COMMISSION IMPLEMENTING DECISION (EU) 2022/1286

of 15 July 2022

on the applicability of Article 34 of Directive 2014/25/EU of the European Parliament and of the Council to the award of contracts to pursue the retail supply of electricity and gas to small customers in the Netherlands

(notified under document C(2022) 4872)

(Only the Dutch 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) The measures provided for in this Decision are in accordance with the opinion of the Advisory Committee for Public Contracts.

(2) On 30 January 2017, Eneco B.V. ('Eneco') and N.V. Nuon Energy ('Nuon') submitted to the Commission a request pursuant to Article 35(1) of Directive 2014/25/EU ('the request'). The request complies with the formal requirements set out in Article 1(1) of Commission Implementing Decision (EU) 2016/1804 ([2]) and in Annex I to that Implementing Decision.

(3) The shares in Nuon are fully held by Vattenfall AB, a non-listed company owned by the Swedish State. As a result, Nuon is considered as a contracting entity within the meaning of Article 4(2) of Directive 2014/25/EU. Following a change in ownership in March 2020 (the company, previously owned by local governments in the Netherlands, was sold to a joint venture composed by Mitsubishi Corporation and Chubu Electric Power), Eneco is no longer considered as a contracting entity.

(4) The request concerns the activities of retail supply of electricity to small customers (households as well as small industrial and commercial users connected to the low-voltage grid with a connection with a maximum connection capacity of no more than 3 * 80A) and retail supply of gas to small customers (households and small businesses connected to the gas network with a maximum connection capacity of no more than 40 m^3).

([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 Articles 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).

(5) In accordance with point 1(a) of Annex IV to Directive 2014/25/EU, considering that free access to the market can be presumed on the basis of Article 34(3), first subparagraph, of that Directive, the Commission is to adopt an Implementing Decision on the request within 90 working days. As the request has not been accompanied by a reasoned and substantiated position adopted by an independent national authority within the meaning of Article 35(2) of Directive 2014/25/EU, the Commission informed the Dutch authorities about the request and required additional information on 24 March 2017. The reply to this request for information was transmitted by the Dutch authorities by email, on 19 June 2017. The response was deemed to be incomplete and led the Commission to ask further clarifications on 27 July 2017, which the Dutch authorities provided on 25 September 2017.

(6) As the available information was still insufficient for the Commission to form its view on the exposure of the activities to competition, further requests for information were sent to the Dutch authorities on 21 December 2017 and 2 March 2018. The Dutch authorities sent a reply on 11 October 2021.

(7) Nuon submitted a substantially modified request on 24 January 2022. The Commission and the applicant agreed that the Commission should adopt an Implementing Decision by 15 July 2022.

2. **LEGAL FRAMEWORK**

(8) Directive 2014/25/EU applies to the award of contracts intended to enable activities related to the retail supply of electricity and gas [as referred to in Article 9(1), point(a), of that Directive], unless those activities are exempted pursuant to Article 34 of that Directive.

(9) Article 34 of Directive 2014/25/EU provides that contracts intended to enable the performance of an activity to which that Directive applies are not to be subject to that Directive if, in the Member State in which it is carried out, the activity is directly exposed to competition on markets to which access is not restricted. Direct exposure to competition is to be assessed on the basis of objective criteria, taking account of the specific characteristics of the sector concerned.

3. **ASSESSMENT**

3.1. **Free access to the market**

(10) Access to a market is deemed to be unrestricted if the Member State has implemented and applied the relevant Union legal acts opening a given sector or a part of it. Those legal acts are listed in Annex III to Directive 2014/25/EU. Directive 2019/944/EU of the European Parliament and of the Council ([3]), that repeals Directive 2009/72/EC of the European Parliament and of the Council ([4]), is applicable to the electricity sector, while Directive 2009/73/EC of the European Parliament and of the Council ([5]) is applicable to the gas sector.

