

## COMMISSION IMPLEMENTING DECISION

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**

(notified under document C(2012) 2426)

(Only the German text is authentic)

(Text with EEA relevance)

(2012/218/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(5) and (6) thereof,

Having regard to the request submitted by *Bundesverband der Energie- und Wasserrwirtschaft e.V.* (Federal Association of the Energy and Water Industry) (hereinafter referred to as BDEW) by e-mail of 26 October 2011,

Whereas:

## I. FACTS

- (1) On 26 October 2011, BDEW transmitted a request pursuant to Article 30(5) of Directive 2004/17/EC to the Commission by e-mail. The Commission informed the German authorities about the request on 11 November 2011 and also requested additional information of the German authorities by e-mail of 10 January 2012, and of BDEW by e-mail of 21 December 2011. Additional information was transmitted by the German authorities by e-mail of 14 December 2011 and by BDEW on 17 January 2012 on 26 January 2012 and on 28 February 2012.
- (2) The request submitted by BDEW on behalf of contracting entities in the sector concerns, as described in the request, 'the construction, the purchase and the operation (including maintenance) of all types of electricity generation plants, as well as the relevant support activities' <sup>(2)</sup>.
- (3) The request is accompanied by an opinion of the Federal Cartel Office (*Bundeskartellamt*) dated 25 July 2011. This opinion (hereinafter referred to as the 'Opinion') was issued on the basis of relevant German legislation, and addresses the question as to whether the activity subject

to the procedure is directly exposed to competition. The Opinion is based on a large sectorial survey of the relevant markets.

## 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 to 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>(3)</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>(4)</sup> which was also replaced by Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC <sup>(5)</sup>.
- (5) Germany has implemented and applied not only Directive 96/92/EC but also Directives 2003/54/EC and 2009/72/EC. Consequently, and in accordance with the first subparagraph of Article 30(3), access to the market should be deemed not to be restricted on the entire territory of Germany.
- (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 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

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

<sup>(2)</sup> The exemption request is intended to cover also activities linked to electricity generation, such as combined heat and power stations.

<sup>(3)</sup> OJ L 27, 30.1.1997, p. 20.

<sup>(4)</sup> OJ L 176, 15.7.2003, p. 37.

<sup>(5)</sup> OJ L 211, 14.8.2009, p. 55.

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 German market of electricity is characterised by a large number of power plants which are operated by a big number of market players<sup>(1)</sup>. The majority of production capacity belongs to four large energy companies: RWE AG, E.ON AG, EnBW AG and Vattenfall Europe AG. However, as two of these companies, namely RWE and E.ON are private companies (i.e. companies not subject to the direct or indirect dominant influence of contracting authorities as provided for under Article 2(1)(b) of Directive 2004/17/EC), which do not operate in the electricity generation sector on the basis of special or exclusive rights within the meaning of Article 2(3) of Directive 2004/17/EC, they are not contracting entities in the sense of the Directive 2004/17/EC. Their procurement for the purpose of producing or selling electricity is therefore not subject to the provisions of this Directive; consequently, in respect of these activities, they should be considered as competitors of the contracting entities whose procurement is subject to this Directive. The analysis will therefore in the following focus on the contracting entities when examining whether the activity is exposed to competition in markets to which access is not restricted.
- (9) Electricity is marketed at wholesale level via the exchanges, i.e. the spot and forward markets of the European Energy Exchange AG (EEX) and the European Power Exchange S.E. (EPEX), or in over-the-counter transactions outside the exchanges. The price on the power exchanges usually serves as a reference price for transactions over the counter. The production companies optimise operation of their power stations in line with the results of the spot market trade on the exchanges. In principle, only those power stations are operated whose marginal costs are below the market price.
- (10) The *Gesetz für den Vorrang Erneuerbarer Energien* <sup>(2)</sup> (hereinafter referred to as EEG) sets out the rules for the

electricity generated from renewable energy sources<sup>(3)</sup>, which, in addition to the electricity generated through conventional sources<sup>(4)</sup>, is playing an increasing role in the German market. According to the amended EEG which entered into force at the beginning of 2012, the share of renewable energy sources in the electricity supply shall increase to 35 % by 2020, to 50 % by 2030 and to 80 % by 2050.

