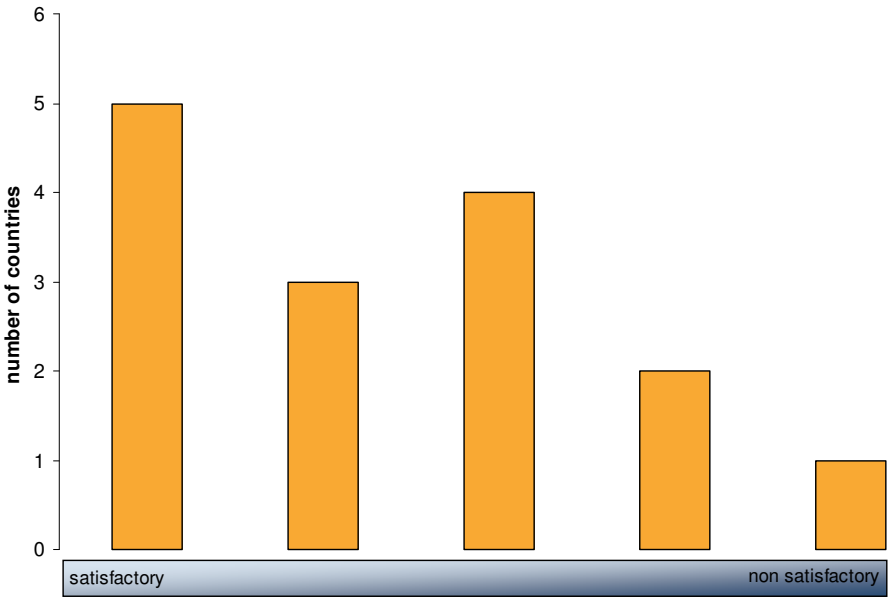

Figure 12 - NRA's satisfaction with actual situation - gas

Certain aspects of DSOs' internal human resources policy (wage, promotion, sanction, dismissal), especially as regards the management of DSOs (where ERGEG recommendations were directly introduced in some countries), seem to be satisfactory in most of Europe.

4.3 Employees

ERGEG established indicative guidelines on appropriate measures for the management and advocated the expansion of some of them to all employees.

The relevant Guidelines are No 5 & 6 (see Annex)

Movement of staff, and particularly of executives, between different entities within a group are mostly part of the human resources management policy. However, in the electricity and gas industries, this type of staff circulation must be accompanied by the strongest possible guarantees in order to prevent that the interests of competing group entities influence the decisions of executives managing regulated subsidiaries. In particular, companies should avoid promoting, even informally, services provided to the group by an employee of the network operator, or imposing limitations on his/her neutrality as regards the group's competitive interests.

4.3.1 Electricity

Regarding the general provision prohibiting employees from working for the competitive branches and the network branch of the vertically integrated company at the same time, the situation in Europe is not satisfactory. In half of the responding countries, employees may or actually do work for both the competitive and the network branches of the vertically integrated company at the same time (see Figure 13).

In some countries, this situation is even more complex, since employees do not work directly for the DSO and the competitive business at the same time, but they may work directly for one of them and work indirectly for the other one through a supply contract between the DSO and the competitive business (shared services). By contrast, secondment[5] is seen as a viable possibility by ERGEG as long as it does not interfere with the independent conduct of the DSO in day-to-day business.

ERGEG recommends that such practices should somehow be regulated in Europe (e.g. through a new employment contract that specifies conditions of secondment). However, CEER noticed that in a large majority of responding countries there are no specific legal provisions at all regarding the secondment of personnel to DSOs (Figure 13).

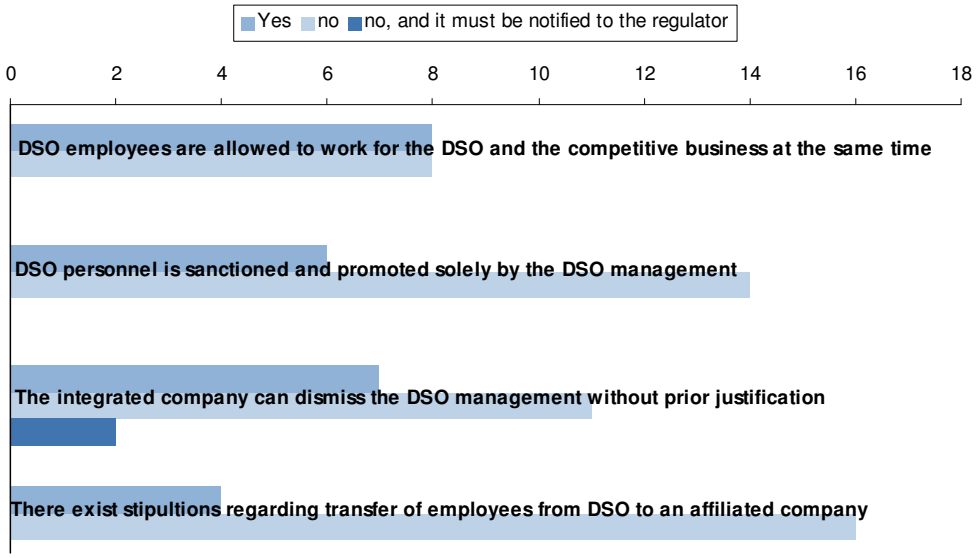

Figure 13 - Stipulations for DSO employees - electricity

[5] ERGEG defines secondment as "any arrangement between the network company and a third company (typically an affiliated company) whereby the employee (temporarily) moves to the network company. The practical effect of such a secondment arrangement is that the employee remains an employee of the home employer but the employee is directed by their home employer to take day-to-day direction from the staff of the host employer. Promotion, salary and other contractual terms are still governed by the employment contract between employee and home employee." (See ERGEG GGPs on Functional and Informational Unbundling for DSOs, July 2008).

In a majority of responding countries there is no specific legal provision that prevents a connection between the careers of DSO employees and the management of the vertically integrated company.

However, this result should be moderated by the fact that in some countries this specific issue is not dealt with in sector-specific legislation. It is a general rule that those who make formal decisions concerning employees' position must have a formal position in the same company.

In some countries, most DSOs have taken internal measures to ensure that promotions and sanctions of DSO personnel should be decided on by the management of the DSO. Such internal dispositions are taken in accordance with public declarations of the NRA and are communicated to the NRA.

Rules about promotions and sanctions of DSO personnel must also apply to dismissal, especially for the upper management of the network company. In a majority of responding countries CEER observes that the dismissal of the upper management of a DSO is not allowed without prior justification and for reasons not based on network issues, which is in line with ERGEG recommendations.

For this topic, it is again difficult to assess the situation, since it could be dealt with in general laws and rules instead of in the national energy legislation. In some countries, there is no legal requirement regarding the dismissal of the upper management, which would allow a vertically integrated company to dismiss the upper management of the DSO if there are no internal statutes against this.

It is worthwhile noticing that in 2 responding countries, ERGEG's recommendations are enforced, and therefore the decision to dismiss upper management of the network branch is notified to the regulatory authority.

Wages and incentives must be based on the performance of the network branch and not also on the performance of the competitive branches. In a majority of responding countries, both in electricity and gas, the management of the network branch is not allowed to receive incentives based on the performance of the vertically integrated company. In some countries there are noticeable exceptions in electricity. The situation is much more contrasted for other employees.

On the electricity markets of 4 responding countries, there is a total prohibition of incentives that are based on the performance of the vertically integrated company but it is possible in 12 countries. In 4 countries it is even the case that all employees receive wages and incentives exclusively based on the result of the network company.

4.3.2 Gas

Similarly to the electricity sector, in 5 out of 12 countries, employees may or actually do work for both the competitive and the network branches of the vertically integrated company at the same time (see Figure 14). In spite of ERGEG's recommendation for regulating such practices, most responding countries lack specific legal provisions regarding the secondment of personnel to DSOs (see Figure 14).

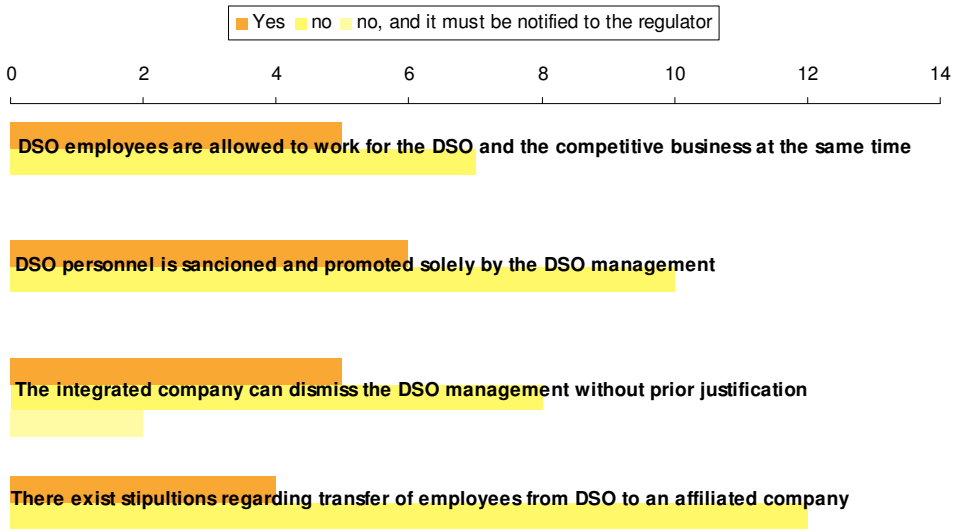

Figure 14 - Stipulations for DSO employees - gas

In some countries, most DSOs have taken internal measures to ensure that promotions and sanctions of DSO personnel should be decided on by the management of the DSO. Such internal dispositions are taken in accordance with public declarations of the NRA and are communicated to the NRA.

Rules about promotions and sanctions of DSO personnel must also apply to dismissal, especially for the upper management of the network company. In a minority of responding countries (8 out of 17), CEER observes that it is not allowed to dismiss the upper management of a DSO without prior justification and for reasons not based on network issues, which is in line with ERGEG recommendations. In some countries, there is no legal requirement regarding dismissal of the upper management, enabling vertically integrated companies to dismiss the upper management if there are no internal statutes against this.

Wages and incentives must be based on the performance of the network branch and not also on the performance of the competitive branches. On the gas markets of 3 responding countries, there is no prohibition against incentives based on the performance of the vertically integrated company.

All in all, the situation is not satisfactory with respect to what is at the core of functional unbundling: too many employees still could or do work for both the competitive and the network branches of the vertically integrated company at the same time. Such a situation is damaging proper retail market functioning, for it can raise suspicions on the part of network users about the DSO's independence and neutrality. This renders all efforts in informational unbundling useless, as these persons have access to confidential data.

4.4 External communication

ERGEG believes that customer relations of network companies and suppliers are a fundamental element of functional unbundling as they ought to mirror the network business´ internal independence from the vertically integrated company. Customers must be convinced of the separation of the system entity and energy suppliers. It must be clear for customers that the system operator is a neutral entity separated from any supply activities with the task of providing access to all energy suppliers in an equal manner. The customer must not believe and be therefore reluctant to change supplier, that the integrated supplier is more reliable because of his closeness to the integrated grid. The affiliated supplier shall not benefit from the public credibility or reliability of the system operator. This must be assured through separate marketing activities.

The relevant Guideline is No 7 (see Annex)

The European energy regulators' position is reflected in new provisions of the internal energy market legislation. The 3rd Package states that "where the distribution system operator is part of a vertically integrated undertaking, the Member States shall ensure that the activities of the distribution system operator are monitored by regulatory authorities or other competent bodies so that it cannot take advantage of its vertical integration to distort competition. In particular, vertically integrated distribution system operators shall not, in their communication and branding, create confusion in respect of the separate identity of the supply branch of the vertically integrated undertaking."[6]

4.4.1 Electricity

Stating that DSOs' external communication must not create confusion for customers, ERGEG observes that half of the responding regulatory authorities are of the opinion that it is rather possible for customers to distinguish between the DSO and the affiliated supplier, and half of them think that this is rather not the case. Major countries are among those who consider the possibility for customers to distinguish between the DSO and the affiliated supplier satisfactory (see Figure 15).

On the other hand, 2/3 of the responding regulatory authorities reported cases where external communication is likely to create confusion about DSO activities and competitive activities of the vertically integrated company.

Numerous cases were reported where consumers were confused about unbundling itself. 2/3 of the responding regulatory authorities reported such cases in their countries (see Figure 8). However, consumers complain about insufficient unbundling in a very limited number of countries.

[6] Article 26(3) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC and Article 26(3) of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC.