(11) The Netherlands has transposed Directives 2019/944/EU and 2009/73/EC into national law through the Dutch Electricity Act ([6]) (Elektriciteitswet) and Dutch Gas Act ([7]) (Gaswet). Consequently, and in accordance with Article 34(3), first subparagraph, of Directive 2014/25/EU, access to the market is deemed not to be restricted on the entire territory of the Netherlands.

([3]) Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (OJ L 158, 14.6.2019, p. 125).
([4]) 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).
([5]) 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).
([6]) Wet van 12-7-2012, Stb. 2012, 334 en Inwerkingtredingsbesluit van 12-7-2012, Stb. 2012, 336.
([7]) Wet van 12-7-2012, Stb. 2012, 334 en Inwerkingtredingsbesluit van 12-7-2012, Stb. 2012, 336.

3.2. **Direct exposure to competition**

(12) Direct exposure to competition is to 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, such as the number of market players, the liquidity of wholesale markets, the switching rates of customers or the existence of price regulation should also be taken into account.

(13) This Decision is without prejudice to the application of the Union rules on competition and of the provisions in other fields of Union law. In particular, while the criteria and the methodology used to assess direct exposure to competition under Article 34 of Directive 2014/25/EU are to be in conformity with the provisions on competition of the Treaty, they do not necessarily need to be identical to those used to perform an assessment under Article 101 or Article 102 of the Treaty or under Council Regulation (EC) No 139/2004 ([8]), as confirmed by the General Court ([9]).

(14) The aim of this Decision is to establish whether the activities concerned by the request are, in markets to which access is not restricted within the meaning of Article 34 of Directive 2014/25/EU, exposed to a level of competition which ensures that, also in the absence of the procurement discipline brought about by the detailed procurement rules laid down in Directive 2014/25/EU, procurement for the pursuit of the activities concerned will be carried out in a transparent and non-discriminatory manner based on criteria allowing purchasers to identify the solution which overall is the economically most advantageous one.

(15) In this context, it is important to keep in mind that, in the markets concerned, not all market players are subject to the public procurement rules. In the present case, only Nuon is considered as a contracting entity within the meaning of Article 4 of Directive 2014/25/EU and is hence subject to public procurement rules.

3.2.1. *Relevant product markets*

(16) According to Commission precedents ([10]), the following relevant product markets can be distinguished in the electricity sector: (i) generation and wholesale supply; (ii) transmission; (iii) distribution and (iv) retail supply to final customers ([11]). In the gas sector, the following product markets can be distinguished: (i) upstream market (exploration for crude oil and natural gas); (ii) (upstream and downstream) wholesale markets; (iii) retail market, which can be defined as the sales, marketing and distribution of gas to final customers ([12]).

(17) There are eight regional distribution companies or Distribution System Operators ('DSOs') in the electricity and gas sector in the Netherlands: Cogas Infra & Beheer, Enduris, Enexis, Liander, Endinet, RENDO Netbeheer, Stedin Netbeheer and Westland Infra Netbeheer. The areas in which the DSOs transport electricity may differ from the areas in which they transport gas. Since the liberalisation of the energy markets, the independent operation of the DSOs was ensured by a series of rules in accordance with the Union sectoral legislation. The Dutch legislator mandated full ownership unbundling at the DSO level. The Dutch authorities confirmed ([13]) that, currently, all DSOs are legally and ownership unbundled from generators and suppliers.

([8]) 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).

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

([10]) Case COMP M. 4110 E.ON – ENDESA, 25.4.2006, paragraphs 10 and 11; 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).

([11]) M.3440 – *EDP/ENI/GDP*, 9.12.2004, paragraph 56.

([12]) M. 4180 *Gaz de France/Suez*, 14.11.2006, paragraph 63; M.3868 – *DONG/Elsam/Energi E2*, 14.3.2006, paragraph 193 et seq.; M. 3440 – *EDP/ENI/GDP*, 09.12.2004, paragraph 215 et seq.; M.5740 – *Gazprom/A2A/JOF*, 16.6.2010, paragraph 17 et seq.

([13]) Letter of the Dutch authorities to the Commission of 25 September 2017.

