

DECISIONS

COMMISSION IMPLEMENTING DECISION (EU) 2018/1134

of 5 July 2018

concerning the applicability of Article 34 of Directive 2014/25/EU of the European Parliament and of the Council to contracts awarded for certain activities related to the retail supply of electricity and natural gas in the Czech Republic

(notified under document C(2018) 4194)

(Only the Czech text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union (TFEU),

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,

Having regard to the request submitted by the Czech Republic,

After consulting the Advisory Committee for Public Contracts,

Whereas:

1. FACTS

THE REQUEST

- (1) On 2 November 2016, the Czech Republic (hereinafter referred to as 'the Applicant') submitted to the Commission a request pursuant to Article 35(1) of Directive 2014/25/EU (hereinafter referred to as 'the Request').
- (2) The Request concerns the following activities as described in it:
 - (a) retail supply of electricity to large customers with 'automated continual metering' A or 'manual continual metering' B that receive individualised offers from suppliers (hereinafter referred to as the 'retail supply of electricity to large customers');
 - (b) retail supply of electricity to small commercial and household customers with 'non-continual metering' C that receive standardised offers from suppliers (hereinafter referred to as the 'retail supply of electricity to small customers');
 - (c) retail supply of natural gas to large customers with (i) automated continual metering with either remote (A) or monthly (B) reading that have annual consumption of at least 4,2 GWh; or with (ii) non-interval metering with monthly reading that have annual consumption of between 0,63 and 4,2 GWh that generally receive individualised offers from suppliers (hereinafter referred to as the 'retail supply of natural gas to large customers');
 - (d) retail supply of natural gas to small commercial and household customers with non-interval metering with other than monthly reading that have annual consumption of less than 0,63 GWh and generally receive standardised offers from suppliers (hereinafter referred to as the 'retail supply of natural gas to small customers').
- (3) The Request was accompanied by a letter of the National Competition Authority ('NCA') of the Czech Republic dated 30 September 2016 and a supplementary letter from that Authority dated 14 June 2017 (hereinafter referred to as the 'NCA Opinion').

⁽¹⁾ OJ L 94, 28.3.2014, p. 243.

- (4) In the letter of 30 September 2016, which the NCA issued in response to the request of the Czech Ministry of Industry and Trade for an opinion concerning the application for exemption of retail sales of electricity and gas in the Czech Republic from the scope of Directive 2014/25/EU, the NCA noted that 'it did not have sufficient time to perform a sector survey in those areas, which would have allowed it to map the situation on those markets in order to respond to' the Ministry's request. The NCA finally took the following view in that letter: 'it can be considered that an exemption on the markets for gas and electricity supplies to end customers in the Czech Republic pursuant to Article 34 should not have a negative effect on economic competition on those markets. This conclusion by the Office ⁽¹⁾ is based on the documentation supplied by the Ministry of Industry and Trade. In this regard, the Office reserves the right to re-evaluate its opinion in the event that any structural or other fundamental changes occur on the markets in question, or if any data forming the basis of the information provided to the Office are corrected.'
- (5) The supplementary letter of NCA dated 14 June 2017 was based on 'other submissions of the Czech Republic [...] and the data provided by an independent market operator (OTE) and also by some undertakings operating in the relevant markets including the ČEZ group (ČEZ) and Pražská plynárenská'. The supplementary letter referred in particular to a number of concerns raised by the Commission in respect to the market for retail of electricity to small customers, such as the high market concentration, low switching rates and vertical integration of ČEZ group. The supplementary letter concluded that nothing prevents all markets subject to the Request from being exempted from the application of the Directive.
- (6) The Request was also accompanied by a consultant report ⁽²⁾ (hereinafter referred to as 'the CRA Report').
- (7) The Commission submitted to the Applicant requests for additional information on 31 January 2017, 24 March 2017, 27 March 2017, 21 April 2017, 1 June 2017, 28 June 2017 and 21 December 2017 to which the Applicant replied on 16 February 2017, 28 March 2017, 31 March 2017, 3 May 2017, 10 May 2017, 9 June 2017, 1 August 2017 and 12 April 2018. Moreover, at the request of the Applicant, the Commission met the representatives of the Applicant on 31 January 2017, 28 February 2017, 29 March 2017, 30 May 2017 and 9 June 2017. The Applicant provided also supplementary information on 27 January 2017.

2. LEGAL FRAMEWORK

- (8) 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.
- (9) Under Directive 2014/25/EU, contracts intended to enable the performance of one of the activities to which the Directive applies are not to be subject to the Directive if, in the Member State in which the activity is carried out, it 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. UNRESTRICTED ACCESS TO THE MARKET

- (10) Access to a market is deemed not to be restricted if the Member State concerned has implemented and applied the relevant Union legislation opening a given sector or a part of it. That legislation is listed in Annex III to Directive 2014/25/EU. As regards the electricity sector, it consists of Directive 2009/72/EC of the European Parliament and of the Council ⁽³⁾. As regards the natural gas sector, it consists of Directive 2009/73/EC of the European Parliament and of the Council ⁽⁴⁾.
- (11) The Czech Republic has transposed Directives 2009/72/EC and 2009/73/EC in its national law through Act No 458/2000 Coll on conditions of business and state administration in energy markets (hereinafter referred to as 'the Energy Act') ⁽⁵⁾.

⁽¹⁾ The term „Office” designates here the NCA.

⁽²⁾ Report by Charles River and Associates of 9 October 2016 called 'An Economic Assessment of the Extent of Competition on the Czech Markets for Retail supply of Electricity and Gas'.

⁽³⁾ 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).

⁽⁴⁾ Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ L 211, 14.8.2009, p. 94).

⁽⁵⁾ Available at <https://www.zakonyprolidi.cz/cs/2000-458> and http://aplikace.mvcr.cz/sbirka-zakonu/SearchResult.aspx?q=458/2000&typeLaw=zakon&what=Cislo_zakona_smlouvy

- (12) On 7 December 2017, the Commission addressed a letter of formal notice ('LFN') to the Minister of Foreign Affairs of the Czech Republic (Ref infringement procedure No 2017/2152) regarding incorrect transposition of Directives 2009/72/EC and 2009/73/EC into the Czech legal order. Given that the presumption of unrestricted access to the market provided for in the first subparagraph of Article 34(3) of Directive 2014/25/EU should not apply for the matters subject to the infringement procedure, the Commission requested by email of 21 December 2017, the Applicant to provide its observations on this matter and explain whether the access to the market is not restricted *de facto* and *de jure*, in accordance with the second subparagraph of Article 34(3) of Directive 2014/25/EU.
- (13) The Applicant in its reply of 12 April 2018 explained that access to the market is not restricted *de facto* and the main arguments were: the low cost of entry, inexistence of other barriers to entry, the large number of licences granted for trading electricity and gas ⁽¹⁾ and the large number of retailers currently active on the markets for retail supply of electricity and retail of gas ⁽²⁾. Moreover, the Applicant explained that the way in which the provisions Union law concerned by the LFN were reflected in national law did not result in a *de jure* restriction to access to the markets of retail of electricity and gas. The Applicant also argued in this context that the specific issues, raised in the infringement procedure, either did not concern access to market or were only potentially related to it.
- (14) As regards the question of whether the access to market is free *de facto* the Commission agrees with the arguments brought by the Applicant and in particular with the existence of a large number of retailers active at national level on the markets for retail supply of electricity and the market for retail supply of gas, which indicates that access to the market is, *de facto*, not restricted.
- (15) As regards the question of whether the access to market is not restricted *de jure*, the Commission has taken good note of the Applicant's explanations regarding the way in which the concerns raised in the LFN were addressed in the national law. The Commission analysed those explanations in the light of requirements of Directive 2014/25/EU, i.e. in order to assess whether the provisions of national law and the concerns related to them and raised in the infringement procedure could result in a *de jure* restriction of access to market, within the meaning of Article 34 of Directive 2014/25/EU. Having reviewed the arguments of the Applicant, the Commission agrees with the argument underlying all of the Applicant's explanations that the specific issues raised in the infringement procedure do not directly concern access to the market. The Commission also takes into account the argument of Applicant that it is appropriate to consider the Czech legal system as a whole, in particular as regards the obligation to interpret the relevant provisions of national law in a way which is conform to the requirements of EU law. Therefore, while the concerns identified in the infringement procedure still persist, and without prejudice to that infringement procedure, for the purposes of this Decision and the procedure pursuant to Directive 2014/25/EU, the Commission considers that access to the market is not restricted *de jure* on the territory of the Czech Republic.
- (16) Based on the preceding conclusions the Commission considers that the condition of unrestricted access to market, referred to in Article 34(1) of Directive 2014/25/EU, is fulfilled in the present case.