- (11) At the end of 2010, 160,5 GW generating capacity was connected to the networks of the Transmission System Operators (TSOs) (77,6 GW) and Distribution System Operators (DSOs) (82,9 GW). Compared to 2009 (152,7 GW), this represents an increase of approximately 7,8 GW. Renewables account for 54,2 GW of the total capacity. Some 50,7 GW of the renewables are paid for in accordance with EEG tariffs. This means that renewables represent approximately 34 % of overall capacity<sup>(5)</sup>.
- (12) In terms of feed-in, in 2010, a total of 531,2 TWh was fed into the TSO (367,5 TWh) and DSO (163,7 TWh) systems. The volume fed in from renewable sources was 93,7 TWh, of which 80,7 TWh were remunerated in accordance with the EEG. This means that feed-in from renewables represents approximately 18 % of the total feed-in volume, a proportion that therefore lies below the 34 % of total generation capacity accounted for by these sources<sup>(6)</sup>. The difference is due to the fact that the period of utilisation of renewable sources per year is lower than that of conventional sources.
- (13) Another feature of the German electricity market relates to the recent decision of the national authorities to close eight nuclear power plants, with a total capacity of 8 400 MW<sup>(7)</sup>, following the nuclear catastrophe in Japan, at the beginning of 2011. Moreover, it was decided to close the rest of the nuclear power plants in Germany by 2022. On the short term this changed the balance between imports and exports, so that, from a net exporter of electricity until 2010, Germany became a net importer in 2011.

<sup>(1)</sup> According to Eurostat data on Environment and Energy of 11/2010, in 2008 there were reported more than 450 electricity generator companies in Germany representing at least 95 % of the net electricity generation.

<sup>(2)</sup> EEG regulates: priority connection to the grid systems for general electricity supply of installations generating electricity from renewable energy sources and from mine gas; priority purchase, transmission, distribution of and payment for such electricity by the grid system operators, also in relation to electricity from combined heat and power (CHP) generation, and including premiums for integrating this electricity in the electricity supply system; and the nationwide equalisation scheme for the quantity of electricity purchased for which a tariff or premium has been paid.

<sup>(3)</sup> Within the meaning of EEG, and under the conditions set out therein, 'renewable energy sources' means hydropower, including wave power, tidal power, salt gradient and flow energy, wind energy, solar radiation, geothermal energy, energy from biomass, including biogas, biomethane, landfill gas and sewage treatment gas, as well as the biodegradable fraction of municipal waste and industrial waste.

<sup>(4)</sup> Within the meaning of this Decision electricity generated from conventional sources, and conventional electricity, means electricity which does not fall within the scope of the EEG.

<sup>(5)</sup> According to the 'Monitoring Benchmark Report 2011' by Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (EN translation), p. 9.

<sup>(6)</sup> According to the 'Monitoring Benchmark Report 2011' by Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (EN translation), p. 10.

<sup>(7)</sup> According to the 'Monitoring Benchmark Report 2011' by Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (EN translation).

