DECISIONS

COMMISSION IMPLEMENTING DECISION (EU) 2020/1499

of 28 July 2020

on the applicability of Directive 2014/25/EU of the European Parliament and of the Council to production and wholesale of electricity from renewable sources in Italy

(notified under document C(2020) 5026)

(Only the Italian text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC ([1]), and in particular Article 35(3) thereof,

After consulting the Advisory Committee for Public Contracts,

Whereas:

1. FACTS

(1) On 3 December 2019, Enel Green Power ('the Applicant'), submitted to the Commission a request pursuant to Article 35(1) of Directive 2014/25/EU ('the Request'). The Request complies with Article 1(1) of Commission Implementing Decision (EU) 2016/1804 ([2]).

(2) The Request concerns production and wholesale of electricity from renewable sources, as referred to in Article 9 of Directive 2014/25/EU, provided by the Applicant in Italy. The services concerned are described as follows in the request: solar, wind, mini-hydro and geothermal energy. The applicant does not include biomass and biogas in the request as it argues that, based on the Commission's practice, the incentive schemes currently supporting these technologies must lead to the conclusion that the related markets are not directly exposed to competition yet.

(3) The Request was not accompanied by a reasoned and substantiated position adopted by an independent national authority. Consequently, in accordance with point 1 of Annex IV to Directive 2014/25/EU, the Commission is to adopt an implementing act on the Request within 105 working days. The initial deadline was suspended in accordance with point 2 of Annex IV to Directive 2014/25/EU. The deadline agreed between the Applicant and the Commission for adopting the implementing act expires on 31 July 2020.

2. LEGAL FRAMEWORK

(4) Directive 2014/25/EU applies to the award of contracts for the pursuit of activities related to, among others, the production and wholesale of electricity within the meaning of Directive 2014/25/EU, unless the activity is exempted pursuant to Article 34 of that Directive.

(5) Under Directive 2014/25/EU, contracts intended to enable the performance of one of the activities to which Directive 2014/25/EU applies are not to be subject to that 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 unrestricted. Direct exposure to competition is assessed on the basis of objective criteria, which may include the characteristics of the products or services concerned, the existence of alternative products or services considered to be substitutable on the supply side or demand side, the prices and the actual or potential presence of more than one supplier of the products or provider of the services in question.

([1]) OJ L 94, 28.3.2014, p. 243.

([2]) Commission Implementing Decision (EU) 2016/1804 of 10 October 2016 on the detailed rules for the application of Article 34 and 35 of Directive 2014/25/EU of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors (OJ L 275, 12.10.2016, p. 39).

3. **ASSESSMENT**

3.1. **Unrestricted access to the market**

(6) Access to a market is deemed to be unrestricted if the Member State concerned has implemented and applied the relevant Union legislation opening a given sector or a part of it to competition. That legislation is listed in Annex III to Directive 2014/25/EU, which includes, as regards production and wholesale of electricity from renewable sources, Directive 2009/72/EC of the European Parliament and of the Council ([3]).

(7) On the basis of the information available to the Commission, Italy has transposed Directive 2009/72/EC into national law by means of Legislative Decree No 93/2011, later amended by Art. 26 of Law No 115/2015 and Art. 33 of Law No 122/2016. Access to the relevant market is therefore deemed not to be restricted in accordance with Article 34(3) of Directive 2014/25/EU.

3.2. **Direct exposure to competition**

(8) Direct exposure to competition should be evaluated based on various indicators, none of which is, *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. As the conditions vary for the different activities that are covered by the Request, the examination of the competitive situation should take into account the different situations in the relevant markets.

(9) This Decision is without prejudice to the application of the rules on competition and state aid and to 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 on the Functioning of the European Union or under Council Regulation (EC) No 139/2004 ([4]) as confirmed by the General Court ([5]).

(10) 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 by the Request 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.

3.3. **Definition of the relevant market(s)**

(11) In 2012, the Commission defined in its Implementing Decision 2012/539/EU ([6]) that the production and wholesale of electricity generated from renewable sources as a separate market.

