



Vertical Relations in Energy Markets
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**The new Directives' illegality
&
the protection of public
energy supply undertakings**

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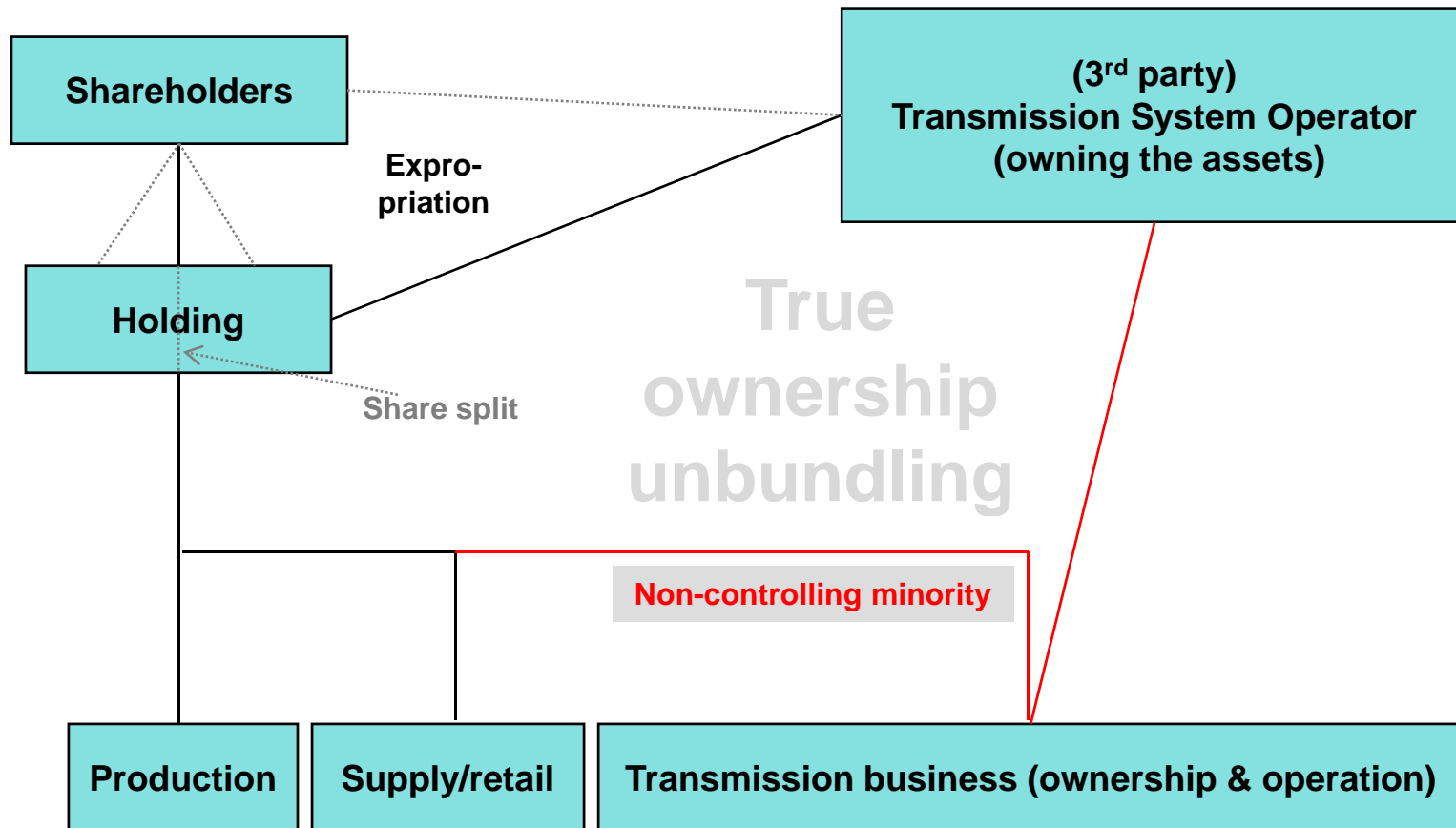


