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Contract models
in a common Nordic
electricity retail market

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1 Introduction¹

1.1 Topic

The Nordic electricity market consists of a common wholesale market for electricity trade in Denmark, Sweden, Finland and Norway.² Electricity is traded at the Nordic power exchange Nord Pool and bilaterally. An electricity supplier in Sweden may therefore, for example, contract electricity supplies from a producer in Norway, and vice versa. On the other hand, a common Nordic electricity retail market, where final customers in one country may freely choose a supplier from one of the other Nordic countries, has yet to be realised.

The organisation for the Nordic energy regulators, NordREG, is aiming to achieve a common Nordic end-user market for electricity by 2015.³ A truly harmonized retail market in the Nordic countries requires harmonization of national approaches to the contractual relationship between customers, grid companies and suppliers. Today, customers in the Nordic electricity market in many cases enter into separate contracts with the local grid company for grid connection and use on the one hand and an electricity supplier on the other hand.

NordREG has determined that the future customer interface model for the harmonized Nordic end user market should be based on a so called *supplier centric* model. This model entails that most issues from a customer perspective, such as billing and supplier switching, are handled by the supplier.⁴ NordREG has, however, emphasized that the distribution

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² This article is a revised version of a report written for Nordic Energy Research and NordREG, which commissioned the authors to conduct a study relating to arrangement of customer contracts in the Nordic electricity market.

³ NordREG Report 7/2010, Implementation Plan for a Common Nordic Retail Market, p. 5.

⁴ Op.cit., p. 11.

system operators (DSOs), which operates the electricity distribution grids, should remain responsible for grid specific issues such as metering and supply quality. Furthermore, NordREG has recommended that the Nordic market should have mandatory combined billing performed by the suppliers, i.e. a system where the supplier shall submit to the customer one single bill including both electricity supply and grid tariff costs.

The objective of this article is to analyse how customers' contracts with suppliers and DSOs could be arranged within a harmonized Nordic end user market based on a supplier centric model with mandatory combined billing. We will consider the legal advantages and disadvantages with different contract models given this choice of a supplier centric model. Since the introduction of a supplier centric model represents a premise for our evaluation of contract models, we will not conduct any separate assessment of whether a supplier centric model could or should be implemented or not in the Nordic electricity market. Furthermore, the point of departure for our article is to provide an analysis of the legal questions arising from a general Nordic contract law perspective in the implementation of a supplier centric model. Although some general descriptions of the regulatory regimes in each Nordic country will be provided as background information in the following, it is beyond the scope of this article to provide any legal assessment of the specific situation in each country or an analysis of the legal consequences of implementing a supplier centric model within each Nordic jurisdiction.

1.2 Overview

In the following we will first provide a brief description of the Nordic electricity market and NordREG's envisaged supplier centric model below in chapter 2 as background for the following analysis. The EU regulation of the internal electricity market provides an important regulatory background for the evaluation of Nordic approaches, and is therefore considered further in chapter 3.

In chapter 4, we describe the current Nordic approaches to the regulation of the electricity market. Chapter 5 then discusses two specific

questions of relevance to all contract models analysed in this article; namely whether grid connection agreements should remain an agreement between customers and DSOs, and whether the mandatory supplier centric model should apply to all customers or only to certain customer groups such as consumers.

The two main categories of contract models which in our opinion may be applied for the implementation of a supplier centric model, *the subcontractor model* and *the power of attorney model*, are analysed in chapters 6 and 7, respectively. In these chapters, we discuss the concepts as well as the legal advantages and disadvantages with the different contract models. NordREG has set out some overall objectives for the harmonized Nordic electricity retail market. In chapter 8, we consider the contract models in relation to these overall objectives.

Chapter 9 concludes and provides some recommendations for further work on the implementation of a supplier centric model.

2 Background

2.1 The Nordic electricity market

The Nordic electricity *wholesale market* is a common market comprising the Danish, Swedish, Finnish and Norwegian electricity markets. Electricity is mostly traded at the Nordic power exchange Nord Pool Spot.⁵ The Nordic market also has a common balancing market in order to ensure balance between generation and consumption in the operating hour.⁶

Total electricity generation in the Nordic countries in 2012 amounted to 399 TWh, of which hydropower is the most significant electricity production source accounting for about 50 % of the generation.⁷ Total Nordic consumption in 2012 amounted to 386.6 TWh.⁸

The Nordic transmission grid includes practically the whole Nordic region, excluding Western Denmark, into one synchronous power system.⁹ The Nordic wholesale electricity market price is determined through day-ahead auctioning. Transmission system capacity congestion is solved by market splitting, which was forced 75 % of the time in 2012.¹⁰ A common Nordic electricity price existed for 25.1 % of the hours in 2012.¹¹ Hence, although one Nordic electricity wholesale market exists, price differences between different market areas still occur to a fairly large extent.

The *retail markets* in the Nordic countries are still to a large extent national in scope.¹² This is illustrated by the fact that retail prices had a

⁵ Trading at Nord Pool is voluntary for the market participants. In 2012, the total volume traded at Nord Pool Spot amounted to approximately 84 % of the total Nordic electricity consumption, see NordREG, Nordic Market Report 2013 (report 6/2013), p. 21.

⁶ NordREG, Nordic Market Report 2012 (report 3/2012), p. 29.

⁷ NordREG, Nordic Market Report 2013 (report 6/2013), p. 5.

⁸ Op.cit., p. 5.

⁹ Op.cit., p. 17, where it is also emphasized that Western Denmark is synchronous with continental Europe.

¹⁰ Op.cit., p. 17.

¹¹ Op.cit., p. 21.

¹² NordREG, Nordic Market Report 2012 (report 3/2012), p. 38.

diverging development in 2011, with prices declining in Norway and Sweden over the year while showing a slight upward trend over the year in Denmark and Finland.¹³ Moreover, the rate of supplier switching differs between the Nordic countries.¹⁴

The number of suppliers in each market also varies between the Nordic countries. According to NordREG's Nordic Market Report 2013, there are approximately 100 suppliers operating nation-wide in Sweden, 30 in Norway, 28 in Finland and 25 in Denmark.¹⁵ NordREG's Nordic Market Report 2012 summarises the situation in 2011 in somewhat more detail:

“At the end of 2011 there were a total of 112 [...] suppliers in Norway – most of these former incumbent suppliers. 20 of these suppliers had offers in all grid areas.

In 2011, there were about 120 suppliers in Sweden. About 100 of these companies operate throughout the country.

In Finland there are currently more than 70 retail suppliers whereof 29 are operating nationwide.

In Denmark there were around 60 retail suppliers, whereof 33 are supply obligation companies with a concession for a specific geographic region to supply households etc. having not concluded a contract on the liberalized market (app. 90-95 %). App. 20-25 suppliers (non-supply obligation suppliers) operate nationwide.”¹⁶

Based on market indicators monitored, NordREG concludes in its 2013 report, *inter alia*, that the Nordic retail markets for electricity appear competitive, although the competitive environment of the retail markets could improve.¹⁷

¹³ Op.cit., p. 38.

¹⁴ The share of customers switching suppliers varies from approximately 6.7 % in Denmark, to 7.7 % in Finland, 9.9 % in Sweden and around 13.0 % in Norway, see NordREG, Nordic Market Report 2013 (report 6/2013), p. 28.

¹⁵ NordREG, Nordic Market Report 2013 (report 6/2013), p. 28.

¹⁶ NordREG, Nordic Market Report 2012 (report 3/2012), p. 41.

¹⁷ NordREG, Nordic Market Report 2013 (report 6/2013), p. 33.

With respect to regulation of the Nordic electricity retail markets, all Nordic countries have adopted acts governing the general requirements as to electricity market organisation and conduct. These acts are described further below in chapter 4.

2.2 The supplier centric model

In order to discuss the contract models which may be applied to introduce a supplier centric model, it is necessary to have a clear understanding of NordREG's definition of the supplier centric concept.

In essence, NordREG's definition of the supplier centric model with mandatory combined billing entails that most issues from a customer perspective, including billing, shall be handled by the supplier.¹⁸ The supplier centric model is described as follows in a NordREG report from 2011:

*"In this model most issues from a customer perspective are handled by the supplier. The supplier centric model doesn't mean that all customer issues should be handled by the supplier. There are also strictly network related issues which should remain within the responsibility of the DSO."*¹⁹

More detailed tables with NordREG recommendations for allocation of responsibilities and contact points for each DSO and supplier function are provided in a NordREG road map from 2012.²⁰ The tables identify the responsible party and the contact point for a number of specific activities at a rather detailed level. As a general point of departure, the division of responsibilities seems to build on the point of departure that DSOs shall retain responsibility for the central grid related issues, while

¹⁸ NordREG, *Implementation plan for a Common Nordic Retail Market* (NordREG report 7/2010), p. 11. See also NordREG, *NordREG recommendations concerning the future billing regime in the common Nordic Retail Market* (2011).

¹⁹ NordREG, *Rights and obligations of DSOs and suppliers in the customer interface* (NordREG report 4/2011), p. 10.

²⁰ NordREG, *Road map towards a common harmonised Nordic end-user market* (NordREG report 3 – 2012), pp. 13-16.

suppliers shall generally be the responsible party as well as the main contact point for all other customer issues. In the following part of this section of the report, we will briefly reiterate the division of responsibilities as identified in the NordREG road map.

According to the tables of the road map, suppliers shall be responsible and contact point for most issues concerning the customers' switching of supplier. The responsibility for issues arising as a result of customers moving in and out of premises will to a greater extent be shared between DSOs and suppliers, but the suppliers will be the main contact point. The responsibility and contact points for the provision of information on various price components will depend on the price component in question, the supplier being responsible for electricity price components and the DSOs for grid tariff components.

Queries and complaint handling related to the energy supply and contractual issues will to a large extent be a supplier responsibility with the supplier also being the main contact point. However, DSOs are assumed to still have a role with respect to electricity consumption based on metering information, and contractual grid terms, although the latter is still for consideration.

The DSOs are envisaged to generally retain responsibility, as well as being contact point, for queries, complaint handling and compensation handling issues related to DSO related issues, such as compensation for damages, electricity quality issues and compensation for outages. Moreover, ensuring new connections and change of connection will be the responsibility of the DSO, which will also be contact point, except for arranging a supply contract for a new connection point, which will be the responsibility of the supplier.

Moreover, issues relating to the quality of supply, unplanned outages, planned interruptions of electricity supply, metering and metering value reporting will be a DSO responsibility and DSOs shall also be the customers' contact point. With respect to the latter activities, however, there is an opening for also having the suppliers as contact point in providing metering data to customers and answering queries about metering values.

With respect to demand response and micro generation issues, DSOs

shall be responsible for communication on metering issues and suppliers and/or ESCOs shall be responsible for communication on commercial issues.

The general impression from the tables summarized above is that although the supplier centric model generally seeks to shift responsibilities, and, to an even greater extent, responsibility for being contact point, from DSOs to suppliers, there are a number of grid related responsibilities that still rest with the DSOs.

3 EU regulation of the internal electricity market

3.1 Overview

All Nordic countries are bound by the EU's internal electricity market legislation. Sweden, Finland and Denmark are part of the internal market as EU Member States, while Norway is part of the market as an EEA Member State.

It would go far beyond the scope of this article to provide an exhaustive overview of all EU measures relevant to the regulation of the Nordic electricity market. Below we will summarise briefly some of those measures which we consider to be most relevant for the assessment of how a supplier centric model may be introduced.

EU regulation of the electricity market can at the outset be divided in two groups; the primary Treaty provisions enshrined in the Treaty on the Functioning of the European Union (TFEU)²¹ and the secondary law provisions, typically in the form of Directives and Regulations, adopted on the basis of the competencies contained in TFEU.

The primary Treaty provisions govern areas such as the free movement of goods, services, persons and capital and the freedom of establishment, the competition rules and State aid. There are a large number of examples of the primary Treaty provisions being applied to energy markets. A supplier centric model must be designed in accordance with the principles of the Treaty. The Treaty principles restrict the Member States' margin of appreciation in designing the specific model, for example by prohibiting restrictions on the free movement of goods and services and by requiring that any public subsidy such as a guarantee complies with the State aid provisions of the Treaty. One possible question which could arise in this respect is whether a measure implementing a supplier centric model with mandatory combined billing could be seen as a prohibited restriction

²¹ A consolidated version of the TFEU is published in OJ C115/47, 9.5.2008.

under the free movement provisions of the TFEU, for example on the basis of an argument that suppliers will be restricted from carrying out their business in the same manner as under an earlier regulatory regime. Such prohibitions would in particular apply to directly or indirectly discriminatory measures, but also in some cases apply to non-discriminatory restrictions. Provided that a measure is deemed a restriction under the free movement provisions, the next question would be whether such measure nevertheless may be accepted under TFEU as a measure which pursues a legitimate interest and fulfills the proportionality requirements under EU law. It is difficult to carry out any such assessment before a specific model for the introduction of a supplier centric model has been designed, and the question is therefore not explored further in the following.

In addition to the primary Treaty provisions, the EU internal electricity market is governed in more detail by a large number of secondary law measures. The third energy package, adopted in 2009, includes the most central part of today's internal electricity market legislation; the Electricity Directive,²² the Electricity Regulation²³ as well the ACER Regulation.²⁴ The former two legislative measures provide substantive provisions for the regulation of the market as such, while the latter ACER Regulation establishes the Agency for the Cooperation of Energy Regulators (ACER) as an EU agency with certain powers within the field of energy. The internal electricity market legislation also consists of certain other measures, such as the Security of Electricity Supply Directive.²⁵ In

²² Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ L211/55, 14.8.2009.

²³ Regulation (EC) No. 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No. 1228/2003, OJ L211/15, 14.8.2009.

