

DECISIONS

COMMISSION IMPLEMENTING DECISION (EU) 2016/1674

of 15 September 2016

exempting retail supply of electricity and gas in Germany from the application of Directive 2014/25/EU of the European Parliament and of the Council

(notified under document C(2016) 5779)

(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 34(3) thereof,

Having regard to the request submitted by the association of undertakings in the German energy and water sectors Bundesverband der Energie- und Wasserwirtschaft e.V. (hereinafter referred to as 'BDEW') by email of 21 March 2016,

After consulting the Advisory Committee for Public Contracts,

Whereas:

1. FACTS

- (1) On 21 March 2016, BDEW transmitted a request pursuant to Article 35 of Directive 2014/25/EU (hereinafter referred to as 'the Request') to the Commission by email.
- (2) The Request submitted by BDEW, 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, concerns the following activities, as described in the Request:
 - (a) retail supply of electricity to customers whose electricity consumption is recorded by consumption metering (*registrierende Leistungsmessung* — hereinafter referred to as 'RLM customers') and the customers whose electricity consumption is charged on the basis of a standard load profile (hereinafter referred to as 'SLP customers'), with the exception of SLP customers supplied under default supply conditions set by law and of the heating electricity market;
 - (b) retail supply of gas to RLM and SLP customers, except those supplied under default supply conditions set by law;
- (3) The Request was accompanied by an opinion of the German Federal Cartel Office — Bundeskartellamt (hereinafter referred to as 'BKartA') dated 11 December 2015 (hereinafter referred to as the 'Opinion'). In this Opinion, BKartA assesses the retail supply markets for electricity and gas and concludes that the conditions for exemption are met for the retail supply of electricity and gas of RLM and SLP customers.

⁽¹⁾ OJ L 94, 28.3.2014, p. 243.

2. LEGAL FRAMEWORK

- (4) Directive 2014/25/EU applies to the award of contracts for the pursuit of activities related to the retail supply of electricity and gas, unless this activity is exempted pursuant to Article 34 of that Directive.
- (5) Article 34 of Directive 2014/25/EU 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.

3. ASSESSMENT

3.1. Free access to the market

- (6) 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 III of Directive 2014/25/EU. For the electricity sector, it refers to Directive 2009/72/EC of the European Parliament and of the Council ⁽²⁾. For the gas sector, it refers to Directive 2009/73/EC of the European Parliament and of the Council ⁽³⁾.
- (7) Germany has transposed Directives 2009/72/EC and 2009/73/EC in the national law on the energy industry — *Energiewirtschaftsgesetz* (hereinafter referred to as 'EnWG'). The sale of electricity and gas is regulated in Part 4, Article 36 et seq. of EnWG. The German Electricity Default Supply Regulation — *Stromgrundversorgungsverordnung* (hereinafter referred to as 'StromGKV') ⁽⁴⁾ and the Gas Default Supply Regulation — *Gasgrundversorgungsverordnung* (hereinafter referred to as 'GasGKV') ⁽⁵⁾ also contain special statutory regulations for the sale of electricity and gas. Consequently, and in accordance with Article 34(1), access to the market should be deemed not to be restricted on the entire territory of the Federal Republic of Germany.

3.2. Direct exposure to competition

- (8) Direct exposure to competition should be evaluated on the basis of various indicators, none of which are, per se, decisive. In respect of the markets concerned by this decision, the market share of the main players on a given market constitutes one criterion which should be taken into account. Given the characteristics of the markets concerned, further criteria should also be taken into account.
- (9) Although a narrower or a broader market definition might be envisaged in certain cases, the precise definition of the relevant market can be left open for the purposes of this Decision to the extent that the result of the analysis remains the same whether it is based on a narrow or a broad definition.
- (10) This Decision is without prejudice to the application of the rules on competition and 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 ⁽⁶⁾. This point was upheld also by the General Court in a recent judgment ⁽⁷⁾.

⁽²⁾ 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 (OJ L 211, 14.8.2009, p. 55).

⁽³⁾ Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in gas and repealing Directive 2003/55/EC (OJ L 211, 14.8.2009, p. 94).