## Market definition

### Product market definition

- (14) According to Commission precedents <sup>(1)</sup>, the following relevant product markets could be distinguished in the electricity sector: (i) generation and wholesale supply; (ii) transmission; (iii) distribution; and (iv) retail supply. While some of these markets may be further subdivided, to date previous Commission practice <sup>(2)</sup> rejected a distinction between an electricity generation market and a wholesale supply market since generation as such is only a first step in the value chain, but electricity volumes generated are marketed via the wholesale market.
- (15) The request by BDEW pertains to electricity generation and wholesale. The Federal Cartel Office in its Opinion defines the product market as 'a primary sales market for electricity' <sup>(3)</sup>, which covers initial sales of all electricity suppliers of their own production and the net imports of electricity, but do not include subsequent trading between market participants. Moreover, the Federal Cartel Office considers that the production and marketing of electricity regulated under EEG (hereinafter referred to as 'EEG electricity') is not part of this market.
- (16) The Federal Cartel Office considers that the market for EEG electricity represents a separate market as far as its first sale is concerned. The EEG electricity is normally not directly sold on the wholesale market but first bought by the transmission grid operators for a statutory rate of remuneration. They then sell it in a second step on the wholesale market.
- (17) The Federal Cartel Office concludes that the production and marketing of EEG electricity is not organised on a competitive basis and that the EEG electricity is independent of demand and price indicators <sup>(4)</sup>. This conclusion is notably based on the following facts:
- (18) The EEG electricity has feed-in priority; therefore the production of EEG electricity is totally independent of demand. The production and feed-in is also independent of the prices as the operators are entitled to a statutory payment. The EEG electricity is marketed by the TSOs on the spot market in conformity with statutory provisions, without any scope for manoeuvre.
- (19) The Federal Cartel Office also noted that, according to the law, EEG electricity may be marketed directly, and a certain percentage of operators are using this opportunity. EEG provides that EEG installation operators may switch between direct selling and receipt of the

tariff payment under the EEG on the first day of the month. Depending on the market price forecast and depending on demand, EEG installation operators can thus decide each month, which form of selling is best for them. However, this direct marketing will in the future only be of marginal importance.

- (20) According to the amended EEG which entered into force at the beginning of 2012, EEG installation operators have — as indicated above — the option of marketing the electricity they produce themselves and receive a marketing premium as well. The marketing premium is to replace the difference between the fixed EEG remuneration and the monthly average price on the exchange determined *ex post*. The taking-up of the marketing premium is however optional, i.e. EEG installation operators can remain in the fixed remuneration system or return to it any month. The largest share of EEG electricity is, however, expected to be marketed via the transmission grid operators. Moreover, the market premium model will not alter the fact that the total remuneration level for EEG producers is not primarily determined by market prices <sup>(5)</sup>.
- (21) The Federal Cartel Office acknowledges therefore that, while EEG electricity exerts a competitive pressure on the electricity produced from conventional sources, the reverse is not true; therefore, EEG electricity cannot be included in the same market as the conventional electricity as the market conditions which prevail for the first sale significantly differ between these two generation forms. The first sale of EEG electricity, moreover, mostly takes place via the transmission grid operators. The market therefore evidently differs also from a demand-side perspective from the wholesale market for conventional electricity.
- (22) Taking into account the specificity of the German electricity market, for the purposes of evaluating the conditions laid down in Article 30(1) of Directive 2004/17/EC, and without prejudice to competition law, the relevant product market is hereby defined as the market for generation and first sale of electricity produced from conventional sources. Generation and first sale of EEG electricity is not part of this market, for the reasons set out above, and it will be hereinafter assessed separately.

### Geographic market definition

- (23) According to the application, the request pertains to activities on the territory of the Federal Republic of Germany. The applicant explores the possibility of a wider market including Germany and Austria based on several trends in respect of development of the regulatory

<sup>(1)</sup> Case COMP/M.4110 — E.ON/ENDESA, of 25.4.2006, paragraph 10, p. 3.

<sup>(2)</sup> Case COMP/M.3696 — E.ON/MOL, of 21.1.2005, paragraph 223, Case COMP/M.5467 — RWE/ESSENT, of 23.6.2009, paragraph 23.

<sup>(3)</sup> According to Federal Cartel Office Opinion (EN translation), p. 5.

<sup>(4)</sup> According to Federal Cartel Office Opinion (EN translation), p. 5.

