EUROPEAN COMMISSION

Brussels, 05.06.2013
C(2013) 3203 final

PUBLIC VERSION

This document is made available for information purposes only.

Subject: State aid SA.32184 (2013/C) (ex 2013/NN) – Denmark
Alleged aid to an electricity supplier

State aid SA.32669 (2013/C) (ex 2013/NN) – Denmark
Aid granted to CHP plants and an electricity supplier which affect the market for regulating power

Sir,

The Commission wishes to inform Denmark that, having examined the information supplied by them on the measures referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU).

1. PROCEDURE

1. 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), registered under case number SA.32669, raising concerns about allegedly unlawful state aid granted to decentralised CHP plants (DCHPs) and Dong Energy a/s. Further information was received on 6 April 2011, 24 June 2011, 11 July 2011, 2 August 2011, 12 and 13 September 2011, 3 and 5 October 2011, 28 March 2012 and 30 April 2012.

2. On 3 May 2012, the complainant in case SA.32669 was informed about the preliminary view that on the basis of the information submitted no unlawful State aid appeared to be involved. Subsequently, the complainant submitted information on 14 May 2012, 12 September 2012, 13 and 27 November 2012. On 15 March 2013 the complainant sent a

Udenrigsminister Villy Søvndal
Asiatisk Plads 2
DK-1448 København K

letter asking for a Commission decision within 2 months by reference to Article 265 TFEU.

3. By electronic submission dated 29 January 2011 and registered under case number SA.32184, the Commission received a complaint from Smørum Kraftvarme raising concerns about alleged state aid granted to Dong Energy. A further exchange took place by letters of 7 February 2011, 4, 25 and 28 March 2011 and 12 and 13 January 2012.

4. The correspondence concerning both the complaint registered under case number SA.32184 and under case number SA.32669 was sent to Denmark for comments on 14 April 2011 and 5 January 2012. Denmark responded on 17 June 2011 and 14 February 2012 respectively.

2. DESCRIPTION

5. In this section State aid measure N 602/2004[1], the complaints and the views of Denmark are described.

2.1. State aid measure N 602/2004

6. On 9 November 2005, the Commission approved 6 State aid measures in Denmark concerning support to (i) energy production from wind power, (ii) energy production from renewable energy production other than wind power and (iii) energy production from CHP plants. The decision was registered under reference N602/2004 (COM(2005)3910, "the Decision N602/2004").

7. Denmark notified these measures following a reorganisation of system-responsible and transmission companies in the Danish energy market. The approved measures in favour of decentralised CHPs which are covered by the Act on Energy Supply can be summarised as follows:

   a. Very small CHPs (< 5MW): Continued right to receive a fixed price (three step tariff), but the option to change to basic amount (price supplement).

   b. Smaller CHPs (< 10 MW): Transitional period until end of 2006 and then obligation to switch to basic amount.

   c. Large CHPs: Transitional period until end of 2004 and then obligation to switch to basic amount.

8. Denmark confirmed that all CHPs 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 these calculations, the support would cover at most 87 % of the extra costs (for decentralised CHPs). Also calculations were provided showing that the support would not exceed the depreciation plus a fair return on capital.

9. The aid was subsequently approved[2] on the basis of the 2001 Environmental Aid Guidelines[3] and especially section E.3.3.1 thereof. In particular the Commission considered that only the difference between the production costs of the environmental friendly energy concerned and the market price of the conventional form of power

[1] OJ C/21/2006

[2] The Commission considered that it was not necessary to take a position on whether or not the means of financing the scheme constituted State resources in view of its compatibility.

[3] OJ C/37/2001

concerned can be compensated. On the basis of the information provided, the Commission concluded in the Decision N602/2004 that the beneficiaries would not be overcompensated.

2.2. The complaint SA.32669

Alleged aid to DCHPs

10. As from 1 February 2007, the Danish Transmission System Operator (TSO), Energinet.dk, changed in west Denmark the bidding set-up for the regulating power market which aims of securing a supply of adequate regulation or reserve power. Suppliers wanting to participate in the regulating power market were no longer obliged to issue bids for the following month, but were instead obliged to issue bids per hour for the following day. This amendment made it much easier for DCHPs to enter the regulating power market. Before February 2007 hardly any DCHP could enter this market, because generally technical improvements were required to their production facilities and DCHPs would not make bids with a commitment period as long as one month. It is easier for DCHPs to forecast only one day ahead.

11. The complainant submitted that Denmark should have, therefore, re-notified the aid scheme N602/2004 in view the possibility for DCHPs plants to enter the market of regulating power since 2007. Allegedly, the possibility for DCHPs to participate on the regulating power market improved the economic situation of DCHPs and would make the aid scheme incompatible.

12. The complainant emphasized that the complaint is about DCHPs now being able to participate in a market for regulating power in which they could not be involved without the aid (as they could not exist without the aid). This is apparently seriously damaging regulating power suppliers that do not receive State aid.

13. In particular, the complainant submitted that the aid granted on the basis of the approved State aid scheme N602/2004 does not take into account the income earned in the regulating power market (as the approval pre-dates the change in the bidding process). In this respect, the complainant refers to the relevant Commission decision which states[4] that any change in the conditions under which the support is granted should be notified to the Commission in advance. The complainant's view is that the wording should be interpreted as referring to any relevant change to the legal, physical and economic conditions identified as relevant for the aid.

14. The complainant alleges that the Commission must examine whether the conditions prevailing at the time of Commission's approval have fundamentally changed. Furthermore, the complainant claimed that an obligation to notify cannot only be assumed in cases where new aid or altered aid is provided as a result of an amendment of the legislation authorizing the aid (or the formula for calculating the aid), but also when a Member State opens a new market for aid recipients. Accordingly, the complainant argues that the opening of a new market for DCHPs should have been notified even if it did not constitute new aid.

[4] It is referred to the wording of section 5 in Decision N602/2004.

15. Alternatively, the complainant argued that the `Namur-les assurances du credit SA´ case law (hereafter: "Namur case")[5] may be interpreted so as to find that new aid is involved in the case at hand (hereafter: "BRD case").

