

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

*(notified under document C(2023) 6271)***(Only the German text is 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 13 April 2023, the German Association of Energy and Water Industries (Bundesverband der Energie- und Wasserwirtschaft e.V., 'BDEW' or 'the Applicant') submitted a request to the Commission pursuant to Article 35(1) of Directive 2014/25/EU ('the Request'). 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) BDEW is an association representing undertakings in the German energy and water sector which are considered as contracting entities in the meaning of Article 4 of Directive 2014/25/EU. The request concerns activities relating 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.
- (3) The request was accompanied by a reasoned and substantiated position of the German Federal Cartel Office (Bundeskartellamt, hereinafter referred to as 'BKartA') dated 25 May 2022. In this position, the BKartA thoroughly analyses the condition for the applicability of Article 34(1) of Directive 2014/25/EU to the activity concerned, in accordance with paragraphs 2 and 3 of that Article.

⁽¹⁾ OJ L 94, 28.3.2014, p. 243.

⁽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).

- (4) 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, the Commission is to adopt an Implementing Decision on the request within 90 working days.
- (5) On 16 May 2023, BDEW submitted additional arguments explaining why it regarded parts of the BKartA's analysis regarding exposure of parts of the renewable electricity generation activity to competition in Germany as not entirely well founded.
- (6) On 15 June 2023, Ørsted A/S submitted a request to the Commission pursuant to Article 35(1) of Directive 2014/25/EU. This request concerns electricity generation and wholesale from offshore windfarms in Germany commissioned after 1 January 2012 and subject to the Renewable Energy Sources Act (Erneuerbare-Energien-Gesetz, hereinafter referred to as 'EEG') 2012. Pursuant to Article 35(5) of Directive 2014/25/EU, this request is not treated as a new procedure and is treated in the context of the first request. The Commission and BDEW agreed that, as a result of this second request, the deadline for the adoption of an implementing act by the Commission would be set at 25 September 2023.

2. LEGAL FRAMEWORK

- (7) 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), point (b), unless this activity is exempted pursuant to Article 34 of that Directive.
- (8) 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.
- (9) 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.
- (10) Direct exposure to competition in a particular market should be evaluated on the basis of various criteria, none of which are by themselves decisive.
- (11) 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 is to be taken into account, as well as the existence and the extent of support to renewable electricity generation and wholesale in Germany through schemes.

3. ASSESSMENT

- (12) The aim of this Decision is to establish whether the activities concerned by the request are, in markets to which access is not restricted within the meaning of Article 34 of Directive 2014/25/EU, 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.

- (13) This Decision is based on the legal and factual situation as of respectively April and June 2023 and on the information submitted by BDEW, Ørsted, the German authorities 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

- (14) 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 ⁽³⁾.
- (15) On the basis of the information available to the Commission, Germany has transposed and applies Directive (EU) 2019/944. Consequently, access to the relevant market is deemed to be not restricted with the meaning of Article 34(3) of Directive 2014/25/EU.

3.2. Competition assessment

3.2.1. Relevant product market definition

- (16) According to BDEW, the relevant product market is constituted by conventional and renewable generation and wholesale, with the exception of electricity from renewable sources generated in installations that went into operation before 1 August 2014 and still receive public funding. According to Ørsted, the relevant market includes electricity generation and wholesale subject to the direct marketing option since 2012 or the direct marketing obligation since 2014.
- (17) BDEW observes ⁽⁴⁾ that for all installations commissioned after 1 August 2014, mandatory direct marketing is the standard form of marketing. Installations in mandatory direct marketing can choose between direct marketing with market premium and direct marketing without support (so-called other direct marketing). An exception to the direct marketing obligation only exists for small installations. For installations commissioned before 1 January 2016, these are installations up to 500 kW whereas for installations commissioned as of 1 January 2016, these are installations below and until 100 kW. Such small installations can decide whether to opt for the fixed feed-in tariff model or direct marketing.
- (18) Concerning the installations that still receive public funding, BDEW indicates that 'post-support'-installations are those that are excluded or will be excluded from support after 20 years of support from 1 January 2021 onwards. 'Post-support'-installations with an installed electrical capacity of more than 100 kW must market the electricity directly without any support (other direct marketing). Installations with an installed electrical capacity of up to and including 100 kW have the choice between (non-supported) other direct marketing and sale to the grid operator against payment of a feed-in tariff. However, this feed-in tariff now only amounts to the 'annual market value' minus the average marketing costs of the transmission system operators for the electricity sold to the grid operator ⁽⁵⁾. The German legislator as well as the Commission therefore treat this remuneration as exclusively market-based support ('transitory item') and thus not as a State aid ('no aid') ⁽⁶⁾. With the exception of small-scale plants, other mandatory direct marketing applies to 'post-support' plants.