<sup>(5)</sup> The remuneration of an individual operator may nevertheless vary depending on whether he will manage to market his electricity at a price above the monthly average price.

framework, level of electricity imports and exports and market coupling and congestion management procedures, but eventually concludes that 'the applicant cannot draw a final conclusion as to whether the German wholesale electricity market and relevant markets in neighbouring countries are sufficiently integrated at the moment so as to be considered a regional market'.

- (24) The Federal Cartel Office, following the sectorial survey carried out, assumes that there is a common primary market for electricity in Germany and Austria. This conclusion is based on the absence of bottlenecks at the border interconnectors between Germany and Austria and the standard marketing and pricing area on the European Power Exchange S.E. (EPEX).
- (25) Previous Commission practice mostly defined the electricity markets as being national in scope<sup>(1)</sup> or even smaller<sup>(2)</sup>. Occasionally, it has left open the possibility of wider than national markets<sup>(3)</sup>.
- (26) The Commission considers that for the purposes of evaluating the conditions laid down in Article 30(1) of Directive 2004/17/EC, and without prejudice to the competition law, it is not necessary to conclude on the precise scope of the relevant geographic market for the generation and first sale of conventional electricity as, under any alternative market definition, the results of the assessment would be the same.
- (27) As regards production and first sale of EEG electricity, its geographic scope could not extend beyond the territory of Germany since it is based on the specific legal conditions laid down in the German EEG.

### Market analysis

*Production and first sale of electricity produced from conventional sources*

(a) Market shares and market concentration

- (28) As it results from a constant practice<sup>(4)</sup> in respect of Commission Decisions pursuant to Article 30, the Commission 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'.

- (29) According to the Opinion of the Federal Cartel Office<sup>(5)</sup>, the cumulative market shares of the first three producers, in terms of feed-in electricity, was 74 % in 2007 and 73 % in 2008 and 70 % in 2010. The German electricity market is therefore in the middle of the range, by comparison with previous exemptions decisions under Article 30 of Directive 2004/17/EC<sup>(6)</sup>.
- (30) However, it is recalled that the first two producers RWE and E.ON, which together have a cumulative market share of 58 % of the market<sup>(7)</sup>, are not subject to the provisions of the procurement law.
- (31) The aim of the present Decision is to establish whether the activities of generation and wholesale of electricity are exposed to such a level of competition (on markets to which access is free) that this will ensure that, also in the absence of the discipline brought about by the detailed procurement rules set out in Directive 2004/17/EC, the procurement for the pursuit of the activities concerned will be carried out in a transparent, non-discriminatory manner based on criteria allowing it to identify the solution which overall is the economically most advantageous one. In this context it is important to keep in mind that the companies which are not subject to the public procurement procedures (notably RWE and E.ON) when acting on these markets have the possibility to bring competitive pressure on the other market players. This will not change even if Austria is included into the relevant geographic market since the market shares of the first producers are expected to be only slightly smaller in a market covering both Austria and Germany<sup>(8)</sup>.

- (32) In respect of production and wholesale supply of electricity from conventional sources the facts above can be considered to be an indication of direct exposure to competition of the market players which are covered by the procurement law provisions.

- (33) It is also worth noting that the Commission Staff Working Paper '2009-2010 Report on Progress in Creating the Internal Gas and Electricity Market' of

<sup>(1)</sup> Commission Decisions 2008/585/EC (OJ L 188, 16.7.2008, p. 28, recital 9) and 2008/741/EC (OJ L 251, 19.9.2008, p. 35, recital 9) and Case COMP/M.3440 — ENI/EDP/GDP, of 9.12.2004, paragraph 23.

<sup>(2)</sup> Commission Decision 2010/403/EC (OJ L 186, 20.7.2010, p. 44, recital 9).

<sup>(3)</sup> Case COMP/M.3268 — SYDKRAFT/GRANINGE, of 30.10.2003, paragraph 27 and Case COMP/M.3665 — ENEL/SLOVENSKE ELEKTRARNE, of 26.4.2005, paragraph 14.

