COMMISSION

COMMISSION DECISION

of 7 July 2008

exempting the production of electricity in Austria from the application of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors

(notified under document number C(2008) 3382)

(Only the German text is authentic)

(Text with EEA relevance)

(2008/585/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [1], and in particular Article 30(4) and (6) thereof,

Having regard to the request submitted by the Republic of Austria by e-mail of 10 January 2008,

After consulting the Advisory Committee for Public Contracts,

Whereas:

I. FACTS

(1) On 10 January 2008, Austria transmitted a request pursuant to Article 30(4) of Directive 2004/17/EC to the Commission by e-mail. The Commission requested additional information by e-mail of 4 February 2008, which, following a prolongation of the initial deadline, was transmitted by the Austrian authorities by e-mail of 29 February 2008.

(2) The request submitted by the Republic of Austria concerns production of electricity.

(3) The request is accompanied by a letter from the independent national authority, E-Control (Energie-Control GmbH, the regulator of the Austrian electricity and natural gas markets), which limits itself to a statement that '… no objection exists against an exemption from the application of Public Procurement Law in the field of electricity generation.'

II. LEGAL FRAMEWORK

(4) Article 30 of Directive 2004/17/EC provides that contracts intended to enable the performance of one of the activities to which the Directive applies shall not be subject to the Directive if, in the Member State in which it is carried out, the activity is directly exposed to competition on markets to which access is not restricted. Direct exposure to competition is assessed on the basis of objective criteria, taking account of the specific characteristics of the sector concerned. Access is deemed to be unrestricted if the Member State has implemented and applied the relevant Community legislation opening a given sector or a part of it. This legislation is listed in Annex XI of Directive 2004/17/EC, which, for the electricity sector, refers to Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity [2]. Directive 96/92/EC has been superseded by Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [3], which requires an even higher degree of market opening.

[1] OJ L 134, 30.4.2004, p. 1. Directive as last amended by Commission Regulation (EC) No 213/2008 (OJ L 74, 15.3.2008, p. 1).

[2] OJ L 27, 30.1.1997, p. 20.

[3] OJ L 176, 15.7.2003, p. 37. Directive as last amended by Directive 2008/3/EC (OJ L 17, 22.1.2008, p. 6).

(5) Austria has implemented and applied not only Directive 96/92/EC but also Directive 2003/54/EC, opting for legal and functional unbundling for transmission and distribution networks except for the smallest companies, which are exempted from the requirements of functional unbundling. Consequently, and in accordance with the first subparagraph of Article 30(3), access to the market should be deemed not to be restricted.

(6) Direct exposure to competition should be evaluated on the basis of various indicators, none of which are, per se, decisive. In respect of the markets concerned by this decision, the market share of the main players on a given market constitutes one criterion which should be taken into account. Another criterion is the degree of concentration on those markets. Given the characteristics of the markets concerned, further criteria should also be taken into account such as the functioning of the balancing market, price competition and the degree of customer switching.

(7) This Decision is without prejudice to the application of the rules on competition.

III. **ASSESSMENT**

(8) The request submitted by Austria concerns production of electricity in Austria.

(9) Austria is divided into three balancing zones and internal congestion points are experienced within one of these (the APG balancing zone in which congestion can arise between the Vienna and Graz areas, interconnected through the Steirmarkleitung). The question could therefore be raised whether the geographical market would be smaller than national ([1]). However, according to the available information, in most cases the effects of these internal congestion points are coped with through the application of technical measures such as the appliance of phase shifters to control transmission capacity. In a few cases it may be necessary to use additional power plants to stabilise the network. When these internal congestion points require that producers in the north of Austria reduce their generation capacity, which according to the Austrian authorities takes place only exceptionally, they are paid damages by the network operator. Furthermore, there are no congestion points between this balancing zone and the two other Austrian balancing zones, nor between the APG balancing zone and Germany. The effect of the internal congestion points are therefore, according to the available information, not significant in terms of energy supply and competition. The absence of congestion in the connections with Germany has raised the question whether a geographical market covering these two countries might exist, which the Commission has concluded not to be the case ([2]). Consequently, the territory of the Republic of Austria should be considered to constitute the relevant market for the purposes of evaluating the conditions laid down in Article 30(1) of Directive 2004/17/EC, although it cannot be seen as being isolated from the surrounding countries.

(10) The Communication from the Commission to the Council and the European Parliament: Report on progress in creating the internal gas and electricity market ([3]), hereafter referred to as the '2005 Report', states that 'many national markets display a high degree of concentration of the industry, impeding the development of effective competition' ([4]). Consequently, it considered that, in respect of electricity generation, 'one indicator for the degree of competition on national markets is the total market share of the biggest three producers' ([5]). For 2006, the share of the three largest generators is indicated as 52,2 % in the Commission Staff Working Document of 15 April 2008, SEC(2008) 460 ([6]). However, Austria has substantial exports and imports of electricity, in 2005 of the order of more than 17 500 GWh exports and over 20 000 GWh imports. It is thus a net importer and imported electricity accounted for approximately a quarter ([7]) of its total needs ([8]), in particular for base load power. There is therefore a certain degree of constraint on the pricing behaviour of the leading Austrian producers through imports of electricity from outside the Austrian territory and as a result investment in the electricity sector inside the Austrian territory takes into account other producers in the surrounding countries, in particular in Germany. These factors should therefore be taken as an indication of a certain degree of direct exposure to competition as regards production of electricity.

