

Case No: 71260
Event No: 629519
Dec. No.: 189/12/COL

EFTA SURVEILLANCE AUTHORITY DECISION

of 22 May 2012

exempting the production and wholesale of electricity in Norway 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

THE EFTA SURVEILLANCE AUTHORITY

Having regard to the Agreement on the European Economic Area,

Having regard to the Act referred to at point 4 of Annex XVI to the Agreement on the European Economic Area laying down the procedures for the award of public contracts in the utilities sector (*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*) (“Directive 2004/17/EC”), and in particular Article 30 thereof,

Having regard to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice (“Surveillance and Court Agreement”), in particular Articles 1 and 3 of Protocol 1 thereto,

Having regard to the request submitted by *Akershus Energi Vannkraft AS, E-CO Energi AS, EB Kraftproduksjon AS and Østfold Energi AS* (“the applicants”) to the Authority on 24 January 2012,

Having regard to the Decision of the EFTA Surveillance Authority (“the Authority”) of 19 April 2012 empowering the Member with special responsibility for public procurement to take certain decisions in the field of public procurement (Decision No. 138/12/COL),

After Consulting the EFTA Public Procurement Committee Assisting the EFTA Surveillance Authority,

Whereas:

I. FACTS

1. On 24 January 2012, the Authority received a request pursuant to Article 30(5) of Directive 2004/17 from *Akershus Energi Vannkraft AS, E-CO Energi AS, EB Kraftproduksjon AS and Østfold Energi AS* to approve the applicability of Article

30(1) of Directive 2004/17/EC to activities of production and wholesale of hydroelectric power in Norway. By letters of 17 February 2012, the Authority requested additional information from both Norway (event no. 624270) and the applicant (event no. 624258). The Authority received a reply to this request from Norway by letter of 20 March 2012 and from the applicants by letter of 22 March 2012.

2. The request by the applicants, which have to be considered as public undertakings within the meaning of Directive 2004/17/EC, concerns the production and wholesale supply of hydroelectric power, as described in the request.

II. LEGAL FRAMEWORK

3. Article 30(1) of Directive 2004/17/EC provides that contracts intended to enable an activity mentioned in Articles 3 to 7 to be carried out shall not be subject to Directive 2004/17 if, in the EFTA State in which it is performed, the activity is directly exposed to competition on markets to which access is not restricted.
4. According to Article 30(5) of Directive 2004/17/EC, a request for applicability of Article 30(1) may be submitted by contracting authorities if the legislation of the EEA State concerned provides for it. It follows from Section 15-1, paragraph 2, of Regulation No 403 of 7 April 2006 on public procurement in the utilities sector (*Forskrift nr. 403 av 7. April 2006 om innkjøp i forsyningssektorene*) that contracting authorities may submit a request for application of Article 30(1) of Directive 2004/17/EC to the Authority, provided they have obtained an opinion from the Norwegian Competition Authority.
5. The applicants obtained the opinion from the Norwegian Competition Authority on 16 March 2011, in which the Norwegian Competition Authority concluded that the relevant activities are directly exposed to competition on a market to which access is not restricted.
6. Access to the market is deemed to be unrestricted if the State has implemented and applied the relevant EEA legislation opening a given sector or a part of it. This legislation is listed in Annex XI of Directive 2004/17/EC, which, for the electricity sector, refers to Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity. Directive 96/92/EC has been superseded by *Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC* ("Directive 2003/54/EC"), which is incorporated in point 22 of Annex IV to the EEA Agreement.¹ Thus, access to the market shall be deemed unrestricted if the Norwegian State has implemented and properly applied Directive 2003/54/EC.
7. The exposure to competition shall be evaluated on the basis of 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. Another criterion is the degree of concentration on those

¹ Directive 2003/54/EC was incorporated into the EEA Agreement by EEA Joint Committee Decision No 146/2005 of 2 December 2005, and entered into force for the EFTA States on 1 June 2007.

markets. Given the characteristics of the markets concerned, further criteria should also be taken into account such as the functioning of the balancing market, price competition and the degree of customer switching.

III. ASSESSMENT

Market definition

Product market

8. The relevant product market is production and wholesale supply of electricity.² The market therefore covers the production of electricity at power stations and the import of electricity through interconnectors for the purpose of resale directly to large industrial customers or to retailers.