²⁴ Regulation (EC) No. 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, OJ L211/1, 14.8.2009.

²⁵ Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment, OJ L33/22, 4.2.2006.

addition, a number of important energy related measures have been adopted on the basis of the EU's environmental competencies, where the new Renewables Directive is arguably one of the most important pieces of legislation for the internal electricity market.²⁶

For EEA Member States, such as Norway, the measures adopted under the third energy package are so far not incorporated in the EEA Agreement. This entails that neither the new Electricity Directive nor the new Electricity Regulation are yet formally binding for Norway.²⁷ In our opinion, both measures are EEA relevant, and we assume that they will be incorporated into the EEA Agreement in the relatively near future. The question of the EEA relevance of the ACER Regulation raises some specific questions, as EEA Member States will most likely not participate as full members of an EU agency. We will not pursue this question further here. The question of EEA relevance of EU internal electricity market legislation also arises with respect to certain other EU measures. However, for the sake of simplicity, we will assume as a working hypothesis that the EU internal electricity market legislation also applies – or that it will soon apply – to EEA Member States and Norway. The Security of Electricity Supply Directive and the Renewables Directive, referred to above, are both incorporated into the EEA Agreement.

3.2 The Electricity Directive

The Electricity Directive can be considered the backbone of today's internal electricity market legislation, establishing *“common rules for the generation, transmission, distribution and supply of electricity, together with consumer protection provisions, with a view to improving and integrating competitive electricity markets in the Community”*.²⁸ Member

²⁶ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ L140/16, 5.6.2009.

²⁷ For the sake of completeness, it should be emphasised that the former Electricity Directive 2003/54/EC and Electricity Regulation No. 1228/2003 have been implemented in the EEA Agreement and are therefore binding for Norway.

²⁸ Article 1 of the Directive.

States were required to transpose the Directive into national law and apply the provisions by 3 March 2011.²⁹ The Directive has yet to be included in the EEA Agreement.

For the purposes of the present study, a number of relevant provisions are included in Article 3 of the Electricity Directive, which *inter alia*, includes provisions concerning public service and universal service obligations, including measures to ensure consumer protection.

Article 3 of the Electricity Directive requires Member States to ensure that electricity undertakings are operated in accordance with the principles of the *Directive* “with a view to achieving a competitive, secure and environmentally sustainable market in electricity”, and, furthermore, the Member States “shall not discriminate between those undertakings as regards either rights or obligations”.³⁰ The latter non-discrimination requirement is repeatedly emphasized in various forms throughout internal electricity market legislation as a sector specific regulation of the more fundamental prohibition against discrimination on the basis of nationality in EU law.³¹

More specifically, with respect to equal treatment of suppliers, the Directive sets out that

*“Member States shall ensure that all customers are entitled to have their electricity provided by a supplier, subject to the supplier’s agreement, regardless of the Member State in which the supplier is registered, as long as the supplier follows the applicable trading and balancing rules. In this regard, Member States shall take all measures necessary to ensure that administrative procedures do not discriminate against supply undertakings already registered in another Member State”.*³²

The non-discrimination requirement entails that any requirements fol-

²⁹ Article 49 of the Directive, an exemption being made for application of Article 11 of the Directive concerning certification in relation to third countries, which applied from 3 March 2013, see Article 49(1) second subparagraph.

³⁰ Article 3(1) of the Electricity Directive.

³¹ Article 18 TFEU.

³² Article 3(4) of the Electricity Directive.

lowing from the introduction of a supplier centric model must apply equally to suppliers from other EU and EEA Member States as to suppliers established in the Nordic countries. Consequently, an evaluation of risks cannot assume that a supplier in the Nordic market is necessarily established in another Nordic country. It may also be established in any other EU or EEA Member State.

The Electricity Directive also requires Member States to ensure universal service, at least for household customers, and it allows Member States to appoint a supplier of last resort in this respect.³³ The Directive does not, however, restrict the Member State's choice of whether a supplier of last resort obligation should be imposed on a supplier or a DSO. As will be described further below, all Nordic countries have implemented supplier of last resort schemes. Norway is the only country where DSOs act as suppliers of last resort, while specifically designated suppliers act as suppliers of last resort in the other Nordic countries.

Moreover, Article 3 of the Electricity Directive also includes measures such as obligations to effect customer switching within three weeks,³⁴ requirements for Member States to take appropriate measures to protect final customers and vulnerable customers,³⁵ and requirements as to specification in bills and promotional material.³⁶ Furthermore, specific Measures on consumer protection are included as Annex 1 to the Directive.³⁷ These provisions do not seem to entail any restrictions on the overall choice to opt for a supplier centric model or not.

At a more general level, Article 6 of the Electricity Directive sets out measures encouraging regional cooperation between Member States “*as a first step towards the creation of a fully liberalised internal market*”, and is therefore also of some interest to the process discussed in this study.³⁸

³³ Article 3(3) of the Electricity Directive, where «universal service» is described as “the right to be supplied with electricity of a specified quality within their territory at reasonable, easily and clearly comparable, transparent and non-discriminatory prices”.

³⁴ Article 3(5) of the Directive.

³⁵ Articles 3(7) and 3(8) of the Directive.

³⁶ Article 3(9) of the Directive.

³⁷ OJ L 211/90, 14.08.2009.

³⁸ Article 6(1).

ACER shall cooperate with national regulatory authorities and TSOs in this respect.³⁹

One of the main purposes of the new Electricity Directive was to introduce new and stricter unbundling requirements at TSO level in order to facilitate market function. The Directive includes a number of provisions in this respect in Chapter IV and V. Of more interest to the present study, Chapter VI of the Directive sets out provisions for DSOs, including, *inter alia*, measures requiring Member States to designate DSOs,⁴⁰ setting forth their tasks,⁴¹ and governing unbundling.⁴² DSOs “*must not discriminate between system users or classes of system users, particularly in favour of its related undertakings*”.⁴³ The unbundling requirements include provisions on legal unbundling, i.e., a requirement that DSO activities shall be carried out by a separate legal entity than other electricity market activities within a vertically integrated undertaking, as well as functional requirements related to involvement in management. Member States may, however, decide not to apply these unbundling requirements for integrated electricity undertakings having less than 100,000 customers or serving small isolated systems.⁴⁴

Article 41 of the Directive sets out some basic rules for retail markets, but does not provide particularly detailed requirements.

3.3 The Electricity Regulation

The Electricity Regulation generally aims at setting fair rules for cross-border exchanges in electricity and facilitating a well-functioning and transparent wholesale market in electricity with a high level of security of supply.⁴⁵ An important aspect of the Regulation concerns the establishment of network codes adopted pursuant to the Regulation on the

³⁹ Article 6(2).

⁴⁰ Article 24 of the Directive.

⁴¹ Article 25 of the Directive.

⁴² Article 26 of the Directive.

⁴³ Article 25(2) of the Directive.

⁴⁴ Article 26(4) of the Directive.

⁴⁵ Article 1 of the Regulation.

basis of the involvement of both ACER and the ENTSO for electricity.⁴⁶ Several of the envisaged network codes are currently at their drafting stage. Generally, these elaborate drafts govern a number of different issues with a considerable level of detail.

The Electricity Regulation sets out a number of areas which may be governed by network codes.⁴⁷ None of these areas relate directly to the choice of supplier models for the retail market. However, several of the categories mentioned in the Regulation are widely defined, such as network codes for third-party access rules⁴⁸ and transparency rules,⁴⁹ and could at least in principle also include the regulation of supplier models. To our knowledge, no network codes are presently being drafted which have direct influence for the choice of a supplier centric model, but the final results of the network code process have yet to be seen.

It should also be mentioned that, as far as we understand, a majority of EU Member States already appear to have implemented a system where the supplier is the main contact point for the customer, and a system where the customer is presented with a single bill also appears to be the most widely applied approach.⁵⁰ The Council of European Energy Regulators (CEER) has also recommended a supplier centric model where combined billing by the supplier should be mandatory.⁵¹

3.4 The Energy Efficiency Directive

Finally in this chapter, the Energy Efficiency Directive should also be

⁴⁶ See in particular Articles 4-12 of the Regulation. The ENTSO for electricity is an organization consisting of all EU electricity transmission system operators, established pursuant to Articles 4 and 5 of the Electricity Regulation.

⁴⁷ See Article 8(6) of the Regulation.

⁴⁸ Article 8(6)(c) of the Regulation.

⁴⁹ Article 8(6)(i) of the Regulation.

⁵⁰ Eurelectric, *Customer-Centric Retail Markets; A Future-Proof Market Design* (Eurelectric Policy Paper, September 2011), pp. 33-35 and Council of European Energy Regulators (CEER), *Electricity and Gas Retail market design, with a focus on supplier switching and billing: Guidelines of Good Practice* (24 January 2012), pp. 12.

⁵¹ Council of European Energy Regulators (CEER), *Electricity and Gas Retail market design, with a focus on supplier switching and billing: Guidelines of Good Practice* (24 January 2012), pp. 12-13 and 21-22.

mentioned.⁵² The directive includes, *inter alia*, provisions relating to metering and billing information.⁵³ We have not analysed this Directive and its potential influence on e.g. metering and billing requirements for the benefit of this article.

⁵² Directive 2012/27/EU.

⁵³ See Articles 9 and 10, correspondingly.

4 The existing Nordic models for regulation of the electricity market

4.1 Introduction

In this section we will briefly describe the existing national models for regulation of the Nordic electricity market. The purpose of this review is to provide a general background for the evaluation of the possible new contract models identified, which are further discussed in chapters 6 and 7 below. We will then review both the existing and proposed new models in light of NordREG's overall objectives for the harmonized Nordic retail market below in chapter 8.

4.2 The Finnish model

The general provisions for the regulation of the Finnish electricity market are provided in the Electricity Market Act 2013/588, which replaced the former Electricity Market Act 386/1995.⁵⁴ The aim of the Electricity Market Act is to ensure the efficient, secure and environmentally sustainable functioning of the national, regional and the EU's electricity market.⁵⁵ The facilitation of a market based on competition is one of the primary means to achieve this aim.⁵⁶

The national Finnish transmission grid is owned and operated by the TSO Fingrid Oyj.⁵⁷ Due to the historical structure of the Finnish electricity system, with many communities having their own power station, the distribution system is operated by a large number of different DSOs which

⁵⁴ See Kim Talus et al., *Energy Law in Finland* (Kluwer Law International, 2010) for a review of the former Electricity Market Act 386/1995. A Swedish language version of the Electricity Market Act 2013/588 is available at url www.finlex.fi/sv/laki/ajantasa/2013/20130588 (last visited 25 February 2014).

⁵⁵ Section 1 of the Electricity Market Act.

⁵⁶ *Ibid.*

⁵⁷ Kim Talus et al., *Energy Law in Finland*, p. 31.

are mostly owned by local communities or their joint ventures.⁵⁸

The Finnish Electricity Market Act governs the generation, import, export, supply, transmission and distribution of electricity.⁵⁹ Section 4 of the Act sets out that electricity grid operation calls for a permit which is issued by the electricity market authority. Further specific permit requirements are set out for the TSO and the DSOs⁶⁰ The general requirements of the grid companies and tariff issues are set out in Chapter 4 of the Act. Chapter 5 sets out provisions for the transmission system and the TSO, such as unbundling requirements and system responsibility. Distribution systems and DSOs are further governed by Chapter 6.

Chapter 9 of the Electricity Market Act provides, inter alia, rules obligating suppliers in a major market position within a supply area (or the retailer with the highest market share in the area in question where no supplier with a major market position exists) to deliver electricity at reasonable prices to consumers and other small-scale electricity end-users.⁶¹

Chapter 13 of the Electricity Market Act set forth provisions concerning electricity market contracts, which are of particular interest to the topic of this study. The chapter applies to service contracts, electricity system contracts and to electricity sale contracts. The service contract ("*anslutningsavtal*" in Swedish) is the contract concluded between the DSO and the owner or customer relating to grid connection.⁶² The electricity system contract ("*elnätsavtal*" in Swedish) is the contract concluded between the DSO and the user of the system for grid services and other related services.⁶³ The electricity sale contract ("*elförsäljningsavtal*" in Swedish) is the contract concluded between the retailer (supplier)

⁵⁸ See op.cit., pp. 31-32, who mentions that there are 87 DSOs and that there are 13 operators specialized in operating the regional network. According to Talus et al., distribution systems include electricity systems with nominal voltage less than 110 kV.

⁵⁹ See Section 2(1) of the Electricity Market Act.

⁶⁰ See inter alia Sections 8 and 9, respectively, of the Electricity Market Act.

⁶¹ See in particular Section 67 of the Act.

⁶² Section 84, second paragraph, subsection (1) of the Act.

⁶³ Section 84, second paragraph, subsection (2) of the Act.

and the customer for supply of electricity.⁶⁴ The provisions in chapter 13 of the Act cannot be exempted from in an agreement to the detriment of consumers.⁶⁵ The Chapter provides a number of safeguard measures for consumers.

The right to terminate an agreement is restricted under Chapter 13 of the Act. According to 91, for example, a DSO may not terminate an electricity system contract entered into with a consumer. Furthermore, a retailer (supplier) cannot terminate an electricity sale contract encompassed by the obligation to deliver if the customer is a consumer.⁶⁶ The above mentioned contracts may, however, exceptionally be terminated by DSOs and suppliers in certain cases such as due to materially violation by the other party of contract obligations, subject to further requirements as stated in the Act.⁶⁷ The supply of electricity can also be interrupted if the user has materially defaulted on payments or otherwise materially infringed contract obligations, but only subject to further procedural requirements and safeguard measures as provided by the Act.⁶⁸

The industry organization Finnish Energy Industries has published recommended electricity agreements on their web pages.⁶⁹ These recommended agreements include, *inter alia*, Terms of Electricity Sales (2010), Terms of Electricity Supply (2010), Terms of Network Service (2010) and Terms of Network Connection (2005).

