

DECISIONS

COMMISSION IMPLEMENTING DECISION (EU) 2022/1376

of 26 July 2022

on the applicability of Article 34 of Directive 2014/25/EU of the European Parliament and of the Council to electricity generation and wholesale in Denmark

(notified under document C(2022) 5046)

(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,

Having regard to Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement procedures of 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

1.1. THE REQUEST

- (1) On 24 September 2021, the Danish Competition and Consumer Authority (DCCA) ('the applicant') submitted a request to the Commission pursuant to Article 35(1) of Directive 2014/25/EU ('the request'). The request complies with Article 1(1) of Commission Implementing Decision (EU) 2016/1804 ⁽²⁾.
- (2) The request concerns electricity generation and wholesale from conventional and renewable sources in Denmark.
- (3) However, the request does not cover the following:
 - electricity produced by onshore and offshore wind turbines outside tenders;
 - electricity produced by wind turbines connected to a grid from 21 February 2008 to 31 December 2013 or later, except for wind turbines which are connected to their own consumption installation and offshore wind turbines (electricity produced from consumption installation (§ 41 of the Promotion of the Renewable Energy Act) and offshore wind turbines pursuant to § 35 b of that Act are excluded from the application and are consequently still to be subject to the provisions of Directive 2014/25/EU);
 - electricity produced by wind turbines connected to a grid no later than 20 February 2008, except for wind turbines which receive price supplements pursuant to sections 39-41 of the Promotion of the Renewable Energy Act;

⁽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).

- electricity produced by wind turbines connected to a grid no later than 31 December 2002;
 - electricity produced by a brand new wind turbine utilising scrapping certificates issued for the dismantling of wind turbines (additional price supplement); electricity produced by bioenergy (biomass and biogas);
 - electricity produced by solar photovoltaic panels, waves and hydropower;
 - electricity produced by other special renewable energy installations (electricity produced from renewable energy sources or technologies of significance for the future expansion of renewable electricity or electricity produced from other renewable energy sources than the ones mentioned);
 - electricity produced by decentralised heat and power plants and incineration plants;
 - electricity produced from other heat and power plants intended to supply district heating;
 - electricity produced from industrial power plants connected to a grid no later than 21 March 2012;
 - ancillary services.
- (4) Electricity generation and wholesale from conventional and renewable sources constitutes an activity relating to the supply of electricity in accordance with Article 9 of Directive 2014/25/EU.
- (5) In accordance with point 1(a) of Annex IV to Directive 2014/25/EU, given that free access to the market can be presumed on the basis of the first subparagraph of Article 34(3) of that Directive, the Commission is to adopt an Implementing Decision on the request within 90 working days.
- (6) Pursuant to the fourth subparagraph of paragraph 1 to Annex IV of Directive 2014/25/EU, the deadline may be extended by the Commission with the agreement of those having requested the exemption. Given that additional information was provided by the DCCA on 4 March 2022, the period available to the Commission for deciding on this request is hereby set to 31 July 2022.

2. LEGAL FRAMEWORK

- (7) Directive 2014/25/EU applies to the award of contracts for the pursuit of activities related to the supply of electricity to fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity, unless the activity is exempted pursuant to Article 34 of that Directive.
- (8) Pursuant to Article 34 of Directive 2014/25/EU, 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 assessed on the basis of objective criteria, taking account of the specific characteristics of the sector concerned ⁽³⁾. This assessment is, however, limited by the short deadlines applicable and by the need to rely on the information available to the Commission, which cannot be supplemented by more time-consuming methods, including, in particular, public inquiries addressed to the economic operators concerned ⁽⁴⁾. In that context, while the question of whether an activity is directly exposed to competition is to be decided on the basis of criteria that are in conformity with the TFEU provisions on competition, it is not required that those criteria should be exactly the same as those referred to in the provisions of EU competition law ⁽⁵⁾.

⁽³⁾ Directive 2014/25/EU, recital 44.

⁽⁴⁾ Ibid.

⁽⁵⁾ Judgment of 27 April 2016 in Case T-463/14, *Österreichische Post AG v. Commission*, EU:T:2016:243, paragraph 28 and recital 44 of Directive 2014/25/EU.