⁽⁴⁾ German Regulation on General Conditions for the Default Supply of Residential Customers and the Auxiliary Supply of Electricity from the Low Voltage Grid (*Verordnung über Allgemeine Bedingungen für die Grundversorgung von Haushaltskunden und die Ersatzversorgung mit Elektrizität aus dem Niederspannungsnetz* — StromGKV) of 26 October 2006, Federal Law Gazette. I p. 2391, most recently amended by Article 1 of the Regulation of 22 October 2014, Federal Law Gazette. I p. 1631.

⁽⁵⁾ German Regulation on General Conditions for the Default Supply of Residential Customers and the Auxiliary Supply of Gas from the Low Pressure Grid (*Gasgrundversorgungsverordnung* — GasGKV) of 26 October 2006, Federal Law Gazette. I p. 2391, 2396, most recently amended by Article 2 of the Regulation of 22 October 2014, Federal Law Gazette. I p. 1631.

⁽⁶⁾ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).

⁽⁷⁾ T-463/14, *Osterreichische Post AG*, point 28.

- (11) It should be kept in mind that the aim of this Decision is to establish whether the services concerned by the Request are exposed to such a level of competition (in markets to which access is not restricted within the meaning of Article 34 of Directive 2014/25/EU) which will ensure that, also in the absence of the discipline brought about by the detailed procurement rules set out in Directive 2014/25/EU, procurement for the pursuit of the activities concerned will be carried out in a transparent, non-discriminatory manner based on criteria allowing purchasers to identify the solution which overall is the economically most advantageous one.

3.2.1 Relevant product markets

3.2.1.1. Electricity retail supply

- (12) Based on Commission precedents, the relevant product market for the supply of electricity at the retail level is the electricity retail market ⁽⁸⁾. As regards the supply of electricity to end-customers, the Commission differentiates between supply to small customers (private residential, small businesses) and supply to large industrial customers connected to the high and medium voltage grid (industry and large commercial consumers) ⁽⁹⁾. This differentiation is related to the different requirements and profiles on the demand side and the different services and technologies on the supply side ⁽¹⁰⁾.
- (13) Like the Commission, the BKartA also differentiates between small and large electricity supply customers on the basis of their different consumption behaviour ⁽¹¹⁾. In so doing, it differentiates between customers whose electricity consumption is recorded by consumption metering ('RLM customers') and customers whose electricity consumption is charged on the basis of a standard load profile ('SLP customers').
- (14) RLM customers have an annual consumption of more than 100 MWh and are therefore, as a rule, industrial or large commercial consumers ⁽¹²⁾. Because of the high costs associated with RLM, this is only worthwhile once high consumption volumes are reached. The use of electricity as a production and cost factor is characteristic of RLM customers. For this group of customers, the use of electricity is a characteristic production and cost factor in their own production. Demand is essentially oriented and structured differently from that of SLP customers ⁽¹³⁾.
- (15) SLP customers are electricity users with relatively low consumption volumes. They are residential customers (with a consumption up to 10 000 kWh annually) and small businesses (with an annual electricity consumption of up to 100 MWh) within the meaning of Section 3 No 22 of the German Energy Industry Law (EnWG), who buy energy primarily for their own consumption in the home or for their own consumption for professional, agricultural or business purposes ⁽¹⁴⁾.
- (16) The BKartA defines three further separate product markets for the supply of SLP customers ⁽¹⁵⁾:
- (a) The market for the supply of SLP customers under general conditions and at general tariffs pursuant to Articles 36 and 38 EnWG ⁽¹⁶⁾ as default and auxiliary supply is an almost entirely legally stipulated and designed product. The contract for SLP default supply customers is not negotiated between the parties; instead, the contract comes into effect between the end-customer and the statutory supplier pursuant to Article 2(2) of the German Electricity Default Supply Regulation (StromGVV) as soon as electricity is used.

⁽⁸⁾ M.3440 — EDP/ENI/GDP, recital 56; M.5496 — Vattenfall/Nuon Energy, recital 12.

⁽⁹⁾ M.3440 — EDP/ENI/GDP, recital 73; M.2947 — Verbund/EnergieAllianz, recital 35.

