COMMISSION IMPLEMENTING DECISION

of 26 September 2012

exempting the production and wholesale of electricity produced from conventional sources in macro-zone north and macro-zone south 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 sector and amending Commission Decision 2010/403/EU

(notified under document C(2012) 6665)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2012/539/EU)

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 EniPower SpA (hereinafter referred to as EniPower) by e-mail of 29 March 2012,

Whereas:

I. FACTS

(1) On 29 March 2012, EniPower transmitted a request pursuant to Article 30(5) of Directive 2004/17/EC to the Commission by e-mail. The Commission informed the Italian authorities of that request on 11 April 2012 and requested additional information from the Italian authorities by e-mail of 25 May and 25 July 2012, and from EniPower by e-mail of 25 May 2012. Additional information was transmitted by the Italian authorities by e-mails of 20 June 2012, 21 June 2012 and of 8 August 2012 and by EniPower on 20 June 2012.

(2) The request submitted by EniPower concerns the production and wholesale of electricity within the territory of Italy, with the exception of Sardinia and Sicily.

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 that Directive applies shall not be subject to that 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 was 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 ([4]).

(4) Italy has implemented and applied not only Directive 96/92/EC but also Directive 2003/54/EC, and Directive 2009/72/EC. 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 Italy.

(5) Direct exposure to competition should be evaluated on the basis of various indicators, none of which are, necessarily, per se, decisive. In respect of the markets concerned by this Decision, the cumulated 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.

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

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

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

([3]) OJ L 176, 15.7.2003, p. 37.

([4]) OJ L 211, 14.8.2009, p. 55.

III. ASSESSMENT

(7) In Italy, wholesale of electricity, is carried out on exchanges, through spot contracts or forward contracts, or bilaterally.

(8) The spot market is composed of the day-ahead market (*Mercato del Giorno Prima* — MGP) where electricity is traded for the following day, and intra-day market (*Mercato Infragiornaliero*) in which operators can adjust their sales and purchases with respect to trading on the day-ahead market and the ancillary services market (*Mercato dei Servizi di Dispacciamento*) in which Terna — the Italian Transmission System Operator procures the resources needed to manage and control the system in order to resolve intra-zone congestions, create the energy reserve and balance the system in real time.

(9) The forward contracts are negotiated on regulated markets: the electricity forward market (*Mercato a Termine* — MTE) and the Italian energy derivatives exchange (IDEX) and/or on over the counter platforms (OTC). The Italian energy derivatives exchange is a platform dedicated to the trading of instruments based on the average purchase price (single national price).

(10) According to the latest information available, natural gas is the most important fuel in the Italian electricity mix providing more than half of the electricity produced. Renewables come second and represented 28 % of the electricity produced in 2011, of which 55 % originated from hydropower, 12 % from wind power, 13 % from solar power, 13 % from bioenergy and 7 % from geothermic ([1]).

Market definition

Product market definition

(11) According to Commission precedents ([2]), the following relevant product markets can be distinguished in the electricity sector: (i) generation and wholesale supply; (ii) transmission; (iii) distribution; and (iv) retail supply. While some of these markets may be further subdivided, to date previous Commission practice ([3]) rejected a distinction between an electricity generation market and a wholesale supply market since generation as such is only a first step in the value chain, while electricity volumes generated are marketed via the wholesale market.

(12) The request by EniPower pertains to electricity generation and wholesale. According to the assessment of the Italian Antitrust Authority (*Autorita Garante della Concorenza e del mercato*) and the Italian Authority for Electricity and Gas (*Autorita per l'energia elettrica e il gas*), the wholesale market is defined as 'the contracts for the purchase and sale of electricity stipulated by operators that possess primary sources of energy (national generated and imported energy) on the one hand and large industrial customers (Acquirente Unico and wholesalers) on the other'.