Geographic market

9. The Norwegian wholesale power market is highly integrated into the Nordic market (Denmark, Norway, Sweden and Finland). A major share of the production of electric power in the Nordic region is traded through the common Nordic exchange for contracts for physical delivery of electric power, operated by Nord Pool Spot AS (Nord Pool). Nord Pool's Nordic electricity exchange currently covers the wholesale power markets in Norway, Sweden, Denmark, Finland and Estonia.
10. Nord Pool operates two markets for physical wholesale trading of electric power: the day-ahead market Elspot where hourly power contracts are traded daily for physical delivery in the next day's 24 hour period and Elbas which is a continuous cross-border intra-day market where adjustments to trades done in the day-ahead market are made until one hour prior to the delivery. Together these markets covered 74% of the Nordic consumption of electricity in 2010 with a volume of 307 TWh. The remaining traded volume is negotiated bilaterally by supplier and customer.
11. The Nordic market is divided into several bidding areas which are coupled by interconnectors. The trading price on Elspot is based on the bids and offers from all participants in the market and is set to balance supply and demand in the market for each hour during the 24 hour period. The price mechanism in Elspot adjusts the flow of power across the interconnectors in the market to the available trading capacity given by the Nordic transmission system operators.
12. Transmission capacity constraints within the Nordic region may lead to temporary congestion separating the Nordic area geographically into smaller markets. At the interconnections between the Nordic countries and within Norway, price mechanisms are used to relieve grid congestion by introducing different Elspot area prices. There

² See European Commission decisions of 26 January 2011 in Case COMP/M.5978 - *GDF Suez/International Power*, of 22 December 2008 in case COMP/M.5224 - *EDF/British Energy*, of 14 November 2006, Case COMP/M.4180 - *Gaz de France/Suez*, of 9 December 2004 Case M.3440 - *EDP/ENI/GDP*. See also the decisions adopted by the Commission exempting the production and sale of electricity in Sweden and in Finland from the application of Directive 2004/17/EC; Decision of 19 June 2006 establishing that Article 30(1) of Directive 2004/17/EC applies to the production and sale of electricity in Finland excluding the Åland Islands and decision of 29 October 2007 exempting the production and sale of electricity in Sweden from the application of Directive 2004/17/EC.

may thus be different prices in the price areas which balance supply and demand in the area.

13. Consequently, the relevant geographic market might vary from one hour to the next. In case of congestion, the relevant geographic market is narrower than the Nordic area and might coincide with domestic bidding areas.
14. There are currently five bidding areas in Norway.³
15. The percentage of hours, however, in which there are price differences between the areas within the Nordic region are limited:

Price area	% hours isolated
NO 1 - Oslo	1,4%
NO 2 – Kristiansand	16,4%
NO 3 - Trondheim	6,2%
NO 4 - Tromsø	6,6%
NO 5 - Bergen	4,1%

15.03.2010-11.03.2011

Most of the time, price areas are connected:

Set of price areas	% hours connected
NO 1 – NO 2	77,7%
NO 1 – NO 3	48,0%
NO 1 – NO 5	94,9%
NO 2 – NO 5	76,6%
NO 3 – NO 4	89,9%
NO 1 – NO 2 – NO 5	75,7%
NO 3 – NO 4 - Sweden	76,3%

15.03.2010-11.03.2011

Norwegian price areas are generally integrated with Sweden.

16. The possibility of the occurrence of congestions may raise concerns on the possible exploitation of temporary bottlenecks that could increase local market power. On this basis, Norwegian competition authorities have defined the relevant geographic market as Nordic in hours without congestions and smaller in hours of congestion.⁴
17. The issue of whether the market should be defined as covering the Nordic region or narrower in scope will be left open as the result of the analysis remains the same whether it is based on a narrow or broader definition.

³ Oslo - NO 1, Kristiansand - NO 2, Trondheim – NO 3, Tromsø - NO 4 and Bergen – NO 5. On 5 September 2011, the boundary between bidding area NO 2 and NO 5 was moved northbound due to a new connection being put into operation. The data provided in the application does not take into account this change.

⁴ See decisions by the Ministry of Government Administration of 14 October 2002 *Statkraft – Agder Energi* and of 7 February 2003 *Statkraft – Trondheim Energiverk*.

Access to the market

18. In light of the information currently available to it, and for the present purposes, it appears that Norway has fully implemented and applied Directive 2003/54/EC. Consequently, and in accordance with the first subparagraph of Article 30(3), access to the market should be deemed not to be restricted on the territory of Norway.