Overview

- New Directives' three unbundling options
- Breach of Article 56 EC
- Breach of principle of equality
- Protection of public ESUs under ECHR, EC law and German law



Ownership unbundling (I)



- “Share split” = form of ownership unbundling (considered as „milder“ form of unbundling)



Ownership unbundling (I)

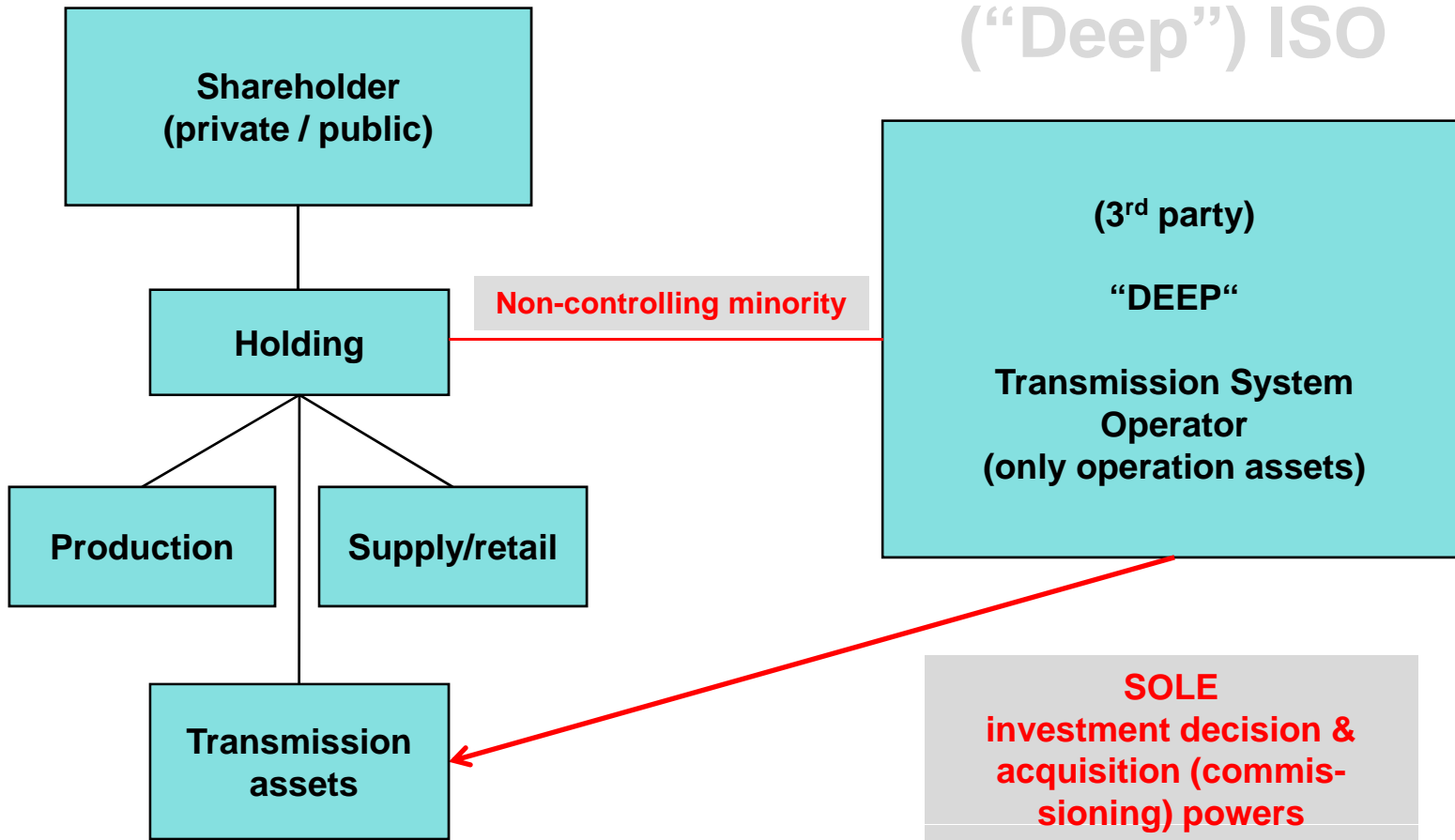
“Example”