(11) Furthermore, even though they represent a small part of the total amount of electricity produced and/or consumed in a Member State, the functioning of the balancing markets should also be considered as an additional indicator. In fact, 'any market participant who cannot easily match its generation portfolio to the

([1]) See COM(2006) 851 final of 10.1.2007. Commission Communication: Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors, hereinafter referred to as 'Final Report', Annex B, point A1, 2).

([2]) See the Final Report, Annex B, point A2, 7.

([3]) COM(2005) 568 final of 15.11.2005.

([4]) The 2005 Report, p. 2.

([5]) Cf. the 2005 Report, p. 7.

([6]) Table 6 'Wholesale Market Position 2006', p. 12 of 'Commission Staff Working Document: Accompanying document to the Report on Progress in Creating the Internal Gas and Electricity Market', COM(2008) 192 final of 15.4.2008.

([7]) 23,5 % according to information given by the Austrian authorities.

([8]) i.e. the quantity of electricity needed for internal consumption and exports.

characteristics of its customers may find itself exposed to the difference between the price at which the transmission system operator (hereinafter TSO) will sell imbalance energy, and the price at which it will buy back excess production. These prices may either be directly imposed by the regulator on the TSO; or alternatively a market based mechanism will be used in which the price is determined by bids from other producers to regulate their production upwards or downwards […]. A key difficulty for small market participants arises where there is the risk of a large spread between the buying price from the TSO and the selling price. This occurs in a number of Member States and is likely to be detrimental to the development of competition. A high spread may be indicative of an insufficient level of competition in the balancing market which may be dominated by only one or two main generators' ([1]). The Austrian balancing market and its main characteristics — in particular its market based pricing and a relatively low spread ([2]) between the buying price from the TSO and the selling price — are such that it should be taken as an additional indicator that electricity production is directly exposed to competition.

(12) Given the characteristics of the product concerned (electricity) and the scarcity or unavailability of suitable substitutable products or services, price competition and price formation assume greater importance when assessing the competitive state of the electricity markets. In respect of large industrial (end-)users, who are most liable to procure their electricity directly from suppliers which are at the same time generators, the number of customers switching supplier may serve as an indicator of price competition and, thus, indirectly, 'a natural indicator of the effectiveness of competition. If few customers are switching, there is likely to be a problem with the functioning of the market, even if the benefits from the possibility of renegotiating with the historical supplier should not be ignored' ([3]). Furthermore, 'the existence of regulated end-user prices is clearly a key determinant of customer behaviour […]. Although the retaining of controls may be justified in a period of transition, these will increasingly cause distortions as the need for investment approaches' ([4]).

(13) According to the latest available information, switching rates amount to 41,5 % for large and very large industrial customers in Austria ([5]). Furthermore, there is no end-user price control ([6]) in Austria, that is, prices are set by the economic operators themselves and do not have to be approved by any authority prior to their application. The situation in Austria is therefore satisfactory as far as switching of large and very large industrial (end-)users and end-user price control are concerned and should be taken as an indicator of direct exposure to competition.

IV. **CONCLUSIONS**

(14) In view of the factors examined in recitals 9 to 13, the condition of direct exposure to competition laid down in Article 30(1) of Directive 2004/17/EC should be considered to be met in respect of production of electricity in Austria.

(15) Furthermore, since the condition of unrestricted access to the market is deemed to be met, Directive 2004/17/EC should not apply when contracting entities award contracts intended to enable electricity generation to be carried out in Austria nor when they organise design contests for the pursuit of such an activity in Austria.

(16) This Decision is based on the legal and factual situation as of January to February 2008 as it appears from the information submitted by the Republic of Austria, the 2005 Report and the Technical Annex thereto, the 2007 Communication and the 2007 Staff Document as well as the Final Report. It may be revised, should significant changes in the legal or factual situation mean that the conditions for the applicability of Article 30(1) of Directive 2004/17/EC are no longer met,

HAS ADOPTED THIS DECISION:

Article 1

Directive 2004/17/EC shall not apply to contracts awarded by contracting entities and intended to enable them to carry out electricity generation in Austria.

([1]) Commission Staff Working Document, Technical Annex to the 2005 Report, SEC(2005) 1448, hereinafter referred to as 'Technical Annex', pp. 67-68.

([2]) According to the Final Report, paragraph 993, Table 52, the Austrian balancing market operates with a spread of 27, which places it in the lower half as spread in balancing markets in the EU ranges between 0 and 79. This analysis looks at the effects on electricity generation of the workings of the balancing market and not at the degree of competition within the balancing market itself. For this purpose it is therefore unimportant whether a low spread is caused by competition or a price cap imposed by the regulator, just as the elevated concentration on the balancing market is without pertinence in this analysis.

([3]) 2005 Report, p. 9.

([4]) Technical Annex, p. 17.

([5]) See the document entitled 'Austria — Internal Market Fact Sheet', published at http://ec.europa.eu/energy/energy_policy/doc/factsheets/market/market_at_en.pdf, using information from Energie-Control GmbH, 2007.

([6]) Technical Annex p. 107.

Article 2

This Decision is addressed to the Republic of Austria.

Done at Brussels, 7 July 2008.

For the Commission
Charlie McCREEVY
Member of the Commission