

# DECISIONS

## COMMISSION IMPLEMENTING DECISION

of 20 May 2011

**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 bituminous coal mining in the Czech Republic**

(notified under document C(2011) 3406)

(Only the Czech text is authentic)

(Text with EEA relevance)

(2011/306/EU)

THE EUROPEAN COMMISSION,

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

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,

Whereas:

### I. FACTS

- (1) On 22 November 2010, the Commission received by e-mail a Czech request pursuant to Article 30(4) of Directive 2004/17/EC, asking for exemption of the bituminous coal mining in the Czech Republic from the application of the provisions of Directive 2004/17/EC. The Commission requested additional information by e-mail of 21 January 2011. The reply to the request for information was transmitted by the Czech authorities by e-mail of 9 February 2011.
- (2) The request was accompanied by a letter from an independent national authority, (Úřad pro ochranu hospodářské soutěže, the Czech Office for the Protection of Competition) in the form of a preliminary opinion, dated 7 November 2008. The Czech Office for the Protection of Competition analysed the conditions of access to the relevant market and found it to be unrestricted. However, the opinion does not state that the other conditions relating to the direct exposure to competition were met in respect of bituminous coal mining in the Czech Republic.

- (3) The only entity engaged in bituminous coal mining in the Czech Republic is the company OKD a.s., which is a private company owned 100 % by a private Dutch Holding – New World Resources (NWR).

### 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 EU legislation opening a given sector or a part of it. This legislation is listed in Annex XI to Directive 2004/17/EC. However for the exploration for and extraction of coal and other solid fuels, Annex XI does not list any relevant legislation liberalising this sector. Consequently free access to the market cannot be presumed, and it has to be demonstrated de facto and de jure.
- (5) An examination of the legal provisions applicable to issuing licenses for mining, in the Czech Republic, shows that it is currently granted on non-discriminatory basis, based on the assessment of the professional qualification of the applicant, and the technical and financial capacity to carry out the works. For the purposes of this decision, the possibility to obtain mining licence could be considered, de jure, free.
- (6) Direct exposure to competition should be evaluated on the basis of various indicators, none of which are necessarily, per se, decisive. In respect of the markets concerned by this decision, the aggregated market shares of the three main players on a given market

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

constitutes one criterion which should be taken into account <sup>(2)</sup>. 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 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 bituminous coal mining in the Czech Republic.

#### Market definition

##### *Product market*

- (9) The Czech request covers what is called 'the primary market for bituminous coal', which includes the production of bituminous coal and the wholesale distribution of coal <sup>(3)</sup>. When considering competition in the market for production of bituminous coal, regard must be had to the links between production and first sale/wholesale distribution of the bituminous coal extracted. This definition is also in line with previous Commission decisions <sup>(4)</sup> referring to the exploitation of other types of fuels.
- (10) The bituminous coal extracted has different chemical compositions and quality depending on geological conditions of individual mined seams. The bituminous coal can be divided into the coal suitable for coking (CSFC) and steam coal (SC). Although the two types of bituminous coal are mined in the same way, using the same technologies, they have however completely different end-use and different customer base. The prices are different and the products are not interchangeable.
- (11) CSFC is defined as bituminous coal with the quality enabling production of coke in blast furnaces and it is not used for direct heating or energy production. CSFC is purchased solely by companies producing coke. CSFC is the only raw material for coke production and has no other application actually. The CSFC cannot be substituted by steam coal.

<sup>(2)</sup> In line with the Commission's constant practice (e.g.: Commission Decision 2009/47/EC (OJ L 19, 23.1.2009, p. 57), Commission Decision 2010/192/EU (OJ L 84, 31.3.2010, p. 52), etc.).

<sup>(3)</sup> See page 21 of the application: '[...] there is no market of the bituminous coal mining, the market can be conceptually defined only in the next phase when the producers sell the coal mined'.

<sup>(4)</sup> See, inter alia, Commission Decision of 29 September 1999 declaring a concentration to be compatible with the common market and the EEA Agreement (Case IV/M.1532 BP Amoco/Arco), point 14.

- (12) SC is the coal which cannot be qualified as coking coal. The SC is used in power plants as fuel for production of electricity, heat and technological steam, as part of the production process of industrial plants such as sugar refineries, brick plants, cement factories and limekilns, paper mills, etc. SC may be substituted by CSFC, but doing so would not be economically viable.

- (13) CSFC may be divided further into a few categories according to its quality. CSFC referred to as hard coking coal is of the best quality, followed by CSFC referred to as semihard coking coal and semisoft coking coal. However, the market for the individual types of CSFC is not separated and no such distinction will be made for the purposes of the assessment for the present decision.

- (14) In view of the above, and in line with the application, for the purposes of evaluating the conditions laid down in Article 30(1) of Directive 2004/17/EC, CSFC and SC are considered to constitute separate product markets and they should therefore be examined separately.