4.3 The Norwegian model

The Norwegian electricity market was opened to competition pursuant to the Norwegian Energy Act which came into force in 1991.⁷⁰ The Act governs, with some modifications, onshore production, conversion,

⁶⁴ Section 84, second paragraph, subsection (3) of the Act.

⁶⁵ Section 85 of the Act.

⁶⁶ Section 92 of the Act.

⁶⁷ See Section 105 of the Act.

⁶⁸ See Section 103 of the Act.

⁶⁹ The agreements are available at url <http://energia.fi/en/electricity-market/electricity-price-and-agreements> (last visited 27 February 2014).

⁷⁰ Act 29 June 1990 No 50.

transport, sale, distribution and use of energy.⁷¹

The Norwegian electricity grid consists of three grid levels rather than two which is the case in many other countries; the central grid, the regional grid and the distribution grid. The distribution grid is operated by a number of different DSOs pursuant to local area licenses awarded on the basis of Section 3-2 of the Energy Act and trading licenses pursuant to Section 4-1 of the Act. The DSO has an exclusive right to build and operate the distribution grid within the defined local area, and is under an obligation to connect customers to the grid within its geographical area, see Sections 3-2 and 3-3 of the Act. In line with Electricity Directive 2003/54/EC, the Energy Act Sections 4-6 and 4-7 set out legal unbundling and functional separation requirements for grid companies with more than 100,000 customers and which are part of vertically integrated undertakings. However, legal unbundling for vertically integrated undertakings have also regularly been required by the regulator NVE on the basis of the trading license terms in connection with acquisitions and mergers etc. of vertical integrations with grid companies having less than 100,000 customers. Suppliers are subject to trading licenses pursuant to Section 4-1 of the Energy Act.

At the outset, three relevant agreements are entered into between DSOs and suppliers on the one hand and the customer on the other hand in the Norwegian system: (i) an agreement for grid connection is entered into between the DSO and the customer, (ii) and agreement for grid use is entered into between the DSO and the customer, and (iii) and agreement for electricity supply is entered into between the supplier and the customer.

As a point of departure, the contractual structure outlined above entails that the customer must relate to two different contract parties – the DSO and the supplier – and that the customer also received two different bills for grid use and electricity supply, from the DSO and the supplier respectively. However, joint invoicing by the DSO and the supplier has been permitted by NVE. In such cases, the logo and contact information of both the supplier and the DSO shall appear at

⁷¹ Section 1 of the Act.

the top of the first page of the invoice.⁷²

In cases where a customer does not have a contract with a supplier, such as in cases where the customer has neglected to enter into a supplier contract when moving or when the supplier contact has been terminated, the DSO is under a supplier of last resort obligation towards the customer.⁷³ The price for delivery of supplier of last resort electricity is partly regulated to the effect that the customer should be given incentives to contract with an ordinary supplier, i.e. prices will be above normal market prices.⁷⁴

The Energy Act does not regulate suppliers' and DSOs' rights to terminate consumer contracts. The Norwegian Consumer Purchase Act, on the other hand, restricts the DSO's right to terminate the distribution of electricity in certain cases.⁷⁵ Such termination cannot be carried out where there is a risk of life, health or considerable damage to property or where the consumer has objections to the grounds for termination which are not evidently groundless. Furthermore, the provision includes strict procedures for the carrying out of a termination.

The Norwegian Consumer Ombudsman and the Norwegian industry organization Energy Norway have negotiated a set of standard agreements for grid use and connection (between customers and grid companies) and for electricity supply (between customers and suppliers) which may be applied for consumers. The current standard agreements were negotiated for use from 1 January 2007.⁷⁶ The Norwegian standard agreements are not mandatory, but it is our general impression that the standards are widely used in the contractual relationship with consumers, although subject to some individual modifications.⁷⁷

⁷² See Section 7-3 of Regulation 11 March 1999 No. 301.

⁷³ See Section 3-3 of the Energy Act and Section 2-1 of Regulation 11 March 1999 No. 301.

⁷⁴ See further Section 2-1a of Regulation 11 March 1999 No. 301.

⁷⁵ Section 48a of the Norwegian Consumer Purchase Act (Act 21 June 2002 No. 34). It should also be noted that, with some exceptions, most provisions of the Act does not apply to supplier contracts, see Section 2 second paragraph littera c).

⁷⁶ The standard agreements are available at the web pages of the Norwegian Consumer Ombudsman, see url www.forbrukerombudet.no/id/11036287.0 (last visited 27 February 2014).

⁷⁷ Contracts entered into between DSOs and suppliers on the one hand and

4.4 The Danish model

The Danish Electricity Supply Act (“lov om elforsyning”) applies to production, transportation, trade and delivery of electricity.⁷⁸ The purpose of the Act is, *inter alia*, to ensure that the country’s electricity supply is organized and implemented in accordance with considerations relating to security of supply, social economics, the environment and consumer protection.⁷⁹

In June 2012, the Danish Parliament passed a bill amending, *inter alia* the Electricity Supply Act, on implementation of a wholesale model which will be implemented from 1 October 2014.⁸⁰ This wholesale model entails that the electricity retail suppliers will buy electricity at the wholesale market as well as grid services from DSOs and TSO services from TSOs, and that they consequently will sell electricity including delivery to the consumers and be the consumers’ main contact point.⁸¹ In other words, this new model entails one possible approach to the implementation of a supplier centric model, which will be discussed in more detail below in section 7 of this report. In the following, we will briefly outline the current Danish model which will be replaced by the wholesale model in 2014.

The Danish Electricity Supply Act provides that the operation of transmission and distribution grids requires an authorization.⁸² The Act also sets out unbundling and certification requirements for transmission

non-household customers on the other hand may, however differ from the consumer standards. The Norwegian industry organization Energi Norge has drafted a separate set of agreements for non-household customers. These latter agreements are not analysed in this report.

⁷⁸ See § 2 of the Act.

⁷⁹ See § 1 of the Act.

⁸⁰ DERA, From combined billing to the wholesale model – New Danish regulation of the electricity retail market (memo dated 25 June 2012), p. 2. The adopted law, amending *inter alia* the Danish Electricity Supply Act, is available at the following url: <https://www.retsinformation.dk/Forms/R0710.aspx?id=142359> (last visited 27 February 2014).

⁸¹ DERA, From combined billing to the wholesale model – New Danish regulation of the electricity retail market, p. 2.

⁸² Section 19 of the Act.

system operators.⁸³ The duties of grid companies are set out in Section 22 of the Act, including requirements to ensure grid quality, electricity metering, promote energy saving and provide information to customers.

An electricity customer may freely choose supplier.⁸⁴ With respect to supplier of last resort obligations, the Danish Electricity Supply Act provides for an authorization scheme for entities with supply obligations which are required to supply electricity to customers within their supply area which have not chosen another supplier.⁸⁵ The introduction in 2003 of freedom for all consumers to choose supplier has only to a very limited extent resulted in increased competition with respect to small-scale consumers.⁸⁶ In 2011, approximately 85 % of Danish consumers received electricity from their supplier of last resort (“*forsyningspligtig virksomhed*”).⁸⁷

The Act confers on the Danish Climate, Energy and Buildings Ministry authority to issue regulations requiring, *inter alia*, DSOs and suppliers to ensure fundamental consumer protection measures in entering into agreements with consumers, including requirements as to the contents of the agreements.⁸⁸

The Danish Energy Association has issued standard recommendations regarding grid companies on issues such as Grid Utilisation Agreement, Grid Connection Guidelines as well as other guidelines and recommendations. The use of such recommendations is voluntary.⁸⁹ The standards are supervised by the Danish Energy Regulatory Authority

⁸³ Section 19a-d of the Act.

⁸⁴ Section 6 of the Act.

⁸⁵ Section 34 of the Act. The setting of electricity prices for such supply obligations is regulated in Section 72 of the Act.

⁸⁶ Lovforslag nr. L 176, Folketinget 2011-2012, fremsatt 25. april 2012, Folketingstidende A, p. 6.

⁸⁷ *Ibid.*

⁸⁸ Section 6a of the Act.

⁸⁹ Presentation by DERA, “Standard recommendations in Denmark” (updated version 29.08.2012). Recommendations available at url: www.danskenergi.dk/AndreSider/~/_/link.aspx?id=48F3633E5E9D42B79B3BCD384D75FBC7&z=z (last visited 27 February 2014).

(DERA) which may propose alterations.⁹⁰ Although there is no legal requirement in Denmark for Grid Utilisation Agreement, the customer has a right to be provided with such agreement upon request.⁹¹

At the outset, the Danish DSOs have billed the consumers the electricity transportation costs, while the suppliers have billed the consumers the cost of electricity.⁹² Combined billing of transportation and electricity supply costs is, however, common where DSO and supplier are part of the same company group.⁹³ Such combined bills have been issues either by the grid company or a specific invoicing entity.⁹⁴ It has been expressed that the EU's third energy package entails that *grid companies* are not permitted to dispatch combined invoices for electricity and grid services.⁹⁵ Combined billing is not used by companies which are not subject to such integration.⁹⁶

4.5 The Swedish model

The Swedish Electricity Act ("ellag (1997:857)") applies to electricity installations and electricity trade in some cases as well as to electricity security.⁹⁷ The Act provides for, *inter alia*, an extensive regulation of grid activities, including provisions on grid concessions, unbundling requirements, duties for grid companies and grid tariffs.

Electricity production in Sweden is predominantly based on hydro-power and nuclear electricity production, which in a normal year together account for more than 90 % of total national electricity generation.⁹⁸ As

⁹⁰ Presentation by DERA, "Standard recommendations in Denmark" (updated version 29.08.2012).

⁹¹ Op.cit.

⁹² DERA, From combined billing to the wholesale model – New Danish regulation of the electricity retail market, p. 1.

⁹³ *Ibid.*

⁹⁴ Lovforslag nr. L 176, Folketinget 2011-2012, fremsatt 25. april 2012, Folketingstidende A, p. 6.

⁹⁵ *Ibid.*

⁹⁶ DERA, From combined billing to the wholesale model – New Danish regulation of the electricity retail market (memo dated 25 June 2012), p. 1.

⁹⁷ Chapter 1, 1 § of the Act.

⁹⁸ Energy Markets Inspectorate (Energimarknadsinspektionen), The Swedish electricity

is the case in Norway, the Swedish electricity grid can also be divided into three levels: the national network, the regional networks and the local networks.⁹⁹ The Swedish TSO Svenska Kraftnät operates the national network (the transmission grid). In 2011, 5 companies operated regional grids, while 171 companies operated local grids in Sweden.¹⁰⁰

Competition in the Swedish retail electricity market was introduced in 1996.¹⁰¹ In December 2011, there were approximately 120 suppliers of which more than half are part of corporate groups which also produce electricity.¹⁰² Customers are free to choose and switch suppliers, and the switch shall be carried out within two weeks and without any fee for changing electricity supplier being charged to the customer.¹⁰³

Chapter 11 of the Swedish Electricity Act contains specific provisions on transportation and supply of electricity to consumers.¹⁰⁴ Terms in agreements which are less favorable to consumers than those provided in Chapter 11 do not take effect.¹⁰⁵

Chapter 11, Sections 3-6 includes substantive and procedural terms for the termination of electricity transportation to consumers, including, *inter alia*, provisions on reduced access to terminate in certain qualified cases of risk to health and property and provisions on procedures for request of payment. Grid companies also have a certain right, subject to further requirements, to provisionally interrupt transportation when necessary to implement measures to ensure electricity security or security of supply.¹⁰⁶

and natural gas markets 2011 (EI R2012:11), p. 33.

⁹⁹ Op.cit., p. 17.

¹⁰⁰ *Ibid.*

¹⁰¹ Energy Markets Inspectorate (Energimarknadsinspektionen), The Swedish electricity and natural gas markets 2011 (EI R2012:11), p. 43.

¹⁰² *Ibid.*

¹⁰³ Op.cit., p. 46.

¹⁰⁴ The Act Chapter 11 Section 1 defines a “konsument” (consumer) as “en fysisk person till vilken el överförs eller levereras huvudsakligen för ändamål som faller utanför näringsverksamhet” (our translation: a physical person to which electricity is transported or supplied primarily for purposes other than business activity).

¹⁰⁵ Chapter 11 Section 2 of the Act.

¹⁰⁶ Chapter 11 Section 7 of the Act.

The Act also provides lists of issues which shall be governed by agreements entered into between consumers and suppliers, and issues which shall be governed by agreements entered into between consumers and DSOs.¹⁰⁷

The Swedish industry organization Swedish Energy has in agreement with the Swedish Consumer Agency composed a set of standard agreements including an Electricity Supply Agreement between supplier and consumer (“Avtalsvillkor EL 2012 K”), an Agreement for grid connection and use between DSO and consumer (Avtalsvillkor NÄT 2012 K) as well as some specific terms for supplier of last resort supply of electricity (“*anvisat elhandelsföretag*”).¹⁰⁸

¹⁰⁷ Chapter 11 Sections 13 and 14 of the Act, respectively.

¹⁰⁸ Available on the url: <http://www.energimarknadsbyran.se/El/Konsumentratt1/Allmanna-avtalsvillkor1/> (last visited 27 February 2014).

5 Introduction of a supplier centric model: defining the contracts and the customer group

5.1 Introduction

Above in chapter 4, we provided an overview of the existing Nordic regulatory systems and models. In the following chapters we will consider how customer's contracts with suppliers and DSOs may be arranged in the future in order to implement a supplier centric model with mandatory combined billing.

