„DNO legal unbundling and the law“

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„Distribution Networks and Smart Grids - Does Unbundling Matter?“

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I. Introduction: 3rd Energy Package

- EU-statutory provisions for TSO unbundling:
  - Full Ownership Unbundling (OU)
  - Independent System Operator (ISO)
  - Independent Transmission Operator (ITO)
- Provisions for DSO unbundling:
  - It remains with the legal unbundling scheme as in Directive 2003/54/EC:
    - Art. 26 § 1 Electricity-Directive 2009/72/EC – Unbundling of DNO:
      „Those rules shall not create an obligation to separate the ownership of assets of the distribution system operator from the vertically integrated undertaking."
  - Implementation of their objectives caused administrative and financial challenges
  - new challenges rise up because of innovative technical processings: Smart Grids

II. Unbundling of DSO – Status Quo

- Directive 2003/54/EG à Arts. 24 & seq. Directive 2009/72/EC
  - Operation of distribution networks
  - Key instruments:
    - legal unbundling
    - informational unbundling
    - operationel unbundling
    - accounting unbundling
  - *De minimis* (> 100,000 customer) rule and corperate clause

III. Problem areas

Need for fundamental reenginieering – A look at Germany:

- The corporate structure of the network operator
  - e.g.: Transfer model or lease model
- The legal form of the network operator
  - e.g.: Limited liability company (*GmbH*) or *Public limited company* (AG)
- The relationships within the corporate group
  - Subsidiary company model
  - Holding company model
- Accumulation of legal limitations
  - Local administrative law of the 16 *Länder*
  - Concession contracts on the use of public ways
  - Public procurement law

III. Problem areas

Consequences up to now:

- Small, predominantly municipally controlled energy companies fear the loss of synergy effects / declining revenues of legal unbundling
- The separation of network and distribution requires costly restructuring
- Additional costs result
  - from the duplication of processes and
  - the higher cost of individual IT system maintenance
- Risk of a decreased service quality for customers
- Otherwise: Distribution companies recognize that legal unbundling offers new opportunities!

IV. Trends to strengthen the rules?

3d legislative package:

- State of the art for longtime?
- Multiplicity of *delegated powers* (Commission, ACER)
  - comitology procedures (delegated acts implemented by the Commission)
  - (implementation) guidelines, best practice rules, network codes etc.
  - binding not only TSOs but also the (national) regulatory & network conduct regime as a whole

National legislation:

- In particular: NL !
- *Splitsingswet of* 21 November 2006 (in force since July 2008)
  à *Owneship* Unbundling (also) of distribution networks
- Infringement of art. 56 EC – or example for the EU-legislator?

V. DNO & Smart Grids: Questions of law

"General rules "(art. 3 § 11) of the Directive 2009/72/EC:

"… In order to promote energy efficiency, Member States … shall strongly recommend that electricity undertakings optimise the use of electricity, for example by providing energy management services, developing innovative pricing formulas, or introducing intelligent metering systems or smart grids, where appropriate."

However:

- New players in the game, such as
  - distributed generation; energy consumer à *prosumer* (solar power; fuel cells)
  - "virtual" power plants operators
  - ICT undertakings & network operators; internet service providers (ISP)
  - metering (service) providers
- lots of new & intricate legal relationships à need to level the playing field!

V. DNO & Smart Grids: Questions of law

Potential legal issues (selected):

- Adjustement of legislation on distributed generation & energy feed-in (matching the bi-directional performance)
- Refinement of (distribution) *system responsibility*
  - i.a.: network management *&* shortage control
  - Interdependency & co-ordination with *transport* systems
- Financing of due investments into networks & technology
- *Smart grids* and network (access) regulation
  - especially: incentive regulation
  - setting of quality standards / admission of "investments budgets"
- Duties of municipal & public procurement law (concerning e.g. Public private- or Public Public partnerships)

→ Need to rebuild energy law: from "*top down*" to "*bottom up*" ?

V. DNO & Smart Grids: Questions of law

Potential legal issues – furthermore:

- Combining of telecommunication & energy regulation law & executive powers?
- Challenge of *critical networks*: prevention of dangers (terrorist/hacker attacks), emergency management & civil protection
- (Consumers) Data protection rights

- *Generally*: Ensuring the congruence of the law & avoid cross-purposes / legislative contradiction !

Many thanks for your attention!

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