(12) In 2017, the Commission adopted Implementing Decision (EU) 2018/71 ([7]) in relation to the Netherlands electricity market. For the Netherlands, the Commission considered that there was no need to define separate markets for electricity depending on its source. The main reasons for departing from Implementing Decision 2012/539/EU in relation to Italy, were the following: the fact that renewable electricity was sold directly on the wholesale market and

([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]) 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).

([5]) Judgment of 27 April 2016, *Österreichische Post AG v. Commission*, T-463/14, ECLI:EU:T:2016:243, paragraph 28.

([6]) Commission Implementing Decision 2012/539/EU of 26 September 2012 exempting the production and wholesale of electricity produced from conventional sources in macro-zone north and macro-zone south 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 sector and amending Commission Decision 2010/403/EU (OJ L 271, 5.10.2012, p. 4).

([7]) Commission Implementing Decision (EU) 2018/71 of 12 December 2017 exempting the production and wholesale of electricity in the Netherlands from the application of Directive 2014/25/EU of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sector and repealing Directive 2004/17/EC (OJ L 12, 17.1.2018, p. 53).

not to a non-market entity, which is Transmission system Operator in Germany and Gestore dei Servizi Energetici (GSE) in Italy, the absence of priority feed in for renewable electricity, the fact that the statutory rate of remuneration applicable to renewable electricity was in the form of a feed in premium (as opposed to fixed rate as in the German and Italian precedents) and the fact that subsidies for renewables were subject to a bidding process at the onset, where different technologies were competing for a predefined amount of subsidies.

(13) In the present Request, the Applicant takes the view that, in Italy, wholesale electricity from renewable energy sources and from conventional sources are part of the same market.

(14) In its submission of 6 March 2020, the Italian competition authority Autorita' Garante della Concorrenza e del Mercato ('AGCM') takes the view that it is not possible to identify a separate market for the production of energy from renewable sources distinct from that of energy production from conventional sources. The authority notes that renewable and conventional production are perfectly substitutable from the point of view of satisfying electricity demand and that the share of renewable energy sold under market conditions is high (more than 50 % of the total). In this context, AGCM argues that incentives granted to production from renewable sources have been significantly reduced since 2012, and in time their level has tended to ensure a mere compensation of the costs incurred by electricity producers.

(15) The Commission notes that electricity generation from renewable sources in Italy is supported by a number of schemes with different characteristics.

(16) The Commission had analysed the features of four schemes supporting electricity production from renewable sources in its Implementing Decision 2012/539/EU in relation to Italy. Given the different characteristics of the schemes introduced in Italy to support electricity production from renewable sources after that Decision, the market will, for the purpose of the analysis in these recitals, be split between, on the one hand, schemes introduced in Italy to support electricity production from renewable sources analysed in Implementing Decision 2012/539/EU and, on the other hand, schemes introduced in Italy to support electricity production from renewable sources after that Decision.

(17) In this context, it is important to mention that, in the markets concerned, not all market players are subject to 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 subject to public procurement rules.

3.4. **Definition of the relevant geographic market**

(18) In the electricity sector, the relevant geographic market is often considered national in scope. However, the relevant geographic area may also depend on bidding zone configuration reflecting network constraints.

(19) In its Implementing Decision 2012/539/EU, the Commission found that due to the presence of network constraints, for the purposes of evaluating whether the conditions laid down in Article 30(1) of Directive 2004/17/EC of the European Parliament and of the Council ([8]) were fulfilled, and without prejudice to competition law, the relevant geographic markets for production and wholesale of electricity generated from conventional sources were considered to be the Macro-zone North and the Macro-zone South.

(20) As regards the geographic market, the Applicant takes the view that it is national.