16. In the Namur case aid was provided within one and the same market for providing the same services for the same purpose. According to the complainant, the fact that in the Namur-case the Court made reference to the fact that the *purpose and areas of operation* of the Office National du Ducroire (i.e., the beneficiary in the Namur case) had not been changed, suggests that also the modification of the legal nature or of the activity of the aid beneficiary might imply a modification of the classification of the measure from existing to new aid.

17. In particular, the complainant raises observations highlighting the differences between the Namur case and the BRD case. While in the Namur case the legislation was amended leading to a quantitative increase of the amount of aid if the recipient increased its commercial activities in the same market, in the BRD case the aid scheme remained unchanged but the beneficiaries of the scheme got access to another market by governmental decree which could, according to the complainant, crowd out competitors.

18. The complainant argues that in the BRD-case two separate markets serving two separate purposes are involved. The aid recipients started to participate in a new market (i.e. the market for regulating power), while the purpose of the State aid was the protection of the environment. This would, according to the complainant, already constitute an abuse of aid[6].

19. Furthermore[7], the complainant submitted the following arguments in support of its claim that notifiable new aid was involved:

    - In the Namur case the Court only answered the questions it was asked, i.e. if new aid or an amendment of an existing aid had taken place which would necessitate notification. The question whether access to a new market constitutes new aid was not answered and according to the complainant it can be argued that access for DCHPs to the hourly market for regulating power constitutes new aid.
    - Even if the access for DCHPs to a new market may not be qualified as new aid, that access constitutes a significant amendment to the aid scheme approved by the Decision N602/2004, to the benefit of the DCHPs and to the detriment of competitors that should have been notified.
    - As a consequence of a lack of notification the Commission did not have the possibility to review the effect brought about by allowing DCHPs to participate in the hourly market for regulating power on the operators already present in that market .
    - In case of doubt notification should always be made.

---

5 C-44/93 Namur-Les-assurances du Credit SA v Office National du Ducroire and the Belgian State,]1994] ECR I-3829.

6 It follows from Art. 16 of Regulation 659/99 on the misuse of aid that, in order to determine the existence of misuse of an approved scheme the Commission shall initiate the formal investigation procedure in Art. 4 (4) of the Regulation.

7 The complainant also pointed to the fact that in the Namur-case (cf. para. 20) the Commission was of the view that an amendment brought about by increasing the area of activity of the aid recipients could not be seen to be an insignificant amendment to the existing aid scheme as it permitted the aid recipient in the Namur case (Office National du Ducroire) to compete with private competitors without giving up its special rights.

20. The complainant alleged that upon notification the Commission would not have accepted that DCHPs could participate in the regulating power market (had it known about it at the time of approving the aid) since it would seriously damage providers of reserve power that had entered that market at the instigation of the State (the TSO) with the aim of securing electricity supply. The complainant claimed that due to the change in the bidding set-up, the balancing principle the Commission has to apply in all State aid cases, including in the decision N 602/2004, can no longer be deemed positive.

21. In this respect, the complainant submitted figures to demonstrate that the participation of DCHPs in the regulating power market (hourly bids), not only causes a distortion of that market, but allegedly crowds out competitors in that market. In particular the complainant submitted that the yearly average price before 2007 was about DKK 60/MWh, whereas the yearly average price in 2009 was DKK 15/MWh.

22. The complainant added that the State (the TSO) itself controls and regulates the regulating power market. It would be difficult to conclude that the Danish State (i.e. the TSO) was unaware at the time the State aid was approved that the opening of the hourly market to DCHPs would cause significant distortive effects. The fact that the TSO obtains financial benefits with regard to the price it pays for regulating power cannot justify State aid.

23. As regards the calculation of possible overcompensation as submitted by Denmark and forwarded to the complainant on 3 May 2012, the complainant stated that it is unable to appraise the correctness and relevance of the figures presented. In any case, the complainant believes a true and fair exploration of this matter would only be possible by making a comparison of income between DCHPs operating at the regulating power market with income in a similar group of DCHPs staying out of this market.

24. However, in light of the severe negative impact of the measure on the price setting mechanism of the regulating power market the intensity of the aid to DCHPs, whether it is above or below 100%, is of less importance for the complainant as the market has allegedly been eroded substantially.

Alleged aid to Dong Energy A/S

25. The complainant further submitted that in eastern Denmark, the TSO concluded in 2010 an agreement for regulating power with Dong Energy[8] for the period 1.1.2011-31.12.2015 for a price of EUR 25 million per year for a reserve of 675 MW[9]. Furthermore, in September 2010, a new power connection "the Great Belt" with a capacity of 600 MW entered into use connecting east and west Denmark[10].

26. The complaint alleges that the contract between the TSO and Dong Energy confers an advantage to the latter as the contract was not concluded on market terms. Moreover, the reservation of the Great Belt connection is discriminatory benefitting exclusively Dong Energy and having a negative effect on regulating power providers in west Denmark.

---

8 The Danish State owns 76% of Dong Energy, 24% is owned by private companies.

9 It is added that out of those 600 MW only 300 MW are available within 15 minutes which is the standard requirement for short term reserve power. The other 300 MW take 90-120 minutes to activate. In parallel the TSO entered into an agreement with the Swedish TSO, Svenska Kraftnät, for a mutual reserve capacity of additional 300 MW, which can be activated within 15 minutes.

10 According to the complainant, the Great Belt connection is intended to lead power from west Denmark (DK1) to east Denmark (DK2) in 80 % of the time as a result of the market conditions implying a general surplus of power in DK1 compared with DK2.

27. The complainant notes that it will need to be determined whether the alleged State aid constitutes a use of State resources and whether the aid is imputable to the State. The complainant claims that there is a use of State funds, and that the aid can be imputed to the State, because the TSO is a fully State owned Danish operator which is controlled by the State, and the Danish State provided its basic capital.