⁽¹⁰⁾ M.5496 — Vattenfall/Nuon Energy, recital 12.

⁽¹¹⁾ BKartA, Decision of 30 November 2009, B8-107/09 — Integra/Thüga, paragraph 28; Decision of 30 April 2010, B8-109/09 — RWE AG, inter alia, paragraph 55.

⁽¹²⁾ Article 12 of the Electricity Grid Access Regulation (*Stromnetzzugangsverordnung (StromNZV)*) of 25 July 2005 (Federal Law Gazette, I p. 2243), most recently amended by Article 8 of the Law of 21 July 2014 (Federal Law Gazette, I p. 1066); Monitoring Report 2014, p. 32 et seq.

⁽¹³⁾ BKartA Opinion, p. 4.

⁽¹⁴⁾ BNetzA and BKartA, Monitoring Report pursuant to Article 63(3) in conjunction with Article 35 EnWG und Article 48(3) in conjunction with Article 53(3) of the Law on Restrictions of Competition (GWB) of 10 November 2015 (Monitoring Report 2015), p. 33; Federal Cartel Office (see above footnote 8), p. 5.

⁽¹⁵⁾ BKartA, Decision of 30 November 2009, B8-107/09 — Integra/Thüga, paragraph 32; Decision of 30 April 2010, B8-109/09 — RWE AG, inter alia, paragraph 55.

⁽¹⁶⁾ Pursuant to Article 36(1) EnWG, energy suppliers must disclose and publish on the internet general conditions and general prices for supply in low voltage and low pressure for network areas in which they carry out the basic supply of residential customers and supply those residential customers under these conditions and at these prices. Pursuant to Article 38 EnWG, default suppliers also have a statutory obligation to provide auxiliary supply in low voltage for up to three months for all end-customers whose energy supplier has failed.

- (b) The market for the supply of SLP customers outside general conditions and tariffs (special contract customers), for which distinct price differences in comparison to default supply customers have evolved ⁽¹⁷⁾.
 - (c) The market for the supply of SLP customers within general conditions and tariffs with electricity for space heating (heating electricity market), which is subject to significant fluctuations depending on the time of year, but is required in much larger volumes at peak times than household electricity, resulting in substantial price differences, which rules out substitution by the other products referred to ⁽¹⁸⁾.
- (17) The Request covers the market for the supply of RLM customers and SLP special contract customers with electricity. The Request does not cover the SLP default supply market and the heating electricity market, where according to the BKartA Opinion, the conditions for exemption are not met.

3.2.1.2. Gas retail supply

- (18) The Commission differentiates between the following markets: supply of natural gas to (i) small customers (including households); and (ii) large customers, which are subdivided into large industrial customers and power stations ⁽¹⁹⁾.
- (19) When defining the market, the BKartA focuses on the supply stages and differentiates between the supply of large and small customers with natural gas, distinguishing separate markets for the supply of RLM and SLP customers ⁽²⁰⁾. RLM customers have an annual consumption of more than 1,5 GWh, whereas SLP customers have an annual consumption of up to 1,5 GWh ⁽²¹⁾.
- (20) Departing from its earlier decision-making practice in respect of SLP customers, the BKartA now further differentiates — as in the electricity sector — between:
- (a) the default and auxiliary supply of SLP customers (default supply market); and
 - (b) the supply of SLP customers on the basis of special contracts (special contract market) ⁽²²⁾.
- (21) The distinction between these two markets is based on the fact that default and auxiliary supply involves a virtually comprehensive obligation to contract ⁽²³⁾. The default supplier is obliged to supply residential customers and the terms and conditions of supply are, for the most part, prescribed by law. Furthermore, there is a significant price difference between default supply and supply on the basis of special contracts ⁽²⁴⁾.
- (22) The Request covers the market for gas supply of RLM customers and SLP special contract customers.
- (23) In view of the factors examined under recitals 12 to 21, for the purposes of assessing whether the conditions laid down in Article 34 of Directive 2014/25/EU are fulfilled, and without prejudice to the application of other Union law, the relevant product markets are the following:
- (a) electricity retail supply to RLM customers;
 - (b) electricity retail supply to SLP special contract customers;

⁽¹⁷⁾ Ibid., with reference to the Monitoring Report 2015, p. 10, according to which violations of competition law by alternative suppliers are only to be observed in special contract customer markets.