⁽³⁾ 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).

⁽⁴⁾ P. 3 of the application

⁽⁵⁾ Pursuant to Annex 1 No 4 EEG 2021 and EEG 2023, the annual market value is calculated from the calendar year average of the spot market price for the energy source concerned on electricity exchanges on which electricity products can be traded for the price zone for Germany.

⁽⁶⁾ Accordingly, the Commission has not considered it necessary to approve this remuneration under State aid law, see FAQ of the Federal Ministry for Economic Affairs and Energy on approval under State aid law, point 6, <https://www.bmwk.de/Redaktion/DE/FAQ/EEG-2021-FAQ/faq-beihilferechtlichen-genehmigung-eu-kommission.html>.

- (19) In a previous decision related to electricity generation in Germany ⁽⁷⁾, the Commission had made a distinction between the market for conventional electricity generation and the market for renewable electricity generation. The Commission considered that the production and marketing of electricity regulated by the EEG was not part of the market for generation and first sale of electricity produced from conventional sources because electricity generated from renewable sources was normally not directly sold on the wholesale market but first bought by the transmission grid operators for a statutory rate of remuneration.
- (20) In later decisions, the Commission found that conventional and (at least some) renewable electricity generation were part of the same market. In its decision concerning the Netherlands ⁽⁸⁾, the Commission noted that the electricity generated from renewable sources was sold directly on the market, and that the Dutch SDE+ system encouraged competitive bids, whereas the competitors would try to minimise their cost (hence the feed in premium they would receive). In its decision concerning Italy ⁽⁹⁾, the Commission remarked that the more recent renewable electricity schemes were subject to a bidding process with a high number of applicants. In its decision related to Lithuania ⁽¹⁰⁾, the Commission stated 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 2022 concerning Denmark ⁽¹¹⁾, the Commission found that the allocation of the public funding was exposed to competition through a bidding process, which disciplines 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.
- (21) In its position, the BKartA observes ⁽¹²⁾ that, between the beginning of 2012 and the end of 2020, approximately 65 GW of generation capacity supported under the EEG have been installed, which represents half of the EEG supported capacity and a quarter of the total generation capacity in Germany. In 2020, the EEG supported electricity amounted to around 20 % of the total electricity generation in Germany. The payouts under the EEG have only increased moderately, as an increasing number of generation facilities decided to sell their production on the market ('direct marketing') instead of receiving a fixed premium. Concerning the product market definition, the BKartA has repeatedly taken the view, in its antitrust decisional practice, that EEG electricity was a separate market ⁽¹³⁾.
- (22) The Commission notes that electricity generation from renewable sources in Germany is supported by a number of schemes with different characteristics.
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- ⁽⁷⁾ Commission Implementing Decision 2012/218/EU of 24 April 2012 exempting the production and wholesale of electricity produced from conventional sources in Germany from the application of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 114, 26.4.2012, p. 21).
- ⁽⁸⁾ 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).
- ⁽⁹⁾ 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).
- ⁽¹⁰⁾ 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).
- ⁽¹¹⁾ 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).
- ⁽¹²⁾ Statement by the Bundeskartellamt on the application by BDEW for a decision on the applicability of Article 34(1) of Directive 2014/25/EU to EEG electricity generation and related activities from plants commissioned in Germany since 1 January 2012 (B8- 70/20). At the same time, statement by the Bundeskartellamt on the application by Ørsted A/S for a decision on the applicability of Art. 34 para. 1 of Directive 2014/25/EU to EEG electricity generation from offshore wind farms in Germany (B8-102/20), of 25 May 2022, point C.1, p. 11.
- ⁽¹³⁾ Bundeskartellamt, D. of 10.7.2018, B4-80/17, para. 167 et seq. – EnBW/MWV; BKartA, case report dated 31.5.2019, B8-28/19 – RWE/E.ON minority shareholding.