28. The TSO calculates the regulating power east of the Great Belt to be 900MW in total[11]. In light of the total required needs of 1200 MW of available power to activate within short notice, the TSO considers the residual regulating power needed in DK2 to be 300 MW which serves as regulating power for DK1 by using the Great Belt connection[12]. According to the complainant, the halving of the DK1 regulating power market to 300 MW took place in September 2010 as the outcome of the contract concluded between the TSO and Dong Energy, two State controlled companies, and the mutual agreement with Sweden.

29. The complainant alleges that such reservation of the Great Belt connection cannot be considered non-discriminatory and in this way reserve power companies in DK2 (i.e. Dong Energy) enjoy an advantage which distorts or threatens to distort competition within the internal market. As a result the income of BRD members decreased by more than 96% and for all suppliers by 90.7%.

30. The value of the 300 MW reserve power bought in DK2 for use in DK1 is not publicly known. The contract might include, beside the availability power, other services like activated power, maintenance etc. The price of the availability power covering DK1 would, according to the complainant, most likely be between EUR 15-25 million per year, but in any event the prices paid by the TSO for the purchase of reserve power from Dong Energy would exceed the market price considerably.

31. The use of a closed tender, in combination with the application of the Great Belt connection would allow for a presumption that State aid is involved and that the payment to Dong Energy constitutes an advantage that ought to be examined more thoroughly by the Commission.

32. The complainant adds that in the absence of information from the TSO to assess these criteria, the Altmark criteria or the market economy investor principle which can be used to establish whether the purchase of regulating power from Dong Energy constitutes State aid are not met either. Furthermore, the complainant alleges that Article 106 TFEU cannot justify solutions that are not necessary. Since the TSO itself can make changes, e.g. through the use of the Great Belt connection, that would make the agreement with Dong Energy superfluous without a loss of power distribution efficiency or economic disadvantages (to itself, to consumers and the general society), it cannot be argued that the solution chosen (i.e. the agreement with Dong Energy) is necessary according to Article 106 TFEU.

---

[11] This is calculated as 600 MW in DK2 from Dong Energy + 300MW from the Swedish TSO. The total regulating power required is 600 MW + 600 MW = 1200MW (DK1 and DK2))

[12] The Danish Energy Regulatory Authority's (the DERA) by decision of 2.7.2010 approved a scheme whereby the transmission of electricity through the Great Belt connection under certain conditions can be reserved for intra-day transmission of reserve power from DK2 to DK1. However, according to the information submitted in November 2012, DERA decided that the reservation should be put on hold for two years due to a lack of substantiation. However, the TSO announced that, in case of activation of reserves in DK1, it would instead reduce purchase and transfer from west to east of electricity from the wholesale market and cover the shortfall by reserve power.

33. Even presupposing that Dong Energy was not entrusted with a public service obligation in the strict sense, it would follow from general EU law that the conclusion of long term purchase contracts by public entities must take place on the basis of open, transparent and non-discriminatory procedures. This was not the case in this instance.

34. The conclusion of the 5 year long term agreement with Dong Energy would also infringe EU public procurement rules and involve State aid. The complainant[13] argued that the regulating power market is not national and, referring to the agreement with the Swedish TSO, that there is no need for a supplier of regulating power to be based in eastern Denmark. Therefore, Dong Energy was not the only possible supplier to provide such reserve power which could have justified the absence of a tender.

35. The complainant submits the TSO issued a statement via Tenders Electronic Daily that an agreement was going to be concluded. However, that publication was made in September 2010 when the TSO was already engaged in negotiations with Dong Energy[14].

36. Furthermore, according to the complainant there is an infringement of Article 37 TFEU on State monopolies of a commercial character which affects the conclusion, albeit indirectly, concerning the assessment of the existence of State aid. Denmark violated Article 37(2) TFEU by introducing a new measure which discriminates regarding the conditions under which goods are procured and marketed. This had a devastating effect on the regulating power market (hourly bids and the TSO reduced demand in DK1 applying).

37. Finally, the complainant claimed that the state-owned TSO abused its dominant position in breach of Article 102 TFEU by reserving the one way transmission through the Great Belt connection and by favouring the only supplier of reserve power in DK2, Dong Energy, to the detriment of the reserve power plants in DK1. It would seem rather obvious that the way the reservation with regard to the Great Belt transmission cable has been dealt with and decided lends itself to a presumption of such abuse.

2.3. The complaint SA.32184

38. The second complainant argues that State aid was granted to Dong Energy by way of a 5 year contract[15] signed between the Danish TSO and Dong Energy. The complainant essentially forwarded to the Commission the complaint made to the Danish Complaints Board for Public Procurement where the complainant´s view was not upheld.

---

13 The complainant brought forward these arguments in relation to a decision by the Danish Complaints Board.

14 The complainant submitted that the first contract with Dong Energy (before 1.1.2011) was not tendered according to the so-called Utilities Directive (2004/17/EC) nor was there a publication according to the so-called Telaustria-criteria (C-324/98, Telaustria, [2000] ECR I-10745; cf also the subsequent Coname judgment, C-231/03, and the interpretative communication by the Commission on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, OJ 2006/C 179/02).

15 Covering the period 31.12.2005 to 31.12.2010 and renewed in 2010 for another 5 years.

39. The claims made to the Complaints Board were that the contract should have been opened to a competitive tender in view of the Utilities Directive[16]. However, the Complaints Board did not accept this claim in view of exceptions of Article 26(b) of the Utilities Directive and Article 12 of the Procurement Directive[17] and the fact that supply facilities need to be physically located in DK2 and therefore the contract award is of no direct interest to economic operators in other Member States.

40. The complainant argued that, while in DK1 a genuine competitive regulating power market exists, in DK2 the opportunity to construct regulating power plants has been removed due to the contract signed between the TSO and Dong Energy. The renewal of the old contract, in combination with the Great Belt connection avoids the development of a competitive regulating power market in DK2 and negatively affects the market in DK1 in view of the transfer of 300 MW reserve power (see point 28).

2.4. The view of Denmark

41. In response to the allegations made by the complainants, which were forwarded to it, Denmark provided the following background information and views on the complaints.

The balancing market (reserve and regulation)

42. In a power system, electricity generation and electricity consumption must always be in balance. The Danish Transmission System Operator (TSO), Energinet.dk, is responsible for maintaining this balance.

