COMMISSION IMPLEMENTING DECISION (EU) 2020/1500

of 28 July 2020

on the applicability of Directive 2014/25/EU of the European Parliament and of the Council to contracts awarded for activities related to production and wholesale of electricity in Lithuania

(notified under document C(2020) 5031)

(Only the Lithuanian text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC ([1]), and in particular Article 35(3) thereof,

After consulting the Advisory Committee for Public Contracts,

Whereas:

1. FACTS

(1) On 8 April 2019, Lietuvos energija UAB ('the Applicant') submitted to the Commission a request pursuant to Article 35(1) of Directive 2014/25/EU ('the Request').

(2) The Request concerns electricity generation and wholesale activities that are not regulated by the national authority ([2]). In its email of 18 June 2019 the Applicant confirmed that trading in balancing power, regulation power, the provision of reserve capacities and the provision of public service obligations are not covered by the Request.

(3) The Request was not accompanied by a reasoned and substantiated position adopted by an independent national authority that is competent in relation to the activities concerned, which thoroughly analyses the condition for the applicability of Article 34(1) of Directive 2014/25/EU to the activities concerned, in accordance with paragraphs 2 and 3 of that Article. Consequently, in accordance with point 1 of Annex IV to Directive 2014/25/EU, the Commission is to adopt an implementing act on the Request within 105 working days. The initial deadline was suspended in accordance with point 2 of Annex IV to Directive 2014/25/EU. The deadline agreed between the Applicant and the Commission for adopting the implementing act expires on 31 July 2020.

(4) In accordance with Article 35(2) of Directive 2014/25/EU, the Commission informed the Lithuanian authorities of the Request, and requested additional information on 14 May 2019 and 24 May 2019. The Lithuanian authorities replied on 18 September and 23 September 2019. The Commission requested further clarifications on 7 October 2019, 30 January and 17 March 2020 and the Lithuanian Authorities replied on 22 January, 5 March and 19 March 2020. In the context of the consultation of the Advisory Committee for Public Contracts, the Lithuanian authorities provided further information on 9 July 2020.

(5) The Commission requested additional information from the Applicant on 3 May, 27 May and 14 June 2019 and the Applicant's responses were received on 17 May 2019, 12 June and 18 June 2019.

2. LEGAL FRAMEWORK

(6) Directive 2014/25/EU applies to the award of contracts for the pursuit of activities related to, among others, the production and wholesale of electricity, unless this activity is exempted pursuant to Article 34 of that Directive. Directive 2014/25/EU does not apply to certain types of that activity where not considered as relevant activity under Article 9(2) of that Directive.

([1]) OJ L 94, 28.3.2014, p. 243.

([2]) Such activity can be subject to EU and national law that grants free access to the market, see Section 3.1 of this Decision

(7) Under Articles 34 and 35 of Directive 2014/25/EU, contracts intended to enable the performance of one of the activities to which that Directive applies are, upon request by a Member State or a contracting entity, not to be subject to the Directive. This exemption may be granted if, in the Member State in which the activity 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.

3. **ASSESSMENT**

3.1. **Unrestricted access to the market**

(8) Access to a market is deemed to be unrestricted if the Member State concerned has implemented and applied the relevant Union legislation opening a given sector or a part of it. That legislation is listed in Annex III to Directive 2014/25/EU, which includes, as regards the electricity sector, Directive 2009/72/EC of the European Parliament and of the Council ([3]).

(9) As confirmed by the Applicant, and on the basis of the information available to the Commission, Lithuania has transposed ([4]) and applies Directive 2009/72/EC. Access to the relevant market is therefore deemed not to be restricted in accordance with Article 34(3) of Directive 2014/25/EU.

3.2. **Direct exposure to competition**

(10) 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. Given the characteristics of the markets concerned, further criteria should also be taken into account.

