

COMMISSION DECISION

of 22 December 2008

establishing that Article 30(1) 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 is not applicable to the production of electricity in the Czech Republic

(notified under document number C(2008) 8569)

(Only the Czech text is authentic)

(Text with EEA relevance)

(2009/47/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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

Having regard to the request submitted by the Czech Republic by e-mail received on 3 July 2008,

After consulting the Advisory Committee for Public Contracts,

Whereas:

I. FACTS

- (1) On 3 July 2008, the Commission received a Czech request pursuant to Article 30(4) of Directive 2004/17/EC, transmitted to the Commission by e-mail. The Commission requested additional information by e-mail of 26 September 2008, which was transmitted by the Czech authorities by e-mail of 9 October 2008.
- (2) The request submitted by the Czech Republic concerns production of electricity.
- (3) The request is accompanied by a letter from an independent national authority, (Energetický regulační úřad, the Czech energy regulatory authority), and by a letter from another independent authority (Úřad pro ochranu hospodářské soutěže, the Czech Office for the Protection of Competition). Both of these authorities analyse the conditions of access to the relevant market, finding it to

be unrestricted, while none of them establish that the further condition relating to the direct exposure to competition is met in respect of electricity production in the Czech Republic.

II. LEGAL FRAMEWORK

- (4) Article 30 of Directive 2004/17/EC provides that contracts intended to enable the performance of one of the activities to which the Directive applies shall not be subject to the Directive if, in the Member State in which it is carried out, the activity is directly exposed to competition on markets to which access is not restricted. Direct exposure to competition is assessed on the basis of objective criteria, taking account of the specific characteristics of the sector concerned. Access is deemed to be unrestricted if the Member State has implemented and applied the relevant Community legislation opening a given sector or a part of it. This legislation is listed in Annex XI to Directive 2004/17/EC, which, for the electricity sector, refers to Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity ⁽²⁾. Directive 96/92/EC has been superseded by Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC ⁽³⁾, which requires an even higher degree of market opening.
- (5) The Czech Republic has implemented and applied not only Directive 96/92/EC but also Directive 2003/54/EC, opting for legal and organisational unbundling for transmission and distribution networks except for the smallest distribution companies, which, while continuing to be subject to accounting unbundling, are exempted from the requirements of legal and organisational unbundling having less than 100 000 customers or serving electricity systems with consumption lower than 3 TWh in 1996. Furthermore, the transmission system operator, CEPS, has been ownership unbundled. Consequently, and in accordance with the first subparagraph of Article 30(3), access to the market should be deemed not to be restricted.

⁽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.

- (6) Direct exposure to competition should be evaluated on the basis of various indicators, none of which are, per se, decisive. In respect of the markets concerned by this decision, the market share of the main players on a given market constitutes one criterion which should be taken into account. Another criterion is the degree of concentration on those markets. Given the characteristics of the markets concerned, further criteria should also be taken into account such as the functioning of the balancing mechanism, price competition and the degree of customer switching.
- (7) This Decision is without prejudice to the application of the rules on competition.

III. ASSESSMENT

- (8) The request submitted by the Czech Republic concerns production of electricity in the Czech Republic.
- (9) The Czech request considers that the relevant geographical market would be a market larger than the national territory, incorporating the territories of the Czech Republic, Poland, Slovakia, Austria and Germany. It is argued that a main reason for this market definition is the high share of interconnection capacity (with several Member States) as compared to domestic generation and demand. According to the information given by the Czech authorities in their answer of 9 October 2008, 25,6 TWh were exported in 2007 and 9,5 TWh imported during the same year. The Czech Republic is thus a net exporter of electricity with net exports amounting to 16,1 TWh, equivalent to almost 20 %⁽¹⁾ of the total, net electricity generation (81,4 TWh). A further argument submitted with respect to the existence of a wider geographic market is a development towards price convergence between the national market within the Czech Republic and the one in Germany as well as the growing role of the PXE Prague energy Exchange.
- (10) However, relatively high interconnection capacity and price convergence are not sufficient to delineate a relevant market. The local market rules, and in particular the indispensability and dominant position of any market player (being in the case of the Czech Republic the operator CEZ) can also lead to defining a narrower market. In this context, it must be noted that according to the reply of the Czech authorities of