43. In order to enable the TSO to cope with major imbalances, it concludes reserve agreements on the market for manual reserves. These agreements entail economic operators being paid a retainer in return for being available and (always) providing offers on the regulating market. This is referred to as the reserve market.

44. When a specific need to balance fluctuations in the system arises, the TSO buys up- or down-regulation on the common Nordic regulation market which includes Denmark, where operators who have concluded a reserve agreement compete on equal footing with voluntary bids submitted by domestic and foreign suppliers without reserve contracts. This is referred to as the regulation market.

45. On the reserve market, the TSO concludes agreements with operators to be available at all times and to submit bids on the regulation market. On the regulation market, the TSO buys actual regulating power (up- or down-regulation) to ensure that the system is in balance at all times. No distinction is made when reference is made in this decision to the regulating power market.

The bidding and pricing system in the market for manual reserves

46. The transmission network in Denmark is divided into two parts, west of the Great Belt (DK1) and east of the Great Belt (DK2). DK1 is connected to Germany, Norway, Sweden and DK2 by four transmission connections. DK2 is connected to DK1, Sweden and Germany by three transmission connections. A connection between DK1 and DK2 was first established in 2010 by means of the Great Belt Connection.

---

16 Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 134/1, 30.4.2004 [amended by Directive 2005/51/EC and Directive 2009/81/EC].

17 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [amended by Directive 2005/51/EC, Directive 2005/75/EC and Directive 2009/81/EC].

47. In east Denmark the TSO signed a five-year agreement with Dong Energy for the delivery of west Denmark's reserves. The agreement will run until the end of 2015 and covers 300 MW of fast reserves (15 minutes) and 375 MW of slow reserves (up to 2 hours). In addition to the delivery of manual reserves, the agreement also includes two black start options and the possible provision of voltage control.

48. In west Denmark the TSO purchases manual reserves at daily auctions which were introduced as of 1 February 2007. An auction is held once a day in the morning for each of the hours of the coming day of operation. The bids submitted must state an hour-by-hour volume (MW) and price (DKK per MW) for the following day of operation. Each bid must be for a minimum of 10 MW and a maximum of 50 MW.

49. All bids accepted receive an availability payment corresponding to the price of the highest bid accepted. The average monthly availability payment for up-regulation (additional production) in DK1 in the last few years has been approximately DKK 120/kW per year.

50. From 2004 to 2007 the reserve agreements had been concluded on a monthly basis. The purpose of the switch in the bidding system was to promote competitive pricing for delivery of services and ensure maximum flexibility in purchasing. At the same time a short commitment period would enable the TSO to adapt dynamically the purchase of manual reserves to suit current needs.

51. The reorganisation of the bidding system in 2007 contributed to a substantial drop in the availability payment for manual reserves over the years apart from the relatively large price fluctuations in 2007 and 2008.

The bidding and pricing system in the regulation market

52. Any operator is free to place bids for activation of regulating power on an hour-by-hour basis during the day of operation. Only operators with a reserve agreement are obliged to submit bids concerning those hours of operation where availability payment is received. The TSO buys regulating power according to the price of the incoming offers. The highest price accepted sets the up-regulation price for all operators supplying regulating power during that hour of operation.

53. Generally, only a minor part of the manual reserves is actually activated, either because the need for balancing the system with regulating power is limited or because the voluntary bids on the regulating market are (partly) activated instead of the manual reserves.

54. The activation price paid to the operators supplying regulating power is, in general, higher than the normal market price of electricity in Denmark as set on the Nordic Power Exchange, Nordpool. In the period 1 February 2007 - 31 March 2011 the price paid for regulating power was roughly DKK 0.11/kWh (112 DKK/MWh) higher than the normal market price (the Nordpool Elspot (day-ahead market price) - see table 1.

Year	Hours of activation of upward regulating power	Sum of "additional payment" per MWh for up-regulation compared to normal market price	Average additional payment in DKK/MWh
2007	2.993	259.277	87
2008	2.956	471.694	160
2009	2.380	203.668	86
2010	2.713	286.850	106
2011	566	77.172	136
TOTAL	**11.608**	**1.298.661**	**112**

Table 1: Regulating power price compared to normal market price
Source: Danish authorities (Common Nordic regulation market and Nordpool Elspot (day-ahead) price)

The switch from monthly to hourly based bids did not require a new notification

55. According to Denmark the switch to an hourly-based bidding system did not constitute a notifiable amendment of an existing aid scheme (i.e. new aid) for a number of reasons described below.

The existing scheme has not been changed materially

56. Denmark stressed that no subsequent substantive legislative or administrative amendment has been adopted as regards the aid regime authorised by decision N602/2004. This alone should suffice to demonstrate that no notifiable event has occurred.

57. Denmark contends that the allegedly notifiable amendment does not, in fact, constitute an amendment to an approved aid scheme. In this respect, Denmark refers both to the definition of new aid in Article 1 of the Procedural Regulation[18] ("the Procedural Regulation") and the definition of an alteration of existing aid in the Implementing Regulation[19].

58. While recognising that an Implementing Regulation is not formally binding on the European Courts when interpreting the primary rules on State aid in the Treaty, Denmark nevertheless considers that the provision provides for a threshold below which a measure cannot deemed to be an "alteration" to an approved aid scheme within the meaning of the Procedural Regulation[20].

59. As regards the reference made to the fact that decision N602/2004 states that any change in the conditions under which the support is granted should be notified to the Commission in advance (see recital 13), Denmark notes that this statement does not refer to any particular part of the reasoning in the decision and therefore pursues no specific purpose or meaning of its own and cannot be interpreted as triggering a particularly restrictive approach towards what qualifies as a notifiable amendment to an approved scheme.

[18] Council Regulation (EC) No 659/1999 of 22 March 2009 laying down detailed rules for the application of Article 93 of the EC Treaty.

[19] Commission Regulation (EC) 794/2004 of.20 April 2004 implementing Council Regulation (EC) No 659/1999.