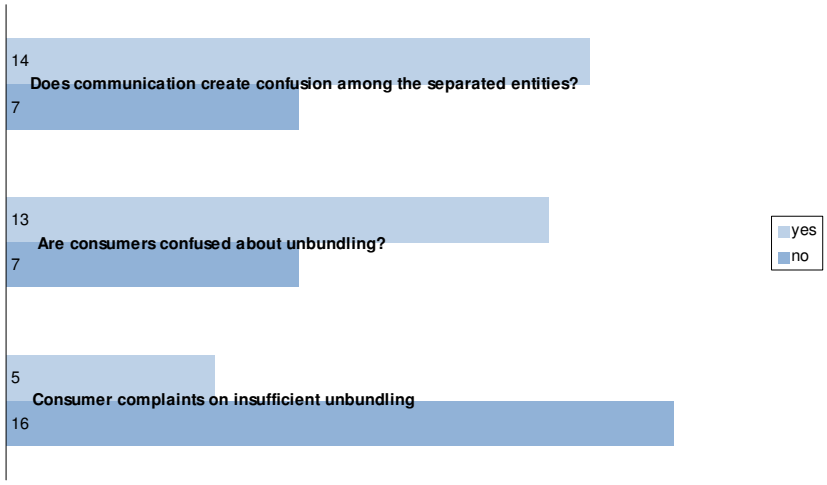

Figure 15 - Unbundling and consumers - electricity

Some regulators noticed that the main reason why consumers do not complain so much about DSO unbundling is because they are not aware of the existence and role of DSOs in particular and the functioning of the liberalised market in general.

As a result it seems that confusion among customers depends on their level of information. Those who are less informed are not confused by a lack of unbundling. If customers are well informed and expect different companies they might be confused when companies do not act accordingly.

ERGEG already expressed its concern that "it is still fair to state that customers do not have a clear picture of the different market players and their responsibilities. Information is therefore a key issue. Information can be provided by NRAs, governments, consumer organisations and, of course, by suppliers and DSOs."[7]

Moreover this effort should increase the awareness of consumers that DSOs and suppliers or producers are not in the same business. The following Figure 16 illustrates that cross-references are normally not forbidden and complaints about insufficient unbundling or lacking awareness of this topic are severe problems.

Formally, the DSO is not prohibited from having a hyperlink on its web page. But since the regulatory codes oblige DSOs to have an autonomous web page, NRAs consider that the hyperlink to the vertically integrated company on the DSO web page cannot be allowed.

Vertically integrated companies are prohibited from setting a hyperlink to the DSO homepage on their homepage in 2 countries. DSOs are prohibited from setting a hyperlink from their homepage to the homepage of the vertically integrated company in 3 countries.

[7] See ERGEG Transposition of Consumer Rights Monitoring Report. Ref: E08-CPR-20-03, 13 October 2008.

By law, DSOs and competitive business units of the same vertically integrated companies are required to have clearly separate branding and communication strategies in 1/3 of the responding countries.

This means that even when clearly separate branding and communication strategies are required by law in many countries, there is still confusion among customers about unbundling and about the companies´ activities. It seems that existing law is not rigorous enough to eliminate customers´ confusion.

While demanding general separation and differentiation of external communication policies, ERGEG gives precise indications on appropriate implementation measures. DSOs and competitive business branches ought to have separate and different names, separate logos, different slogans, different phone numbers, and different web pages. Regarding web pages, ERGEG advocates that there should not be hyperlinks between the vertically integrated companies' homepages and the DSOs' homepages.

Although the situation may vary widely within each Member State, some regulators were able to give a picture of their national situation.

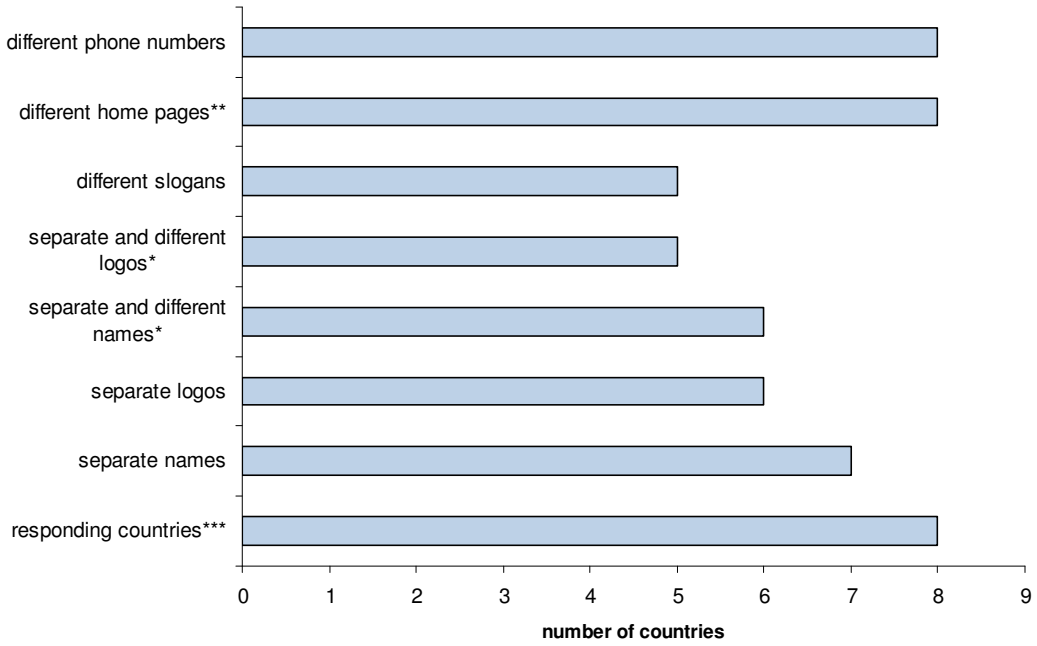

Figure 16 - Countries with legally enforced separation strategies - electricity

* Separate means separate from the affiliated company. Different means different enough so as not to create confusion among customers between the supply part and the regulated part.

** Internal dispositions taken by the DSOs are communicated to the NRA or can be observed by the NRA. For example, most DSOs' websites do not refer to the homepage of the vertically integrated company. Such measures have been taken in accordance with public declarations of the NRA.

*** About 42% of considered population (EU + Norway).

Based on these results, one may ask whether making the measures advocated by ERGEG legally binding is a necessary step towards their implementation.

Where there is no legal obligation for DSOs and the competitive business branch of the vertically integrated company to have a clearly separate communication strategy either none of the DSOs or only some have implemented such a measure (see Figure 17).

Figure 17 - DSOs with independent communication strategies in countries with no legal obligation - electricity

4.4.2 Gas

Stating that DSOs' external communication must not create confusion for customers, ERGEG observes that half of the responding regulatory authorities are of the opinion that it is rather possible for customers to distinguish between the DSO and the affiliated supplier, and half of them think that this is rather not the case. Major countries are among those who consider the possibility for customers to distinguish between the DSO and the affiliated supplier satisfactory. They account for about 57 % of the considered population (see Figure 18).

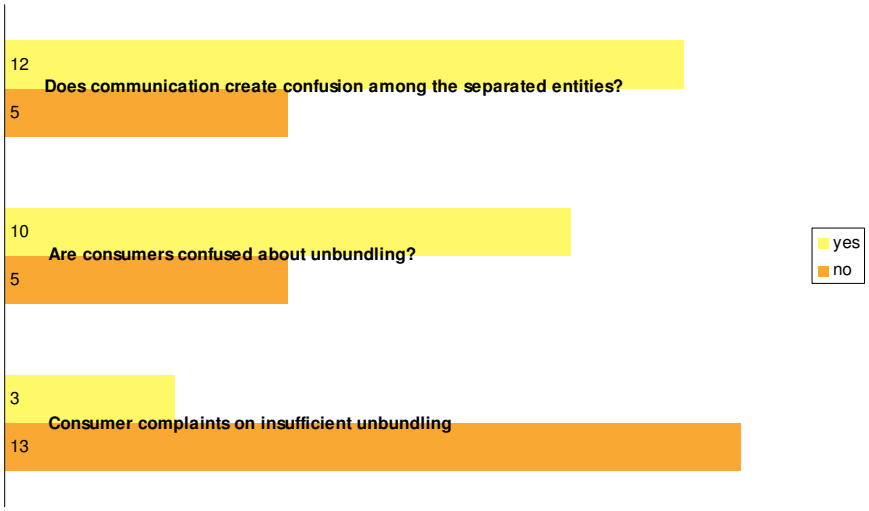

Figure 18 - Unbundling and consumers - gas

On the other hand, 2/3 of the responding regulatory authorities reported cases where external communication is likely to create confusion about DSO activities and competitive activities of the vertically integrated company.

Numerous cases were reported where consumers were confused about unbundling itself. However, when consumers complain about insufficient unbundling, they blame firstly the DSOs' call centres for creating confusion (2 out of 3 reported cases in gas), and secondly promotional materials (advertising campaigns and websites in half of the cases).

CEER also identified "public speeches" and "crisis/emergency communication" as possible occasions for creating confusion for consumers. This is the reason why ERGEG advocates separate and sufficiently different external communication policies from the affiliated company so as not to create confusion among customers.

Some regulators noticed that the main reason why consumers do not complain so much about DSO unbundling is because they are not aware of the existence and role of DSOs in particular and the functioning of the liberalised market in general. Similarly to the electricity market, confusion among customers depends on their level of information.

Since the regulatory codes oblige DSOs to have an autonomous web page, NRAs consider that a hyperlink to the vertically integrated company from the DSO web page cannot be allowed.

Vertically integrated companies are prohibited from setting a hyperlink from their homepage to the DSO homepage in 2 countries in the gas sector. Also in 2 countries, DSOs are prohibited from setting a hyperlink from their homepage to the homepage of the vertically integrated company.

In only 5 out of 12 responding countries, DSOs and competitive business units of the same vertically integrated companies are legally required to have clearly separate branding and communication strategies.

While requesting general separation and differentiation of external communication policies, ERGEG gives precise indications on appropriate implementation measures. Network branches and competitive business branches ought to have separate and different names, separate logos, different slogans, different phone numbers, and different home pages. Regarding home pages, ERGEG advocates that there should not be hyperlinks between the vertically integrated companies' homepages and the DSOs' homepages.

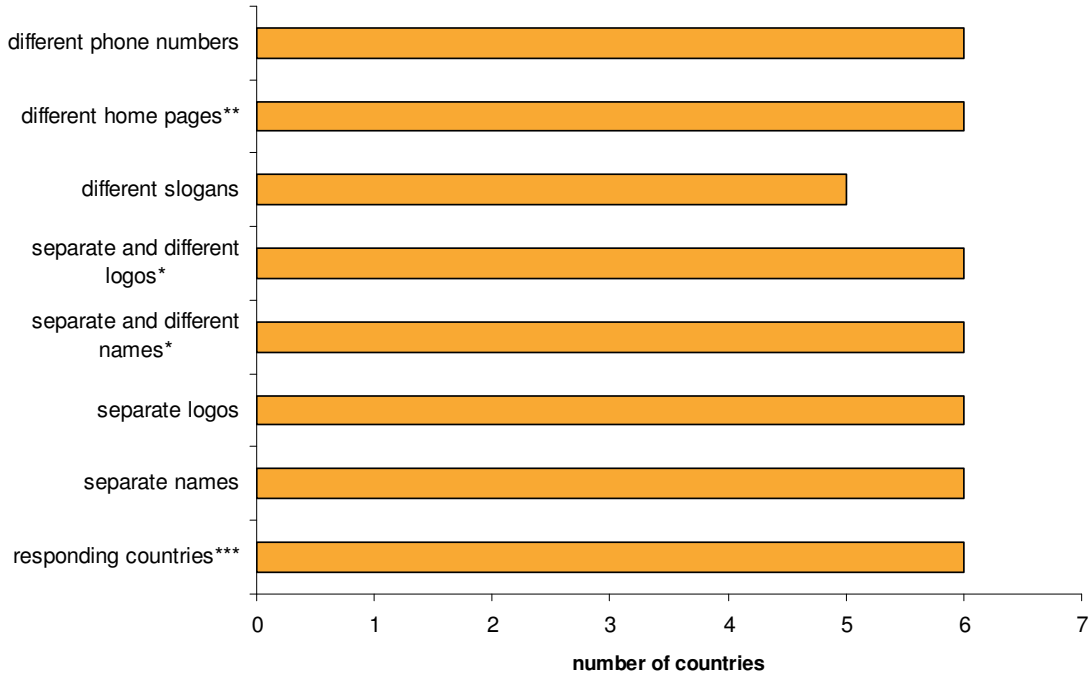

Figure 19 - Countries with legally enforced separation strategies - gas

* Separate means separate from the affiliated company. Different means different enough so as not to create confusion among customers between the supply part and the regulated part.

** Internal dispositions taken by the DSOs are communicated to the NRA or can be observed by the NRA. For example, most DSOs' websites do not refer to the homepage of the vertically integrated company. Such measures have been taken in accordance with public declarations of the NRA.

*** About 37% of considered population (EU + Norway in gas).

Although the situation may differ widely within each Member State, some regulators were able to give a picture of their national situation (see Figure 20).