- (9) Access is deemed to be unrestricted if the Member State has implemented and applied the relevant Union legislation opening a given sector or a part of it to competition. That legislation is listed in Annex III to Directive 2014/25/EU. For electricity generation and wholesale, that Annex refers to Directive 2009/72/EC, repealed by Directive (EU) 2019/944 ⁽⁶⁾ with effect from 1 January 2021. According to the applicant, Denmark has transposed Directive (EU) 2019/944 ⁽⁷⁾. Consequently, pursuant to Article 34(3) of Directive 2014/25/EU, free access to the market can be presumed.
- (10) Direct exposure to competition should be evaluated on the basis of various indicators, none of which is necessarily on its own decisive. In respect of the market concerned by this Decision, market shares constitute one criterion which should be taken into account, along with other criteria, such as the competitive pressure exerted by generators from neighbouring countries or the number of bidders in tenders for renewable energy capacity.
- (11) The aim of this Decision is to establish whether the services concerned by the request are exposed to a level of competition (in markets to which access is not restricted within the meaning of Article 34 of Directive 2014/25/EU) sufficient to ensure that, also in the absence of the discipline brought about by the detailed procurement rules set out in Directive 2014/25/EU, procurement for the pursuit of the activities concerned will be carried out in a transparent, non-discriminatory manner, based on criteria allowing purchasers to identify the solution which overall is the economically most advantageous one.

3. ASSESSMENT

- (12) This Decision is based on the legal and factual situation as of September 2021, as apparent from the information submitted by the applicant and publicly available information.

3.1. UNRESTRICTED ACCESS TO THE MARKET

- (13) Access to a market is deemed to be unrestricted if the Member State concerned has implemented and applied the relevant Union legislation opening a given sector or a part of it to competition. Denmark has transposed Directive (EU) 2019/944 through 29 national measures, according to the applicant. This was confirmed by the Danish Energy Agency ⁽⁸⁾. Therefore, the Commission considers that the conditions for free market access *de jure* are met.
- (14) As far as free access *de facto* is concerned, the Commission notes the progress of liberalisation of the Danish electricity generation market since its opening up to competition in 1999. The participation of Denmark in the Nord pool power exchange and the development of interconnection capacities have played a significant role in fostering competitive pressure. Concerning generation from renewable sources, in particular offshore wind farms, tenders organised by the Danish authorities have attracted an increasing number of participants.
- (15) The Commission concludes that access to the market is to be considered *de jure* and *de facto* free on the territory of Denmark for the purposes of this Decision.

⁽⁶⁾ 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).

⁽⁷⁾ This is without prejudice to the Commission's assessment of the transposition of this Directive in Denmark.

⁽⁸⁾ See p. 28 of the application.