(13) The applicant submits that for the purposes of its request, the analysis of the wholesale market can be limited to the analysis of the day-ahead market, since that market also includes the forward contracts which, in any case, must be programmed in the day-ahead market once the time of the physical delivery has been reached. For this reason, the volumes traded through forward contracts that are being physically delivered contribute to price formation in the day-ahead market. The applicant argues that the intra-day market is a complementary session of the day-ahead market and that the quantities traded on the intra-day market are only marginal compared to those traded on the day-ahead market. The ancillary services market is organised in a fundamentally different way from the day-ahead market and the intra-day market, as in this market Terna is the central counterpart and procures the resources necessary for the safe management and control of the national system. The applicant's assessment is endorsed by the Italian Antitrust Authority ([4]) and by the Italian Authority for Electricity and Gas ([5]).

(14) The most recent Commission decision under Article 30 of Directive 2004/17/EC, Commission Implementing Decision 2012/218/EU of 24 April 2012 exempting the production and wholesale of electricity produced from conventional sources in Germany 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 ([6]), distinguished between two product markets in respect of production and wholesale of electricity, namely the market for electricity produced from conventional sources and the market for electricity produced from

([1]) According to the letter of the Italian Antitrust Authority of 21.6.2012, p. 3.
([2]) Case COMP/M.4110 — E.ON/Endesa of 25.4.2006, paragraph 10, p. 3.
([3]) Case COMP/M.3696 — E.ON/MOL of 21.12.2005, paragraph 223, Case COMP/M.5467 — RWE/Essent of 23.6.2009, paragraph 23.
([4]) According to the letter of the Italian Antitrust Authority of 21.6.2012, p. 2.
([5]) According to letter of the Italian Authority for Electricity and Gas of 20.6.2012, p. 3.
([6]) OJ L 114, 26.4.2012, p. 21.

renewable sources ([1]). Such distinction was made due to the special regime applicable to the energy produced from renewable sources ([2]) in Germany.

(15) In accordance with Implementing Decision 2012/218/EU, it should be examined whether the Italian market for production and wholesale of electricity should be split into two separate product markets. For that purpose, the applicant and the Italian authorities were invited to express their opinion on that matter.

(16) In Italy the production of electricity from renewable sources benefits from special conditions ([3]) such as:

(a) a simplified procedure for obtaining an authorisation from the regions or the local authorities, for installations powered by renewable sources;

(b) fixed-rate connection charges and priority treatment;

(c) incentive remuneration systems;

(d) dispatching priority in the event of equivalent offers in the day-ahead market.

(17) The incentive systems referred to in point (c) of recital 16 can be applied through one of the following instruments: the CIP6 ([4]) mechanism (*Meccanismo CIP6*), omni-comprehensive tariff (*Tariffe Omnicomprensive* — FIT), green certificates (*Certificati Verdi* — CV) and energy accounts (*Conto Energia* — CE).

(a) The CIP6 mechanism consists in a statutory feed-in tariff for electricity produced from renewable sources and from sources 'similar to renewables', notably electricity produced in combined heat and power generation plants. Out of 3,5 GWh covered by CIP6 mechanism in 2011, 1GWh is represented by renewables ([5]). This mechanism covers the operational costs, the capital cost, the fuel cost and also includes an incentive component applicable in the first eight years of life. This system is being phased out ([6]).

(b) Omni-comprehensive tariff (FIT mechanism hereinafter) applies to plants with installed capacity of less than 200 kW for wind farms and less than 1 MW for other types of renewables. This system is guaranteed for 15 years, is voluntary and alternative to the system of green certificates. The omni-comprehensive tariff includes the price of the energy and an incentive.

(c) The mechanism of green certificates (CV mechanism hereinafter) is based on the imposition of mandatory quotas for producers and importers of electricity produced from conventional sources, which shall submit yearly a number of green certificates. The green certificates are then allocated to renewable energy installations depending on the source of the energy produced and can be exchanged in a separate market, distinct from that for energy. Renewable electricity producers receive revenue from the sale of the renewable energy and, as an incentive, revenue from the sale of the green certificates. The value of the green certificates is determined by the relationship between demand (by the producers and importers of electricity from conventional sources) and supply (by producers of electricity from renewable sources). Green certificates schemes apply to installations above 1 MW (except photovoltaic installations) and for wind power above 200 kW.

(d) The energy accounts (CE mechanism hereinafter) system incentivises the production of electricity from photovoltaic sources and represents a feed in premium whereby the producers receive the market price on the day-ahead market and an incentive fee. This incentive system is guaranteed for 20 years.