Retail supply of electricity

(18) As regards the supply of electricity to end customers, in its previous decisions the Commission distinguished between supply to small customers (households and small businesses) connected to low-voltage distribution grids and supply to large industrial customers typically connected to the high and medium voltage grid (large industrial and commercial consumers) ([14]). That distinction is related to the different requirements and profiles on the demand side and the different services and technologies on the supply side ([15]).

(19) In the past decisions, the Dutch Authority for Consumers and Markets (Autoriteit Consument & Markt – 'ACM') also made a distinction between supply to small-scale customers ([16]) and supply to large-scale customers ([17]). ACM observed that differences in sale and marketing, pricing and delivery terms, different switching patterns, differences on the demand side and separate licence needed for each type of customers justified such distinction.

(20) The present request concerns small customers, i.e. households as well as small industrial and commercial users connected to the low-voltage grid with a maximum connection capacity of no more than 3 * 80A.

Retail supply of gas

(21) In its previous Decisions, the Commission distinguished between the following markets: supply of natural gas to: (i) gas-fired power plants ([18]); (ii) large industrial customers ([19]) and (iii) small customers ([20]). The last category, based on a case-by-case analysis, could be further divided into the supply of natural gas to: (i) households and (ii) commercial customers ([21]).

(22) In its past decisions, ACM made a distinction between supply of natural gas to small customers and supply to large customers and power stations ([22]). ACM held that competitive conditions were different in both markets as regards purchase profile, prices and switching. As in the case of retail supply of electricity, a specific licence was needed for each type of customers.

(23) ACM also indicated that a possible further subdivision of the market for the supply of natural gas could be made on the basis of the quality of gas ([23]), between low calorific gas ('L-gas') used typically by small customers and high calorific gas ('H-gas') used by both large and small customers.

(24) The present request concerns small customers, i.e. households and small businesses with a maximum connection capacity of no more than 40 m^3.

Conclusion

(25) In view of the factors examined under recitals 15 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, the Commission considers that the relevant product markets are the markets for the retail supply of electricity to small customers and the retail supply of gas to small customers.

([14]) M.3440 – *EDP/ENI/GDP* of 9.12.2004, paragraph 73; M.2947 – *Verbund/EnergieAllianz*,of 11.6.2003, paragraph 35.
([15]) M.5496 – *VATTENFALL/NUON ENERGY*, 22.6.2009, paragraph 12.
([16]) Small-scale customers include both households and small commercial customers.
([17]) ACM Decision Case 6017 Nuon/Essent of 21 May 2007, paragraph 53. In this (negative) decision, the ACM concluded that there would be a concentration on various markets, including supply to retail consumers.
([18]) Case COMP/M.4180 *GDF/Suez*, 14.11.2006, paragraphs 362-367.
([19]) Case COMP/M.4180 *GDF/Suez*, 14.11.2006, paragraphs 78-81.
([20]) Case COMP/M.3440 EDP/GDP/ENI, 9.12.2004.
([21]) Case COMP/M.4180 *GDF/Suez*, 14.11.2006, paragraphs 78-81, and case COMP/M.3696 *E.ON/MOL* 21.12.2005, paragraphs 122-124.
([22]) ACM Decision Case 5975 Essent/Westland 13.3.2007, paragraph 18 and ACM Decision Case 6017 Nuon/Essent, 21.5.2007, paragraph 56.
([23]) ACM decision, Case 5724/Electrabel – Rendo, paras 25 en 26 and ACM decision, Case 5975/Essent – Westland, 13.3.2007, paragraph 19. See also ACM decision, Nuon/Essent, 21.5.2007, paragraph 61.

3.2.2. *Relevant geographic markets*

Retail supply of electricity

(26) The Commission previously found [24] that the markets for retail supply of electricity in the Netherlands were national in scope.

(27) From the geographical perspective, in its previous practice [25], ACM has defined the relevant product markets in the sector of retail supply of electricity as national in scope.

(28) According to the information received from the Dutch authorities [26], there are around 55 active electricity suppliers in the Netherlands and they are all active at national level.