England & Wales electricity
transmission grids into
National Grid *upon privatization*



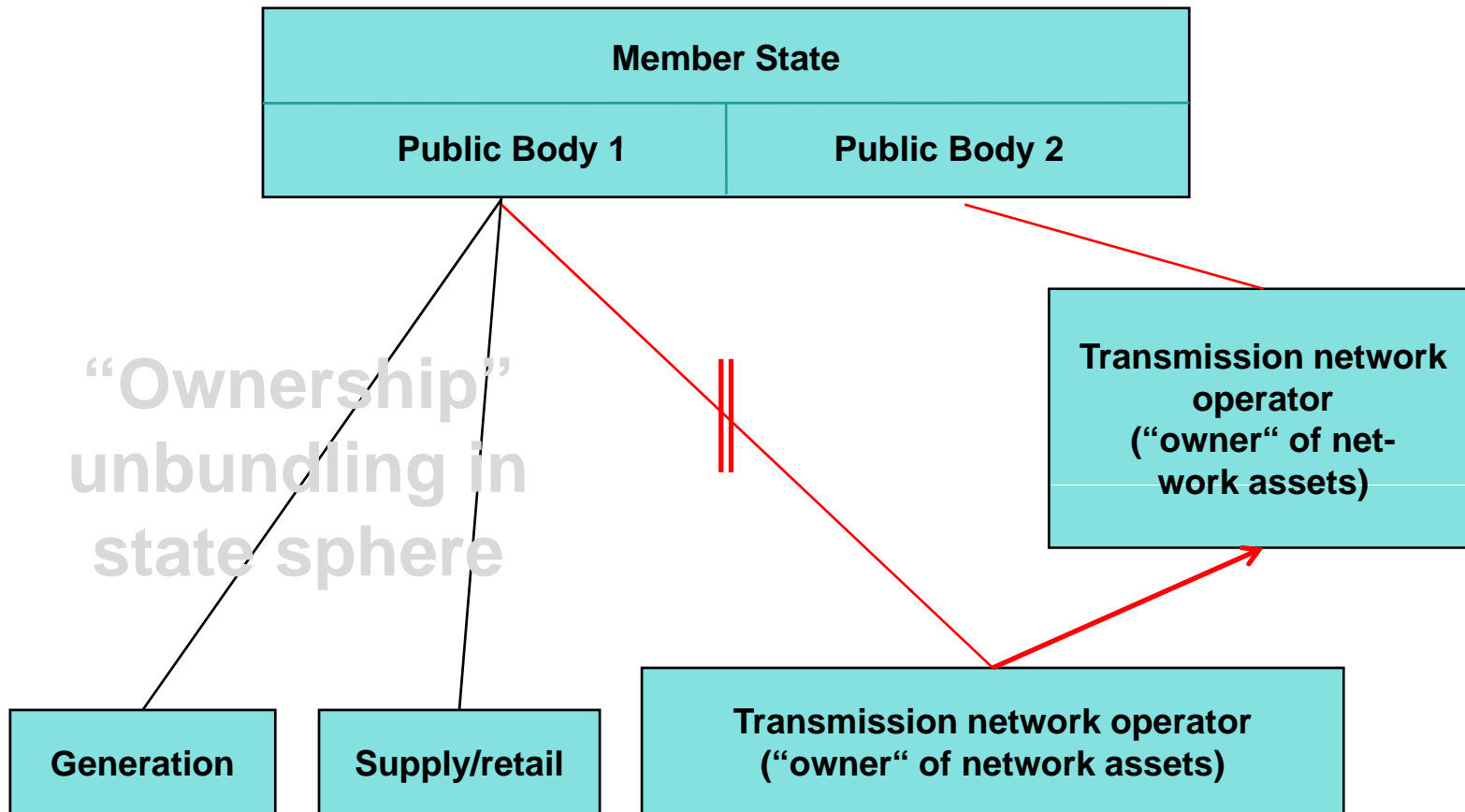
Ownership unbundling (II)

