



COMMISSION IMPLEMENTING DECISION (EU) 2025/477

of 6 March 2025

on the applicability of Article 34 of Directive 2014/25/EU of the European Parliament and of the Council to the award of contracts for the activities related to the generation and wholesale of electricity in Belgium, with the exception of electricity generated in the Doel 4 and Tihange 3 nuclear power plants

(notified under document C(2025) 1381)

(Only the Dutch and French texts are 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 AND PROCEDURE

- (1) On 24 July 2024, the Belgian authorities submitted a request to the Commission pursuant to Article 35(1) of Directive 2014/25/EU ('the request') on behalf of Luminus, Norther and Ørsted ('the applicants') concerning electricity generation and wholesale in Belgium, with the exception of electricity generated in the Doel 4 and Tihange 3 nuclear power plants. The request complies with the formal requirements set out in Article 1(1) of Commission Implementing Decision (EU) 2016/1804 ⁽²⁾ and in Annex I to that Implementing Decision.
- (2) Luminus is 68,63 % owned by Electricité de France ('EDF') Belgium SA, a subsidiary of the EDF Group, and is mainly active on the electricity markets and on the gas and energy services markets in France and Belgium.
- (3) Norther is 50 % owned by Elnu NV, a subsidiary of Elicio SA-NV, fully owned by Nethys SA-NV, and 50 % owned by Boreas Wind Offshore NV, a fully owned subsidiary of Eneco Wind Belgium NV. Eneco Wind Belgium NV is a subsidiary of Eneco BV, an international producer and supplier of electricity, natural gas and heat, Norther operates an offshore wind farm in the North Sea within the Belgian Exclusive Economic Zone.
- (4) Ørsted is part of the Ørsted Group which is 50,12 % owned by the Danish state. Ørsted has currently no energy generation or trading activities in Belgium but is considering initiating renewable energy activities in Belgium.
- (5) The request was not accompanied by a reasoned and substantiated position of the Belgian competition authority.

⁽¹⁾ OJ L 94, 28.3.2014, p. 243, ELI: <http://data.europa.eu/eli/dir/2014/25/oj>.

⁽²⁾ Commission Implementing Decision (EU) 2016/1804 of 10 October 2016 on the detailed rules for the application of Articles 34 and 35 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 sectors (OJ L 275, 12.10.2016, p. 39, ELI: http://data.europa.eu/eli/dec_impl/2016/1804/oj).

- (6) In accordance with point 1(a) of Annex IV to Directive 2014/25/EU, considering that free access to the market can be presumed on the basis of Article 34(3), first subparagraph, of that Directive, as also indicated in recital 15 of this Decision, the Commission is to adopt an implementing act referred to in article 35 of Directive 2014/25/EU within 105 working days.
- (7) On 30 July 2024, the Commission asked the Belgian authorities to confirm within 10 working days that the data provided by the applicants concerning market shares was valid, even if it differed from the official data published by the Belgian Federal Commission for Electricity and Gas Regulation (CREG). The Commission received CREG's confirmation on 2 September 2024. The Commission asked further clarifications to the Belgian authorities on 28 November 2024, which were provided on 27 January 2025. Pursuant to point 2 of Annex IV to Directive 2014/25/EU, the deadline to adopt an implementing decision is consequently set at 6 March 2025.

2. LEGAL FRAMEWORK

- (8) Directive 2014/25/EU applies to the award of contracts for the pursuit of activities related to electricity generation and wholesale referred to in Article 9(1)(b) of that Directive unless that activity is exempted pursuant to Article 34 of that Directive.
- (9) Directive 2014/25/EU imposes on public authorities and publicly controlled undertakings in the water, energy, transport and postal services sectors the public procurement discipline to ensure the free movement of goods, the freedom of establishment and the freedom to provide services as well as respect for the principles deriving from those freedoms. The reasons for this legislative choice, according to recital 1 of the Directive, are the fact that national authorities continue to be able to influence the behaviour of those entities and the closed nature of the markets in which the entities in those sectors operate.
- (10) Pursuant to Article 34(1) of Directive 2014/25/EU, contracts intended to enable the performance of an activity to which that Directive applies are, upon request by a Member State or a contracting entity, not to 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.
- (11) Direct exposure to competition is to be assessed on the basis of objective criteria, taking account of the specific characteristics of the sector concerned. This assessment is, however, limited by the short deadlines applicable and by the need to rely on the information available to the Commission. That information originates either from already available sources or from the information obtained in the context of the request pursuant to Article 35 of Directive 2014/25/EU and cannot be supplemented by more time-consuming methods, including, in particular, public inquiries addressed to the economic operators concerned ⁽³⁾.
- (12) Direct exposure to competition in a particular market should be evaluated on the basis of various criteria, none of which are by themselves decisive.
- (13) For the purposes of assessing whether the relevant activities are subject to direct competition in the markets concerned by this Decision, the market share of the main players, as well as the existence and the extent of support to renewable electricity generation and wholesale in Belgium through public schemes are to be taken into account.
- (14) As recalled by the General Court ⁽⁴⁾, the burden of proof lies on the applicant to demonstrate that the conditions laid down in Article 34 of Directive 2014/25/EU are fulfilled and, hence, to benefit from an exemption from the application of Directive 2014/25/EU. This implies that the applicant should accompany its request with comprehensive evidence to demonstrate that the conditions for the exemption are met.

