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COMMISSION DECISION

of 14 July 2010

exempting the production and wholesale of electricity in Italy's Macro-zone North and the retail of electricity to end customers connected to the medium, high and very high voltage grid in Italy, 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 C(2010) 4740)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2010/403/EU)

(OJ L 186, 20.7.2010, p. 44)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

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(5) and (6) thereof,

Having regard to the request submitted by the Compagnia Valdostana delle Acque SpA — Compagnie valdôtaine des eaux SpA (hereinafter 'CVA') by e-mail of 15 February 2010,

After consulting the Advisory Committee for Public Contracts,

Whereas:

I. FACTS

(1) On 15 February 2010, CVA transmitted a request pursuant to Article 30(5) of Directive 2004/17/EC to the Commission by e-mail. The Commission requested additional information of the Italian Authorities by e-mail of 15 April 2010, and of CVA by e-mail of 15 April 2010. Additional information was transmitted by the Italian authorities by e-mail of 10 May 2010 and of 20 May 2010 and, following a prolongation of the initial deadline, by CVA on 7 May 2010.

(2) The request submitted by CVA, a public undertaking within the meaning of Directive 2004/17/EC, concerns the following activities, as described in the request:

(a) production and wholesale of electricity, in the entire territory of the Italian Republic;

([1]) OJ L 134, 30.4.2004, p. 1.

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(b) in the alternative, the production and wholesale of electricity in the territory of the Northern Geographical Zone (hereinafter 'Macro-zone North' ([1])); and

(c) retail sale of electricity to the final customers on the free electricity market in the entire territory of the Italian Republic.

II. LEGAL FRAMEWORK

(3) 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]).

(4) Italy 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 on the entire territory of the Italian Republic.

(5) 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

([1]) This includes the Zone Nord as well as four smaller zones (Ene, Enw, Turbigo and Monfalcone), as referred to in Annex B to Commission Communication of 10 January 2007'Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report)' (COM(2006) 851 final, 'Final Report').

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

([3]) OJ L 176, 15.7.2003, p. 37. It is to be noted that Directive 2003/54/EC has been replaced by 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 L 211, 14.8.2009, p. 55), which requires an even higher degree of market opening than the previous two directives. However, as the deadline for its implementation has not yet expired, reference will continue to be made to the legal framework introduced by Directive 2003/54/EC.

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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.

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

III. ASSESSMENT

(7) Based on Commission precedents ([1]), the following relevant product markets could be distinguished in the electricity sector: (i) generation and wholesale supply; (ii) transmission; (iii) distribution and (iv) retail supply. Consequently, CVA's request should be analysed independently in respect of production and wholesale supply on the one hand and retail on the other.

Production and wholesale supply of electricity

(8) As recalled in recital 2 above, the request submitted by CVA concerns production and wholesale of electricity, in the entire territory of the Italian Republic, or alternatively in the Macro-zone North.

(9) According to the available information ([2]), the national territory of Italy should, due to congestions on links between different zones whose prices are almost perfectly correlated, be considered to be constituted by four regional geographical markets as far as the production and wholesale supply of electricity is concerned: Macro-zone North, Macro-zone Centre South ([3]), Macro-zone Sicily ([4]) and Sardinia. The Italian Authorities have confirmed that the delimitation of Macro-zone North remains valid as a relevant market; adding, however, that changes are ongoing so that the delimitation between the remainder of the macro-zones is not clear for the time being, pending extensive inquiries, a definitive evaluation of the state of competition on these geographical markets is therefore currently not possible. On the basis of the above, and considering also that, incidentally, the power plants of CVA are all located in the Macro-zone North, the present Decision will, for the purposes of evaluating the conditions laid down in Article 30(1) of Directive 2004/17/EC, limit itself to an examination of the competitive situation existing within the territory of Macro-zone North in respect of production and wholesale supply of electricity. Although Macro-zone North forms a relevant market on its own, it can, however, not be seen as being completely isolated from the surrounding countries and the other regions.