3.2. DIRECT EXPOSURE TO COMPETITION

- (17) 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.
- (18) 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 TFEU or Council Regulation (EC) No 139/2004 ⁽³⁾. This point was upheld by the General Court in a recent judgment ⁽⁴⁾.

⁽¹⁾ 388 licences granted for trading electricity and 229 licences to trade gas (see Applicant's reply of 12 April 2018 to Commission's Request for information — RFI of 21 December 2017, p. 1).

⁽²⁾ 71 active suppliers in the retail supply of electricity and 68 active suppliers in the retail supply of gas (see Applicant's reply of 12 April 2018 to Commission's RFI of 21 December 2017, p. 1).

⁽³⁾ 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).

⁽⁴⁾ Judgment of 27 April 2016, *Österreichische Post AG v Commission*, T-463/14, EU:T:2016:243, para. 28.

- (19) It should be kept in mind that the aim of this Decision is to establish whether the activities concerned by the Request are exposed to a level of competition, on 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.
- (20) In this context, it is important to mention that, in the markets concerned, not all market players are subject to the public procurement rules. Therefore, the companies which are not subject to those rules, when acting on those markets, would normally have the possibility to exert competitive pressure on the market players which are subject to the public procurement rules ⁽¹⁾.

RELEVANT PRODUCT MARKETS

Retail supply of electricity

- (21) As the Commission has found in the past ⁽²⁾, the retail supply of electricity encompasses the overall sale of electricity to final customers, that is household and small industrial and commercial customers on the one hand (i.e. customers who are not subject to continual metering and connected to the low voltage grid ⁽³⁾) and large industrial and commercial customers on the other hand (i.e. customers who are 'half-hourly metered' and typically connected to high and medium voltage grids ⁽⁴⁾).
- (22) In its decisional practice, the Czech NCA ⁽⁵⁾ also considered a segmentation of the retail market by different categories of final customers, but ultimately left the definition open.
- (23) The Applicant differentiates between three categories of customers.
- (a) Large commercial customers, identified by (i) 'automated continual metering' customers — essentially load-measured customers that are connected to the high and medium voltage grid; and (ii) 'manual continual metering' customers — essentially customers that are connected to the low voltage grid ⁽⁶⁾. Large customers typically receive individualised offers from suppliers or buy electricity directly on commodity exchanges. In 2015, they represented around [...] ⁽⁷⁾ of total electricity consumption, namely in volume, [...] TWh out of [...] TWh ⁽⁸⁾.
- (b) Small commercial customers and households, identified by 'non-continual metering'. These customers receive standardised offers from suppliers and are free to choose their electricity supplier since 2006. In 2015, this category represented around [...] of total electricity consumption, namely in volume, [...] TWh out of [...] TWh ⁽⁸⁾.
- (c) Other customers. This third category consists of large commercial customers such as operators of the local distribution zones ('LDZs') ⁽⁹⁾ who are at the same time electricity producers and retailers and industrial parks connected to LDZs. These large customers may purchase electricity from other suppliers than the operators of the LDZs, therefore they fall under the category of large customers as defined above. In 2015, this third category accounted for around [...] % of total electricity consumption, namely, in volume, [...] TWh out of [...] TWh.
- (24) In view of the factors listed in recitals 21 to 23, 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,

⁽¹⁾ According to the Applicant, in the markets subject to this Request, only ČEZ Prodej and Pražská plynárenská ('PP') are contracting entities in the sense of Article 4(1) of Directive 2014/25/EU and, hence, subject to the public procurement rules.

⁽²⁾ Case COMP/M.3440 — EDP/ENI/GDP, recital 56.

⁽³⁾ See case COMP/M.6225 — Molaris/Commerz Real/RWE/Amprion, of 23 August 2011; COMP/M.5467 — RWE/Essent, of 23 June 2009.

⁽⁴⁾ See cases COMP/M.5512 — Electrabel/E.ON, of 16 October 2009; COMP/M.5496 — Vattenfall/Nuon Energy, of 22 June 2009.

⁽⁵⁾ Czech NCA Decision n. ÚOHS-S0830/2015/KS-45620/2015/840/JMě of 21 December 2015, BOHEMIA ENERGY entity s.r.o./Europe Easy Energy a.s.; Czech NCA Decision n. ÚOHS-S0438/2016/KS-28103/2016/840/LBř of 7 July 2016 in BOHEMIA ENERGY entity s. r. o./RIGHT POWER, a. s..

⁽⁶⁾ See CRA Report page 17, last para.

⁽⁷⁾ [...] confidential information.

⁽⁸⁾ See CRA Report, page 18, Table 3.

⁽⁹⁾ The Applicant explained that the LDZs started out as a production site of a specific large industrial customer that over time turned the production site into an industrial park that comprises its own production facilities as well as other large industrial customers' production facilities that are hosted by the industrial customer with the historic production site.

the relevant product markets for this Decision, as regards the retail supply of electricity in the Czech Republic, are the following: (a) retail supply of electricity to large customers (continual metering large industrial and commercial consumers including those in the third category mentioned in recital 23(c)); and (b) retail supply of electricity to small customers (non-continual metering households and small commercial customers).

Retail supply of natural gas

- (25) In respect of retail supply of gas, the Commission differentiates between the supply of natural gas to small customers and the supply of natural gas to large customers, which are subdivided into large industrial customers and power stations ⁽¹⁾.
- (26) In its Decision M.4238 — E.ON/PP ⁽²⁾ concerning the Czech gas retail market, the Commission left the definition open, as the transaction concerned did not lead to competition concerns under any alternative definition.
- (27) In its decisional practice ⁽³⁾, the Czech NCA also considered a segmentation of the gas retail market by the different categories of final customers, but ultimately left the definition open.
- (28) The Applicant also differentiates between large and small gas supply customers. Large gas supply customers ⁽⁴⁾ are commercial customers with (i) automated continual metering with remote (A) or monthly (B) reading that have annual consumption of at least 4,2 GWh; or with (ii) non-interval metering with monthly reading that have annual consumption of between 0,63 and 4,2 GWh. They normally receive individualised offers from suppliers. Small customers are commercial and household customers with non-interval metering with other than monthly reading that have annual consumption of less than 0,63 GWh. They generally receive standardised offers. Each category accounts for around half of the total gas consumption.
- (29) In view of the factors listed in recitals 25 to 28, 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) retail supply of natural gas to large customers; (b) retail supply of natural gas to small customers.