Before discussing the different contract models, two questions relating to the scope of the supplier centric model should be analysed. First, it should be considered whether one particular contractual aspect, namely the terms for grid connections, should remain subject to agreement between DSOs and customers even within a supplier centric model. This question is discussed below in section 5.2. Second, it should be considered whether a supplier centric model with mandatory combined billing should apply to all customers or only to certain customer groups, such as consumers. This question is considered below in section 5.3. In section 5.4 we will then briefly present the two overall contract models which will be analysed in more detail in chapters 6 and 7.

5.2 Grid connection: contractual relationship between DSO and customer

In the Nordic countries, there are generally three kinds of contractual relationships between customers on the one hand and DSOs and suppliers on the other hand.

Between the supplier and the customer, there will be an electricity supply agreement governing the terms and conditions for the customer's procurement of electricity from the supplier, over the DSO's grid.

Between the DSO and the customer, there will typically be one grid

connection agreement and one agreement for grid use. The grid connection agreement generally governs the terms and conditions for the physical connection of the DSO's grid to the customer's premises. For example, the Norwegian standard grid connection terms governs issues such as the ordering and planning of a grid connection, the conveying and placing of distribution grid, investment contributions, connection and disconnection, as well as liability provisions.¹⁰⁹ The agreement for grid use, on the other hand, governs the conditions for the day-to-day use of the grid in order for the customer to be supplied with electricity. In some cases, the grid connection agreement may be entered into by others than the final electricity customer, such as for example a building's owner.

As far as we understand, the voluntary standard agreements issued in all Nordic countries except Sweden appear to build on the division outlined above, separating the grid connection terms and the grid use terms in two different agreements. In Sweden we understand the standard agreement NÄT 2012 K to include both grid connection terms and grid use terms in the same standard contract document.

NordREG's definition of DSO and supplier responsibilities in the supplier centric model entails that issues related to grid connection shall still be the responsibility of the DSOs.¹¹⁰ The Danish legislator applied a similar point of view when determining the new Danish wholesale model which is to take effect from 2014. Under the latter model, grid companies will still retain some tasks requiring contact with consumers, such as technical grid connection, metering, planned interruptions, etc.¹¹¹ Hence, under the Danish system, grid connection agreements will still be entered into between the consumer and the grid company (alternatively via an electricity installation contractor).¹¹²

In our opinion, the NordREG and Danish approach outlined above

¹⁰⁹ See further the standard agreement available at url www.forbrukerombudet.no/id/11036287.0 (last visited 30 October 2012).

¹¹⁰ See section 2.2 above.

¹¹¹ Lovforslag nr. L 176, Folketinget 2011-2012, fremsatt 25. april 2012, Folketingstidende A, p. 8.

¹¹² *Ibid.*

conforms well to the fundamental points of departure for the division of roles and responsibilities between DSOs and suppliers. Investments, development, maintenance and connections of the distribution grid are primarily DSO responsibilities. Consequently, it would in our opinion also be a natural solution to let the DSOs determine whether a separate grid connection agreement should be entered into when connecting to a new customer, whether as a result of a new physical connection or because a new customer has moved into premises already connected to the grid. A number of issues might arise between a DSO and a customer with respect to the physical connection, such as requirements for maintenance and upgrades, investments and reinvestments, wrong use of the grid, investment contributions, etc. The way we understand NordREG's definition of tasks between DSOs and suppliers, these issues are beyond the roles and responsibilities of a supplier. At the same time, most physical grid connection issues are not likely to require regular contact between DSOs and the customer. Retaining a grid connection agreement between the DSO and the customer should therefore most likely not be a problem for the implementation of a supplier centric model.

Consequently, in the following, we will assume that the issues governed by the grid connection terms will remain a DSO responsibility also under a supplier centric model and that the DSO will still be able to enter into a grid connection agreement with the customer (or other parties such as a building's owner, as the case may be) if deemed necessary.

Based on the above, the arrangement of customer contracts for the implementation of a supplier centric model will focus on the terms for electricity supply and grid use in the following.

It should, however, be emphasized that, under a new contract model where electricity supply and grid use terms may be subject to a new structure, it could become increasingly important to define clearly the scope of the grid connection terms. This is particularly the case under the subcontractor model to be discussed further below, since this model entails that DSOs will no longer enter into grid use agreements directly with customers. Hence, the division between terms to be governed in grid connection agreements between DSOs and customers (or building's

owners, land owners, etc) on the one hand and terms to be governed in grid use agreements between suppliers and customers on the other hand may be more important to define precisely.

5.3 The customer terminology

As far as we are aware, NordREG has yet to decide whether a supplier centric model with mandatory combined billing should apply to all customers of electricity, only to consumers, or whether a solution somewhere in between should be implemented (e.g., including consumers and small enterprises).

In NordREG's 2011 report concerning rights and obligations of DSOs and suppliers, a customer is defined as "*a natural or legal person purchasing electricity for his own consumption*" while a consumer is defined as "*a natural person purchasing electricity for his own household consumption*".¹¹³

NordREG's definition of "customer" largely correspond to the Electricity Directive's definition of "final customer" as "*a customer purchasing electricity for his own use*", although the latter definition does not explicitly clarify whether it comprises both natural and legal persons.¹¹⁴ Hence, NordREG's definition focuses on all end-users of electricity, excluding wholesale customers.¹¹⁵ In other words, suppliers are not comprised by NordREG's customer definition.

NordREG's definition of "consumer" appears to correspond to the Electricity Directive's definition of a "household customer" as "*a customer purchasing electricity for his own household consumption, excluding commercial or professional activities*".¹¹⁶

At the outset, NordREG's analysis of the supplier centric model does

¹¹³ Definitions from NordREG, Rights and obligations of DSOs and suppliers in the customer interface (NordREG report 4/2011),p. 11.

¹¹⁴ Article 2(9) of Electricity Directive 2009/72/EC.

¹¹⁵ The definition of "customer" in Article 2(7) of the Electricity Directive embraces both wholesale and final customers, and is consequently broader than NordREG's customer definition.

¹¹⁶ Article 2(10) of the Electricity Directive.

not appear to distinguish between customers in general and consumers more specifically. At the same time, we understand some of the rationale for the introduction of a supplier centric model as seeking to promote customer friendliness. This objective is likely to be more important for many consumers than for professional customers, who may be in a better position to deal with both DSOs and suppliers. This will particularly be the case for large-scale customers, such as power intensive industry, which may have entered into long-term power purchase agreements directly with a power producer. Other large-scale customers may procure electricity at the spot market without contracting with a supplier as intermediary. In particular the Swedish, Norwegian and Finnish electricity markets are influenced by a large share of energy intensive industries.¹¹⁷ In cases where electricity supply is not contracted through a supplier, a mandatory combined billing regime will in any case not apply, and the customer will have to enter into an agreement with the DSO for grid use, unless a seller such as a producer is required to perform such tasks.

In other cases, professional customers may contract suppliers for the delivery of large supply volumes which will also involve high grid tariffs. Such grid tariffs may, in turn, entail higher risks for suppliers entering the market which will be required to invoice for grid services as well as for electricity supply.

It is beyond the scope of this article to determine the scope of the customer definition to be applied in the implementation of a supplier centric model. Based on the above, a narrow customer definition, including only consumers and possibly also small to medium sized enterprises, could entail lower risks for suppliers than a wider definition, and consequently also decrease barriers to market entry and thereby promote competition. The objective of customer friendliness is also likely to be most important to consumers and smaller enterprises. As far as we understand, CEER also appear to focus on household customers and small to medium sized enterprises in their recent Guidelines of Good Practice on electricity and gas retail market design, see their definition

¹¹⁷ NordREG, *Nordic Market Report 2012* (report 3/2012), p. 14.

as provided in the report.¹¹⁸ On the other hand, duplication of functions, such as duplication of parallel customer contact functions by both DSOs and suppliers, leads to lack of efficiency and should be avoided.

In the following, we will generally refer to the customer group subject to the supplier centric model merely as “customers” without providing a specific definition.

5.4 The contract models: the subcontractor model and the power of attorney model

In the following two chapters 6 and 7 we will consider the two overall categories of contract models which may be applied for the implementation of a supplier centric model with mandatory combined billing: the *subcontractor model* and the *power of attorney model*. Both models may in principle comprise a number of sub-models. Following the implementation of a new contract scheme, the contracts as such will normally be drafted by the market participants rather than by regulators. This article therefore focuses on the models from a general contract law perspective, analyzing the overall legal advantages and disadvantages of each overall model, and to some extent sub-models, rather than to discuss sub-models or specific clauses in detail.

An overall question in determining the choice of contract model is whether the supplier will acquire grid services from the DSO and then market a bundled product consisting of both electricity supply and grid services to the customer, or whether the customer will still formally acquire grid services from the DSO.

Under the former scenario, the customer will not need to enter into a grid use contract with the DSO. The characteristic aspect of what we would define as the *subcontractor model* is that customers enter into a contract only with the suppliers. The suppliers must then contract with the DSOs for grid use, making the DSO a subcontractor. The subcon-

¹¹⁸ Council of European Energy Regulators (CEER), *Electricity and Gas Retail market design, with a focus on supplier switching and billing: Guidelines of Good Practice* (24 January 2012), p. 10.

tractor model is discussed in chapter 6 below.

Under the latter scenario, a formal contract between the customer and the DSO will be necessary. In order to introduce a supplier centric model under this approach, the supplier could act with a power of attorney from one of the parties in order to facilitate combined billing. This *power of attorney model* is discussed further below in chapter 7.

6 The subcontractor model

6.1 Model description

6.1.1 Introduction

According to the *subcontractor model*, the suppliers will be contractually responsible for the grid service towards the customer, and the DSOs will only have a contractual obligation towards the supplier. The legal consequence is that DSOs at the outset have no independent contractual responsibility towards customers, and customers have no independent contractual rights against the DSOs (except for rights and obligations under a grid connection agreement).

Thus, if a customer should experience problems with the grid service, any legal right or claim it might have would at the outset be only against the supplier. The supplier might then have its own legal claim against the DSO, based on its contract with the DSO. The responsibility of the supplier towards the customer would however not be affected by its contract with the DSO.

These basic outsets may nevertheless, as we show below, be considerably modified by customers being given rights of direct recourse (*direktekravsadgang* in Norwegian) against the DSO.

The more detailed legal consequences of the subcontractor model can best be examined by looking separately at the distinct legal relationships between each of the parties involved, i.e. respectively, the relationship between the supplier and the customer, the relationship between the customer and the DSO, and the relationship between the supplier and the DSO. In the following, we review each in turn.

6.1.2 The relationship between the supplier and the customer

Under the present systems in place in the Nordic countries, the main responsibility for reliable electricity supply rests with the electricity grid

operators. The main rationale for this approach is considered to be that the quality and security of electricity supply for customers mainly depends on the grid service.¹¹⁹ The obligation of the supplier towards the customer is a strict volume obligation which is only sensitive to price, whereas the quality of supply primarily depends on grid related issues under the responsibility of TSOs and DSOs. In addition, TSOs and DSOs are subject to comprehensive regulatory requirements, such as with respect to non-discrimination requirements and grid tariff regulation, due to their position as monopoly providers of grid services.

As a point of departure, customers experiencing a problem with the electricity supply are as a result expected to deal with the grid companies, even though there are separate agreements for grid use and supply. The Finnish Electricity Act, for example, provides that the electricity user is always entitled to present his claim for statutory standard compensation for interruptions to the DSO.¹²⁰ The Swedish Electricity Act also seems to focus primarily on the grid companies' liability in case of interruptions.¹²¹

For the reasons outlined above, existing rules on mandatory consumer protection also appear to be somewhat stricter for grid use contracts entered into between consumers and DSOs than for electricity supply agreements entered into between consumers and suppliers subject to competition. One specific example is the Norwegian Consumer Purchase Act, which expressly applies to contracts with a "grid company (nettselskap) for transmission of electric power,"¹²² whereas contracts with a "power supplier for supply of electric power" are expressly exempted.¹²³ In essence this provides grid service companies with a mandatory responsibility for the quality and consistency of the power supply towards consumers, in the sense that the customer cannot agree to terms and

¹¹⁹ See NOU 2004:4, p. 80.

¹²⁰ See Section 101 of the Finnish Electricity Market Act.

¹²¹ See Chapter 11, Sections 8-10 of the Swedish Electricity Act.

¹²² Cf Act 21 June 2002 No. 34 on Consumer Purchase (the Consumer Purchase Act), § 2 (1) d).

¹²³ The Consumer Purchase Act § 2 (2) c), which also emphasise that certain provisions of the Act do apply to electricity supply contracts.

conditions putting it in a less favorable position than what follows from the Act.¹²⁴ The latter Norwegian choice to include grid contracts but not supply contracts within the scope of the Consumer Purchase Act may, however, also be seen against the background that the DSOs are the suppliers of last resort in the Norwegian electricity market. Consequently, in the other Nordic markets where designated suppliers act as suppliers of last resort, more specific consumer protection provisions apply for such supplies.

Shifting the contractual responsibility for grid services towards customers onto the ordinary suppliers would mean allocating the main burden of the legal responsibilities involved in power distribution and supply to customers onto the suppliers. The core of the legal responsibility carried by the supplier towards the customer would be based on the physical function still provided by the DSO, but now contracted by the supplier from the DSO as its subcontractor. In other words, the supplier centric subcontractor model entails essentially that the core of the supplier's legal responsibility will be dependent on a physical function and responsibility that it does not itself carry out or control.