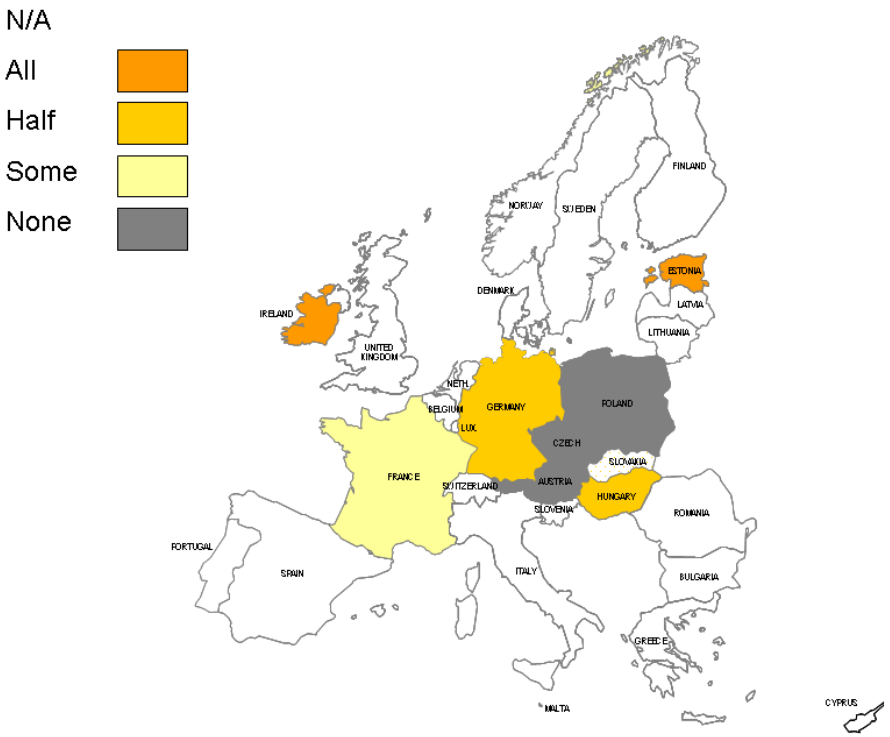

Figure 20 - DSOs with independent communication strategies in countries with no legal obligation - gas

4.5 DSO communication on role and mission

ERGEG advocates that:

DSOs must conduct actions to promote their notoriety, role and mission. Customers must be able to associate quality of service and continuity of supply with the DSOs and not with the supplier. They need to understand exactly who the DSOs are and what they really deal with.

4.5.1 Electricity

CEER observes that in the majority of countries, DSOs communicate their role and mission and try to communicate the unchanged quality and continuity of service. On the other hand, only a minority of DSOs communicate the possibility to choose among various suppliers. The following Figure shows how many DSOs communicate their role and mission, quality of services after switching and continuity of supply. A total of 21 countries answered these questions.

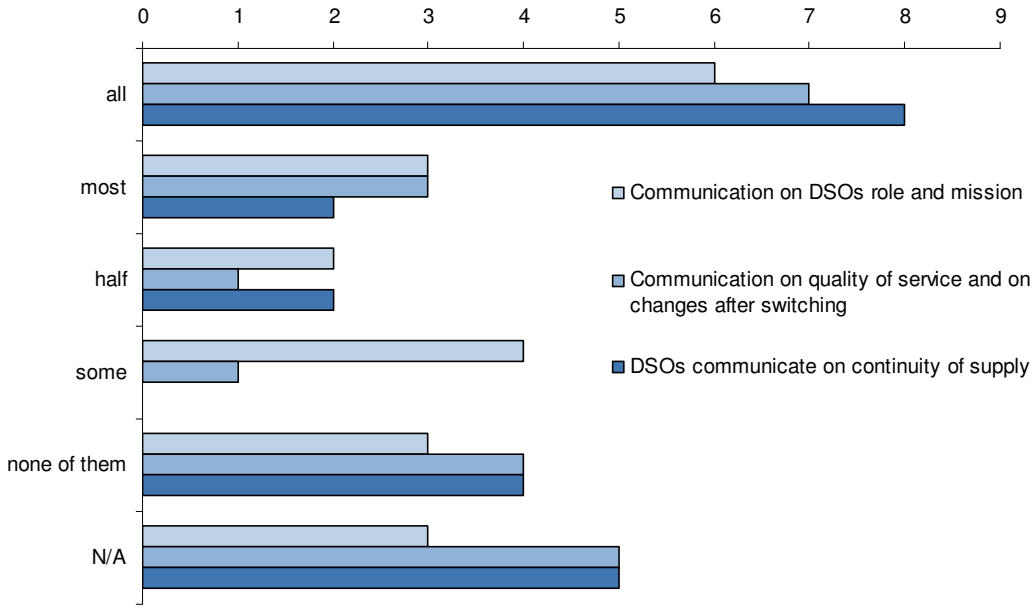

Figure 21 - Communication activities of DSOs - electricity

These responses reinforce the idea that communication about the DSOs' role and mission is not systematic in all Member States. Therefore, actions concerning information given to customers need to be reinforced in Member States where they have been launched and must be initiated in Member States where they are absent. In most Member States, an effort needs to be made to communicate the list of available suppliers.

It should be noted that there seems to be a lack of communication to the NRA as for about 27% of responses, information was not available.

4.5.2 Gas

In the gas sector, CEER observes that most DSOs do communicate about their role and mission and try to communicate the unchanged quality and continuity of service. As on the electricity market, there is a minority of DSOs communicating the possibility to choose among various suppliers.

Regarding Figure 22, the number of respondents varies from 18 countries answering questions about communication on role and mission to 16 countries answering questions about communication on quality of service after switching as well as communication on continuity of supply.

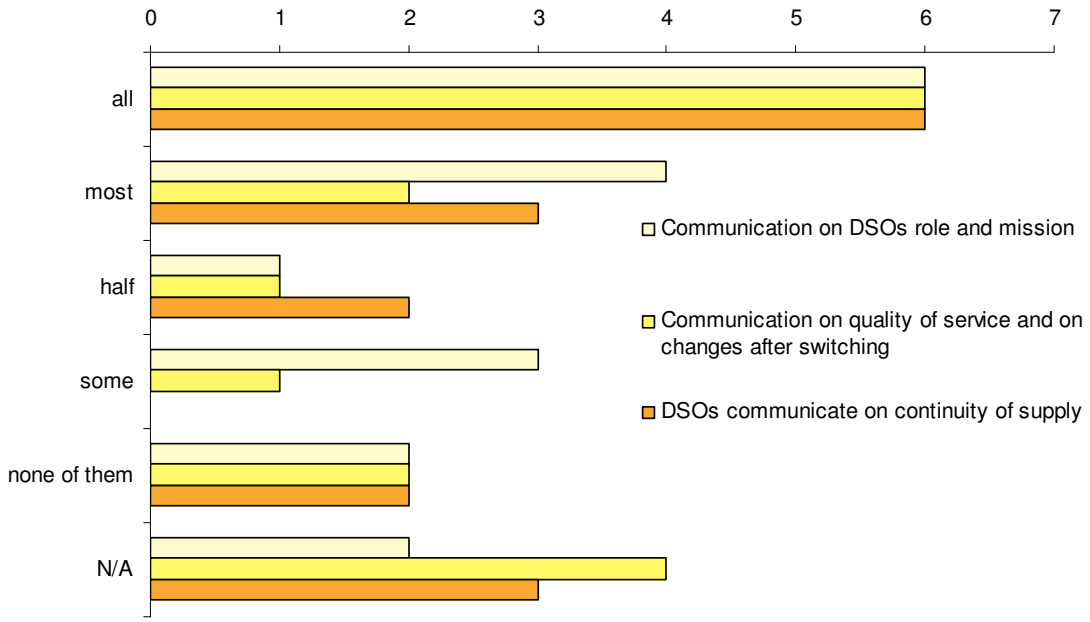

Figure 22 - Communication activities of DSOs - gas

These responses also reinforce the idea that communication on the DSOs' role and missions is not systematic for DSOs in the gas sector in all Member States. Therefore, actions concerning information given to the customers need to be intensified in Member States where they have been launched and must be initiated in Member States where they are absent. In most Member States, an effort needs to be made to communicate the list of available suppliers.

It should be noted that there seems to be a lack of communication to the NRA as for about 38% of the gas respondents, information was not available.

In summary, DSOs cannot be perceived as independent and non-discriminatory by the customers who do not know about them, be it on the electricity or on the gas market. In most countries the general public is largely ignorant of DSOs and their work. This situation perpetuates an obscurity that damages the open market. It is therefore essential that these companies improve their public awareness. This problem goes well beyond issues relating to non-discrimination and independence. It affects particularly the confidence network operators inspire in the markets and more specifically in the market for households. This situation inhibits the open market, particularly because customers may have concerns about quality of supply and network repair times after switching to an alternative supplier, as they do not know that the DSO is responsible for these aspects regardless of the chosen supplier.

It is therefore of paramount importance that DSOs play an active role in facilitating market functioning by communicating their role and mission, the unchanged quality and continuity of service. Although this is the case in a majority of observed European countries, communication on the DSOs' role and mission is far from being systematic in all Member States. Therefore, actions concerning information given to the customers need to be deepened in Member States similar to electricity.

This does not only require sound external communication but also communication strategies that are independent from the vertically integrated company. For half of the responding countries, regulators consider the DSOs' communication strategies not confusing. However, there is strong concern about multiple cases where confusion is perpetuated through call centres, promotional materials, and even name and branding which are not differentiated strongly enough from those of the business units of the vertically integrated company.

5 Unbundling of Decisions

The relevant Guideline is No 8 (see Annex)

In the electricity as well as in the gas sector, CEER observes that important principles regarding unbundling of decisions are implemented by law or equivalent provisions.

From NRAs' point of view, it is not sufficient to guarantee the effective independence of the decision-making body as only 30% of electricity DSOs have independent decision-making processes which are classified as satisfactory (of 19 responding countries). The same applies for 22% of gas DSOs (of 13 responding countries).

Gaining independence is ongoing for most of the DSOs. There are various reasons for this; laws and regulations are not completely implemented; DSOs do not have to comply with unbundling and/or recent unbundling provisions.

6 Unbundling of Information

Regulators were asked how and to which extent unbundling of information is implemented. The following table lists the different kinds of information which may be available to DSOs, their respective handling principles and general procedural solutions.

	Third-party information	Generic network information
Definition	**Commercially sensitive information**	**Commercially advantageous information**
Treatment	**Confidentiality (disclosure upon agreement)**	**Disclosure**
Non-discriminatory implementation	**Data access rules**	**Rules for data disclosure**

The relevant Guidelines are No 9, 10, 11 & 12 (see Annex)

6.1 Electricity

11 out of 18 countries answered that DSOs and competitive business units of vertically integrated companies are required to have separate databases on customer information.

Directive 2003/54/EC defines two types of network information (commercially sensitive, where it is owned by third parties or commercially advantageous, where it is owned by the DSO itself). This categorisation is implemented in 10 countries. Some countries ensure this by legislation; others allocate DSOs to consider this issue in the compliance programme or annual report.

For data that is disclosed or access to which is granted, 13 out of 21 countries answered that there is a legal requirement for equal and non-discriminatory treatment regarding time, procedures, updating, costs, and data quality.

The questionnaires included some more questions about informational unbundling, for example how DSOs make sure that equal and non-discriminatory treatment is granted. Other questions broached the issue of disclosing information when participating in board meetings. Since the NRAs could not answer these questions sufficiently, it seems that they might not have enough knowledge about informational unbundling.

NRAs were asked if the DSO management or employees would be legally allowed to participate in any internal activities of the vertically integrated company where information can be disclosed, or the other way around. According to the answers given, the prohibition of attendance for the integrated company's staff in the DSO's activities seems to be stronger than for participation of DSO personnel in activities of the mother company.

Figure 23 depicts the opinion of the NRAs about the handling of commercially sensitive/advantageous information with focus on non-discriminatory use.

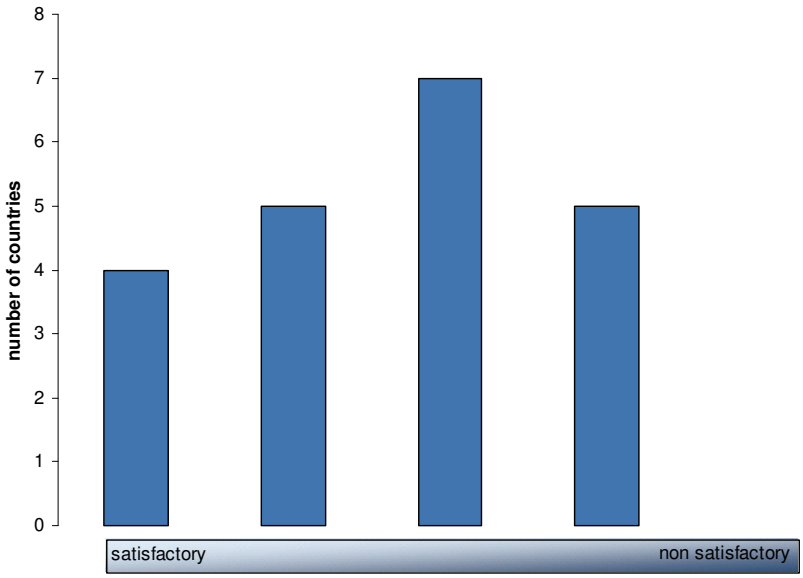

Figure 23 - Satisfaction concerning unbundling of information - electricity

The majority of responding countries are convinced that unbundling of information is granted, e.g. by requiring separate databases and non-discriminatory treatment. This is largely secured by legal requirements. However, the NRAs were not able to tell whether non-discriminatory treatment is granted by the DSOs or not. The majority of the NRAs consider that the DSOs' handling of commercial sensitive/advantageous information is not satisfactory.