(29) 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 Commission considers that the relevant geographic market for retail supply of electricity to small customers is national in scope.

Retail supply of gas

(30) The Commission has generally defined the markets for retail supply of gas, including possible further subdivisions, as national in scope, provided that these are fully liberalised [27].

(31) From the geographical perspective, in its previous practice [28], ACM has defined the relevant product markets in the sector of retail supply of gas as national in scope.

(32) According to the information received from the Dutch authorities [29], there are 55 active gas suppliers in the Netherlands and all are active at national level.

(33) 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 Commission considers that that the relevant geographic market for the retail supply of gas to small customers is national in scope.

3.2.3. *Market analysis*

(34) The Commission has already adopted several decisions [30] exempting retail supply of electricity and gas in a number of Member States from the application of public procurement rules. The Commission will base its assessment in particular on the following criteria: number of market participants, combined market share of the largest undertakings, switching rate of final consumers, liquidity of the wholesale markets and price regulation.

3.2.3.1. Number of market players and market shares of the largest undertakings

(35) According to the Dutch authorities [31], there are 55 active suppliers at national level on both the electricity retail market and the gas retail market.

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[24] M. 5467 – RWE/Essent, 23.6.2009, paragraph 61.
[25] ACM decision Case Nuon/Essent, 21.5.2007, paragraph 107.
[26] Letter of the Dutch authorities to the Commission of 19 June 2017.
[27] M.5224 – EDF/British Energy, 22.12.2008; COMP/M.4180 – Gaz de France/Suez, 14.11.2006 and COMP/M.3696 – E.ON/MOL, 21.12.2005.
[28] ACM decision Case 5975 Essent/Westland, of 13.03.2007, para 26.
[29] Letter of the Dutch authorities of 19 June 2017.
[30] 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); Commission Decision 2010/403/EC 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).
[31] Letter of the Dutch Authorities of 19 June 2017.

(36) According to the present request ([32]), the total cost of entry into the market for retail supply of electricity and gas is low and does not constitute a barrier to entry.

(37) In previous decisions ([33]), the Commission considered that, concerning the retail supply market, the total market share of the largest three undertakings was relevant. Other measures of concentration could also be considered relevant. A particular feature was that only one market player was subject to the public procurement rules.

Retail supply of electricity to small customers

(38) Nuon is subject to the public procurement rules, while its two biggest competitors, Essent and Eneco are not. According to the information provided by the Dutch authorities ([34]), the market shares of the main suppliers remained fairly stable over the 2017-2020 period: Nuon's market share decreased from 27 % to 25 %, Eneco's market share decreased from 25 % to 22 % and Essent's market share decreased from 27 % to 26 %.

(39) Overall, the consolidated market share of the three largest retailers on the Dutch market for electricity retail supply shrank from 79 % in 2017 to 73 % in 2020.

Retail supply of gas to small customers

(40) According to the information provided by the Dutch authorities ([35]), the market shares of the main suppliers remained fairly stable over the 2017-2020 period: Nuon's market share decreased from 27 % to 25 %, Eneco's market share decreased from 25 % to 22 % and Essent's market share remained unchanged at 27 %.

(41) Overall, the consolidated market share of the three largest retailers on the Dutch market for gas retail supply shrank from 79 % in 2017 to 74 % in 2020.

3.2.3.2. Switching rates of final consumers

(42) The number of customers switching to another supplier (external switching) or to another tariff or contract within the same supplier (internal switching) is considered a relevant indicator of effectiveness of competition. In previous decisions ([36]), the Commission analysed mainly the external switching.

(43) Most small customers in the Netherlands are supplied through dual-fuel contracts which implies that they receive both gas and electricity from one supplier.

(44) The external switching rate for the retail supply of electricity and gas in the Netherlands was increasingly high, from 17 % in 2017 to 21 % in 2020 ([37]).

(45) According to available public information ([38]), the internal switching rates for small customers' accounts for 8 % for electricity and for gas in 2020.

(46) Those switching rates indicate that small customers are willing to switch and that there are valid alternatives to meet their needs related to the electricity and gas supply.

