



Brussels,
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Terms of Reference

Subject: Liability of electricity transmission system operators failing to supply

I. INTRODUCTION

In 2005, PB Power¹ carried out a study on behalf of the Commission on network security and reliability rules covering all main electricity synchronous areas of the EU². This study assessed the adequacy of these rules and specified further needs to improve them. To abide by network security and reliability rules is amongst other reasons important to avoid failure of the networks, since failures in the electricity transmission system can potentially cause huge damages to market participants, particularly in case of large black-outs. If however a black-out causes damages to market participants, the question becomes relevant what damages should actually be compensated, who should compensate for those damages and how this compensation needs to be organised.

It has therefore been recognized that in addition to the above mentioned study, further study is needed regarding third party and contractual liability of network operators (especially transmission system operators) in case they fail to supply, i.e. fail to transport the electricity in a reliable manner or in the volumes needed. This study should look at the liability regime which is in place in various Member States and assess whether the differences in liability and compensation might hinder the establishment of the internal electricity market. In addition, the need for EU legislation in this area should also be assessed.

In short, the study should provide for an insight in the rules on civil liability of network operators (especially transmission system operators) in different EU Member States. The study should compare the rules applicable in various Member States. The study should cover and analyse liability regimes, the norms triggering liability (e.g. fault and risk liability, (gross) negligence), which damage the network operator is liable for, possible limits to liability and the possibilities for these companies to insure themselves against damages and claims. It should be assessed whether the differences between the applicable rules in the MS could hamper the establishment of a true internal market or which could

¹ Study on the Technical Security Rules of the European Electricity Network Final Report 62236a/001 Rev 2 February 2006

² Notably UCTE, Nordel, the UK and the Baltic States.

lead to distortion of competition between the network operators. The study must also include liability insurance. Finally, the question is raised whether such differences would warrant a uniform approach and/or a harmonisation on EU level.

II. OBJECTIVES AND OUTPUTS

- (1) make a global comparative research of the rules and conditions, contained in laws, regulatory frameworks, contracts (to the extent that these contracts are available, and including the general conditions) on the liability of transmission system operators when damage occurred due to failing to supply and transport electricity;
- (2) make a more specific and detailed comparative analysis of the following MS: CZ, DE, DK, FR, IT, NL, PL and UK;
- (3) analyse TSO's liability towards various parties that would suffer damage: generators, distribution system operators, big industrial consumers directly connected to the grid, small consumers (households) etc.
- (4) assess the differences between these applicable rules in the selection of MS;
- (5) analyse the way TSOs are insured against those risks, what are the premiums and whether these premiums are reflected in the network tariffs;
- (6) analyse whether the difference between these rules hamper the establishment of an internal market or whether they impede on competition;
- (7) given the outcome of the above research questions, analyse whether an Community wide approach could be warranted in order to facilitate the creation of a competitive internal energy market.

III. METHODOLOGY

Make an:

- Inventory of civil liability law for TSO's causing damage due to a black-out and the regulatory frameworks in the MS (comparative assessment) with a focus on CZ, DE, DK, FR, IT, NL, PL and UK;
- Inventory and assessment of contractual and third party liability cases in the electricity sector in the afore mentioned MS;
- Inventory and assessment of existing TSO liability insurance in case of black outs; analyse the effect of insurance on network tariffs;
- Analysis the effect on competition between players object of this study and effect on the establishment of an internal market;

- In case there are other cases of liability of TSOs (other than liability due to a black-out) having an potential effect on the internal market, this should be mentioned in the study as well;
- Assess and discuss whether given the above outcome, a EU uniform approach is warranted.

IV. ISSUES TO BE ADDRESSED

The study should answer a number of questions related to the chapters above:

Liability for failure to supply/ failure to transport (black-out):

- What does failure to supply or to transport actually mean? Do MS have a definition for "failure to supply", or do domestic rules prescribe a certain (minimum) norm which if not met, implies that there is a failure?
- Certain MS have electricity specific norms, others rely on general liability rules stemming from tort or civil law (like for example (gross) negligence and malice aforethought)
- Does the norm to be guaranteed reflect the interests of all players involved? I.e. the norm should not be too low (interest client) and not too high either (interest of operator and client (*regulated tariff*)?)
- Who determines the norm? What would be the appropriate level of liability (e.g. according to the market players concerned?)

Liability by whom and liability versus whom?

- Privity of contract and tort (in case no contract exists)?
 - Liability of TSOs towards other TSOs (domestic and foreign)
 - Allegedly, there are agreements between the TSOs in the different synchronous areas whereby the maximum compensation for damages resulting from liability is agreed upon, and whereby the TSOs have agreed to follow certain procedures in order to claim damages resulting from a failure to supply. This should be analysed.
 - Liability of TSOs towards major industrial customers
 - Liability of TSOs towards DSOs
 - Liability of DSOs towards households
 - In some MS this is limited to certain specific situations. What kind of situations, and what legal form do these limitations take?

Is there a cap on liability, are there any statutory or other limitations on damages?