RELEVANT GEOGRAPHIC MARKETS

Retail supply of electricity

- (30) The Commission has previously found ⁽⁵⁾ that the retail supply of electricity to large customers was national in scope, whereas narrower, regional markets could be considered for the retail supply of electricity to small customers. In its Decision M.4238 — E.ON/PP ⁽⁶⁾ concerning the Czech retail market, the market investigation confirmed that the market was at least national in case of electricity retail market. However, the exact scope of the geographic market was left open. The Czech NCA found that the retail supply of electricity to small customers is national in scope ⁽⁷⁾.
- (31) According to the Applicant, there are currently around 65 active suppliers with more than 100 delivery points that can supply large and small commercial customers and households on a national basis. This would point to a national scope of the retail supply markets.
- (32) In the Czech Republic there are three distribution areas, according to the ownership of the distribution companies ⁽⁸⁾. Due to the high market shares of the three regional distributors in their own respective distribution areas, the Czech Republic is characterised by a strong regional element. ČEZ group, through its

⁽¹⁾ 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.

⁽²⁾ M.4238 — *E.ON/PP*, recital 16.

⁽³⁾ Czech NCA Decision n. ÚOHS-S0830/2015/KS-45620/2015/840/JMě of 21 December 2015, BOHEMIA ENERGY entity s.r.o./Europe Easy Energy a.s.; Czech NCA Decision n. ÚOHS-S0438/2016/KS-28103/2016/840/LBř of 7 July 2016 in BOHEMIA ENERGY entity s. r. o./RIGHT POWER, a. s.

⁽⁴⁾ This market does not include supply to gas-fired power plants, which typically purchase gas directly on Power Exchanges and have gas delivered by purchasing gas pipeline capacity.

⁽⁵⁾ M.5496 — *Vattenfall/Nuon Energy*, recital 15 and seq., M.7778 — *Vattenfall/Engie/GASAG*, recital 37.

⁽⁶⁾ M.4238 — *E.ON/PP*, recitals 19 and 20.

⁽⁷⁾ Merger Decision UOHS-S492/2011/KS of the Czech NCA.

⁽⁸⁾ ČEZ group, the former Czech electricity incumbent and currently still state-owned, owns five of the eight electricity distribution networks, two distribution networks are owned by E.ON, while the electricity distribution company in the capital area is owned by Prazska energetica a.s. (PRE) — a company owned by EnBW and the City of Prague and controlled by EnBW. See CRA Report, para. 2, p. 1.

subsidiary ČEZ Distribuce, is the largest distributor with five of the eight electricity distribution networks accounting for around [...] of all the electricity consumed in the Czech Republic; in comparison, [...] of electricity consumption stems from E.ON's distribution area and only [...] stems from PRE's distribution area while the rest stems from the local LDZ ⁽¹⁾. In total, around [...] % of all delivery points are located in the area of ČEZ Distribuce. Not all of them are served by ČEZ Prodej (the retail supply arm of ČEZ group); however ČEZ Prodej supplies the large majority ([...] %) of the small commercial customers and households in its own distribution area ⁽²⁾.

- (33) At national level, ČEZ Prodej serves [...] million household delivery points, which corresponds to around [...] % market share in terms of delivery points.
- (34) Another element that would point to non-homogeneous competition conditions across the three distribution areas would be the fact that PRE charges around [...] % more for the energy component of the standard tariff in its own area. The Applicant justifies this price difference by the presence of PRE's low-cost subsidiary (Yello Energy) outside its own area but claims that ČEZ Prodej and E.ON charge identical prices for the energy component of the tariff across the three areas ⁽³⁾.
- (35) 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; and based on the fact that there are a large number of retailers operating at national level, the geographic scope of the retail supply of electricity to final customers in the Czech Republic can be considered national for both large and small customers. This does not exclude however that strong regional elements may also be present.

Retail supply of natural gas

- (36) The Commission has previously defined the markets for retail supply of gas, including those for small customers, as national in scope ⁽⁴⁾.
- (37) In its Decision M.4238 — *E.ON/PP* ⁽⁵⁾ concerning the Czech retail market, the Commission left the definition open, as the transaction concerned did not lead to competition concerns under any alternative definition.
- (38) From a geographical perspective, the Czech NCA has, in its previous practice ⁽⁶⁾, considered the relevant product markets in the sector of retail supply of gas as national in scope.
- (39) According to the latest information, there are currently a large number of active suppliers ⁽⁷⁾ in the Czech gas retail market. According to the Applicant these suppliers can supply large and small customers on a national basis.
- (40) As for electricity, gas distribution in the Czech Republic is split into three distribution areas, according to the ownership of the distribution companies ⁽⁸⁾. With regard to retail supply of gas to households, the Commission notes a similar pattern as for electricity with regard to the incumbent gas distributors' market shares per distribution area. In 2015, these market shares were around [...] % for RWE, [...] % for PP and [...] % for E.ON ⁽⁹⁾. However, the market shares of these companies are more diluted at national level with regard to the supply of gas to large customers ⁽¹⁰⁾.
- (41) The energy component of the gas price is not regulated and is set by the local distribution companies across the three distribution areas. The Applicant's analysis shows that both PP's and RWE's pricing of the energy component of the total gas price is the same across the three distribution areas, while E.ON has identical prices in PP and RWE areas, and slightly lower (less than [...] %) in its own area ⁽¹¹⁾. In the light of this, the Applicant argues that the market for gas retail is national in scope.

⁽¹⁾ See CRA Report, Table 1, p. 6.

⁽²⁾ See CRA Report, Table 8, p. 23.

⁽³⁾ See CRA Report, Table 9, p. 23-24.

⁽⁴⁾ M.3696 — *E.ON/MOL* (2005), recitals 138 and 140.

⁽⁵⁾ M.4238 — *E.ON/PP*, recital 16.

⁽⁶⁾ Case S830/2015/KS Bohemia Energy entity s.r.o./Europe Easy Energy a.s.; S713/2016/KS Bohemia Energy entity s.r.o./X Energie s.r.o.

⁽⁷⁾ ERO National Report 2016, indicate that in 2016, 98 active traders were supplying gas to customers in the Czech Republic (https://www.eru.cz/documents/10540/488714/NR_ERU_2016/3e05aa8c-0a79-4c3c-9389-6d0c3c313e1e).

⁽⁸⁾ See CRA Report, para. 2, p. 1.

⁽⁹⁾ See CRA Report, page 31, Table 17.

⁽¹⁰⁾ That is, [...] % for RWE and [...] % for both PP and E.ON (see CRA Report, page 22, Table 7). However, according to more recent data, in 2016, RWE had [...] %; PP had [...] % and E.ON [...] % of the market for large customers (see Applicant's reply of 12 April 2018 to Commission's RFI of 21 December 2017, p. 16).

⁽¹¹⁾ See CRA Report, Table 18, p. 33.

- (42) 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; and based on the fact that there are a large number of retailers operating at national level, the geographic market for the retail supply of natural gas to final customers in the Czech Republic can be considered national for both large and small customers. This does not exclude however that, like for electricity supply, regional elements may also be present.

Market analysis

- (43) The Commission has adopted other decisions ⁽¹⁾ concerning the applicability of exemptions from procurement rules to the retail supply of electricity and gas. In those Decisions, the Commission based its assessment on the following criteria in particular: number of market participants in general, combined market share of the biggest players, switching rate of final consumers, liquidity of the wholesale markets and price regulation.

Retail supply of electricity

- (44) It should be first pointed out that, in order for a supplier to be a credible long-term player exerting effective competitive pressure at retail level in the Czech Republic, it is necessary to have access to competitive electricity sources, either via own generation capacity or through access to liquid wholesale markets for all the necessary wholesale products in the Czech Republic or abroad through imports. Otherwise, retailers are dependent on their vertically-integrated competitors for their electricity sourcing which means that they are under the permanent threat of a margin squeeze, which in turn significantly limits the competitive constraint they can exert on vertically-integrated suppliers such as ČEZ.
- (45) In assessing whether the retail supply of electricity is directly exposed to competition, it is therefore also necessary to consider the conditions of competition in the upstream market for generation and wholesale supply of electricity and the position of the operators therein ⁽²⁾.