6.2 Gas

In 8 out of 13 responding countries, DSOs and competitive business units of vertically integrated companies are required to have separate databases on customer information.

The categorisation of commercially sensitive and commercially advantageous information is implemented in 7 countries. Some countries ensure a distinction between commercially sensitive and advantageous information by legislation, other countries allocate DSOs to consider this issue in the compliance programme or the annual report. Therefore one country established several license conditions.

8 out of 15 NRAs mention that in their countries DSOs are required by law or regulation to define data collection, data processing and data access rules in a 'data management system'. All these countries are convinced that their systems ensure confidentiality (or disclosure upon agreement) for commercially sensitive information. This is for example secured via multi-client capability, authorisations concepts, controlled access to different categories of information and separated IT systems. 7 countries have not defined data collection, data processing or data access rules by law.

For data that is disclosed or access to which is granted, 9 NRAs answered that there is a legal requirement for equal and non-discriminatory treatment regarding time, procedures, updating, costs, and data quality. For 4 NRAs this is not the case. In addition most of them were not able to quote how many of their DSOs would make sure that there is equal and non-discriminatory treatment.

4 countries depict the opinion of the NRAs about the handling of commercially sensitive/advantageous information with focus on use in a non-discriminatory way.

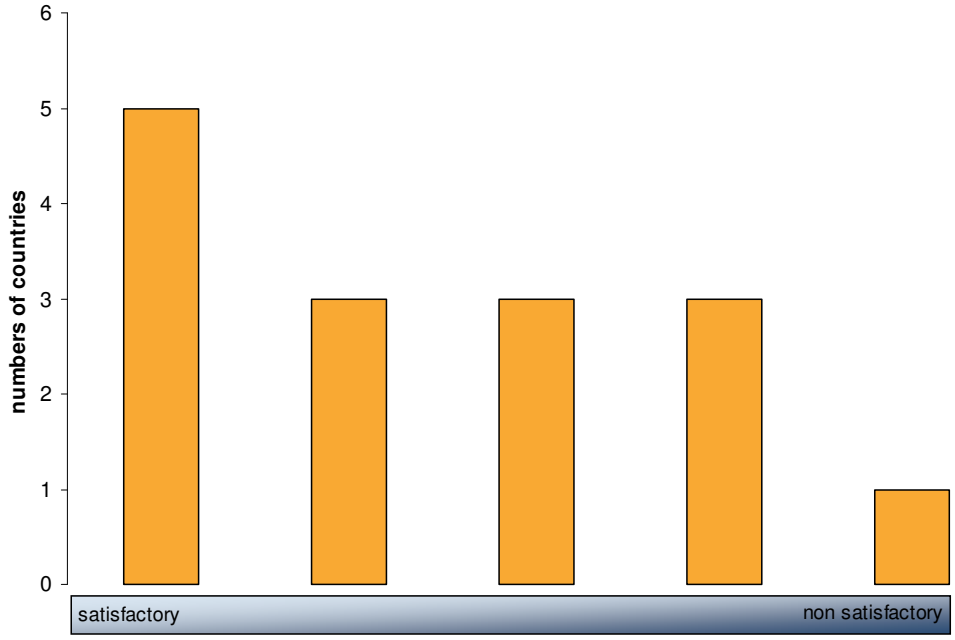

Figure 24 - Grad of satisfaction concerning unbundling of information - gas

7 Compliance officer

The relevant Guidelines are 13, 14 & 15 (see Annex)

7.1 Electricity

CEER observes that if a compliance programme is implemented, usually a compliance officer is appointed who is responsible for the development of the programme. There are differences between how the work of the officer is promoted and supported.

In most countries the compliance officer is not defined by law. Sometimes it is the management of the DSO which is responsible for compliance programme implementation and reporting. Many of them have “compliance programme specialists” but they are not compliance officers as defined in the GGP or in the 3rd Package[8]. They have therefore no specific mission and are not necessarily independent.

The following questions and answers are indicators of how easily employees get information about their compliance officer and about the significance of this institution.

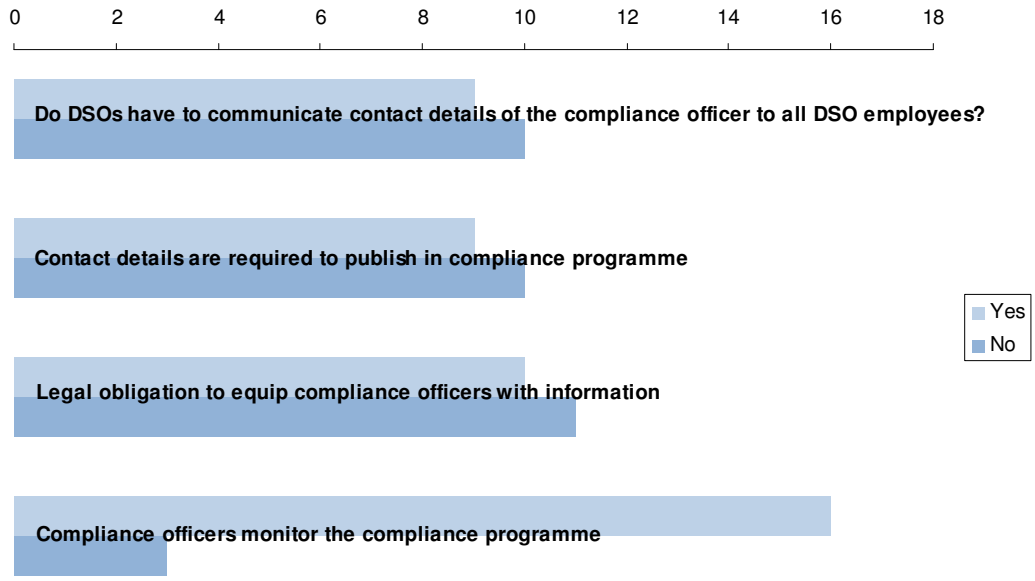

Figure 25 - Environments of a compliance officer - electricity

Nearly all NRAs who answered this question believe that DSO employees have easy and confidential access to the compliance officer in case of actual or suspected discrimination, disputes or queries and breaches of the compliance programme.

8 countries notified that employees of DSOs have easy and confidential access to the compliance officer in case of actual or suspected discrimination, disputes or queries and breaches of the compliance programme.

A compliance officer has to be endowed with plenty of rights or functions to be effectively productive. In this questionnaire, NRAs were asked questions concerning the rights and functions of a compliance officer:

1. Elaboration and improvement of the compliance programme;

[8] Article 21 of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC.

2. Monitoring of compliance of employees and management with the obligation of non-discrimination and equal treatment of customers;
3. Unrestricted access to all relevant data, documents and offices in the company;
4. Organisation of training on compliance issues in the company;
5. Right to propose disciplinary sanctions to the DSO management in the event of violation of the compliance programme;
6. Direct access to the senior management of the DSO;
7. Direct access to the senior management of the vertically integrated company.

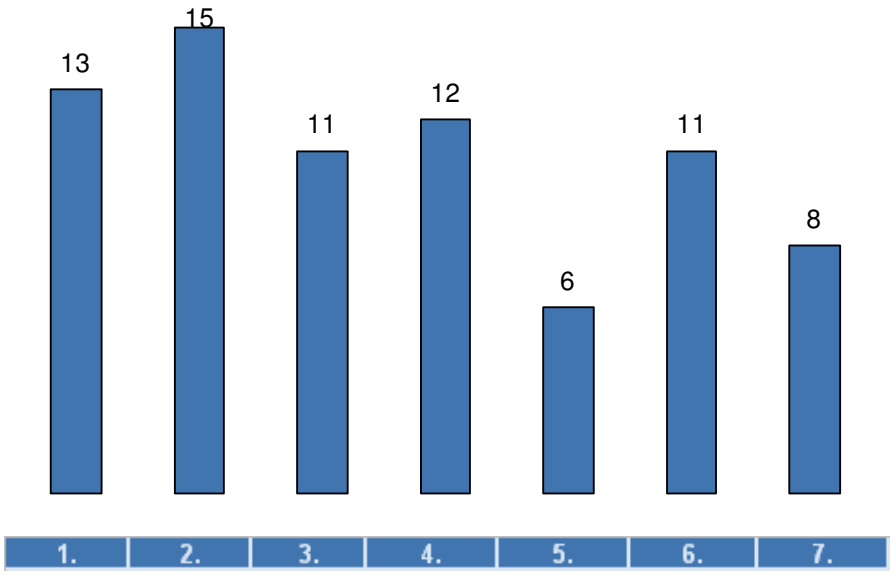

Figure 26 - Functions or rights of a compliance officer - electricity

On average, NRAs are quite satisfied with the support of the compliance officers by the DSOs in their countries in terms of receiving enough information and resources to fulfil their task independently. Although there are positive and negative outliers, on average they assign marks between 2 and 3, as depicted in Figure 27.

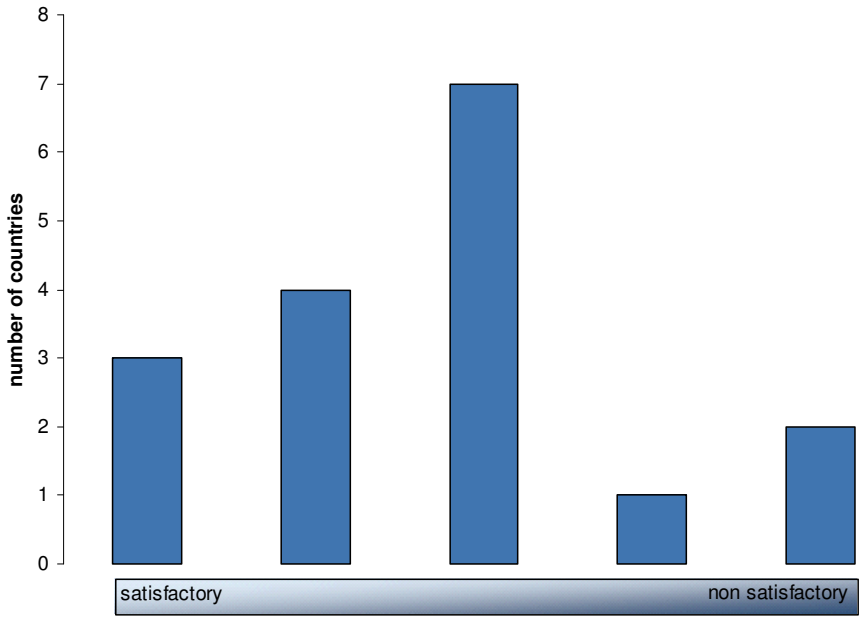

Figure 27 - Satisfaction of NRAs with support of compliance officer received from the DSO - electricity

7.2 Gas

If a compliance programme is implemented, usually a compliance officer is appointed who is responsible for the development of the programme. There are several differences between the way the work of the officer is promoted and supported.

In most countries, the compliance officer is not defined by law. In some countries it is the management of the DSO which is responsible for compliance programme implementation and reporting. Many of them have "compliance programme specialists" but they are not compliance officers as defined in the GGP or in the 3rd Package[9]. They have therefore no specific mission and are not necessarily independent.

The following questions and answers are indicators of how easily employees get information about their compliance officer and about the significance of this institution.

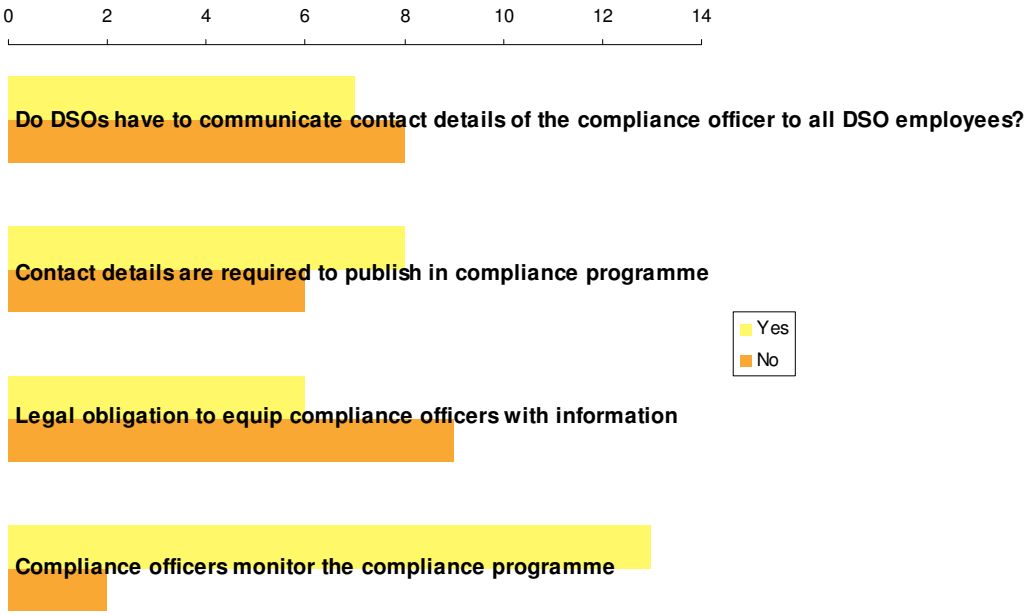

Figure 28 - Environments of a compliance officer - gas

Almost in every country DSO employees have easy and confidential access to the compliance officer in case of actual or suspected discrimination, disputes or queries and breaches of the compliance programme. Only one country answered that this is not possible in every DSO.

