

DECISIONS

COMMISSION DECISION (EU) 2019/1037

of 23 May 2016

on the measures SA.32184-2013/C (ex 2013/NN) and SA.32669-2013/C (ex 2013/NN) implemented by Denmark for combined heat and power plants and an electricity supplier which affect the market for regulating power

(notified under document C(2016) 3003)

(Only the Danish text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽¹⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) By electronic submission dated 29 January 2011 the Commission received a complaint from Smørum Kraftvarme raising concerns about alleged unlawful State aid granted to DONG Energy. This complaint was registered under case number SA.32184.
- (2) By letter dated 23 February 2011, the Commission received a complaint from the Association of Regulating Power in Denmark (Brancheforeningen for Regulerkraft I Danmark, 'BRD'), raising concerns about allegedly unlawful State aid granted to decentralised combined heat and power plants ('DCHP plants') and DONG Energy. This complaint was registered under case number SA.32669.
- (3) Following further correspondence and assessment of the issues brought forward by the complainants, by letter dated 5 June 2013 the Commission informed Denmark that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty with regard to some of the allegations made in the two complaints (the 'opening decision').
- (4) Denmark provided its comments on 8 July 2013.
- (5) On 8 August 2013 the Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽²⁾. The Commission invited interested parties to submit their comments.

⁽¹⁾ OJ C 230, 8.8.2013, p. 23.

⁽²⁾ Cf. footnote 1.

- (6) The Commission received comments from BRD on 5 September 2013 and 10 March 2014, and from DONG Energy on 9 September 2013. No comments were received from Smørum Kraftvarme. The Commission forwarded the comments to Denmark, which was given the opportunity to react. Denmark sent its comments on the third party observations on 17 March 2014 and 9 December 2014.
- (7) Denmark also provided responses to further questions from the Commission on 5 February 2015, 10 June 2015 and 7 December 2015.

2. DETAILED DESCRIPTION OF THE MEASURES

2.1. Background

2.1.1. *The Danish electricity transmission system operator, Energinet.dk*

- (8) The transmission system operator in Denmark is Energinet.dk. The Act on Energinet.dk requires Energinet.dk to engage in system operation activities and electricity transmission activities, including acting as independent transmission system operator. Energinet.dk is responsible for ensuring security of supply, and must, in fulfilling this task, maintain technical quality and balance within the interconnected electricity supply system, and ensure there is sufficient production capacity in the system.
- (9) Energinet.dk is organised as an independent public undertaking under the Act on Energinet.dk. It is organised as a separate legal entity, governed by a supervisory board. The Danish Minister for Climate, Energy and Building appoints eight out of eleven supervisory board members, including the chairman. The minister has quarterly meetings with the supervisory board, and may call additional ad hoc meetings. The supervisory board members are required to employ a qualified executive board which manages Energinet.dk's day to day business. Energinet.dk controls its own investment and operating funds.

2.1.2. *The Danish electricity and ancillary services markets*

- (10) In electricity markets, market participants can freely trade power ahead of the time when electricity must be generated or consumed ('real time'). 'Day-ahead' refers to the market in which electricity is traded one day-ahead of the time the traded electricity must be delivered or consumed. 'Intraday' refers to the market in which electricity is traded between one day and one hour ahead of the time the traded electricity must be delivered or consumed. At the end of intraday trading at what is called 'gate closure' (in Denmark, one hour ahead of real time), the transmission system operator takes control of the market to ensure that supply and demand in the electricity market are balanced and that system stability is maintained. In Denmark this timeframe after gate closure is called the regulating power market.
- (11) To assist with system balancing in the regulating power market, transmission system operators purchase ancillary services. In Denmark, Energinet.dk purchases these services in advance through individually negotiated contracts and, in what is called the reserve market, through auctions. It also purchases ancillary services within the regulating power market.
- (12) In the reserve market, Energinet.dk concludes reserve contracts, which provide for payments for operators in return for them being available to deliver energy when instructed. Operators party to those contracts are also under an obligation to provide offers on the regulating power market.
- (13) In the regulating power market, Energinet.dk can call upon both operators who have already signed reserve contracts and on other participants that submit bids voluntarily to increase or reduce their electricity generation.
- (14) The electricity transmission network in Denmark is divided into two areas: the western part of Denmark ('DK1') and the eastern part of Denmark ('DK2'). The transmission network in DK1 is connected to transmission networks in Germany, Norway and Sweden. The transmission network in DK2 is connected to transmission networks in Germany and Sweden. A transmission connection between DK1 and DK2 was established for the first time in 2010 by the 600 MW Great Belt transmission connection.

2.1.3. *The reserve power contract between Energinet.dk and DONG Energy*

- (15) On 21 December 2010 Energinet.dk signed a five-year contract with DONG Energy for ancillary services to be provided by DONG Energy in DK2. The contract ran from January 2011 until the end of 2015 and covered 300 MW of fast reserves (which at the request of Energinet.dk must be delivered at 15 minutes' notice) and 375 MW of slow reserves (at up to two hours' notice) which were to be provided by DONG Energy's Kyndby and Masnedø power plants.
- (16) The contract included fixed cost elements for ensuring that the services were available to Energinet.dk for use in the regulating power market, as well as utilisation payments for any services actually requested and delivered. The maximum annual price payable to DONG Energy was DKK 191 million, equalling DKK 955 million (approximately EUR 128 million) for the 5 year duration of the contract.
- (17) The contract was then amended on 8 February 2013 to compensate DONG Energy for changes to nitrogen oxide (NOx) taxes in Denmark, which increased its costs of providing the contracted services. Based on the tax at the time the amendment was made, the fixed payment element in the contract was increased by DKK 827 000 per year from 1 January 2013 to 31 December 2015. This meant an additional total cost to Energinet.dk of approximately EUR 332 000.