- (23) Given the diversity of schemes to support electricity production from renewable sources in Germany, the market will, for the purpose of the analysis in these recitals, be split between, on the one hand, installations that can receive a remuneration independent of market prices (fixed feed-in tariff, tenant electricity surcharge) and, on the other hand, installations that receive a remuneration linked to market prices (direct marketing with legally determined value applicable, direct marketing with applicable value determined through tenders, post-subsidised old plants and other direct marketing). This approach is in line with the Commission exemption Decision 2012/218/EU concerning the German electricity market, in which the Commission had found that the existence of statutory remuneration was a key feature when analysing the exposure to competition of EEG electricity.

3.2.2. *Relevant geographic market definition*

- (24) According to BDEW, based on the decisional practice of the Commission, the relevant geographic market should be defined as national, comprising the territory of the Federal Republic of Germany ⁽¹⁴⁾.
- (25) As regards the geographical market, in its previous practice ⁽¹⁵⁾, the Commission took the view that the market for electricity generation is national in scope. The Applicant's position is in line with Commission practice.
- (26) 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 competition law, the geographic scope of the generation and wholesale of electricity from renewable sources can be considered to cover the territory of Germany.

3.2.3. *Market analysis*

3.2.3.1. *Market shares and overall assessment of the electricity generation market in Germany*

- (27) The Commission will undertake an analysis of the electricity generation and wholesale market in Germany based on available data for the conventional and renewable electricity generation respectively.
- (28) The BKartA provides an overview of market shares in its yearly market report for conventional electricity generation. Over the 2019–2021 period, the annual market shares of the largest five conventional electricity producers were fairly stable: RWE (26 %, 25,3 %, 26,1 %), LEAG (16,2 %, 14,9 %, 15,7 %), EnBW (12,7 %, 9,9 %, 11,4 %), EON (8,8 %, 9,6 %, 9,2 %) and Vattenfall (6,4 %, 5,6 %, 4,5 %). Only two of these companies, EnBW and Vattenfall, are contracting entities. Ørsted had a market share lower than 1 % for the combined conventional and renewables electricity generation market in 2020, 2021 and 2022 ⁽¹⁶⁾.
- (29) The names and market shares of the three largest producers of electricity from renewable sources are not publicly available. This is partly due to the high number of players active in the market for electricity from renewable energy sources.
- (30) The BKartA has determined that the market shares of the five above-mentioned companies with the highest sales in conventional electricity generation amounted for the generation volume supported under the EEG for the market area Germany in 2021 together to around 6,4 % ⁽¹⁷⁾.
- (31) According to BDEW, it is safe to assume that the market shares of generators of electricity from renewable sources are relatively small, and that none of them has more than 10 % market share.

⁽¹⁴⁾ Request, point 3.2.

⁽¹⁵⁾ Implementing Decision 2012/218/EU.

⁽¹⁶⁾ See Ørsted request p. 40.

⁽¹⁷⁾ BNetzA/BKartA, Monitoring Report 2022. p. 52 et seq.

- (32) The BKartA states in its position ⁽¹⁸⁾ that effective competitive pressure prevails in the general electricity wholesale in Germany and that wholesale price signals are the result of effective competition. The Commission therefore acknowledges the existence of a competitive pressure from the conventional electricity generation and wholesale on the renewable electricity generation and wholesale, subject to a more detailed analysis of the renewable electricity support schemes.

3.2.3.2. Renewable electricity generation and wholesale installations that can receive a remuneration independent of market prices (i.e. subject to a fixed feed-in tariff ⁽¹⁹⁾ and to the tenant electricity surcharge ⁽²⁰⁾)

