



## **EER position on UNBUNDLING**

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Founded in 2017 by:

ACIE: Asociación de Comercializadores Independientes de Energía / Association of Independent Retailers – SPAIN

AFIEG: Association Française Indépendante de l'Electricité et du Gaz / French independent association for electricity and gas – FRANCE

AIGET: Associazione Italiana di Grossisti di Energia e Trader / Italian Association of Energy Traders & Suppliers – ITALY

BNE: Bundesverband Neue Energiewirtschaft e.V. / Association of Energy Market Innovators – GERMANY

Oberoende Elhandlare / Independent Electricity Retailers – SWEDEN

## EER position paper on Unbundling

One of the most important issues for a well-functioning, competitive European energy market is the correct and effective unbundling of activities. For EER this point is fundamental and one of its key principles.

### **1. Clear distinction of activities and subsidiaries in vertically integrated groups.**

Today European markets are still dominated by vertically integrated groups with generation, distribution and retail activities, which are active both in the free market and in the regulated market.

The dominant position of these vertically integrated companies is worrying, and their practices harm competition in the retail sector because they generate confusion among consumers, mainly household consumers, who cannot clearly distinguish the distribution and retail branches. Nor can they distinguish the brands of the subsidiaries which are active in the regulated markets versus free markets.

This is not a minor issue. The obligation of the DSO (electricity and natural gas) not to create confusion in their information and in the presentation of brand and brand image, with respect to the identity of the marketing subsidiary belonging to the vertically integrated group, stems from European regulation (Article 26.3 of Directive 2009/72/EC and of Directive 2009/73/EC, respectively). For all Member States it is mandatory to transpose the disaggregation obligations (unbundling) into their national legal systems.

EER has collected evidence through its national member associations, that confusion persists among consumers in the differentiation between supply in the free market, the supply of last resort and the distribution activity. This happens in both the electricity and natural gas sectors.

The Council of European Energy Regulators (CEER) published in June 2019 an update on the degree of implementation of the obligations included in the European Directives relating to the effective unbundling of the activities of vertically integrated gas and electricity DSOs<sup>1</sup>. While progress had been made in many Member States, there is still confusion in the brand image and corporate identity of vertically integrated groups (see 2016 CEER figures below).

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<sup>1</sup> CEER (14 June 2019): "CEER Status Review: Implementation of TSO and DSO Unbundling Provisions – Update and Clean Energy Package Outlook". <https://www.ceer.eu/documents/104400/-/-/f69775aa-613c-78a5-4d96-8fd57e6b77d4>

MARKET CONCENTRATION - RETAIL ELECTRICITY MARKET, ACER 2015



- Over 70% market share of 3 largest suppliers
- Less than 70% market share of 3 largest suppliers

Ref: C154-TR-43-03  
CEER Status Review on DSOs Unbundling

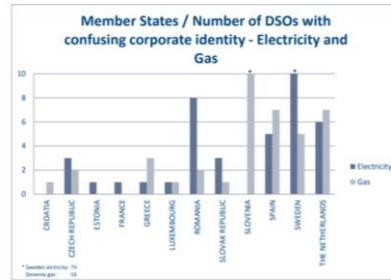


Figure 7. DSOs with confusing corporate identity - Electricity and Gas

Reports from the National Regulatory Authorities (e.g. from the CNMC in Spain, AGCM in Italy, and others) state that the effects of the confusion between regulated and non-regulated activities in the retail electricity and natural gas markets are:

- A high concentration in the retail markets of electricity and gas supply to final consumers by the retailers that belong to the same business group, mainly in the household sector.
- The dominant position of the integrated groups of the DSO in each area developing new supply points due to the hardware deployment in this type of processes.
- Intra group customers switching (where sometimes bad business practices have been reported by consumers to the NRA)

Considering the points above, EER concludes that the current situation of differentiation is not always clear in the vertically integrated groups with respect to information and the presentation of the brand and brand image, which is affecting the choice of retailer by the consumer, and consequently, the competitive dynamics of the retail market.

Therefore, we request the NRAs of the Member States to act forcefully when investigating these practices and to promote the obligation of effective measures that allow the clear and non-confusing distinction of regulated retailing activities and the free market, as well as the DSO activity of incumbent groups, vertically integrated, with different branch names, different logos and colours, different websites, etc. This is crucial to avoid the customers confusion.

## 2. EU DSO Body

The EU recently adopted new rules on electricity distribution system operators (DSOs) that could change the design of Europe’s electricity market. They include creating a new EU-level entity for DSOs, an “EU DSO body” composed of vertically integrated operators in the value chain of the electricity sector.

This body will promote coordination amongst the European Union’s approximately 2.750 DSOs and pave the way for them to take on more tasks to ensure their grids are smarter, flexible and capable of integrating more renewable energy resources.

EER is greatly concerned that without effective unbundling, this EU DSO body, though intended to create value, would reinforce the role of vertically integrated companies to the detriment of independent operators. Indeed, EER underlines that unbundling is not yet entirely effective in many EU Member States in which incumbent companies still own vertically integrated activities (power generation, distribution and supply).