⁽¹⁸⁾ BKartA, Opinion, p. 6.

⁽¹⁹⁾ M. 4180 *Gaz de France/Suez*, recital 63; M.3868 — *DONG/Elsam/Energi E2*, recital 193 et seq.; M. 3440 — *EDP/ENI/GDP* recital 215 et seq.; M.5740 — *Gazprom/A2A/JOE*, recital 17 and seq.

⁽²⁰⁾ BKartA, Decision of 23 October 2014, B8 — 69/14, paragraph 74.

⁽²¹⁾ Article 24 *Gasnetzzugangsverordnung* (GasNZV) of 3 September 2010, Federal Law Gazette. I p. 1261, most recently amended by Article 4 of the Law of 21 July 2014, Federal Law Gazette. I p. 1066.

⁽²²⁾ BKartA, Decision of 23 October 2014, B8 — 69/14, paragraph 168.

⁽²³⁾ BKartA, Opinion, p. 8.

⁽²⁴⁾ BKartA, Opinion, p. 9; 2015 Monitoring Report, p. 329.

- (c) gas retail supply to RLM customers;
- (d) gas retail supply to SLP special contract customers.

3.2.2 *Relevant geographic markets*

3.2.2.1. Electricity retail supply

- (24) In its Decision M.5496 *Vattenfall/Nuon Energy* ⁽²⁵⁾, the Commission found that the market for large (or RLM) customers in Germany was national, whereas it could be regional for small and household (or SLP) customers, depending on the size of the distributor. However, it eventually left open the precise definition of the relevant geographical market. In its Decision M. 7778 — *Vattenfall/Engie/GASAG* ⁽²⁶⁾, the Commission again discussed whether both the market for electricity retail supply to small customers as well as for gas retail supply to small customers in Germany should be defined as regional, leaving both markets finally open.
- (25) The BKartA found that the market for retail supply of electricity was national both for RLM and SLP customers. In the latter case, it departed from its earlier network-related market definition, given the change in the competitive conditions of special contract customers, who now have a wide range of suppliers to choose from.
- (26) Although the majority of regional suppliers who offer special contracts for SLP customer have a regional focus, a considerable (and increasing) number of suppliers have been trading outside their own established supply area. 4 % of all suppliers, equivalent to more than 30 companies, supply customers in 251-500 network areas, i.e. nationwide. A further 56 undertakings operate in more than 500 network areas, covering the whole country.
- (27) For the purpose of assessing whether the conditions laid down in Article 34 of Directive 2014/25/EU are fulfilled, and without prejudice to the application of other Union law, the relevant geographic market for electricity retail supply is national for RLM and SLP with special contract customers. Even if the assessment would focus on the regional level, comparable competitive constraints would exist on the market for electricity retail supply to small customers.

3.2.2.2. Gas retail supply

- (28) In its Decision M.5467 *RWE/Essent* ⁽²⁷⁾, the Commission found there was evidence to support the fact that the gas retail market was regional. However, it eventually left open the precise definition of the relevant geographical market.
- (29) The BKartA found that the market for retail supply of electricity was national both for RLM and SLP customers. Departed from its earlier network-related market definition, the BKartA noted the changes in the competitive conditions for RLM and SLP with special contract customers, who now have a wide range of suppliers to choose from.
- (30) In its decision on the *EWE/VNG merger* ⁽²⁸⁾, the BKartA examined in detail the framework conditions of the gas sector, carrying out many market surveys in the context of the procedure. It concluded that the market for the supply of RLM customers was national and no longer network-related or related to market area. The BKartA established that rapidly advancing competition was permeating the traditional distribution areas. Concerning SLP customers, the BKartA also concluded that the market was national. SLP customer have a sufficient number of suppliers to choose from (about 10 on average), the maximum prices of which are no more than 10 % above the cheapest rate. Although the majority of gas suppliers have a regional focus, more than 50 (or 7 %) operate on a national basis.

⁽²⁵⁾ M. 5496 — *Vattenfall/Nuon Energy*, recital 15 and seq.

