# 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)

## 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').

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(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.

(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

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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.

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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 Energitilsynet (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 Energitilsynet:

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, Energitilsynet 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’).

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(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