(“Deep”) ISO





Ownership unbundling (III)





Ownership unbundling (II + III)

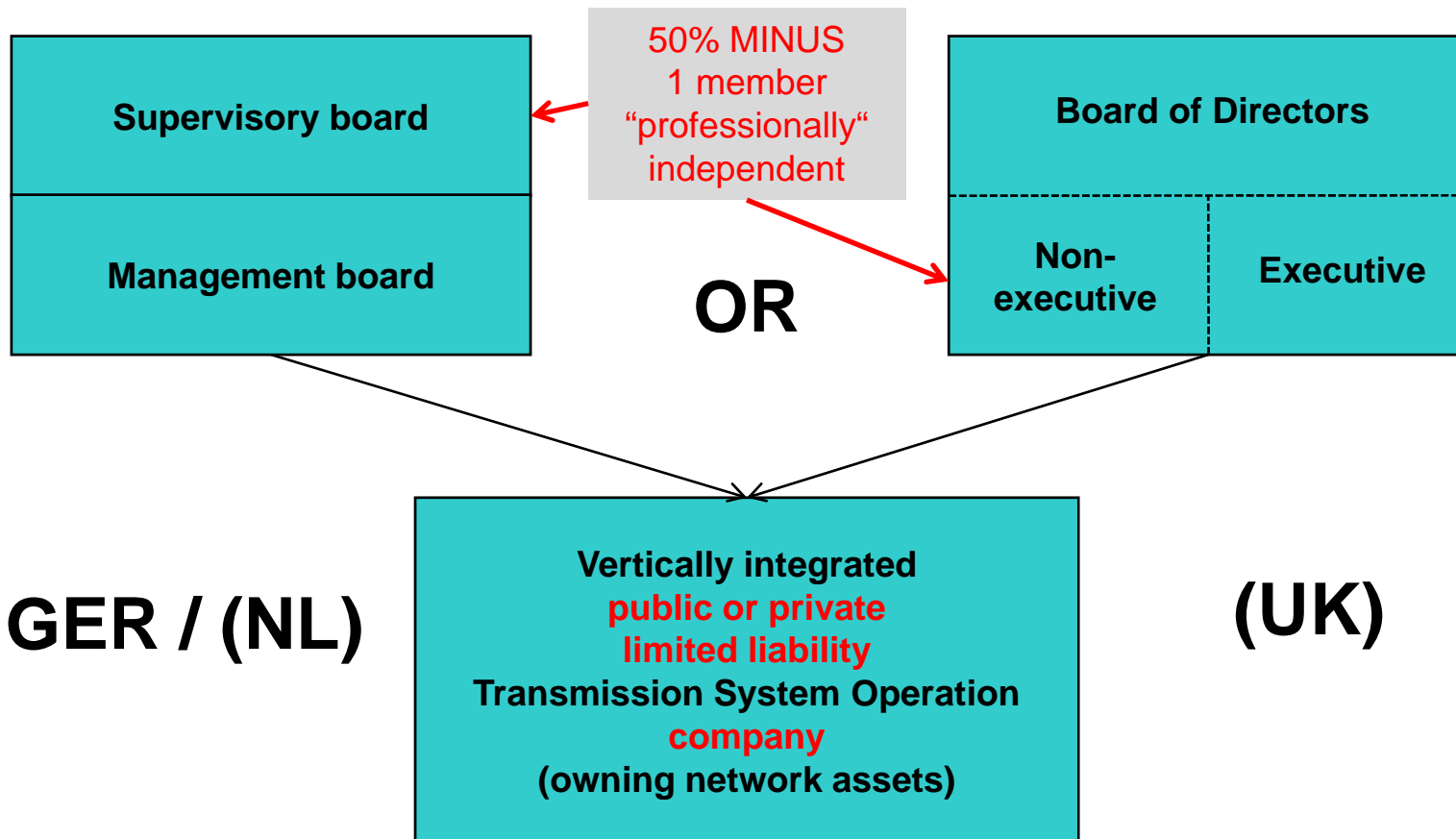
“Deep” ISO: Scotland PLUS

“Ownership” unbundling:

EdF & RTE in France
and
GasTerra & Gasunie in NL



Independent Transmission Operator (ITO)



- PROBLEM: “professional independence“ (Anglo-Saxon *versus* German style)
- “Scottish Clause“ (Art. 9(9) draft E-Directive): assurance that Scottish (non-“deep“!) ISO model is more than ITO and thus compliant



Independent Transmission Operator (ITO)

- ➔ Problem: 4-year cooling-off period
- Breach of freedom of economic activity (choice *versus* practise of occupation)?
- Vertical integration separate for electricity and for gas supply (vertical integration of energy supply as originally envisaged “only“ for ownership unbundling option)



Art. 56 EC (I)

Art. 9(12) draft E-Directive:

"Undertakings performing any of the functions of generation or supply shall not in any event be able to directly or indirectly take control over or exercise any right over unbundled transmission system operators in Member States which apply paragraph 1 [of Art. 9]."



Art. 56 EC (II)

- Only (vertically integrated) transmission network undertakings can invest in TSOs of Member States which apply OU
- NO public policy/security reason; “competitive markets“ NOT overriding reason of general interest
- Spanish electricity generation & supply company Iberdrola owns Scottish Power, which owns parts of Scottish electricity transmission network



Principle of equality

Art. 9(6) draft E-Directive:

"For the implementation of this Article, where the person referred to in [...] paragraph 1 [ownership unbundling] is the Member State or another public body, two separate public bodies exercising control over a transmission system operator or over a transmission system on the one hand, and over an undertaking performing any of the functions of generation or supply on the other, shall be deemed not to be the same person or persons (comment added)."

→ **Discrimination between state-owned and private energy supply undertakings**