9 October 2008, the overwhelming share of the growing volume of the PXE, stems from transactions involving CEZ. Furthermore, the Commission has also analysed in its Energy Sector Inquiry⁽²⁾, with regards to possible geographical market definitions going beyond the national scope, whether certain countries in Central Europe could be part of possible pairs of relevant markets. For the Austria-Germany country pair, the size of the main operator in Austria coupled with internal Austrian network congestion prevented the Commission from concluding that there would be a larger than national relevant market. Similarly, in the case of the Czech Republic and Slovakia, the respective size of the dominant operators and their indispensability to meet demand lead to the conclusion that even those two country pairs are not part of one and the same relevant geographic market. In addition, the Commission has recently examined the Austrian and the Polish electricity production markets and found them to be national in geographical scope⁽³⁾. Finally, in its recent antitrust Decision C(2008) 7367 of 26 November 2008 against E.ON concerning the German wholesale market⁽⁴⁾, the Commission has considered the latter to be national in scope, without neighbouring countries (neither to the west, nor the east) being part of a broader geographic market.

- (11) Consequently, the existence of a regional market should be rejected. This is also consistent with the statement by the Czech Office for the Protection of Competition that 'in assessing the (application pursuant to Article 30), the Bureau, taking into account its existing investigation, started from the presumption that the relevant market of production of electricity should be, from the geographical standpoint, defined by the territory of the Czech Republic.' In view of the facts set out in recitals 9 and 10 above, the territory of the Czech Republic should therefore be considered to constitute the relevant market for the purposes of evaluating the conditions laid down in Article 30(1) of Directive 2004/17/EC.
- (12) 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

⁽¹⁾ 19,78 %. The total (gross) exports amounted to 31,45 % of the total, net generation, whereas the total imports amounted to 11,67 % of the total, net generation. If seen in relation to the domestic net electricity consumption for 2007 (approximately 59,7 TWh according to the Czech authorities), the total exports amounted to 42,88 % and net exports to 26,97 %, whereas total imports amounted to 15,91 % of the domestic net electricity consumption.

⁽²⁾ See COM(2006) 851 final of 10.1.2007: Commission Communication: Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors, hereinafter referred to as 'Final Report', Annex B, point A.2.7, p. 339.

⁽³⁾ See Commission Decision 2008/585/EC of 7 July 2008 exempting the production of electricity in Austria from the application of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 188, 16.7.2008, p. 28, and Commission Decision 2008/741/EC of 11 September 2008 establishing that Article 30(1) of 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 is not applicable to the production and wholesale of electricity in Poland, OJ L 251, 19.9.2008, p. 35.

⁽⁴⁾ Not published in the Official Journal. See press release IP/08/1774 of 26.11.2008.

⁽⁵⁾ Most recently in the abovementioned Decisions 2008/585/EC and 2008/741/EC.

generation, 'one indicator for the degree of competition on national markets is the total market share of the biggest three producers'. According to 'Table 6: Wholesale Market Position', p. 12 et seq. of 'Commission Staff Working Document: Accompanying document to the Report on Progress in Creating the Internal Gas and Electricity Market' ⁽¹⁾, the shares of the three largest generators amounted to 69,4 % of electricity production in 2006 and rising to 73,9 % in 2007. According to the information given by the Czech authorities in their answer of 9 October 2008, the dominant company held almost 70 % of the total installed capacity, and the second and third largest held respectively 3,5 and 3 %. These levels of concentration, encompassing the total market share of the largest three generators, are higher than the corresponding percentage, 39, to which Commission Decisions 2006/211/EC ⁽²⁾ and 2007/141/EC ⁽³⁾ refer to for the UK. They are also significantly higher than the level (52,2 %) referred to in Commission Decision 2008/585/EC ⁽⁴⁾ in respect of Austria, as well as being higher than the level (58 % of gross production) referred to in Commission Decision 2008/741/EC ⁽⁵⁾ in the case of Poland.