(11) This Decision is without prejudice to the application of the rules on competition and State aid rules and other fields of Union law. In particular, the criteria and the methodology used to assess direct exposure to competition under Article 34 of Directive 2014/25/EU are not necessarily identical to those used to perform an assessment under Article 101 or 102 TFEU or Council Regulation (EC) No 139/2004 ([5]), as confirmed by the General Court ([6]).

(12) It should be kept in mind that the aim of this Decision is to establish whether the activities concerned by the Request are directly exposed to competition, in markets to which access is not restricted within the meaning of Article 34 of Directive 2014/25/EU. This will ensure that, in the absence of the discipline brought about by the detailed procurement rules set out in Directive 2014/25/EU, procurement for the pursuit of the activities concerned will be carried out in a transparent, non-discriminatory manner based on criteria allowing purchasers to identify the solution which overall is the economically most advantageous one.

3.2.1. *Product market definition*

(13) The Request pertains to electricity generation and wholesale.

(14) In its decision in Case COMP M.4110 E.ON – ENDESA ([7]), the Commission identified the following relevant product markets in the electricity sector: generation and wholesale supply; transmission; distribution, and retail supply. While some of these markets may be further subdivided, to date, previous Commission practice ([8]) 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, but electricity volumes generated are marketed via the wholesale market.

([3]) 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).

([4]) National transposition act: Lietuvos Republikos Elektros Energetikos Įstatymas, 2000 m. liepos 20 d. Nr. VIII-1881.

([5]) Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).

([6]) Judgment of 27 April 2016, Österreichische Post AG v. Commission, T-463/14, ECLI:EU:T:2016:243, paragraph 28.

([7]) Case COMP/M. No 4110 E.ON – ENDESA, of 25.4.2006, paragraphs 10 and 11.

([8]) Case COMP/M. No 3696 E.ON – MOL of 21.1.2005, paragraph 223, Case COMP/M. No 5467, RWE- ESSENT of 23.6.2009, paragraph 23.

(15) In 2012, the Commission adopted Implementing Decision 2012/218/EU ([9]) and Implementing Decision 2012/539/EU ([10]) in relation to respectively the German and the Italian electricity markets. For Germany, the Commission considered that the production and marketing of electricity regulated by Renewable Energy Sources Act is not part of the market for generation and first sale of electricity produced from conventional sources because electricity generated from renewable sources is normally not directly sold on the wholesale market but first bought by the transmission grid operators for a statutory rate of remuneration. Similarly, for Italy, the Commission considered that the market for production and wholesale of electricity generated from renewable sources is separate from the market for production and wholesale of electricity generated from conventional sources because the sale of the electricity generated from renewable sources which are subject to the Comitato Interministeriale Prezzi del 29 aprile 1992 (CIP6) and Feed-in Tariffs (FIT) mechanisms mostly takes place via the energy service operator. Key reasons for the Commission to make such a distinction relate, essentially, to the sale by renewable electricity producers of their production to a non-market entity which is the Transmission system Operator in Germany and Gestore dei Servizi Energetici in Italy. Additional considerations put forward in these two precedents were: priority feed-in for renewables and a statutory rate of remuneration. The Commission concluded that in Germany and in Italy renewable generation and first sale was therefore not subject to market forces.

(16) In 2017, the Commission adopted Implementing Decision (EU) 2018/71 ([11]) in relation to the Netherlands electricity market. For the Netherlands, the Commission considered that there was no need to define separate markets for electricity depending on its source. The main differences from Implementing Decisions 2012/218/EU and 2012/539/EU in relation to Germany and Italy were the following: the fact that renewable electricity was sold directly on the wholesale market and not to a non-market entity, the absence of priority feed in for renewable electricity, the fact that the statutory rate of remuneration applicable to renewable electricity was in the form of a feed in premium (as opposed to fixed rate as in Implementing Decisions 2012/218/EU and 2012/539/EU in relation to Germany and Italy) and the fact that subsidies for renewables were subject to a bidding process at the onset, where different technologies were competing for a predefined amount of subsidies.