⁽³⁾ See Case T-575/20 *SŽ – Tovorni promet v Commission*, ECLI:EU:T:2022:551, para. 34.

⁽⁴⁾ See Case T-463/14 *Österreichische Post AG v Commission*, ECLI:EU:T:2016:243, para. 41 and Case T-575/20 *SŽ – Tovorni promet v Commission*, ECLI:EU:T:2022:551, para. 29.

3. ASSESSMENT

- (15) For the purpose of implementing Article 34 of Directive 2014/25/EU, this Decision must establish whether the activities concerned by the request are, in markets to which access is not restricted within the meaning of that provision, exposed to a level of competition which ensures that, also in the absence of the procurement discipline brought about by the detailed procurement rules laid down in Directive 2014/25/EU, procurement for the pursuit of the activity concerned will be carried out in a transparent and non-discriminatory manner based on criteria allowing purchasers to identify the solution which overall is the economically most advantageous one.
- (16) This Decision is based on the legal and factual situation as of July 2024 and on the information submitted by the applicants and information that is publicly available. It may be revised, should significant changes in the legal or factual situation mean that the conditions for the applicability of Article 34(1) of Directive 2014/25/EU are no longer met.

3.1. Unrestricted access to the market

- (17) Access to a market is deemed to be unrestricted if the Member State concerned has implemented and applied the relevant Union legal acts listed in Annex III to Directive 2014/25/EU, which includes, as regards electricity generation and wholesale, Directive (EU) 2019/944 of the European Parliament and of the Council ⁽⁵⁾.
- (18) On the basis of the information available to the Commission, Belgium has implemented and applied Directive (EU) 2019/944 ⁽⁶⁾. Consequently, access to the relevant market is deemed not to be restricted within the meaning of Article 34(3) of Directive 2014/25/EU.

3.2. Competition assessment

3.2.1. Relevant product market definition

- (19) According to the applicants, the relevant product market is the market for conventional and renewable electricity generation and wholesale. This is in line with the Commission's decisional practice regarding exemption requests related to electricity generation and wholesale. The product market definition retained in this decision is without prejudice to the application of the Union competition rules.
- (20) In past decisions, the Commission has found that some subsidy schemes did not stand in the way of the conclusion that electricity generation benefiting from them could belong to the relevant product market. In Commission Implementing Decision (EU) 2018/71 ⁽⁷⁾ addressed to the Netherlands, the Commission noted in recitals 19 and 21 that the electricity generated from renewable sources was sold directly on the market, and that the Dutch Stimulerende Duurzame Energieproductie (SDE+) system encouraged competitive bids, whereas the competitors would try to minimise their cost (hence the feed in premium they would receive). The Commission therefore considered that electricity generated from renewable sources belonged to the same market as conventional electricity generation. In Commission Implementing Decision (EU) 2020/1499 ⁽⁸⁾ addressed to Italy, the

⁽⁵⁾ Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (OJ L 158, 14.6.2019, p. 125, ELI: <http://data.europa.eu/eli/dir/2019/944/oj>).

⁽⁶⁾ Directive 2009/72/EC, which is referred to in Annex III to Directive 2014/25/EU, has been replaced by Directive (EU) 2019/944.

⁽⁷⁾ 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, ELI: http://data.europa.eu/eli/dec_impl/2018/71/oj).

⁽⁸⁾ Commission Implementing Decision (EU) 2020/1499 of 28 July 2020 on the applicability of Directive 2014/25/EU of the European Parliament and of the Council to production and wholesale of electricity from renewable sources in Italy (OJ L 342, 16.10.2020, p. 8, ELI: http://data.europa.eu/eli/dec_impl/2020/1499/oj).