- (13) The Czech levels of concentration of the largest three operators are finally similar to or lower than the corresponding levels referred to in Commission Decisions 2006/422/EC ⁽⁶⁾ and 2007/706/EC ⁽⁷⁾ concerning, respectively Finland (73,6 %) and Sweden (86,7 %). There

is, however, an important difference between the Czech case on the one hand and the Swedish and Finnish on the other hand. Notably, in the Czech Republic there is a single dominant operator with the other two largest producers having market shares that are smaller by a factor of 20 (3 % being the lowest share and almost 70 % the highest). In Finland the corresponding figures show that the operator with an 18,3 % market share was lowest among the top three and one with a 33,7 % market share the highest. Similarly, for Sweden there exists a range between 17,4 % as the lowest and 47,1 % as the highest.

- (14) A constant jurisprudence should also be recalled in this context ⁽⁸⁾, 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 %'.
- (15) The level of electricity imports into the Czech Republic amounts to slightly more than 11 % of its total demand ⁽⁹⁾, which, while higher than the share of electricity imports into Poland, reaches less than half of the share in the case of Austria ⁽¹⁰⁾ ⁽¹¹⁾. Also in the Swedish and Finnish cases, the high levels of concentration of the three largest producers are 'offset' by the 'competitive pressure on the [...] market deriving from the potential to import electricity from outside [...]' ⁽¹²⁾. It is therefore difficult to find that there would be a substantial competitive pressure from imported electricity in the Czech Republic and the fact that there would be transport capacity to raise the level of imports substantially is only theoretical, given that the Czech Republic has been a net exporter each year since at least 2003 and will continue to be so in the mid-term. This level of concentration therefore cannot be taken as an indicator of direct exposure to competition of the generation market.
- (16) The Czech authorities' answer of 9 October 2008 also points towards CEZ planning the majority of future large-scale generation projects on the transmission network level, through in particular envisaged nuclear new-build, the planned life-time extension of the existing Dukovany nuclear plant as well as coal- and gas-fired power plant projects. Besides CEZ's plans,

⁽¹⁾ COM(2008)192 final of 15.4.2008, in the following referred to as the 'Annex to the 2007 Progress Report'. The Report itself, SEC(2008)460, will be referred to as the '2007 Progress Report'.

⁽²⁾ Commission Decision of 8 March 2006 establishing that Article 30(1) 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 applies to electricity generation in England, Scotland and Wales, OJ L 76, 15.3.2006, p. 6.

⁽³⁾ Commission Decision of 26 February 2007 establishing that Article 30(1) 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 applies to the supply of electricity and gas in England, Scotland and Wales, OJ L 62, 1.3.2007, p. 23.

⁽⁴⁾ Commission Decision of 7 July 2008 exempting the production of electricity in Austria from the application of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 188, 16.7.2008, p. 28.

⁽⁵⁾ Commission Decision 2008/741/EC of 11 September 2008 establishing that Article 30(1) of 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 is not applicable to the production and wholesale of electricity in Poland, OJ L 251, 19.9.2008, p. 35.

⁽⁶⁾ Commission Decision of 19 June 2006 establishing that Article 30(1) 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 applies to the production and sale of electricity in Finland, excluding the Åland Islands, OJ L 168, 21.6.2006, p. 33.

⁽⁷⁾ Commission Decision of 29 October 2007 exempting the production and sale of electricity in Sweden from the application of 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, OJ L 287, 1.11.2007, p. 18.

⁽⁸⁾ See point 328 of the judgment of the Court of First Instance (Third Chamber) of 28 February 2002. *Atlantic Container Line AB and Others v Commission of the European Communities*. Case T-395/94. European Court reports 2002 Page II-00875.

⁽⁹⁾ i.e. the quantity of electricity needed for internal consumption and exports.

⁽¹⁰⁾ 23,5 % according to information given by the Austrian authorities.

⁽¹¹⁾ See recital 10 of Decision 2008/585/EC. '[...] imported electricity accounted for approximately a quarter of its total needs, in particular for base load power.'

⁽¹²⁾ See, e.g. recital 12 of Decision 2007/706/EC. Indeed, in the Swedish and Finnish cases, the existence of a regional market has been left open, which, if taken as reference, brought the levels of concentration to 40 %.

there are also projects, especially in the field of renewable energy sources, which are planned by others in part at the transmission level and in particular at the distribution level.