[20] Cf., concurring in this respect, the opinion of Advocate-General Mancini in the joined cases 91 and 127/83 Heineken Brouwerijen BV v Inspecteur der Vennootschapsbelastning et. al., at paragraph 5.

60. In any event, Denmark argues that the Namur case, referring to, in particular, point 28, but also 31-33 thereof, clarified that whether a measure constitutes a notifiable amendment to an aid scheme can only be assessed with regard to the legal basis, including the limits and conditions provided for the aid[21]. In order to find out whether a measure constitutes a notifiable amendment to an aid scheme, it is of no relevance whether the measure can be imputed to a Member State or whether it complies with the market economy investor principle (MEIP).

61. Denmark noted that in the joined cases T-195/01 and T-207/01 Government of *Gibraltar* v *Commission*[22], the General Court, when distinguishing the case from the Namur case, emphasized at paragraph 114 of the judgment that notwithstanding the fact that the classification of aid as new aid or as an alteration of existing aid must be determined by reference to the provisions providing for it, although the 1978 and 1983 amendments were inserted into the original 1967 legislation, those amendments were nevertheless severable from the original scheme.

62. Therefore, according to Denmark, the crucial issue remains whether the legislative provisions or conditions provided for in the legislation have been altered in the first place[23]. In this light, Denmark reiterated that regarding the present complaint nothing has been altered in the legislation which the Commission approved.

63. In this respect, Denmark observes that it is incumbent on the Commission to explain why differences between an approved scheme and a new scheme constitute a notifiable measure[24] and even in case of a notifiable amendment it would not necessarily mean that the entire approved aid scheme is transformed into new aid[25].

64. In fact, Denmark considers that the participation in the regulating power market is no different from other changes in market structure which are brought about by the market itself, be it of a technical nature or otherwise (e.g. due to the advent of internet)[26].

65. The mere fact that an adjacent market which has previously remained closed to smaller market players is opened by an independent TSO, without involving any change of the provisions providing for aid to these smaller market players, does not constitute a notifiable event in relation to decision N602/2004. Moreover, the participation of DCHPs on the regulating power market was foreseen.

---

21 The French version of the judgment, like the Danish version, is more explicit in this respect, referring to the limits and conditions of the provisions providing for the aid: *"C'est par référence aux dispositions qui la prévoient, à leurs modalités et à leurs limites qu'une aide peut être qualifiée de nouveauté ou de modification."*

22 Joined cases T-195/01 and T-207/01 Government of Gibraltar vs Commission, (2002) ECR II-2309.

23 Cf. joined cases T-265/04, T-292/04 and T-504/04 *Tirrenia di Navigazione SpA et. al. v Commission*, where the applicant admitted at point 90 of the judgment that the legislative provisions had been changed, although only to a limited extent. Cf. also the joined cases T-231/06 and T-237/06 *Netherlands and NOS v Commission*, paragraphs 180-183 and 187.

24 Cf. joined cases T-265/04, T-292/04 and T-504/04 *Tirrenia di Navigazione SpA et. al. v Commission*, points 125-127.

25 Cf. joined cases T-195/01 and T-207/01 *Government of Gibraltar v Commission*, paragraph 111.

26 European State Aid Law", C.H. Beck, Munich 2010, in particular it is referred to paragraph 563 "*It should be noted that the case law appears to require, for classification as a relevant alteration, active intervention by the Member State, e.g. in the form of an amendment to the statutory provisions. A mere extension of the field of activity of the beneficiary, even if it has an impact on competition or on the amount of aid, is therefore not notifiable if the aid scheme itself remains unchanged. Changes in the competitive environment, without alteration of the aid measure itself, do not trigger the notification requirement*".

The participation of DCHP plants on the regulating power market was foreseen

66. Denmark stresses that in the notification of the measure approved by Commission decision N448/2003, it was explicitly stated that repealing the obligation of the TSOs to buy energy produced by DCHPs implied that the DCHPs would be able to participate not only on the Nordic wholesale energy market but also on the regulating and balancing market and to conclude agreements with the TSO to ensure balance in the electricity system. In its Decision N448/2003, the Commission decided that the notified measure did not constitute aid.

67. Due to the consolidation of the previous TSOs into the public TSO Energinet.dk (as described in detail in the Decision N602/2004), the aid measure N448/2003 was however later withdrawn by Denmark (after the Commission adopted decision N448/2003), and a revised act was adopted in 2004. The revised act included materially unaltered provisions for aid to DCHPs which the Commission had already assessed in the case N448/2003. Again, this 2004 act was notified to and approved by the Commission as compatible aid in the Decision N602/2004.

68. Therefore, according to Denmark the description of the measure initially presented in N448/2003, inter alia, the reference to DCHPs being able to compete on the regulating and balancing markets is still both applicable and relevant and must therefore be taken into account in the assessment of whether the switch to daily based hour-by-hour auctions for manual reserves was a notifiable amendment to an existing aid scheme.

69. The changes in the bidding system in 2007 concern the procurement of manual reserves in DK1 only where some DCHPs already participated from 2005. The terms and conditions on the regulating market remained unaltered. On the common Nordic regulating market an hour-by-hour bidding system has existed since the market was opened in September 2002.

The changed market conditions cannot be imputed to the Danish State

70. According to Denmark, the decision of the TSO to change the market conditions, cannot be imputed to the Danish State and therefore fails to fulfil all the criteria of Article 107(1) of the Treaty to constitute State aid. With reference to the *Stardust Marine* case[27], Denmark argues that even if the State is in a position to control a public undertaking and to exercise a dominant influence over its operations, actual exercise of that control in a particular case cannot be automatically presumed.

71. Subsequently, Denmark submits that the relevant criteria as held in that ruling are i.a.:

- whether the undertaking could take the contested decision without taking account of the requirements of the public authorities,
- the integration of the undertaking into the structures of the public administration,
- the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators,
- the legal status of the undertaking (in the sense of its being subject to public law or ordinary company law),
- the intensity of the supervision exercised by the public authorities over the management of the undertaking, or
- any other indicator showing, in the particular case, an involvement by the public

[27] Case C-482/99 *France v Commission (StardustMarine),* paragraph 52.

authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it contains.