(17) In view of Implementing Decisions 2012/218/EU, 2012/539/EU and (EU) 2018/71, it is necessary to examine in the present case, based on the same criteria, the pertinence of a distinction between electricity produced from renewable sources and the electricity produced from conventional sources.

(18) In reply of 18 September 2019 to the request for information from the Commission of 14 May 2019 the Lithuanian authorities informed that there are currently three support schemes for electricity produced from renewable sources.

(19) The **first support scheme** applies to producers generating electricity from renewable energy sources ('RES') that obtained the right to benefit from the incentives of the scheme between 1 January 2002 and 23 May 2011. The main elements of the first scheme are: compulsory purchase of RES electricity by a company designated by the Ministry of Energy or by the distribution network, priority feed in; remuneration at a fixed rate set by the energy regulator, exemption from grid balancing responsibility and compensation of the producer for the cost of connecting to the grid. Depending on the capacity of the installation, the first scheme is subject to a competitive process for the building permits.

(20) The installed capacity that could benefit from the incentive under the first support scheme was 237 MW and the incentive period applied until end of 2020 or, if the period between the date of issuance of the generation permit and 2020 was less than 12 years, for 12 years following the date the generation permit was issued.

(21) The **second support scheme** applies to producers generating electricity from RES that obtained the right to benefit from the incentives of the scheme between 24 May 2011 and 30 April 2019. The main elements of the second scheme are: compulsory purchase of RES electricity by a company designated by the Ministry of Energy or by the distribution network; priority feed in; remuneration at a fixed rate awarded following an tender or set by the energy regulator; exemption from grid balancing responsibility and compensation of the producer for the cost of connecting to the grid.

([9]) Implementing Decision 2012/218/EU of 24 April 2012 concerning the production and wholesale of electricity produced from conventional sources in Germany (OJ L 114, 26.4.2012, p. 21).

([10]) Implementing Decision 2012/539/EU of 26 September 2012 concerning the production and wholesale of electricity produced from conventional sources Macro-zone North and Macro-zone South in Italy (OJ L 271, 5.10.2012, p. 4).

([11]) Commission Implementing Decision (EU) 2018/71 of 12 December 2017 exempting the production and wholesale of electricity in the Netherlands from the application of Directive 2014/25/EU of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sector and repealing Directive 2004/17/EC (OJ L 12, 17.1.2018, p. 53).

(22) Depending on the capacity of the installation, under the second support scheme, the allocation of the fixed rate support is established through a competitive bidding procedure.

(23) The installed capacity that could benefit from is 464 MW and the incentive period applies, for 12 years following the date the generation permit was issued, and payments will continue until 2029.

(24) The **third support scheme** was approved by the Commission ([12]) and entered into force on 1 May 2019. The main elements of the third scheme are: priority feed in; remuneration is based on a price premium established following a tender process (no payment is made in case of zero or negative pries for six hours or more; no payment is made for quantities produced over the electricity production allocated at tender); exemption from grid balancing responsibility for plants with capacity of less than 500 KW or less and for pilot projects.

(25) Under the third support scheme, premium-based support is to be established through a competitive bidding procedure for all types of installations without differentiation based on size and technology.

(26) The size of the incentive under the third support scheme is of around 2,9 TWh and the incentive period applies, for 12 years following the date the generation permit was issued.

(27) According to the Applicant, the third support scheme for electricity produced from renewable sources in Lithuania is similar to the respective measures adopted in the Netherlands. This would therefore justify defining one product market comprising electricity produces from conventional sources and renewable sources. However, the Commission notes that the third scheme has only been introduced very recently.

(28) According to the Lithuanian authorities, production and wholesale should be defined as a single market regardless of the source of electricity. Alternatively, if two markets were to be defined, the Lithuanian authorities propose the following delineation: a market for electricity from conventional sources and from renewable sources ([13]) with the exception of electricity from renewable sources covered by the first and second support scheme and a market for electricity from renewable sources covered by the first and second support scheme.