<sup>(4)</sup> Commission Decisions 2009/47/EC (OJ L 19, 23.1.2009, p. 57); 2008/585/EC, 2008/741/EC, 2007/141/EC (OJ L 62, 1.3.2007, p. 23), 2007/706/EC (OJ L 287, 1.11.2007, p. 18), 2006/211/EC (OJ L 76, 15.3.2006, p. 6) and 2006/422/EC (OJ L 168, 21.6.2006, p. 33).

<sup>(5)</sup> According to Federal Cartel Office Opinion (EN translation) paragraph 2 of page 7.

<sup>(6)</sup> Cumulated market shares of the first three producers in United Kingdom (39 %), Austria (52 %) and Poland (55 %) have lower values, but the corresponding values in Finland (73,6 %) and Sweden (87 %) are higher.

<sup>(7)</sup> The production is calculated taking into account the own power stations, the shares in jointly owned power stations and the long-term output secured on a contractual basis (drawing rights).

<sup>(8)</sup> According to Federal Cartel Office Opinion (EN translation) paragraph 3 of page 7.



June 2011 <sup>(1)</sup> indicated a decrease in the market concentration in Germany <sup>(2)</sup> compared to the previous years and placed the German electricity market in the category of 'moderately concentrated markets' <sup>(3)</sup>, namely those markets with a Herfindahl-Hirschman Index (HHI) <sup>(4)</sup> by capacity between 750 and 1 800.

- (34) Having regards to the above figures, for the purposes of this Decision and without prejudice to the competition law, it can be assumed with respect to the contracting entities that the degree of concentration of the market can be considered as an indication of a certain degree of exposure to competition of electricity production and wholesale from conventional sources in Germany.

(b) Other factors

- (35) In the last years, actually until March 2011, Germany was a net exporter of electricity. However, due to the decision to phase out production of electricity by several nuclear plants, Germany became a net importer. There is therefore currently a competitive pressure on the market deriving from the potential to import electricity from outside Germany. This ensures that investment in the electricity sector in Germany cannot be made without taking into account other producers in the surrounding countries. These factors should therefore be seen as not opposing the conclusion that contracting entities operating on the German production market from conventional sources are exposed to competition. Furthermore, an analysis of the situation in respect of customer switching <sup>(5)</sup> and the degree of liquidity on the wholesale market <sup>(6)</sup> show that these factors do not oppose the conclusion that contracting entities operating on the German production market from conventional sources are exposed to competition. Finally, it should

also be noted that the German balancing market <sup>(7)</sup> and its main characteristics (market-based pricing and price difference between positive and negative balancing power) do not either oppose the conclusion that contracting entities operating on the German production market from conventional sources are exposed to competition.

*Production and first sale of EEG electricity*

- (36) EEG electricity benefits from priority connection to the grid, and it has priority over conventional electricity for grid feed-in, which means that EEG electricity production is independent from demand. Since EEG electricity is generally produced at costs which are higher than the market price, a system was established by which EEG electricity receives particular support. EEG installation operators <sup>(8)</sup> have the right to receive a statutory rate of remuneration from the transmission grid operators for a period of 20 years plus the commissioning year. This remuneration provides for a coverage of their costs and is therefore higher than the market price. They can therefore feed the electricity they produce into the grid irrespective of the price on the exchanges <sup>(9)</sup>.
- (37) EEG electricity is generally not directly sold on the wholesale market but first bought by the transmission grid operators for a statutory rate of remuneration. The transmission system operators are responsible for marketing the EEG electricity on the power exchange spot market which consequently causes a loss for them. These costs are ultimately paid by the final electricity consumers who pay to their energy suppliers an extra EEG fee which is subsequently passed to the transmission grid operators. Energy suppliers buying more than 50 % of EEG electricity including at least 20 % of electricity from solar or wind pay a reduced EEG fee.