- As referred to above, in some MS there is a cap on the liability, and sometimes there is a cap on the damages (direct damage, indirect damage). What kind of situations are being referred to and what legal form do these limitations take?
- Can the TSO escape liability? In what cases does he have a right of recourse? Can he invoke force majeure? What does this cover in specific? If he can invoke force majeure, is there any compensation provided for (other than liability)?

Liability: does the government or regulator in the Member States concerned play a role?

- Does the government or national regulator in the Member States concerned play a role in setting the maximum liability, determining the conditions, etc? What role do they play?
- Does the government or regulator impose a standardised claims handling? Do you think this is important?
- Is there a liability of the State or does the State play any role in compensating for damages ?

Insurance against liability?

- What is the current practice of TSO-insurance coverage? Are TSOs insured? If yes under which conditions, and for which amounts?
- Is it possible in all MS to insure against liability for damages stemming from a failure to supply?
- Is there a competitive insurance market for this? What are the conditions, what is known about premiums?
- Are insolvency risks being covered by insurance policies?
- Ideally, who should take up insurance? The network operator or the final consumer?
- What is the effect of insurance on network tariffs?

Regulated versus non-regulated industries? How to provide for an incentive? Insurance fees: part of regulated tariffs?

- The question is whether damages should be recuperated through tariff increase? How are the rules on these aspects? Are the insurance premiums taken into account when establishing the tariff for transmission and distribution?
- If TSOs are not insured, will any damage than be covered by the network tariffs? What are the powers of national energy regulators in this respect?

What are the effects on competition of the different liability rules, do the rules hamper the establishment and/or functioning of a true internal market?

- Does the fact that different rules exist for transmission (and distribution) companies have an effect on competition and hamper these rules the establishment and/or functioning of a true internal market?

Forward looking: harmonisation on EU level or "subsidiarity"?

- If the difference of the liability rules for TOSs hampers the functioning of an internal market and hampers effective competition, would the establishment of uniform EU rules bring about positive effects instead?
- If yes, how should these EU rules look like? What should be the substance of these rules?

V. WORK STRUCTURE

- Comparison of the laws, regulations and contracts applicable (analysis of actual situation) ;
- Provide an assessment of legal and regulatory framework concerning third party and civil liability of TSOs in the MS (with a focus on: DE, FR, UK, NL, SE, PL, CZ and IT);
- Analysis of coverage of such liability;
- Analysis of whether the different rules and regulatory framework hamper the establishment of the internal market or whether they have an impact on competition.

VI. DELIVERABLES AND TIMETABLE

The work will start just after the signature of the contract (May or June 2009) and be terminated within six months time counting from the signature of the contract.

Within fifteen (15) days following the signing of the contract and commencement of the work, a kick-off meeting shall be arranged. Prior to the meeting, the contractor shall prepare a draft agenda. Tentatively, this agenda would include the following:

- Confirmation of the study methodology, timetable and deliverables
- Agreement of principal contacts within the Commission and the contractor.

The planning of the study is the following:

- § Phase I: Analysis of the legal and regulatory framework in the different MS (duration 4 months)
- § Phase II: Analysis of barriers to an internal market/effect on competition (duration 2 months)
- § Phase III: conclusion (duration: 1 month)

At the end of phase I, the contractor shall submit the Preliminary Report.

At the end of phase II, the Draft Final Study has to be submitted to the Commission. The deadline is 2 months after the Preliminary Report, unless comments made by the Commission on the preliminary report necessitate additional research and drafting. In the latter case, the draft final study has to be submitted 2 months upon receipt of the Commission's request.

The Final Study, taking into account the Commission services' comments and, if appropriate, stakeholders' observations on the Draft Final Study. This final study needs to be submitted 1 month after the draft final study.

All reports have to be submitted in the English language. The contractor shall submit copies of the above reports in electronic form, in MS Word. Five hard copies will also be provided, bound in paper form.

All three reports will be presented at a meeting in Brussels. The presentation of the final study will include all aspects of the study.

VII. MISCELLANEOUS

a. Consultation

The contractor shall cooperate with the main interested bodies, including at least ERGEG, ETSO, IFIEC, organisation of DSO's, organisations of major electricity users, European organisation of consumer organisations. Those consultations shall be either via interview or via written contribution of the organisations mentioned. This consultation shall address the results of the fact finding and already discuss preliminary findings.

b. Steering Committee

A close inter-action between the Commission's responsible services and the contractor will be needed right from the start of the contract. For this purpose, a Steering Committee will be established. This Steering Committee will meet in principle every eight weeks and prior to the conclusion of each phase of the contract. This committee will consist of the contractor as well as a delegation from the Commission.

The exact timing of the meetings will be mutually agreed between the Directorate TREN/C and the contractor. All meetings shall take place in Brussels.

c. Duties of the contractor

The contractor is responsible and in charge for the implementation of the project as described in these terms of reference. The contractor has to ensure close co-ordination with the Commission.

e. Use of the results of the study

The Commission services will be responsible for deciding the possible dissemination of the findings and conclusions and the related materials produced under this contract. Any

results of the Study shall be owned solely by the Commission, who may use, publish, assign or transfer them as it sees fit.