(29) The electricity produced under the third scheme receives premium-based support established through a competitive bidding procedure for all types of installations without differentiation based on size and technology. The support period per installation is 12 years. Beneficiaries receive a maximum premium, set as a difference between a maximum price (cost of the most cost-efficient RES electricity technology available in Lithuania – onshore wind) and a reference price. In April 2019, the Commission by Decision C(2019) 3122 ([14]) found that the financial support for the scheme was compatible with the internal market pursuant to Article 107(3)(c) TFEU.

(30) The electricity produced under the third scheme receives premium-based support established through a competitive bidding procedure. This is significantly different from the situation of electricity produced from renewable sources, which receive a statutory payment, independently of market conditions.

(31) Taking into account the above specificities of the Lithuanian electricity market, for the purposes of evaluating the conditions laid down in Article 34(1) of Directive 2014/25/EU, and without prejudice to competition law and state aid rules, the relevant product market is hereby defined as the market for generation and wholesale of electricity produced from conventional sources and from renewable sources except electricity produced from renewable sources subject to the first and second support scheme.

(32) As regards first and second support scheme, under both schemes, electricity producers benefit from a fixed rate for the electricity they generate, independently from market conditions.

(33) They are exempt from grid balancing responsibilities: it is the transmission or distribution network operator that manages balancing, depending on which network the producer is connected to.

(34) They benefitted from a compensation for the cost of connecting electricity generation facilities. When the facilities of the producers were connected to the electricity network, they were reimbursed part of the connection cost incurred by the electricity network operator.

([12]) State Aid SA.50199 (2019/N) of 23 April 2019 on Lithuania Support to power plants producing electricity from renewable energy sources.

([13])

([14]) [Commission Decision C(2019) 3122 of … April 2020 on Lithuania Support to power plants producing electricity from renewable energy sources.?]

(35) They are entitled to a compulsory purchase of generated electricity. Producers can sell their electricity on the market, but, if they choose not to do so, are entitled to sell all the electricity generated and supplied to the grid to the designated company when the electricity generation facilities are connected to the transmission network, or to a distribution network operator serving more than 100 000 users where the electricity generation facilities of the producers are connected to the distribution network.

(36) They benefit from priority feed-in. Under the priority right, the electricity network operator must accept, transfer or distribute – at transparent, non-discriminatory rates – all the electricity offered by the producer, and this priority right is guaranteed to the producer in respect of other producers of non-RES electricity.

(37) Electricity produced from renewable sources which is subject to the first and second support scheme therefore forms a separate market.

3.2.2. *Geographic market definition*

(38) In 2012, Lithuania joined the NordPool energy trading exchange and thus the Lithuanian electricity producers competed to sell their electricity to suppliers on the market. In 2013, the Lithuanian electricity system was already connected to the systems of other Member States such as Latvia and from December 2015 also Sweden and Poland. However, Lithuania remains a single bidding zone.

(39) According to the Applicant, the Request pertains to activities on the territory of Lithuania.

(40) In its Implementing Decisions 2012/218/EU and (EU) 2018/71 with respect to electricity markets, the Commission took the view that the geographic scope of the market was national.

(41) In the absence of any indication of a different scope of the geographic market, for the purposes of the assessment under this Decision and without prejudice to competition law and state aid rules, the Commission considers that the geographic scope of production and wholesale electricity market, both for electricity generation from conventional and renewable (subject to all schemes) sources, is the territory of Lithuania.

3.2.3. *Market analysis*

(42) It is important to mention that, in the Lithuanian electricity production and wholesale markets, not all market players are subject to the public procurement rules. Therefore, the companies, which are not subject to those rules, when acting on those markets, would normally have the possibility to exert competitive pressure on the market players, which are subject to the public procurement rules. According to the Lithuanian authorities, in the markets covered by the Request, apart from the Applicant, the following entities are subject to the public procurement rules: UAB Vilniaus energija, AB Panevėžio energija, VšĮ Alantos technologijos ir verslo mokykla, AB Vilniaus šilumos tinklai, AB Klaipėdos energija and AB Šiaulių energija.