2.1.4. *Reservation of Great Belt transmission connection capacity for ancillary services*

- (18) Some or all of the 600 MW electricity transmission capacity of the Great Belt transmission connection could be allocated to commercial energy trading between DK1 and DK2, or could be reserved to enable Energinet.dk to transport power delivered by providers of ancillary services between DK1 and DK2.
- (19) Before concluding the contract with DONG Energy, Energinet.dk calculated its total requirement for contracted reserve power to be 600 MW in DK1, and 600 MW in DK2. Before the Great Belt transmission connection was built, Energinet.dk had to enter into reserve power contracts for 600 MW of reserve capacity locally in each of DK1 and DK2.
- (20) Part of the economic rationale for building the Great Belt transmission connection was that, once it became operational, reserve contract capacity could be shared between DK1 and DK2, reducing the overall amount of reserve power capacity that Energinet.dk had to purchase. In July 2010 Energitsynet (the Danish Energy Regulatory Authority) approved a scheme allowing Energinet.dk to reserve capacity on the Great Belt transmission connection for the transmission of reserve contract services from DK2 (where DONG Energy was contracted to provide ancillary services) to DK1. This enabled Energinet.dk to reduce the amount of reserve contract services required in DK1 from 600 MW to 300 MW.
- (21) In general, power flows across the Great Belt transmission connection from the lowest price region to the highest price region. Under the scheme approved by Energitsynet:
 - a) When the conclusion of day-ahead trade implied a power flow below 300 MW from DK2 to DK1, 300 MW of capacity would be 'reserved' for flows from DK2 to DK1 and would not be available to market participants for intraday trading;
 - b) When the conclusion of day-ahead trade implied a power flow above 300 MW from DK2 to DK1, all remaining capacity would be reserved for flows from DK2 to DK1.
- (22) On 30 October 2012, Energitsynet decided to abolish the scheme for reserving capacity described in recitals 20 and 21 as of 1 January 2013.

2.1.5. *State aid for combined heat and power in Denmark (measure N 602/2004)*

- (23) On 9 November 2005, the Commission approved and declared compatible with the internal market pursuant to Article 107(3)(c) of the Treaty six State aid measures in Denmark concerning support to energy production from wind power, energy production from renewable energy sources other than wind power and energy production from combined heat and power plants ('CHP plants'). The decision was registered under reference N 602/2004 (COM(2005)3910, 'Decision N 602/2004').

- (24) Those measures can be summarised as follows:
- a) Very small CHP plants (< 5 MW): Continued right to receive a fixed price (three step tariff), but with the option to change to basic amount (price supplement);
 - b) Small CHP plants (< 10 MW): Transitional period until end of 2006 during which they have the option to continue to receive a fixed price (three step tariff) and then obligation to switch to basic amount;
 - c) Large CHP plants (at least 10 MW): Transitional period until end of 2004 during which they have the option to continue to receive a fixed price (three step tariff) and then obligation to switch to basic amount.
- (25) Denmark confirmed that all CHP plants benefiting from the notified schemes were highly efficient and provided a calculation of the extra costs for the supported form of energy, which were considered reasonable. According to those calculations, the support would cover at most 87 % of the extra costs (for DCHP plants). Also calculations were provided showing that the support would not exceed the depreciation plus a fair return on capital.
- (26) The aid was subsequently approved on the basis of the 2001 Environmental Aid Guidelines ⁽³⁾ — particularly section E.3.3.1. In particular the Commission considered that only the difference between the production costs of the environmentally friendly energy concerned and the market price of the conventional form of power concerned could be compensated. On the basis of the information provided, the Commission concluded in Decision N 602/2004 that the beneficiaries would not be overcompensated.

2.2. Alleged aid

- (27) The complainants made two main allegations:
- a) Changes to the rules governing the procurement of reserve capacity in Denmark —from a month-ahead to a day-ahead reserve market auction — led to DCHP plants being overcompensated through existing State aid support arrangements (approved under Decision N 602/2004). The change meant that, from February 2007, DCHP plants had access to an additional revenue stream that was not anticipated at the time the State aid was originally approved. This is because one day ahead of delivery, DCHP plants are able to accurately forecast the capacity they will have available to provide reserve services. Therefore, once this change to the reserve market auction was made, DCHP plants could take part in the market to a much larger extent than had been possible when reserve market procurement was conducted a month ahead. BRD alleged that this led to overcompensation of DCHP plants.
 - b) DONG Energy allegedly received State aid through the five-year contract for ancillary services concluded in 2010 with Energinet.dk. The contract was not publicly tendered, and was allegedly not concluded on market terms, so gave an advantage to DONG Energy. The reservation of intraday capacity to flow reserve power from DK2 to DK1 through the Great Belt transmission connection allegedly conferred an advantage on DONG Energy. The complainant alleged that Energinet.dk was a fully State owned Danish operator, controlled by the state, so its actions were imputable to the State.