72. The TSO is an independent public undertaking primarily governed by private law but certain general provisions of public law are also applicable. It was formally established by an Act of Parliament no. 1384 of 20 December 2004. The TSO falls under the responsibility of the Minister for Climate, Energy, and Building, cf. section 20 of the Act, who was also in charge of drafting the Articles of Association of the TSO.

73. The day-to-day business is run by a management appointed by the board of directors, who informs the responsible Minister. The Minister may appoint 8 out of the 11 members of the board, including the chairman. The Minister may take any decision regarding the business of Energinet.dk and exercise his powers on a written basis and through the Articles of Association.

74. Denmark submits that in this particular case, the responsible Minister has not been involved in any way in the decision taken by the TSO to transform the structure of the market. In contrast to the Namur case where the relevant ministers had been involved in the decision making, the Danish Government had not played any part in the decision to modify the regulating power market from a monthly-based to an hourly-based market.

75. According to Denmark, the mere fact that the Minister has certain powers of oversight over the TSO does not mean that the TSO´s actions can generally be imputed to the State[28]. The fact that Energinet.dk manages the markets for which it has responsibility does not mean that such funding, including the basic amount approved by decision N602/2004, yet again constitutes State resources within the meaning of article 107(1) TFEU[29]. There are, in fact, no State resources disbursed at all with regard to the change from a monthly-based market to an hourly-based market.

76. Furthermore, there is no connection between the fact that the TSO decided to open the market for regulating power and the fact that DCHPs receive aid within the framework of aid scheme N602/2004.

The implications of the switch on the aid levels granted under existing aid scheme

77. DCHP plants are benefitting from support either by way of a three-part tariff where the TSO pays a fixed price to DCHPs or by a basic amount, a price supplement, where DCHPs sell electricity under normal market conditions in competition with other operators on the electricity market. The latest changes were approved by Commission decision N602/2004[30].

78. In addition, DCHPs receive an electricity production grant, which compensates for extra costs related to environmentally friendly electricity production, e.g. the general CO2 tax levied on all electricity production in Denmark. The electricity production grant has been approved by the Commission latest in decision N567/2007[31].

---

28 Cf., *inter alia*, Commission decision 2009/608/EC of 24 April 2007 relating to the aid measure implemented by Belgium in support of Inter Ferry Boats (C 46/05 (ex NN 9/04 and ex N 55/05)), OJ 2009 L 225/1, at paragraphs 199-234, particularly paragraphs 208 and 210.

29 See, by analogy, case C-345/02 *Pearle NV*, at paragraph 34.

30 See also cases N1073/1995, N448/2003, N618/2003.

31 See also cases N1037/1995 and N466/2002. An amendment to the electricity production grant scheme has been notified by Denmark under case number SA.30382.

79. As regards the absence of overcompensation, Denmark first recalled the calculations presented in Commission decision N 602/2004. Denmark explained that in 2004, no separate income from the regulating market or from any other market on which DCHPs decide to sell products was included in these calculations for several reasons.

80. First, section E.3.3.1 of the 2001 Environmental Aid Guidelines (EAG) would not require to take into account potential income on adjacent markets where the beneficiary competes on equal terms. Second, the potential for DCHPs to enter an adjacent market was already announced in the 2003 notification (of case N448/2003), but not considered relevant for a compatibility assessment under section E.3.3.1 of the 2001 EAG by Denmark in line with the first consideration.

81. Third, the calculation provided in decision N 602/2004 was made for the plant having the highest risk of overcompensation. As this plant was benefitting from the three-part tariff support, it could not operate on the free market and also could not enter e.g. the regulating market.

82. However, Denmark does not question that some DCHPs may have entered the free energy market and might have been able to generate income by participating on adjacent markets. Therefore, Denmark also provided information to demonstrate that, even if revenues from the sale of energy on the regulating market are included in the calculation, there is no overcompensation.

> The increased participation of DCHPs on the regulating power market does not lead to overcompensation.

83. Denmark provided a calculation for a 5 MW plant which benefits from the basic amount using the same approach as in decision N 602/2004 and the same reference points and underlying assumptions. Some figures are updated such as the fuel and electricity prices since 2005 (past actual prices and an estimate for the period 2011-2014).

84. Compared to decision N602/2004, the calculation of the 'market price' takes account of both the wholesale market price and (now also) the potential availability and activation payments from the regulating market. As regards the wholesale market price, Denmark used past actual Nordpool prices in combination with an estimated average price of roughly DKK 0.36 per kWh for the years 2011-2014. Furthermore, Denmark added DKK 0.03 per kWh to the calculated market price as the weighted market price for DCHPs was higher in western Denmark[32].

85. In order to reflect the participation of DCHPs on the reserve and regulating market calculation, Denmark calculated the best possible scenario that an operator will receive both an availability payment and an activation fee (i.e. reserve power is activated).

86. According to the calculation provided by Denmark and presented in table 2, activation of reserves in DK1 occurs approximately in 14 % on average in the period 2007-2011:

[32] The higher weighted average market price for decentralised plants in western Denmark (Source: Danish authorities):

Year	Regulating power (up-regulation) MWh/h	Total reserve capacity purchased, MWh/h	Relative operation of purchased capacity
2007	629.093	1.845.058	34 %
2008	481.796	3.137.982	15 %
2009	252.726	3.653.314	7 %
2010	290.598	3.066.919	9 %
2011 (Jan-Mar)	83.144	548.129	15 %
Average			**14 %**

Table 2 Activation of reserves in western Denmark (DK1)
Source: Danish authorities

87. As the average additional payment for activation of regulating power is about 0.11 DKK/kWh (table 1, see recital 54), an average DCHP plant producing 4200 kWh per year will annually receive approximately 65 DKK/kW since 2007 in activation payment[33]. In the best possible scenario the DCHP plant will also receive an availability payment for the same hours of operation which corresponds to 17 DKK/kWh. This is based on an average yearly availability payment in the relevant period of approximately 120 DKK/kWh (see recital 49)[34].

