

## II

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

## DECISIONS

## COMMISSION

## COMMISSION DECISION

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**

(notified under document number C(2008) 4805)

(Only the Polish text is authentic)

(Text with EEA relevance)

(2008/741/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 <sup>(1)</sup>, and in particular Article 30(4) and (6) thereof,

Having regard to the request submitted by the Republic of Poland by a letter received on 19 May 2008,

After consulting the Advisory Committee for Public Contracts,

Whereas:

## I. FACTS

- (1) On 19 May 2008, the Commission received a Polish request pursuant to Article 30(4) of Directive 2004/17/EC, transmitted to the Commission by letter. The Commission requested additional information by e-mail of 11 July 2008, which was transmitted by the Polish authorities by e-mail of 28 July 2008, after the end of the deadline set for answering.
- (2) The request submitted by the Republic of Poland concerns production and wholesale of electricity.

- (3) The request is introduced, and thus endorsed, by the independent national authority, (Urzędu Regulacji Energetyki, the Polish energy regulatory office).

## 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 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 <sup>(2)</sup>. 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 <sup>(3)</sup>, which requires an even higher degree of market opening.

<sup>(1)</sup> OJ L 134, 30.4.2004, p. 1.

<sup>(2)</sup> OJ L 27, 30.1.1997, p. 20.

<sup>(3)</sup> OJ L 176, 15.7.2003, p. 37.

- (5) Poland 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. It is, however, foreseen that Distribution System Operators (DSOs) will function within publicly owned vertically integrated groups at least for 2008. 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 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 Poland concerns production and wholesale of electricity in Poland.
- (9) The Polish request considers that the relevant geographical market is limited to the national territory. The market presents a unified character with no obstacles for electricity generated in one region of the country to be purchased by a recipient from a different region (the majority of electrical energy capacity is installed in the south of Poland, but energy from this region is sold throughout Poland). Furthermore, according to the 2007 Activity Report <sup>(1)</sup>, in '2006 system congestion of structural character ... was existent at the borders with Germany, the Czech Republic and Slovakia. ...' In 2006 9,74 % of the total generation of electricity was exported from Poland, whereas imports to Poland in the same year amounted to 2,94 % of total generation (net exports thus accounted for 6,8 % of total generation in 2006). The 2007 Activity Report concludes that the 'most important

issue related to electricity exchange is limited transfer capacity of the Polish grid resulting in congestion on interconnectors. It is mainly caused by a high market pressure resulting from significant price differences of electricity in Poland and Germany, the Czech Republic and Sweden.' Consequently, the territory of the Republic of Poland should 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.

- (10) The Communication from the Commission to the Council and the European Parliament: Report on progress in creating the internal gas and electricity market <sup>(2)</sup>, 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' <sup>(3)</sup>. 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' <sup>(4)</sup>. For 2006, the Polish authorities have indicated a share of the three largest generators of 44,2 % of the attainable power and 52,3 % of the gross production <sup>(5)</sup>. In 2007, according to the reply of the Polish authorities received on 28 July, the shares rose to 51,7 % of the attainable power and 58,0 % of the gross production <sup>(6)</sup>. According to the Polish authorities, the market shares of the three largest operators on the wholesale market amounted to 48,1 % in 2006 and rose to 55,4 % in 2007 <sup>(7)</sup>. It has to be highlighted, that the figures provided by the Polish authorities show a clear growth, between 2006 and 2007, of the market shares of the three largest operators in each field. These levels of concentration are higher than the corresponding percentage, 39, to which Commission Decisions 2006/211/EC <sup>(8)</sup> and 2007/141/EC <sup>(9)</sup> refer to for the UK. They are similar to (or somewhat higher than) the level (52,2 %) referred to in Commission Decision 2008/585/EC <sup>(10)</sup> in respect of Austria and the Polish levels of concentration are finally lower than the corresponding levels referred to in Commission Decisions 2006/422/EC <sup>(11)</sup> and 2007/706/EC <sup>(12)</sup> concerning, respectively Finland (73,6 %) and Sweden (86,7 %). In all three cases, however, these levels of concentration are 'offset' by the 'competitive pressure on the ... market deriving from the potential to import electricity from outside ...' <sup>(13)</sup>. As described under recital 9 above, there are system congestions and limited transfer capacities so that imports amount to less than 3 % of the

<sup>(2)</sup> COM(2005) 568 final of 15.11.2005.