([32]) Section 5.3.3 of the request.
([33]) Letter of the Dutch Authorities of 19 June 2017.
([34]) Letter of the Dutch authorities to the Commission of 11 October 2021.
([35]) ACER Report on the functioning of the gas wholesale market 2020 https://documents.acer.europa.eu/en/Electricity/Market%20monitoring/Documents/MMR%202020%20 Summary%20-%20Final.pdf
([36]) ACER Report on the functioning of the gas wholesale market 2020 https://documents.acer.europa.eu/en/Electricity/Market%20monitoring/Documents/MMR%202020%20 Summary%20-%20Final.pdf
([37]) ACER Annual Report on the Results of Monitoring the Internal Electricity and Gas Markets in 2020- Energy retail markets and consumer protection volume, p. 44.
([38]) ACER Annual Report on the Results of Monitoring the Internal Electricity and Gas Markets in 2020- Energy retail markets and consumer protection volume, p. 45.

3.2.3.3. Liquidity of the wholesale electricity and gas markets

(47) Electricity and gas can be traded on different types of wholesale markets: on power exchanges or multilateral trading platforms and/or in bilateral over-the-counter (OTC) trading. Power exchanges are platforms used by market players to negotiate purchases and sales of electricity. Gas is also traded in liquid gas hubs. These arrangements provide an open market, organise competition and establish a transparent reference price for market participants.

(48) The wholesale market is a market that is directly upstream to the retail market. While some retailers belong to vertically integrated groups, many electricity retailers do not have their own generation assets. These retailers source electricity in the wholesale market with a view to reselling it in the retail market in competition with the vertically integrated retailers. Liquid and well-functioning competitive wholesale markets, where retailers without generation assets can easily source electricity at competitive prices, is therefore a key condition for competitive retail markets where vertically and non-vertically integrated retailers compete on an equal footing. Liquid gas hubs underpin the functioning of the market in many ways and ensure that new entrants can secure access to gas at wholesale level.

(49) The ACM has concluded in its liquidity report ([39]) that the liquidity of the Dutch wholesale electricity market (e.g. higher traded volumes, lower price volatility and smaller bid-ask spread) has increased over the period 2009-2013. Higher volumes and improved liquidity help the wholesale markets function better, and enable market participants to make efficient decisions when buying or selling electricity. In in 2020, the Dutch electricity wholesale market was about 3 times larger than national consumption, compared to 1.5 times in 2015 ([40]).

(50) The Commission considers that the liquidity of the Dutch wholesale electricity market has reached a level that is sufficient so as not to constitute an obstacle to retail supply of electricity to household customers being subject to direct exposure to competition.

(51) The level of competition in the Dutch wholesale gas market is shown in particular by the functioning of the Title Transfer Facility (TTF), the wholesale gas trading hub of the Netherlands. The latest annual ACER report on the functioning of the gas wholesale market ([41]) ('the ACER report') shows that TTF has a high liquidity and that liquidity has increased in recent years ([42]). The report also shows the efficient and transparent pricing setting process at TTF, leading to low bid-ask spreads ([43]).

(52) The ACER Report singles out the Dutch gas wholesale market as a good example ([44]), in the following terms: 'TTF in the Netherlands and NBP in the UK continue to be the two most liquid and competitive trading hubs, accounting for the bulk of forward gas trading activity in the EU.'

(53) Given the above characteristics, the Commission considers that the liquidity of the Dutch wholesale gas market is sufficient to allow new suppliers to enter the market and does not constitute an obstacle to retail supply of gas to small customers being subject to direct exposure to competition.