As emphasized above in section 5.2, the grid connection agreement will still be entered into between the DSO and the customer following the introduction of a supplier centric model. Hence, the rights and obligations under the grid connection agreement are exceptions from the point of departure that customers and DSOs do not have independent contractual rights and obligations towards one another in the subcontractor model. However, NordREG's current definition of a supplier centric model also raises the question whether certain other functions need to be governed by a direct agreement between DSOs and customers under this model. NordREG has, for example, indicated that issues relating to quality of supply, outages and interruptions should remain a DSO responsibility with the DSO still acting as the customers' contact point.¹²⁵ There are two

¹²⁴ See also for a general analysis, Kaurin, 'Nettleieavtaler med forbruker: En fremstilling av nettleieforholdet etter reguleringen i forbrukerkjøpsloven' MarLus Nr. 379 (2009).

¹²⁵ See above in section 2.2.

approaches to this issue under a subcontracting model.

On the one hand, any function which should remain exclusively an issue between the customer and the DSO could be moved from today's grid use contracts to a new standard grid connection agreement and thus be made subject to direct agreement between the customer and DSO without any supplier involvement. This approach would, however, be difficult to implement in those situations where a grid connection agreement is entered into by another party than the electricity end-user, such as for example a building's owner.

On the other hand, the DSO's responsibility for such functions could ultimately rest with the DSOs in the sense that they would still be statutory required to fulfill the functions, including possible contact with customers, but that their contractual obligation to perform such functions follows from the contract with the supplier. This latter approach would significantly extend the obligations of suppliers towards the customers, but the suppliers would in most cases be able to turn around and make a claim against the DSO for breaches of grid services ultimately resting with the DSO.

Since the existing mandatory legislation in place in the Nordic countries is based on the assumption that the grid service carries the main burden of the legal responsibilities directly towards customers, legislative changes will however be necessary to implement a supplier centric model based on the subcontractor model. To take the example of Norwegian law again, the Consumer Purchase Act should then probably be amended to ensure that contracts with electricity suppliers are covered by the act. The aim of the supplier centric model is precisely to have the suppliers provide an integrated product to consumers including both electricity supply and grid services. This naturally shifts the need for customer protection to the contracts with the supplier side.

6.1.3 The relationship between the supplier and the DSO

As emphasised above, electricity supply disruptions are in most cases due to grid related problems. In cases where the supplier is liable towards the customer for such interruptions under the subcontractor model, the

supplier will usually have a right of recourse against the DSO. In the relationship between the supplier and the DSO, however, the current mandatory consumer protection requirements would not apply, since the consumer protection regulations only apply to protect consumers. The suppliers, although being ultimately liable towards consumers, would not themselves constitute consumers. One might therefore envisage that a DSO in its contractual relationship with suppliers for instance demanded exclusions of liability that would not apply in the relationship between the supplier and customers.

A supplier centric subcontractor model could thus potentially entail a substantial shift of responsibility onto suppliers from the DSOs. On the other hand, the suppliers would probably seek to make their contracts with the DSOs back-to-back with their own responsibility towards customers, in which case any responsibility initially incurred towards customers relating to the grid services could be brought by the supplier against the DSO. It cannot however be automatically assumed this would be the case, since it would depend on the relative commercial strength of the suppliers on the one hand and the DSOs as monopoly providers on the other hand when negotiating the grid use contract. One way of alleviating such challenges could be to regulate in national law the services and liability of DSOs towards the buyers of grid services (i.e., the suppliers). This need to govern the relationship between suppliers and DSOs by law in order to facilitate a well-functioning market based on neutrality and non-discrimination should be carefully considered in the designing of a possible new model. We consider it quite difficult to envisage a subcontractor model without quite extensive regulation of the relationship between DSOs and suppliers.

6.1.4 The relationship between customers and the DSO

In the relationship between customers and DSOs, the lack of a formal contract entails that a DSO would not have a direct contractual responsibility towards the customer. This nevertheless does not entail that customers would be entirely devoid of remedies against the DSO. It is possible to envisage an arrangement where customers are given a direct

right of recourse against DSOs based on well-known contractual mechanisms and general principles of third party claims that to some extent at least are common to all the Nordic countries.

Assuming that the supplier is or at least will be made directly liable towards the consumers under the Consumer Purchase Act,¹²⁶ such a direct right of recourse for consumers against the DSO would under Norwegian law probably follow already from the current provision in the Consumer Purchase Act § 35. Under this provision, a consumer is entitled to make a claim for defects directly against a “prior sales stage”, i.e. a previous vendor in a chain of sales, *to the extent such claim could have been made by the seller*. Moreover, according to § 35, second part, any agreement between the seller and the previous vendor (i.e. the DSO) limiting the right of the seller (i.e. the supplier) cannot be invoked by the subcontractor against the consumer to any greater extent than it could also have been agreed in the contract between the seller and the consumer.¹²⁷ In any case, a right of direct recourse for end-customers against the DSO as a subcontractor of the suppliers would probably under Norwegian law also follow from general contractual principles.¹²⁸

The legal position with respect to rights of direct claims under the law of the other Nordic countries may differ somewhat from the Norwegian approach, and we are not confident that all the Nordic countries would recognize such a direct right of recourse without a specific legislative basis.¹²⁹ However, such a right could be provided for in applicable national legislation, or by other means such as requiring so called third

¹²⁶ As stated above in section 6.1.2, implementing a subcontractor model in Norway probably assumes that the Consumer Purchase Act is amended to ensure its applicability towards the integrated electricity supply contracts towards end customers envisaged by a subcontractor model.

¹²⁷ Norwegian law would in our view probably recognize a direct right of recourse also for customers which are not consumers, but then based on non-statutory law, and not subject to the mandatory protection under § 35 second part.

¹²⁸ See generally Hagstrøm, *Obligasjonsrett* (2. utg., 2011), p. 814 et seq., and Tørum, *Direktekrav* (2007), especially p. 171 et seq.

¹²⁹ See for a general and comparative account of Nordic law and other countries as well, Ulfbeck: *Kontraktens relativitet – det direkte ansvar i formueretten* (Forlaget Thomson AS, København, 2000) especially p. 130 et seq.

party rights to be granted to the customers in the contracts to be entered into between the suppliers and DSOs.¹³⁰ Hence, it would also be possible to require the DSOs to remain responsible directly towards the customers for those specific functions where the responsibility should remain with the DSOs, such as quality of supply responsibility. The main difference of the subcontractor model from the current two-contract model would then be that the customers would also have a primary right of recourse against the supplier in case of disruptions or defects in the power supply, cf. above.

6.2 Legal advantages and disadvantages

The main advantage of the subcontractor model is that it will let the customer envisage the power supply as a single, integrated service delivered by the supplier. In other words, the service will constitute a package. In case of problems with the supply, the customer will be expected to present any claims or complaints against the supplier and it will be legally entitled to hold the supplier responsible for all parts of the service.

The new Danish wholesale model which will be implemented from 1 October 2014 represents one example of a subcontractor model as described above. As explained above in section 4.4, the wholesale model entails that the electricity retail suppliers will buy electricity at the wholesale market as well as grid services from DSOs and TSO services from TSOs, and that they consequently will sell electricity including

¹³⁰ A question is whether such a right of recourse should be based on a subrogation model or what is known in Norwegian law as *springende regress*. The difference is that in respect of the latter, the end user is given a right to present its own claim directly against the DSO, in other words the claim would be conditional upon the end user having a claim against the supplier, whereas in respect of the former category the end user would be entitled to step into the supplier's claim against the DSO, in principle irrespective of whether the end user has a claim against the supplier. In practice there may not be much difference, since the claim will in any case probably have to be conditional in principle upon the DSO *having a contractual responsibility* under its own contract with the supplier, although it would be possible to restrict the ability of the DSO to invoke *limitations* on such responsibility for the purpose of consumer protection. We do not go further into these issues here, but see generally Hagstrøm, *Obligasjonsrett* (2nd edn. 2011), p. 814 et seq.

delivery to the consumers and be the consumers' main contact point.¹³¹ Some of the background for the new Danish model is that only a limited share of Danish consumers have utilized their rights to switch supplier, and that providing the suppliers with a more distinguished place in the market than today and ensuring that customers receive one single bill was considered to promote competition.¹³² The Danish legislator has considered their wholesale model as the most cost-effective solution for ensuring a strengthened position for suppliers which will also increase competition in the electricity market.¹³³ A number of other envisaged advantages in implementing the wholesale model have also been emphasized by the Danish legislator, such as the promotion of a common Nordic market, equal treatment of suppliers and the decrease in administrative costs for grid companies in handling consumer issues.¹³⁴

Importantly, the subcontractor model entails that the supplier will carry the full risk of the quality and consistency of the power supply, including the grid services, towards the customer. While the supplier will usually be entitled to have recourse against the DSO, it will nevertheless in this regard be exposed to a residual risk. We assume that most DSOs may be expected to be more or less financially stable. Thus, we would expect the main risk here to be the possibility of disagreement and disputes with DSOs in respect of the extent and division of responsibility. Nevertheless, a certain insolvency risk will always be involved. In our view, it would nevertheless not as such be unreasonable to expect the suppliers to carry this risk. It has obvious benefits for customers to envisage the services as a single package. Moreover, the suppliers as commercial actors may be deemed better suited than most customers to handle responsibility issues in relation to the grid services.

¹³¹ DERA, From combined billing to the wholesale model – New Danish regulation of the electricity retail market, p. 2. It should be noted that we have not considered specifically in this article whether the suppliers under a subcontractor model should also be required to contract TSO services from TSOs, of whether these services should be contracted by the DSOs in the first instance.

¹³² Lovforslag nr. L 176, Folketinget 2011-2012, fremsatt 25. april 2012, Folketingstidende A, p. 5.

¹³³ Op.cit., p. 7.

¹³⁴ Op.cit., pp. 7-9.

Conversely, there will also be a risk for grid companies of incurring a loss in case of bankruptcy of suppliers, typically in cases where bankruptcy occurs before payment has been made to the grid company by the supplier for use of the grid services. This may be a considerable risk, especially if power supply and consequently grid services is maintained for an extended period, with the supplier being in default of its payment obligation to the DSO, something which cannot be ruled out. The subcontractor model implies that the DSOs will have fewer and larger customers (the suppliers) than under the current models, which could entail increased risks. On the other hand, increased billing due to future smart metering schemes may at least to some extent possibly contribute to limit these risks. The right of a DSO to terminate the grid services in a situation of non-payment from the supplier raises some additional questions, since such a right would have to be structured in a manner that would not disrupt the power supply to the customers. A possible risk for grid companies in incurring losses due to supplier bankruptcy is also mentioned by the Danish legislator in the preparatory works to the wholesale model.¹³⁵ The envisaged Danish solution for a supplier which repeatedly or manifestly breaches its obligations is that such supplier may lose its registration at the data hub, effectively preventing the company from operating on the market.¹³⁶ In such cases, the suppliers' customers will be transferred to the supplier of last resort.¹³⁷ Correspondingly, if a supplier defaults on payment to the grid company or the TSO, these companies may terminate service delivery to the supplier, which in practice entails that the suppliers' customers are transferred to the supplier of last resort.¹³⁸

A potential disadvantage of the subcontractor model is that it will give the suppliers a much more extensive responsibility than under both the current system and a power of attorney model. As described above, it is implicit in the nature of the services involved that the main burden

¹³⁵ Op.cit., p. 8.

¹³⁶ See further Op.cit., p. 10.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

of responsibility carried by the supplier under this model would depend on the functions performed by the DSO as responsible for the grid. The suppliers would in other words be legally responsible for a physical performance mainly carried out by someone else. On the other hand, it may be held that this in itself is not materially different from the legal situation of most retailers selling pre-fabricated goods from different manufacturers. The suppliers under a supplier centric model may similarly be envisaged as retailers of electricity, with customer contact and coordination of power supply and grid services into packages to be offered to different market segments as their speciality.

Another possible disadvantage is the implications of increased risks and responsibility for suppliers in relation to the final price customers will have to pay. The subcontractor model essentially entails that both the suppliers and the DSOs will have a potential exposure to liability for disrupted or defective power supply, something which may affect prices both in the relationships between DSOs and suppliers and between suppliers and customers. When offering a bundled package, suppliers will naturally have to compensate for increased risks and responsibilities as an additional cost that will have to be taken into account in the prices offered to the market. If it is assumed that also the DSOs shall retain their potential responsibility towards customers, which we consider an essential condition for this model to be advantageous for customers, cf below, it cannot be expected that the risk addition in the supplier's price calculations will be fully compensated for in lower prices charged by DSOs.

Furthermore, the suppliers under a supplier centric model will be responsible for collecting electricity taxes and passing it on to the State. It must be considered whether the introduction of a subcontractor model is liable to increase the risk of lost tax proceeds for the State due to risk of non-payment by suppliers in cases of bankruptcy or situations of payment failure. One possible way of reducing such risk is exemplified by the new Danish system, which introduces a mandatory guarantee and insurance scheme intended to guarantee the State tax proceeds at the lowest necessary costs for the suppliers in general, which in turn will

contribute not to make market entry too expensive for the suppliers.¹³⁹

Another potential disadvantage of this model is that customers would not have any immediate contractual rights against the DSO, which nevertheless would be physically responsible for the most important part of the power supply. The DSOs will in most situations be closer to the problems, and appear geographically closer as they necessarily have a local presence. The DSOs may also in some cases be financially stronger than the suppliers. Thus, it would in our view be a disadvantage of the model if customers should not have a direct right of recourse against the DSOs. As described above, this does not necessarily have to be a problem, however, as customers may be provided with direct recourse against the DSOs either legislatively or in the contracts between suppliers and DSOs. Such a right may already to some extent follow from applicable background law in all of the Nordic countries, but in our view it would be advisable to provide a separate legal basis for such direct claims.