(21) In their submission of 6 March 2020, the Italian authorities indicate that the price difference between the Macro-zone South and Sardinia has been almost reduced to 0, while the price difference between the Macro-zone South and the Macro-zone Sicily has been reduced. AGCM underlines the deconcentration process that affected the market in Italy, as shown by the steady decline in the Herfindahl-Hirschman index (HHI) at national level (549 in 2018, 686 in 2017, 713 in 2016 and 884 in 2012). The HHI calculation was provided by the Applicant in its submission of 19 September 2019. However, AGCM points out that at least for one Macro-zone (Sicily) the zonal price still appears to remain permanently and significantly different from that of the rest of the country.

([8]) 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).

(22) The Commission agrees that the developments in price differences over the past eight years have shown a very significant convergence between the Macro-zones. However, the persistence of a price premium for the market in the Macro-zone Sicily appears to warrant a separation of this zone from the rest of the Italian market.

(23) For the purposes of the assessment under this Decision and without prejudice to competition law and state aid rules, the Commission considers two relevant geographic markets: on the one hand, the Macro-zones North, South and Sardinia, and on the other, the Macro-zone Sicily.

3.5. **Market analysis**

(24) The Commission had concluded, in its Implementing Decision 2012/539/EU, that only production and wholesale of electricity from conventional sources could be exempted from public procurement rules. The Decision stated that the condition of direct exposure to competition laid down in Article 30(1) of Directive 2004/17/EC should be considered to be met with respect to the production and wholesale supply of electricity from conventional sources within the territory of Italy, with the exception of Sardinia and Sicily. The Decision analysed the features of four renewables incentives schemes.

(25) The Comitato Interministeriale Prezzi del 29 aprile 1992 (CIP6) mechanism consists in a statutory feed-in tariff for electricity produced from renewable sources and from sources similar to renewables, notably electricity produced in combined heat and power generation plants. This mechanism covers the operational costs, the capital cost, the fuel cost and includes an incentive component applicable in the first eight years of life.

(26) Omni-comprehensive tariff ('TO') applies to plants with installed capacity of less than 200 kW for wind farms and less than 1 MW for other types of renewables. This system is guaranteed for 15 years, is voluntary and alternative to the system of Green Certificates. The omni-comprehensive tariff includes the price of the energy and an incentive.

(27) The mechanism of Green Certificates ('CV') is based on the imposition of mandatory quotas for producers and importers of electricity produced from conventional sources, which are to submit yearly a number of Green Certificates. The Green Certificates are then allocated to renewable energy installations depending on the source of the energy produced and may be exchanged in a separate market, distinct from that for energy. Renewable electricity producers receive revenue from the sale of the renewable energy and, as an incentive, revenue from the sale of the Green Certificates. The value of the Green Certificates is determined by the relationship between demand (by the producers and importers of electricity from conventional sources) and supply (by producers of electricity from renewable sources). Green certificates schemes apply to installations above 1 MW (except photovoltaic installations) and for wind power above 200 kW.

(28) The Green Certificates were modified in January 2016 and renamed GRIN. It works via a quarterly premium paid on top of the electricity price to the beneficiaries of the scheme. The amounts paid and their duration under GRIN are exactly the same as what beneficiaries would have received under the older Green Certificates.

(29) The Energy Accounts ('CE') system incentivises the production of electricity from photovoltaic sources and represents a feed in premium whereby the producers receive the market price on the Day Ahead Market and an incentive fee. This incentive system is guaranteed for 20 years.

(30) Based on the features of these schemes, and the specificities of production and wholesale of electricity generated, the Commission had concluded in its Implementing Decision 2012/539/EU that the condition of direct exposure to competition was not met with respect to the production and wholesale supply of electricity generated through renewable sources. As the conditions for these schemes are largely unchanged, the Commission sees no reason to change its assessment.

(31) For the schemes introduced after Implementing Decision 2012/539/EU, the most important ones were notified to the Commission and were authorised under the state aid rules by Commission Decision C(2016) 2726 ([9]) and Commission Decision C(2019) 4498 ([10]). This implies that these schemes include an adequate remuneration in the light of the costs incurred, and that the aid granted does not distort the Single Market.

([9]) Commission Decision C(2016) 2726 of 28 April 2016 on support to electricity from renewable sources.

([10]) Commission Decision C(2019) 4498 of 14 June 2019 on support to electricity from renewable sources 2019–2021.