(18) According to the latest information ([7]), 45 % of the electricity produced from renewable sources (which represent around 12,6 % of the total electricity traded on the day-ahead market in 2011) benefited from a regulated price and is independent of the supply and demand of electricity. The remaining 55 % of the electricity produced from renewable sources is traded directly through

([1]) In that case defined as being subject to the German Renewable Energy Act (*Gesetz für den Vorrang Erneuerbarer Energien*).

([2]) The situation in Germany is as follows: renewable electricity benefits from priority connection to the grid, and it has priority over conventional electricity for grid feed-in. Since renewable electricity is generally produced at costs which are higher than the market price, a system was established by which such electricity receives particular support. Renewable electricity installation operators have the right to receive a statutory rate of remuneration from the transmission grid operators for a period of 20 years plus the commissioning year. This remuneration provides for coverage of their costs and is therefore higher than the market price. They can therefore feed the electricity they produce into the grid irrespective of the price on the exchanges.

([3]) According to the letter of the Italian Authority for Electricity and Gas of 20.6.2012, p. 2.

([4]) CIP is the acronym for *Comitato Interministeriale Prezzi* which is the institution which introduced this mechanism in 1992.

([5]) According to the letter of the Italian Authority for Electricity and Gas, of 8.8.2012, p. 7.

([6]) It is no longer possible to access this mechanism as it was superseded by the introduction of the Legislative Decree 79/1999 on the Green Certificate System, however, plants previously granted access will continue to benefit.

([7]) According to the letter of the Italian Antitrust Authority of 21.6.2012, p. 3.

bilateral contracts or on the exchanges, at the market price but can still receive incentives under the form of green certificates or energy accounts.

(19) Nevertheless, as the Italian authorities point out [1], it is noted that some of the electricity even though generated from renewable sources does not receive any incentive in terms of remuneration and does not benefit from dispatching priority [2]. Such electricity is sold on the day-ahead market at the market prices, similarly to electricity produced from conventional sources.

(20) Since, generally electricity produced from all renewable sources has feed-in priority, the production of such electricity can be regarded as being independent of demand [3].

(21) In respect of electricity subject to the CIP6 mechanism and to the FIT mechanism, the production and feed-in are also independent of the prices as the operators are entitled to a statutory payment. In respect of electricity subject to CV and CE mechanisms, the electricity is sold on the wholesale market at a price that depends on the day-ahead market, but receives an incentive over and above the price at which the electricity was sold on the market.

(22) Moreover, the sale of the electricity generated from renewable sources which are subject to the CIP6 and FIT mechanisms mostly takes place via the energy services operator [4] (*Gestore dei Servizi Energetici* — hereinafter GSE), which withdraws the electricity and then sells it, in the second stage, on the wholesale market. The market therefore evidently differs also from a demand-side perspective from the wholesale market for conventional electricity.

(23) The Italian Antitrust Authority submits that the market for fully subsidized renewable electricity (under CIP6 and FIT mechanism), which represents only around 12 % of the power produced in Italy, is smaller than the German renewable electricity market (14 % of the total electricity market); and that it is not considered appropriate to divide the Italian product market for electricity as in the German case. The Commission is however of the opinion that the *de minimis* principle cannot be invoked in this case. Even if only 12 % of the total market is subject to guaranteed price, the renewable electricity which is sold on the market generally benefits from priority connection and priority feed in and part of the energy producers also benefit from support other than guaranteed price (e.g. CE and/or CV mechanisms).

(24) The Italian Authority for Electricity and Gas considers that the electricity produced from renewable sources is part of the same market as the market for electricity produced from conventional sources as renewable electricity exerts competitive pressure on conventional electricity.

(25) The Commission acknowledges that the electricity generated through renewable sources exerts a competitive pressure on the electricity produced from conventional sources. However, it results from the factual elements set out above, in particular in recitals 19 to 22, that the opposite does not hold true. Moreover, neither the applicant, nor the Italian authorities have adduced any convincing evidence in support of a finding that conventional electricity exerts a competitive pressure on electricity generated from renewable sources. The latter can therefore not be included in the same market as conventional electricity.