- (33) Renewable electricity generation facilities commissioned between 1 January 2012 and 1 August 2014 are exempt from the direct marketing obligation and can use the fixed feed-in tariff option. According to the BkartA, these installations receive a fixed remuneration from a non-market player (the transmission grid operators) and are not involved in any market activity. In line with the analysis performed by the Commission in its 2012 Decision concerning electricity generation and wholesale in Germany, such plants cannot be regarded as being exposed to competition.
- (34) Small plants commissioned on or after 1 August 2014 (i.e. plants < 100 kW or, if commissioned by the end of 2015, < 500 kW) are exempt from the direct marketing obligation and can use the fixed feed-in tariff option. According to the BkartA, these installations receive a fixed remuneration from a non-market player and are not involved in any market activity. In line with the analysis performed by the Commission in its 2012 Decision concerning electricity generation and wholesale in Germany, such plants cannot be regarded as being exposed to competition.
- (35) Concerning the 'tenant electricity surcharge' or the electricity that the plant operator does not sell to its tenants, according to the BKartA, the plant operator will only opt for the tenant electricity surcharge if that presents additional financial benefits. This is therefore by default a more subsidised option. The BKartA concludes that renewable electricity plants subject to the 'tenant electricity surcharge' are not directly exposed to competition. The Commission does not identify elements that would allow to depart from this conclusion.
- (36) For the purposes of this Decision and without prejudice to competition law, the factors described above should be taken as an indication of the absence of exposure to competition of renewable electricity generation and wholesale subject to feed-in tariffs and tenant electricity surcharge in Germany. Consequently, since the conditions set out in Article 34 of Directive 2014/25/EU are not met, it should be established that Directive 2014/25/EU should continue to apply to contracts intended to enable the pursuit of these activities in Germany.

3.2.3.3. Renewable electricity plants that receive a remuneration linked to market prices (i.e. subject to direct marketing with legally determined value applicable ⁽²¹⁾, direct marketing with applicable value determined through tenders ⁽²²⁾, post-subsidised old renewable electricity plants ⁽²³⁾ and renewable electricity plants subject to other direct marketing ⁽²⁴⁾)

- (37) The EEG plant operators subject to direct marketing with legally determined value applicable generate revenue from:

— the sale of electricity to third parties (in the amount of the purchase price paid for the quantities entered into the balancing group). This marketing is free of regulatory requirements regarding the price. The third party may not be a grid operator. The sale thus takes place on the wholesale market,

⁽¹⁸⁾ Statement by the Bundeskartellamt, *idib.*, page 44.

⁽¹⁹⁾ Section 21 subsection 1 number 1 of the EEG.

⁽²⁰⁾ Section 21 subsection 3 of the EEG.

⁽²¹⁾ Section 20 of the EEG.

⁽²²⁾ Sections 20 and 22 of the EEG.

⁽²³⁾ Section 23 b paragraph 2 of the EEG.

⁽²⁴⁾ Section 21 a of the EEG.

— the market premium paid to the plant operator by the grid operator for each kWh fed in. This is subject to a restriction for plants commissioned as of 1 August 2014: If the value is negative for at least six consecutive hours on the EPEX Spot Day Ahead, the value to be applied and thus the market premium for this entire period is reduced to zero. For plants newly commissioned or newly awarded as of 1 January 2021, the relevant period has been reduced to four hours. For all RES-plants commissioned or being awarded with an EEG-award from 1 January 2023 onwards, this time period will be lowered gradually from four hours in 2023 to one hour in 2027. The market premium is a separate payment claim of the EEG plant operator against the grid operator. It is calculated for installations commissioned as of 1 August 2014 as the difference between the 'applicable value' ('anzulegender Wert', AW) to be applied to the installation and the 'monthly market value' ('Monatsmarktwert', MW) according to the formula $MP = AW - MW$.