⁽²⁶⁾ M. 7778 — *Vattenfall/Engie/GASAG*, recital 37

⁽²⁷⁾ M. 5467 *RWE/Essent*, recital 372 and seq.

⁽²⁸⁾ BKartA, Decision of 23 October 2014, *EWE/VNG*

- (31) For the purpose of assessing whether the conditions laid down in Article 34 of Directive 2014/25/EU are fulfilled, and without prejudice to the application of other Union law, this Decision, the Commission will consider that the relevant geographic market for gas retail supply is national for RLM and SLP with special contract customers. Even if the assessment would focus on the regional level, comparable competitive constraints would exist on the market for gas retail supply to small customers.

3.2.3. Market analysis

3.2.3.1. Electricity retail supply

- (32) The total volumes of electricity withdrawals in Germany are the following, according to a joint monitoring report by the German national regulatory agency — *Bundesnetzagentur* (hereinafter referred to 'BNetzA') — and the BKartA (hereinafter referred to as the 'Monitoring Report'):

	2012 ⁽¹⁾	2013 ⁽²⁾	2014 ⁽³⁾
Total withdrawal volumes (in TWh)	512,0	510,6	497,8
of which, industrial and commercial undertakings	377,2	372,9	367,3
of which, residential customers ⁽⁴⁾	124,5	126,1	120,2
of which, pumped storage	10,3	11,6	10,3

⁽¹⁾ BNetzA and BKartA, Monitoring Report pursuant to Article 63(3) in conjunction with Article 35 EnWG und Article 48(3) in conjunction with Article 53(3) GWB of 19 December 2013 (Monitoring Report 2013), p. 24.

⁽²⁾ Monitoring Report 2014, p. 26.

⁽³⁾ Monitoring Report 2015, p. 29.

⁽⁴⁾ Residential customers are end-customers who purchase energy mainly for their own use in the household or for their own annual consumption not exceeding 10 000 kilowatt hours for professional, agricultural or commercial purposes (Section 3(22) EnWG) — defined before.

- (33) Concerning the repartition of sales to all customers on the German market, the Applicant provided data based on the annual data of electricity suppliers for 2012. It shows that the combined market share of the four largest companies is approximately 41,6 %. The two largest suppliers, RWE and E.ON, are not subject to public procurement rules.
- (34) According to the 2015 Monitoring Report, the electricity suppliers surveyed sold a total of approximately 268 TWh of electricity to RLM customers throughout Germany. Approximately 88 TWh were attributable to the four largest undertakings (RWE, Vattenfall, EnBW und E.ON) on the market for RLM customers. This results in an aggregate market share of the four largest undertakings on this market of approximately 33 % ⁽²⁹⁾.
- (35) A total of approximately 103 TWh were sold to SLP special contract customers in 2014, corresponding to 64 % of the total volume sold to SLP customers ⁽³⁰⁾. In 2014, the cumulative sales of the four largest undertakings amounted to approximately 37 TWh, leading to an aggregated market share of the four largest undertakings of approximately 36 % ⁽³¹⁾.
- (36) The market shares of the larger members of BDEW that can be regarded as contracting entities were provided by the Applicant in a confidential annex to the Request. These market shares are [...] for the supply to RLM customers and [...] for the supply to SLP customers.

⁽²⁹⁾ Monitoring Report 2015, p. 39.

⁽³⁰⁾ Ibid.

⁽³¹⁾ Monitoring Report 2015, p. 40.