[9] Article 21 of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC.

A compliance officer has to be endowed with plenty of rights or functions to be effectively productive (see page 41):

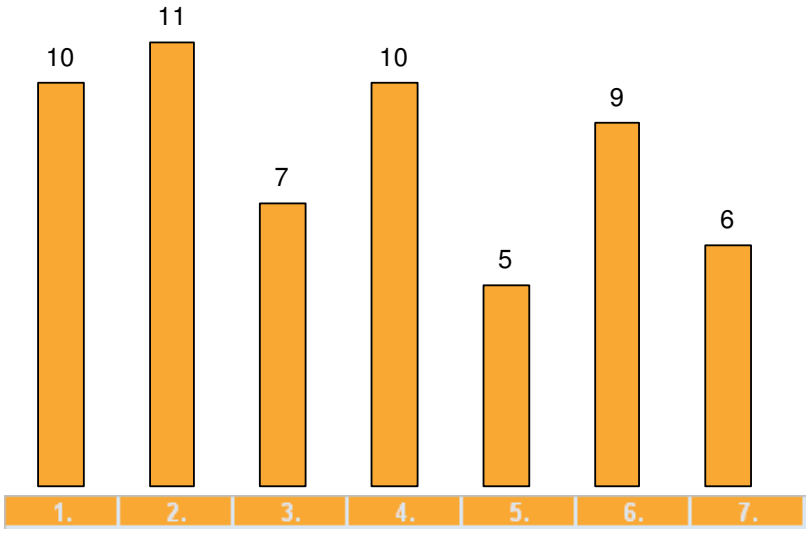

Figure 29 - Functions or rights of a compliance officer - gas

On average NRAs are more or less satisfied with the support of the compliance officers by the DSOs in their countries in terms of receiving enough information and resources to fulfil their task independently (see Figure 30 below).

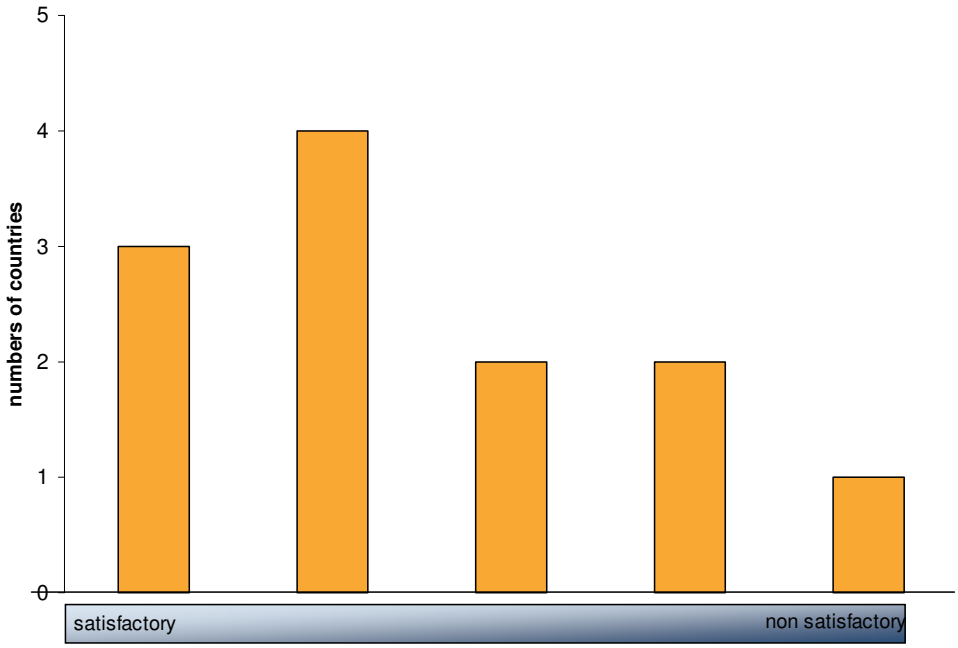

Figure 30 - Satisfaction of NRAs with support of compliance officer by the DSO - gas

8 Compliance programme

The relevant Guidelines are 16, 17, 18, 19 & 20 (see Annex)

8.1 Electricity

DSOs are not required by law or regulation to integrate compliance programmes into a company quality system or equivalent (one sole exception).

If a compliance programme is implemented, it should meet several requirements. The questionnaire asked if the compliance programmes are legally required to contain the following points:

1. All processes relating to activities;
2. Data management system;
3. Behaviour of employees towards customers, customers of other parts of the integrated company and third companies.

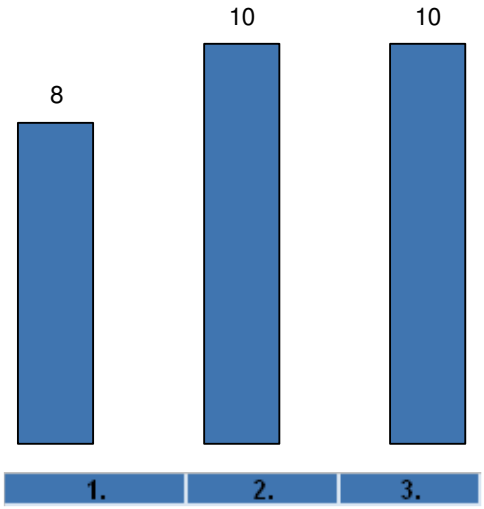

Figure 31 - Requirements for a compliance programme - electricity

Figure 32 evaluates whether the compliance programmes usually apply to all employees, i.e. including seconded employees from affiliated companies or subcontractors.

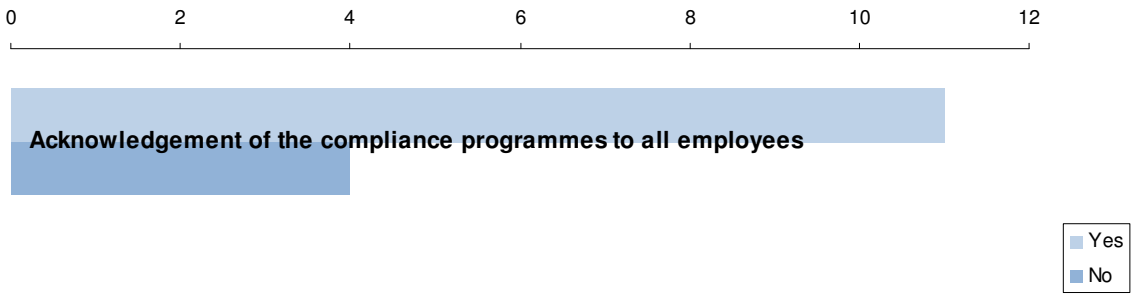

Figure 32 - Acknowledgement of the compliance programmes to all employees - electricity

Almost in every country DSOs instruct the customer service in unbundling issues and employees receive specific training.

8.2 Gas

As in the electricity sector, in only one of 14 countries DSOs are required by law or regulation to integrate compliance programmes into a company quality system or equivalent.

If a compliance programme is implemented, it should meet several requirements. The figure below shows that only 7 or 8 countries include the following requirements in the compliance programme (for numbers see page 45):

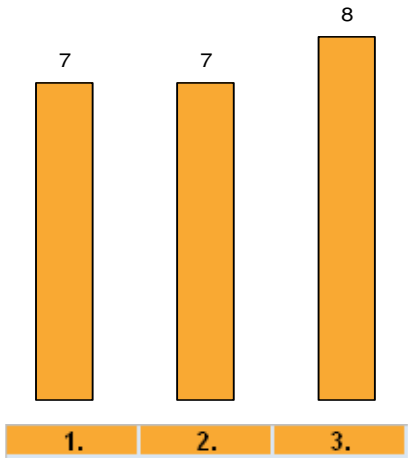

Figure 33 - Requirements for a compliance programme - gas

The next figure shows that the compliance programmes usually applies to all employees, i.e. including seconded employees from affiliated companies or subcontractors.

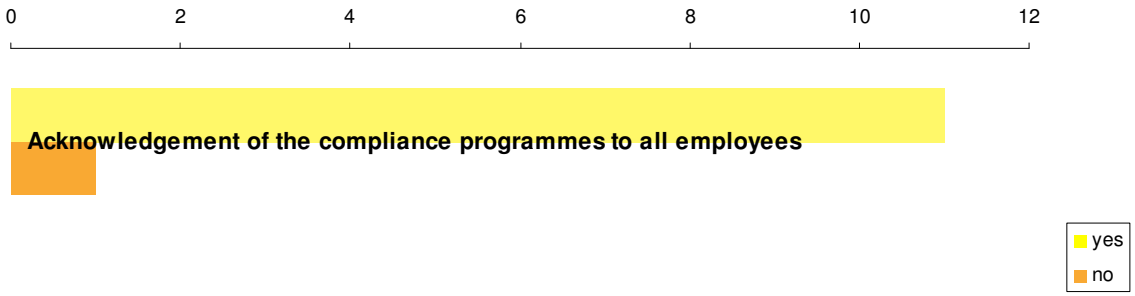

Figure 34 - Acknowledgement of the compliance programmes to all employees - gas

9 Annual compliance report

The relevant Guideline is No 21 (see Annex)

9.1 Electricity

In 18 out of 20 countries DSOs are obliged by law or regulation to publish an annual report that indicates which measures have been taken during the year to ensure that discriminatory conduct is avoided and that observance of the compliance programme is adequately monitored.

The figure below shows what kind of information on compliance programmes must be included in the DSO annual reports:

1. The promulgation of the compliance programme;
2. Compliance training;
3. Compliance incidents;
4. Cooperation with the management;
5. Process analysis including external audits.

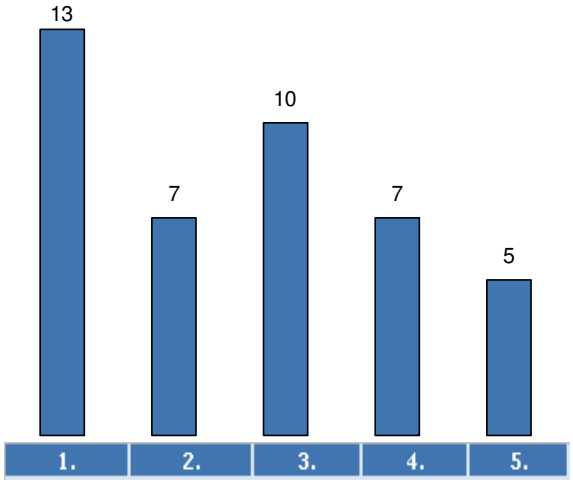

Figure 35 - Information that should be included in an annual compliance report - electricity

9.2 Gas

In 14 out of 15 countries DSOs are obliged by law or regulation to publish an annual report that indicates which measures have been taken during the year to ensure that discriminatory conduct is avoided and that observance of the compliance programme is adequately monitored.

The figure below shows what kind of information on compliance programmes must be included in DSO annual reports (for numbers see page 48):

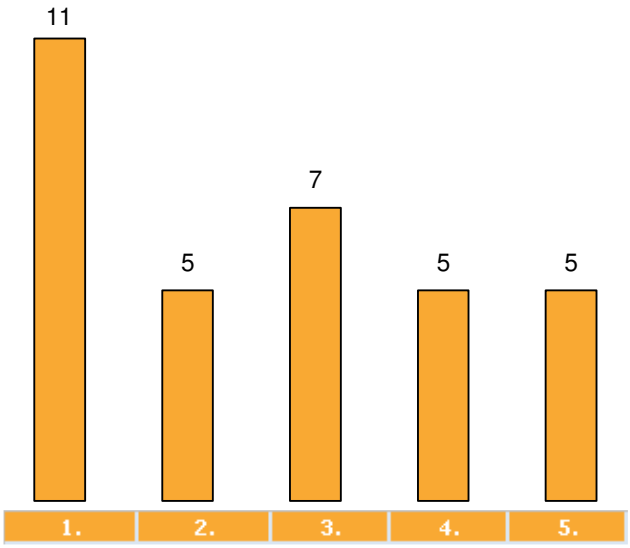

Figure 36 - Information that should be included in an annual compliance report - gas

It seems that compliance programmes, both in electricity and gas, always include the promulgation of the compliance programme and often compliance incidents. But trainings, cooperation with the management and process analysis are sometimes not covered by the compliance programme.

Comparing gas with electricity, it seems that DSOs have more possibilities and the implementation of the compliance programme is tougher in the gas sector sometimes.

10 General issues

10.1 Electricity

Looking at Figure 37, it turns out that the situation seems to be divided into two groups of roughly equal size. There is one group where unbundling is problematic and one where the unbundling procedure has already worked and so complaints and discriminatory behaviour are not such a big problem.