- (38) In its position, the BKartA states that, with regard to its concrete practical and economic consequences, it is decisive that the market premium compensates for the difference between the plant-specific applicable value and the market value of the respective technology. Since it cannot become negative, it has an increasing effect on the plant operator's profits if it is positive, i.e. if the plant-specific applicable value is higher than the corresponding market value. The BKartA performed an analysis of both values over 23 months between May 2020 and April 2022. As of 1 January 2021, the applicable values were set by law and are degressive over time at a rate between 0,5 and 1,5 percent per year. At least until around the middle of the year 2021, the applicable values were mostly significantly above the respective market values of the last 12 months. This meant that a correspondingly high market premium was paid, which isolated the RES plants concerned from the effective market and competitive forces of other electricity generation. Plants whose plant-specific applicable value exceeds the normal market value and which are consequently supported by the legally determined market premium are therefore, in the BKartA's view, not exposed to direct competition from other generation plants.
- (39) Looking into specific technologies, the BKartA observed that up to the middle of 2021 only the plant-specific applicable values of individual new plants for hydropower and landfill gas were perceptibly below the EPEX market value in some months. This applied to hydropower with a capacity of more than 50 MW in September 2020 and, from November 2020 on, hydropower with a capacity between 20 MW and 50 MW in September 2020 and from December 2020 on, and hydropower with a capacity between 10 MW and 20 MW in January and April 2021. This also affected landfill gas with a capacity of 1 MW to 5 MW in September 2020 and from December 2020 on, and landfill gas with a capacity of 5 MW or more in November 2020. The same applies to offshore wind installations. Since mid 2021, a large number of applicable values have fallen below the relevant monthly market values, and since the end of 2021 this has affected the vast majority of applicable values.
- (40) According to the BKartA, if this trend were to stabilise, the market premium for these plants would no longer have any economic effect; they would therefore operate without restriction at competitive market conditions and be exposed to effective competition. However, the BKartA would only assume such a stable trend if the plant-specific applicable value fell below the market value (or a corresponding but forward-looking Power Purchase Agreement index) for a suitable period of time. Such a period would be 12 consecutive months. The Commission agrees with the BKartA that it is appropriate to link the direct exposure to competition of this activity to the fact that the plant-specific applicable value fell below the market value (or a corresponding but forward-looking Power Purchase Agreement index) for 12 consecutive months.
- (41) Concerning direct marketing with applicable value determined through tenders, some features are common to all tenders, according to the BKartA. The EEG-tenders are characterised by a small-scale bid structure. The size of individual bids is small compared to the demand in the respective tender and far away from the presumption threshold for market dominance under German cartel law. Behind these bids, there is a sufficiently small-scale, and in the case of wind onshore and solar almost atomistic, supplier structure. The tendering public body is the Federal Republic of Germany, which is not itself active as a bidder.

- (42) The BKartA adds that in the case of all renewable energy sources, due to climate policy considerations and against the background of corresponding political expansion targets and specifications, the tendering regime aims to expand the offer of electricity from renewable energy sources and a correspondingly high demand for eligible projects. The actual and potential offer by bidders in the context of the tender, on the other hand, depends, among other things, on the availability of corresponding land for new projects. Bids covering existing plants are currently only practically relevant in the biomass sector. In the case of onshore wind, there are already bids for substantially technically upgraded plants at the same site (repowering). Bidding for new plants is possible throughout and is the most significant case in practice. Market entry is also facilitated by the fact that the supply of renewable electricity is not characterised by intensive, local personnel deployment. Furthermore, competition for the applicable values for the support of electricity production from renewable energy sources is not a competition for the market. An award does not confer a monopoly or dominant position on the downstream market, since the sale of the electricity generated on the wholesale takes place in a competitive environment at prices determined by market mechanisms.
- (43) In previous decisions ⁽²⁵⁾, the Commission held that the existence of tenders to determine the level of support to renewable electricity schemes was an important factor to determine direct exposure to competition. In the present case concerning Germany, the BKartA, while acknowledging the Commission's decisional practice, suggests to introduce an additional criterion allowing to differentiate according to the intensity of competition for the subsidy in the individual tender. This criterion could be an oversubscription by at least by 25 per cent of the capacity tendered out. BDEW questions the feasibility of applying such a criterion, as the oversubscription can only be measured after the tender, while contracting entities need to organise their own procurement before participating into such tenders. This would render void *de facto* an exemption.
- (44) The Commission held in previous decisions that a tendering process for renewable electricity generation subsidies was an indication of exposure to competition. For instance, in its decision concerning the Netherlands, the Commission noted ⁽²⁶⁾ that 'the allocation of the SDE+ subsidy is exposed to competition through a bidding process which disciplines the behaviour of renewable electricity producers with regard to their procurement policy'. Similarly, in Decision (EU) 2020/1499 concerning Italy ⁽²⁷⁾, the Commission noted that the more recent subsidy schemes operated in a competitive environment given the high number of applicants and bids in the respective tenders. In Decision (EU) 2020/1500 concerning Lithuania, the Commission observed ⁽²⁸⁾ that the electricity produced under the third scheme receives premium-based support established through a competitive bidding procedure and found that was exposed to competition. Finally, in its decision concerning Denmark, the Commission noted ⁽²⁹⁾ that the allocation of public funding was exposed to competition through a bidding process. In line with those previous decisions, the Commission therefore considers that renewable electricity plants subject to direct marketing with applicable value determined through tenders are directly exposed to competition.
- (45) The BKartA is of the opinion that post-subsidised plants are exposed to direct competition insofar as they are paid a feed-in tariff by the grid operator amounting to the market value less flat-rate marketing costs. The Commission agrees with this analysis.
- (46) According to the BKartA, other post-subsidised EEG installations have no entitlement under the EEG. They are subject to other direct marketing pursuant to section 21a EEG. All EEG installations in other direct marketing pursuant to section 21a of the EEG participate in the electricity first sales market in the same way as any other electricity generation system not supported under the EEG. In the meantime, this remuneration category is already relevant for newly constructed plants, such as ground-mounted solar plants. These plants are exposed to general competitive forces. The Commission shares the view that renewable electricity plants subject to other direct marketing are directly exposed to competition.

