



GUIDELINES

On Legal Unbundling of KEDS / Distribution System Operator from KEDS Public Electricity Supplier

Prishtina, 29 April 2014

Board of the Energy Regulatory Office, in accordance with Article 8, paragraph 1, subparagraph 1.6, Article 14, paragraph 2, subparagraph 2.16, Article 25 of the Law on Energy Regulator No. 03/L-185, and Article 15 of the Law on Electricity No. 03/L-201, in the session held on 29 April 2014, adopted the following:

Guidelines on Legal Unbundling of KEDS / Distribution System Operator from KEDS Public Electricity Supplier

CHAPTER I GENERAL PROVISIONS

Article 1 Scope and Purpose



1. In accordance with Article 15 of the Law on Electricity, the Distribution System Operator (DSO) has to develop and submit for approval to the Energy Regulatory Office (ERO) the Compliance Programme, which shall define the activities related to the legal unbundling from all other energy related activities it carries out.
2. Legal unbundling is necessary to eliminate cross subsidies between the distribution and public supply activities, and to monitor by the ERO based on Article 14 paragraph 2 of the Law on Energy Regulator.
3. These guidelines set out:
 - 3.1. The contents of the Compliance Programme to be developed by the Licensee – KEDS DSO,
 - 3.2. The process for reviewing, approving and monitoring of the Compliance Programme by the ERO.
4. Annex A – Action Plan and Annex B – Legal Basis and Legal Interpretation from an integral part of these guidelines.

Article 2 Definitions and Interpretations

1. The following terms have the following meanings:
 - 1.1. "**Affiliated Enterprise**" refers to the electricity enterprise which has under common ownership the Distribution System Operator (DSO) and Public Electricity Supplier (PES). KEDS is a legal entity consisting of DSO and PES, and the same legal entity owns controlling interest both in DSO and PES.
 - 1.2. "**KEDS**" refers to the Kosovo Electricity Distribution and Supply Company;
 - 1.3. "**Board**" refers to the Board of ERO;
 - 1.4. "**Compliance Committee**" refers to the committee established by the Board of Directors of KEDS to be established under Article 8 of these Guidelines;
 - 1.5. "**Distribution System Operator**" (DSO) refers to the licensed electricity enterprise responsible to operate, maintain and develop the distribution system in a specific area, and where it is possible, its interconnectors with other systems as well as to ensure long-term ability of the system to cover reasonable demand for electricity distribution;
 - 1.2. "**Public Electricity Supplier**" (PES) refers to the electricity enterprise licensed to carry out the public supply of electricity;
 - 1.3. "**Suppliers**" refers to electricity enterprises licensed to carry out the supply of electricity, including the PES;
 - 1.4. "**Compliance Officer**" refers to the DSO employee selected by the Board of Directors of KEDS to supervise the implementation of the Compliance Programme.



2. Other terms used in these Guidelines shall have the meanings specified in the Law on Energy (03/L-184), Law on Electricity (03/L-201) and the Law on the Energy Regulator (03/L-185).

CHAPTER II THE COMPLIANCE PROGRAMME

Article 3 Contents of the Compliance Programme

1. The Compliance Programme shall describe the activities undertaken by the DSO to ensure:
 - 1.1 Non-discriminatory access to information that DSO obtains from the Suppliers;
 - 1.2 Non-discriminatory treatment of Suppliers and other participants in the market;
 - 1.3 That confidential or commercially sensitive information provided to the DSO by Suppliers is not made available to the Affiliated Enterprise, except where necessary for operational or legal reasons;
 - 1.4 The decision-making independence of the management of the DSO from Affiliated Enterprises;
 - 1.5 Separate corporate identity of the DSO from the Affiliated Enterprise; and
 - 1.6 Effective oversight and monitoring of the Compliance Programme.

Article 4 Management Independence

1. The management of the DSO shall have full decision-making authority.
2. Nothing in this Article shall limit the rights of parent company of the DSO to impose appropriate and reasonable restrictions on the level of indebtedness, financial plan and strategy, target rates of return and similar measures to protect their economic rights, in accordance with Article 15 paragraph 4 of the Law on Electricity.
3. The remuneration and performance assessment of the management of the DSO shall be solely limited to the financial, commercial and technical performance of the DSO itself and shall not be related in any way to the performance of Affiliated Enterprises.

Article 5 Separation of Accounts

1. Under the Compliance Programme, the DSO¹ and PES are required to maintain separate, audited, financial accounts for their licensed activities.