(26) In view of the factors examined under recitals 11 to 25, for the purposes of assessing whether the conditions laid down in Article 30(1) of Directive 2004/17/EC are fulfilled, and without prejudice to the rules on competition law, two relevant product markets are hereby defined. The first product market is defined as the market for production and wholesale of electricity generated from conventional sources. For the purposes of this Decision, electricity referred to in recital 19 which does not benefit from remuneration under any of the applicable incentive systems and does not have dispatching priority, although is generated through renewable sources, is considered part of the product market for production and wholesale of electricity generated from conventional sources. The second product market is defined as the market for production and wholesale of electricity generated from renewable sources. For the purposes of this Decision, electricity generated from sources 'similar to renewable', subject to CIP6 mechanism referred to in point (a) of recital 17, is considered part of the product market for production and wholesale of electricity generated from renewable sources.

[1] According to the letter of the Italian Antitrust Authority of 8.8.2012, p. 2.

[2] This is mostly the case for electricity produced by large hydropower plants.

[3] Implementing Decision 2012/218/EU, recital 18.

[4] GSE is the State-owned company which promotes and supports renewable energy sources in Italy. GSE is the parent company of three subsidiaries: single buyer (*Acquirente Unico* — AU), energy market operator (*Gestore dei Mercati Energetici* — GME), and research on the energetic system (*Ricerca sul Sistema Energetico* — RSE), which is active in research.

Geographical market definition

Production and wholesale of electricity from conventional sources

(27) Previous Commission practice mostly defined the electricity markets as being national in scope ([1]) or even smaller ([2]). Occasionally, it has left open the possibility of wider than national markets ([3]).

(28) The electricity market in Italy was subject to another procedure under Article 30 of Directive 2004/17/EC, which resulted in Commission Decision 2010/403/EU 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 ([4]). The application was submitted by *Compagnia Valdostana delle Acque* and concerned production and wholesale of electricity, in the entire territory of Italy, or alternatively in the macro-zone north. For the purposes of assessing whether the conditions laid down in Article 30(1) of Directive 2004/17/EC were fulfilled, the Commission limited its examination to the competitive situation existing within the territory of macro-zone north in respect of the production and wholesale supply of electricity. At the time, the Italian authorities confirmed that the delimitation of macro-zone north was valid as a relevant market; adding, however, that 'changes are ongoing so that the delimitation between the remainder of the macro zones was 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'.

(29) The applicant submits that the geographical market should be redefined following significant changes both in the transmission grid configuration and the structure of the supply and demand. More precisely, over the last three years, on the supply side, there has been a significant entry of new combined cycle capacity in the northern and southern regions of the country, of high efficiency coal-fired capacity in central Italy and of renewables in the southern areas and in Sardinia and Sicilia. On the demand side, there has been a falling demand in all economic sectors due to the economic crisis, from 2008 onwards. Consequently, the applicant defines the relevant geographical market for the production and wholesale of electricity, as the territory of the Italy with the exception of Sardinia and Sicily (hereinafter referred to as continental Italy).

(30) In 2005, the Authority for Electricity and Gas and the Antitrust Authority performed an in-depth analysis of the geographical market for electricity in Italy, and the results were presented in the study 'Fact-finding investigation on the state of liberalisation in the electrical energy sector' ('*Indagine conoscitiva sullo stato della liberalizzazione nel settore dell'energia elettrica e del gas naturale*' — IC22). This analysis identified four distinct geographic markets:

(a) the macro-zone north (which consists of the north ([5]) area plus the limited production hubs of Turbigo and Monfalcone);

(b) the macro-zone south corresponding to the rest of continental Italy (composed of three areas — northern central ([6]), southern central ([7]), south ([8]) and Calabria — plus the limited production hubs of Piombino, Rossano and Brindisi);

(c) the macro-zone Sicily (which corresponds to Sicily plus the limited production hub of Priolo);

(d) the macro-zone Sardinia.