##### *Geographical market*

- (15) 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, Slovakia, Austria, Poland and Hungary for CSFC. In the case of SC, the applicant considers that the geographical market should be defined as comprising the Czech Republic, Slovakia, Austria, Poland, Hungary and Germany. It is argued that the main reason for this market definition is the important mutual cross-border supply, the customer switching and the non-existence of administrative obstacles (customs barriers, quotas, etc.).
- (16) According to the application <sup>(5)</sup> the Czech Republic is a net exporter of both CSFC and SC. In 2009, the Czech Republic exported 3 581 thousands tonnes CSFC and 2 389 thousands tonnes SC <sup>(6)</sup> which accounts for around 61 % and 47 % of the respective internal production. In the same year, the imports into the Czech Republic accounted for 771 thousands tonnes CSFC and 954 thousands tonnes SC representing 13 % and 19 % respectively of the internal production <sup>(7)</sup> and the source of this imports was mainly Poland. In fact imports from Poland amounted to around 90 % for CSFC and 80 % for SC of total imports.

<sup>(5)</sup> See table 2 on page 39 of the application.

<sup>(6)</sup> European Commission General Directorate for Energy and Transport, Coal and Oil Market Observatory – Supplies and requirements of solid fuels in 2009 in the Czech Republic.

<sup>(7)</sup> Idem 5.

- (17) Although the applicant states that the coal produced by OKD in the Czech Republic – whether CSFC or SC – is competitive for a radius of 500 km, it is noted that the customers of OKD are located on a radius of approximately 350 km from the place of production of the coal, in Ostrava.
- (18) In respect of CSFC sales, OKD has one important customer in Slovakia, which purchased around 26 % in 2007 and 30 % in 2009 of OKD production and another important customer in Austria, which purchased 13 % in 2007 and 19 % in 2009 of the OKD production. The applicant lists also among its main customers outside the Czech Republic one company in Poland but its purchases account for only around 8 % of OKD production.
- (19) In respect of SC sales, apart from Czech customers, OKD lists one important customer in Austria, which accounted for around 12 % in 2007 and 21 % in 2009 of OKD sales and one customer in Germany with around 5 % in 2007 and 3 % in 2009 of SC sales.
- (20) According to the application, ‘the three biggest competitors are heavily concentrated’<sup>(8)</sup>, and indeed this can be observed in all the national markets taken separately, both in respect of SC and CSFC. The applicant also acknowledges that ‘the overwhelming majority of extracted coal is consumed on the local market’<sup>(9)</sup>, and this is confirmed in all countries in the geographic area considered by the application which are producing bituminous coal (the Czech Republic, Poland, Germany).
- (21) According to the Commission Notice on the definition of the relevant market<sup>(10)</sup> the relevant geographic market comprises the area in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different there. It is therefore worth noting that the coastal regions of Central Europe (in particular northern Germany and northern Poland) are exposed to imports of sea borne coal and given, inter alia, that sea freight rates are considerably lower than the cost for land transport, conditions of competition may therefore be different in those areas<sup>(11)</sup>.
- (22) The application mentions that an important factor in determining the price of the coal is the stability and the security of supply, and the duration of the contract<sup>(12)</sup>, and that generally the contracts for supply of coal, whether SC or CSFC, are long-term contracts.

- (23) The customers of bituminous coal in the Czech Republic are buying coal from OKD or, in limited quantities, from Polish companies. The imports from other countries, although increasing, are not very significant to date<sup>(13)</sup>.
- (24) In view of the above factors, for the purposes of evaluating the conditions laid down in Article 30(1) of Directive 2004/17/EC, the geographical market is considered to be confined to the Czech Republic and Poland, both in respect of SC and CSFC. Due to the abovementioned differences between those regions which can be easily supplied by sea borne coal and those which might be too far away from any coast, the market could even be smaller comprising only the Czech Republic and the south of Poland. The question can, however, be left open, since the larger market definition is the one more favourable to the applicant. Under both market definitions, the analysis does not lead to a different outcome.

#### *Market analysis*

- (25) It is considered that, in respect of bituminous coal mining, one indicator for the degree of competition on national markets is the total market share of the biggest three producers.

#### *CSFC Market*

- (26) OKD and two Polish suppliers of CSFC are by far the most important suppliers in the relevant geographic market. OKD is the largest supplier of CSFC in the Czech Republic (75,5 % market share in the Czech Republic in 2008). The two Polish suppliers of CSFC are the largest suppliers in Poland (60,2 % and 19,3 % market share in Poland in 2008). In the geographical market encompassing the Czech Republic and Poland, the aggregated market share of the three biggest producers in 2008 was around 93 %. It is also worth noting that the biggest competitor of OKD has on its own a market share of around 49 % of the market.
- (27) Even considering a larger market, comprising the Czech Republic, Slovakia, Austria, Poland and Hungary, as claimed by the applicant, the aggregated market shares of the three biggest competitors would still be very high (91,3 % in 2005, 87,7 % in 2006, 85 % in 2007 and 86,6 % in 2008<sup>(14)</sup>) and cannot constitute indication of sufficient exposure to competition of the CSFC market.