The preparatory works to the new Danish model emphasized that the introduction of the new model will require the amendment and adoption of a number of statutory requirements as well as a thorough review and revision of existing agreements.¹⁴⁰ This will also be the case for the other Nordic countries if a supplier centric model is introduced along the lines of the subcontractor model.

6.3 Summary

A supplier centric subcontractor model will entail that the burden of the legal responsibilities currently involved in power supply is shifted from the grid companies to the suppliers.

The main advantage of this model is that suppliers will be able to market electricity as one fully integrated package consisting of both supply and grid services. There are also certain disadvantages with this model which are outlined further above.

¹³⁹ See further Lovforslag nr. L 176, Folketinget 2011-2012, fremsatt 25. april 2012, Folketingstidende A, p. 9.

¹⁴⁰ Op.cit., p. 5-6.

In our view the model does not entail any material disadvantage for customers from a legal perspective, provided that they are given a direct right of recourse against the DSOs.

7 The power of attorney model

7.1 Model description – three alternative models

7.1.1 Introduction

As an alternative to what we have termed the “subcontractor model” above, it is possible to envisage a supplier centric model where the supplier acts as a contract representative of one or both of the customer or the DSO in the relationship towards the other. We may distinguish between three alternative *power of attorney models* – the first where the supplier acts as customer representative, a second where the supplier acts as DSO representative, and a third where the supplier acts as joint customer and DSO representative. We shall now review each in turn.

7.1.2 The Supplier as customer representative

In this contract model, the supplier would act as agent for the customer in entering into a formal contract for grid services on behalf of the customer with the DSO.¹⁴¹ This could formally be arranged through inclusion of a clause (or clauses) in the main contract between the supplier and the customer, expressly authorizing the supplier to act as agent for the customer. However, in practice it would probably be advisable to include separate signatory documents in order to emphasize the position of the supplier as a legal representative.

The relationship between the customer and the supplier in relation to the grid services under this model would only be a relationship between principal and agent. There would be no contract between the supplier and the customer with respect to the grid use as such. The supplier would not be directly responsible towards the customer for the grid services, and the customer would not be able to make a claim against the supplier

¹⁴¹ According to Eurelectric, this model exists in at least four EU Member States: Italy, France, the UK and Spain. See Eurelectric, Customer-Centric Retail Markets; A Future-Proof Market Design (Eurelectric Policy Paper, September 2011), p. 34.

in case of problems with the grid use or performance. The objective of a supplier centric model probably nevertheless would require that the customer should be able to present certain claims and complaints *to* the supplier (to the extent that it is envisaged that such functions shall be carried out by suppliers under a final definition of roles and responsibilities under a supplier centric model). But in principle the supplier would then act merely as a claims handler with responsibility towards the customer to forward claims and complaints to the DSO.

Conversely, the relationship between the customer and the DSO would be a direct contractual relationship, where the DSO would be directly responsible towards the customer for the grid services. The customer would be entitled to make claims and complaints directly to the DSO, independent of and without going through the supplier, since the supplier would only have acted as a representative of the customer when the contract was entered into. More significantly, as regards payment for the grid services, this would also be an obligation owed directly by the customer towards the DSO. Although in practice this could be arranged so that the customer would pay to the supplier, the supplier would then only act as a payment forwarder for the customer.¹⁴² The DSO's claim against the customer for payment would in principle not be affected by payment from the customer to the supplier. If the supplier should be in default on forwarding payment to the DSO, this would consequently be at the customer's risk.

Under this model, there would be no contractual relationship between the supplier and the DSO. The supplier centric model nevertheless assumes that the supplier would have to handle customer contact on behalf of the DSO. This model entails in principle that such customer contact would then be formally structured as a responsibility of the supplier *towards the customer*. In other words, the supplier would, in addition to assuming authority as a legal representative of the customer towards DSOs, also undertake certain other tasks to be performed *as a service to the customer*, such as receiving and forwarding payment, and

¹⁴² We have not examined whether such a role could be problematic in relation to the relevant financial services regulations in place in the Nordic countries.

handling complaints and other administrative tasks in connection with the grid service.

Conversely, since the supplier formally would be the contractual representative of the customer when entering into the contract for grid services, it would not be contractually responsible towards the DSO for any aspects of these services. The implication of this model is in principle that any complaints of the DSO against the supplier relating to its performance of the administrative functions would incur responsibility for the customer, since the supplier would discharge its functions as essentially a customer representative.

7.1.3 The supplier as DSO representative

The alternative representation model is where the supplier functions as a DSO representative. In this model, the supplier would have to make an arrangement with the relevant DSO in the customer's geographical area, authorizing the supplier to enter into a grid service contract with the customer on behalf of the DSO. This could in practice be combined with a separate arrangement between the supplier and the DSO, where the supplier assumed responsibility for discharge of customer contact and related administrative functions such as billing, in order to provide a single point of contact towards the customer. The power of attorney procedure would have to be designed in such a way that a new supplier would immediately become the agent of the relevant DSO at the same time as a customer's switching of supplier takes effect.

This model has the advantage that a direct contractual link is established between the DSO and the customer, and it may also be structured in a way that would have the supplier in practice take care of all or most of the administrative functions towards the customer. The further implications of the model are again best reviewed by looking closer at the relationships of each of the parties involved.

The DSO would in principle remain fully responsible for its performance towards the customer, and the customer's payment obligation would be owed directly to the DSO. If structured in the manner that the supplier in practice functions as the single point of contact towards the

customer, the DSO would nevertheless remain formally and legally responsible towards the customer for the supplier's exercise of such functions. Thus, in respect of joint billing for instance, the supplier would receive payment on behalf of the DSO, and the customer's payment obligation towards the DSO would thereby be discharged.¹⁴³ In other words, the risk of the supplier forwarding the DSO its share of the total amount paid by the customer would be on the DSO.

Conversely however, in the relationship between the supplier and the customer, the supplier would, in principle, carry out all contact with the customer in relation to the grid services as a DSO representative. Thus, the supplier would not have any independent responsibility towards the customer with respect to the grid service, and the customer would have no separate claim against the supplier in respect of these services. The consequence is that the supplier in its relationship to the customer would assume a dual role. It would partly, in respect of the supply, act as the party fully and directly responsible, and partly, in respect of the grid services, act merely as a contract representative.

In its relationship to the DSO, the supplier would under this model assume a role essentially as a service provider. In principle, the supplier would of course have to be paid for such services and the parties would have to make a commercial arrangement on applicable terms and conditions. If made into a mandatory model the structuring of this relationship might, nevertheless, be somewhat more complicated. Each supplier would both be required and entitled to offer this service to DSOs, and DSOs would have to be required to accept every licensed supplier as its authorized representative. This could raise problems in relation to ensuring fair and equal conditions for all participants. In practice, a considerable degree of government supervision and control might be required in order to ensure fair and equal conditions for all participants. One might envisage a system where the licensing authority were given powers to accept and/or put in place the requisite contractual arrangements between suppliers

¹⁴³ As emphasized in the footnote above, we have not examined whether such role could be problematic in relation to the relevant financial services regulations in place in the Nordic countries. This should be further examined before such model is chosen.

and DSOs as an integrated aspect of the licensing process.

Another problem with a mandatory scheme where the supplier acts as a DSO representative is that the DSO will not have any influence on the choice of its own agents. In practice, the customer will also choose the agent that will represent the DSO when choosing supplier. Such approach may potentially create uncertainty for DSOs, and it may also increase administrative costs for DSOs in potentially having to relate to a large number of suppliers as their agents.

7.1.4 The Supplier as combined customer and DSO representative

It may be possible to envisage a third and hybrid power of attorney model, where the supplier assumes the role as a combined customer and DSO representative.

An obvious premise is that the supplier cannot simultaneously function as a contractual representative of both parties. However, it is possible to envisage that the supplier functions as a representative for the customer in some aspects, while in other aspects it represents the DSO.

The most practical alternative here in our view is that a customer when concluding a contract with a supplier authorizes the supplier to enter into a contract for grid services on its behalf, and that the supplier then in its relationship to the DSO assumes the role of a DSO representative for the purpose of maintaining customer contact and discharging administrative functions such as collection of payment for the services etc.

In the relation between the supplier and the customer, the supplier would be responsible towards the customer for entering into the grid service contract but would then reverse roles and become a DSO representative for the purpose of administering the contract. In the relation between the DSO and the customer, the model would serve to establish a direct contractual link between the DSO and the customer but would not materially differ in this regard from the power of attorney model with the supplier as a DSO representative. Similarly, in the relationship between the supplier and the DSO, the supplier would assume the same role as a service provider to the DSO as under the previous model.

7.2 Legal advantages and disadvantages

In our view, the description of the models presented above shows that a *power of attorney model with the supplier as a customer representative* has clear disadvantages. The only advantage it provides from a customer perspective is that the customer retains a direct contractual relationship with the DSO.

The main disadvantage of the model is that it would place an additional burden of risks on the customer. In principle, the customer would in its relationship to the DSO carry the responsibility for the performance of the supplier as a customer representative. Thus, in making payment for the grid services to the supplier, the customer would in principle have the risk of the supplier's default in relation to the DSO. If the supplier should fail to forward payment from the customer to the DSO, the customer would be obligated to pay again directly to the DSO, and then recover its payment from the supplier and carry the risk of insolvency etc. Furthermore, the customer would in principle also be responsible for the supplier's performance of other administrative functions towards the DSO, if applicable. One issue which could be considered in order to alleviate the disadvantages involved in increased customer risk, is whether there could be a scope for introducing e.g. mandatory guarantee or insurance schemes guaranteeing customer's payment in case of supplier bankruptcy etc. Such procedures could, however, also lead to increased administration and increased costs.

For this model to be a feasible alternative it would in our view most likely have to be limited to the stage of entering into the contracts. One might envisage an arrangement where suppliers are authorized by customers to enter into a contract for grid services with the relevant DSO, but that the DSO then afterwards in principle handles all customer contact related to the grid service contracts in the same manner as under the current system.¹⁴⁴

The alternative model where *the supplier is a DSO representative* has

¹⁴⁴ As far as we understand, the Norwegian Regulation 11 March 1999 No. 301, Section 2-1 second paragraph last sentence, opens for such approach and is an example in this respect.

the advantage that it retains the primary legal responsibility of the DSO towards the customer, while at the same time allowing for the supplier to act as the primary point of contact throughout the contractual relationship.

One obvious disadvantage of the model is however that it outwardly would obscure the formal legal division of functions and responsibilities between the supplier and the DSO. The model would probably create the natural expectation among customers that the supplier was responsible for all aspects of the offered and delivered service. It would in other words create the impression of a subcontractor model, without its legal effects.

An equally significant disadvantage in our view is the potential conflict of interest for the supplier in discharging its dual function as supplier and contract representative of the DSO. Such a conflict of interest potentially exists both in relation to the handling of the interface between the parties' respective responsibilities towards the customer, and in relation to the overriding interest of each supplier to market its product in competition with other suppliers.

An additional disadvantage with the model is, as already described, that it might necessitate extensive government supervision and control of the relationship between suppliers and DSOs, in order to ensure fair and equal market conditions for all market participants. Moreover, the fact that the DSO would not have any influence on the choice of their agents, and that the DSOs would potentially have to relate to a large number of agents, may cause unreasonable uncertainty and administrative costs for DSOs.

Finally, the model may entail increased payment risks for DSOs, since the risk of the supplier forwarding the DSOs their share of the total amount paid by the customer would be on the DSO and not on the customer. Correspondingly, the model may possibly entail increased tax collection risk for public authorities.

The *hybrid model* discussed above does not in our view remedy any of the shortcomings of the power of attorney model. It is difficult to see any advantage of the supplier acting as a customer representative only for the purpose of concluding a contract, while subsequently acting as a

DSO representative. Such a combination of roles would probably also cause additional confusion about the responsibility of the supplier.

7.3 Concluding remarks

The above descriptions of the alternative power of attorney models show in our view that a power of attorney model has several legal disadvantages when compared to a subcontractor model.

The main advantage of the model is that it would not distort the current allocation of legal risks and responsibilities between the supplier and DSO in their relationships towards customers to the same extent as a subcontractor model.

The main disadvantage with a *power of attorney model with the supplier as customer representative* is that it most likely would be feasible only in the order stage, as it would probably be impractical and undesirable to have the supplier discharge its customer contact function, including combined billing responsibility, as a representative of the customer.

Conversely, the main disadvantage with the *power of attorney model with the supplier as a DSO representative* is twofold. On the one hand, it would obscure the legal realities and create an impression that the supplier offers a fully integrated service, when in fact it would act only as a contract representative in respect of the most significant part of the service. Furthermore, the supplier would have a conflict of interest in discharging its function as primary customer contact on behalf of the DSO, drawn between its interest as a market actor on the one hand and its obligations as a service provider towards the DSO on the other.

The *hybrid model* is in our view not a practicable alternative. It will therefore not be discussed further in the following.

8 Relationship to the overall objectives of the harmonized Nordic retail market

8.1 Introduction

NordREG has defined a set of overall objectives for the harmonized Nordic electricity retail market. These objectives are customer friendliness, well-functioning market, improved competition, improved efficiency, compliance with EU regulation and development, and neutrality of DSOs. In the following, these objectives are considered for each of the contract models discussed in this article. A general assessment of the overall market objectives would go beyond a strictly legal evaluation, also encompassing areas such as for example economic sciences. The following assessment is therefore more limited in scope, focusing on some relevant issues from a legal perspective.