(31) Based on the analysis referred to in recital 30, and on the actual market data for 2008-2011, the applicant estimated the following indicators:

(a) the saturation of transmission limits between zones in terms of hours of congestion (number of hours during which the transmission limits between two adjacent zones are saturated). A low frequency of congestions between adjacent zones means that they belong to the same geographical market, since competitive conditions are homogeneous within the area concerned; on the contrary, a high frequency of congestions indicates a certain level of market fragmentation, and the possible existence of non-homogeneous competitive conditions within the area concerned;

(b) the price differences and zonal price competition; and

(c) the residual demand test defined as the difference between the total demand in each zone and the maximum potential imports from adjacent zones.

(32) The Italian authorities were invited to express their views on the current definition of the relevant geographical market for Italy. The Italian Authority for Electricity

([1]) Commission Decision 2008/585/EC (OJ L 188, 16.7.2008, p. 28), recital 9, Commission Decision 2008/741/EC (OJ L 251, 19.9.2008, p. 35), recital 9, Case COMP/M.3440 ENI/EDP/GDP of 9.12.2004, paragraphs 76-77.
([2]) Commission Decision 2010/403/EU (OJ L 186, 20.7.2010, p. 44), recital 9.
([3]) Case COMP/M. No 3268 Sydkraft/Graninge of 30.10.2003, paragraph 27, and COMP/M. No 3665 ENEL/Slovenske Elektrarne of 26.4.2005, paragraph 14.
([4]) OJ L 186, 20.7.2010, p. 44.
([5]) Consisting of the following regions: Valle d'Aosta, Piemonte, Liguria, Lombardia, Trentino, Veneto, Friuli Venezia Giulia and Emilia Romagna.
([6]) Consisting of the following regions: Toscana, Umbria and Marche.
([7]) Consisting of the following regions: Lazio, Abruzzo and Campania.
([8]) Consisting of the following regions: Molise, Puglia, Basilicata and Calabria.

and Gas confirmed that the definition of the relevant geographical market given in 2005 in the 'Fact-finding investigation on the state of liberalisation in the electrical energy sector' remained valid and indicated that, based on the data at their disposal, the relevant geographical market should be subdivided into four macro zones, for the purposes of this exemption procedure: macro-zone north, macro-zone south, macro-zone Sicily and macro-zone Sardinia.

(33) The Italian Antitrust Authority also confirmed the opinion of the Authority for Electricity and Gas. Although it acknowledges that some of the original grid bottlenecks have been overcome as a result of investments by Terna, the evolution of the relation between supply (development of new production capacities) and demand has shown recently new network constraints, which resulted in lower prices in the south in a significant percentage of full hours. Moreover the Antitrust Authority indicated that the application of the residual demand test confirms the division of continental Italy into two separate zones, namely macro-zone north and macro-zone south.

(34) In view of the above, and in the absence of sufficient supporting evidence to prove the existence of a single market zone covering the continental Italy, the Commission does not share the applicant's view that the relevant geographical market, as far as conventional electricity is concerned, is continental Italy.

(35) In conclusion, given the factors examined in recitals 27 to 34, for the purposes of evaluating whether the conditions laid down in Article 30(1) of Directive 2004/17/EC are fulfilled, and without prejudice to competition law, the relevant geographic markets for production and wholesale of electricity generated from conventional sources are considered to be the macro-zone north and the macro-zone south.

Production and wholesale of electricity from renewable sources

(36) As regards the production and wholesale of renewable electricity, as defined in recital 26, it is not necessary to conclude on the exact geographic scope, as the result of the analysis would be the same under any alternative market definition (entire territory of Italy, continental Italy or macro-zone north and macro-zone south).

(37) It is nevertheless noted that the set of incentives listed in recital 16 are applied uniformly across the entire territory of Italy.

Market analysis

Production and wholesale of electricity produced from conventional sources

(a) *Market shares and market concentration*

(38) In accordance with its constant practice [1], the Commission considers that, in respect of electricity generation, 'one indicator for the degree of competition is the total market share of the biggest three producers'.

(39) According to the information provided by the applicant, the cumulative market shares of the first three producers of electricity produced from conventional sources was of 48,9 % in the macro-zone north and of 62,7 % in the macro-zone south in 2010. The market for conventional electricity is therefore in the middle of the range, by comparison with previous exemptions decisions under Article 30 of Directive 2004/17/EC [2].