2.3. The Commission's decision to open a formal investigation

- (28) In its opening decision, the Commission concluded that, based on information and calculations from Denmark which included revenues to DCHP plants from the sale of ancillary services, DCHP plants were not overcompensated for their investments in CHP capacity and the aid to DCHP plants approved under Decision N 602/2004 remained compatible. This aspect of the complaints was therefore not part of the formal investigation procedure.
- (29) However, in the opening decision, the Commission expressed doubts as to whether aid might have been granted to DONG Energy, including doubts about the potential compatibility of such aid with the internal market. Concerning the existence and compatibility of State aid, the Commission's investigation was limited to the following issues:
- a) Whether Energinet.dk's actions in signing the contract for ancillary services with DONG Energy were imputable to Denmark;

⁽³⁾ OJ C 37, 3.2.2001, p. 3.

- b) Whether the contract for ancillary services between Energinet.dk and DONG Energy conferred an advantage on DONG Energy;
- c) In the event that State aid was involved, whether it constituted compatible State aid.

3. COMMENTS FROM INTERESTED PARTIES

3.1. Comments from BRD

- (30) BRD noted that Danish legislation does not provide guidance for Energinet.dk in relation to the procurement of reserve power. However, BRD argued that since the legislation requires the monitoring and approval by the Danish Energy Agency (DEA) of Energinet.dk's overall operational plans, it can be considered that the DEA has approved the contract with DONG Energy.
- (31) BRD also argued that the following facts suggest intervention by other authorities in Energinet.dk's decision making:
 - a) In 2006 Energinet.dk publicly declared that it planned to establish a competitive market in DK2 but this plan was not carried out.
 - b) The contract between DONG Energy and Energinet.dk contained clauses protecting the financial position of DONG Energy against later amendments to the contract by the DEA.
- (32) BRD put forward the following arguments asserting that, based on the contract, Energinet.dk paid to DONG Energy a price higher than market price:
 - a) In a parliamentary question in April 2011 the Minister of Climate and Energy stated that the average price paid to DONG Energy for the 675 MW reserve capacity was DKK 22 716/MW/month, compared to the average price of reserve power for short term delivery in DK1 of DKK 8 850/MW/month.
 - b) The average price was in fact higher than declared in the minister's response, because the calculation did not take account of the fact that 75 MW of the 675 MW contracted capacity was exempted from a delivery obligation for 1 year, due to a maintenance requirement. Over 5 years, this effectively meant only 660 MW had been purchased.
 - c) If DONG Energy could not deliver or preferred not to deliver the contracted capacity when it was called, Energinet.dk had to obtain capacity from other sources. The penalties for non-delivery specified in the contract may not have been sufficient to cover the additional costs incurred by Energinet.dk when it had to obtain alternative capacity.
 - d) Based on the cost of establishing reserves in DK1, 300 MW of fast reserves could have been delivered in DK2 through new equipment for DKK 750 million, or by transferring equipment from DK1 for DKK 450 million — either option cheaper than the total DKK 920 million the minister's response to the April 2011 parliamentary question suggested would be paid to DONG Energy under the 5 year contract.
 - e) At least some of the reserve capacity required in DK2 should have been acquired in DK1 (making use of the possibility of sharing reserve across the Great Belt transmission connection from DK1 to DK2). BRD argued that the contract with DONG Energy was linked to the reservation of Great Belt transmission connection capacity to allow transfers of ancillary services only from DK2 to DK1. The plans for reserving this capacity formed part of the initial application to build the Great Belt transmission connection (which was approved by the Minister for Transport and Energy in 2007).
 - f) BRD explained that although Energitilsynet abolished the scheme for reserving Great Belt transmission connection capacity from 1 January 2013, the contract with DONG Energy would remain in place until 2015.
- (33) BRD also stated that it did not agree with the Commission's conclusion in the opening decision that aid to DCHP plants was compatible with the internal market and reasserted its view that DCHP plants were overcompensated.

3.2. Comments from DONG Energy

- (34) DONG Energy asserted that the remuneration it receives under the five-year contract for ancillary services in DK2 is a normal market price, which reflects its costs of providing the contracted services including a reasonable return on equity.
- (35) DONG Energy provided information on the prices paid for ancillary services in the UK and Ireland, claiming that these are significantly higher than the DKK 313 000/MW DONG Energy said was the 2013 annual price it was due to receive from the 5 year contract.
- (36) DONG Energy also argued that the DKK 313 000/MW it was paid under the current contract in 2013 was lower than the prices historically paid by Energinet.dk for ancillary services in DK1. To demonstrate this, DONG Energy provided information on the 2007 prices for reserve power in DK1. DONG Energy argued that the 2007 price for DK1 reserve power was DKK 324 000/MW/year (in 2013 prices had inflated by 2 %/year — according to Statistics Denmark, net inflation in Denmark was 2,2 % per year on average between 2007 and 2013).