¹ The Law on the Energy Regulator, in Article 46(3), requires separation of accounts to be introduced "on or before 31 December 2014". The DSO license requires, in Article 2, that the licensee separates its distribution business from its other businesses with immediate effect. The Regulatory Accounting Guidelines issued by ERO also require the separation of the accounts of the DSO and other businesses conducted by the same legal entity. The unbundling timeline based on the Agreement on Energy signed between the R. Of Kosovo and R. Of Serbia is set out to be 1 July 2014.



2. This obligation is in addition to any obligations that may be imposed under Regulatory Accounting Guidelines issued by ERO.

Article 6 Common Services

1. DSO and PES may have services used by both licences, such as, without being limited to: IT, legal, procurement, administration, financial and transport services.
2. Common services shall be carried out by the DSO or parent company of the DSO, based on an agreement on common services to be concluded between DSO and PES. Terms and conditions of the agreement, payments and other elements shall be set out in the agreement which prior to signing shall be submitted for approval to ERO.

Article 7 Corporate Identity of the DSO

1. Under the Compliance Programme, the DSO is required to ensure that the DSO maintains a separate corporate identity from PES.
2. The DSO may not share the same name, logo, badge or other corporate identification as the PES.
3. Employees of the DSO shall have separate identification to those of PES.

Article 8 Compliance Committee and Compliance Officer

1. KEDS is required to establish the Compliance Committee with responsibility to oversight and implement the legal unbundling in accordance with the Action Plan attached as Annex A to these Guidelines.
2. Following the completion of the legal unbundling of the DSO and PES, the Compliance Committee shall cease to exist. The oversight of the Compliance Programme shall be conducted by the Compliance Officer, to be nominated by the Board of Directors of KEDS.

Article 9 Complaints

1. The Compliance Programme shall contain provisions on how complaints regarding a failure to follow the Programme can be made to the DSO.
2. Where a complainant is dissatisfied with the actions taken by the DSO in response to their complaint, they may submit the complaint to ERO.
3. A record of all complaints received, the measures taken to resolve the complaints and the actions taken shall be kept by the ERO. The record, within 30 days following the end of each calendar year, shall be submitted to ERO.

Moreover, the Agreements on privatisation of Distribution and Public Supply between the Government of Kosovo and KEDS Company, signed on 8 May 2013, set out the legal unbundling within 1 year.



Article 10 Publication of the Compliance Programme

1. The DSO is required to publish the Compliance Programme on its official website.
2. KEDS is required to ensure that all its employees are provided with a copy of the Compliance Programme.

CHAPTER III APPROVAL, REPORTING AND INVESTIGATION

Article 11 Approval and Review of the Compliance Programme

1. The DSO will submit their proposed Compliance Programme to ERO within 90 days of the coming into force of these Guidelines.
2. ERO will provide its comments, if any, on the proposed Programme within 30 days of its submission.
3. Following the review, the Board of ERO will approve the Compliance Programme.
4. The DSO may at their own discretion propose amendments to the Compliance Programme at any time. Such proposed amendments, together with a justification, will be submitted to ERO.
5. ERO may, where it considers necessary for the more effective operation of the Compliance Programme, direct the DSO to propose amendments to the Programme and to submit these to ERO. When issuing such a direction, ERO will describe the reasons which have led it to require these amendments to be made and the expected nature of the amendments.

Article 12 Reporting on Compliance Programme

1. The DSO will submit to ERO, no later than 31 January of each year, a report on the operation of the Compliance Programme in the preceding calendar year. The report will be provided in a format suitable for publication and in Albanian, Serbian and English-language versions.
2. Where the report contains confidential information, the DSO will provide a full version of the report for review by ERO and a separate version, containing no confidential information, shall be published in its website.
3. The Report will be signed by the Managing Director of the DSO and the Compliance Officer.
4. This report will be monitored by the ERO in accordance with the monitoring procedures.

Article 13 Investigation

1. ERO may, at its own discretion or in response to a complaint by an affected party, conduct investigations into the implementation of the Compliance Programme by the DSO.
2. The DSO is required to make available all documentation, access to its premises, access to its employees and contractors as may required by ERO for the purposes of the investigation.



3. ERO will publish the report of its investigation on its official website, except for the confidential information. The report shall contain:
 - 3.1 The reasons for the investigation;
 - 3.2 Any breaches of the Compliance Programme identified as a result of the investigation and the administrative measures and fines imposed by ERO; and
 - 3.3 Any requirements for amendments to address weaknesses identified as a result of the investigation.
4. The DSO will be provided with an opportunity to comment the draft conclusions ahead of publication and may submit a request not to publish confidential information.