(40) The Herfindahl-Hirschman index (HHI) [3] calculated for the conventional electricity producers in macro-zone north was of 1 302 and in macro-zone south, was of 1 714 in 2010 [4], which places both macro zones in the category of the 'moderately concentrated markets'.

(41) The aim of this Decision is to establish whether the activities of generation and wholesale of electricity are exposed to such a level of competition (on markets to which access is free) that even in the absence of the discipline imposed by the detailed procurement rules set out in Directive 2004/17/EC, the procurement for the pursuit of the activities concerned will be carried out in a transparent and non-discriminatory manner based on criteria allowing contracting entities to identify the solution which is overall the economically most advantageous one. In this context it should be noted that the companies producing electricity from renewable sources which is bought by the energy

[1] Commission Decisions 2009/47/EC (OJ L 19, 23.1.2009, p. 57); 2008/585/EC; 2008/741/EC; 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).

[2] Cumulated market shares of the first three producers in the United Kingdom (39 %), Austria (52 %) and Poland (55 %) have lower values, but the corresponding values in Finland (73,6 %) and Sweden (87 %) are higher.

[3] Herfindahl Hirshman index: It is defined as the sum of the squares of the market shares of each individual firm. As such, it can range from almost 0 to 10 000, moving from a very large amount of very small firms to a single monopolistic producer. Decreases in the HHI generally indicate an increase in competition, whereas increases imply the opposite.

[4] According to the additional information received form the applicant on 20.6.2012 in response to Commission letter of 25.5.2012.

service operator at regulated prices (CIP6 and FIT mechanisms) or is in other way subject to incentive remuneration (CV and CE mechanisms), when acting on the electricity markets, have the possibility to bring competitive pressure on the producers of electricity from conventional sources.

(42) Having regards to the above figures, for the purposes of this Decision and without prejudice to the competition law, it can be assumed that the degree of concentration of the market can be considered as an indication of a certain degree of exposure to competition of electricity production and wholesale from conventional sources in both macro zones.

(b) *Other factors*

(43) Although macro-zone north and macro-zone south form relevant markets on their own, they cannot be seen as being completely isolated from the surrounding regions. Italy is currently a big importer of electricity, and the imports take place mainly through the north border. According to the Italian authorities the imports bring competitive pressure on mainly on the macro-zone north ([1]). The macro-zone south is provided with electricity by macro-zone north ([2]). This ensures that investment in the electricity sector in both, macro-zone north and macro-zone south cannot be made without taking into account other producers in the surrounding regions. Those factors should therefore be seen as not opposing the conclusion that contracting entities operating on both macro zones production market from conventional sources are exposed to competition.

(44) 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, the functioning of the intra-day market and ancillary services market are such that it does not constitute an obstacle to electricity production being subject to direct exposure to competition.

(45) Finally, an analysis of the situation in respect of customer switching ([3]) shows that the level of customers switching does not oppose the conclusion that producers of electricity form conventional sources in both, macro-zone north and macro-zone south, are exposed to competition.

([1]) According to the letter of the Italian Authority for Electricity and Gas of 20.6.2012.

([2]) As mentioned above, producers of electricity in the north are currently not subject to the Directive 2004/17/EC following the exemption under Article 30 in 2010.

([3]) According to AEEG Annual Report 2011, the customers switching for big industrial customers connected to the high voltage grid was of 17,8 % in terms of withdrawal points and of 39,1 % in terms of volume.

Production and wholesale of electricity generated from renewable sources

(46) Electricity produced from renewable sources benefits from priority connection to the grid, and it has priority over conventional electricity for grid feed-in, which means that production of electricity from renewable sources is virtually independent from demand.

(47) In terms of remuneration, there are currently several incentive mechanisms applicable to renewable electricity as indicated in recital 17. Those mechanisms depend on the specific type of the renewable source, the production capacity, and/or the year in which the plant become operational.

(48) Of the total electricity produced in Italy, 12,6 % is bought by GSE at a statutory rate of remuneration ([4]). GSE is responsible for selling this electricity, in a second stage, on the day-ahead market. Therefore, the production and feed-in are also totally independent of the prices in this case as the operators are entitled to a statutory payment.