8.2 Customer friendliness

8.2.1 General analysis of the customer friendliness objective

The customer friendliness objective essentially concerns the facilitation of customer participation in the market, simplicity for customers and the quality of service for customers. Under the *current models* in the Nordic countries, the customers as a point of departure have a contractual relationship with both suppliers and DSOs. It is our impression that the extent to which customers today in practice receive one single bill or two separate bills for electricity supply and grid use varies, but that it is not unusual for customers having contracted with a supplier which is affiliated with the area DSO to receive one single bill. Nevertheless, the customers will in many cases formally have contractual relationships with two different parties – the DSO and the supplier – with different roles and responsibilities. This dual contract system may be perceived as complex

by consumers and may be detrimental to consumer friendliness. This is even more so in cases where the customer receives two separate bills for electricity supply and grid use. As far as we understand, the promotion of customer friendliness is also one of the grounds for the introduction of a supplier centric model with mandatory combined billing.

The *subcontractor model* is better suited to ensure simplicity and ease for customers than the current models as it allows the customer to relate to one party only, both formally and in practice. Having one designated contact point for all, or almost all, issues related to the electricity supply as well as receiving one single bill for electricity and grid use from the same entity should represent an advantage from a customer perspective. Under such approach, the suppliers may also be incentivised to compete for customers not only on the basis of electricity prices, but also on the provision of high quality service levels.

In our opinion, the fact that the formal contractual rights and obligations of the supplier correspond to the actual tasks that the supplier is required to perform for the customer is also an advantage from the perspective of customer friendliness. Consequently, the customer's perception that the supplier is in fact the responsible party for the delivery of electricity supply will also formally be correct, unlike what may be the case under a power of attorney model.

One issue which potentially could reduce customer friendliness under the subcontractor model is that the customer will not have a contractual relationship with the DSO and, hence, at the outset may not have the right to bring any grid related claim directly before the DSO. Customers may in certain cases possibly prefer to contact the DSO given reasons such as its local presence and, in cases which essentially concerns grid issues, the fact that it is the grid operator. This concern may, however, in large part be alleviated by a possibility for customers to bring direct claims before the DSO. The customers' rights to such direct claims could be provided for in applicable national legislation. Hence, the customer would always be able to contact or bring a claim before the supplier, and in some cases (i.e., grid related issues, such as quality of supply issues) have the right to claim against both the supplier and the DSO.

The *power of attorney model* could at the outset also to some extent satisfy the need for simplicity and ease for customers by providing that the customer in practice can relate to the supplier only concerning most electricity supply issues. However, in our opinion the power of attorney model also raises several challenges for the protection of customer friendliness. At an overall level, one of the drawbacks of this model is that it may create an impression for the customer that the supplier is formally responsible for the grid services as well as for the electricity supply. Under such model, there is a risk that a customer may not understand that the supplier is not formally the contractual party responsible for the grid service before a potential dispute arises. Consequently, the model may in our opinion be liable to conceal the formal rights and obligations of each party, and hence also downplay the complexity of the formal contractual organisation, which will still exist.

The power of attorney model where the supplier is a DSO representative may be particularly likely to obscure the formal legal division of roles and responsibilities between the parties, but similar concerns apply to all power of attorney models. The supplier as DSO representative model may also lead to potential conflicts of interest for the supplier, potentially affecting customer friendliness in a negative way

The power of attorney model where the supplier is a customer representative raises particular concerns from the perspective of customer friendliness, as the customer will still be formally liable towards the DSO although the contractual relationship in practice is handled by the supplier as a customer agent. Consequently, the DSO's payment claim against the customer would at the outset not be affected by payment from the customer to the supplier. If the supplier should, for example, be in default on forwarding payment to the DSO, such default would be at the customer's risk. This model is therefore in our opinion not recommendable from the perspective of customer protection or customer friendliness.

In conclusion, it is our view that the subcontractor model, in its overall form, is potentially well suited to promote the objective of customer friendliness, while the power of attorney model is less suited to promote customer friendliness.

8.2.2 The particular challenges involved in governing termination of contracts

One important contractual risk aspect which strictly speaking is broader than only referring to customer friendliness, is the issue of termination of contracts due to non-payment by consumers. This issue is not only important for customers, but also affects the risks carried by suppliers and DSOs.

Under *the current models*, the Nordic countries have, broadly speaking, similar approaches to the issue in the sense that grid service contracts between consumers and DSOs can only be terminated by the DSOs subject to certain qualified requirements. Typically, a grid service agreement cannot, for example, be terminated by the DSOs where such termination may put life and health at risk. For electricity supply contracts not comprised by the supplier of last resort, on the other hand, the supplier's right of termination due to non-payment by consumers is typically not restricted to the same extent. In such cases, the consumer may choose a competing supplier or, eventually, the supplier of last resort.

Under a *subcontractor model*, the supplier will contract with the customer for the delivery of both electricity and grid services. Hence, if the consumer defaults on payment to the supplier, the question arises whether the supplier should be able to terminate the contract. At the outset, we assume that restrictions on the supplier's right to terminate in such cases, beyond general contract law obligations such as requiring a manifest default by the consumer, may perhaps not be necessary from a consumer perspective. In case of default and termination, the consumer will have the option to contract with another supplier or, ultimately, the supplier of last resort. In Norway, where the DSOs are suppliers of last resort, the DSO would then be required to deliver electricity and grid services to the customer, which they are also required to under today's system. For the other Nordic countries, where the supplier of last resort obligation rests on specific suppliers, those suppliers will then be under an obligation to deliver electricity and grid services to the customer. In cases where the consumer also defaults on payment to the supplier of last resort, it is possible to envisage that the general costs of such loss

may be taken into account as a loss in the regulation of grid tariffs, limiting the risks for suppliers of last resort.

The procedures and requirements for shutdown of electricity supply to a customer should in our opinion nevertheless be carefully considered under the implementation of a new model. It is important to ensure that the roles and responsibilities of the market participants are clearly defined in decisions relating to shutdown of electricity supply in a way which also guarantees sufficient levels of customer protection. It may be possible to envisage situations in which suppliers or DSOs may desire to terminate electricity supply due to non-payment by customers, but where such termination may not be in conformity with considerations of customer protection.

Another question which may be raised is whether the system above may incentivize suppliers to introduce differentiated price schemes for different consumers based on their record of payment default or on their perceived financial situation. Such approach would be contrary to the objective of protecting vulnerable customers, which could then in practice be forced to apply the supplier of last resort alternative. Any such risk could, however, most likely be alleviated by regulation requiring equal treatment of consumers within the same price area.

Under a *power of attorney model*, the DSO will still ultimately be responsible for providing the grid service to the customer. This model raises several questions as to the carrying out of termination in cases where the customer defaults on payment.

In cases where *the supplier acts as a customer representative*, a first question which arises is what happens with the power of attorney if the supplier terminates the electricity supply contract due to payment default by the customer. In such cases, we assume that the new supplier contracted by the customer, or the supplier of last resort as the case may be, will immediately take over as agent for the customer under the grid service contract pursuant to a new power of attorney. Assuming that the customer has not only defaulted on payment of electricity supply, but also on payment for grid services, the new agent would then take over in a situation where a default is already existing in the relationship between

customer and DSO, and where the DSO may be considering termination of the grid service contract. The DSO would at the outset confront the supplier as a customer representative when giving notice of a termination of the grid contract. In such cases, it is vital that the customer is made clearly aware of the consequences of further non-payment, i.e., shutdown of electricity supply. One way of ensuring customer awareness could be to require that the DSO contacts the customer directly, and not through the supplier, in cases of potential termination of a grid service contract. This would also reduce the risks involved for the supplier in communicating wrong or imprecise information as an intermediary between the customer and DSO, in particular with respect to cases where a new supplier has been contracted after the situation of payment default arose.

Another question which should be considered is whether a supplier, which on the one hand has entered into an electricity supply contract with a customer and on the other hand acts as the customer's agent under the grid service contract between the customer and the DSO, may experience a conflict of interest in cases where the customer defaults on payment under both contracts. In such cases, the supplier shall collect payment for its delivery of electricity supply to the customer on the one hand while collecting payment for grid services from the customer to be forwarded to the DSO on the other hand. Where the payment by customers is not sufficient to cover both payment obligations, the supplier may possibly be incentivized to ensure payment of its own electricity supply delivery before payment of grid services.

In cases where *the supplier acts as a DSO representative*, most of the questions outlined above may apply correspondingly. First, also in such cases the supplier may terminate the electricity supply contract in cases of manifest default of payment by the customer, requiring the DSO to issue a new power of attorney to a new supplier or supplier of last resort. Second, we assume that also in such cases some of the challenges involved in ensuring correct communication in cases where the DSO considers terminating a grid contract may be alleviated by requiring the DSO to contact the customer directly in such cases. Finally, we assume that this approach may also potentially raise conflict of interest challenges for the

supplier in case of the customer's non-payment, as the supplier also in this situation may be incentivized to give priority to ensuring coverage of its own outstanding debts before the DSO's outstanding debt.

In conclusion, all models raise some challenges with respect to payment default by consumers and possible termination of contracts. In our opinion, however, the subcontractor model appears to represent the most transparent and best practicable approach, although all models include advantages and disadvantages.

8.3 Well-functioning market

One of NordREG's goals is to create a well-functioning harmonized Nordic electricity market at both wholesale and retail level. The objective of ensuring a well-functioning market relies on the fulfillment of a number of intermediate aims, such as improved competition, facilitating cross-border trade by ensuring sufficient levels of Nordic harmonization, ensuring non-discrimination and equal treatment, guaranteeing a sufficient level of customer protection, avoiding anti-competitive behavior, etc. In the following, we will only seek to provide some overall comments to what we assume could be the likely general effects of each model on market functioning.

With respect to *the current models*, NordREG has recently concluded that there is good or reasonable competition on all Nordic markets, although room for intensified price competition among suppliers.¹⁴⁵ The retail markets are, however, still to a large extent national in scope. Consequently, there is a need to facilitate the provision of cross-border supplier services to the customers in order to establish a common Nordic retail market as such as well as to contribute to increased competition among suppliers.

The rate of supplier switching as well as the percentage of customers having contracted with a "local" supplier belonging to the same company group as the area DSO appear to differ between the Nordic countries. The customers' reliance on the supplier of last resort as their regular

¹⁴⁵ See section 2.1 above.

electricity supplier also seems to differ from country to country. In order to ensure a well-functioning market under a future system with a supplier centric model, it is important to choose a model and design regulation in a way that facilitates competition between suppliers.

The *subcontractor model* could in our view provide a good basis for ensuring a well-functioning market. By conferring on the suppliers the formal responsibility as well as designating them as *de facto* contact point for the customers, we assume that the suppliers at least in principle would be in a better position to compete for the same customers irrespective of the suppliers' place of establishment or company group belonging. To what extent the model in fact will contribute to increased competition is difficult to evaluate from a legal perspective. In the Danish preparatory works to the wholesale model, it is assumed that current provisions aiming at preventing grid companies from acting in a discriminator manner to the benefit of integrated supply undertakings will have reduced significance with the new model since grid companies will no longer be the primary contact point for consumers.¹⁴⁶

We are less convinced that a *power of attorney model* will provide a good basis for ensuring a well-functioning market, although, depending on the way in which the model is implemented, we will not exclude the possibility that such model may also facilitate market functioning. From a legal point of view, our main concern with the power of attorney model viewed in relation to market functioning is that the model could obscure the legal realities and the main contractual relationship between the parties, that it may in some cases lead to conflicts of interest for suppliers and that it may lead to increased risks for the customers and the market participants involved in certain situations.¹⁴⁷

One specific question in relation to market functioning and the introduction of a supplier centric model is whether the chosen model would also require the establishment of new technologies for information and communication in the electricity market given the new role and increased

¹⁴⁶ Lovforslag nr. L 176, Folketinget 2011-2012, fremsatt 25. april 2012, Folketingstidende A, p. 6.

¹⁴⁷ See chapter 7 above for a further discussion of these arguments.

responsibilities of suppliers. A supplier centric model, where suppliers assume responsibility for invoicing, may also necessitate new technical solutions in order to provide suppliers with the necessary customer data required for invoicing. Again, the Danish reform provides an example through the introduction of a data hub as an important part of their new wholesale model.¹⁴⁸ A data hub can in general terms be described as a joint database and unit for communications and calculations, handling metering data for all customers.¹⁴⁹

The assessment of whether a supplier centric model will contribute to a well-functioning market also needs to take into account whether the chosen model will be supported by the necessary technological solutions to ensure market functioning. In Norway, an elaborate report has been issued concerning efficiency in the retail market for electricity, where future solutions for information and communications technologies are considered.¹⁵⁰ The report discusses the implementation of a communications hub or a data hub as the two main solutions for a future communications platform in the electricity market. As far as we understand, the main differences between the two solutions are, at a general level, that a communications hub provides for data exchange, while a data hub is a more fully integrated service which also includes data relating to e.g. metering points. The report considers the data hub as the better alternative.¹⁵¹ In particular, the report considers that a data hub will support a supplier centric model in a better way than a communications hub.¹⁵² The recommendations in the report have, however, been contested by the Norwegian Data Protection Authority in a consultation response to the hearing of the report, where the Authority has raised data protection concerns with respect to the implementation of a data hub.¹⁵³

In conclusion, it is our view that the subcontractor model provides

¹⁴⁸ See, *inter alia*, op.cit., pp. 9-10.

¹⁴⁹ See op.cit., p. 8.

¹⁵⁰ Statnett, *Effektivt sluttbrukermarked for kraft* (31 May 2012).

¹⁵¹ For a summary of the arguments, see the executive summary of the report Statnett, *Effektivt sluttbrukermarked for kraft* (31 May 2012), pp. 14-15.

¹⁵² Statnett, *Effektivt sluttbrukermarked for kraft* (31 May 2012). P. 132.

