Commission Implementing Decision (EU) 2020/1500 of 28 July 2020 on the applicability of Directive 2014/25/EU of the European Parliament and of the Council to contracts awarded for activities related to production and wholesale of electricity in Lithuania (notified under document C(2020) 5031) (Only the Lithuanian text is authentic) (Text with EEA relevance)

COMMISSION IMPLEMENTING DECISION (EU) 2020/1500

of 28 July 2020

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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 8 April 2019, Lietuvos energija UAB (‘the Applicant’) submitted to the Commission a request pursuant to Article 35(1) of Directive 2014/25/EU (‘the Request’).

(2) The Request concerns electricity generation and wholesale activities that are not regulated by the national authority[(2)]. In its email of 18 June 2019 the Applicant confirmed that trading in balancing power, regulation power, the provision of reserve capacities and the provision of public service obligations are not covered by the Request.

(3) The Request was not accompanied by a reasoned and substantiated position adopted by an independent national authority that is competent in relation to the activities concerned, which thoroughly analyses the condition for the applicability of Article 34(1) of Directive 2014/25/EU to the activities concerned, in accordance with paragraphs 2 and 3 of that Article. 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.

(4) In accordance with Article 35(2) of Directive 2014/25/EU, the Commission informed the Lithuanian authorities of the Request, and requested additional information on 14 May 2019 and 24 May 2019. The Lithuanian authorities replied on 18 September and 23 September 2019. The Commission requested further clarifications on 7 October 2019, 30 January and 17 March 2020 and the Lithuanian Authorities replied on 22 January, 5 March and 19 March 2020. In the context of the consultation of the Advisory Committee for Public Contracts, the Lithuanian authorities provided further information on 9 July 2020.

(5) The Commission requested additional information from the Applicant on 3 May, 27 May and 14 June 2019 and the Applicant's responses were received on 17 May 2019, 12 June and 18 June 2019.

2. LEGAL FRAMEWORK

(6) 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, unless this activity is exempted pursuant to Article 34 of that Directive. Directive 2014/25/EU does not apply to certain types of that activity where not considered as relevant activity under Article 9(2) of that Directive.

(7) Under Articles 34 and 35 of Directive 2014/25/EU, contracts intended to enable the performance of one of the activities to which that Directive applies are, upon request by a Member State or a contracting entity, not to be subject to the Directive. This exemption may be granted if, in the Member State in which the activity is carried out, the activity is directly exposed to competition on markets to which access is not restricted. Direct exposure to competition is assessed on the basis of objective criteria, taking account of the specific characteristics of the sector concerned.

3. ASSESSMENT

3.1. Unrestricted access to the market

(8) 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. That legislation is listed in Annex III to Directive 2014/25/EU, which includes, as regards the electricity sector, Directive 2009/72/EC of the European Parliament and of the Council[(3)].

(9) As confirmed by the Applicant, and on the basis of the information available to the Commission, Lithuania has transposed[(4)] and applies Directive 2009/72/EC. 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

(10) 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.

(11) This Decision is without prejudice to the application of the rules on competition and State aid rules 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[(5)], as confirmed by the General Court[(6)].

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

3.2.1. *Product market definition*

(13) The Request pertains to electricity generation and wholesale.

(14) In its decision in Case COMP M.4110 E.ON – ENDESA[(7)], the Commission identified the following relevant product markets in the electricity sector: generation and wholesale supply; transmission; distribution, and retail supply. While some of these markets may be further subdivided, to date, previous Commission practice[(8)] rejected a distinction between an electricity generation market and a wholesale supply market since generation as such is only a first step in the value chain, but electricity volumes generated are marketed via the wholesale market.

(15) In 2012, the Commission adopted Implementing Decision 2012/218/EU[(9)] and Implementing Decision 2012/539/EU[(10)] in relation to respectively the German and the Italian electricity markets. For Germany, the Commission considered that the production and marketing of electricity regulated by Renewable Energy Sources Act is not part of the market for generation and first sale of electricity produced from conventional sources because electricity generated from renewable sources is normally not directly sold on the wholesale market but first bought by the transmission grid operators for a statutory rate of remuneration. Similarly, for Italy, the Commission considered that the market for production and wholesale of electricity generated from renewable sources is separate from the market for production and wholesale of electricity generated from conventional sources because the sale of the electricity generated from renewable sources which are subject to the Comitato Interministeriale Prezzi del 29 aprile 1992 (CIP6) and Feed-in Tariffs (FIT) mechanisms mostly takes

place via the energy service operator. Key reasons for the Commission to make such a distinction relate, essentially, to the sale by renewable electricity producers of their production to a non-market entity which is the Transmission system Operator in Germany and Gestore dei Servizi Energetici in Italy. Additional considerations put forward in these two precedents were: priority feed-in for renewables and a statutory rate of remuneration. The Commission concluded that in Germany and in Italy renewable generation and first sale was therefore not subject to market forces.