- (37) As it results from a constant practice in respect of Commission Decisions pursuant to Article 30 of Directive 2004/17/EC of the European Parliament and of the Council ⁽³²⁾, the Commission considered that, concerning electricity supply, the total market share of the largest three undertakings was relevant. In Commission Decision 2010/403/EU ⁽³³⁾, the aggregated market shares of the three largest electricity retailers in Italy was 43,89 %. In Commission Decision 2007/706/EC ⁽³⁴⁾ concerning Sweden, this market share was 43 %. In the present case, the market share of the three largest retailers on the German electricity market is 36,8 %.
- (38) The number of suppliers active on the German electricity market is high. In its Opinion, the BKartA states that more than 50 suppliers are active in 82 % of all network areas. On average, German end-customers (which cover both RLM and LP customers) can choose from 106 suppliers in their network area ⁽³⁵⁾.
- (39) Further evidence of effective competition is the high switching rate in electricity supply. The supplier switching rate among RLM customers (industrial and commercial customers) in 2014 was approximately 11 %. The switching rate among industrial and commercial customers has remained more or less constant since 2006 ⁽³⁶⁾. No costs are incurred for switching electricity supplier.
- (40) By contrast, switching among SLP customers has increased significantly since 2006: and stands at 3,8 million ⁽³⁷⁾. The share of default supply residential customers in 2014 was 32,8 %, which means that 67,2 % of residential customers have switched their electricity supply contract at least once and are therefore on a special contract ⁽³⁸⁾.
- (41) Increasingly effective competition is also demonstrated by the declining importance of default suppliers as contracting parties. They remain however dominant for residential customers: in 2014, 43 % had a special contract with the local default supplier. 32,8 % of residential customers had a classic default supply contract (2012: 36,7 %). 24 % of all customers were supplied by an undertaking other than the default supplier (2012: 20,1 %) ⁽³⁹⁾. The situation is different for commercial and industrial customers with special contracts. Of the total volume supplied to RLM customers, in 2014 approximately 66 % was accounted for by supplier contracts with a supplier other than the local default supplier and approximately 34 % by special contacts with the default supplier. Less than 1 % of RLM customers have a default supply contract, so default supply plays a very limited role.
- (42) In 2014, the electricity wholesale markets in Germany are characterised by high liquidity. Alongside bilateral, over-the-counter wholesale trade, power exchanges play a key role. They create a reliable trading forum and at the same time provide important price signals for market participants in other electricity sectors.
- (43) In 2014, liquidity of the spot and futures markets increased. The volume of day-ahead trading on EPEX SPOT ⁽⁴⁰⁾ and EXAA ⁽⁴¹⁾ increased from 254 TWh in 2013 to 269 TWh in 2014. The volume of intraday trading on EPEX SPOT grew by 30 %. The volume of electricity futures contracts trading on EEX rose by 21 % from 669 TWh to 812 TWh. By contrast, there was a fall of 17 % in the volume of futures trading via broker platforms. In 2014 broker platforms brokered electricity futures contracts with a total volume of some 4 500 TWh ⁽⁴²⁾. The high liquidity of the wholesale market makes it easier for entrants on the retail market to compete for instance with established players who have their own generation capacity.

⁽³²⁾ 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 (OJ L 134, 30.4.2004, p. 1).

⁽³³⁾ Commission Decision 2010/403/EU of 14 July 2010 exempting the production and wholesale of electricity in Italy's Macro-zone North and the retail of electricity to end customers connected to the medium, high and very high voltage grid in Italy, 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 186, 20.7.2010, p. 44).

⁽³⁴⁾ Commission Decision 2007/706/EC of 29 October 2007 exempting the production and sale of electricity in Sweden from the application of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 287, 1.11.2007, p. 18).

⁽³⁵⁾ Monitoring Report 2015, p. 180.

⁽³⁶⁾ Monitoring Report 2015, p. 186; opinion of the BKartA, p. 13.

⁽³⁷⁾ Monitoring Report 2015, p. 188.

⁽³⁸⁾ Monitoring Report 2015, p. 187.

⁽³⁹⁾ Ibid.

⁽⁴⁰⁾ Epex Spot is the exchange for power spot markets of Germany, France, Austria and Switzerland.

⁽⁴¹⁾ Energy Exchange Austria (EXAA) is a central European energy exchange which covers Austria and Germany.

⁽⁴²⁾ Monitoring Report 2015, p. 24 et seq.

