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)

COMMISSION IMPLEMENTING DECISION (EU) 2020/1499

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 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

Changes to legislation: *There are currently no known outstanding effects for the Commission Implementing Decision (EU) 2020/1499. (See end of Document for details)*

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.

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 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.

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(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.

(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.