

II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COMMISSION

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

(notified under document number C(2007) 5197)

(Only the Swedish text is authentic)

(Text with EEA relevance)

(2007/706/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 Kingdom of Sweden by e-mail of 29 June 2007,

After consulting the Advisory Committee for Public Contracts,

Whereas:

I. Facts

- (1) On 29 June 2007, Sweden transmitted a request pursuant to Article 30(4) of Directive 2004/17/EC to the Commission by e-mail. The Commission requested

additional information by e-mail of 20 July 2007, which, following a prolongation of the initial deadline, was transmitted by the Swedish authorities by e-mail of 17 August 2007.

- (2) The request submitted by the Kingdom of Sweden concerns production and sale (wholesale and retail) of electricity.
- (3) The request is accompanied by the conclusions of the independent national authority, Konkurrensverket (the Swedish Competition Authority), that the conditions for the applicability of Article 30(1) of Directive 2004/17/EC would be met.

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

⁽¹⁾ OJ L 134, 30.4.2004, p. 1. Directive as last amended by Directive 2006/97/EC of the Council (OJ L 363, 20.12.2006, p. 107).

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 ⁽¹⁾. 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 ⁽²⁾, which requires an even higher degree of market opening.

- (5) Sweden has implemented and applied not only Directive 96/92/EC but also Directive 2003/54/EC, opting for full ownership unbundling for transmission networks and legal and functional unbundling for distribution networks except for the smallest companies, which are exempted from the requirements of functional unbundling. Consequently, and in accordance with the first subparagraph of Article 30(3), access to the market should be deemed not to be restricted.
- (6) Direct exposure to competition should be evaluated on the basis of various indicators, none of which are, *per se*, decisive. In respect of the markets concerned by this decision, the market share of the main players on a given market constitutes one criterion which should be taken into account. Another criterion is the degree of concentration on those markets. Given the characteristics of the markets concerned, further criteria should also be taken into account such as the degree of liquidity, the functioning of the balancing market, price competition and the degree of customer switching.
- (7) This Decision is without prejudice to the application of the rules on competition.

III. Assessment

- (8) The request submitted by Sweden concerns production as well as the sale (wholesale and retail) of electricity.
- (9) The wholesale electricity market in Sweden is to a large degree integrated into the Nordic power market, which consists of Denmark, Norway, Sweden and Finland. It

consists of a bilateral trading market between generators on one hand and suppliers and industrial companies on the other hand, and a voluntary Nordic power exchange 'Nord Pool' which has a spot market and a forward market. This and the integrated market design of 'Nord Pool' ⁽³⁾ shows that there is a clear development towards a Nordic regional wholesale market. However, transmission bottlenecks (congestion) part of the time divide the Nordic area up into six geographically distinct price areas, of which Sweden is one. Sweden has five main connections between its networks and those of other parts of the European Economic Area (Western Denmark — Sweden, Eastern Denmark — Sweden, Sweden — Southern Norway, Sweden — Northern Norway and Sweden — Finland). In 2005, the most congested of these five connections was congested for 52 % of the time and the least congested for 8 % of the time ⁽⁴⁾. However, this seldom occurred simultaneously on all five connections. Thus, according to the Swedish authorities, Sweden was a fully separate price area, that is, it had no connections with any other price area, during 0,5 % of the time in 2005. Furthermore, an overview of the number of areas connected with Sweden since 2001 shows that Sweden was connected to at least 4 of the then 6 other price areas — Norway was then divided into three areas as opposed to the current two — in 82,4 % of the time ⁽⁵⁾. Consequently, and in line with previous Commission practice ⁽⁶⁾, the issue of whether the market is national or regional will be left open as the result of the analysis remains the same whether it is based on a narrow or a broader definition.

- (10) For essentially the same reasons, there is also a clear development towards a Nordic regional market in the case of electricity production, although transmission bottlenecks and the limits to capacity — of the order of 24 % of the installed generation capacity in Sweden — of the connections between the Swedish networks and those of other areas of the European Economic Area can have the effect of temporarily limiting the market to the territory of Sweden. Here as well the issue of whether the market is national or regional will be left open as the result of the analysis remains the same whether it is based on a narrow or a broader definition.

⁽¹⁾ OJ L 27, 30.1.1997, p. 20.

⁽²⁾ OJ L 176, 15.7.2003, p. 37.

⁽³⁾ Cf. p. 334, paragraph A.2 5) of 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'.

⁽⁴⁾ Cf. p. 333, paragraph A.1, table c, of the Final Report.

⁽⁵⁾ Point 28 of Case COMP/M.3867 Vattenfall/Elsam and E2 Assets of 22.12.2005.

⁽⁶⁾ Cf. the just mentioned Case COMP/M.3867, points 22-33, and Commission Decision 2006/422/EC 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 of 21.6.2006, p. 33. See also in that sense the Final Report, p. 334, paragraph A.2.5.