Commission remarked in recitals 37 and 38 that some renewable electricity schemes were subject to a bidding process with a high number of applicants. Consequently, electricity generation benefiting from those schemes was found to be part of the same market as conventional electricity generation. In Commission Implementing Decision (EU) 2020/1500 ⁽⁹⁾ addressed to Lithuania, the Commission stated in recital 30 that electricity produced under the third support scheme received premium-based support established through a competitive bidding procedure and found that it was part of the same market as conventional electricity generation. In Commission Implementing Decision (EU) 2022/1376 ⁽¹⁰⁾ addressed to Denmark, the Commission found in recital 29 that the allocation of the public funding was exposed to competition through a bidding process, which disciplined the behaviour of renewable electricity producers with regard to their procurement policy. As a result, it concluded that the renewable electricity generation facilities subject to the request belonged to the same market as conventional electricity generation. In Commission Implementing Decision (EU) 2023/1978 ⁽¹¹⁾ addressed to Germany, the Commission concluded in recital 47 that renewable electricity generation and wholesale receiving no subsidies or subsidies directly linked to market price were directly exposed to competition.

- (21) In general, the Commission concluded that renewable electricity generation could be found to compete with conventional electricity generation either if it did not receive subsidies or if the subsidies it received were granted through a mechanism guaranteeing that the level of subsidies was directly linked to a market price. In a number of cases, the Commission found that the existence of a bidding process ensured that the subsidies were linked to a market price.
- (22) The Commission notes that electricity generation in Belgium is supported by three categories of schemes with different characteristics. They are the capacity remuneration mechanism ('CRM'), the subsidy scheme for Doel 4 and Tihange 3 nuclear power plants as extended beyond 2025 ⁽¹²⁾ and the subsidy schemes for renewable electricity.

3.2.1.1. *The Capacity Remuneration Mechanism (CRM)*

- (23) The applicants describe the situation as follows. Belgium plans to close all nuclear reactors on its territory by 2025, with the exception of the two most recent reactors, one at Doel and one at Tihange. According to Belgian Transmission System Operator Elia ⁽¹³⁾, this closure will require the installation of between 2 and 4 GW of additional capacity between now and 2030. However, the operation of the wholesale markets does not provide sufficient incentives for such investment. It is however essential to the energy system that flexible capacity is available. From the point of view of demand, renewable energies, which are intermittent and random, need to be complemented by sufficiently flexible means of production.

⁽⁹⁾ 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 (OJ L 342, 16.10.2020, p. 15, ELI: http://data.europa.eu/eli/dec_impl/2020/1500/oj).

⁽¹⁰⁾ Commission Implementing Decision (EU) 2022/1376 of 26 July 2022 on the applicability of Article 34 of Directive 2014/25/EU of the European Parliament and of the Council to electricity generation and wholesale in Denmark (OJ L 206, 8.8.2022, p. 42, ELI: http://data.europa.eu/eli/dec_impl/2022/1376/oj).

⁽¹¹⁾ Commission Implementing Decision (EU) 2023/1978 of 21 September 2023 on the applicability of Article 34 of Directive 2014/25/EU of the European Parliament and of the Council to the award of contracts for the activities related to the generation and wholesale of electricity from renewable sources in Germany, with the exception of electricity from renewable sources generated in installations that went into operation before 1 August 2014 and still receive public funding and activities related to the generation and wholesale of electricity from offshore wind farms commissioned after 1 January 2012 and subject to the 2012 Renewable Energy Sources Act (Erneuerbare-Energien-Gesetz) in Germany (OJ L 235, 25.9.2023, p. 13, ELI: http://data.europa.eu/eli/dec_impl/2023/1978/oj).

⁽¹²⁾ As the electricity generation and wholesale from Doel 4 and Tihange 3 is not covered by the request, the Commission will not analyse this scheme.

⁽¹³⁾ See Elia, *Adequacy & flexibility study for Belgium (2024-2034)*, 29 June 2023, pp. 15, 191, 205, 223, 269, available at https://issuu.com/eliagroup/docs/adequacy_flexibility_study_for_belgium_2024-2034?fr=sOTBhNDYxOTUwMTY.

- (24) The applicants add that Belgium has introduced the CRM for this reason. As long as a producer can guarantee availability, it is eligible to the mechanism, which is neutral with regard to the technology or source of origin of the energy. The CRM, which came into force in March 2021, encourages investment by guaranteeing sufficient profitability for projects providing peak production and balancing mechanisms. It operates by competitive auction. This mechanism was approved by Commission Decision (EU) 2022/639 ⁽¹⁴⁾ in 2021.
- (25) According to the applicants, the activities benefitting from the CRM mechanism belong to the overall wholesale and generation market as (i) electricity is sold directly on the wholesale market; (ii) does not benefit from injection priority; or (iii) from exemption of balancing responsibility; (iv) the subsidy delivers no hedge from market risk; (v) the amount of subsidy covers no more than the net extra costs associated with the costs of building, maintaining and operating a thermal power plant operated to guarantee the security of supply minus the relevant market revenues of this power plant. The Commission shares this view.