Exposure to competition

19. The Authority, in line with the European Commission⁵, will analyse the market share of the three main producers, the degree of concentration in the market and the degree of market liquidity.
20. The European Commission considers that, in respect of electricity production, “*one indicator for the degree of competition on national markets is the total market share of the biggest three producers*”.⁶
21. The aggregate market share in terms of production capacity of the three largest producers in the Nordic region in 2010 was of 45,1% (Vattenfall: 18,8%, Statkraft: 13,3% and Fortum: 13%) which is an acceptable level.
22. The degree of concentration in Norway as measured by the Hirschman-Herfindahl Index (HHI) by capacity was 1826 in 2008.⁷
23. The Nordic wholesale market for electric power must be regarded as competitive. The transition to an open market in the Nordic region has been very successful. Since the opening of a joint Norwegian-Swedish market in 1996, the other Nordic countries have later been integrated in the market; Finland in 1998, Denmark in 1999/2000 and Estonia in 2010. About 74% of the consumption of electric energy in the Nordic region in 2010 was traded over the exchange. There are over 300 traders registered on the exchange.
24. As illustrated above, bottlenecks due to congestion are rare and temporary in nature. A constant competitive pressure deriving from the potential to obtain electricity from outside the Norwegian territory therefore exists. No transmission fee is charged between the Nordic countries. The frequently uncongested links between Norway and other price areas ensure that investment in the electricity sector inside the Norwegian territory cannot be made without taking into account other producers in the Nordic market. Furthermore, prices for wholesale electricity are set by Nord Pool, which operates a highly liquid trading platform.
25. Furthermore, the functioning of the balancing markets should also be considered as an indicator, not only in respect of production but also for the wholesale market. In fact,

⁵ Decision of 19 June 2006 establishing that Article 30(1) of Directive 2004/17/EC applies to the production and sale of electricity in Finland excluding the Åland Islands and decision of 29 October 2007 exempting the production and sale of electricity in Sweden from the application of Directive 2004/17/EC, paragraphs 7 – 13.

⁶ See Report on progress in creating the internal gas and electricity market, COM (2005) 568 final of 15.11.2005, Decision of 29 October 2007 exempting the production and sale of electricity in Sweden from the application of Directive 2004/17/EC.

⁷ See Commission staff working document, Technical Annex to the Communication from the Commission to the Council and the European Parliament report on progress in creating the internal gas and electricity market, COM (2010) 84 final, page 12.

any market participant who cannot easily match its production portfolio to the characteristics of its customers may find himself exposed to the difference between the price at which the transmission system operator (TSO) will sell imbalance energy, and the price at which it will buy back excess production. These prices may either directly be imposed by the regulator on the TSO; or alternatively a market based mechanism will be used in which the price is determined by bids from other producers to regulate their production upwards or downwards. There is an almost fully integrated balancing market in the Nordic region for supplying balancing energy and its main characteristics – market based pricing and a low spread between the buying price from the TSO and the selling price – are such that it should be taken as an indicator of direct exposure to competition.

26. These factors should therefore be taken as an indication of direct exposure to competition for the relevant market under review irrespective of whether the geographical scope of the market extends to the Nordic region as a whole or is narrower in scope.

IV. CONCLUSION

27. In view of the abovementioned indicators in Norway, the condition of direct exposure to competition laid down in Article 30(1) of Directive 2004/17/EC should be considered to be met in respect of production and wholesale of electricity in Norway. Besides, as noted in recital 18, the condition of free access to the activity must be deemed to be met. Consequently, Directive 2004/17/EC should not apply when contracting entities award contracts intended to enable electricity production or the wholesale of electricity to be carried out in these geographical areas nor when they organise design contests for the pursuit of such an activity there.
28. This Decision is based on the legal and factual situation as of 24 January 2012 as it appears from the information submitted by the applicant. It may be revised, should significant changes in the legal or factual situation mean that the conditions for the applicability of Article 30(1) of Directive 2004/17/EC are no longer met.
29. This Decision is made solely for the purpose of granting an exemption pursuant to Article 30 of Directive 2004/17/EC and is without prejudice to the application of the rules on competition.
30. This Decision applies to the production and wholesale of electricity in Norway and does not concern the activities of transmission, distribution and retail supply of electricity in Norway.
31. The measures provided for in this Decision are in accordance with the opinion of the EFTA Public Procurement Committee Assisting the EFTA Surveillance Authority.

HAS ADOPTED THIS DECISION:

Article 1

The Act referred to at point 4 of Annex XVI to the Agreement on the European Economic Area laying down the procedures for the award of public contracts in the utilities sector (*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) shall not apply to contracts awarded by contracting entities and intended to enable the activities of production and wholesale of electricity in Norway.

Article 2

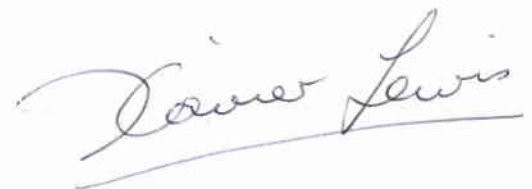
This decision is addressed to the Kingdom of Norway.

Done at Brussels, 22 May 2012

For the EFTA Surveillance Authority



Sverrir Haukur Gunnlaugsson
College Member



Xavier Lewis
Director