4. COMMENTS FROM DENMARK

- (37) Denmark asserted that the actions of Energinet.dk were not imputable to the State because:
 - a) Energinet.dk is an independent public undertaking, with responsibility for security of supply, including maintaining system balance and ensuring there is sufficient production capacity in the system.
 - b) Legislation does not specify any requirements concerning the signing of or content of contracts which Energinet.dk chooses to enter into to carry out its responsibilities. Energinet.dk is free to sign these contracts without the approval of the Minister for Climate, Energy and Building, and does not have to inform the minister of the conclusion of those contracts. No representatives from the ministry were involved in the negotiation meetings between Energinet.dk and DONG Energy prior to the contract being signed, nor was the ministry involved in establishing the framework for the discussions, including price setting. Energinet.dk did not inform the minister about the content of the negotiations, nor were the final contract terms put before the minister for approval or comment.
 - c) The minister is entitled to make decisions about any aspect of Energinet.dk's affairs. But the minister has never used this authority in relation to Energinet.dk's entering into specific contracts for reserve power, including the contract with DONG Energy.
 - d) Energinet.dk did not involve the Danish State in any other way, nor did it receive instructions from the State, relating to the conclusion of the contract with DONG Energy.
- (38) Denmark asserted that Energinet.dk's contract with DONG Energy did not confer an advantage on DONG Energy capable of being categorised as aid within the meaning of Article 107(1) of the Treaty, and forwarded comments from Energinet.dk on this aspect of the investigation which stated:
 - a) The Nordic System Operation agreement requires Energinet.dk to have reserves available in each zone (DK1 and DK2) sufficient to cover the capacity that would be needed if the biggest plant in the zone was to fail. The only operator able to supply sufficient reserve capacity (600 MW) in DK2 was DONG Energy. All other potential providers combined would not have been able to provide sufficient reserve capacity to avoid the need to sign a contract with DONG Energy.
 - b) Because the majority of the costs to DONG Energy of supplying reserves were linked to the costs of keeping the plants on standby, the overall cost of reserve services from DONG Energy would have been the same whether 400 MW or 600 MW had been contracted. The rationale for this was verified by the Danish Competition Authority.

- c) In 2009, Energinet.dk examined the potential suppliers of reserve capacity in DK2 and concluded that no more than 150 MW could be purchased from operators other than DONG Energy. Energinet.dk said it would not have been possible to contract 600 MW of reserve capacity in DK2 without including DONG Energy, and the cost of providing reserve power in DK2 from a combination of DONG Energy and other sources would have been greater than the cost of contracting these services solely from DONG Energy.
 - d) At least for black start services where a power station must be able to start generating without relying on power from the electricity transmission network, it would not have been possible to purchase reserve power in DK1 for use in DK2 because the black start service requires the delivering power station to be directly connected to the power station to be restarted.
 - e) Energinet.dk negotiated a price with DONG Energy that covered DONG Energy's costs plus a [1-7] % profit.
- (39) Denmark also provided comments from Energinet.dk on the decision to reserve capacity on the Great Belt transmission connection from DK2 to DK1. Energinet.dk explained that without reserving capacity on the Great Belt transmission connection, it would be necessary to contract 600 MW reserve capacity in each of DK1 and DK2, 1200 MW in total. With the reservation, the total requirement could be reduced to 900 MW.
- (40) In response to BRD's suggestion that the reservation could be organised to flow power from DK1 to DK2 rather than DK2 to DK1, Energinet.dk explained that the reservation from DK2 to DK1 resulted in much less distortion to the market than would have been the case if capacity was reserved to flow power in the opposite direction.
- (41) Energinet.dk provided analysis to show that, given the general surplus capacity available in DK1 compared to DK2, lower prices in DK1 mean electricity flows across the Great Belt transmission connection from DK1 to DK2 72,7 % of the time, and from DK2 to DK1 16,7 % of the time. The way the reservation was organised by Energinet.dk, capacity was only reserved after the day-ahead market had closed, and only when day-ahead trading suggested flows would be from DK2 to DK1. So the reservation was only implemented 16,7 % of the time. If an alternative model for reserving capacity was implemented, Energinet.dk argued that this would inevitably increase the number of hours when the reservation would have to be implemented and would therefore increase the distortion of the intraday market because less transmission capacity would be available to market participants for trading.

5. ASSESSMENT OF THE MEASURE

- (42) In accordance with Article 107(1) of the Treaty any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market. All the conditions of Article 107(1) of the Treaty must be met for there to be State aid within the meaning of that Article.
- (43) As set out in recital 29 above, with regard to the existence of State aid within the meaning of Article 107(1) of the Treaty, the formal investigation was focused on (a) whether Energinet.dk's actions in signing the contract with DONG Energy were imputable to Denmark, and (b) whether the reserve power contract between Energinet.dk and DONG Energy gave DONG Energy an advantage, or was concluded on market terms.

5.1. Existence of State aid — State resources

- (44) To be considered aid in the meaning of Article 107(1) of the Treaty, a measure must be granted directly or indirectly from State resources.
- (45) In accordance with case law, resources of an undertaking are to be considered State resources if the State is capable, by exercising its dominant influence over the undertaking, to direct the use of its resources. ⁽⁴⁾
- (46) Energinet.dk is a public company, fully owned by the Danish State. Given the Danish State's position as the sole shareholder, as well as the possibility for the Danish State to exercise influence on the use of Energinet.dk's financial resources, the financial resources of Energinet.dk must be considered to be State resources ⁽⁵⁾.

⁽⁴⁾ Case C-482/99, *French Republic v Commission (Stardust Marine)*, [2002] ECR I-4397, paragraph 38.

⁽⁵⁾ Case C-278/00, *Hellenic Republic v Commission*, [2004] ECR I-3997, paragraph 54.