<sup>(3)</sup> The 2005 Report, p. 2.

<sup>(4)</sup> Cf. the 2005 Report, p. 7.

<sup>(5)</sup> Cf. point 5.1 of the request.

<sup>(6)</sup> Cf. page 1 of the reply.

<sup>(7)</sup> Cf. Point 5.1 of the request and page 2 of the reply.

<sup>(8)</sup> OJ L 76, 15.3.2006, p. 6.

<sup>(9)</sup> OJ L 62, 1.3.2007, p. 23.

<sup>(10)</sup> OJ L 188, 16.7.2008, p. 28.

<sup>(11)</sup> OJ L 168, 21.6.2006, p. 33.

<sup>(12)</sup> OJ L 287, 1.11.2007, p. 18.

<sup>(13)</sup> 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 %.

<sup>(1)</sup> English Language version of the 2007 Activity Report, issued by the President of the Energy Regulatory Office in Poland, dated 31 October 2007 and published 24.4.2008 on [http://www.ure.gov.pl/portal/en/1/17/Activity\\_Report\\_2007.html](http://www.ure.gov.pl/portal/en/1/17/Activity_Report_2007.html)

total Polish generation as compared, e. g., to the Austrian case where 'imported electricity accounted for approximately a quarter <sup>(1)</sup> of its total needs <sup>(2)</sup>, in particular for base load power' <sup>(3)</sup>. In addition, according to a document issued by the President of the Polish Energy Regulatory Office <sup>(4)</sup> 'the current structure and the concentration degree of the power industry activity have resulted first from the horizontal and then from vertical consolidation of state-owned power industry companies. The consolidation process, which has negatively affected the competition conditions on the domestic market, will carry on to substantially affect competition development on the wholesale market.' This level of concentration therefore cannot be taken as an indicator of direct exposure to competition of the generation and wholesale markets.

and the selling price, the Polish balancing market and its main characteristics – in particular the lack of an intraday market or access to other market platforms that may function as a substitute as well as certain aspects of balancing costs – are such that the 'current structure of tariffs for transmission services, under which all customers are charged with the balancing and congestion management costs, does not send appropriate economical signals for the market participants' <sup>(7)</sup>. The functioning of the Polish balancing market can therefore not be taken as an additional indicator that electricity production and wholesale are directly exposed to competition.

(11) 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 markets should also be considered as an additional indicator. 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' <sup>(5)</sup>. Despite having a relatively low spread <sup>(6)</sup> between the buying price from the TSO

(12) 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, who are most liable to procure their electricity directly from suppliers which are at the same time generators, 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' <sup>(8)</sup>. 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' <sup>(9)</sup>.

<sup>(1)</sup> 23,5 % according to information given by the Austrian authorities.

<sup>(2)</sup> i.e. the quantity of electricity needed for internal consumption and exports.

<sup>(3)</sup> See Recital 10 of Decision 2008/585/EC.

<sup>(4)</sup> The English language version of 'Roadmap of prices liberalisation for all electricity consumers – Towards the customers rights and effective competition in the power industry sector', dated February 2008, and published on 30.5.2008 on [http://www.ure.gov.pl/portals/en/1/18/Roadmap\\_of\\_prices\\_liberalisation\\_for\\_all\\_electricity\\_consumers.html](http://www.ure.gov.pl/portals/en/1/18/Roadmap_of_prices_liberalisation_for_all_electricity_consumers.html), p. 10. In the following, this document will be referred to as 'Roadmap'.

<sup>(5)</sup> Commission Staff Working Document, Technical Annex to the 2005 Report, SEC(2005)1448, hereinafter referred to as 'Technical Annex', p. 67–68.

<sup>(6)</sup> According to the Final Report, paragraph 993, table 52, the Polish balancing market operates with a spread of 13, which places it in the lower half as spread in balancing markets in the EU ranges between 0 and 79. This analysis looks at the effects on electricity generation of the workings of the balancing market and not at the degree of competition within the balancing market itself. For this purpose it is therefore unimportant whether a low spread is caused by competition or a price cap imposed by the regulator, just as the elevated concentration on the balancing market is without pertinence in this analysis.