Number of market players, market shares of the biggest players

- (46) In June 2017, 65 active suppliers were supplying more than 100 delivery points across the three distribution areas of ČEZ group, E.ON and PRE. ČEZ Prodej is the largest supplier for both large and small customers, followed by E.ON and PRE. Other competitors have much smaller market shares for the supply of final customers.
- (47) In previous decisions ⁽³⁾, the Commission considered that, concerning the electricity retail supply market, the combined market share of the largest three undertakings is one of the relevant indicators to assess the market concentration and assess the general competition situation. Given that not all market players are subject to public procurement rules, the analysis focuses mainly on the market position and competitive constraints on the individual market players subject to public procurement rules that is, essentially, ČEZ Prodej and PP. However, whenever relevant to understand the market context in which ČEZ Prodej and PP are operating, other market operators are included in the analysis (see also recital 20). Other measures of concentration may also be considered relevant.

Retail supply of electricity to large customers

- (48) ČEZ Prodej supplies [...] of large customers, namely, in volume, around [...] TWh out of [...] TWh ⁽⁴⁾. Its market shares for large customers have been rather stable during the period 2012-2015 at [...] % ⁽⁵⁾, however they dropped to [...] % in 2016 ⁽⁶⁾. The Commission notes that this drop happened during the same year when ČEZ group experienced several shortfalls at a number of its nuclear reactors affecting around [...] of its nuclear

⁽¹⁾ Commission Decision 2007/141/EC of 26 February 2007 establishing that Article 30(1) of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors applies to the supply of electricity and gas in England, Scotland and Wales (OJ L 62, 1.3.2007, p. 23) and 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 (OJ L 253, 17.9.2016, p. 6).

⁽²⁾ The upstream market concerning wholesale of electricity was not investigated in previous Decisions under Article 34 of Directive 2014/25/EU, as the competitive situation in these upstream markets did not raise concerns in the downstream level.

⁽³⁾ Implementing Decision (EU) 2016/1674, recital 37 and the decisions cited.

⁽⁴⁾ See CRA Report, Table 3, p. 18 and Table 6, p. 21.

⁽⁵⁾ See Request, p. 32, Table 3.

⁽⁶⁾ For large industrial customers, if the operators of the LDZ are included, the market share of ČEZ Prodej increases from [...] % to [...] % (see reply of 1 August 2017 to Commission's RFI of 28 June 2017, Table 2, p. 8).

capacity, which confirms that access to competitive electricity sources is a key factor to compete in the retail markets. Furthermore, it cannot be excluded that ČEZ Prodej's [...] % market share would be larger in one or more regions if it was calculated on the basis of a regional, instead of national, geographic market for large customers. However, local market share figures for large customers connected to the network of ČEZ Prodej were not provided, although requested.

- (49) During the period 2014-2016, the market shares for large customers were rather stable also in the case of E.ON with around [...] % and in the case of PRE with around [...] %.
- (50) At national level, the combined market share of the three main market players (ČEZ Prodej, E.ON and PRE) for large customers is around 60 % ⁽¹⁾ (HHI ⁽²⁾ calculated for this market is 1 847 ⁽³⁾). With regard to the other suppliers for large customers, Bohemia Energy, CENTROPOL, RWE, Veolia Komodity, Lumius, EP Energy Trading, Slovenské elektrárne and Amper Market are all below [...] %.

Retail supply of electricity to small customers

- (51) At national level, ČEZ Prodej supplies [...] % of small customers ⁽⁴⁾ in terms of volume deliveries; however, larger volumes were consumed in ČEZ group's distribution area, namely, [...] TWh out of [...] TWh were consumed by small customers ⁽⁵⁾. ČEZ Prodej's market shares for such customers have been rather stable during the period 2012-2015 at [...] % ⁽⁶⁾. The Commission notes however that, according to the NCA opinion, the market shares of ČEZ Prodej have decreased over the last 6 years ⁽⁷⁾.
- (52) At local level, the incumbents' market shares for small customers are high: in 2014-2015, ČEZ Prodej and E.ON had [...] % market share in their respective distribution areas, while PRE had [...] % market share in the Prague area. The presence of the three main suppliers in each other's respective areas was insignificant ([...] %) ⁽⁸⁾. This confirms that strong regional elements are present.
- (53) During the period 2014-2016, the market shares for small customers were rather stable also in the case of E.ON with around [...] % and in the case of PRE with around [...] %. At national level, the combined market share of the three main market players (ČEZ Prodej, E.ON and PRE) for small customers is around 74 % ⁽⁹⁾ (the HHI calculated for this market is 2 664) ⁽¹⁰⁾. The closest competitor for that category of small customers is Bohemia Energy with [...] %.

Switching rates of final consumers

- (54) The number of customers switching is also considered a relevant indicator of effective competition. Two types of customer switching could be defined: external switching, which refers to the switching of supplier, and internal switching, which is defined as the switching of tariff or contract with the existing supplier. In a previous decision ⁽¹¹⁾, the Commission analysed mainly the external switching.

⁽¹⁾ By comparison, Implementing Decision (EU) 2016/1674 found that the combined market shares of the four largest electricity retailers in Germany was 33 %, in 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), concerning Italy, the combined market shares of the three largest electricity retailers was found to be 43,89 %. In Commission Decision 2006/422/EC of 19 June 2006 establishing that Article 30(1) of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors applies to the production and sale of electricity in Finland, excluding the Åland Islands (OJ L 168, 21.6.2006, p. 33), concerning Finland, this market share was at 35-40 %.

⁽²⁾ HHI — Herfindahl-Hirschman Index.

⁽³⁾ See Request, page 7.

⁽⁴⁾ See, for small customers Table 10 of the Applicant's reply of 10 May 2017 to Commission's RFI of 21 April 2017.

⁽⁵⁾ See CRA Report, Table 3, p. 18 in combination with Table 8, p. 23.

⁽⁶⁾ See Request, Table 3, p. 32.

⁽⁷⁾ See NCA Opinion, p. 2.

⁽⁸⁾ See CRA Report, Table 8, p. 23.

⁽⁹⁾ By comparison, Implementing Decision (EU) 2016/1674 found that the combined market shares of the four largest electricity retailers in Germany was 36 %. In Decision 2006/422/EC concerning Finland, this market share was at 35-40 %.

⁽¹⁰⁾ See CRA presentation to DG COMP of 9 June 2017.

⁽¹¹⁾ Implementing Decision (EU) 2016/1674.

Retail supply of electricity to large customers

- (55) The Applicant claims that external switching rates are relatively high among large consumers. However, the external switching rate among large customers decreased from around 30 % in 2010 to 16 % in 2015; the average external switching rate during those six years was 22 % ⁽¹⁾. By way of comparison, on average the external switching rates are higher in the Czech Republic than in Germany (around 11 %) ⁽²⁾ and lower than in Italy (around 32 %) ⁽³⁾. According to the Applicant, no costs are incurred for switching electricity supplier; customers directly connected to the high voltage network organise their electricity supply through tenders or they directly purchase electricity on the exchanges, which may explain their tendency to switch suppliers more often than small customers (see recitals 56 to 59) ⁽⁴⁾.