5.2. Existence of State aid — Imputability

- (47) In its opening decision, the Commission expressed doubts on whether the contract signed by Energinet.dk with DONG Energy was imputable to the State.
- (48) In the *Stardust Marine* case ⁽⁶⁾ the Court of Justice pointed out that even if the State is in a position to control a public undertaking and to exercise dominant influence over its operations, actual exercise of that control for a particular measure cannot be automatically presumed. It is also necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of the measure concerned. The Court recognised that it may not always be possible to demonstrate in a particular case that measures taken by such an undertaking were in fact adopted on the instructions of the public authorities. It therefore established certain indicators that can be used to assess imputability, including (without being exhaustive or prescriptive):
- a) the extent to which the public undertaking (in this case Energinet.dk) can take the decision without taking into account the requirements of the public authorities;
 - b) the extent to which directives (guidance) provided by the authorities are to be taken into account by the public undertaking (in this case Energinet.dk);
 - c) the extent to which the public undertaking (in this case Energinet.dk) is integrated in the structures of the public administration;
 - d) the nature of the activities and the exercise of them on a market in normal conditions of competition with private operators;
 - e) the legal status of the public undertaking (in this case Energinet.dk) in the sense of its being subject to public law or ordinary company law;
 - f) the intensity of the supervision of the public authority on the decisions taken by the public undertaking (in this case Energinet.dk).
- (49) No evidence has been provided to the Commission to suggest that the Danish state was involved in any planning, negotiations or approval of the contract signed by Energinet.dk with DONG Energy. Thus, as established in the *Stardust Marine* case, imputability would have to be assessed on the basis of any concrete indicators of State involvement in the conclusion of the contract. This was further specified in the ‘SACE’ case, where the General Court stated that proof of such involvement could be provided on the basis of ‘sufficiently precise and convergent indicators of the exercise of actual influence or control by the State’. ⁽⁷⁾
- (50) Energinet.dk is organised as an independent public undertaking and not integrated in the normal structures of the public administration. Energinet.dk is not subject to ordinary company law but is regulated under the Law on Energinet.dk and governed on the basis of the company’s Articles of Association. The independence of Energinet.dk is reflected in its Articles of Association, according to which Energinet.dk is an independent legal entity which engages in its activities without any liability on the part of the Danish State. Furthermore, the assets of Energinet.dk are separate from the assets of the Danish State, and Energinet.dk controls its own investment and operating funds within the framework laid down.
- (51) The management structure of Energinet.dk comprises a supervisory board and an executive board. The Danish Minister for Climate, Energy and Building appoints eight out of eleven supervisory board members, including the chairman. Two of the eight members appointed by the minister must be appointed on the recommendation of the electricity sector. The supervisory board members are required to employ a qualified executive board which operates below the supervisory board. The right to appoint supervisory board members gives the minister influence over the general operation of Energinet.dk. However, the fact that the State has influence over its general operation is a reflection of its ownership and does not in itself indicate the State’s involvement in any specific measure adopted by Energinet.dk. This was confirmed by the General Court in the SACE case where, after observing that the selection by the Italian State of the board of directors shows a special link to the public authorities, the Court states that ‘such organic links [...] are not sufficient in themselves to establish the specific involvement of the State in the adoption of the measure at issue’. ⁽⁸⁾

⁽⁶⁾ Case C-482/99, *French Republic v Commission (Stardust Marine)*, [2002] ECR I-4397, paragraph 52.

⁽⁷⁾ Case T-305/13, *SACE and Sace BT v Commission*, EU:T:2015:435, paragraph 51.

⁽⁸⁾ Case T-305/13, *SACE and Sace BT v Commission*, EU:T:2015:435, paragraph 63.

- (52) Denmark asserts that the right of the minister to appoint board members is not based on an intention to govern actual contracts signed by Energinet.dk. Denmark also explained that section 9 of Energinet.dk's Articles of Association, which sets out the tasks of the supervisory board, fully incorporates §115 of the Danish Act on Limited Companies which defines the tasks of supervisory boards in such companies. The link to ordinary company law is explicitly recognised in the preparatory works to the Law on Energinet.dk which states that 'the tasks of Energinet Denmark's Supervisory board basically correspond to the general instructions for division of responsibility and tasks between the Supervisory board and the Executive board, resulting from the Act on limited companies'. Denmark has also explained that in practice it was the executive board, not the supervisory board, which handled the negotiation of the contract with DONG Energy.
- (53) Furthermore, Denmark has stated that the Minister of Climate, Energy and Building had no involvement in the authorisation or negotiation of the contract between Energinet.dk and DONG Energy and was not informed of the development of the negotiations. Although the minister is entitled to make decisions about any aspect of Energinet.dk's affairs, Denmark emphasised that the minister has never used this authority in relation to Energinet.dk entering into specific contracts for reserve power. According to Denmark, this authority is intended to ensure that the minister can intervene if necessary to ensure that Energinet.dk acts within the boundaries of the law and is run in a financially sound manner. The minister does intervene in decisions regarding new network infrastructure or substantial modifications to existing network infrastructure, but his authority is not used to intervene in specific tasks which Energinet.dk undertakes (or contracts it signs) to be able to fulfil its legal responsibilities.
- (54) Contrary to what is the case for certain other measures which are operated by Energinet.dk and which are set out in Danish law ⁽⁹⁾, Danish legislation does not specify or provide guidance for Energinet.dk in relation to the procurement of reserve power. There is no public regulation or express approval of the decisions or actions for which Energinet.dk is legally responsible in terms of reserve power. Nor does the legislation lay down any fixed requirements concerning the content of the contracts which Energinet.dk may choose to conclude in order to fulfil its obligations under the law.
- (55) BRD argued, however, that since Danish legislation does require the monitoring and approval by the Danish Energy Agency of Energinet.dk's overall operational 'strategy plans', the State would have approved the contract with DONG Energy as part of its approval of those plans. The General Court stated in the SACE case that the approval of the projections for the public undertakings by a public organ may show that the undertaking does not exercise its activities in conditions of full management autonomy and can thus be considered to act under the control of the public authorities, at least in respect of the adoption of important decisions ⁽¹⁰⁾. However, contrary to the situation in the SACE case, the contract with DONG Energy was never included in Energinet.dk's strategy plans (nor were other reserve power contracts).
- (56) Denmark has explained that the contract with DONG Energy was included in the 2010 Annual Report by Energinet.dk, but no *ex ante* approval was required from the State, and the 2010 Annual Report was submitted to the Ministry of Climate, Energy and Building only in March 2011 after the contract had been concluded. The first quarterly meeting between the ministry and Energinet.dk's supervisory board in which the contract was mentioned was in March 2011. In case T-305/13, the General Court confirmed that in so far as financial and political controls, first, take place *a posteriori* and second, relate in principle to all the accounts or activities of the public undertaking, they do not in themselves permit the presumption that the public authorities specifically influenced upstream decisions. ⁽¹¹⁾
- (57) Although the quarterly meetings between Energinet's supervisory board and the ministry, and the annual reporting by Energinet.dk to its shareholder give the State certain control over the general activity of Energinet.dk, Denmark has explained that the State's involvement is limited to ensuring that Energinet.dk complies, in general terms, with its obligations under the legislation. According to settled case law, such general control is not sufficient to establish the imputability to the State of the conclusion of a specific contract ⁽¹²⁾.