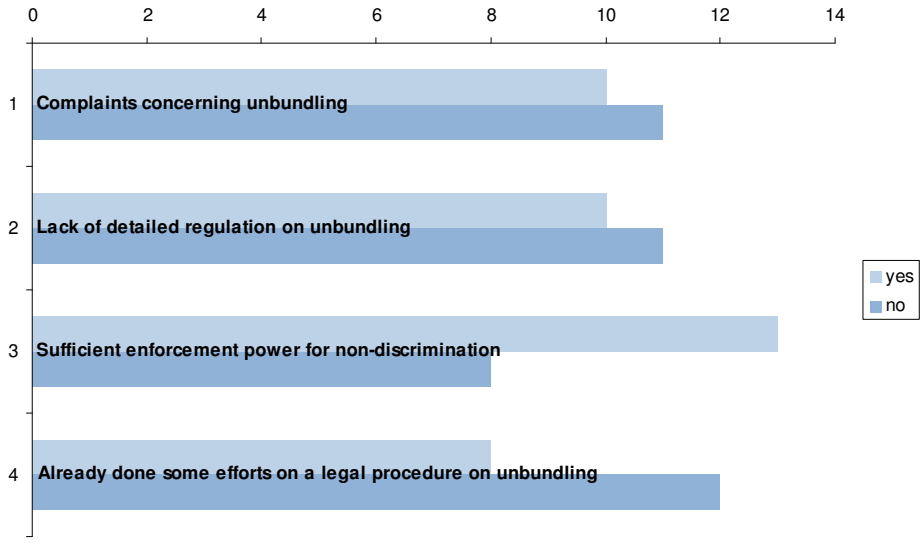

Figure 37 - Complaints concerning unbundling - electricity

Basically most of the complaints concerning unbundling are related to the dissemination of commercially sensitive information, to the confusion of the customer and to switching problems.

Comparing Figure 15 and Figure 37, it turns out that there are less consumer complaints than general complaints.

Consumers complain about the lack of information. Also branding of DSOs versus other businesses of the vertically integrated company creates confusion.

In some countries a procedure in respect of fair competition rules has concerned, among other issues, inefficient unbundling and competition law.

10.2 Gas

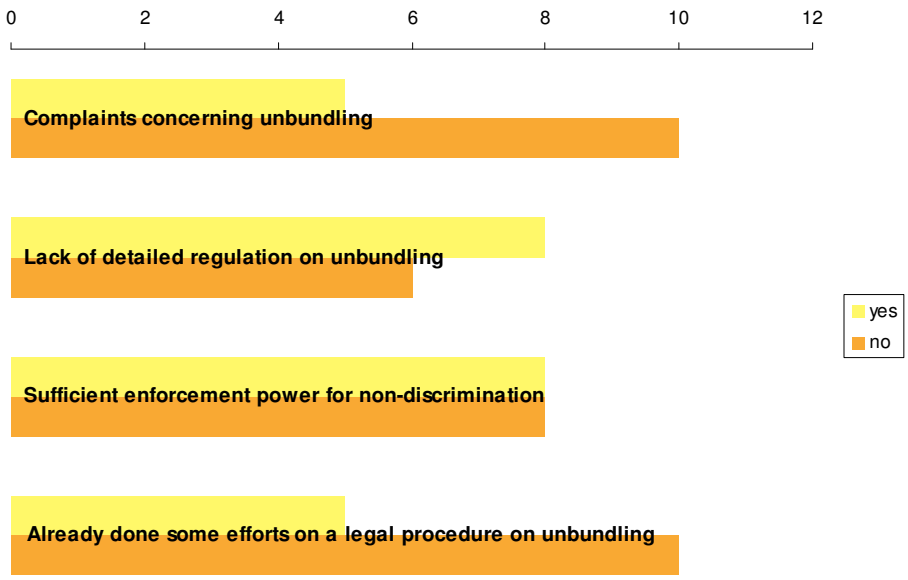

Figure 38 - Unbundling and enforcement power - gas

As on the electricity market, Figure 30 shows more complaints than Figure 18, which leads to the conclusions that there are also complaints from suppliers in the gas sector. Basically, most of the complaints concerning unbundling are related to the dissemination of commercially sensitive information, to the large proportion of shared services and consumers complain about the lack of information.

In some countries a procedure in respect of fair competition rules has concerned, among other issues, inefficient unbundling and competition law.

Some efforts on legal procedures aimed to remove all-inclusive contracts, to remove structures that allow the DSO to be the owner of the supplier and to make sure that participation of DSO management in related business has been stopped.

11 Annex 1 – Questionnaire on DSO unbundling

Introduction

In 2008, the CEER published Guidelines for Good Practice on Informational and Functional Unbundling (GGP) for DSOs. DSO unbundling is relevant to the further liberalisation of retail markets in Member States and therefore essential to mobilising final customers.

At the 1st meeting of the Citizens' Energy Forum in London (27-28 October 2008) the forum invited ERGEG to present at the next forum a status report on the degree of adherence to the guidelines on informational and functional unbundling for DSOs which have been adopted by ERGEG in 2008.

A first report should therefore monitor the status and real implementation of DSO unbundling. Where appropriate, reference to the Guidelines issued by ERGEG has been made, in order to clarify the objective of unbundling and to get criteria for its assessment. The report will therefore NOT assess the implementation of the Guidelines but will try to give an assessment of the present status of unbundling. The Task Force will collect information on the present status of unbundling through questionnaires which will be filled in by National Regulatory Authorities (NRAs) based on their present level of information. (Therefore no specific additional collection of information by NRAs is requested.)

The questionnaire is composed of 80 questions. The URB Task Force will assess the status of unbundling within legally unbundled DSOs. The following questions refer only to DSOs with more than 100.000 customers as the GGP are restricted to legally unbundled DSOs.

The questionnaire consists of 8 parts:
1. Contact details
2. General issues
3. Unbundling of functions
4. Unbundling of decisions
5. Unbundling of information
6. Compliance programme
7. General issues
8. Remarks

The questionnaire will be implemented in the CEER database. Please fill in the questionnaire by 11th of May 2009.

For any questions you may have on this questionnaire, please contact

Karin Stubenvoll
E-Control
Phone +43 1 24724 603
Karin.Stubenvoll@e-control.at

Fill-in guide

Questions concerning legal or organisational provisions in the country refer only to legal unbundling or regulatory provisions. Please note that these questions do not refer to competition law. Generally, with this questionnaire we try to analyze the status on legal or regulatory framework and besides that, we try to analyze the institution settings of DSOs.

The questionnaire uses 3 different types of questions: First, questions on legal or regulatory implementation, second, questions on voluntary implementation by the company itself. And after each topic a general assessment by the NRA on the adequacy of the present situation will help drafting the final report.

At the end of each chapter you will find space for general comments. Please note, that this comments provide a basis for clarification. It is not meant to include all general comments to the final report.

N/A means not available

Contact details

Date:

National Regulatory Authority:

Country:

Name of the respondent:

Phone:

E-mail:

General issues

1. Are unbundling provisions regarding Directive 2003/54/EC and Directive 2003/55/EC of the European Parliament and of the Council concerning common rules for the internal market in electricity and gas transposed into your country's national legislation?

Yes ☐ No ☐ Partly ☐

2. Are integrated electricity and gas companies serving less than 100,000 customers or integrated electricity and gas companies serving small isolated systems exempted from legal and functional unbundling in your country?

Yes ☐ No ☐

3. Which institution is appointed to be the supervisory authority for DSO unbundling in the gas sector of your country?

4. Which institution is appointed to be the supervisory authority for DSO unbundling in the electricity sector in your country?

5. Is it possible that the DSO is the owner of the supplier (e. g. DSO is the Vertically Integrated Company of the supply company)?

Yes ☐ No ☐

6. How many gas DSOs are there in your country?

7. How many gas DSOs serve less than 100.000 connected customers in your country?

8. How many electricity DSOs are there in your country?

9. How many electricity DSOs serve less than 100.000 connected customers in your country?

10. What is the market share covered with the electricity DSOs more than 100.000 customers? (number of connected customers proportional to all connected customers in your country)

11. What is the market share covered with the gas DSOs more than 100.000 customers? (number of connected customers proportional to all connected customers in your country)

Unbundling of functions

12. Are DSOs in your country required by law or regulation to be physically separated from competitive business structures?

Yes ☐ No ☐

13. If yes, in which sense?

O Different offices within the same building
O Different buildings
O Different locations

The meaning of sufficient resources entails full-functionality of the DSO in the sense of concentration in merger control. Typically this will mean that the DSO will own its assets, employs its own personnel and have access to sufficient financial resources adequate for an infrastructure company.

14. Do DSOs have sufficient financial resources under its immediate control to ensure real decision-making power and independence in their work?

none of them ☐ some ☐ half ☐ most ☐ all ☐ N/A ☐

15. If yes, how is this secured?

16. Do DSOs have sufficient personnel resources directly employed to ensure real decision-making power and independence in their work?

none of them ☐ some ☐ half ☐ most ☐ all ☐ N/A ☐

17. If yes, how is this secured?

by law ☐ by regulation ☐ licence condition ☐ no obligation in place ☐

18. Do DSOs have, from a regulators point of view, sufficient personnel and financial resources under its immediate control to ensure independence (1 satisfactory; 5 not satisfactory)?

1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

General comment:

_____

_____

Shared services

19. Are DSOs allowed by law or regulation to use general services performed by competitive business units of the vertically integrated company?

Yes ☐ No ☐

20. If yes, does the national regulatory authority have the possibility to have access to the contracts between these parties?

Yes ☐ No ☐

21. If yes, what is the National Regulator Authority power over these contracts (e. g. is it possible for the National Regulator Authority to require changes)?

22. Has it been demonstrated that they result in lower cost?
Yes ☐ No ☐

23. Which common services are shared?
O Communication
O IT
O Risk management
O Customer services
O Call Center
O Human resources
O Accounting, Controlling and Financial services
O Legal services
O Regulatory affairs
O Insurance
O Others_____

24. Is the DSO management (upper and middle) prohibited from holding any position in the upper and middle management or supervisory board of a Vertically Integrated Company, wherever they might be located?
Yes ☐ No ☐

25. Are DSO employees prohibited from holding any position in the supervisory board of a Vertically Integrated Company, wherever they might be located?
Yes ☐ No ☐

26. Is the DSO management prohibited by law or regulation from working for the competitive branches of vertically integrated companies at the same time?
Yes ☐ No ☐

27. Is the DSO management allowed to have incentives that relate to the performance of the vertically integrated company?
Yes ☐ No ☐

28. Are vertically integrated companies prohibited by law or regulation from interfering on the day to day business of DSOs or on individual decisions concerning the distribution lines?
Yes ☐ No ☐

29. Are DSO management staffs, from a regulators point of view, independent in carrying out their work? (1 satisfactory; 5 non satisfactory)?
1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

General comment:
_____
_____

Is the regulator aware of voluntary implementation (e.g. by internal statutes) by the DSO of the unbundling requirements treated in this chapter – if yes, please describe and also refer to the extent of coverage of the DSOs

_____
_____

Employees

30. Do employees work for a DSO and the competitive business at the same time?
Yes ☐ No ☐

31. Are wages and incentives for employees and management based exclusively on the result of the network company by law or regulation?
none of them ☐ some ☐ half ☐ most ☐ all ☐ N/A ☐

32. Do national rules and regulations foresee that promotions and sanctions of DSO personnel should be decided by the management of the DSO only?
Yes ☐ No ☐

33. Is the Vertically Integrated Company legally allowed to dismiss the upper management of a DSO without prior justification?
Yes ☐ No ☐ Must be notified to the regulator ☐

34. Are there any stipulations by law or the regulator regarding the transfer of an employee of the DSO to an affiliated company (for example, on the disclosure of commercially sensitive and advantageous information)?
Yes ☐ No ☐

General comment:

_____
_____

Is the regulator aware of voluntary implementation (e.g. by internal statutes) by the DSO of the unbundling requirements treated in this chapter – if yes, please describe and also refer to the extent of coverage of the DSOs

_____
_____

External communication

35. Are DSOs and competitive business units of the same vertically integrated companies required to have clearly separate branding and communication strategies by law or regulation?
Yes ☐ No ☐

Separate means separate from the affiliated company. Different means, different enough so as not to create confusion among customers between the supply part and the regulated part. Slogan means the main catchy words in an advertisement.