- (44) There was a further decrease in the average wholesale prices in 2014. Average prices on the spot markets showed a year on year decrease of around 13 %. The average daily price dispersion was smaller in a year on year comparison. Prices for electricity futures also fell in 2014. At EUR 35,09 per MWh, the average annual Phelix Base Year Future price fell just over 10 % from the previous year. The average annual Phelix Peak Year Future price was EUR 44,40 per MWh, half of the 2008 figure.
- (45) As far as electricity prices are concerned, Germany has one of the highest prices in the EU for residential customers ⁽⁴³⁾. This is largely due to the fact that the electricity price is influenced by taxes, social security contributions and levies. The price before taxes is in the EU average. For industrial customers, the price level including taxes is higher than the EU-28 average, but below average if taxes are excluded ⁽⁴⁴⁾.

3.2.3.2. Gas retail supply

- (46) The analysis carried out by the BNetzA and the BKartA in the retail supply gas sector showed that, in 2014, approximately 391 TWh of gas were sold to RLM customers (including sales to gas-fired power stations). The cumulative sales of the three strongest undertakings amounted to 123 TWh. The aggregated market share of these undertakings was, therefore, approximately 32 % of RLM customers ⁽⁴⁵⁾.
- (47) The analysis carried out in the retail supply gas sector showed that in 2014 approximately 321 TWh gas were sold to SLP customers. Of this, special contracts accounted for 261 TWh and default supply contracts accounted for 60 TWh. The cumulative sales of the three strongest undertakings in terms of sales for SLP customers amounted to approximately 71 TWh, approximately 6 TWh of which was accounted for by special contracts. This results in an aggregated market share of the three strongest undertakings in terms of sales of approximately 19 % for SLP special contract customers and 22 % for SLP customers ⁽⁴⁶⁾.
- (48) The market shares of the larger members of BDEW that can be regarded as contracting entities were provided by the Applicant in a confidential annex to the Request. These market shares are [...] for the supply to RLM customers and [...] for the supply to SLP customers.
- (49) There is strong supplier diversity in the end-customer market in the gas sector. More than 50 gas suppliers are available to consumers in almost 74 % of networks ⁽⁴⁷⁾. Taking only residential customers (SLP customers) into account, they are supplied by 50 or more gas suppliers in almost 60 % of network areas ⁽⁴⁸⁾. Supplier diversity has been on the increase in the past years.
- (50) The supplier switching rate among RLM customers (industrial and commercial customers) in 2014 was just under 12 % and has been stable in recent years ⁽⁴⁹⁾. Among SLP customers (residential customers), the total number of supplier switches remained stable in comparison with the preceding year. SLP special contract customers have, by definition, already switched supplier at least once to get out of basic supply ⁽⁵⁰⁾.
- (51) In 2014, 19 % of residential customers were supplied by a gas supplier other than the default supplier. Just under 57 % of residential customers were supplied by their default gas supplier under a special contract. 24 % of the volume of gas supplied to residential customers was sold under a default contract ⁽⁵¹⁾. However, default suppliers play a minor role among RLM customers (industrial and commercial customers) with special contracts. Of the total volume supplied to RLM customers in 2014, 67 % was accounted for by supplier contracts with a supplier other than the local default supplier and approximately just 33 % by special contracts with the default supplier. Less than 1 % of RLM customers have a default supply contract ⁽⁵²⁾.

⁽⁴³⁾ [http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Electricity_prices_for_household_consumers,_2015s1_\(EUR_kWh\).](http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Electricity_prices_for_household_consumers,_2015s1_(EUR_kWh).png)

⁽⁴⁴⁾ Ibid.

⁽⁴⁵⁾ Monitoring Report 2015, p. 254.

⁽⁴⁶⁾ Ibid.

⁽⁴⁷⁾ Monitoring Report 2015, p. 300.

⁽⁴⁸⁾ Ibid.

⁽⁴⁹⁾ Monitoring Report 2015, p. 306.

⁽⁵⁰⁾ Opinion BKartA, p. 19.

⁽⁵¹⁾ Monitoring Report 2015, p. 307; Opinion of the BKartA, p. 19.

⁽⁵²⁾ Monitoring Report 2015, p. 304.