CHAPTER IV FINAL PROVISIONS

Article 14 Official Language

These Guidelines are issued in the Albanian language and shall be translated into the Serbian and English languages. In the event of discrepancies, the Albanian language version shall prevail.

Article 15 Interpretation

In the event of uncertainty over any provision of these Guidelines, the Board will provide clarification.

Article 16 Entry into Force

These Guidelines shall enter into force upon their adoption by the Board and their publication on the official website of ERO.

Board of ERO:

Enver Halimi, Chairperson

Merita Kostari, Member

Krenar Bujupi, Member.



Annex A² Action Plan

No	Action	Implemented By	Timeline	Comments
1	Establishment of the Compliance Committee	KEDS - DSO	Immediately following the receipt of the Guidelines	
2	Appointment of the Compliance Officer (In KEDS DSO)	Board of Directors of KEDS	Following the completion of time 1 and 3 of the action plan	ERO considers that the Compliance Officer can be appointed even before the completion of the unbundling process, as it would be useful for the Compliance Officer to participate in the process as early as possible.
3	Preparations for legal separation: <ul style="list-style-type: none"> - Separation of assets between the DSO and PES; - Separation of staff between the DSO and PES; - Appointment of the Managing Director of DSO and PES; - Separation of debts based on their origin between the DSO and PES; and - Separation of remaining legal obligations (court cases not 	Compliance Committee. Approved by the Board of Directors of KEDS.	To be completed before submitting the new application for license for a new PES. KEDS must submit to ERO the effective date foreseen for the legal unbundling with the obligations presented for the modified transfer of the license 90 days ahead of the effective legal	

² Action Plan sets out only the general actions to be undertaken. DSO may set out a more detailed Action Plan, based on the guidelines for action deriving from this plan.



	completed, purchase or service contracts, payment of remaining taxes and similar).		unbundling. The effective legal unbundling shall not be later than 1 January 2015 in accordance with the applicable law	
	Registration of new legal entity (KEDS DSO and KEDS PES).	Compliance Committee	To be completed prior to submitting the application for licence for a new PES	Annex B
	Preparation of the new organisation structure of KEDS DSO and KEDS PES and submission to the ERO	Compliance Committee	To be completed prior to submitting the application for licence for a new PES.	ERO will consider and approve it
	KEDS DSO and KEDS PES shall conclude an agreement on common services – IT, administration, finances, procurement, to be carried out by the DSO		To be completed prior to submitting the application for licence for a new PES	Annex B
	Application to ERO for amendment of the existing licenses.	Managements of both entities	90 days prior to effective date of transfer of the licence (effective unbundling date)	
	Preparation of the Compliance Plan and submitting it to ERO		Within 90 days following the entry into force of the Guidelines	Approval by ERO



Annex B Legal Basis and Legal Interpretation

Article 46 of the Law on Energy Regulator (LER) sets out that *“Energy enterprises carrying out transmission or distribution of electricity shall be independent in terms of their legal form, organization, and decision making in accordance with the Law on Electricity”*.

Moreover, Article 46 of the LER sets out that *“On or before 31 December 2014, energy enterprises licensed for the activities of generation, distribution and supply **shall separate their internal accounts for all of these activities as if the activities in question were carried out by separate enterprises, with a view to avoiding discrimination, cross subsidies, and distortion of competition.”***

The Public Electricity Supplier (PES) shall maintain separate accounts for the supply of eligible customers and supply of non-eligible customers, as if they were carried out by separate enterprises, and shall ensure that such accounts are audited. ERO shall monitor the implementation of unbundling by the DSO.

The fact that Article 46 of the LER requires separation of internal accounts *“as if the activities in question were carried out by separate enterprises”* confirms that the unbundling which must be carried out on or before 31.12.2014, at minimum, shall contain: separation of businesses, organisation and accounts (as required by the EU Directive of the II-nd and III-rd package).

Article 15 of the Law No. 03/L-201 on Electricity (LOE) also sets out that when the DSO is part of a vertically integrated electricity enterprise *“it shall be independent from all other activities not relating to distribution, at least in terms of its legal form, organization and decision making”*. Those rules do not establish any obligation to separate the ownership of the assets of the DSO from the vertically integrated enterprise.