36. If yes, do they have
O separate names
O separate logos
O separate and different names
O separate and different logos
O different slogans
O different home pages
O different phone numbers

37. If not, how many legally unbundled DSOs have branding and communication strategies that are clearly separate from the competitive business units?
none of them ☐ some ☐ half ☐ most ☐ all ☐ N/A ☐

38. Are vertically integrated companies prohibited by law or regulation to set a hyperlink from their homepage to the DSO homepage?
Yes ☐ No ☐

39. Are DSOs prohibited to set a hyperlink by law or regulation from their homepage to the homepage of the vertically integrated company?
Yes ☐ No ☐

40. Has the regulator observed cases where communication can create confusion, among DSOs activities/ activities of the vertically integrated company?
Yes ☐ No ☐

41. Does the regulator have observed cases where consumers were confused about unbundling?
Yes ☐ No ☐

42. Are there consumer complains on insufficient unbundling of DSOs?
Yes ☐ No ☐

43. If yes, does it concern:
O information given on websites
O advertisement
O call center
O public speeches
O crisis communication
O other_____

44. From a regulators point of view, is it possible for customers to distinguish between the DSO and the affiliated supplier? (1 satisfactory; 5 non satisfactory)?
1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

General comment:
_____
_____

Is the regulator aware of voluntary implementation (e.g. by internal statutes) by the DSO of the unbundling requirements treated in this chapter – if yes, please describe and also refer to the extent of coverage of the DSOs

_____
_____

DSO communication on role & mission

45. How many DSOs (actively, i.e. as part of the communication policy) communicate on their role and mission?

none of them ☐ some ☐ half ☐ most ☐ all ☐ N/A ☐

46. How many DSOs communicate on quality of service offered to customers / unchanged quality of service after switching suppliers?

none of them ☐ some ☐ half ☐ most ☐ all ☐ N/A ☐

47. Do DSOs (actively) communicate on continuity of supply offered to customers (and not related to their choice)?

none of them ☐ some ☐ half ☐ most ☐ all ☐ N/A ☐

48. How many DSOs spontaneously indicate to the customer a possibility to choose among various suppliers?

none of them ☐ some ☐ half ☐ most ☐ all ☐ N/A ☐

General comment:

_____
_____

Unbundling of decisions

49. Is the DSO authorised by law to take independent decisions on all commercial and operational issues related to the operation, maintenance and development of the network without involving the related Vertically Integrated Company?

Yes ☐ No ☐

50. Is the DSO authorised by law to take independent decisions on all issues related to day-to-day business and to the assets (physical and human) without involving the related supply business or holding company?

Yes ☐ No ☐

51. From a regulators point of view, is the decision making process of the DSO independent? (1 satisfactory; 5 non satisfactory)?

1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

General comment:

_____

_____

Is the regulator aware of voluntary implementation (e.g. by internal statutes) by the DSO of the unbundling requirements treated in this chapter – if yes, please describe and also refer to the extent of coverage of the DSOs

_____

_____

Unbundling of information

The following table lists the different kinds of information which may be available to DSOs, their respective handling principles and general procedural solutions.

	Third-party information	**Generic network information**
Definition	**Commercially sensitive information**	**Commercially advantageous information**
Treatment	**Confidentiality (disclosure upon agreement)**	**Disclosure**
Non-discriminatory implementation	**Data access rules**	**Rules for data disclosure**

52. Are DSOs and competitive business units of vertically integrated companies required to have separate databases on customer information?

Yes ☐ No ☐

53. Do DSOs required by law or regulation to categorize network information at their disposal according to the two types defined in the directive (commercially sensitive - where it is owned by third parties or commercially advantageous - where it is owned by the DSO itself)?

Yes ☐ No ☐

54. If yes, how is this secured?

55. Are DSOs required by law or regulation to define data collection, data processing and data access rules in a 'data management system'?

Yes ☐ No ☐

56. If yes, does this system ensure confidentiality (or disclosure upon agreement) for commercially sensitive information?

none of them ☐ some ☐ half ☐ most ☐ all ☐ N/A ☐

57. If yes, how is this secured (e.g. multi-client capable)?

58. If data is disclosed or access is granted, is there a legal requirement for equal and non-discriminatory treatment regarding time, procedures, updating, costs, and data quality?

Yes ☐ No ☐

59. If not, how many DSOs make sure that there is equal and non-discriminatory treatment?

none of them ☐ some ☐ half ☐ most ☐ all ☐ N/A ☐

60. Are the DSO management or employees legally allowed to participate in any internal activities of the vertically integrated company in which information can be disclosed (e.g. board meetings, strategic meetings)?

Yes ☐ No ☐ N/A ☐

61. Are the management or employees of the vertically integrated company legally allowed to participate in any internal activities of the DSO?

Yes ☐ No ☐

62. From a regulators point of view, do you think commercial sensitive/advantageous information is generally handled in a non-discriminatory way in your country (1 satisfactory; 5 not satisfactory)?

1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

General comment:

_____

_____

Is the regulator aware of voluntary implementation (e.g. by internal statutes) by the DSO of the unbundling requirements treated in this chapter – if yes, please describe and also refer to the extent of coverage of the DSOs

_____

_____

Compliance programme

Compliance officer

63. Are DSOs required to communicate the contact details of the compliance officer (name, address,email,phone number) to all employees of the DSO?

Yes ☐ No ☐

64. Are DSOs required to publish those contact details in the compliance programme?

Yes ☐ No ☐

65. Do DSO employees have easy and confidential access to the compliance officer in case of actual or suspected discrimination, disputes or queries and breaches of the compliance programme?

none of them ☐ some ☐ half ☐ most ☐ all ☐ N/A ☐

66. Are DSOs legally required to equip compliance officers with the necessary information and adequate resources (including human resources) to fulfil their task in full independence from the DSO management?

Yes ☐ No ☐

67. Do compliance officers monitor the compliance programme?

Yes ☐ No ☐

68. Do Compliance Officers generally have the following functions/rights?

O Elaboration and improvement of the compliance programme
O Control of compliance of employees and management with the obligation of non-discrimination and equal treatment of customers
O Unrestricted access to all relevant data, documents and offices in the company
O Organisation of training on compliance issues in the company
O Right to propose disciplinary sanctions on the DSO management in the event of violation of the compliance programme
O Direct access to the senior management of the DSO
O Direct access to the senior management of the Vertical Integrated Undertaking

69. From a regulators point of view, do you think compliance officers have enough information and resources to fulfil their task independent (1 satisfactory; 5 not satisfactory)?

1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

General comment:

_____

_____

Is the regulator aware of voluntary implementation (e.g. by internal statutes) by the DSO of the unbundling requirements treated in this chapter – if yes, please describe and also refer to the extent of coverage of the DSOs

_____

_____

Compliance programme

70. Are DSOs required by law or regulation to integrate compliance programmes into a company quality system or equivalent (for example ISO 9000)?

Yes ☐ No ☐

71. Is there an imposed model made by the NRA for Compliance Programmes?

Yes ☐ No ☐

72. By law or regulation, have the compliance programmes to identify

O all processes relating to activities
O data management system
O behaviour of employees towards customers, customer of other parts of the integrated company and third companies in written form

73. Do DSOs' compliance programmes apply to all their employees, i.e. including seconded employees from affiliated companies or subcontractors?

Yes ☐ No ☐

74. In how many DSOs does the customer service receive a specific training in compliance programme principles?

none of them ☐ some ☐ half ☐ most ☐ all ☐ N/A ☐

General comment:

_____
_____

Is the regulator aware of voluntary implementation (e.g. by internal statutes) by the DSO of the unbundling requirements treated in this chapter – if yes, please describe and also refer to the extent of coverage of the DSOs

_____
_____

Annual compliance reports

75. Are DSOs obliged by law or regulation to publish an annual report that indicates which measures have been taken during the year to ensure that discriminatory conduct is avoided and that observance of the compliance programme is adequately monitored?

Yes ☐ No ☐

76. What kind of information on compliance programmes must be included in DSO annual reports?

O the promulgation of the compliance programme
O compliance training
O compliance incidents
O cooperation with the management
O process analysis including external audits

General comment:

_____
_____

Is the regulator aware of voluntary implementation (e.g. by internal statutes) by the DSO of the unbundling requirements treated in this chapter – if yes, please describe and also refer to the extent of coverage of the DSOs

_____

_____

General issues

77. Did you have any complaints concerning unbundling issues in your country?
Yes ☐ No ☐

If yes, please specify_____

78. Do you think there is a lack of detailed regulation on unbundling in your country

79. Do you think there is sufficient enforcement power for non-discrimination in your country?
Yes ☐ No ☐

80. Has there already been a legal procedure on unbundling issues in your country?
Yes ☐ No ☐

If yes, please specify_____

12 Annex 2 – GGP on Functional and Informational Unbundling for DSOs

Guidelines for Good Practice on Functional and Informational Unbundling for Distribution System Operators

Ref: C06-CUB-12-04b
15 July 2008

Table of Contents

1. Introduction

The present Guidelines on "Functional and Informational Unbundling" are what regulators consider is an appropriate way to realise functional unbundling under the present legal framework [for DSOs]. The Guidelines are referenced in a general way for both vertically integrated companies and network companies subject to functional and informational unbundling requirements. These guidelines apply only for "legally unbundled" network companies. There exist two exceptions though: where there is full **ownership unbundling** or where the NRA acting fully independently (from the industry as well as politically) can show that an objective of a specific guideline is already being met through demonstrable and verifiable means, such as **licence conditions**. Where this is the case, the NRA shall report regularly on the implementation of these means in relation to the achievement of the objectives of the guidelines, and if necessary consider action to address any discrepancy"

The risks and negative effects of insufficient unbundling of network and commercial activities, which are numerous and can seriously hamper competition and liberalisation, show that effective unbundling is a necessity and of crucial importance.

The main role of the network company in relation to the competitive business is to serve as a market facilitator. It is therefore important to further define what effective unbundling means or what should be achieved by unbundling in order to be effective.
In our view effective unbundling implies:

- to effectively ensure non discriminatory access to networks, by excluding any possibility of discrimination of network users and to take away any (commercial) incentive for the network operators to give preferential treatment to related companies. This includes:
  - non-discriminatory access to the network for all potential users;
  - non-discriminatory access for all network users to information on network-related issues;
  - correct incentives for managers and employees to act accordingly;

- to effectively ensure that network operators act in full independence of any commercial interests in the market to avoid any conflict of interest;
  - incentives for managers and employees to act independently;
  - full sovereignty of the network operators in decision making;
  - services from related companies to the network operators must at all times be provided at market based cost;

- to effectively monitor and enforce unbundling: precise written processes and procedures which effectively secure unbundling.

The following guidelines are subdivided into an A priority, which means that those guidelines must be implemented and are therefore mandatory, and a B priority, which means that implementation of those guidelines depends on national circumstances and should be decided by the relevant regulators. Where not otherwise stated, all the guidelines are considered as an A priority.

2. Definitions/Clarifications

Management: The management of the network company includes the upper management as well as the middle management.

Sufficient resources: The meaning of sufficient resources entails full-functionality of the network company in the sense of concentration in merger control. Criteria to be met include there being a dedicated management to run the day-to-day business and with access to sufficient financial/physical resources. Typically this will mean that the network company will own its assets, employs its own personnel and have access to sufficient financial resources adequate for an infrastructure company.
It is possible, however, that the personnel will not be directly employed by the network company. A third party may provide staff, or alternatively the parent company may provide personnel on secondment or via a subcontract. In this case the terms of secondment/subcontract must not deviate from usual terms with third companies, so that the network company deals with affiliated companies at arm's length and on the basis of normal commercial conditions, and as such is free to recruit its own employees.10

Employment arrangements: Typically distribution companies do not directly employ all the labour force used directly but also profit from secondments and assignments.

[10] See "Sufficient resources to operate independently on a market" in the Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) 139/2004 on the control of concentrations between undertakings.

- **Secondment**: In this set of Guidelines "secondment" means any arrangement between the network company and a third company (typically an affiliated company) whereby the employee (temporarily) moves to the network company. The practical effect of such a secondment arrangement is that the employee remains an employee of the home employer but the employee is directed by their home employer to take day-to-day direction from the staff of the host employer. Promotion, salary and other contractual terms are still governed by the employment contract between employee and home employer.
- **Assignment**: In this set of Guidelines "assignment" means any arrangement whereby an employee remains an employee of the third company but is located at the network company. The third company has still control over day-to-day work of the employee.

3. Unbundling of Functions

The Electricity and Gas Directives provide that: *"those persons responsible for the management of the transmission [respectively distribution] system operator may not participate in company structures of the integrated electricity or gas undertaking responsible, directly or indirectly, for the day-to-day operation of the generation (for electricity) or production (for natural gas), distribution [respectively transmission] and supply of electricity or natural gas".*

Generation, production and supply of energy are hereafter the "competitive business" of a vertically integrated company. Unbundling of functions implies that the management of the network company shall not be involved in any competitive business of the vertically integrated company. Equally, the competitive businesses must neither participate in the daily business of the network company, nor receive information concerning other issues relevant to their own clients or grid information that is not publicly available.

G01: (A priority) The network company shall be physically separated from the competitive business structures.

(B priority) The network company shall work in a geographically separated structure from the competitive business structures.

Physical separation means that access restrictions to the facilities of the network company are in place, whereas geographical separation implies different buildings for the network and competitive businesses.

G02: The network company must have sufficient financial and personnel resources to ensure real decision-making power and independence to carry out its work. This includes having enough resources to prepare decisions, to evaluate alternatives and to be assisted by external consultancy. The network company that employs personnel of the vertically integrated company must define the profile of the employees he needs and must not accept the personnel sent by the vertically integrated company that don't match with this profile. The network company could choose to benefit from general services performed by the parent company if it demonstrates that this choice results in lower costs and it does not imply any undue dependence. Such services shall be provided under precisely defined contracts, which are to be kept at the disposal of the regulator. Certain services, especially strategic ones such as the legal, regulatory and controlling services, have to be established in the network company.