⁽⁹⁾ See e.g. State aid cases 354/2008 — Modification of the scheme 'support to environmentally friendly electricity production' (N 602/2004), supplement for electricity from new wind turbines (OJ C 143, 24.6.2009, p. 6) and N 356/2008 — Modification of the scheme 'support of environmentally friendly electricity production' (N 602/2004), supplements for electricity generated with biogas (OJ C 151, 3.7.2009, p. 16).

⁽¹⁰⁾ Case T-305/13, SACE and Sace BT v Commission, EU:T:2015:435, paragraph 76.

⁽¹¹⁾ Case T-305/13, SACE and Sace BT v Commission, EU:T:2015:435, paragraph 73.

⁽¹²⁾ Cf. footnote 6.

- (58) As regards the nature of the activities of Energinet.dk, the Act on Energinet.dk requires Energinet.dk to engage in system operation activities, and electricity transmission activities including acting as independent system operator. Energinet.dk is responsible for security of supply, and must, in fulfilling this task, maintain technical quality and balance within the interconnected electricity supply system, and ensure there is sufficient production capacity in the system. These are typical activities of a transmission system operator, which due to their nature are often linked to the responsibilities of the State, regardless of how they are organised.
- (59) The aspect of Energinet.dk's operations under consideration is the conclusion of ancillary services contracts. In the procurement of ancillary services, Energinet.dk participates in the market, selecting ancillary services from the providers available in the market. It is therefore possible that a transmission system operator can undertake ancillary services procurement, acting as a market operator without the involvement of the State.
- (60) The complainant claimed that Energinet.dk announced publicly in 2006 that it intended to establish a competitive market in DK2, but that this was not subsequently carried out. The complainant suggests this is evidence of the State's interference in Energinet.dk's decision making. However, the fact that Energinet.dk may not have followed through on plans announced in 2006 does not in itself suggest State involvement in Energinet.dk's decisions.
- (61) The complainant also claimed that provisions in the contract between Energinet.dk and DONG Energy that protect DONG Energy from any losses in the event that the DEA made changes to the contract suggests intervention by the DEA in Energinet.dk's decision making. However, the contract does not mention the DEA at all and only states that: 'If the Danish Energy Regulatory Authority requires one or both of the Parties to change the terms of the Agreement...the Agreement shall be adjusted...'. The contract does not provide any evidence that the State reviewed or approved the contract with DONG Energy, and Denmark has stated that the contract was not reviewed or approved by the Danish State. As explained in recital 56, the contract was not subject to any *ex ante* review, monitoring or approval by the State, and Denmark was only made aware of the contract through an annual report which was first shared with the Ministry of Climate, Energy and Building only in March 2011 after the contract had been signed.
- (62) As regards the more general indicators of State involvement, the Commission notes that there are indicators in both directions. While Energinet.dk has a high degree of independence, the Danish State is in a position to exercise certain influence over the general operation of the company.
- (63) However, having regard to the conclusions drawn in recitals 85 and 86 with regard to the issue of whether the measures conferred an advantage on DONG Energy and constituted State aid, it is not necessary to take a definitive position the issue of imputability.

5.3. Existence of aid — advantage

- (64) In its opening decision, the Commission also expressed uncertainty about whether the contract signed by Energinet.dk with DONG Energy reflected a normal market price for the services provided, and therefore whether it gave DONG Energy an advantage. Given issues raised by BRD in relation to the reservation of capacity on the Great Belt transmission connection, and the overall amount of the capacity purchased by Energinet.dk from DONG Energy in DK2, the Commission has investigated the need for the amount of ancillary services purchased by Energinet.dk in DK2, the decision by Energinet.dk to negotiate with DONG Energy for the supply of the required services, and the price ultimately paid to DONG Energy for those services.