3.2.1.2. *The subsidy schemes for renewable electricity*

- (26) The applicants proposed to group the applicable subsidy schemes for renewable electricity generation in Belgium into the following categories.

3.2.1.2.1. Fixed and legally defined premiums

- (27) This category includes: the C-Power, Belwind, Northwind and Nobelwind offshore wind parks, the first green certificates ('GC') scheme of the Brussels region (facilities installed between 2004 and June 2011), the first and second GC scheme of the Walloon region (facilities installed between 2002 and July 2014), the first GC scheme of the Flemish region (facilities installed between 2009 and 2012).
- (28) The applicants claim that those offshore wind parks should be regarded as belonging to the general generation and wholesale market, given that the subsidies received cover no more than the net extra costs of the projects. However, the Commission has, in the decisions referred to in recital 18, repeatedly taken the view that installations receiving fixed subsidies were not part of the overall electricity generation and wholesale market. For the Commission, such subsidies shield beneficiaries from competition by providing guaranteed levels of revenue. The Commission sees no reason to depart from this approach.

3.2.1.2.2. Electricity market price dependent and legally defined premium

- (29) This category includes: the second GC scheme of the Brussels region (facilities installed from July 2011), the third GC scheme of the Walloon region (facilities installed from July 2014), the first GC scheme of the Flemish region (facilities installed from 2013), the Norther, Rentel, Seamede, Northwester II offshore wind parks.
- (30) For the regional schemes, project costs are re-assessed yearly, and the estimated project cost of installed projects is indexed to take into account variations in operating expenditure. For the offshore wind parks, the subsidy is subject to a project specific monthly indexation on a consumer price index.
- (31) The applicants claim that the facilities receiving subsidies that are electricity market price dependent with a legally defined premium are part of the overall electricity generation and wholesale market. The Commission shares this view, as those subsidies are linked to a market price.

⁽¹⁴⁾ Commission Decision (EU) 2022/639 of 27 August 2021 on the aid scheme SA.54915 – 2020/C (ex 2019/N) Belgium – Capacity remuneration mechanism (OJ L 117, 19.4.2022, p. 40, ELI: <http://data.europa.eu/eli/dec/2022/639/oj>).

3.2.1.2.3. Electricity market price dependent premium defined through a competitive auction process

- (32) This category includes the Princess Elisabeth zone projects. The applicants claim that since the future facilities under that scheme will receive subsidies defined through a competitive auction process, they should be part of the overall generation and wholesale market. The Commission shares this view, as those subsidies are linked to a market price.

3.2.1.2.4. Capacity based subsidy – level of subsidy defined through a competitive auction process

- (33) This category includes the small to medium capacity solar and onshore wind projects installed in Flanders between 2021 and 2023. The applicants claim that since those facilities receive subsidies defined through a competitive auction process, they should be part of the overall electricity generation and wholesale market. The Commission shares this view, as those subsidies are linked to a market price.

3.2.1.2.5. Facilities that no longer receive subsidies

- (34) The applicants claim that facilities which have ceased to receive subsidies should be part of the overall generation and wholesale market. The Commission shares this view, as these facilities do not receive any subsidy and sell their production receiving only the electricity market price. This is in line with the approach taken in previous exemption decisions, such as Implementing Decision (EU) 2023/1978 concerning Germany.
- (35) The Commission finds that the overall electricity generation and wholesale market is composed of conventional electricity generation and wholesale, electricity generation and wholesale supported by the CRM and renewable electricity generation and wholesale that receive subsidies based on market prices. Electricity generation and wholesale from renewable energy sources receiving fixed and legally defined premiums form a separate market.

3.2.2. **Relevant geographic market definition**

- (36) According to the applicants, based on the decisional practice of the Commission, the relevant geographic market should be defined as national, comprising the territory of Belgium⁽¹⁵⁾. The applicants underline that Belgium has strong links with the other countries of the central and western Europe region (Austria, Belgium, France, Germany, Luxembourg and the Netherlands).
- (37) In its previous practice⁽¹⁶⁾, the Commission took the view that the market for electricity generation and wholesale is national in scope. The applicants' position is in line with the Commission's practice.
- (38) 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 Union competition law, the geographic scope of the generation and wholesale of electricity from conventional and renewable sources can be considered to consist in the territory of Belgium.