- (11) As confirmed by the Swedish authorities, the retail market area corresponds to the territory of Sweden, due to, among others, differences in taxation and the rules for balance responsibility between Nordic countries. Furthermore, Konkurrensverket explicitly states that the retail market 'is national, primarily because several technical and regulatory obstacles prevent the end user from buying electricity from energy brokers in other countries.'
- (12) The Communication from the Commission to the Council and the European Parliament: Report on progress in creating the internal gas and electricity market⁽¹⁾, hereafter referred to as the '2005 Report' states that 'many national markets display a high degree of concentration of the industry, impeding the development of effective competition'⁽²⁾. Consequently, it considered that, in respect of electricity generation, 'one indicator for the degree of competition on national markets is the total market share of the biggest three producers'⁽³⁾. According to the 'Technical Annex'⁽⁴⁾, the aggregate market share of the three largest generators of the total production in the Nordic area is 40 %⁽⁵⁾, which is a satisfactorily low level. When referred to the Swedish territory, the aggregate market shares of the three largest generators are, of course, higher at 86,7 %⁽⁶⁾ in 2004. However, the periods in which the Swedish market is isolated were limited to 0,5 % of the time in 2005⁽⁷⁾. There is therefore during significant parts of the year a competitive pressure on the Swedish market deriving from the potential to import electricity from outside the Swedish territory, the more so as no transmission fee is charged between the Nordic countries. The frequently uncongested links between Sweden and other price areas ensure that investment in the electricity sector inside the Swedish territory cannot be made without taking into account other producers in the Nordic market. These factors should therefore be taken as an indication of direct exposure to competition for the production market whether taken as the national Swedish market or the emerging regional one.
- (13) The degree of concentration is also a good indicator of competition on the wholesale market for electricity as is the degree of liquidity. At the regional level, 42,82 % of electricity consumption in the Nordic countries was sold through Nord Pool Spot AS — the voluntary Nordic power exchange described in recital 9 — in 2004-2005⁽⁸⁾. According to the Final Report, on that type of power exchange 'the concentration in generation finds [...] direct expression in a rather stable *equivalent*'⁽⁹⁾ concentration in the power exchanges'⁽¹⁰⁾. For the three largest generators in the Nordic area, this amounts to 40 %⁽¹¹⁾, which, referred to a regional market, is at a satisfactory level. When referred to the sole Swedish market, the aggregate market shares of the three largest actors on the wholesale market are, of course, higher at 86 %⁽¹²⁾ in 2006. It should, however, be stressed that there is competition between the three large and several smaller wholesale actors on the Swedish market. Furthermore, as regards the connection to the Nordic area, it should be noted again that the aforementioned bottleneck problems (congestion) are not constant, only temporary. There is therefore, in addition to domestic competition, a frequent external competitive pressure on the Swedish market deriving from the potential to obtain electricity from outside the Swedish territory. This is the more so as Sweden is the third biggest net importer of electricity in the EU in terms of percentage of its domestic consumption⁽¹³⁾ and no transmission fee is charged between the Nordic countries. It should further be noted that the conditions of competition in wholesale trade in electricity are also greatly influenced by financial trade in electricity in the market area concerned, which, in terms of volume via Nord Pool, represented almost twice the amount consumed in the Nordic countries in 2005⁽¹⁴⁾ (and, if other identified transactions such as OTC — Over The Counter or direct sale — are included, more than five times the amount in 2005⁽¹⁵⁾). In the Technical Annex⁽¹⁶⁾, this degree of liquidity was considered as being satisfactory, i. e. it is such as to constitute an indicator of a well-functioning and competitive market. Given the strong link between the Swedish wholesale market and the Nordic market, this degree of liquidity should also be considered as providing a competitive pressure on the Swedish market. The Final Report also ranges Nord Pool among the 'most liquid and efficient wholesale electricity markets'⁽¹⁷⁾. These factors should therefore be taken as an indication of direct exposure to competition for the wholesale market whether taken as the national Swedish market or the emerging regional one.
- (14) Taking the size of the country into account, the number of economic operators on the retail market is fairly

(1) COM(2005) 568 final of 15.11.2005.

(2) The 2005 Report, p. 2.

(3) Cf. the 2005 Report, p. 7.

(4) Commission Staff Working Document, Technical Annex to the 2005 Report, SEC(2005) 1448.

(5) P. 44, table 4,1, of the Technical Annex.

(6) According to the Final Report, Annex C, p. 338.

(7) Cf. recital 9.

(8) Final Report, p. 126, paragraph 380, table 16.

(9) Emphasis added for ease of reading.

(10) P. 141, paragraph 424.

(11) P. 44, table 4,1, of the Technical Annex.

(12) According to the information supplied by the Swedish authorities.