5.3.1. *The need for the amount of ancillary services Energinet.dk purchased in DK2*

- (65) As explained in recitals 19, 20, 21 and 41, 600 MW of ancillary services were required by Energinet.dk in DK2, on the basis of a reservation of Great Belt transmission connection capacity for transferring ancillary services between DK1 and DK2 that was expected to reduce the overall need for ancillary services in Denmark while limiting interference with commercial trading between DK1 and DK2. BRD claimed that the size of contract signed with DONG Energy was a consequence of Energinet.dk's decision to reserve capacity on the Great Belt transmission connection to flow power from DK2 to DK1, which was approved by the Danish State as part of the application to build the connection. BRD also argued that a reservation could have been implemented in the opposite direction (to flow power from DK1 to DK2) or in both directions, and that this would have reduced the cost of ancillary services by increasing competition.

- (66) However, the overall purpose of the investment in the connection was to improve market functioning and limit the potential for market participants to exercise market power because of transmission constraints⁽¹³⁾. The potential for optimising the use of ancillary services was just one of many benefits of the investment in the Great Belt transmission connection anticipated by Denmark. As confirmed by Denmark the potential for sharing reserve services between DK1 and DK2 was not a decisive factor in the Government's decision to authorise the construction of the Great Belt transmission connection, and the potential for sharing reserve services was not directly mentioned in the Government's approval of the project.
- (67) Evidence provided by Denmark suggests that had a reservation been implemented in the opposite direction, this would have resulted in much more frequent intraday market distortion because of the balance of supply and demand in DK1 and DK2 and the fact that electricity flows from DK1 to DK2 72,7 % of the time. As Denmark has demonstrated that a reservation in the opposite direction or in both directions could have been expected to have increased the level of market distortion arising from the reservation of Great Belt transmission connection capacity, the Commission rejects the complainant's argument that Energinet.dk should have implemented a reservation of Great Belt transmission connection capacity in the opposite direction or in both directions.
- (68) Once the reservation of capacity was confirmed, the requirements for ancillary services in DK1 and DK2 could be determined. With the reservation implemented between 2010 and 2012, Energinet.dk required 600 MW of ancillary services in DK2. The requirement for capacity in DK2 was not altered by the cancellation of the scheme for reserving capacity on the Great Belt transmission connection.

5.3.2. *Energinet.dk's decision to negotiate with DONG Energy for the supply of the required services*

- (69) In 2009, before opening negotiations with DONG Energy, Energinet.dk commissioned a market study to identify the potential options available to fulfil the identified need for reserve power in DK2. The results of Energinet.dk's 2009 market study suggest that the 600 MW of ancillary services sought in DK2 could not have been procured without purchasing at least some capacity from DONG Energy. The study concludes that 'it is abundantly clear that the Kyndby plants play an absolutely crucial role for the reserve situation in East Denmark, merely owing to their size'.
- (70) More specifically, those ancillary services that could have been procured from suppliers other than DONG Energy were only expected to be available for a relatively high price. The report for instance mentions discussions with developers, one which offered to construct a new 150 MW plant for DKK 65 000/MW/month for a three year contract, and another which offered to construct a 50 MW plant for DKK 50 000/MW/month for a three year contract.
- (71) BRD claimed that 300 MW could be supplied by providers other than DONG Energy in DK2, but did not provide any evidence that the further 300 MW capacity that would have been required on top of those 300 MW could have been secured other than by procuring capacity from DONG Energy, or by deploying a different reservation of capacity on the Great Belt transmission connection.
- (72) In addition to providing Energinet.dk's 2009 study, Denmark explained that although around 300 MW of new capacity might have been provided in DK2, it was not available in the market at the time the contract with DONG Energy was signed, and would have taken as much as five years to install. Even if this 300 MW capacity had been available in the market at the time the contract with DONG was signed, it would not have been possible to provide the full 600 MW capacity required in DK2 without procuring capacity from DONG Energy.
- (73) Based on the evidence provided, the Commission therefore concludes that there would have been a need to purchase ancillary services from DONG Energy to secure the total required quantity of ancillary services in DK2. However, it is still necessary to examine whether alternative better value sources of ancillary services might have been available to Energinet.dk, than the price paid to DONG Energy for all ancillary services.

5.3.3. *The price ultimately paid to DONG Energy for ancillary services in DK2*

- (74) Energinet.dk purchased 675 MW of ancillary services from DONG Energy in DK2. If the exemption from the delivery obligation for maintenance is taken into account an average of 600 MW of ancillary services had to be available for the five year contract period. Denmark has provided documents from Energinet.dk that explain that the capacity provided by DONG Energy's Kyndby and Masnedø plants was only available at a set price regardless of the amount of capacity purchased.

⁽¹³⁾ June 2005 'Energy Strategy 2025' of The Danish Ministry of Transport and Energy.