<sup>(1)</sup> [http://ec.europa.eu/energy/gas\\_electricity/legislation/doc/20100609\\_internal\\_market\\_report\\_2009\\_2010.pdf](http://ec.europa.eu/energy/gas_electricity/legislation/doc/20100609_internal_market_report_2009_2010.pdf)

<sup>(2)</sup> See page 7, paragraph 4 of the Commission Staff Working Paper.

<sup>(3)</sup> Table 3.1 of the Technical Annex, p. 12 of the Technical Annex to Commission Staff Working Paper '2009-2010 Report on Progress in Creating the Internal Gas and Electricity Market' of June 2011.

<sup>(4)</sup> Herfindahl-Hirschmann Index: it is defined as the sum of the squares of the market shares of each individual firm. As such, it can range from almost 0 to 10 000, moving from a very large amount of very small firms to a single monopolistic producer. Decreases in the HHI generally indicate an increase in competition, whereas increases imply the opposite.

<sup>(5)</sup> According to Table 2.1, page 6 and Table 2.2, page 7 of the Technical Annex to Commission Staff Working Paper '2009-2010 Report on Progress in Creating the Internal Gas and Electricity Market' of June 2011, 2009 Germany had a customer switching for large industry of 10,7 % in volume and of 15,6 % by eligible meter point.

<sup>(6)</sup> According to the 'Monitoring Benchmark Report 2011' by Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen, page 28, the German wholesale market is extremely liquid. In 2010, the volume of wholesale trade amounts to an estimated 10 600 TWh, which is more than 17 times the actual electricity demand in Germany.

<sup>(7)</sup> 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 mechanisms should also be considered as an additional indicator. This is because if there is a large difference between the price at which transmission system operators provide balancing power and the price at which they buy back surplus production, this can be a problem for smaller market participants and undermine the development of competition.

<sup>(8)</sup> Within the meaning of this Decision and in accordance with the EEG, 'EEG installation' means any facility generating electricity from renewable energy sources or from mine gas. Installations generating electricity from renewable energy sources or from mine gas shall also mean all those facilities which receive energy which has been temporarily stored and originates exclusively from renewable energy sources or from mine gas and convert it into electricity; and 'EEG installation operator' means anyone, irrespective of the issue of ownership, who uses the installation to generate electricity from renewable energy sources or from mine gas.

<sup>(9)</sup> Remuneration rates for EEG electricity are regularly above the exchange price, EEG electricity is therefore more expensive than conventionally produced electricity. These additional costs must be borne by energy consumers via the EEG levy (3,5 cents/kWh in 2011).

