

# European decision lifts procurement controls on UK renewables developers

## The Background

European Directive 2004/17/EC, the “Procurement Directive”, imposes procurement procedures on those operating in the water, energy, transport and postal services sectors in European Member States.

The Directive, and the domestic legislation which implements it, is aimed at encouraging genuine competition between the European Member States and preventing discrimination on grounds of the origin of a tender. Where a contract exceeds a certain threshold value, specific procedures must be followed to ensure a compliant tendering process from start to finish.

The regulations are often detailed and burdensome setting out requirements relating to advertising tenders in the EU's Official Journal, dealing with responses by following a set procedure, and justifying awards of contracts by objective standards.

The outcome has been that developers in the UK have found themselves compelled on many occasions to source machinery from suppliers in other EU states. It is argued this has hindered the development of a domestic renewables manufacturing industry in the UK.

The Directive provides at Article 30 (1) however that its controls should not apply where it is shown that:

- The relevant activity within a Member State is directly exposed to competition and
- Access to the market is not restricted.

## The Decision – Decision 2006/211/EC

The European Commission decided on 8<sup>th</sup> March 2006 that the Directive will not apply when “contracting entities” in Scotland, England and Wales award contracts “intended to enable electricity generation to be carried out . . . or when they organise design contests for the pursuit of such an activity”.

Article 30(4) of the Directive allows a Member State to apply to the Commission where it considers that a particular activity should no longer be subject to the procurement procedures laid down in the Directive. The United Kingdom submitted a request to the European Commission in November 2005 in relation to electricity production in Scotland, England and Wales. The Commission decided that given the unified character of the markets in Scotland, England and Wales and the relatively limited capacity of connections between the UK and other member states, the three countries should be considered to constitute one relevant market for the purposes of deciding on the applicability of the Directive to electricity production.

The question of whether or not the electricity market should be subject to the Directive's procurement procedures was assessed by taking into account the particular characteristics of the sector and the implementation of various European legislative provisions. The Commission noted that the UK had

implemented previous Directives dealing with common rules for the Internal Market in electricity, and as such access to the market in the UK was deemed not to be restricted.

In relation to exposure to competition within the market, the Commission assessed this on the basis of various indicators.

- The Commission noted that, in respect of electricity generation, one indicator for the degree of competition in national markets was to be the total market share of the biggest three producers. Looking at the UK, the Commission considered the aggregate market share of the three largest generators of the wholesale market, which was 39%, and decided that this was a satisfactorily low level that would suggest a sufficient degree of direct exposure to competition within the electricity sector.
- The Commission also considered the introduction of the British Electricity Trading and Transmission Arrangements (BETTA) and noted that there has been a unified balancing market in electricity for England, Scotland and Wales.
- The main characteristics of the market (market based pricing, half hourly gate closures and fairly low spread) were said to indicate a satisfactory level of direct exposure to the competition within the electricity market.
- The number of customers switching between electricity suppliers was considered and it was noted that in the UK the percentage of users switching suppliers was high enough to indicate healthy competition.
- The Commission was also concerned with the existence of any end user price control regulation. They noted that end user price control was abolished in the UK in 2002.
- In reaching their decision the Commission also noted the unbundling of networks from generation/supply and the effective regulation of network access in the UK.

### The Result

The result is that those involved with electricity generation in the UK (including developers of renewables projects) can now enjoy more freedom of contract with their tendering process than under the procurement regulations. The requirements to publish tenders in the Official Journal and follow the Directive's strict rules on procurement procedures no longer apply where the contract offered is intended to enable electricity generation to be carried out in Scotland, England or Wales, or is a design contest for the pursuit of electricity generation there. Choosing a local contractor need not necessarily be justified on the basis of "lowest price" or the most "economically advantageous" tender.

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