- (75) The documents provided by Denmark show that Energinet.dk argued in negotiations with DONG Energy that costs should be reduced pro rata if 600 MW of capacity was procured rather than the 675 MW Energinet.dk eventually contracted. However, these efforts were resisted by DONG Energy because of the high fixed costs associated with making the ancillary services capacity available, which would not change if less capacity was contracted.
- (76) DONG Energy received a maximum of DKK 957 481 000 under the contract — including the additional compensation for increased NOx taxes. This equates to DKK 24 178/MW/month for 660 MW of ancillary services (capacity available after allowing for the exemption from the delivery obligation for maintenance). If calculated on the basis of Energinet.dk's 600 MW requirement, this equates to DKK 26 597/MW/month.
- (77) Information provided by DONG Energy suggests that the price paid for ancillary services in DK2 was lower than the prices paid for similar services by the TSOs in Ireland and Great Britain. The Commission finds the British and Irish prices cannot be considered an appropriate benchmark for assessing the price paid to DONG Energy, as there could be several reasons that the prices for ancillary services differ significantly in different markets, for instance, depending on the levels of local supply and demand and the specific local arrangements for contracting ancillary services, and DONG Energy did not substantiate why the prices in Britain and Ireland would be relevant and provide an appropriate benchmark for assessing the market level of the contract price.
- (78) DONG Energy also showed that the price it received was lower than the prices paid for ancillary services in DK1 in 2007. However, as noted by BRD, the price DONG Energy received was significantly higher than the prices paid for ancillary services in DK1 in 2011. Prices in DK1 in 2011 may have been reduced after the change in 2007 from a month-ahead to a day-ahead reserve market auction which increased competition in the procurement of ancillary services. The supply and demand situation may also be different in DK1 compared to DK2. The Commission therefore finds that neither the 2007 price in DK1, nor the 2011 price in DK1 should be considered an appropriate benchmark for assessing the price paid to DONG Energy for ancillary services in DK2 between 2011 and 2015.
- (79) BRD argued that the 300 MW of ancillary services that BRD said could have been provided in DK2 from suppliers other than DONG Energy, could have been provided for between DKK 450 and 750 million. This equates to between DKK 25 000 and 41 667/MW/month — which suggests that overall the costs for this 300 MW would have been higher than the costs for 300 MW of the capacity Energinet.dk contracted from DONG Energy, which amounted to DKK 26 597/MW/month (for 600 MW).
- (80) Furthermore, although Denmark has explained that they may not in fact have been available in time to provide capacity from January 2011, the Commission notes that Energinet.dk's 2009 study identified two potential new projects of a total of 200 MW that might have been built if offered three year contracts with Energinet.dk. If the costs are calculated over five rather than three years — assuming the full price indicated for the three year contracts spread over five years (though costs may have increased as a result of a longer period incurring fixed costs that would need to be recovered) — then 150 MW was potentially available for DKK 39 000/MW/month, and a further 50 MW for DKK 30 000/MW/month. These indicative costs were both higher than the price Energinet.dk paid to DONG Energy.
- (81) Finally, BRD also claimed that the penalties for non-delivery specified in the contract with DONG Energy may not have been sufficient to cover the additional costs incurred by Energinet.dk when it had to obtain alternative capacity. Denmark has explained that the penalties were sufficient: in 2014, the penalty imposed on DONG Energy was DKK [50-70]/MW, and alternative capacity was contracted at an average cost of DKK 58/MW.
- (82) Taking as a benchmark the prices demanded by potential alternative suppliers of ancillary services that were identified by BRD and by Energinet.dk, the Commission notes that these prices were higher than the price paid to DONG Energy. The Commission therefore concludes that Energinet.dk secured a competitive price — better than available alternatives — for the required ancillary services in DK2.

5.3.4. *The profitability of the contract for DONG Energy*

- (83) In addition, the Commission considered the impact of the competitive price secured on the return under the contract. Given DONG Energy's position as a 'crucial' supplier of ancillary services in DK2 there may have been the potential for the exercise of market power in negotiations with Energinet.dk. The Commission has therefore also investigated the potential that DONG Energy received an undue profit from its position in the market.

- (84) Documents provided by Denmark indicate that, based on the final negotiated prices, DONG Energy stood to make a [1-7] % profit from the contract for ancillary services. This rate of return was compared to the return made on a government bond that could have been available as an alternative investment. The yield on five year Danish Government bonds in December 2010 averaged 2,13 %. Given the risks DONG Energy bore relating to ensuring the reliable operation of the plants providing the ancillary services, the Commission concludes that the [1-7] % level of profit was not unreasonable taking into account the 2,13 % return on a five year government bond.

5.3.5. Conclusion

- (85) Energinet.dk studied the supply situation in the market in 2009, seeking to identify all options for purchasing the necessary ancillary services. As well as determining the possible cost of contracts with alternative providers to DONG Energy, this study confirmed that there was insufficient capacity available, other than from DONG Energy, to fulfil Energinet.dk's requirements. This fact is confirmed by the complainant, since BRD claims only half of the required capacity could have been provided by suppliers other than DONG Energy. Through its negotiations with DONG Energy, Energinet.dk secured a price lower than the benchmark prices identified in Energinet.dk's market study and lower than the prices at which the complainant suggests 300MW potential new investment could have been provided in DK2. Energinet.dk also managed to secure a price which limited DONG Energy's profit to a [1-7] %, which is not unreasonable.
- (86) The Commission therefore concludes that Energinet.dk acted as a prudent market investor, and that the contract did not confer an advantage on DONG Energy capable of being categorised as aid within the meaning of Article 107(1) of the Treaty.

6. CONCLUSION

- (87) The Commission finds that, since the contract between Energinet.dk and DONG Energy does not meet all the cumulative conditions of Article 107(1) of the Treaty, it does not constitute State aid,

HAS ADOPTED THIS DECISION:

Article 1

The contract of 21 December 2010 between Energinet.dk and DONG Energy does not constitute aid within the meaning of Article 107(1) of the Treaty.

Article 2

This Decision is addressed to the Kingdom of Denmark.

Done at Brussels, 23 May 2016.

For the Commission
Margrethe VESTAGER
Member of the Commission