(49) Renewable electricity subject to CV and CE incentive mechanisms is sold by the producers on the wholesale market, but nevertheless they receive an incentive over and above the price at which they sold the electricity on the market. This incentive, which in some cases can be rather high (as for instance the CE for solar electricity), provides a competitive advantage over the producers from conventional electricity.

(50) For the reasons indicated above in recitals 46 to 49, the generation and wholesale of electricity produced from renewable sources, as defined in recital 26, in Italy are part of a regulated system. It cannot therefore be concluded that the activity of producers of renewable electricity is exposed to competition. Consequently, no other indicators, such as those listed in recital 5, need to be assessed.

(51) In order to reflect the current situation of the legal and factual framework defining the production and wholesale of renewable electricity in Italy, which emerged during the assessment of EniPower's application, and in order to ensure coherent treatment of renewable electricity market across the internal market, in line with the recent Commission precedent established in Implementing Decision 2012/218/EU, Decision 2010/403/EU should be amended accordingly.

([4]) This electricity corresponds to the electricity generated from renewable sources which is subject to CIP6 and FIT incentive mechanisms mentioned in recital 17.

IV. **CONCLUSIONS**

(52) In view of the factors examined in recitals 38 to 45, the condition of direct exposure to competition laid down in Article 30(1) of Directive 2004/17/EC should be considered to be met with respect to the production and wholesale supply of electricity from conventional sources, as defined in recital 26, in both macro-zone north and macro-zone south in Italy.

(53) Furthermore, since the condition of unrestricted access to the market is deemed to be met, Directive 2004/17/EC should not apply to the award of contracts intended to enable production and wholesale supply of electricity from conventional sources to be carried out in macro-zone north and macro-zone south nor to design contests organised for the pursuit of such an activity in that geographical area.

(54) Nevertheless, the condition of direct exposure to competition laid down in Article 30(1) of Directive 2004/17/EC should be considered not to be met with respect to the production and wholesale supply of electricity generated through renewable sources, as defined in recital 26, on the entire territory of Italy. Since Decision 2010/403/EU exempted contracts intended to enable the production and wholesale supply of electricity in the macro-zone north without distinguishing between conventional and renewable sources, it is appropriate to amend that Decision in order to limit the exemption to production and wholesale of electricity from conventional sources. In order to allow operators to adapt to the new scope of the exemption, which will no longer cover renewable sources of electricity, a transitional period should be provided for.

(55) Since the production and wholesale supply of electricity generated through renewable sources, as defined in recital 26 continues to be subject to Directive 2004/17/EC, it is recalled that procurement contracts covering several activities should be treated in accordance with Article 9 of Directive 2004/17/EC. This means that, where 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 must be had to the activities for which the contract is principally intended. In the event of such mixed procurement, where the purpose is principally to support the production and wholesale of electricity generated through renewable sources, the provisions of Directive 2004/17/EC are to be applied. Where it is objectively impossible to determine for which activity the contract is principally intended, the contract is to be awarded in accordance with the rules referred to in paragraphs 2 and 3 of Article 9 of Directive 2004/17/EC.

(56) This Decision is based on the legal and factual situation existing between March 2012 and September 2012, as it appears from the information submitted by EniPower and the Italian authorities. 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 in respect of production and wholesale supply of electricity from conventional sources are no longer met.

(57) The measures provided for in this Decision are in accordance with the opinion of the Advisory Committee for Public Contracts,

HAS ADOPTED THIS DECISION:

Article 1

Directive 2004/17/EC shall not apply to contracts awarded by contracting entities and intended to enable the production and wholesale of electricity produced from conventional sources to be carried out in the macro-zone south of Italy.

Directive 2004/17/EC shall continue to 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 south of Italy.

Article 2

Article 1 of Decision 2010/403/EU is amended as follows:

(a) point (a) is replaced by the following:

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

(b) the following paragraph is added:

'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.'.

Article 3

Article 2 shall apply from 15 April 2013.

Article 4

This Decision is addressed to the Italian Republic.

Done at Brussels, 26 September 2012.

For the Commission
Michel BARNIER
Member of the Commission