(32) Concerning the scheme established by Ministerial Decree of 23 June 2016, it was open to all renewable energy sources except for solar photovoltaic energy. Beneficiaries were divided in three categories depending on the plant power: new large generators (i.e., with installed capacity greater than 5 MW), new middle size generators (e.g., with installed capacity between 500 kW2 and 5 MW this category also includes repowering of generators of any size) and smaller generators (i.e., with installed capacity no larger than 500 kW). The Commission remarked that, for the technologies eligible under the scheme, the Levelized Cost of Energy ('LCOE') would be higher than the expected electricity market price and that, without the aid and under normal market conditions, the Net Present Value ('NPV') for renewable energy projects would be negative.

(33) Concerning the scheme established by Ministerial Decree of 4 July 2019, it consists in operating aid for the production of electricity from installations using the following renewables technologies: onshore wind, solar photovoltaic, hydroelectric, and sewage gases. As was the case in Decision C(2016) 2726, the Commission noted that for the technologies eligible under the scheme the LCOE would be higher than the expected electricity market price. Without the aid and under normal market conditions, the NPV for renewable energy projects would therefore be negative. The Commission concluded that without the aid the projects benefitting from the scheme would not be financially viable.

(34) A specific scheme was introduced by Ministerial Decree of 14 February 2017 for small islands. These are 20 islands, 14 of which are in Sicily, that are not interconnected to the mainland's electricity network. They have an area of more than a square kilometre, are located more than 1 km from the mainland and with a resident population of at least 50. For each island, specific electricity and thermal targets for the energy transition were identified for 2030. Access is granted for the new construction, enhancement and reactivation of electricity production installations of not less than 0,5 kW, entered into operation since 15 November 2018, connected to the island's electricity grid and powered by locally available renewable sources. Beneficiaries receive a feed-in tariff for the electricity sold onto the grid and a feed-in premium for the electricity produced and instantly consumed on the site.

(35) Ritiro Dedicato ('RID') is a mechanism for manufacturers to be placed on the market for electricity fed into the grid. It consists of the sale to GSE of electricity and replaces any other contractual obligation relating (among others) to dispatching and transport services of the energy. Installations with less than 10 MW power are eligible for RID, along with installations with any power if they are supplied with [solar, wind, tidal, wave, geothermal energy or by hydraulic sources limited to water-flow plants or by] other renewable sources provided they are owned by a self-producer. RID is an alternative to the incentives granted under the other schemes established by Ministerial Decrees of 5 July 2012, 6 July 2012, 23 June 2016 and 4 July 2019.

(36) Scambio sul Posto ('SSP') allows an economic compensation between the value associated with the electricity fed into the grid and the value associated with the electricity taken and consumed in a different period from that in which the electricity is produced. It applies to installations, which have entered into operation by 31 December 2014 at the latest if supplied from renewable sources or from High Efficiency Combined Heat and Power (HE CHP) with a maximum power not exceeding 200 kW, or plants with a capacity of up to 500 kW if powered from renewable sources and having entered into service from 1 January 2015. SSP is an alternative to the incentives granted under the other schemes established by Ministerial Decrees of 5 July 2012, 6 July 2012, 23 June 2016 and 4 July 2019.

(37) The Commission notes that the schemes established by Ministerial Decrees of 23 June 2016 and 4 July 2019 include a bidding process to benefit from the incentives.

(38) The Commission notes that the level of competition to benefit from the schemes established by Ministerial Decrees of 23 June 2016 and 4 July 2019 has increased, with a high number of applicants and bids for renewable electricity generation. Consequently, the Commission considers that the renewables generation installation benefitting from the more recent schemes operate in a competitive environment.

(39) Concerning the other three schemes, the scheme established by Ministerial Decree of 14 February 2017, RID and SSP, the Commission has no basis to conclude that beneficiaries are subject to competitive pressure. Some of their features, such as a feed-in tariff or the fact that the energy produced is bought by the GSE, are similar to the ones of other schemes analysed in the 2012 decision.