88. On the basis of the figures above, Denmark provided updated tables to demonstrate that over the period 1992-2014, i.e. the reference period of decision N 602/2004, DCHP plants are not overcompensated (see table 3 and 4), including specifically for the individual years 2009 - 2014.

	Net present value, DKK per kW						
		Market prices (2)					
	Production costs (1)	Market price (wholesale)	Reserve market (Availability payment)	Regulation market (Activation payment)	Extra Costs (3) = (1)-(2)	Support (4)	Support in % of extra costs (4):(3)
DCHPs	26,989	17,458	52	201	9,278	6,326	68%

Table 3: The support in relation to extra costs
Source: Danish authorities

	Net present value, DKK per kW						
		Market price (2)					
	Guaranteed income (1)	Market price (wholesale)	Reserve market (Availability payment)	Regulating market (Activation payment)	Support (3) = (1)-(2)	Investment + fair return on capital (4)	Support in % of the investment (3):(4)
DCHPs	24037	17,458	52	201	6,326	11,561	55 %

Table 4: Support in relation to depreciation and a fair return on capital
Source: Danish authorities

33 The calculation is: 4200kWh*0.11 DKK/kWh*0.14 = 64.7 DKK/kW.
34 The calculation is: 120 DKK/kWh*0.14 = 16.8 DKK/kW.

89. In particular, Denmark emphasized that compared to decision N 602/2004, the column 'guaranteed income' is based on a DCHP plant that receives the basic amount and participates on the electricity markets, including the regulating and reserve markets since 2007[35].

90. Therefore, Denmark submits that the finding in decision N 602/2004 that payment of the basis amount did not lead to any overcompensation cannot be put into question by the fact that the regulating power market was opened to a greater number of operators. Even when the extra income from the regulating market is added, the level of compensation to DCHPs is at best 68 % of the extra costs.

91. This means, according to Denmark, that the alleged notifiable amendment does not even fulfill the substantive requirements of Article 4 of the Implementing Regulation to constitute an amendment to an existing aid scheme as set out in Article 1(c) of the Procedural Regulation.

Alleged aid to Dong Energy A/S

92. Denmark argues that the TSO acted as a prudent market investor and that the contracted amount for the obligation of Dong Energy to be able to deliver 600 MW of reserves reflects the theoretical market price. It is emphasized that the agreement with Dong Energy was concluded without any involvement from the Danish authorities. The TSO acted independently and without any instructions from or obligation to involve the Minister or other regulating bodies.

93. Denmark finally submits that the agreement between the TSO, being an independent public undertaking, economically separate from the Danish State, and Dong Energy cannot be imputed to the Danish State (see recitals 70 - 75), i.e. the contract does not imply the use of State resources. The Minister or government bodies were not involved in the decision-making process or have specifically sanctioned an agreement, even though the Minister has special authority to take a decision on the TSO´s affairs in quite specific situations.

3. ASSESSMENT

94. The Commission has to examine the facts and events which happened after the approval of the aid measures by Commission decision N 602/2004 to assess whether a notification from Denmark was required or whether appropriate measures should be proposed. Furthermore, the Commission assesses whether the contract between the TSO and Dong Energy involves State aid and if so whether it is compatible.

[35] The figures take into account an extra income of 0.03 DKK/kWh due the special operating conditions for DCHP plants and the income from the regulation market on a best possible scenario (availability and activation).

3.1. The compatibility of State aid scheme N 602/2004

3.1.1. Did the change in the bidding process trigger a notification requirement?

95. According to the complainant, the change in the bidding process requires notification in view of the statement in decision N 602/2004 that any change in the conditions under which the support is granted should be notified to the Commission in advance. In the complainant´s view, the wording can, presumably, be interpreted as referring to any relevant changes to the legal, physical and economic conditions identified as relevant for the aid.

96. The Commission notes in this respect that the Procedural Regulation defines in Article 1 ´existing aid´ inter alia as aid schemes which have been authorised by the Commission. The aid measure N 602/2004 was authorised by the Commission on 6 January 2005. It therefore constitutes existing aid as long as the aid is granted in conformity with the decision authorising the aid. If that would not be the case, it would constitute new aid[36].

97. It is to be noted that the change in the bidding process on the regulating power market did not imply a change in the legal basis on which basis the aid to energy production from CHP plants is granted. Denmark confirmed that, after the Commission decision N 602/2004, no subsequent substantive changes were made to the legal basis for granting the aid. The Commission is therefore of the view that no notification was required.

98. This conclusion is not affected by the statement that "a change in the conditions should be notified to the Commission in advance" made in decision N 602/2004. This statement rather confirms the obligation laid down in the Procedural Regulation requiring Member States to notify any plans to grant new aid in sufficient time to the Commission. However, as the legal basis for granting the aid has not changed, no notification requirement was triggered by this statement.

99. Furthermore, the complainant claimed that the Namur case cannot be applied to the case at hand due to different circumstances and that in this case new aid is involved. In this respect, the complainant focused on the fact that the change in the bidding process allowed DCHPs to enter a different market (as opposed to a larger activity on the same market) and the fact that the purpose of the aid was to increase environmental protection and not to allow access to the regulating power market.

100. The Commission first notes that the circumstances of the case at hand indeed differ to some extent from the factual circumstances in the Namur case. There the Court had to answer a question whether the decision by the Member State (through the supervising ministers) to abolish an internal limitation of the beneficiary's activities in export credit insurance sector, that were otherwise defined in very general terms in the relevant legislation, resulting in an enlargement of the scope of an aid must be regarded as constituting the granting or alteration of aid. Therefore, in the Namur case, the main question concerned the widening of the field of beneficiary's activities in the export credit insurance sector supported through State aid. In the case at hand the DCHPs aided activities remain the same and their ability to operate in another market does not result in an increase of State aid they receive for their operations in electricity market.

101. Nevertheless, the Court held in point 28 that "the emergence of new aid or the alteration of existing aid cannot be assessed according to the scale of the aid or, in particular, its

[36] Case C-47/91, Italy v Commission [1994] ECR I-4635, paras 24-26; judgment in Case C-36/00, Spain v Commission [2002] ECR I-3243, paras 24 and 25.

amount in financial terms at any moment in the life of the undertaking if the aid is provided under earlier statutory provisions which remain unaltered".