⁽²⁵⁾ Decisions (EU) 2018/71 (OJ L 12, 17.1.2018, p. 53) (Netherlands), (EU) 2020/1499 (OJ L 342, 16.10.2020, p. 8) (Italy) and (EU) 2020/1500 (OJ L 342, 16.10.2020, p. 15) (Lithuania), (EU) 2022/1376 (OJ L 206, 8.8.2022, p. 42) (Denmark)

⁽²⁶⁾ Commission Decision (EU) 2018/71 (Netherlands), point 21.

⁽²⁷⁾ Commission Decision (EU) 2020/1499 (Italy), point 38.

⁽²⁸⁾ Commission Decision (EU) 2020/1500 (Lithuania), point 30.

⁽²⁹⁾ Commission Decision (EU) 2022/1376, point 29 of the decision.

- (47) For the purposes of this Decision and without prejudice to competition law, the factors listed above should be taken as an indication of exposure to competition of renewable electricity plants subject to direct marketing with legally determined value applicable, direct marketing with applicable value determined through tenders, post-subsidised old renewable electricity plants and renewable electricity plants subject to other direct marketing in Germany. Consequently, since the conditions set out in Article 34 of Directive 2014/25/EU are met, it should be established that Directive 2014/25/EU does not apply to contracts intended to enable the pursuit of those activities in Germany.

4. CONCLUSION

- (48) In view of the factors examined above, 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 Germany in respect of the activities related to renewable electricity generation and wholesale subject to feed-in tariffs and tenant electricity surcharge.
- (49) Directive 2014/25/EU should therefore continue to apply when contracting entities award contracts intended to enable those activities, or when design contests are organised for the pursuit of such activities in that geographic area.
- (50) In view of the factors examined above, 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 Germany in respect of the activities related to renewable electricity generation and wholesale subject to direct marketing with legally determined value applicable (when the plant-specific applicable value falls below the market value (or a corresponding but forward-looking Power Purchase Agreement index) for 12 consecutive months), direct marketing with applicable value determined through tenders, other direct marketing as well as post-subsidised old renewable electricity plants.
- (51) Since the condition of unrestricted access to the market is deemed to be met, Directive 2014/25/EU should not apply when contracting entities award contracts intended to enable those activities to be carried out in Germany, nor when design contests are organised for the pursuit of such activities in that geographic area.
- (52) 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 ⁽³¹⁾,

HAS ADOPTED THIS DECISION:

Article 1

Directive 2014/25/EU shall not apply to the award of contracts by contracting entities and intended to enable the following activities to be carried out in Germany:

- electricity generation and wholesale from renewable electricity plants subject to direct marketing with legally determined value applicable (provided that the plant-specific applicable value is lower than the market value (or a corresponding but forward-looking Power Purchase Agreement index) for 12 consecutive months),
- electricity generation and wholesale from renewable electricity plants subject to direct marketing with applicable value determined through tenders,

⁽³⁰⁾ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, p. 1).

⁽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.

- electricity generation and wholesale from renewable electricity plants subject to other direct marketing,
- electricity generation and wholesale from post-subsidised old renewable electricity plants.

Article 2

Directive 2014/25/EU shall continue to apply to the award of contracts by contracting entities and intended to enable the following activities to be carried out in Germany:

- renewable electricity generation and wholesale from renewable electricity plants subject to a fixed feed-in tariff,
- renewable electricity generation and wholesale from renewable electricity plants subject to the tenant electricity surcharge.

Article 3

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 21 September 2023.

For the Commission
Thierry BRETON
Member of the Commission