Legal services and internal control functions are considered strategic in the sense that they handle all major decisions in a company. Therefore independent decisions are only possible if the network has independent advice in these areas. Independent decision-making also involves separation of information, as the integrated company would gain commercial advantage from information about major decisions within the network company (guidelines on separation of information follow later).

G03: The management of the network company shall be prohibited from holding any position in the management or supervisory board of a competitive business unit, wherever they might be located (Holding or affiliated company).

G04: The activities and rights of the vertically integrated company as regards the network operator are limited to securing her financial interest (supervisory function) via a supervisory report. Any interference in the network business by the vertically integrated company outside this supervisory function, and knowledge of the day-to-day network business is not allowed. The financial plan shall be proposed by the network company. Day-to-day decisions within the scope of the approved financial plans (or equivalent) must not be subject to further consultation or approval of the parent company.
The supervisory board of the parent company may approve the global amount of investments, but thereafter the parent company must not be consulted on nor seek to influence any individual investment, whatever its cost, provided it stays within the limits of the financial plan For investment under Third Party Access (TPA) the return on capital is usually set by the regulatory authority.

4. Unbundling of professional interest

The Electricity and Gas directives provide that "*appropriate measures must be taken to ensure that the professional interests of the persons responsible for the management of the transmission and distribution system operator (…) are taken into account in a manner that ensures that they are capable of acting independently"*.

This section concerns the additional measures that are necessary to ensure the independence of the management of the network company [Transmission/Distribution]. They are applicable whether legal separation is in place or not within the vertically integrated company.

The goal of the following measures is to allow the management of the network company to act independently and to guarantee its decision making power in grid related issues. A way to achieve this to guarantee the professional interest of the management of the network company and other employees, and therefore to introduce specific stipulations in their contract of employment.

G05: The employment conditions of the management and employees including those on basis of subcontracting of the network company shall specify in particular:

G05 a. The employee shall be subject only to the authority of the management of the regulated entity.
G05 b. Wages and incentives are exclusively based on the results of the network company. The management of the network company must neither own shares of the competitive businesses nor shares of the vertically integrated company
G05 c. Promotions and sanctions can be decided only by the management of the network company.
G05 d. The upper management of the network company shall not be dismissed without prior justification, in accordance with national labour laws. Justification for any dismissal shall be based on network issues and shall be notified to the regulator.
G05 e. The conditions of the transfer of an employee of the network company to an affiliated company shall address the need for safeguards related to the disclosure of commercially sensitive and advantageous information acquired during his/her previous employment.

Ad 5b: The management of the network company should act independently which is unlikely if they own shares of companies with commercial interest in its respective energy market. The primary concern of the GGP is for vertically integrated companies but this provision may also be relevant for shares of competing companies.

G06: When a person employed in an affiliated company is seconded to a regulated subsidiary of the group, it is necessary, either for the employee to sign a new employment contract with this subsidiary, or for the company he belongs to to sign a contract with the subsidiary to define the conditions of the secondment. In this second situation, an amendment will be signed to the employment contract of the person. In both cases, the contract or the amendment will clearly define the conditions of secondment with reference to the conditions laid down under G05.

Additional measures to reinforce functional unbundling concerning customer relations:
Customer relations between the network company and suppliers are a fundamental element of functional unbundling as they mirror the internal independence of the network business from the vertically integrated company. Customers must be convinced of the separation of the system entity and energy suppliers. It must be clear for customers that the system operator is a neutral entity separated from any supply activities with the task of providing access to all energy suppliers in an equal manner. The customer must not believe that the integrated supplier is more reliable because of his closeness to the integrated grid, and therefore be reluctant to change suppliers. The affiliated supplier shall not benefit from the public credibility or reliability of the system operator. This must be assured through separate marketing activities.

G07: Network companies shall have their own identity; nothing shall imply a link from the network to the supply business. This involves clearly separate branding strategies, communication policies, and separate contact routes to the network and supply business such as separate telephone numbers and home pages (including transparent linking policies).

5. Unbundling of decisions

The Electricity and Gas Directives *provide that the distribution/transmission system operator shall have effective decision-making rights, independent from the integrated electricity undertaking, with respect to assets necessary to operate, maintain or develop the network. This should not prevent the existence of appropriate coordination mechanisms to ensure that the economic and management supervision rights of the parent company in respect to return on assets, regulated indirectly in accordance with Article 23(2), in a subsidiary are protected. In particular this shall enable the parent company to approve the annual financial plan, or any equivalent instrument, of the distribution/transmission system operator and to set global limits on the levels of indebtedness of its subsidiary. It shall not permit the parent company to give instructions regarding day-to-day operations, nor with respect to individual decisions*

concerning the construction or upgrading of distribution lines, that do not exceed the terms of the approved financial plan, or any equivalent instrument.

Ensuring the ability to implement effective decision making processes in transmission and/or distribution companies, even if they are part of vertically integrated units, is one of the essential measures in support of unbundling processes.

Independent decisions

Ensuring effective decision making rights for transmission and distribution operators means that decisions must be made independently from competitive business units. The sphere of such decisions relates to the day-to-day operations and to the assets (physical as well as human) necessary for operating, maintaining or developing the network..

Effective decision making rights

Effective decision making rights entail the following requirements:

G08: All commercial and operational decisions related to the operation, maintenance and development of the network must be made within the network business in a non-discriminatory way, without involvement of the related supply business or holding company of the integrated company.

6. Unbundling of information

The Electricity and Gas Directives *provide that without prejudice to Article 18 or any other legal duty to disclose information, the distribution/transmission system operator must preserve the confidentiality of commercially sensitive information obtained in the course of carrying out its business, and shall prevent information about its own activities which may be commercially advantageous being disclosed in a discriminatory manner.*

Unbundling of information is concerned with the publication of data, respecting data protection rules and non-discriminatory access to data. With regard to transparency of information ERGEG[11] considers that information shall generally be made available to market participants unless there is a clear reason against it (e.g. in cases of legitimate commercial reservations or system security issues). In terms of the unbundling rules the confidentiality and disclosure of information have to be specified in a well defined data management system in order to avoid any discrimination.

The following table lists the different kinds of information, their respective handling principles as well as general procedural solutions.

	Third party information	**Generic network information**
Definition	**Commercially sensitive Information**	**Commercially advantageous Information**
Treatment	**Confidentiality (Disclosure upon agreement)**	**Disclosure**
Non-discriminatory implementation	**Data access rules**	**Rules for data disclosure**

[11] See ERGEG Guidelines for Good Practice on Information Management and Transparency (ref. E05-EMK-06-10), 2 August 2006.http://www.ergeg.org/portal/page/portal/ERGEG_HOME/ERGEG_PC/GGP_Transparency

Third party information

Third party information (information which does not belong to the network company), obtained by the grid operators in the course of carrying out their business, is very often confidential and classified as commercially sensitive information. As a matter of principle confidentiality has to be respected except in the case where the data owner (third party) agrees to disclosure (general or specific addressees). Data access rules have to be established so that contract partners can get access to the data on equal terms such as time, procedures, cost, and quality. Informational unbundling has to respect data protection law, where the person in possession of confidential information is obliged to a specific behaviour.

The following list of possibly confidential information is neither exhaustive (it depends on the role of the network company which information it receives) nor mandatory (information can be classified "non-confidential" in the case of the consent of the data owners):

- Financial and technical conditions of grid access (individual grid access contracts).
- Financial and other conditions of energy supply (individual energy supply contracts, such as interruptibility,…).
- Metering data, load profile and load forecast of the clients (enabling suppliers to set up tailor made products).
- Inactive and planned new connections to the grid (reducing acquisition cost).
- Name, address and bank account details of the client (reducing acquisition cost).
- Billing records (giving information on good/bad customer behaviour).
- Participation in capacity allocation procedures (revealing potential alternative suppliers).

G09: The network company shall define for all network information at its disposal whether it is commercially sensitive (where it is owned by third parties) or commercially advantageous (where it is owned by the network company itself).

G10: For all network data the network operator will define data collection, data processing and data access rules in a "data management system". This system will ensure that for commercially sensitive information, confidentiality is respected and that equal, well specified and non-discriminatory access/disclosure) is guaranteed to contract partners. This involves equal treatment related to time, procedures, updating, costs and data quality. For commercially advantageous information the network company shall define whether data are to be disclosed, in a non-discriminatory way, or not (respecting the transparency needs of the market). Non-discriminatory access to such data again involves equal treatment related to time, procedures, cost and data quality.

G11: (B priority) The ultimate objective to comply with these requirements would be to ensure separate databases related to customers for the network and competitive businesses. This should allow each market participant to have equal access to information.

G12: The management and the employees of the network company shall not participate in any internal activities of the vertically integrated company, in which commercially sensitive or advantageous information can be disclosed and which could give an advantage to the competitive business. Equally, the management and employees of the competitive businesses shall not take part in such activities of the network company.

7. Compliance programme

The Electricity and Gas directives *provide that the distribution and transmission system operator shall establish a compliance programme, which sets out measures to ensure that discriminatory conduct is excluded, and ensure that its observance is adequately monitored. The programme shall set out the specific obligations of employees to meet this objective.*

The network company shall create a framework (compliance programme) for the employees and management of the company dealing with network tasks. This must not be limited to employees of the network company, and shall be extended to affiliated or external service providers.

This programme should be implemented and improved within the company under the supervision of a designated person or body (hereinafter “compliance officer”).The compliance programme shall have the status of a management directive or an equivalent rule in the corporate culture. It has to be a legally binding part of the employees’ obligations. The main target of the compliance programme is to secure the implementation of the established unbundled processes in the company.

Compliance officer

The network company shall appoint a person or a body as a compliance officer to monitor the implementation of the “compliance programme” in the network company. The compliance officer can also have the competence to *implement* the compliance programme in the company (drafting and publication of the compliance programme; defining measures to implement compliance; …etc). The responsibility for an effective compliance programme remains however with the management of the network company.

The compliance officer should have direct access to the management. He must also have relevant experience to decide which areas have to be monitored.

G13: The contact details of the compliance officer, such as name, address, e-mail, phone number, have to be published in the compliance programme and communicated to all employees of the network company in the ways generally applied (such as Intranet etc.). As a matter of principle any employee in the company shall have easy access to the compliance officer in case of actual or suspected discrimination, disputes or queries, and breaches of the compliance programme.

G14: The compliance officer shall be guaranteed the necessary independence by the management of the network company through the compliance programme. He shall be trained properly in all aspects necessary of the job. He shall be equipped with the resources (including human resources) necessary to accomplish his mission and provided with all the necessary information.

G15: In order to monitor the compliance programme in an appropriate manner, the compliance officer shall have the following functions which will be part of the compliance programme:

- Elaboration and improvement of the compliance programme
- Control of compliance of the employees and management with the obligation of non-discrimination and equal treatment of customers through random sampling in the company.
- Unrestricted access to all relevant data, documents and offices in the company.
- Right to request support in order to assess all processes with regard to their relevance for potential discrimination.
- Organisation of training on compliance issues in the company of instruction of new employees.
- Right to propose disciplinary sanction to the management in the event of the violation of the compliance programme in accordance with internal guidelines.
- Direct access to the senior management of the network company.

Compliance programme

In practice, the system operator should implement the compliance programme annually through the following stages:

G16: The network company should identify all activities to be examined within the compliance programme. This will be undertaken by, or at least in cooperation with, the compliance officer. All processes [12]relating to these activities, including the data management system, have to be defined in written form in the compliance programme. These processes will define the behaviour of employees in relation to customers, employees

[12] In international quality standards this is often referred to as “procedures“

of other parts of the integrated company and third companies. The compliance programme should be integrated into the company quality system where applicable.

(a) Implementation

G17: The network company shall ensure compliance with the processes by its employees as well as seconded employees from affiliated and subcontractors, external or affiliated. They will train employees in the processes they are involved in and make these processes binding. Effective internal measures in case of non-compliance have to be defined.

(b) Assessment

G18: The compliance officer shall monitor and assess the compliance programme, compares it to the requirements set in the law and regulations and draw up reports on the results. To do so he shall be provided with all the necessary information and adequate resources. The employees shall support the Compliance Officer in fulfilling his tasks.

(c) Development

G19: The compliance officer shall advise on the measures to be taken to correct any deviations detected in attaining the planned results and to continue to improve the processes.

(d) Reporting

G20: As a result of the assessment and development stage, the compliance officer shall draw up an annual report, submit it to the regulatory authority (details see G28) and publish it.

Report

As a conclusion of the monitoring and development stage, the compliance officer shall draw up an annual public report on the result of the monitoring of the compliance programme. The report must provide real insight into the daily processes in the company and inform about the effort made by the network company to comply with the programme in its daily business.

G21: The annual report must inform on the following issues:

- Promulgation of the compliance programme within the company
  - Information to employees about the compliance programme
  - Binding compliance programme
  - Signature of employees
- Training of the employees
  - Main issues
  - Organisation
- Report on all incidents
  - Number of sanctions imposed
  - Involvement of CO
- Cooperation from management
  - Support for CO
  - Consultation of the compliance officer
  - Number of consultations
  - Issues
- Presentation of the result of any process analysis, including that performed by external audits

The report must be signed by the managing director of the network subsidiary, published and submitted to the regulator. The regulator will write an annual report on the monitoring of the compliance programme and the compliance report.