([39]) ACM, 2014 Liquidity Report, wholesale markets for natural gas and electricity, https://www.acm.nl/en/publications/publication/13483/2014-Liquidity-Report-wholesale-markets-for-natural-gas-and-electricity

([40]) Total volume traded in the Netherlands in 2015 amounted to 175 TWh. This was the sum of 44 TWh (spot) + 61 TWh (futures via the exchange) + 70 TWh (other OTC deals). Total consumption of electricity was 113 TWh. The ratio between total volume traded and total consumption was therefore approximately 1,5 (175TWh/113 TWh). The 2020 data comes from the European Commission's quarterly report on European electricity markets, 4th quarter 2020, p. 20 https://ec.europa.eu/energy/sites/default/files/quarterly_report_on_european_electricity_markets_q4_2020.pdf

([41]) ACER Report on the functioning of the gas wholesale market 2020 https://documents.acer.europa.eu/en/Electricity/Market%20monitoring/Documents/MMR%202020%20Summary%20-%20Final.pdf

([42]) ACER Report on the functioning of the gas wholesale market 2016, p. 24, paragraph 83.

([43]) ACER Report on the functioning of the gas wholesale market 2016, p. 30, paragraph 94.

([44]) ACER Report on the functioning of the gas wholesale market 2016, p. 5, paragraph 5.

3.2.3.4. Price regulation

Retail supply of electricity and gas to small customers

(54) The price of electricity and gas supply to final customers is composed of 1) energy tax, 2) network cost, 3) meter rental, 4) VAT and 5) supply cost ([45]). While the first four elements are regulated, the supply cost is not regulated.

3.2.3.5. Other elements

(55) Nuon is vertically integrated in the electricity sector and is active in the Dutch market for production and wholesale of electricity (16,8 % market share) and in the Dutch market for retail supply of electricity and gas.

(56) Among the operators that are not subject to the public procurement rules, Eneco and Essent are also vertically integrated, with 4,6 % and 13 % market shares in terms of installed capacity in the market for production and wholesale ([46]).

(57) Despite vertical integration in the electricity sector, the market position of Nuon at both the production and wholesale levels do not constitute an obstacle for retail supply of electricity to small customers to be directly exposed to competition. Similarly, given the liquid gas wholesale markets, there are no significant obstacles for the retail supply of gas to household small customers to be directly exposed to competition.

4. **CONCLUSIONS**

(58) As regards the retail supply of electricity to small customers in the Netherlands, the situation can be summarised as follows: the market share of the three largest market players is decreasing; the switching rate is high and increasing; there is no end-user price control and the functioning of the wholesale market does not constitute an obstacle for the retail market for small customers to be exposed to competition.

(59) As regards the retail supply of gas to small customers in the Netherlands, the situation can thus be summarised as follows: the market share of the three largest market players is decreasing; the switching rate is high; there is no end-user price control and the wholesale market liquidity is high.

(60) In view of the factors examined in recitals 34 to 57, 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 electricity and gas to small customers in the Netherlands.

(61) This Decision is based on the legal and factual situation as of January 2017 to October 2021 as it appears from the information submitted by Nuon and by the Dutch authorities. It may be reviewed as a result of significant changes in the legal or factual situation, the conditions for the applicability of Article 34(1) of Directive 2014/25/EU are no longer met.

(62) Since some activities related to retail supply of electricity and gas 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 a ‘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 referred to in Article 6(3) of Directive 2014/25/EU.

([45]) ACM Reports on market operation and consumer confidence trends in the energy market for second half of 2015, p. 22.

([46]) This market was analysed for the purposes of the exemption request for production and wholesale of electricity in the Netherlands referred in footnote 2.

(63) It is recalled that Article 16 of Directive 2014/23/EU of the European Parliament and of the Council ([47]) 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 Directive 2014/25/EU. Since it was concluded that the activities of retail supply of electricity and gas to small customers are directly exposed to competition, concession contracts intended to enable the performance of those activities in the Netherlands will be excluded from the scope of application of Directive 2014/23/EU,

HAS ADOPTED THIS DECISION:

Article 1

Directive 2014/25/EU shall not apply to contracts awarded by contracting entities and intended to enable the retail supply of electricity and gas to small customers in the Netherlands.

Article 2

This Decision is addressed to the Kingdom of Netherlands.

Done at Brussels, 15 July 2022.

For the Commission
Thierry BRETON
Member of the Commission

([47]) 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).