3.2.3. **Market analysis**

- (39) The Commission aims to assess at this stage whether or not the activities concerned by the request are exposed to a sufficient level of competition to ensure that the procurement discipline of Directive 2014/25/EU is not required. In the present case, the factors that are to be taken into account to carry out this assessment are the market shares, the concentration levels and the influence of electricity imports on competition on the Belgian electricity generation and wholesale market.

⁽¹⁵⁾ Request, point 3.2.

⁽¹⁶⁾ See Implementing Decision (EU) 2018/71, Implementing Decision (EU) 2020/1500, Implementing Decision (EU) 2023/1978, op. cit.

3.2.3.1. Renewable electricity generation facilities receiving fixed and legally defined premiums

- (40) In line with its previous decisions referred to in recital 18, the Commission finds in the present case that fixed and legally defined subsidies for renewable electricity generation do not ensure that the facilities benefitting from such subsidies are directly exposed to competition.
- (41) Consequently, since the conditions set out in Article 34 of Directive 2014/25/EU are not met, Directive 2014/25/EU should continue to apply to contracts intended to enable the pursuit of renewable electricity generation receiving fixed and legally defined premiums in Belgium.

3.2.3.2. Market shares in the overall electricity generation and wholesale market in Belgium

- (42) The applicants provide the following overview of market shares over the 2019-2023 period on the electricity generation and wholesale market.

Market shares of the largest five producers in Belgium (energy produced, in MWh)	2019	2020	2021	2022	2023
Engie	64 %	64 %	62,4 %	53,5 %	52,2 %
Luminus	13,7 %	13,7 %	11,9 %	13,7 %	14,1 %
RWE	2,6 %	2,6 %	3 %	2,8 %	2,7 %
Eneco	3,1 %	3,1 %	3,2 %	4,4 %	4,2 %
Total Energies	2,5 %	2,5 %	3,5 %	3,5 %	3,3 %
Market shares of the largest five producers in Belgium (installed capacity, in MW)	2019	2020	2021	2022	2023
Engie	43,7 %	43,7 %	41,9 %	37,8 %	33,5 %
Luminus	11,4 %	11,4 %	11,1 %	10,5 %	10,2 %
RWE	2,6 %	2,6 %	2,4 %	2,4 %	2,5 %
Eneco	4,2 %	4,2 %	4,1 %	4,3 %	4,5 %
Total Energies	3,7 %	3,7 %	3,5 %	3,8 %	3,9 %

- (43) The decrease in Engie's market share in 2022 and 2023 can mainly be attributed to the closure of the Doel 3 (September 2022) and Tihange 2 (March 2023) nuclear reactors.
- (44) Engie's market share is expected to decrease further as of 2025, with the closure of three further reactors, Doel 1, Doel 2 and Tihange 1. The remaining nuclear reactors, Doel 4 and Tihange 3, will be operated until 2035 following an agreement between the Belgian government and Engie.
- (45) According to the applicants, Engie's market share of electricity generation and wholesale in Belgium would be 52 % in 2023, 44 % in 2024 and 32 % in 2025. This is due to the fact that, from 2025 onwards, the production of the two remaining nuclear reactors is considered to be split between Engie and the Belgian State, as the reactors will be operated by BE-NUC, a joint venture between Engie and the Belgian state, each owning 50 %.

- (46) The Herfindahl-Hirschman Index (HHI), which measures market concentration, stands at the following (very high to high) levels for the market for electricity generation and wholesale in Belgium:

HHI	2019	2020	2021	2022	2023
	4 108	3 996	4 343	4 115	3 150

It is expected to decrease significantly (2 253) in 2025 and afterwards, as the generation from nuclear reactors will remain stable while generation from renewable sources will increase.

- (47) The market share of the largest three undertakings on the market for electricity production and wholesale has decreased from 79 % to 72 % between 2019 and 2023.
- (48) The Commission observes that the Belgian market for electricity production and wholesale has been highly concentrated until now. The concentration should be reduced after 2025 with the planned closure of three further nuclear reactors.