Retail supply of electricity to small customers

- (56) The Applicant claims that external switching rates are not high for small customers, due to alleged high customer satisfaction levels and/or due to contract renegotiations with the same supplier. The external switching rate of small customers was approximately 4,6 % in 2015 (i.e. the same as in 2010); the average external switching rate during these six years was 5 % ⁽⁵⁾. According to the Applicant, external switching of the electricity supplier is fairly easy also for small customers. According to a customer survey carried out by the Applicant, small customers across the three distribution areas would switch electricity supplier 'in response to price increases of 5-10 %' ⁽⁶⁾.
- (57) The NCA Opinion indicated that according to the customer survey ordered by ČEZ Prodej, customers are very sensitive to prices and willing to switch ⁽⁷⁾. Moreover, the NCA Opinion indicated that 'suppliers started to make pro-competitive retention offers to their customers with significant discounts' and consequently, based on internal data of ČEZ Prodej, 'a substantial part of the customers of ČEZ Prodej that would otherwise switch to another supplier chose switching to a more advantageous price of ČEZ Prodej' ⁽⁸⁾. Also, the NCA Opinion concluded that by combining external switching rate with the internal switching rate of ČEZ Prodej, the combined level of switching rates for households was of [...] %.
- (58) The Commission notes however that, according to the latest available public information ⁽⁹⁾, internal switching rates for households appear to be rather low in the Czech Republic. In particular, the three-year average of internal switching rates of electricity for household customers' accounts for 2 % only, while the five-year average of external switching of electricity for household customers is 6 % ⁽¹⁰⁾.
- (59) Moreover, the Commission notes that the Czech National Regulator (ERO) points out, in relation to the retail market for electricity, certain unclear contractual conditions in fixed-term contracts with automatic extension, which may make it more difficult for customers to identify the dates and conditions on which contracts can be terminated ⁽¹¹⁾. The same point regarding contracts with fixed term and automatic extension was reiterated in the latest available ERO National Report of 2016 ⁽¹²⁾.

Access to wholesale electricity

- (60) The liquidity of the wholesale market is a relevant indicator for competition, as sufficient volumes on both the supply and the demand side for the relevant wholesale products (e.g. baseload, peak load, hourly blocs for

⁽¹⁾ See Request, Table 12, p. 58. The percentages are calculated in terms of points of delivery.

⁽²⁾ Implementing Decision (EU) 2016/1674, recital 39.

⁽³⁾ Decision 2010/403/EU, recital 18.

⁽⁴⁾ See CRA Report, p. 43.

⁽⁵⁾ See Request, Table 13, p. 59. The percentages are calculated in terms of points of delivery.

⁽⁶⁾ See CRA Report, p. 49.

⁽⁷⁾ See NCA Opinion, p. 2, last para.

⁽⁸⁾ See NCA Opinion of 14.6.2017, p. 3, paras. 3 and 4

⁽⁹⁾ ACER/CEER Annual Report on the Results of Monitoring the Internal Electricity and Gas Markets in 2015 of November 2016, page 66 https://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Publication/ACER_Market_Monitoring_Report_2015.pdf

⁽¹⁰⁾ The five-year average of external switching in the Czech Republic is lower than in Germany, Sweden, Finland, and Great Britain.

⁽¹¹⁾ ERO National Report 2015, p. 21. (https://www.ero.cz/documents/10540/488714/NR_ERU_2015.pdf/e6ca9e45-17c6-4f48-9561-8f0ef0d6af29), ERO National Report 2016, p. 25.

⁽¹²⁾ ERO National Report 2016, p. 25.

different timeframes) provide sourcing and hedging opportunities to suppliers that do not dispose of own generation, enabling them to enter the retail markets and to compete with vertically integrated suppliers with own generation capacity.

ČEZ group remains by far the largest electricity generator

- (61) At the generation level, ČEZ group produced [...] % of the electricity generated in the Czech Republic in 2016 ⁽¹⁾. The second largest generator (Elektrárna Počeradý a.s.) had a [...] % market share and the following three largest generators (Sokolovská Uhelná a.s., Elektrárna Dětmarovice a.s. and Severní Energetická a.s. ⁽²⁾) were all below [...] % each ⁽³⁾. The following six producers were below 3 % and the remaining category (representing around 17 % of the electricity generated) consisted in a multitude of small solar/wind power plants and agricultural undertakings. E.ON, PRE and the other smaller retailers (e.g. Bohemia Energy, CENTROPOL) do not own generation assets in the Czech Republic.
- (62) ČEZ group remains therefore the largest electricity generator of the Czech Republic. Its market share at generation level reflects its privileged access to the cheapest sources of generation in the Czech Republic (nuclear, lignite, coal).
- (63) As regards nuclear generation, it should be noted that in 2016-2017, ČEZ group experienced several shortfalls at a number of its nuclear reactors [...].
- (64) Under the Czech long-term energy strategy plan of the Czech Republic ⁽⁴⁾, nuclear generation should account for around half of the country's total electricity consumption by 2050 (up from around one third at present). The Czech authorities plan to phase out four units at Dukovany from 2035 onwards and at the same time they plan to build new reactors at the two existing nuclear sites (Dukovany and Temelin) with an option either for the State to acquire ČEZ group's nuclear division or for ČEZ group to finance the new plants. In this scenario, with the full re-start of its reactors and forecast increase of power generation for next year ⁽⁵⁾, ČEZ group's share of the generation market will likely increase to previous levels.

Use of the wholesale market

- (65) At the wholesale level, electricity is either sold internally within vertically integrated undertakings carrying out both generation and retail supply activities (such as ČEZ group entities) or traded through various channels: under purely bilateral (over-the-counter or 'OTC') or brokered contracts; at the futures markets organised by Power Exchange Central Europe, a.s. ('PXE') or the Czech Moravian Commodity Exchange Kladno ('CMCEK') ⁽⁶⁾; and at spot markets organised by the Czech electricity and gas market operator, the company OTE a.s. Electricity traders can use any combination of bilateral contracts and energy exchange products, including OTE's platforms and foreign exchanges ⁽⁷⁾, for buying and selling ⁽⁸⁾.
- (66) Wholesale prices at the PXE exchange traditionally follow the prices on the EEX exchange. In this regard, the Applicant claims that ČEZ Prodej ⁽⁹⁾ has no competitive advantage compared with other retailers on the market procuring their electricity on the PXE exchange, because [...] ⁽¹⁰⁾. However, it should be noted that this price level is based on a purely contractual arrangement between two companies belonging to the same group, and can therefore be changed at any time and has no impact on the total profit of ČEZ group.

⁽¹⁾ More precisely, almost [...] TWh out of a gross electricity generation of around [...] TWh (See Applicant's reply of 10 May 2017 to the Commission's RFI of 21 April 2017, page 1, Table 1). ERO reports that in 2016, gross electricity generation totalled 83,3 TWh.

⁽²⁾ It could nonetheless be expected that, after the announced sale of ČEZ group's Pocerady coal-fired power plant (1 000 MW) to Czech Coal, the market share of Severní Energetická (subsidiary of Czech Coal) will slightly grow.

⁽³⁾ See Applicant's reply of 1 August 2017 to Commission's RFI of 28 June 2017.

⁽⁴⁾ See Platts Power in Europe, Issue 753, 3 July 2017, p. 15.

⁽⁵⁾ In March 2017, ČEZ group forecast an increase in its power generation in 2018 to 66 TWh from 59 TWh in 2015 — see Platts Power in Europe, issue 722 (28 March 2016), page 15.

⁽⁶⁾ This commodity exchange focuses more on domestic than international trading.

⁽⁷⁾ Mainly, the European Energy Exchange in Leipzig (EEX).

⁽⁸⁾ ERO National Report 2015, p. 17, 18.

⁽⁹⁾ The NCA, in its Opinion, brings forward the same argument.

⁽¹⁰⁾ See Applicant's reply of 28 March 2017 to Commission's RFI of 24 March 2017.