(10) As it results from a constant practice ([5]) in respect of Commission Decisions pursuant to Article 30, the Commission 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'. According to the Italian Authorities, for 2009, the share of the three largest generators in Macro-zone North is indicated as 49,7 %. This level of concentration, encompassing the total market share of the largest three generators, is lower than the level (52,2 %) referred to in Decision 2008/585/EC in respect of Austria, as

([1]) MERGER COMP M - 4110 E.ON – Endesa, p. 3.
([2]) See Final Report, Annex B, point A1, 2.
([3]) This includes the Zones Centro Nord, Piombino, Centro Sud, Sud, Rossano, Brindisi and Calabria.
([4]) This includes the zones Sicilia, Priolo and Calabria.
([5]) See Commission Decisions 2009/47/EC (OJ L 19, 23.1.2009, p. 57); 2008/585/EC (OJ L 188, 16.7.2008, p. 28); 2008/741/EC (OJ L 251, 19.9.2008, p. 35); 2007/141/EC (OJ L 62, 1.3.2007, p. 23); 2007/706/EC (OJ L 287, 1.11.2007, p. 18); 2006/211/EC (OJ L 76, 15.3.2006, p. 6) and 2006/422/EC (OJ L 168, 21.6.2006, p. 33).

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well as being lower than the level (58 % of gross production) referred to in Decision 2008/741/EC in the case of Poland, and much lower than the respective levels referred to in Decisions 2006/422/EC and 2007/706/EC concerning, respectively Finland (73,6 %) and Sweden (86,7 %). It is however noted that the level is higher than the corresponding percentage, 39, to which Decisions 2006/211/EC and 2007/141/EC refer to for the UK. Nevertheless this level is considered satisfactorily low, and therefore could be taken as an indication of a certain degree of direct exposure to competition as regards production and wholesale supply of electricity in the Macro-zone North.

(11) Moreover, Italy has also substantial imports of electricity, in 2008 of the order of more than 42 997 GWh. Italy is a net importer and imported electricity accounting for approximately 13,43 % of its total needs ([1]). As confirmed by the Italian Authorities ([2]), the imports have a pro-competitive effect, notably in the Macro-zone North. Although this effect is conditioned by the technical limitation of the interconnection with other countries, it is expected that, in view of the new legislation in place ([3]), the situation would improve further. There is therefore a certain degree of constraint on the pricing behaviour of the leading producers in Macro-zone North through imports of electricity from outside the Italian territory. These factors should therefore be taken as an indication of a certain degree of direct exposure to competition from other EU Member States, as regards production and wholesale supply of electricity in Macro-zone North.

(12) The Commission Communication of 11 March 2010‘Report on progress in creating the internal gas and electricity market’ ([4]) revealed that the three biggest generators still control more than 75 % of the generation capacity in 14 Member States. However, the report places the Italian electricity market in the category of ‘moderately concentrated’ markets ([5]), whereby the Herfindahl-Hirchman Index (HHI) has lower values compared to the other categories. Given that the competition pressure is felt even more in the Macro-zone North than in the rest of the zones, the degree of concentration can be considered as an indication of direct exposure to competition of electricity production and wholesale in the Macro-zone North.

(13) 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 mechanisms should also be considered as an additional indicator. According to the available information, the workings of the balancing mechanism — in particular the markets based pricing and the well-developed intra-day market — are such that it does not constitute an obstacle to electricity production being subject to direct exposure to competition.

([1]) i.e. the quantity of electricity needed for internal consumption and exports.
([2]) Letter 0018212 of 10 May 2010 of the Italian Authority for Electricity and Gas.
([3]) Law No 99/2009 of 23 July 2009.
([4]) SEC(2010) 251, hereinafter ‘2010 Communication’.
([5]) Table 3.1 of the Technical Annex (p. 12) to 2010 Communication.

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Retail supply of electricity

(14) As regards retail supply, a further distinction of the relevant product market could be made between: (A) retail supply to industrial customers connected to the medium, high and very high voltage grid and (B) retail supply to smaller industrial, commercial and domestic customers connected to the low-voltage grid. These markets shall be analysed further separately.

Retail supply of electricity to end customers connected to the medium, high and very high voltage grid

(15) As confirmed by the Italian Authorities, the market for retail supply of electricity to end customers connected to the medium, high and very high voltage grid is national in scope.

(16) According to the available information ([1]), the aggregate market shares of the three largest retailers of electricity to end customers connected to the medium, high and very high voltage grid amounts to 43,89 %, which is a satisfactorily low level ([2]) and it should be taken as an indication of direct exposure to competition.

(17) 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. The number of customers switching supplier may therefore 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]).