4. **CONCLUSIONS**

(40) In view of the factors examined above, the condition of direct exposure to competition laid down in Article 34 of Directive 2014/25/EU should be considered to be met in view of contracting entities with respect of the production and wholesale of electricity produced from renewable sources based on the schemes introduced by Ministerial Decrees of 23 June 2016 and of 4 July 2019 in Italy.

(41) Furthermore, since the condition of unrestricted access to the market is deemed to be met, Directive 2014/25/EU should not apply when contracting entities award contracts intended to enable production and wholesale of electricity produced from renewable sources based on the schemes introduced by Ministerial Decrees of 23 June 2016 and 4 July 2019 in Italy nor when they organise design contests for the pursuit of such an activity in that geographical area.

(42) In view of the factors examined above, the condition of direct exposure to competition laid down in Article 34 of Directive 2014/25/EU should be considered not to be met in view of contracting entities with respect to the production and wholesale of electricity produced from renewable sources based on the schemes introduced by CIP6, CV/GRIN, CE, TO, Ministerial Decree of 14 February 2017, RID and SSP. Consequently, Directive 2014/25/EU should continue to apply when contracting entities award contracts intended to enable the pursuit of that activity to be carried out in Italy and when they organise design contests for the pursuit of such an activity in that geographical area.

(43) In view of the factors examined above, the condition of direct exposure to competition laid down in Article 34 of Directive 2014/25/EU should be considered to be met with respect to the production and wholesale of electricity produced from renewable sources in Italy, except for Sicily.

(44) Since the production of electricity from renewable sources covered by the CIP6, CV/GRIN, CE, TO, DM 14 February 2017, RID and SSP schemes should continue to be subject to Directive 2014/25/EU, it is recalled that procurement contracts covering several activities are to 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 is to 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.

(45) It is recalled that Article 16 of Directive 2014/23/EU of the European Parliament and of the Council ([11]) on the award of concession contracts provides for an exemption from the application of that Directive for concessions awarded by contracting entities where, for the Member State in which the concessions are to be performed, it has been established pursuant to Article 35 of Directive 2014/25/EU that the activity is directly exposed to competition in accordance with Article 34 of that Directive. Since it was concluded that the activity of production and wholesale of electricity from renewable sources based on the schemes introduced by Ministerial Decrees DM 23 June 2016 and DM 4 July 2019 in Italy is directly exposed to competition, concession contracts intended to enable the performance of those activities in Italy (except Sicily) will be excluded from the scope of application of Directive 2014/23/EU.

(46) When installations cease to receive support from CIP6, CV/GRIN, CE, TO, Ministerial Decree of 14 February 2017, RID and SSP, the provisions of Directive 2014/25/EU should not apply to them anymore, as they will be deemed to be exposed to competition.

(47) This Decision is based on the legal and factual situation as of April 2017 to May 2020 as it appears from the information submitted by the Applicant, by the Italian Authorities and from publicly available information. It may be reviewed, 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,

([11]) Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, p. 1).

HAS ADOPTED THIS DECISION:

Article 1

Directive 2014/25/EU shall not apply to contracts awarded by contracting entities and intended to enable the production and wholesale of electricity produced from renewable sources based on the schemes introduced by Ministerial Decrees of 23 June 2016 and of 4 July 2019 to be carried out in Italy.

Article 2

Directive 2014/25/EU shall continue to apply to contracts awarded by contracting entities and intended to enable production of electricity from renewable sources, which receives support from any of the following support schemes, to be carried out in Italy:

(a) the Comitato Interministeriale Prezzi del 29 aprile 1992 (CIP6);

(b) mechanism of Green Certificates or GRIN;

(c) Energy Accounts system;

(d) Omni-comprehensive tariff;

(e) Ministerial Decree of 14 February 2017;

(f) Ritiro Dedicato mechanism;

(g) Scambio sul Posto.

Article 3

This Decision is addressed to the Italian Republic.

Done at Brussels, 28 July 2020.

For the Commission
Thierry BRETON
Member of the Commission