3.2. COMPETITIVE ASSESSMENT

3.2.1. PRODUCT MARKET DEFINITION

- (16) According to Commission merger practice ⁽⁹⁾, the following relevant product markets could be distinguished in the electricity sector: (i) generation and wholesale supply; (ii) transmission; (iii) distribution; and (iv) retail supply. While some of these markets may be further subdivided, to date previous Commission practice ⁽¹⁰⁾ rejected a distinction between an electricity generation market and a wholesale supply market since generation as such is only a first step in the value chain, but electricity volumes generated are marketed via the wholesale market. This has been confirmed for the Nordics more specifically ⁽¹¹⁾.
- (17) In its merger practice, the Commission has, moreover, considered that the relevant product market in the Nordic region covered electricity sold both by means of bilateral contracts and on the Nord Pool platform, both on Elspot (day-ahead) and Elbas (intra-day) ⁽¹²⁾.
- (18) The applicant argues that corporate Power Purchase Agreements (cPPAs) should be included in the scope of the relevant market. Such agreements are bilateral contracts between an electricity generator and a customer (usually a large electricity user) by which the user purchases electricity directly from the generator. Trading companies enter into Power Purchase Agreements (PPAs) with producers of both conventional and renewable power, competing for the conclusion of PPAs.
- (19) As for other bilateral transactions, customers entering into PPAs must enter into an agreement with a balance responsible party to manage their imbalances. Concerning balancing of generation/production, power generators (such as owners of offshore windfarms) have to match their forecasted electricity production in real time, i.e. adapting the forecasted production with the actual production. This responsibility is not affected by how the generator chooses to sell the electricity produced, including by cPPAs.
- (20) With regard to whether conventional and renewable electricity belong to the same product market, the Commission has come to different conclusions depending on the factual situation. It found that conventional and renewable electricity generation in Germany ⁽¹³⁾ and Italy ⁽¹⁴⁾ should be considered as different product markets.
- (21) However, in the case of the Netherlands ⁽¹⁵⁾, the Commission found that generation and wholesale supply of electricity from conventional and renewable sources was part of the same relevant product market. For the Nordic region, the Commission has in its merger practice considered the source of the electricity to be irrelevant for product definition purposes ⁽¹⁶⁾.
- (22) The applicant argues that the situation in Denmark differs from that in Germany and Italy referred to in the above decision, and is similar to that at issue in the Netherlands. The applicant provided tables detailing the similarities and differences between the Danish and, respectively, German, Italian and Dutch cases. The applicant points out that the main differences with the German and Italian situations are the absence of statutory rate of remuneration, the absence of feed-in priority and the fact that renewable electricity is sold on the wholesale market at the same price as conventional electricity.

⁽⁹⁾ Case COMP/M.4110 – E.ON/ENDESA, of 25.4.2006, paragraph 10, p. 3.

⁽¹⁰⁾ Case COMP/M.3696 – E.ON/MOL, of 21.1.2005, paragraph 223, Case COMP/M.5467 – RWE/ESSENT, of 23.6.2009, paragraph 23.

⁽¹¹⁾ See case M.8660 Fortum/Uniper of 15 June 2018, paragraph 18. See also COMP/M.7927 – EPH/ENEL/SE, paras 9-12; COMP/M.6984 – EPH/Stredoslovenska Energetika, para. 15; M.3268 – Sydkraft/Granninge, paras 19-20.

⁽¹²⁾ See case M.8660 Fortum/Uniper of 15 June 2018, paragraph 18. See also COMP/M.7927 – EPH/ENEL/SE, paras 9-12; COMP/M.6984 – EPH/Stredoslovenska Energetika, para. 15; M.3268 – Sydkraft/Granninge, paras 19-20.

⁽¹³⁾ OJ L 114, 26.4.2012, p. 21, paras 36-40.

⁽¹⁴⁾ OJ L 271, 5.10.2012, p. 4, paras 46-50.

⁽¹⁵⁾ OJ L 12, 17.1.2018, p. 53, paras 19-23.

⁽¹⁶⁾ See case M.8660 Fortum/Uniper of 15 June 2018, paragraph 18.