3.2.3.1. Production and wholesale of electricity produced from conventional sources and from renewable sources except electricity produced from renewable sources subject to the first and second support scheme

(43) In its Implementing Decisions 2012/218/EU and 2012/539/EU, the Commission considered that, as regards production and wholesale market, the cumulated market share of the largest three undertakings is relevant. However, given that not all market players are subject to the public procurement rules, the analysis focuses on the market position and competitive constraints on the individual market players subject to the public procurement rules. Other measures of concentration may also be considered relevant.

(44) On the Lithuanian electricity generation market, according to the reply by the Lithuanian authorities of 5 March 2020 to the Commission's request for information of 30 January 2020, the Applicant is the biggest market player, and its market share has fluctuated over the 2015-2019 period, between a highest share of 60,8 % in 2018 and a lowest of 53,9 % in 2019. The second market player is AB ACHEMA, which managed to increase its market shares over the same period, from 10,3 % in 2015 to 23 % in 2019. The next two larger market players have market shares between 5 % and 10 % each. The Commission notes that apart from the Applicant, the other major active market players are not subject to the public procurement rules. UAB Vilniaus Energija is subject to the public procurement rules, but since 2016 is no longer active on the relevant market.

(45) According to the national legislation, wholesale electricity market consist of trading on the power exchange, on bilateral agreements and trading of balancing and regulation power.

(46) According to table 14 of reply by the Applicant of 17 May 2019 to the request for information by the Commission of 3 May 2019 out of the total volumes traded in Lithuania, more than 75 % of electricity is traded through the NordPool power exchange. Nord Pool is the biggest European power exchange. Nord Pool delivers power trading across Europe. Nord Pool offers day-ahead and intraday trading, clearing and settlement, data and compliance, as well as consultancy services. Nord Pool operates power trading markets in Norway, Denmark, Sweden, Finland, Estonia, Latvia, Lithuania, Germany, the Netherlands, Belgium, Austria, Luxembourg, France and the United Kingdom. In 2019 Nord Pool had a total turnover of 494 TWh traded power, this includes more than 90 % of total power consumption in the Nordic and Baltic market.

(47) The liquidity of the wholesale market is a relevant indicator for competition, as sufficient volumes on both the supply and the demand side for the relevant wholesale products (for example, baseload, peak load, hourly blocs for different timeframes) provide sourcing and hedging opportunities to traders and suppliers.

(48) The degree of liquidity on the NordPool wholesale market reinforces the conclusion that contracting entities operating on the Lithuanian production and wholesale market are exposed to competition.

(49) The interconnection capacity is sufficient to enable significant imports or exports to or from Lithuania. In addition, Lithuania is part of the NordPool energy trading exchange, where a number of electricity generators from participating countries (Norway, Sweden, Finland, Denmark, Estonia, Latvia and Lithuania) compete. A significant part of Lithuanian electricity imports come from Russia and Belarus.

(50) The increase in interconnection capacity between Lithuania and other countries is likely to have had a favourable impact on competition in the Lithuanian electricity generation market.

(51) According to the Request, imports covered 80 % of Lithuanian electricity demand in 2018. Net imports increased from 7208 TWh in 2015 to 9632 TWh in 2018, while electricity generated in Lithuania dropped from 4598 TWh to 3220 TWh. The Applicant explains that, while the total installed capacity in Lithuania would be sufficient to satisfy demand, the imported electricity is cheaper than the one locally produced. As a result, some of its facilities were mothballed and are kept as reserve capacity.

(52) The magnitude of imports in the Lithuanian market leads to the conclusion that contracting entities operating on the Lithuanian market for electricity generation from conventional and renewable sources except electricity produced from renewable sources subject to the first and second support scheme are exposed to competition.