(13) Final Report, p. 112, paragraph 319.

(14) Final Report, p. 127, paragraph 383, table 17.

(15) See the Final Report, p. 127, paragraph 383, table 17.

(16) P. 44-45.

(17) P. 193, paragraph 581.

large ⁽¹⁾ (approximately 130, according to the Swedish authorities, a considerable number of which are offering their services on a nationwide basis) as is the number of companies with a market share above 5 %. At the end of 2004, the aggregate market share of the three largest companies in terms of supply to all categories of users (large industrial users, small and medium sized businesses and very small commercial customers and households) is at a satisfactorily low level at 50 % ⁽²⁾. According to the information supplied by the Swedish authorities, the aggregate shares of the three biggest companies on the Swedish retail market amounted to 43 % in terms of number of customers in 2006. These factors should therefore be taken as an indication of direct exposure to competition.

- (15) Furthermore, the functioning of the balancing markets should also be considered as an indicator, not only in respect of production but also for the wholesale and retail markets. In fact, 'any market participant who cannot easily match its generation portfolio to the characteristics of its customers may find itself exposed to the difference between the price at which the transmission system operator [hereinafter TSO] will sell imbalance energy, and the price at which it will buy back excess production. These prices may either be directly imposed by the regulator on the TSO; or alternatively a market based mechanism will be used in which the price is determined by bids from other producers to regulate their production upwards or downwards [...]. A key difficulty for small market participants arises where there is the risk of a large spread between the buying price from the TSO and the selling price. This occurs in a number of Member States and is likely to be detrimental to the development of competition. A high spread may be indicative of an insufficient level of competition in the balancing market which may be dominated by only one or two main generators. Such difficulties are made worse where network users are unable to adjust their positions close to real time' ⁽³⁾. There is an almost fully integrated balancing market in the Nordic area for supplying balancing energy and its main characteristics — market based pricing, hourly gate closures, that is the possibility

for network users to adjust their position each hour, and a low spread between the buying price from the TSO and the selling price — are such that it should be taken as an indicator of direct exposure to competition.

- (16) Given the characteristics of the product concerned (electricity) and the scarcity or unavailability of suitable substitutable products or services, price competition and price formation assume greater importance when assessing the competitive state of the electricity markets. The number of customers switching supplier is an indicator of genuine 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' ⁽⁴⁾. 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' ⁽⁵⁾.
- (17) A recent Commission Staff Document ⁽⁶⁾ states that 'Customer switching is very common in the Swedish retail electricity market. In total 54 per cent of electricity customers have either renegotiated their contracts or switched supplier since the market reform in 1996. Generally speaking competition on final customers is considered to work' ⁽⁷⁾. Furthermore, there is no end-user price control ⁽⁸⁾ in Sweden, that is, prices are set by the economic operators themselves and do not have to be approved by any authority prior to their application. The situation in Sweden is therefore satisfactory as far as switching and end-user price control are concerned and should be taken as an indicator of direct exposure to competition.

⁽¹⁾ In comparison, there are six main suppliers active in the household market with additional companies active in the large user sector in the U. K., cf. Commission Decision 2007/141/EC 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 of 1.3.2007, p. 23, whereas the number of economic operators on the retail market in Finland is more than 60, cf. the above-mentioned Decision 2006/422/EC.

⁽²⁾ Technical Annex, p. 45.

⁽³⁾ Technical Annex, p. 67-68.

⁽⁴⁾ 2005 Report, p. 9.

⁽⁵⁾ Technical Annex, p. 17.

⁽⁶⁾ SEC(2006) 1709 of 10.1.2007 'Accompanying document to the Communication from the Commission to the Council and the European Parliament: prospects for the internal gas and electricity market — implementation report, COM(2006) 841 final'. Hereinafter, these documents will be referred to, respectively, as 2007 Staff Document and 2007 Communication.

⁽⁷⁾ 2007 Staff Document, p. 158.

⁽⁸⁾ Technical Annex p. 124.

IV. Conclusions

(18) In view of the factors examined in recitals (8) to (17), the condition of direct exposure to competition laid down in Article 30(1) of Directive 2004/17/EC should be considered to be met in respect of production and sale (wholesale and retail) of electricity in Sweden.

changes in the legal or factual situation mean that the conditions for the applicability of Article 30(1) of Directive 2004/17/EC are no longer met,

HAS ADOPTED THIS DECISION:

Article 1

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

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

Article 2

This Decision is addressed to the Kingdom of Sweden.

(20) This Decision is based on the legal and factual situation as of June to August 2007 as it appears from the information submitted by the Kingdom of Sweden, the 2005 Report and the Technical Annex thereto, the 2007 Communication and the 2007 Staff Document as well as the Final Report. It may be revised, should significant

Done at Brussels, 29 October 2007.

For the Commission
Charlie McCREEVY
Member of the Commission