- (23) In its merger decision Fortum/Uniper ⁽¹⁷⁾, the Commission recalled that the relevant product market in the Nordic region covered both generation and wholesale of electricity, irrespective of generation sources and trading channels, and that it comprised electricity sold by means of bilateral contracts and on the Nordic power exchange, Nord Pool.
- (24) Concerning electricity produced from renewable sources, the request covers the Horns Rev 3, Vesterhav Syd, Vesterhav Nord and Kriegers Flak offshore windfarms, as well as the wind farms to come, including the Thor offshore windfarm. All of the concerned support schemes were subject to Commission decisions confirming their compatibility with EU State aid rules ⁽¹⁸⁾.
- (25) Moreover, the premiums paid out for wind production have decreased to a minimum thanks to increased competition for generation. For all of the abovementioned windfarms, the Danish Energy Agency organised an open tender for generation of electricity from renewable sources. The Horns Rev 3 (400 MW), held in 2015, had four bidders, the Kriegers Flak (600 MW), held in 2016, seven and the Vesterhav Nord/Sud (350 MW), held in 2016, three.
- (26) Risk hedging is being carried out prior to the tendering procedures, and the Danish authorities now have a better understanding of the market and have established a real market dialogue.
- (27) The total costs of renewable technologies such as offshore wind turbines or solar photovoltaic have also significantly declined. Consequently, the winning bid in 2010 for Anholt Offshore Wind Farm was a premium of 105 øre/kWh while the winning bid in 2016 for Kriegers Flak Offshore Wind Farm was a premium of 37 øre/kWh.
- (28) Denmark also intends to launch three new large-scale offshore windfarms. The first offshore wind farm shall have a capacity of approximately 800 MW, while the remaining offshore wind farms shall have a capacity of at least 800 MW. The Danish Energy Agency will call for bids in tender schemes for each future offshore windfarm.
- (29) As it did in its exemption Commission Implementing Decision (EU) 2018/71 ⁽¹⁹⁾ concerning electricity generation and wholesale in the Netherlands, the Commission notes that the allocation of the subsidies is exposed to competition through a bidding process which disciplines the behaviour of renewable electricity producers with regard to their procurement policy. This places conventional and renewable (for those offshore windfarms subject to the request) electricity generation on an equal footing in Denmark.
- (30) For the purposes of evaluating the conditions laid down in Article 34(1) of Directive 2014/25/EU and without prejudice to the application of competition law, the Commission considers that the relevant product market is the market for generation and wholesale supply of electricity, including cPPAs, produced from conventional as well as from offshore wind farms that are subject to the application for exemption.

⁽¹⁷⁾ See cases M.8660 Fortum/Uniper of 15 June 2018, paragraph 18, as well as cases COMP/M.7927 – EPH/ENEL/SE, paras 9-12; COMP/M.6984 – EPH/Stredoslovenska Energetika, para. 15; M.3268 – Sydkraft/Gräninge, paras 19-20.

⁽¹⁸⁾ Cases SA.40305, SA.43751, SA.45974 and SA.57858.

⁽¹⁹⁾ See paragraph 21 of Commission Implementing Decision (EU) 2018/71 of 12 December 2017 exempting the production and wholesale of electricity in the Netherlands from the application 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 sector and repealing Directive 2004/17/EC, (OJ L 12, 17.1.2018, p. 53).

3.2.2. GEOGRAPHIC MARKET DEFINITION

- (31) In 2006, the Commission has in a merger decision defined ⁽²⁰⁾ two separate geographic markets for electricity wholesale: that of East Denmark ('DK2') and that of West Denmark ('DK1'), as at the time there was no direct interconnection between the two Danish bidding (or price) areas. The Commission reached the same conclusion in the *DE/DK Interconnector* decision in 2018 ⁽²¹⁾.
- (32) In 2014, the Danish Competition Council investigated the market for generation and wholesale of electricity in Denmark in its Virtual Power Plant ('VPP') decision ⁽²²⁾. By that decision, the Danish Competition Council repealed previous commitments entered into by Elsam A/S in a merger between Elsam A/S and Nesa A/S in 2004. The Danish Competition Council partly supported a larger geographical market than DK1. DK1 is connected to Norway, Sweden and Germany through transmission connections. The wholesale price for physical electricity in DK1 was different from all of the connected price zones in less than 10 % of the hours during 2013. In most hours, DK1 had a wholesale price equal to at least one of the connected price zones, which supported a wider geographical market than Western Denmark. However, it was left open, whether there was a wider geographical market than Western Denmark. In 2019, the Danish Competition Council ⁽²³⁾ indicated that the market for generation and wholesale of electricity was national in scope, but left the question open of whether to define either a broader or a narrower geographical market definition. This conclusion was based on the following precedent cases: 1) the *M.8660 Fortum/Uniper* decision in which the Commission concluded on the existence of a national market in Sweden, 2) the *M.3268 Sydkraft and Grønting* decision in which the Commission found that Sweden only constituted a separate market from Finland and Denmark in an insignificant number of hours, which indicated that the wholesale market for electricity was broader than national in scope, and 3) the Danish Competition Council's *VPP decision* in which it found indications of a larger geographical market than DK1 due to developments within the market for generation and wholesale of electricity in Denmark. Interconnection capacity between Denmark and neighbouring countries has been significantly expanded since 2006. Notably, the Skagerrak (with Norway), Kontiskan (with Sweden) and Kontek (with Germany) interconnectors have been put in service or expanded. The Cobra cable (with the Netherlands) was commissioned in 2019. Within Denmark, the Great Belt now connects Western and Eastern Denmark.
- (33) Evidence provided by the applicant ⁽²⁴⁾ shows increasing price correlation between Eastern and Western Denmark, as well as with neighbouring price zones of Sweden, Norway and Germany (SE3, SE4, NO2 and DE). For instance, DK1 had the same price as one of the other areas (DK2, SE3, SE4, NO2 and DE) for 91,7 % in 2013 and 96,3 % in 2018; for DK2, the figures were 97,8 % in 2013 and 98,6 % in 2018. Conversely, the hours during which the DK1 area had a different price from the other areas dropped from 8,3 % to 3,7 % from 2013 to 2018; for DK2, the percentage dropped from 2,2 % to 1,4 %.
- (34) According to Energinet, Denmark has a very large capacity on the interconnectors to its neighbouring countries, equalling approximately 90 % of its domestic peak demand. The close integration with Denmark's neighbouring countries implies that Denmark only has a separate spot market price for electricity during approximately 10 % of the time. In the remaining time, the wholesale price is common with either Norway, Sweden or Germany.
- (35) In 2019, the international connection between Eastern Denmark (DK2) and Germany has an available trading capacity of 90 % of the total capacity of the interconnector in the export direction, and of 95 % in the import direction. The remaining foreign connections had an available trading capacity in the export direction of between 60 and 88 % of the total capacity of the interconnector. Trading capacity was lower between Western Denmark