(18) According to the latest available information ([4]), switching rates by eligible point in 2008 amount to 32,50 % for large industrial customers and to 32,80 % for medium sized industry in Italy. While lower than the degree of switching in e.g. Austria, where the degree of switching for large and very large industrial customers amounted to 41,5 % ([5]), the degree of switching in

([1]) Annual Report on the State of Services and the Regulatory Activities of Italian Authority for electricity and Gas (AEEG) of 31 March 2009 (hereinafter the '2009 Annual Report of AEEG'), p. 76.

([2]) It corresponds very closely to the level of concentration, 43 %, found on the Swedish retail market (see recital 14 of Decision 2007/706/EC).

([3]) Commission Communication of 15 November 2005'Report on progress in creating the internal gas and electricity market' (COM(2005) 568 final, hereinafter '2005 Communication'), p. 9.

([4]) Table 2.2 of Technical Annex to 2010 Communication.

([5]) See recital 13 of Decision 2008/585/EC.

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Italy is still considerable, involving nearly one third of the large and medium sized industrial customers. Furthermore, the retail market to end customers connected to the medium, high and very high voltage grid is not subject to regulated prices. The situation in Italy is therefore satisfactory as far as switching and end-user price control are concerned and should be taken as an indicator of direct exposure to competition.

Retail supply of electricity to end customers connected to the low voltage grid

(19) As regards the relevant geographical market for retail supply, this has traditionally been considered to be national in scope. In its application, CVA uses the national market as relevant market for retail supply of electricity.

(20) Based on the assumption that the geographical market is national in scope, and on the information currently available ([1]), it appears that the level of market concentration for the retail supply of electricity on the Italian market is very high. The cumulated market shares of the biggest three retailers to customers connected to the low voltage grid is of 79,44 %, of which the largest company holds a share of 71,11 % on its own. A constant jurisprudence should also be recalled in this context ([2]), according to which 'very large market shares are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position. That is the situation when there is a market share of 50 %'.

(21) Moreover, the retail market in Italy is subdivided into three subcategories, out of which the first two are subject to regulated prices:

(a) an enhanced protection service for domestic customers and small companies (with less than 50 employees and a turnover of no more than EUR 10 million) connected to the low voltage grid, and that have not signed a contract for purchases in the free market. Operation of these service is reserved for the company Acquirente Unico SpA (hereinafter the 'Single buyer');

(b) a safeguarded service for all customers not eligible for the enhanced protection service and that have no contract for purchases on the free market. This service is delivered by providers selected by the Single buyer through a competitive tender; and

(c) the free market, namely the remainder of the retail market.

(22) These markets should, however, not be considered as independent, relevant markets, for the purpose of the present decision since customers may switch from one subcategory to another and since the prices within all three subcategories are market-based ([3]). However, according to the 2009 Annual Report of AEEG, the so-called 'captive market' which includes the 'enhanced protection service' and the 'safeguarded service', accounts for about 36 % of the entire retail market. Moreover, according to the same report, the enhanced protection service is characterised by a very strong presence (84,3 %) of one specific

([1]) 2009 Annual Report of AEEG.

([2]) See point 328 of the judgment of the Court of First Instance of 28 February 2002 in Case T-395/94 *Atlantic Container Line AB and Others* v *Commission*, [2002] ECR II-875.

([3]) In fact, the regulated prices are set on the basis of prices that are found on the free market.

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supplier, who is also active in the free market. According to the Italian authorities, the costs of switching are perceived by customers to be high and the perceived benefits of switching are seen as low. This, combined with low prices under the enhanced protection service renders it very difficult for new operators to obtain a sufficient customer-base within this subcategory. This basically results in a competitive advantage for operators under the enhanced protection service which operate also on the free market, given that customers who wish to switch from an enhanced protection service to the free market or vice versa often do so without changing supplier.

(23) However, based on the information received from the relevant Italian authorities ([1]), it can be concluded for the purposes of the present Decision that the geographical market for retail sale of electricity in Italy is not national in scope, as traditionally considered and as assumed by the applicant, but is local in scope, with a territory most often not exceeding the municipal level.

(24) In the absence of information on the degree of competition on each of the thus defined local markets for retail supply of electricity to end users connected to the low voltage grid and considering the above-mentioned doubts about the degree of competition in the retail market to customers connected to low voltage grid, seen globally at national level, as discussed in recitals 19 to 22, it is not possible to conclude that the conditions for granting an exemption under Article 30(1) of Directive 2004/17/EC to retail supply of electricity to end customers connected to the low voltage grid in Italy, are met.