In order to ensure the independence of the DSO, Article 15 of the LE sets out the **minimum criteria** that shall be applied:

- *“persons responsible for the management of a DSO may not participate in company structures of any vertically integrated electricity enterprise responsible, directly or indirectly, for the day-to-day operation of the generation, transmission or supply of electricity;*
- *appropriate measures must be taken to ensure that the professional interests of the persons responsible for the management of a DSO are taken into account in a manner that ensures that they are capable of acting independently;*
- *the DSO shall have effective decision-making rights, independent from the vertically integrated electricity enterprise, with respect to assets necessary to operate, maintain and develop the system;*
- *the DSO shall have at its disposal the necessary resources including human, technical, physical and financial resources.*
- *the DSO shall establish, and the ERO shall approve, a compliance programme, which sets out measures taken to ensure that discriminatory conduct is excluded, and ensure that observance of it is adequately monitored.”*



Article 15 of the LE explains in details what criteria need to be fulfilled in order to ensure the independence of KEDS/DSO from other activities in the energy sector (in this concrete case from the PES activities). Nothing in this Article shall prevent KEDS, if it fulfils the minimum criteria under Article 15 of the LE, to have under its ownership the DSO and PES as two businesses legally separated.

Based on Article 26 of the Directive 2009/72/EC (from package III of EC) and the Interpretative Note of the Directive 2009/72/EC issued by the European Commission on 22.01.2010, the unbundling mechanism has remained the same as in the second package of EC Directives. This means that same as in the second package of EC Directives, where our laws are based (Law on Energy Regulator and Law on Electricity), the unbundling is defined as: Legal unbundling of DSO from other activities not related to distribution, functional unbundling and unbundling of accounts.

According to the above mentioned Article of the Directive 2009/72/EC it is required that the distribution is carried out by a separate “network” company or as the directive states “network operator”. The requirement to establish a separate company is related only to the activities of the distribution system operator, whereas other activities, such as supply and generation may be carried out within a single company.

This article means that it is not allowed for the Transmission System Operator and DSO to be in the same company. The Directive provides for full ownership unbundling between them (for the TSO occurred in 2006) whereas for the DSO it is required only legal unbundling from the other activities of the energy sector.

Moreover, the Interpretative Note on Directive 2009/72/EC states: *“The vertically integrated undertaking is in principle free to choose the legal form of the DSO, provided that this legal form ensures a sufficient level of independence of the management of the DSO from other parts of the vertically integrated undertaking in order to fulfil the requirements of functional unbundling”*.

The Interpretative Note on Directive 2009/72/EC also sets out that *“unbundling rules contained in the Electricity Directives are minimum rules”*. Member States may therefore consider supplementing the minimum set of rules with further measures, with a view to ensuring effectiveness of unbundling.

The Interpretative Note on Directive 2009/72/EC explains that the Directive itself sets out that the unbundling requirements were provided in order to enable each country (or competent body such as ERO) to consider which unbundling model is more favourable under the specific circumstances of that country.

Based on Article 26 of the Directive, *“The distribution system operator must establish a compliance programme, which sets out measures taken to ensure that discriminatory conduct is excluded, and ensure that observance of it is adequately monitored. The compliance programme shall set out the specific obligations of employees to meet that objective. An annual report, setting out the measures taken, shall be submitted by the person or body responsible for monitoring the compliance programme, the compliance officer of the distribution system operator, to the regulatory authority referred to in Article 35(1) and shall be published. The compliance officer of the distribution system operator shall be fully independent and shall have access to all the necessary information of the distribution system operator and any affiliated undertaking to fulfil his task”*. 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.

Nothing in the EU Directive shall prevent KEDS, if it properly separates: businesses, accounts, staff, assets and obligations/debts, to hold separate licences for each energy activity, with two entities which are eventually registered in the business registration books, but with one Board managing them. In this concrete case, it is not required to establish separate Boards for each company. Establishment of two KEDS companies will enable ERO to carry out a proper monitoring, therefore ERO will aim for the unbundling to be carried out in this manner. ERO considers that through a proper restructuring and adequate allocation of employees, DSO and PES will operate properly, as set out in their respective licenses.

It is important to explain the extent to which it is permissible to have common services, i.e. services that are contracted between the DSO and PES, that are *“related to personnel and finance, IT services, transport and similar”*. Although such an organisation is not prohibited, they shall be limited to a certain number of activities and shall be contracted between the DSO and PES immediately following the unbundling.

DSO and PES may have common services established as a unit within the DSO and serving also to the PES on contractual basis (the agreement is concluded between the DSO and PES). As explained in the Interpretative Note above, such services shall be specified in the Compliance Plan to be prepared by the DSO.