¹⁵³ Letter from the Norwegian Data Protection Authority to NVE dated 15 August 2012.

the best basis for ensuring a well-functioning market, although we will not rule out the possibility that a power of attorney model may also be designed in a way that facilitates market functioning. The ability of each supplier centric model to promote a well-functioning market would also need to be evaluated in more detail on the basis of the solutions to be implemented for future information and communication technology in the Nordic electricity market.

8.4 Improved competition

Under the *current models* in the Nordic countries, one obstacle to the improvement of competition which may possibly apply to at least parts of the markets is that entry barriers for suppliers to areas not operated by an affiliated DSO could be too high. Moreover, without considering any specific model, it could from a general theoretical perspective be questioned whether some supplier of last resort schemes in principle may hinder competition among suppliers by facilitating a customer preference for the supplier of last resort as the standard solution. One possible example is provided by the preparatory works for the new Danish model by further reference to a report by the Danish Competition and Consumer Authority from November 2011 concerning the electricity retail market.¹⁵⁴ The latter report emphasizes that there is limited competition in the electricity market, and that regulation limits competition in part because supply undertakings which are vertically integrated with grid companies lack incentives to expand beyond its license area, and in part because it is difficult for independent suppliers to enter the market.¹⁵⁵ One of the advantages of the new Danish model envisaged by the preparatory works is that it will lead to equal treatment of suppliers, entailing that companies in the same company group will no longer be able to share invoicing costs through combined billing.¹⁵⁶

The *subcontractor model* should in our view be well suited to promote

¹⁵⁴ Lovforslag nr. L 176, Folketinget 2011-2012, fremsatt 25. april 2012, Folketingstidende A, p. 6.

¹⁵⁵ *Ibid.*

¹⁵⁶ Op.cit., p. 7.

competition by facilitating equal treatment of suppliers.¹⁵⁷ The recent Statnett report concerning efficiency in the Norwegian electricity retail market also considers that mandatory combined billing will contribute to improved competition since customers will continue with combined billing also in cases where they switch electricity supplier.¹⁵⁸

There could be a theoretical risk under the subcontractor model that DSOs may be incentivized to discriminate between suppliers to the benefit of affiliated suppliers when determining the terms of the grid use contract to be entered into between the DSO and the supplier. In the relationship between DSOs and suppliers, mandatory consumer protection provisions will at the outset not apply. The suppliers, although ultimately liable towards consumers, would not themselves constitute consumers. A DSO could therefore theoretically in its contract with independent supplier A require exclusion of liability clauses or stricter termination clauses than required in its contract with supplier B which belongs to the DSO's company group.¹⁵⁹ Non-justified discrimination would be contrary to the non-discrimination requirements imposed on DSOs in the Electricity Directive, and usually incorporated into national legislation.¹⁶⁰ Nevertheless, prior to introducing a subcontractor model, it should be considered whether such model necessitates further regulation of the contractual terms in the agreement between DSOs and suppliers. In our opinion, more specific legislation governing the relationship between the DSOs and the suppliers will most likely be necessary under this model.

The subcontractor model could entail that suppliers incur a higher risk compared to the current models, since the suppliers will incur a risk for the customers' failure to pay for electricity supply as well as grid services. Consequently, the subcontractor model may possibly entail

¹⁵⁷ The preparatory works to the new Danish model appears to build on similar reasoning. Given that only a limited share of Danish consumers has utilized their rights to switch supplier, providing the suppliers with a more distinguished place in the market than today and ensuring that customers receive one single bill is considered to promote competition, see Lovforslag nr. L 176, Folketinget 2011-2012, fremsatt 25. april 2012, Folketingstidende A, p. 5.

¹⁵⁸ Statnett, *Effektivt sluttbrukermarked for kraft* (31 May 2012), p. 86.

¹⁵⁹ See chapter 6 above.

¹⁶⁰ See, *inter alia*, Article 25(2) of the Electricity Directive.

higher barriers to market entry for suppliers by imposing more significant responsibilities on the suppliers for grid related issues than what is the case both under the present models and under a power of attorney model. This would in particular be the case if larger-scale non-consumer customers were to be included under the mandatory subcontractor model scheme.

The advantages for competition outlined above in facilitating combined billing will at the outset also apply to the *power of attorney model*, since the latter model is also based on combined billing. A theoretical risk of incentivizing discriminatory behavior may also arise under a power of attorney model where the supplier acts as DSO representative, where the terms for the power of attorney relationship between the DSO and the supplier at the outset would be negotiable (unless specifically regulated in legislation, which we assume would be necessary). On the other hand, the power of attorney model may not entail increased barriers to market entry for supplier to the same extent as the subcontractor model, since the power of attorney model does not extend the responsibilities of the suppliers to the same extent.

In conclusion, we assume that both models may be suitable to facilitate equal treatment of suppliers. Increased responsibility for suppliers under the subcontractor model may, however, possibly entail higher entry barriers for new suppliers under the subcontractor model than what is the case under the power of attorney model. The evaluation of whether the subcontractor model or the power of attorney model will be best suited to promote competition will in part rely on the specific design and implementation of each model. It is therefore difficult to provide clearer answers at a general level.

8.5 Improved efficiency

The term “efficiency” may be defined in different ways. In the following, we understand the term broadly as referring to the ratio of output, i.e. electricity supply to customers, to the ratio of input. Measuring efficiency in the Nordic electricity retail market with any degree of precision is

beyond the scope of a purely legal analysis. In the following, we will therefore focus on one issue which we consider important to the objective of improved efficiency and, ultimately, benefits for the customers and society at large: the need to avoid duplication of tasks between the DSOs and the suppliers. As a general point of departure, we assume that any task which is carried out in parallel by both DSOs and suppliers, even though the task could have been carried out with the same results at lower costs by only one actor, may be detrimental to the objective of improved efficiency.

Since *the current models* in the Nordic markets are not parallel in all respects, it is difficult to provide any general view on their effect on efficiency. One general aspect which could be emphasised is that parallel invoicing by both suppliers and DSOs at the outset may be less efficient than combined billing of both electricity and grid costs.

The *subcontractor model* entails that the suppliers are responsible for delivering a bundled product consisting of both electricity and grid services to the customer. At the same time, NordREG has in its definition of a supplier centric model emphasised that some grid related tasks, such as issues related to quality of supply, outages and interruptions, should remain a DSO responsibility where the DSOs should also still be responsible for customer contact. Provided that DSOs shall be responsible for the latter tasks, the customer under the subcontractor model may as a point of departure choose whether to relate to the supplier or the DSO in such cases. Such approach may lead to duplication of administrative functions, where, for example, both suppliers and DSOs may need to establish customer support services in order to handle similar customer inquiries. Such situation may lead to a lack of efficiency which in turn leads to higher electricity prices to take into account higher cost levels to the detriment of customers. Similarly, higher risks incurred by both DSOs and suppliers may also lead to higher electricity price levels as the actors will seek to cover their respective risks. On the other hand, we cannot exclude the possibility that such duplication of tasks may wholly or partly be alleviated through the design of regulatory requirements setting out a clear division of roles and responsibilities between DSOs

and suppliers under a subcontractor model.

The *power of attorney model* may at the outset be less likely to raise similar efficiency concerns to those discussed above under the subcontractor model. On the other hand, certain other efficiency challenges may arise under the power of attorney model. For the model where the supplier acts as agent for the DSO, the DSO would potentially have to relate to a large number of different suppliers from different EU/EEA Member States which would all act as agents for the DSO. Handling a number of different agents from different countries may require increased DSO administration which ultimately may be detrimental to efficiency. As far as we can see, the power of attorney model where the supplier acts as customer agent does not raise the same efficiency concerns. It is, however, difficult to foresee all potential efficiency effects of the different models, and it cannot be ruled out that the latter model raises other efficiency challenges.

In conclusion, we assume that the subcontractor model may possibly lead to a greater lack of efficiency than the power of attorney model. The result will, however, depend on the specific design of each model.

8.6 Compliance with EU regulation and development

EU regulation of the electricity market is analysed in chapter 3 above. It is not possible to provide a precise assessment of compliance with EU law before specific implementing measures for a determined supplier centric model has been defined. Both Treaty rules and specific internal electricity market legislation restrict the Member States' margin of appreciation in designing the specific model. An important obligation in this respect is the requirement for equal treatment of all suppliers established in an EU or EEA Member State.¹⁶¹ Consequently, a basic requirement is that any supplier centric model is designed in such way that it does not discriminate directly or indirectly against a supplier established in another Member State.

Since the main objective of this article is to consider new contract

¹⁶¹ See, *inter alia*, Article 3(4) of the Electricity Directive.

models, we have not considered whether any of the present models raise any questions concerning compliance with EU regulation, such as the requirement for equal treatment of all suppliers.¹⁶² As far as we can see, both *the subcontractor model and the power of attorney model* as they are described in their general form may most likely be implemented in compliance with EU law. The specific design of the model would, however, need to be further considered under EU law, *inter alia* on the basis of the non-discrimination requirements as incorporated in the internal electricity market legislation. It might possibly be argued that the subcontractor model, by imposing more responsibility on the suppliers, may be more liable to qualify as a prohibited restriction under the free movement provisions in TFEU than the power of attorney model. On the other hand, it may not be obvious that one model is more restrictive than the other, and it is difficult to assess the question in full detail before the specific measures of implementation have been designed.

8.7 Neutrality of DSOs

In our view, both the subcontractor model and the power of attorney model should at the outset be better suited to facilitate DSO neutrality than the current models, since the competing suppliers will become the primary contact point for customers. At the same time, we cannot in theory rule out the potential risk under both new models that DSOs may be incentivized to discriminate between suppliers to the benefit of affiliated suppliers when negotiating the terms of the grid service contract or the power of attorney, as the case may be, to be entered into with the supplier. Irrespective of which model is chosen, it will in our opinion be important to consider carefully to what extent the applicable terms between suppliers and DSOs should be regulated in legislation in order to ensure a well-functioning market where neutrality and non-discrimination is guaranteed. In practice, we consider it difficult to envisage a

¹⁶² The Danish Sekretariatet for Energitilsynet has, for example, expressed that the third energy package entails that *grid companies* may no longer send one joint invoice for both electricity and grid services, see Lovforslag nr. L 176, Folketinget 2011-2012, fremsatt 25. april 2012, Folketingstidende A , p. 6.

supplier centric model without quite extensive regulation of the relationship between DSOs and suppliers. This applies equally to both contract models.

We have no clear opinion on whether the subcontractor model or the power of attorney model would be best suited to ensure DSO neutrality. The fact that the subcontractor model may be perceived as a more consistent model, and perhaps also a more transparent model, from a legal perspective may possibly be applied as an argument in favour of considering the subcontractor model as including the best approach to facilitate DSO neutrality.

9 Conclusion

The aim of this article has been to analyse how customer's contracts with suppliers and DSOs could be arranged within a harmonized Nordic end user market based on a supplier centric model with mandatory combined billing.

At the outset, three categories of agreements exist between customers on the one hand and suppliers and DSOs on the other hand in the Nordic electricity retail markets: grid connection agreements entered into between customers and DSOs, grid service agreements entered into between customers and DSOs, and electricity supply agreements entered into between customers and suppliers.

As far as we understand, the issues governed by grid connection terms will remain a DSO responsibility under a supplier centric model. We conclude that grid connection agreements should still be entered into between customers and DSOs under a supplier centric model. The analysis of possible future contract models therefore comprises the rights and obligations normally governed by grid service agreements and electricity supply agreements.

In this article we have analyzed two overall categories of contract models which may be applied for the implementation of a supplier centric model with mandatory combined billing: the *subcontractor model* and the *power of attorney model*. Under the subcontractor model, the customers enter into a contract for both electricity supply and grid use with the supplier. The supplier then enters into a subcontract with the DSO for the provision of grid use, making the DSO a subcontractor. Under the power of attorney model, the customer enters into an electricity supply agreement directly with the supplier. In addition, the customer formally enters into a contract for grid use with the DSO, with the supplier acting as agent under the grid use contract for either the customer or the DSO on the basis of a power of attorney.

From a legal perspective, it is our conclusion that a subcontractor model is better suited than the power of attorney model for the imple-

mentation of a supplier centric model with mandatory combined billing.

The main advantage of the subcontractor model is that it will entitle the customer to envisage the electricity supply, including grid services, as a single service delivered by the supplier. The power of attorney model, on the other hand, may from the customer perspective obscure the formal legal division of functions and responsibilities between the supplier and the DSO, potentially creating the customer expectation that suppliers are legally responsible for all aspects of the service delivered. The power of attorney model may also in some cases lead to potential conflicts of interest for suppliers as well as potentially additional risks for customers and DSOs. Both models also have other advantages and disadvantages as further discussed above in this report.

It is worth noting that Denmark has decided to introduce a wholesale model in the Danish electricity retail market with effect from 2014 which in our view essentially incorporates a specific version of the subcontractor model discussed in this report.

Viewed in relation to the overall objectives of the Nordic electricity retail market, as defined by NordREG, both models have certain advantages and disadvantages. In our view, the subcontractor model is most likely best suited to promote customer friendliness and a well-functioning market. Both models may facilitate improved competition, although the subcontractor model may possibly entail higher entry barriers for new suppliers than the power of attorney model. We also assume that the subcontractor model may potentially lead to a greater lack of efficiency than the power of attorney model, but efficiency gains is difficult to measure with any degree of precision for the benefit of this report. It is our opinion that both the subcontractor model and the power of attorney model may, subject to their specific design, most likely be applied in accordance with the objectives of compliance with EU regulation and development and neutrality of DSOs.

In our view, the subcontractor model would be the most suitable model to explore further with a view to possible implementation in the Nordic countries. The introduction of such model is, however, likely to require a number of amendments to existing national statutory require-

ments, a thorough review and revision of existing national agreements, and it should be carefully scrutinized under EU law.

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