⁽²⁰⁾ Commission Decision 2007/353/EC of 14 March 2006 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (Case COMP/M.3868 – DONG/Elsam/Energi E2) (OJ L 133, 25.5.2007, p. 24), paragraphs 258-260.

⁽²¹⁾ Summary of Commission Decision of 7 December 2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.40461 – DK/DE Interconnector) (OJ C 58, 14.2.2019, p. 7), paragraphs 49-50.

⁽²²⁾ Danish Competition Council, DONG Energys anmodning om ophævelse af VPP tilsagn, 2014: <https://www.kfst.dk/media/13295/20140528-ikkefortrolig-afgoerelse-dong.pdf>

⁽²³⁾ Danish Competition Council's decision of 25 June 2019; <https://www.kfst.dk/media/54483/20190625-fusion-se-energi.pdf>

⁽²⁴⁾ See application, paras 94 to 97.

(DK1) and Norway and Sweden in 2019 compared to 2018. On the other hand, trading capacity against Germany was higher for both Danish bidding areas. The Cobra connection has had an available trading capacity in the export and import direction of 87 % of the total capacity of the interconnector in 2019.

- (36) The Commission observes the existence of pricing constraints on both zones from the outside: DK1 has the same prices as other areas 89,3 % of hours, and DK2 for 98,4 % of the hours. For reference, in paragraph 28 of the *Fortum/Uniper* merger decision, the Commission concluded that the four Swedish bidding zones formed a single geographic market because they had a common price for 89,7 % of hours. The Commission also notes that, according to the applicant, the four largest players with market shares higher than 10 % are present in both DK1 and DK2.
- (37) For the purposes of evaluating the conditions laid down in Article 34(1) of Directive 2014/25/EU and without prejudice to the application of competition law, the Commission considers that the relevant geographic market for generation and wholesale supply of electricity, including cPPAs, produced from conventional as well as from those renewable sources that are subject to the application can be left open, either in the case of a separate market for DK1 and DK2 or in the case of a single national Danish market.