- (38) The EEG installation operators have also the possibility to do 'direct marketing' of the electricity produced. This means that an EEG plant operator can renounce to the statutory remuneration and opt to sell the electricity directly on the spot market. Due to the high generation costs of EEG electricity, direct marketing outside of the statutory conditions is normally not a viable option. In the past, this method has mainly been used to a limited extent in instances where the buyers were able to achieve an exemption from the extra EEG fee by combining a certain amount of EEG electricity sourced directly from a producer with conventional electricity <sup>(1)</sup>. With the new EEG law which entered into force beginning of 2012, the possibility for this specific exemption was limited which is expected to reduce this form of direct marketing <sup>(2)</sup>.
- (39) The new law contains a new possibility of 'direct marketing' which, however, includes the payment of a so-called 'market premium' to the EEG electricity producers that covers the difference between their higher costs and the average market price (in the following: 'market premium model'). Transmission System Operators estimate selling in the market premium model to take a share of 15 % for all types of renewable energies together in 2012 <sup>(3)</sup>. It can be concluded that at present and in the near future, the by far largest part of EEG electricity is marketed in the regime of statutory payments and via the transmission grid operators. Unsubsidised direct marketing will only play a marginal role.
- (40) For the reasons indicated above the generation and first sale of EEG electricity form part of a regulated system in which producers are remunerated on the basis of a statutory payment. They are not exposed to competition since they can feed in their EEG electricity regardless of the prevailing market price. Due to the feed-in priority they can also sell all the quantities they produce. It cannot be therefore concluded that the activity of producers of EEG electricity is exposed to competition. In view of the above, no other indicators, such as those listed in recital 6, need to be assessed.
- (41) In view of the factors examined above, the condition of direct exposure to competition laid down in Article 30(1) of Directive 2004/17/EC should be considered to be met in view of the contracting entities with respect of production and wholesale supply of electricity from conventional sources in Germany.
- (42) Furthermore, since the condition of unrestricted access to the market is deemed to be met, Directive 2004/17/EC should not apply when contracting entities award contracts intended to enable production and wholesale supply of electricity from conventional sources to be carried out in Germany nor when they organise design contests for the pursuit of such an activity in that geographical area.
- (43) Nevertheless, the condition of direct exposure to competition laid down in Article 30(1) of Directive 2004/17/EC should be considered not to be met in view of the contracting entities with respect to production and first sale of EEG electricity in Germany.
- (44) Since the production and first sale of EEG electricity continues to be subject to the provisions of Directive 2004/17/EC, it is recalled that procurement contracts covering several activities shall be treated in accordance with Article 9 of Directive 2004/17/EC. This means that, when a contracting entity is engaged in 'mixed' procurement, that is procurement used to support the performance of both, activities exempted from the application of Directive 2004/17/EC and activities not exempted, regard shall be had to the activities for which the contract is principally intended. In the event of such mixed procurement, where the purpose is principally to support the production and wholesale of EEG electricity, the provision of Directive 2004/17/EC shall apply. If it is objectively impossible to determine for which activity the contract is principally intended, the contract shall be awarded in accordance with the rules referred to in paragraphs 2 and 3 of Article 9 of Directive 2004/17/EC. This Decision is based on the legal and factual situation as of October 2011 to February 2012 as it appears from the information submitted by BDEW and the German authorities. 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 in respect of production and wholesale supply of electricity from conventional sources are no longer met.
- (45) The measures provided for in this Decision are in accordance with the opinion of the Advisory Committee for Public Contracts,

#### IV. CONCLUSIONS

- (41) In view of the factors examined above, the condition of direct exposure to competition laid down in Article 30(1) of Directive 2004/17/EC should be considered to be met in view of the contracting entities with respect of production and wholesale supply of electricity from conventional sources in Germany.

<sup>(1)</sup> This phenomenon has been sometimes referred to as 'Grünstrom-privileg'.

<sup>(2)</sup> The Transmission System Operators estimate the share of such direct marketing (§33b EEG (2012)) at 3,7 % in 2012. See [http://www.eeg-kwk.net/de/file/111115\\_Eckwerte\\_Einspeisung\\_final.pdf](http://www.eeg-kwk.net/de/file/111115_Eckwerte_Einspeisung_final.pdf)

<sup>(3)</sup> See [http://www.eeg-kwk.net/de/file/111115\\_Eckwerte\\_Einspeisung\\_final.pdf](http://www.eeg-kwk.net/de/file/111115_Eckwerte_Einspeisung_final.pdf)

#### Article 1

Directive 2004/17/EC shall not apply to contracts awarded by contracting entities and intended to enable production and first sale of electricity produced from conventional sources to be carried out in Germany.

For the purposes of this Decision, electricity produced from conventional sources means electricity which does not fall within the scope of the EEG. Moreover, within the meaning of the EEG, and under the conditions set out therein, 'renewable energy sources' means hydropower, including wave power, tidal power, salt gradient and flow energy, wind energy, solar radiation, geothermal energy, energy from biomass, including biogas, biomethane, landfill gas and sewage treatment gas, as well as the biodegradable fraction of municipal waste and industrial waste.

*Article 2*

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 24 April 2012.

*For the Commission*

Michel BARNIER

*Member of the Commission*

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