- (67) The volumes traded on the wholesale markets (spot and forward, brokered and exchanges) in the Czech Republic in 2016 ([...] TWh) were around [...] the amount of annual electricity consumption ⁽¹⁾. In particular, OTC volumes traded on broker platforms such as Trayport amounted to [...] TWh (out of a total traded volume of [...] TWh) in 2016, increasing slightly since 2008 ([...] TWh) ⁽²⁾. In comparison, the size of the German wholesale market was ten times bigger than the total volumes of electricity withdrawals ⁽³⁾. In the Czech Republic, low futures trading volumes ⁽⁴⁾ were registered in the largest power exchange (PXE ⁽⁵⁾), while very small volumes (2-3 TWh) were traded in domestic trading venues such as the CMCEK ⁽⁶⁾. The volumes traded in the day-ahead and intra-day markets (OTE-Spot), which are also required for retailers to be able to rely on wholesale markets, increased since 2008 but the volumes involved remain small ⁽⁷⁾. Finally, the lack of data about direct (OTC) bilateral sales does not allow the Commission to assess whether they are sufficient for new entrants to compete in the market ⁽⁸⁾.

Import opportunities

- (68) With regard to imports, the Applicant has argued that there is 'ample interconnector capacity on the Czech/German border' ⁽⁹⁾. However, the Czech TSO has reported ⁽¹⁰⁾ several critical situations in the Czech transmission system due to unplanned transit flows (or 'loop flows') amounting to several GW. In particular, according to the Czech TSO, loop flows are a major problem in grid stability ⁽¹¹⁾ and a limiting factor for commercial trade on the Czech borders, in particular on the Czech-German border. Figures submitted by the Applicant ⁽¹²⁾ shows that the import capacity commercially available at the border with Germany has substantially decreased in the period 2014-2016 ⁽¹³⁾.
- (69) Moreover, the scope for imports from neighbouring countries could be reduced due to the traditionally low wholesale prices in the Czech Republic. This has been the case during the period 2012-2016 when the average day-ahead price differential across the Czech borders was negative, namely – 3,9 EUR/MWh with Poland; – 0,4 EUR/MWh with Austria; – 0,6 EUR/MWh with Slovakia, and only with Germany was it slightly positive (0,4 EUR/MWh) ⁽¹⁴⁾.
- (70) Notwithstanding the above, the Applicant has argued that in 2016, around 8,6 TWh of import capacity was allocated to market participants, while 7,9 TWh, representing 'roughly 13 % of total electricity consumption', were imported in response to the sudden outages of ČEZ group's nuclear power plants ⁽¹⁵⁾. This exceptional circumstance may explain the volumes of capacity imported and allocated to market participants in 2016. Indeed, ČEZ group has calculated that, in the absence of those shortfalls, it would have produced additional [...] TWh of electricity. However, the situation is recovering and some of the reactors have restarted while others are planned to restart soon. As a result it can be expected that imports will gradually decrease in the future as the ramping up of nuclear generation with low marginal cost will push down electricity prices in the Czech Republic.

⁽¹⁾ Figures reported by the Applicant on the basis of figures from OTE.

⁽²⁾ The evolution of brokered volumes on Trayport — OTC during the previous years has been the following: [...] TWh in 2008; [...] TWh in 2009; [...] TWh in 2010; [...] TWh in 2011; [...] TWh in 2012; [...] TWh in 2013; [...] TWh in 2014 and [...] TWh in 2015. See Applicant's reply of 10 May 2017 to the Commission's RFI of 3 May 2017.

⁽³⁾ See Implementing Decision (EU) 2016/1674.

⁽⁴⁾ [...] TWh in 2016 compared to [...] TWh in 2008 — see Applicant's reply of 10 May 2017 to Commission's RFI of 3 May 2017, Table 5, p. 4.

⁽⁵⁾ At PXE, only financial products, i.e. without the option of physical supply are traded.

⁽⁶⁾ Approx. 2,6 TWh according to the 2015 Annual report of Kladno (available online in Czech language at: <https://www.cmkkb.cz/zpravy/vz2015/#6/z>, p. 6).

⁽⁷⁾ Around [...] TWh. See Table 5, page 4 of the Applicant's reply of 10 May 2017 to the Commission's RFI of 21 April 2017.

⁽⁸⁾ The Applicant has not submitted the volumes of electricity supplied under cooperation agreements or direct bilateral sales (without a broker) on the argument that they are unknown to them. The above calculations did not include data from OTC platforms.

⁽⁹⁾ See page 10 (answer to Q. 9) of Applicant's reply of 16 February 2017 to the Commission RFI of 31 January 2017.

⁽¹⁰⁾ See several reports and studies published by the Czech TSO Ceps, a.s. (www.ceps.cz) about loop-flows in the region.

⁽¹¹⁾ See also the ERO Annual Report 2016.

⁽¹²⁾ See the Applicant's reply of 1 August 2017 and Annexes thereof, to the Commission's RFI of 28 June 2017.

⁽¹³⁾ Commercial capacity at the Czech-German border (in the direction Germany to Czech Republic) available on the day-ahead market has fallen from [...] MWh in 2014 to [...] MWh in 2016 (figures processed on the basis of Annex 8 of the Applicant's reply of 1 August 2017 to the Commission's RFI of 28 June 2017).

⁽¹⁴⁾ See ACER 2016 Electricity and gas markets report (http://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Publication/ACER%20Market%20Monitoring%20Report%202016%20-%20ELECTRICITY.pdf).

⁽¹⁵⁾ See p. 10 (answer to Q. 9) of Applicant's reply of 16 February 2017 to the Commission's RFI of 31 January 2017.

Price competition and price regulation

- (71) The price of electricity supply to end customers, has two main components ⁽¹⁾: the first one, accounting for 45 % of the total final price, includes fixed costs for electricity distribution, auxiliary services, system charges, etc.; the second one, accounting for 37 % of the total final price, is the electricity component, which includes the retail supply margin ⁽²⁾. This second component is not regulated ⁽³⁾.
- (72) With regard to prices of electricity to end consumers, for both large and small customers, the price level including taxes is smaller than the EU-28 average, and also smaller than the EU-28 average if taxes are excluded ⁽⁴⁾. The Applicant observes that these prices were consistently lower than the corresponding prices in Germany over the period 2007-2015.
- (73) In particular, with regard to large industrial customers ⁽⁵⁾, the Applicant observes that the Czech energy component decreased by more than 40 % between the second half of 2012 and the second half of 2015, when it was 24 % lower (0,0300-0,0400 EUR per kWh) than the German energy component (0,0400-0,0500 EUR per kWh). With regard to households ⁽⁶⁾, the Applicant observes that, after the second half of 2009, the Czech energy component was constantly declining and in the second half of 2015 it was almost 0,0400 EUR per kWh, which means that it was 49 % lower than the German energy component (0,0700-0,0800 EUR per kWh) ⁽⁷⁾.
- (74) The Applicant concludes from these figures, based on Eurostat data, that 'the degree of competition is larger in the Czech market than in the German market that is directly exposed to competition according to the Commission's recent German Retail Exemption Decision' ⁽⁸⁾. However, this is not corroborated by evidence, in particular with regard to the price comparison between the Czech and German markets. Under certain conditions (e.g. marginal cost levels and elasticities of demand), economic theory suggests that highly concentrated markets could have lower prices than less concentrated markets ⁽⁹⁾. More importantly, the price comparison depended on the choice of unit. In fact, German prices were above Czech ones in absolute terms in the last years but they were lower in terms of purchasing power standard (PPS); in that respect Czech prices were higher in 2015 ⁽¹⁰⁾.
- (75) Moreover, with regard in particular to household prices, the Agency for Cooperation of Energy Regulators (ACER) has observed, on the basis of information received from the national regulators, that 'there may be irregularities in the data for household electricity prices. These results should therefore be interpreted with caution' ⁽¹¹⁾.

RETAIL SUPPLY OF NATURAL GAS

Number of market players, market shares of the biggest players

- (76) Latest figures from the ERO indicate that in 2016, 98 active traders supplying gas to customers operated in the Czech Republic ⁽¹²⁾. The total cost ⁽¹³⁾ of entry into the market for retail supply of gas is low, and does not seem to constitute a barrier to entry.