(25) Directive 2004/17/EC therefore continues to apply when contracting entities award contracts intended to enable the retail supply of electricity to end customers connected to low voltage grid to be carried out in Italy and when they organise design contests for the pursuit of such an activity in Italy.

IV. **CONCLUSIONS**

(26) In respect of production and wholesale of electricity in the Macro-zone North, the situation can thus be summarised as follows: the aggregate market shares of the three biggest generators is moderately low, and the substantial amount of electricity imported is having a pro-competitive effect on this zone. As set out in recital 13, the functioning of the balancing mechanism does not constitute an obstacle to direct exposure to competition of the electricity generation market. Consequently it can be considered that all the above factors are indications of direct exposure to competition on the Macro-zone North.

(27) In view of the factors examined in recitals 8 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 and wholesale supply of electricity in the Macro-zone North.

(28) 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 production and wholesale supply to be carried out in Macro-zone North nor when they organise design contests for the pursuit of such an activity in that geographical area.

([1]) Letter 0032953 of 20 May 2010 of the Italian Competition Authority.

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(29) In respect of retail sale of electricity to end customers connected to the medium, high and very high voltage grid, in Italy, the situation can thus be summarised as follows: the aggregate market shares of the three biggest retail companies is low, and the degree of switching by withdrawal point is satisfactory and there is no end-user price control. These conclusions are also in line with the opinion of the relevant Italian Authorities whereby this market has been exposed to competition for several years and the resulting degree of competition is satisfactory.

(30) In view of the factors examined in recitals 15 to 18, 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 retail supply of electricity to end customers connected to the medium, high and very high voltage grid on the entire territory of the Italian Republic.

(31) 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 retail supply of electricity to end customers connected to the medium, high and very high voltage grid in Italy nor when they organise design contests for the pursuit of such an activity in that geographical area.

(32) In view of the factors examined in recitals 19 to 25 and given the doubts about the existence of sufficient competition at the national level in respect of retail supply to end customers connected to the low voltage grid and moreover in the absence of detailed information on each and every relevant local market, as defined by the Italian authorities, it is not possible to conclude that the conditions for granting an exemption under Article 30(1) of Directive 2004/17/EC for the retail supply of electricity to end customers connected to low voltage grid in Italy, are met. Consequently, Directive 2004/17/EC continues to apply when contracting entities award contracts intended to enable the retail supply of electricity to end customers connected to low voltage grid, to be carried out in Italy and when they organise design contests for the pursuit of such an activity in Italy. As the statistical obligations pursuant to Article 67 will continue to apply, it may be necessary to ensure that the contracting entities concerned take appropriate measures such as managerial and/or accounting separation so as to be able to report correctly on procurement made for the pursuit of the relevant activities which have not been exempted pursuant to the present Decision.

(33) Also, it is recalled that contracts covering several activities shall be treated in accordance with Article 9 of Directive 2004/17/EC. In the present context this means that when a contracting entity is engaged in ‘mixed’ procurement, that is procurement used to support the performance of both activities exempted from the application of Directive 2004/17/EC and activities not exempted, regard shall be had to the activities for which the

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contract is principally intended. In the event of such mixed procurement, where the purpose is principally to support the retail of electricity to end customers connected to the low voltage grid, the provision of Directive 2004/17/EC shall apply. If it is objectively impossible to determine for which activity the contract is principally intended, the contract shall be awarded in accordance with the rules referred to in paragraphs (2) and (3) of Article 9.

(34) This Decision is based on the legal and factual situation as of February to May 2010 as it appears from the information submitted by the Italian Republic, CVA, the 2005 and 2010 Communications and their Technical annexes and the 2007 Staff Document, the Final Report and the 2009 Annual Report of AEEG. 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 for wholesale supply of electricity in the Macro-zone North and retail supply to end customers connected to medium, high and very high voltage grid 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 the following activities to be carried out:

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(a) production and wholesale of electricity produced from conventional sources to be carried out in the macro-zone north of Italy;

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(b) retail supply of electricity to end customers connected to the medium, high and very high voltage grid in the entire territory of the Italian Republic.

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Directive 2004/17/EC shall apply to contracts awarded by contracting entities and intended to enable production and wholesale of electricity produced from renewable sources to be carried out in the macro-zone north of Italy.

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Article 2

This Decision is addressed to the Italian Republic.