3.2.3. MARKET ANALYSIS

- (38) All market shares calculations and indications related to the share of electricity generation are based on input from the applicant.
- (39) In its analysis, the Commission takes account of several factors. While market shares are an important aspect, the competitive pressure exerted by generators from neighbouring countries and the number of bidders in tenders for renewable energy capacity are also taken into account.
- (40) On the electricity generation and wholesale market in Denmark, there are at present three main market players subject to public procurement rules pursuant to Directive 2014/25/EU. They are Ørsted A/S (hereinafter Ørsted) (50,1 % owned by the Danish state), the Danish subsidiary of Vattenfall, Vattenfall AB) (hereinafter Vattenfall) (100 % owned by the Swedish state) and HOFOR Energiproduktion A/S (hereinafter HOFOR), ultimately owned by the municipality of Copenhagen.
- (41) There are currently 18 Danish companies trading on Nord Pool. A majority of these companies, such as Danske Commodities and Centrica Energy Trading, are not public undertakings according to Directive 2014/25/EU.
- (42) In 2018 and 2019, Ørsted's market share on the combined market DK1-DK2 (in terms of generation) was [20 to 30]% and [10 to 20]% respectively, Vattenfall's market share was [5 to 10]% and [10 to 20]% and HOFOR's market share was [0 to 5]% and [0 to 5]%. The larger competitors of these companies, which are not covered by public procurement rules, are Vindenergi Danmark ([40 to 50]% and [40 to 50]% market shares) and Energi Danmark ([10 to 20]% and [10 to 20]%). The market shares on the DK1 and DK2 markets were broadly in the same range (Ørsted [20 to 30]% in DK1 and [10 to 20] % in DK2 in 2018, [20 to 30]% in DK1 and [10 to 20]% in DK2 in 2019, Vattenfall [5 to 10]% in DK1 and [0 to 5]% in DK2 in 2018, [10 to 20]% in DK1 and [0 to 5]% in DK2 in 2019, HOFOR [0 to 5]% in DK1 and [5 to 10]% in DK2 in 2019). If the relevant geographic market is wider than Denmark, these market shares would be smaller.
- (43) Imports and exports are a very significant feature of the Danish electricity market. In 2018 and 2019, electricity consumption stood at around 33,5 TWh. Imports represented approximately 45,6 % of total consumption in 2018, while national production covered 41 % of the consumption in 2018 and 48 % in 2019. Exports are also significant, as they stood at 73 % and 62 % of Danish electricity production in 2018 and 2019.
- (44) This shows the magnitude of the integration of the Danish electricity market into a wider geographic market and, as a result, the competitive pressure exerted by electricity generators from, most importantly but not exclusively, neighbouring countries on Danish producers via cross-borders interconnectors.

- (45) Concerning wholesale spot prices, Nordic prices are set on the Nord Pool exchange. The average hourly price in the spot market for DK1 and DK2 was respectively 38,50 and 39,84 EUR/MWh in 2019, which is a decrease of 13 % in both areas from 2018. The system price was 38,94 EUR/MWh in 2019. The price of the Nordic system is the fictitious spot price that would have occurred if the whole Nordic region was one bidding area. DK1 generally has lower prices than DK2 due to the relatively large installed wind turbine capacity in DK1, which helps push prices down. The average spot price in 2019 was 39,28 EUR/MWh in Norway, 37,68 EUR/MWh in Germany and 38,79 EUR/MWh in Sweden, very similar to the price in DK1 and DK2.
- (46) In Denmark, approximately 6 percent of electricity is traded in the single European intra-day market Xbid. The intraday market is based on continuous trading with trades made pay-as-bid as opposed to the day ahead market, which is auction-based with a single clearing price. The intraday market is used to adjust consumption and production plans with regard to i.a. restoring portfolio balances. This means that the price in the intraday market for each hour will start at the spot price and then move up or down if there are unforeseen events during the trading window. The annual average price for the intraday market in DK1 was 35,1 EUR/MWh in 2019. In DK2, it was 36,7 EUR/MWh. In 2018, the average price in DK1 was 40,4 EUR/MWh and 41,9 EUR/MWh in DK2.
- (47) Further calculations included in the application ⁽²⁵⁾ show that prices in DK1 and DK2 are the same as one or more neighbouring price zones a vast majority of the time. In 2018 and 2019, prices in DK1 were the same as in another pricing area of the region (DK2, SE3, SE4, NO2 and DE) 94,8 % and 96,3 % of the time; prices in DK2 were the same as in another pricing area of the region (DK1, SE3, SE4, NO2 and DE) 98,8 % and 98,6 % of the time. In addition, the correlation between the two Danish zones and the Nordic system and German wholesale price is rather high, ranging between 64 % and 83 % over the 2017-2018 period.
- (48) Denmark has a very large capacity on the interconnectors to its neighbouring countries, equalling approximately 90 % of its domestic peak demand. The close integration with Denmark's neighbouring countries implies that Denmark only has a separate spot market price for electricity in DK1 and DK2 in approximately 10 % of the time. In the remaining time, the wholesale price in DK1 and DK2 is common with either Norway, Sweden or Germany.
- (49) The Commission considers that these elements show a very strong convergence of electricity prices in Denmark with the prices in the countries of the Nordic region and in Germany.