⁽¹⁾ Taxes account for 18 % of the price.

⁽²⁾ See ERO National Report 2016, Chart 8, p. 20.

⁽³⁾ The only exception to this rule is the price of electricity supplied by the supplier of last resort, which is marginal in the Czech Republic.

⁽⁴⁾ See <http://ec.europa.eu/eurostat/web/energy/data/database>

⁽⁵⁾ For the purpose of this price calculation, the Applicant defines large industrial customers as customers with consumption between 2 000 and 20 000 MWh.

⁽⁶⁾ For the purpose of this price calculation, the Applicant defines household consumers as customers with consumption between 2 500 and 5 000 kWh.

⁽⁷⁾ See CRA Report, p. 41, and p. 42.

⁽⁸⁾ Section 5.2 of the Request, p. 37, last para.

⁽⁹⁾ For instance, in an oligopolistic market with Cournot competition it can be shown that the aggregate Lerner Index of market power (the percentage of price not devoted to cover marginal costs, also known as mark-up) is inversely related to demand elasticity and directly related to the HHI index of concentration (see for example Chapter 4 in Vives, 1999, 'Oligopoly Pricing: Old Ideas and New Tools', MIT Press). This means that, other things equal, markets with higher concentration (higher elasticity) would display higher (lower) mark-ups. It also implies that a highly concentrated market A could show lower prices (and yet a higher mark-up) than another less concentrated market B if, for example, marginal costs in A are small enough compared to B. The same result holds for other alternative combinations of relative marginal costs and demand elasticities between A and B, including combinations that resemble real features of the Czech and German markets. Therefore, these counterexamples suggest that from a simple comparison of observed prices, and without taking into consideration other factors, it might not be possible to unambiguously infer whether one market is more competitive than other.

⁽¹⁰⁾ Commission calculation based on Eurostat data (Ref. tables: nrg_pc_204 and nrg_pc_205).

⁽¹¹⁾ See ACER Market Monitoring report 2015 — Electricity and gas retail markets — p. 44, footnote 107. https://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Publication/ACER%20Market%20Monitoring%20Report%202015%20-%20ELECTRICITY%20AND%20GAS%20RETAIL%20MARKETS.pdf

⁽¹²⁾ See ERO National Report 2016, p. 42.

⁽¹³⁾ Total costs are composed of the cost associated with the licensing and operational cost (marketing, customers' service costs, etc.).

- (77) In previous decisions ⁽¹⁾, the Commission considered that, concerning the gas retail supply market, the combined market share of the largest three undertakings is one of the relevant indicators to assess the market concentration and assess the general competition situation. Given that not all market players are subject to public procurement rules, the analysis focuses mainly on the market position and competitive constraints on the individual market players subject to public procurement rules that is, essentially, ČEZ Prodej and PP. However, whenever relevant to understand the market context in which ČEZ Prodej and PP are operating, other market operators are included in the analysis (see also recital 20). Other measures of concentration may also be considered relevant.
- (78) According to the most recent figures ⁽²⁾, the largest suppliers of gas in terms of quantity supplied to customers are RWE (now, Innogy Energie, s.r.o.) with almost [...] % market share, followed by PP and E.ON with [...] % market share. Also ČEZ Prodej is active in this market with a market share of [...] % ⁽³⁾.

Retail supply of natural gas to large customers

- (79) According to the 2016 figures supplied by the Applicant, RWE is the largest supplier to large customers with a market share of [...] %, followed by ČEZ Prodej with a market share of [...] % and E.ON with a market share of [...] %. The Commission notes that only PP and ČEZ Prodej are considered contracting entities in the sense of Article 4 of Directive 2014/25/EU, and hence are subject to procurement rules.
- (80) The combined market share of the three largest retailers to large customers on the Czech gas market is 51 %. The HHI calculated for this market is 1 341 ⁽⁴⁾.

Gas retail supply to small customers

- (81) According to the 2016 figures supplied by the Applicant, the three largest suppliers to small customers are RWE, with a market share of [...] %, followed by PP with a market share of [...] %, and E.ON with a market share of [...] % ⁽⁵⁾. Also ČEZ Prodej (fourth largest supplier) is active in this market with a market share of [...] %. The Commission notes that only PP and ČEZ Prodej are considered contracting entities in the sense of Article 4 of Directive 2014/25/EU, and hence are subject to procurement rules.
- (82) The combined market share of the three largest retailers to small customers on the Czech gas market is 69 % ⁽⁶⁾. The HHI calculated for this market is 2 024 ⁽⁷⁾.

Switching rates of final consumers

Retail supply of natural gas to large customers

- (83) ERO's national report for 2016 contains information regarding supplier switching data separately for four categories of customers ⁽⁸⁾: 'high demand', 'medium size demand', 'low demand' and 'households'.
- (84) The first two categories ('high demand' and 'medium size demand') can be broadly assigned to the category of 'large customers' as defined for the purposes of this Decision. In 2016, customer switching for high demand customers was 38 % and for medium size demand was 29 %. The levels of switching for those two categories were also high over the last five years.

Retail supply of natural gas to small customers

- (85) The last two categories ('low demand' and 'households') can be broadly assigned to the category of 'small commercial customers and households' as defined for the purpose of this Decision.

⁽¹⁾ Implementing Decision (EU) 2016/1674, recital 37 and the decisions cited.

⁽²⁾ See ERO National Report 2016, p. 43.

⁽³⁾ Market shares in this recital refer to global retail supply of gas (to large customers and small customers).

⁽⁴⁾ Calculated on the basis of Table 1, page 16 of Applicant's reply of 12 April 2018 to Commission's RFI of 21 December 2017.

⁽⁵⁾ See Request, p. 70.

⁽⁶⁾ See Request, p. 68.

⁽⁷⁾ Calculated on the basis of Table 2, page 16 of Applicant's reply of 12 April 2018 to Commission's RFI of 21 December 2017.

⁽⁸⁾ See ERO National Report 2016, Table 9, p. 43.

- (86) In 2016, customer switching for 'low demand' was at 14 %, while for 'households' it was at 6,6 %. The levels of switching for 'low demand' customers were above 10 % during the period 2011-2016. The levels of switching for 'households' have been decreasing since 2011 (around when the switching rate was 13 % ⁽¹⁾), however in 2016 the switching rate increased.

Access to wholesale gas ⁽²⁾

- (87) Entities trading at the wholesale gas market can buy gas under long-term contracts, at commodity exchanges, or from other traders. Long-term contracts with Russian and Norwegian gas producers probably still have the most significant influence on the formation of wholesale prices. Long-term contracts are usually entered into for very long terms of up to 30 years. Earlier, certain changes to the gas price formulae were made in these contracts, but long-term contracts themselves have not been abandoned ⁽³⁾. According to Eurostat figures, in total 36 entities imported gas into the Czech Republic in 2016 ⁽⁴⁾.
- (88) According to the ERO, the holder of the exclusive licence for the activities of the market operator in the Czech Republic, OTE, a.s., has been organising a spot gas market since 2010. An amendment to the Gas Market Rules has abolished the day-ahead gas market organised by the market operator. On the other hand, a platform has been established for the intra-day gas market. According to ERO, this market has maintained its high attraction for gas market participants in 2016 ⁽⁵⁾.
- (89) The largest share of the wholesale market takes place outside of the exchange platforms and in the form of bilateral over-the-counter ('OTC') trading. OTC trading offers the advantage that it can be carried out flexibly, namely in particular without having to have recourse to a limited set of contracts. A significant role in OTC trading is played by brokerage via broker platforms. OTC trading saw substantial increases as of 2012. In 2016, natural gas trading transactions brokered on broker platforms with the Czech Republic as a supply area totalled 88 TWh (93 TWh including the volumes traded on exchange platforms). The volume of futures contracts rose from 0,7 TWh in 2014 to 3 TWh in 2015.
- (90) In 2016, annual gas consumption in the Czech Republic totalled around 88 TWh. Consumption rose by 8,5 % compared to 2015. The ratio of the wholesale trading volume with the consumption is > 1 ⁽⁶⁾.
- (91) In view of the factors examined in recitals 87-90, in this case, the Commission considers that the liquidity of the Czech wholesale market is sufficient to allow the retailers to have access under competitive conditions to the wholesale gas either through wholesale markets or through imports. The liquidity of the Czech wholesale market does not prevent the retail supply of gas from being subject to direct exposure to competition.