3.2.3.3. *Analysis of the competitive pressure exerted by electricity imports*

- (49) The applicants explain that, while the market concentration is high, electricity imports exert an important competitive pressure.
- (50) The Commission recognises that electricity imports exert some competitive pressure. However, the Commission also notes that Belgium has, over the past 10 years, been mostly exporting electricity to neighbouring countries. According to figures provided by the applicants ⁽¹⁷⁾, Belgium has been a net importer of electricity in 2023, but was a net exporter between 2018 and 2022. In the coming years, Belgium is likely to import more electricity due to the closure of nuclear reactors.
- (51) The applicants compare the situation in Belgium to the situation of Lithuania, where the Commission acknowledged the significance of electricity imports ⁽¹⁸⁾. However, the two cases are different, as in Lithuania imports represented 80 % of electricity demand in 2018, while in Belgium imports would make up to 20 to 40 % of electricity demand in the next 10 years according to a study by CREG referenced in the request ⁽¹⁹⁾.
- (52) Therefore, the Commission does not share the applicants' view that the importance of imports is comparable in the Belgian and Lithuanian cases. In view of the differences exposed in recitals 46 and 47, the Commission concludes that electricity imports cannot be taken as a decisive factor to measure exposure to competition for the Belgian electricity generation and wholesale market.
- (53) The Commission recognises however that electricity imports may exert a competitive pressure on the electricity generation in the future as Belgium's capacity will be reduced with the planned closure of three nuclear reactors in 2025. That trend has not yet materialised, as Belgium has mostly been a net exporter in the last five years.

3.2.3.4. *Contracting entities active in the overall electricity generation and wholesale market in Belgium*

- (54) The applicants explain that Luminus is a contracting entity, given that it is 68,63 % owned by EDF Belgium SA, which is a 100 % subsidiary of the EDF Group, a public limited company under French law, owned by the French state.

⁽¹⁷⁾ Para. 121 of the request.

⁽¹⁸⁾ See recitals 51 and 52 of Implementing Decision (EU) 2020/1500, op. cit.

⁽¹⁹⁾ Table 9 of Annex II of the request.

- (55) The applicants consider that Norther is a contracting entity, given that it is 50 % owned by Nethys, itself a 100 % owned subsidiary of Enodia, an 'intercommunale' owned by the province of Liège, 74 communes of the Liège area and the Walloon region. The Commission agrees that Norther is to be considered a contracting entity. In addition to Norther, Nethys controls through its subsidiary Elicio a number of subsidiaries in Belgium ⁽²⁰⁾ active in the renewable electricity generation and wholesale activity (hereinafter the 'the other subsidiaries of Nethys'), which the Commission considers to be contracting entities.
- (56) According to the applicants, contracting entities (a group in which the applicants include Luminus and Norther but not yet Ørsted, as the latter is not yet active in Belgium) have combined market shares on the market for overall electricity generation and wholesale in Belgium of between 20 and 30 % in capacity and 15 and 20 % in generation over the 2019-2023 period ⁽²¹⁾.
- (57) Despite the fact that the applicants indicate that Engie is 23,64 % owned by the French state, which controls 33,97 % of the voting rights, they state that Engie does not operate on the European public procurement platforms because it is in the applicants' view not subject to the Directive. ⁽²²⁾
- (58) The Caisse des Dépôts et Consignations ('CDC'), a French public institution, holds 3,63 % of shares and 3,53 % of voting rights ⁽²³⁾. The French public shareholders, with 27,27 % of shares and 38,03 % of voting rights, have a blocking minority.
- (59) The remaining significant shareholders of Engie are The Capital Group Companies (6,37 % of shares, 5,05 % of voting rights), Blackrock (4,51 % of shares and 3,44 % of voting rights) and Engie's employees (3,49 % of shares and 4,18 % of voting rights). The French contracting authorities together are therefore by far Engie's largest shareholder.
- (60) At the last five annual general meetings (AGM) of Engie's shareholders, the French state and the CDC have held more than half of the votes actually cast by shareholders. Based on the AGM voting sheets available on Engie's website ⁽²⁴⁾, the Commission makes the following calculation of the exercise of voting rights:

	2020	2021	2022	2023	2024
Share of French public entities (State + CDC) (in % of total voting rights)	36,9	36,91	37,3	37,3	38,03

⁽²⁰⁾ Elicio plateau de Bassenge, Elicio Wind for Water NV, Elicio WP NV, Elicio Bastogne NV, Elicio Maldegem NV, Elicio Berlare NV, Elicio SLH NV and Elicio Plus NV as mentioned in Annex 1 of the reply of the Belgian authorities of 27 January 2025.

⁽²¹⁾ Para. 116 of the request.

⁽²²⁾ Para. 164 of the request.

⁽²³⁾ See <https://www.engie.com/en/shareholders/engie-share/shareholder-structure>.