- (17) 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 with one-and-a-half hourly gate closures, that is the possibility for network users to adjust their position every one-and-a-half hours – are such that it does not constitute an obstacle to electricity production being subject to direct exposure to competition.
- (18) Given the characteristics of the product concerned (electricity) and the scarcity or unavailability of suitable substitutable products or services, price competition and price formation assume greater importance when assessing the competitive state of the electricity markets. In respect of large industrial (end)users, the number of customers switching supplier may serve as an indicator of price competition and, thus, indirectly, 'a natural indicator' of the effectiveness of competition. If few customers are switching, there is likely to be a problem with the functioning of the market, even if the benefits from the possibility of renegotiating with the historical supplier should not be ignored⁽¹⁾. Furthermore, 'the existence of regulated end-user prices is clearly a key determinant of customer behaviour [...]. Although the retaining of controls may be justified in a period of transition, these will increasingly cause distortions as the need for investment approaches'⁽²⁾.
- (19) According to the latest available information, switching rates in the Czech Republic have been qualified as being at a 'high level'⁽³⁾ and, according to the latest information given by the Czech authorities in their answer of 9 October, 'since the electricity market opening almost every second customer in the large customer segment has changed its electricity supplier'. This must be seen against the background of the situation as set out in the previous Decisions concerning the electricity sector in which switching rates for large and very large industrial users ranged from more than 75 % (Decision 2006/422/EC concerning Finland) to 41,5 % (Decision 2008/585/EC

concerning Austria). Furthermore, supply markets (for household, industrial customers, etc.) have in the Commission's prior decision practice been defined as separate product markets, and may, due to the influence of strong and well-established supply companies, have a different competitive landscape the wholesale or generation market. The high level of switching can therefore not be taken as an unequivocal indicator of direct exposure to competition.

- (20) In respect of production of electricity in the Czech Republic, the situation can thus be summarised as follows: the aggregate market shares of the three biggest generators are high, but more importantly, the biggest generator on its own represents a market share of almost 70 %, without this having been counterbalanced by imported electricity, as the Czech Republic has on the contrary been a constant net exporter of substantial quantities of electricity over at least the past 5 years. As set out in recital 17, the functioning of the balancing mechanism does not constitute an obstacle to direct exposure to competition of the electricity generation market and there is a high degree of switching. The well-functioning balancing mechanism and the high level of switching can not, however, outweigh the quite high degree of concentration, and in particular the high share of the greatest producer, taking into account also the jurisprudence mentioned under recital 14 above.

IV. CONCLUSIONS

- (21) In view of the factors examined in recitals 9 to 20, it should be concluded that production of electricity is currently not directly exposed to competition in the Czech Republic. Therefore Article 30(1) of Directive 2004/17/EC is not applicable to contracts intended to enable the pursuit of those activities in the Czech Republic. Consequently, Directive 2004/17/EC continues to apply when contracting entities award contracts intended to enable generation of electricity to be carried out in the Czech Republic or when they organise design contests for the pursuit of such activities in the Czech Republic.
- (22) This Decision is based on the legal and factual situation as of July to October 2008 as it appears from the information submitted by the Czech Republic, the 2007 Communication and the 2007 Staff Document, the Final Report as well as the 2007 Progress Report and the Annex thereto. It may be revised, should significant changes in the legal or factual situation mean that the conditions for the applicability of Article 30(1) of Directive 2004/17/EC are met,

⁽¹⁾ 2005 Report, p. 9.

⁽²⁾ Technical Annex, p. 17.

⁽³⁾ See the 2007 Progress Report, p. 8, point 7.

HAS ADOPTED THIS DECISION:

Article 1

Article 30(1) of Directive 2004/17/EC is not applicable to production of electricity in the Czech Republic. Consequently, Directive 2004/17/EC shall continue to apply to contracts awarded by contracting entities and intended to enable them to carry out such activities in the Czech Republic.

Article 2

This Decision is addressed to the Czech Republic.

Done at Brussels, 22 December 2008.

For the Commission
Charlie McCREEVY
Member of the Commission