3.2.4. CONCLUSION

- (50) Contracting entities hold a limited market share on the electricity generation and wholesale market in Denmark subject to the request.
- (51) The high level of electricity imports and exports compared to Danish electricity generation, combined with the interconnection capacity with neighbouring countries, shows that the electricity and wholesale market in Denmark is largely integrated into a wider, transnational market. Even if the geographical market is not necessarily transnational, electricity imports to Denmark in any case exert competitive pressure on the Danish electricity wholesale prices during a significant number of hours each year.
- (52) This is further confirmed by the data provided by the applicant on wholesale prices, which demonstrates that the Danish prices are very similar to Nordpool-wide prices and prices in Germany.
- (53) The aim of the present Decision is to establish whether the activities of generation and wholesale of electricity are exposed to such a level of competition (on markets to which access is free) that this will ensure that, also in the absence of the discipline brought about by the detailed procurement rules set out in Directive 2014/25/EU, the procurement for the pursuit of the activities concerned will be carried out in a transparent, non-discriminatory manner, based on criteria allowing the contracting entity to identify the solution which overall is the economically most advantageous.

⁽²⁵⁾ See application para. 95.

- (54) In view of the factors examined above, the Commission can conclude that the activity of electricity generation and wholesale from conventional sources and from offshore wind farms subject to a tendering procedure in Denmark is directly exposed to competition on a market to which access is not restricted, within the meaning of Article 34(1) of Directive 2014/25/EU.

4. CONCLUSION

- (55) For the purposes of this Decision and without prejudice to the application of competition law, it follows from recitals 11 to 53 that the generation and wholesale of electricity from conventional sources and from offshore wind farms subject to a tendering procedure in Denmark is exposed to competition on a market to which access is not restricted, within the meaning of Article 34 of the Directive 2014/25/EU. Consequently, Directive 2014/25/EU should not continue to apply to contracts intended to enable the pursuit of that activity in Denmark.
- (56) Directive 2014/25/EU should continue to apply to contracts intended to enable the pursuit of activities which are specifically excluded from the request.
- (57) This Decision is based on the legal and factual situation as of October 2021 to March 2022 as it appears from the information submitted by the applicants. It may be revised, should the conditions for the applicability of Article 34 of Directive 2014/25/EU no longer be met, following significant changes in the legal or factual situation.
- (58) It is recalled that Article 16 of Directive 2014/23/EU ⁽²⁶⁾ 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 that Directive. Since it was concluded that the activity of production and wholesale of electricity subject to the request is exposed to competition on a market to which access is not restricted, concession contracts intended to enable the performance of those activities in Denmark will be excluded from the field of application of Directive 2014/23/EU.
- (59) The measures provided for in this Decision are in accordance with the opinion of the Advisory Committee for Public Contracts,

HAS ADOPTED THIS DECISION:

Sole Article

Directive 2014/25/EU shall not apply to contracts awarded by contracting entities and intended to enable the electricity generation and wholesale from conventional and renewable sources in Denmark, covered by the request made pursuant to Article 35(1) of Directive 2014/25/EU.

This Decision is addressed to the Kingdom of Denmark.

Done at Brussels, 26 July 2022.

For the Commission
Thierry BRETON
Member of the Commission

⁽²⁶⁾ 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).