EER strongly suggests that such a body should be strictly controlled and monitored by the European Commission, ACER (the European Agency for the Cooperation of Energy Regulators) and other regulatory agencies in order to ensure maximum transparency and independency from the business interests of DSOs' parent utilities. The work of drafting new network codes needs to be carried out in a strictly neutral way and with constructive participation by market actors such as retailers, aggregators and other service providers to avoid the potential for DSOs to attempt to influence the content of the regulations in a manner that gives their parent utilities an unfair advantage over new market players, such as small-scale renewables, energy communities, or aggregators.

In this vein, it is pivotal that such a body is compelled to include the vision and the technical expertise of other operators in the energy value chain such as retailers and demand aggregators. Those actors cover the "last mile" of the energy sector with the consumers and are a key part of the value chain that cannot be forgotten when defining technical rules related to networks, smart meters, data management and formats, cybersecurity, demand side flexibility, and renewable energy integration. Defining a transparent process for ensuring the constructive participation of stakeholders is of utmost importance and needs to be tackled in the early stages of setting up the EU DSO entity and its working structures.

In conclusion, EER requests:

- An effective unbundling, so that there are no pre-established situations for the benefit of vertically integrated companies as opposed to independent operators.
- A robust regulatory oversight of the EU DSO Body as well as a robust regulatory oversight of the implementation of and compliance with network codes by the European Commission and ACER.
- The participation of other actors in the electricity sector in the elaboration of new network codes; especially independent retailers and demand aggregators should be included in any consultation process.

### **3. Clear distinction of the rights and responsibilities of the DSOs / Retailers**

One of the main problems faced by independent retailers is that DSOs don't assume the cost of their actions, transferring these to retailers, including errors in consumption or generation measurements, invoice delays, etc.

A clear regulatory framework is needed that establishes the responsibilities of the DSOs in terms of deadlines, sanctions and claims rectification. The retailers are the companies that communicate with and respond to the consumers. But in many cases mistakes or problems that exist are not the sole responsibility of the retailers, but they are the ones that are exposed to the criticism of customers.

In many cases, the courts also sanction retailers for lack of maintenance in the quality of supply. It is a frequent error, with harmful consequences for the supplier, when in addition, responsibility for the quality of supply is only the responsibility of the DSO. Something similar happens, for example, with frauds in Spain, where the role of the DSO is fundamental but has consequences for the retailer. Due to regulation, when a fraud is detected, DSOs charge the penalties directly to the retailer in the tariff invoices and then it is the retailer who is in charge of recovering the fraud penalties from customers. In this sense, it is the retailer that assumes penalties for energy and anticipates the payment of these amounts to the DSO regardless of

whether the consumer doesn't want to pay or even wants to take the case to court (with the consequent delay that this implies).

#### **4. Prohibition of TSOs and DSOs to engage in free market activities**

In the context of the energy transition, the sector will be required to carry out a process of decarbonization of the economy through electrification, sector coupling and integration. The development of renewable energy, large-scale storage solutions and other technologies such as power-to-gas will be fundamental. It is important that DSOs and TSOs are not allowed to be involved in these market activities (as foreseen in Articles 36 and 54 of the Electricity Directive in the case of storage); they should focus on the regulated activity that corresponds to them. In addition, their interference in these activities would distort competition in the market and would increase costs for all consumers.

The more the market-based energy retail business is a matter of services, including empowerment of energy efficiency/awareness/demand response, the more the enforcement of the unbundling principles becomes trickier and requires more surveillance by the NRAs. Indeed, while it is relatively easy to distinguish energy sales from network operation, the boundary between network operation and delivery of energy efficiency services – i.e. based on merchant maintenance services to private appliances connected to the grids – may be more difficult to determine. Not surprisingly, there are examples of TSOs and DSOs selling such services which should clearly be a purely competitive business where monopolistic entities shouldn't be allowed to operate.

Another important vector of the energy transition is mobility and transport, one of the sectors responsible for the highest percentage of GHG emissions. This is another market activity with great possibilities for new operators, companies and demand managers, and electrical installers. For this reason, it is key not to allow the participation of DSOs in this activity (DSOs have already insistently shown their interest in installing the recharging points and charging them to the regulated costs of the system).

While the recently adopted Recast of the Electricity Directive includes strong provisions that don't allow the involvement of DSOs and TSOs in free market activities, it will be key to ensure the proper implementation of these rules across the EU, as the number of exemptions and lack of proper implementation in some Member States may open the "back door" for DSOs and TSOs to actively engage in the free market.

#### **5. New infrastructure investment**

The integration of the European markets and the new roles of consumers as part of the generation and/or balancing services will probably imply new network infrastructure developments that have to be considered.

In this sense, transmission infrastructures shall be open to competition so consumers and generators may be freely able to build their own connection grids and to develop transmission infrastructures.

In any case, any transmission infrastructure investment should be subject to a competitive bidding process.