(16) In 2017, the Commission adopted Implementing Decision (EU) 2018/71[(11)] 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 differences from Implementing Decisions 2012/218/EU and 2012/539/EU in relation to Germany and Italy were the following: the fact that renewable electricity was sold directly on the wholesale market and not to a non-market entity, 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 Implementing Decisions 2012/218/EU and 2012/539/EU in relation to Germany and Italy) 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.

(17) In view of Implementing Decisions 2012/218/EU, 2012/539/EU and (EU) 2018/71, it is necessary to examine in the present case, based on the same criteria, the pertinence of a distinction between electricity produced from renewable sources and the electricity produced from conventional sources.

(18) In reply of 18 September 2019 to the request for information from the Commission of 14 May 2019 the Lithuanian authorities informed that there are currently three support schemes for electricity produced from renewable sources.

(19) The **first support scheme** applies to producers generating electricity from renewable energy sources ('RES') that obtained the right to benefit from the incentives of the scheme between 1 January 2002 and 23 May 2011. The main elements of the first scheme are: compulsory purchase of RES electricity by a company designated by the Ministry of Energy or by the distribution network, priority feed in; remuneration at a fixed rate set by the energy regulator, exemption from grid balancing responsibility and compensation of the producer for the cost of connecting to the grid. Depending on the capacity of the installation, the first scheme is subject to a competitive process for the building permits.

(20) The installed capacity that could benefit from the incentive under the first support scheme was 237 MW and the incentive period applied until end of 2020 or, if the period between the date of issuance of the generation permit and 2020 was less than 12 years, for 12 years following the date the generation permit was issued.

(21) The **second support scheme** applies to producers generating electricity from RES that obtained the right to benefit from the incentives of the scheme between 24 May 2011 and 30 April 2019. The main elements of the second scheme are: compulsory

purchase of RES electricity by a company designated by the Ministry of Energy or by the distribution network; priority feed in; remuneration at a fixed rate awarded following an tender or set by the energy regulator; exemption from grid balancing responsibility and compensation of the producer for the cost of connecting to the grid.

(22) Depending on the capacity of the installation, under the second support scheme, the allocation of the fixed rate support is established through a competitive bidding procedure.

(23) The installed capacity that could benefit from is 464 MW and the incentive period applies, for 12 years following the date the generation permit was issued, and payments will continue until 2029.

(24) The **third support scheme** was approved by the Commission[(12)] and entered into force on 1 May 2019. The main elements of the third scheme are: priority feed in; remuneration is based on a price premium established following a tender process (no payment is made in case of zero or negative pries for six hours or more; no payment is made for quantities produced over the electricity production allocated at tender); exemption from grid balancing responsibility for plants with capacity of less than 500 KW or less and for pilot projects.

(25) Under the third support scheme, premium-based support is to be established through a competitive bidding procedure for all types of installations without differentiation based on size and technology.

(26) The size of the incentive under the third support scheme is of around 2,9 TWh and the incentive period applies, for 12 years following the date the generation permit was issued.

(27) According to the Applicant, the third support scheme for electricity produced from renewable sources in Lithuania is similar to the respective measures adopted in the Netherlands. This would therefore justify defining one product market comprising electricity produces from conventional sources and renewable sources. However, the Commission notes that the third scheme has only been introduced very recently.

(28) According to the Lithuanian authorities, production and wholesale should be defined as a single market regardless of the source of electricity. Alternatively, if two markets were to be defined, the Lithuanian authorities propose the following delineation: a market for electricity from conventional sources and from renewable sources[(13)] with the exception of electricity from renewable sources covered by the first and second support scheme and a market for electricity from renewable sources covered by the first and second support scheme.

(29) The electricity produced under the third scheme receives premium-based support established through a competitive bidding procedure for all types of installations without differentiation based on size and technology. The support period per installation is 12 years. Beneficiaries receive a maximum premium, set as a difference between a maximum price (cost of the most cost-efficient RES electricity technology available in Lithuania – onshore wind) and a reference price. In April 2019,