- (52) There was a further increase in the liquidity of the wholesale natural gas markets in Germany in 2014. By far the largest share of wholesale trading in natural gas is transacted bilaterally, that is outside the exchanges ('over the counter' — OTC). Bilateral trading offers the advantage that it can be carried out flexibly, i.e. in particular without having to have recourse to a limited set of contracts. A significant role is played in OTC trading by brokerage via broker platforms. Bilateral wholesale trading saw substantial increases. In 2014, natural gas trading transactions brokered on broker platforms with Germany as a supply area totalled 3 000 TWh. This corresponds to an increase of 15 %. On-exchange gas trading volumes on the spot market more than doubled in 2014 and were around 129 TWh. This corresponds to five times the volume of the spot market in 2012. The volume of futures contracts rose from 29 TWh in 2013 to 83 TWh in 2014 ⁽⁵³⁾.
- (53) 2014 was marked by significantly lower wholesale gas prices. The daily reference prices calculated by EEX fell by around 22 % (annual average) and the average cross-border price calculated by BAFA (Federal Office for Economic Affairs and Export Control) dropped by 15 %. This drop in price is generally attributed to the drop in German and European gas consumption.
- (54) Gas prices are very close to the EU average, both for residential and industrial customers ⁽⁵⁴⁾.

4. CONCLUSIONS

- (55) In respect of the retail supply of electricity to RLM and SLP special contract customers in Germany, the situation can thus be summarised as follows: the aggregate market shares of the three largest retail supply companies are low, the degree of switching point is satisfactory, there is no end-user price control and the wholesale market liquidity is high. In its Opinion, the BKartA assesses that these markets are directly exposed to competition.
- (56) In view of the factors examined in recitals 32 to 45, 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 respect of retail supply of electricity to RLM and SLP special contract customers on the entire territory of the Federal Republic of Germany.
- (57) In respect of the retail supply of natural gas to RLM and SLP special contract customers in Germany, the situation can thus be summarised as follows: the aggregate market shares of the three largest retail supply companies are low, the degree of switching point is satisfactory, there is no end-user price control and the wholesale market liquidity is high. In its Opinion, the BKartA assesses that these markets are directly exposed to competition.
- (58) In view of the factors examined in recitals 46 to 54, 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 respect of retail supply of natural gas to RLM and SLP special contract customers on the territory of the Federal Republic of Germany.
- (59) This Decision is based on the legal and factual situation as of March 2016 to May 2016 as it appears from the information submitted by the Applicant and by BKartA. It may be revised, should the conditions for the applicability of Article 34 of Directive 2014/25/EU be no longer met, following significant changes in the legal or factual situation.
- (60) Since some services related to retail supply of electricity ⁽⁵⁵⁾ and gas ⁽⁵⁶⁾ continue to be subject to Directive 2014/25/EU, it is recalled that procurement contracts covering several activities should be treated in accordance with Article 6 of that Directive. This means that, where 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 2014/25/EU and activities not exempted therefrom, regard must 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 activities which are not exempted, the provisions of Directive 2014/25/EU are to be applied. Where it is objectively impossible to determine for which activity the contract is principally intended, the contract is to be awarded in accordance with the rules referred to in Article 6(3) of Directive 2014/25/EU ⁽⁵⁷⁾.

⁽⁵³⁾ On total sales see Monitoring Report 2015. pp. 245 and 291 et seq.

⁽⁵⁴⁾ See footnote 43.

⁽⁵⁵⁾ Default and fallback supply of SLP customers and supply of electricity for heating.

⁽⁵⁶⁾ Default and fallback supply of SLP customers.

⁽⁵⁷⁾ The same material outcome would also result from the application of Article 9 of Directive 2004/17/EC.

- (61) 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

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

- (a) retail supply of electricity to customers whose consumption is recorded by consumption metering (*registrierende Leistungsmessung* — RLM) and customers whose consumption is charged on the basis of a standard low profile (SLP), with the exception of SLP customers supplied under default supply conditions set by law and of the heating electricity market on the territory of the Federal Republic of Germany;
- (b) retail supply of natural gas to customers whose consumption is recorded by consumption metering (*registrierende Leistungsmessung* — RLM) and the customers whose consumption is charged on the basis of a standard low profile (SLP), with the exception of SLP customers supplied under default supply conditions set by law on the territory of the Federal Republic of Germany.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 15 September 2016.

For the Commission
Elżbieta BIENKOWSKA
Member of the Commission