Protection of public ESUs

- European Convention of Human Rights (ECHR)
 - EC law
 - German law?
- ➔ **THREE** different levels of protection



Protection of public ESUs under the ECHR

- Lifting of corporate veil exceptional, i.e. strict distinction between corporate firms and their shareholders
- Protected are any legal persons if recognized as such under national law
- Public shareholders (as governmental organizations) not protected
- Formal understanding of undertakings



Protection of public ESUs under EC law

- Public & private undertakings distinguished according to control but equally protected, at least when it comes to fundamental freedoms (Commission also seems to extend protection to fundamental rights)
- Any economic activity relevant, i.e. also if conducted by public bodies
- Functional understanding of undertakings



Protection of public ESUs under German law (I)

- 1990s case law BVerfG (*Sparkassen & HEW*): no protection of public (private) undertakings
- Recent case law BVerfG: indication that protection of public private undertakings might become possible if not controlled by public bodies



Protection of public ESUs under German law (II)

- Traditional literature: State as guarantor of fundamental rights protection cannot at same time be beneficiary of such protection
- More recent voices argue that protection cannot depend on short-term changes in share ownership (see, e.g., RWE)
- Protection of legal persons depends on public control



Protection of public ESUs under German law (III)

- Listed RWE good example for problematic position of German law as regards protection of public private ESUs because RWE's municipal shareholding lies at around 25%
 - threshold for "blocking" minority
 - depending on control which might depend on quick movements of share transactions, RWE not necessarily public undertaking under EC law
- ESUs controlled by foreign state-owned shareholders such as Vattenfall enjoy better (legal) position than German publicly controlled ESUs



Thank you!

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