⁽²⁴⁾ See <https://www.engie.com/sites/default/files/assets/documents/2024-05/R%C3%A9sultat%20Des%20Votes%20VF%20AGM%2030.04.2024.pdf>

<https://www.engie.com/sites/default/files/assets/documents/2023-04/R%C3%A9sultat%20Des%20Votes.pdf>

<https://www.engie.com/sites/default/files/assets/documents/2022-04/ENGIE%20-%20Re%C3%A9sultat%20du%20scrutin%20en%20fran%C3%A7ais.pdf>

<https://www.engie.com/sites/default/files/assets/documents/2021-05/ENGIE%20-%20R%C3%A9sultat%20du%20scrutin%20en%20fran%C3%A7ais.pdf>

<https://www.engie.com/sites/default/files/assets/documents/2020-05/ENGIE%20-%20R%C3%A9sultat%20du%20scrutin%20AG%20du%2014-05-2020.pdf>

	2020	2021	2022	2023	2024
Percentage of votes cast (in % of total voting rights)	71,682	68,472	70,6	74,17	72,1
Percentage of the voting rights held by the French contracting authorities (in % of votes cast)	51,48	53,9	52,83	50,29	52,75

- (61) Under French law ⁽²⁵⁾, the French state also has the possibility to turn an ordinary share of Engie into a golden share via a decree if the essential national interests, in particular in continuity and security of supply, are at stake. This golden share gives specific rights to the state, such as opposing the sale of strategic assets to a third party or conditioning the entry of new shareholders into the company's capital above a given threshold to the minister of economy's agreement.
- (62) The Commission gave Engie the opportunity to provide comments on this specific point, which it did on 24 December 2024. Engie argues that the State and the CDC should not be regarded as a single contracting authority and that, even if they were, they cannot be presumed to exert a dominant influence on Engie. Engie adds that the French state only appoints three of the fourteen members of Engie's board.
- (63) Engie argues that, under Article 4(2)(b) of the Directive, only the majority of votes attached to shares issued by the undertaking is relevant, not the percentage of votes expressed at general shareholders' meetings. However, the definition of a public undertaking in Article 4(2) first sentence of the Directive includes dominant influence exercised by contracting authorities through the majority of votes cast at general shareholders' meetings. Dominant influence via control of the majority of votes attached to shares issued by the undertaking, as referred to in Article 4(2)(b), is one of the cases where such dominant influence is presumed; it does not preclude dominant influence in other situations.
- (64) The Commission takes the view that, in light of the elements described in recitals 57 to 63, contracting authorities exercise a dominant influence on Engie within the meaning of Article 4(2) of Directive 2014/25/EU. Consequently, Engie should be regarded as a contracting entity pursuant to that Article.
- (65) The Commission considers that the competitive situation of Engie and Luminus, on the one hand, and Norther, the other subsidiaries of Nethys as well as Ørsted, on the other, is very different. Engie and Luminus both have a long-standing strong presence in the Belgian electricity generation and wholesale market. In 2019, their market shares were 64 % and 13,7 % respectively, and in 2023 they were 52,2 % and 14,1 %. ⁽²⁶⁾ Even after 2025, based on the applicants' forecasts, Engie and Luminus would retain a very strong position on the Belgian electricity generation and wholesale market, as they are expected to remain by far the largest market players until at least 2034 ⁽²⁷⁾.
- (66) Engie's and Luminus' cumulated strong positions in the Belgian generation and wholesale electricity market are reinforced by their diversified generation portfolios. Those include production from nuclear power plants located in Belgium ⁽²⁸⁾, which gives them access to a stable and (thanks to its low marginal cost) competitive flexible baseload electricity generation source. They also both operate hydro and gas-fired power plants in Belgium which provide flexible peak electricity generation.

⁽²⁵⁾ Article L111-69 of code de l'énergie amended by Loi 2019-486 relative à la croissance et à la transformation des entreprises, known as «Loi Pacte».

⁽²⁶⁾ See Table 8 of Annex II to the request.

⁽²⁷⁾ See Table 8 of Annex II to the request.

⁽²⁸⁾ Both Engie and Luminus also enjoys drawing rights on some French nuclear power plants. Luminus' controlling shareholder (EDF) operates a fleet of 56 nuclear reactors in France. French nuclear electricity production can be imported in Belgium via the interconnections between the two countries.