<sup>(8)</sup> See application, page 23, paragraph 6.

<sup>(9)</sup> See application, page 23, paragraph 6.

<sup>(10)</sup> See Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).

<sup>(11)</sup> See application, page 14, paragraph 4.

<sup>(12)</sup> See application, page 8, paragraph 3.

<sup>(13)</sup> In 2009, CSFC imports from USA represented around 1 % of the consumption and the imports of SC from Russia represented around 6 % of the consumption. In 2010, according to still provisional data in the letter of the applicant of 9.2.2011, the share of imports of CSFC from USA rose to 3 % of the consumption and the share of imports of SC from Russia rose to 12 % of the internal consumption.

<sup>(14)</sup> See table on page 58 of the application.

- (28) As recalled in recital 22 the security and the stability of supply play an important role in the contractual relationships. The information provided by the applicant on the customer switching for CSFC shows that there is virtually no switching for this product. The contracts for CSFC supply are long-term contracts and no evidence has been provided to show that any of OKD customers changed from OKD to other suppliers. It can consequently not be assumed that a CSFC customer would be willing or indeed able to easily switch in the event of a small but significant increase of price by OKD.

#### SC market

- (29) OKD and two Polish suppliers of SC are the by far most important producers of SC in the relevant geographic market. OKD is the largest supplier of SC in the Czech Republic (61,6 % market share in the Czech Republic in 2008). Two Polish suppliers of SC are the largest suppliers in Poland (52,5 % and 17,7 % market share in Poland in 2008). In the geographical market encompassing the Czech Republic and Poland, the aggregated market share of the three biggest producers was around 72 % in 2008. It is also worth noting that the biggest competitor of OKD had on its own a market share of around 50 % of the geographical market, encompassing the Czech Republic and Poland.
- (30) Moreover, on all three geographical markets for SC mentioned in recital 29 (the Czech Republic alone, Poland alone and a geographical market encompassing both) there is an economic operator which on his own has a market share of around 50 % or more. A constant jurisprudence should consequently be recalled in this context<sup>(15)</sup>, 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 %'.
- (31) Even considering a larger market than national, comprising the Czech Republic, Slovakia, Austria, Poland, Hungary and Germany, as claimed by the applicant, the aggregated market shares of the three biggest competitors would still be rather high (62,7 % in 2005, 60,2 % in 2006, 56,9 % in 2007 and 57,3 % in 2008<sup>(16)</sup>).
- (32) As is the case for CSFC, the security and stability of supply of SC play an important role in the contractual

relationships. The information provided by the applicant on the customer switching shows that a number of OKD customers of SC are interrupting their supplies from OKD, in certain years, or that some 1-year contracts or on-the-spot contracts were never renewed. However, given the fact that the applicant did not, as requested, provide information on the volumes of supplies concerned or of their proportion of the OKD production, it would be difficult to conclude that a customer of OKD would easily switch, following a small but significant increase of price by OKD.

#### IV. CONCLUSIONS

- (33) In respect of bituminous coal mining in the Czech Republic, the situation can thus be summarised as follows: in respect of both SC and CSFC, the aggregate market shares of the three biggest competitors on the geographical market as defined for the purposes of this decision are high, and more importantly, the biggest producer on its own represents a market share of almost 50 %, the markets should therefore be considered as being heavily concentrated and as recalled in recital 20, the overwhelming majority of extracted coal is consumed on the local market. The information on the degree of switching does not support the conclusion that a bituminous coal customer would have the will or possibility to easily switch supplier in the event of a small but significant price increase.
- (34) The applicant also acknowledged that, since the bituminous coal mining is not profitable in other places than those already exploited (notably those exploited by OKD), 'access of another entity to the Czech market is not realistic and has not taken place during the last five years'<sup>(17)</sup>. The same holds in respect of coal supplies, where the applicant states that he is not aware of any significant access to the Czech market, and most of the significant wholesale customers concluded long-term contracts<sup>(18)</sup>.
- (35) In view of the factors examined in recitals 8 to 34, it should be concluded that the market for mining bituminous coal, both CSFC and SC, 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 bituminous coal mining to be carried out in the Czech Republic or when they organise design contests for the pursuit of such activities in the Czech Republic.

<sup>(15)</sup> 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.

<sup>(16)</sup> See table on page 59 of the application.

<sup>(17)</sup> See paragraph 5, on page 62, of the application.

<sup>(18)</sup> See paragraph 6, on page 62 of the application.

(36) This Decision is based on the legal and factual situation as of November 2010 to March 2011 as it appears from the information submitted by the Czech Republic. 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.

(37) The measures provided for in this Decision are in accordance with the opinion of the Advisory Committee for Public Contracts,

HAS ADOPTED THIS DECISION:

*Article 1*

Article 30(1) of Directive 2004/17/EC is not applicable to bituminous coal mining 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, 20 May 2011.

*For the Commission*

Michel BARNIER

*Member of the Commission*

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