(13) According to the latest available information, switching rates amount to 15,84 % for large and very large industrial customers in Poland <sup>(10)</sup>, representing about 7,6 % of total supplies <sup>(11)</sup>. 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,

<sup>(7)</sup> See Roadmap, p. 11.

<sup>(8)</sup> 2005 Report, p. 9.

<sup>(9)</sup> Technical Annex, p. 17.

<sup>(10)</sup> See 'Table 2: Annual Switching Rate Electricity 2006 (by volume)', p. 5 et seq. of 'Commission Staff Working Document: Accompanying document to the Report on Progress in Creating the Internal Gas and Electricity Market', COM(2008)192 final of 15.4.2008.

<sup>(11)</sup> See 2007 Activity Report, p. 72.

there are still end-user price controls for household customers, where operators have to provide the regulator with the tariffs they wish to apply. The situation in Poland is therefore not satisfactory as far as the level of switching of large and very large industrial (end)users<sup>(1)</sup> and end-user price control are concerned and can not be taken as an indicator of direct exposure to competition.

- (14) In respect of production and wholesale of electricity in Poland, the situation can thus be summarised as follows: market shares of the three biggest generators and wholesalers are relatively high without this being counterbalanced by readily available imported electricity; as set out in recital 11 the functioning of the balancing markets is not sufficient to be taken as an indicator of direct exposure to competition, the degree of switching is low and end-user price controls subsist for some groups of customers.
- (15) Finally, the overall context of the energy sector in Poland can not be disregarded. Thus, the Commission's 'Recommendation for a Council Recommendation on the 2008 up-date of the broad guidelines for the economic policies of the Member States and the Community and on the implementation of Member States employment policies'<sup>(2)</sup> recommends that Poland 'improve the framework for competition in network industries, including through a review of the role of regulators, and vigorously continue the process of the liberalisation of energy markets'<sup>(3)</sup>, another indication that electricity production and wholesale are not (yet) fully exposed to competition in Poland.

#### IV. CONCLUSIONS

- (16) In view of the factors examined in recitals 9 to 15, it should be concluded that production and wholesale of electricity are currently not directly exposed to competition in Poland. Therefore Article 30(1) of Directive 2004/17/EC is not applicable to contracts intended to enable the pursuit of those activities in Poland. Conse-

quently, Directive 2004/17/EC continues to apply when contracting entities award contracts intended to enable generation and wholesale of electricity to be carried out in Poland or when they organise design contests for the pursuit of such activities in Poland.

- (17) This Decision is based on the legal and factual situation as of May to July 2008 as it appears from the information submitted by the Republic of Poland or published on websites administered by the Polish authorities, 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 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,

HAS ADOPTED THIS DECISION:

#### *Article 1*

Article 30(1) of Directive 2004/17/EC is not applicable to production and wholesale of electricity in Poland. 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 Poland.

#### *Article 2*

This Decision is addressed to the Republic of Poland.

Done at Brussels, 11 September 2008.

*For the Commission*

Charlie McCREEVY

*Member of the Commission*

<sup>(1)</sup> See 2007 Activity Report, p. 71: 'The number of companies executing TPA rights' – i.e. switching – 'has been steadily growing since 2001 but the overall figures are far from satisfactory'.

<sup>(2)</sup> Part IV of the Commission's Communication from the Commission to the Spring European Council: Strategic report on the renewed Lisbon strategy for growth and jobs: launching the new cycle (2008 to 2010), COM(2007) 803 final of 11.12.2007. Published at [http://ec.europa.eu/growthandjobs/pdf/european-dimension-200712-annual-progress-report/200712-countries-specific-recommendations\\_en.pdf](http://ec.europa.eu/growthandjobs/pdf/european-dimension-200712-annual-progress-report/200712-countries-specific-recommendations_en.pdf)

<sup>(3)</sup> P. 31, point 5. This is also consistent with some statements of the 2007 Activity Report: 'In Poland the energy market has not yet fully developed.' (p. 2-3); 'Still the structure of the Polish energy market could hardly be described as fully competitive' (p. 12).