3.2.3.2. Production and wholesale of electricity from renewable sources which is subject to the first and second support scheme

(53) Based on the characteristics of the support schemes, the Commission notes that the first and second support schemes have similar features to the schemes analysed in Implementing Decisions 2012/218/EU and 2012/539/EU in relation to Italy and Germany. In both cases, the Commission had distinguished particularly important specific features. First, electricity production from RES benefits from priority connection to the grid, and has priority over conventional electricity for grid feed-in, which means that it is virtually independent from demand. Second, the production and feed-in are completely independent of the prices as the RES electricity producers are entitled to a statutory payment.

(54) Given the similarity of the features of the first and second scheme in Lithuania with the RES electricity production analysed in the 2012 Decisions, the Commission concludes that these activities are not exposed to competition.

4. **CONCLUSIONS**

(55) In view of the factors examined above the condition of direct exposure to competition laid down in Article 34 of Directive 2014/25/EU should be considered to be met with regard to the production and wholesale of electricity produced from conventional sources and from renewable sources except electricity produced from renewable sources subject to the first and second support scheme in Lithuania.

(56) Furthermore, since the condition of unrestricted access to the market is deemed to be met, Directive 2014/25/EU should not apply when contracting entities award contracts intended to enable production and wholesale of electricity produced from conventional sources and from renewable sources except electricity produced from renewable sources subject to the first and second support scheme to be carried out in Lithuania nor when they organise design contests for the pursuit of such an activity in that geographical area.

(57) In view of the factors examined above the condition of direct exposure to competition laid down in Article 34 of Directive 2014/25/EU should not be considered to be met with respect to the production and wholesale of electricity produced from renewable sources subject to the first and second support scheme in Lithuania. Consequently, Directive 2014/25/EU should continue to apply when contracting entities award contracts intended to enable the pursuit of that activity to be carried out in Lithuania and when they organise design contests for the pursuit of such an activity in that geographical area.

(58) Since the production of electricity from renewable sources subject to the first and second support schemes should continue to be subject to Directive 2014/25/EU, it is recalled that procurement contracts covering several activities are to be treated in accordance with Article 6 of that Directive. 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 2014/25/EU and activities not exempted therefrom, regard is to 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 activities, which are not exempted, the provisions of Directive 2014/25/EU 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 laid down in Article 6(3) of Directive 2014/25/EU.

(59) It is recalled that Article 16 of Directive 2014/23/EU of the European Parliament and of the Council ([15]) on the award of concession contracts provides for an exemption from the application of that Directive for concessions awarded by contracting entities where, for the Member State in which the concessions are to be performed, it has been established pursuant to Article 35 of Directive 2014/25/EU that the activity is directly exposed to competition in accordance with Article 34 of that Directive. Since it was concluded that the activity of production and wholesale of electricity from conventional sources and from renewable sources except electricity produced from renewable sources subject to the first and second support scheme is subject to competition, concession contracts intended to enable the performance of those activities in Lithuania will be excluded from the scope of application of Directive 2014/23/EU.

(60) This Decision is based on the legal and factual situation as of April 2019 to May 2020 as it appears from the information submitted by the Applicant, by the Lithuanian authorities and from publicly available information. It may be reviewed, should the conditions for the applicability of Article 34 of Directive 2014/25/EU be no longer met, following significant changes in the legal or factual situation,

HAS ADOPTED THIS DECISION:

Article 1

Directive 2014/25/EU shall not apply to contracts awarded by contracting entities and intended to enable the production and wholesale of electricity produced from conventional sources and from renewable sources except production and wholesale of electricity from renewable sources subject to the first and second support scheme, to be carried out in Lithuania.

Article 2

Directive 2014/25/EU shall continue to apply to contracts awarded by contracting entities and intended to enable production and wholesale of electricity from renewable sources which is subject to the first and second support scheme to be carried out in Lithuania.

([15]) Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, p. 1).

Article 3

This Decision is addressed to the Republic of Lithuania.

Done at Brussels, 28 July 2020.

For the Commission
Thierry BRETON
Member of the Commission