- (67) In addition, the HHI index, referred to in recital 46 shows high market concentration levels and, in relation with market shares, evidences the fact that competitors are taking a long time to challenge the dominance of well-established players. Actually, the market concentration is only expected to drop significantly in relation with the planned closure of nuclear reactors in Belgium, and not because of market entry or expansion.
- (68) The situation of the contracting entities Norther, the other subsidiaries of Nethys and Ørsted is, however, different. Norther only operates a wind farm at present. Electricity generation from wind is not flexible and is dependent on weather conditions. Ørsted is not yet present on the Belgian electricity generation and wholesale market. Even in the next 10 years, these two companies are not expected to become major players in Belgium ⁽²⁹⁾. Both of them face the competition from the major players Engie and Luminus. It follows that the activities of Norther and Ørsted on the electricity generation and wholesale market in Belgium should be considered to be directly exposed to competition.
- (69) While the exemption foreseen by Articles 34 and 35 of Directive 2014/25/EU has, in light of relevant circumstances, hitherto been granted or refused with respect to the activity on the relevant market taken as a whole, the present case presents features which would render such an approach incompatible with the objective pursued by this Directive, i.e. ensuring the respect of the internal market freedoms in the procurement of government-dominated network-operating entities without unnecessarily burdening activities that are directly exposed to competition.
- (70) The economic sectors covered by Directive 2014/25/EU are characterised by the presence of former State monopolies, still controlled or influenced by public authorities, which may be facing varying degrees of competition and the market shares of which, although declining, often remain high. The influence of public authorities over contracting entities generates the risk that, in the absence of applicability of the public procurement directive, national suppliers are favoured in the procurement of the contracting entity concerned. The situation is however different in the present case, as some of the applicants are contracting entities having a small market share, and sometimes are merely a potential competitor or a new entrant on the relevant market. It is apparent that while the activity of some of the applicants can for that reason be considered to be directly exposed to competition, in particular from the established contracting entities that are incumbents with large market shares, an exemption cannot be granted to all the applicants, nor to the activity taken as whole on the electricity generation and wholesale market in Belgium and carried out by all the entities active therein. However, refusing to grant the exemption to those applicants whose activities are directly exposed to competition because the activities of other major market players are not directly exposed to competition would go against the objective Article 34 of Directive 2014/25/EU pursues. Consequently, the Commission deems it appropriate in light of the characteristics of the market in this case to grant the exemption only to some applicants.

4. CONCLUSION

- (71) Since the conditions set out for an exemption in Article 34 of Directive 2014/25/EU are not met, Directive 2014/25/EU should continue to apply to contracts intended to enable the pursuit of renewable electricity generation receiving fixed and legally defined premiums in Belgium.
- (72) In view of the factors examined in recitals 40 to 70, the condition of direct exposure to competition laid down in Article 34(1) of Directive 2014/25/EU should be considered not to be met in Belgium in respect of the activities of Engie and Luminus related to the overall electricity generation and wholesale market in Belgium.
- (73) Directive 2014/25/EU should therefore continue to apply when Engie and Luminus award contracts intended to enable those activities, or when design contests as defined in Article 2, point 17, of Directive 2014/25/EU are organised for the pursuit of such activities in that geographic area.

⁽²⁹⁾ See Table 8 of Annex II to the request.

- (74) In view of the factors examined in recitals 40 to 70, the condition of direct exposure to competition laid down in Article 34(1) of Directive 2014/25/EU should be considered to be met in Belgium in respect of the activities of Norther, the other subsidiaries of Nethys and Ørsted related to the overall electricity generation and wholesale market in Belgium.
- (75) On the contrary, Directive 2014/25/EU should not apply when Norther, the other subsidiaries of Nethys and Ørsted award contracts intended to enable those activities, or when design contests as defined in Article 2, point 17, of Directive 2014/25/EU are organised for the pursuit of such activities in that geographic area.
- (76) This Decision is without prejudice to the application of the Union rules on competition and of the provisions in 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 of the Treaty or Council Regulation (EC) No 139/2004 ⁽³⁰⁾ as confirmed by the General Court of the European Union ⁽³¹⁾,

HAS ADOPTED THIS DECISION:

Article 1

Directive 2014/25/EU shall continue to apply to the awarding by contracting entities of contracts intended to enable the electricity generation and wholesale activities from renewable energy sources receiving fixed and legally defined premiums to be carried out in Belgium.

Article 2

Without prejudice to Article 1, Directive 2014/25/EU shall not apply to the awarding by Norther, the other subsidiaries of Nethys and Ørsted of contracts intended to enable the electricity generation and wholesale activities to be carried out in Belgium. Directive 2014/25/EU shall continue to apply to the awarding by other contracting entities of contracts intended to enable the electricity generation and wholesale activities to be carried out in Belgium.

Article 3

This decision is addressed to the Kingdom of Belgium.

Done at Brussels, 6 March 2025.

For the Commission
Stéphane SÉJOURNÉ
Executive Vice-President

⁽³⁰⁾ 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, ELI: <http://data.europa.eu/eli/reg/2004/139/oj>).

⁽³¹⁾ Judgment of the General Court of 27 April 2016, *Österreichische Post AG v. Commission*, T-463/14, ECLI:EU:T:2016:243, paragraph 28. See also Directive 2014/25/EU, recital 44.