Price competition and price regulation

- (92) The price of gas supply to end customers, without taxes, has two main components ⁽⁷⁾. The first one, accounting for 22 % of the price, contains regulated parts (transmission, distribution, etc.). The second one, which accounts for 78 % of the price, represents the price of the commodity itself which includes the retail supply margin. The second component is not regulated ⁽⁸⁾.

Retail supply of natural gas to large customers

- (93) For large customers, the price level including taxes is smaller than the EU-28 average, and also smaller than the EU-28 average if taxes are excluded ⁽⁹⁾.

Retail supply of natural gas to small customers

- (94) For small customers, the price level including taxes is smaller than the EU-28 average, and also smaller than the EU-28 average if taxes are excluded ⁽⁹⁾.

⁽¹⁾ See Request p. 73.

⁽²⁾ In addition to wholesale and imports, in 2017, the Czech Republic produced 1 TWh gas.

⁽³⁾ See ERO National Report 2016, p. 39.

⁽⁴⁾ See http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Number_of_entities_bringing_natural_gas_into_the_country-T1.png

⁽⁵⁾ See ERO National Report 2016, p. 39.

⁽⁶⁾ 88 TWh of gas consumed in 2016 out of 93 TWh volume of gas traded at the wholesale level.

⁽⁷⁾ See ERO National Report 2016, p. 32.

⁽⁸⁾ The only exception to this rule is the price of gas supplied by the supplier of last resort, which according to the Request (para. 3, p. 76) has not been used so far in the Czech Republic.

⁽⁹⁾ Based on <http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do>

4. CONCLUSIONS

4.1. ELECTRICITY

- (95) Competition on the Czech retail electricity markets is structurally limited by the fact that retailers (other than ČEZ Prodej) do not have sufficient own generation capacity nor access to significantly liquid wholesale markets either in the Czech Republic or abroad through imports. As a result these retailers are not in a position to compete on an equal footing with ČEZ Prodej which is vertically integrated with the largest local distribution company and the largest electricity generator.

RETAIL SUPPLY OF ELECTRICITY TO LARGE CUSTOMERS

- (96) The combined market shares of the three largest retail supply companies for large customers is rather high (60 %) with the largest market player (ČEZ Prodej) holding a [...] % market share. The second and third largest market players, namely E.ON and PRE, which hold market shares of [...] % and [...] %, respectively, are not subject to Union procurement rules. Despite their non-negligible market shares, they can only exercise limited competitive pressure on ČEZ Prodej. Access to wholesale electricity is not sufficient: ČEZ group is by far the largest electricity generator in the Czech Republic and electricity interconnection capacities are limited and therefore the liquidity of the wholesale electricity market is dependent on the behaviour of ČEZ group. This situation limits their possibility to procure electricity both in baseload and the other products needed under competitive conditions, which in turn structurally limits their ability to compete with ČEZ Prodej. For the same reasons, smaller competitors have a limited ability to compete with the three largest suppliers.
- (97) The market position of ČEZ Prodej, E.ON and PRE is strengthened by the strong regional elements characteristics of this market and non-homogeneous competition conditions across the three distribution areas make it difficult for competitors to challenge those operator's market positions within their own respective distribution areas. Finally, the degree of customer switching although higher than for small customers has declined in recent years.
- (98) 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 respect of the retail supply of electricity to large customers on the territory of the Czech Republic.

RETAIL SUPPLY OF ELECTRICITY TO SMALL CUSTOMERS

- (99) The combined market share of the three largest retail supply companies for small customers is high (74 %), with the largest market player (ČEZ Prodej) holding a [...] % market share. The second and third largest market players, namely E.ON and PRE, which are the second and third largest market players holding market shares of [...] % and [...] %⁽¹⁾, respectively, are not subject to Union procurement rules. Despite their non-negligible market shares, they can only exercise limited competitive pressure on ČEZ Prodej. Access to wholesale electricity is not sufficient: ČEZ group is by far the largest electricity generator in the Czech Republic and electricity interconnection capacities are limited and therefore the liquidity of the wholesale electricity market is dependent on the behaviour of ČEZ group. This situation limits their possibility to procure electricity both in baseload and the other products needed under competitive conditions, which in turn structurally limits their ability to compete with ČEZ Prodej. For the same reasons, smaller competitors have a limited ability to compete with the three largest suppliers.
- (100) The market position of ČEZ Prodej, E.ON and PRE is strengthened by the strong regional characteristics of this market and non-homogeneous competition conditions across the three distribution areas, which make it difficult for competitors to challenge those operators' market position within their own respective distribution area. Finally, the degree of customer switching is rather low and, for the reasons noted above, low retail prices are not an indicator of direct exposure to competition.
- (101) 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 respect of the retail supply of electricity to small customers on the territory of the Czech Republic.

⁽¹⁾ See, for small customers, Table 10 of the Applicant's reply of 10 May 2017 to Commission's RFI of 21 April 2017.

4.2. GAS

RETAIL SUPPLY OF NATURAL GAS TO LARGE CUSTOMERS

- (102) In respect of the retail supply of gas to large customers in the Czech Republic, the situation can be summarised as follows: there is a high number of suppliers active at national level; the combined market shares of the three largest retail supply companies is not very high (51 %); the first and third market players are not subject to Union procurement rules; the degree of switching appears satisfactory, there is no end-user price control and the wholesale market liquidity does not seem to constitute an obstacle to the retail supply of gas being subject to direct exposure to competition.
- (103) 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 respect of retail supply of gas to large customers on the territory of the Czech Republic.

RETAIL SUPPLY OF NATURAL GAS TO SMALL CUSTOMERS

- (104) In respect of the retail supply of gas to small customers in the Czech Republic, the situation can be summarised as follows: there is a high number of suppliers active at national level; the combined market shares of the three largest retail supply companies is rather high (69 %), however the first and the third market players are not subject to procurement rules; the degree of switching appears satisfactory; there is no end-user price control and the wholesale market liquidity does not seem to constitute an obstacle to the retail supply of gas being subject to direct exposure to competition.
- (105) 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 respect of retail supply of gas to small customers on the territory of the Czech Republic.

4.3. CONCLUSION

- (106) This Decision is based on the legal and factual situation as of November 2016 to April 2018 as it appears from the information submitted by the Applicant, and the ERO National Reports. 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.
- (107) Since the services related to the retail supply of electricity ⁽¹⁾ should 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 laid down in Article 6(3) of Directive 2014/25/EU.
- (108) 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 on the territory of the Czech Republic:

- (a) retail supply of natural gas to large customers;
- (b) retail supply of natural gas to small customers.

⁽¹⁾ Retail supply of electricity to large customers and to small customers.

Article 2

Directive 2014/25/EU shall continue to apply to contracts awarded by contracting entities and intended to enable the following activities to be carried out on the territory of the Czech Republic:

- (a) retail supply of electricity to large customers;
- (b) retail supply of electricity to small customers.

Article 3

This Decision is addressed to the Czech Republic.

Done at Brussels, 5 July 2018.

For the Commission
Elżbieta BIENKOWSKA
Member of the Commission