102. The Court moreover held in point 32 that "To take the contrary view would in effect be tantamount to requiring the Member State concerned to notify to the Commission and submit for its preventive review not only new aid or alterations of aid properly so-called granted to an undertaking in receipt of existing aid but also all measures which affect the activity of the undertaking and which may have an impact on the functioning of the common market, on competition or simply on the actual amount, over a specific period, of aid which is available in principle but which necessarily varies in amount according to the undertaking's turnover."

103. The Commission considers that the conclusion in the Namur case that it is the legal basis which in principle determines whether a notification of new aid is required is equally applicable in the present case.

104. The Commission therefore has to verify whether or not the legal basis has changed since the approval of the aid scheme in 2005. Denmark confirmed that no subsequent substantive legislative or administrative amendment has been adopted since the approval of aid scheme N 602/2004. Accordingly, there is no reason to doubt that the aid scheme constitutes existing aid.

105. The claim that there is an abuse of aid as DCHPs enter the regulating power market appears to refer rather to situations of misuse of aid. Such misuse would exist if Denmark would grant the aid contrary to its stated purpose of increasing the environmental protection. However, this does not seem to be the case at stake. As CHP plants are considered to have a beneficial effect on the environment, supporting these plants within the limits of the State aid rules and the State aid decision Denmark does not appear to lead to the misuse of such aid.

106. The complainant emphasized that the access to a new market constitutes a significant amendment to an existing aid scheme qualifying as new aid. However, for the reasons set out above, the fact that DCHPs can access another market does not in itself change the existing character of the aid. Nevertheless, the Commission will also examine the compatibility of the measure taking into account the CHP's participation on the regulating power market and assess whether appropriate measure would be necessary.

107. The conditions for compatibility of the aid for DCHPs are set out in the EAG, in particular section 3.1.7 thereof, including cases in which a more in depth assessment of the balancing test is needed to determine the compatibility of State aid measures. In view of the potential change in economic conditions a review of the compatibility of the aid scheme N602/2004 needs to be carried out.

3.1.2. The compatibility of State aid to DCHPs

108. The decision N602/2004 allows aid for high efficient DCHPs essentially to compensate for the extra production costs of environmentally friendly electricity production as compared to the production costs for conventional energy. The Commission concluded that the aid scheme was compatible with the internal market as the support granted under the notified scheme does not exceed the extra production costs.

109. The scheme was approved on the basis of section E.3.3.1 (points 58-65) of the 2001 Environmental Aid Guidelines. Since then new 2008 Environmental Aid Guidelines (hereafter EAG) have been adopted and entered into force in 2008. The 2008 EAG

required that existing environmental aid schemes should be amended where necessary within 18 months after publication of these Guidelines.

110. The new 2008 EAG did not significantly change the conditions on which basis aid for CHP plants could be found compatible. The 2008 EAG allow, again by reference to the conditions for aid for energy from renewable sources, to compensate for the extra production costs. Therefore, a similar analysis has to be carried out to assess whether the aid scheme is in line with the 2008 EAG.

111. Denmark provided updated calculations, taking into account potential revenues from the regulation power market, showing that (see recital 88) the aid does not compensate more than the extra production costs. Therefore, the Commission has no reason to doubt that the aid is granted in conformity with the decision and continues to be compatible with the internal market.

112. The conditions set out in chapter 3 of the EAG ensure that for the aid scheme the balancing test is presumed to be positive if those conditions are met. For aid which has a higher risk of distortion, a more detailed assessment is already foreseen. Therefore, the claim that the balancing test would be negative following DCHPs entering the regulating power market cannot be followed.

3.1.3. Conclusion

113. In view of the above, the Commission concludes that the measure N602/2004 also following the change in the bidding set-up constitutes an existing aid within the meaning of Article 1 of the Procedural Regulation and still complies with the considerations set out in Commission decision N602/2004. In addition and in any event, it constitutes a compatible State aid, as demonstrated above, and for these reasons the Commission does not propose any appropriate measures.

114. Nevertheless, the Commission reminds Denmark that the Commission will maintain under review the aid scheme and this conclusion does not prejudge any future conclusion on the compatibility of the aid scheme with the internal market.

3.2. The contract between Dong Energy A/S and the TSO

3.2.1. Existence of State aid

115. In order to fall within the control of State aid, it first has to be established whether all conditions set out in Article 107(1) TFEU are met. Under Article 107(1) TFEU, 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, in so far as it affects trade between Member States, is incompatible with the internal market.

3.2.1.1. Granted by a Member State or through State resources in any form whatsoever

116. The complainant submitted that State resources are involved which can be imputed to the State, because the TSO is a fully State owned Danish operator which is controlled by the State, and the Danish State has provided its basic capital.

117. The fact that the TSO is a public company can indeed be considered as an indication that State resources are involved. However, the fact that a public company is providing the

funds is not sufficient. Case law[37] has confirmed that the imputability of aid to a State is separate from the question whether aid was granted through State resources. These are separate and cumulative conditions. Accordingly, the fact that a State owned company, the TSO, is paying the remuneration is not sufficient in this respect to demonstrate imputability.

118. In the Stardust Marine case, the Court of Justice pointed out (point 52) that "*Even if the State is in a position to control a public undertaking and to exercise a dominant influence over its operations, actual exercise of that control in particular case cannot be automatically presumed. A public undertaking may act with more or less independence, according to the degree of autonomy left to it by the State. […] Therefore, the mere fact that a public undertaking is under State control is not sufficient for measures taken by that undertaking, such as the financial support measures in question here, to be imputed to the State. 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 those measures".*

119. The mere potential control based on organic links between the undertaking granting advantages and the State is not a sufficient evidence of actual State involvement. Therefore, a position of control even of dominant influence by the State over a public undertaking cannot lead to the presumption that the State has actually exercised its control regarding the decisions taken by that undertaking. It must thus be proved that the State - by any direct or indirect means – has been involved in the adoption of the aid measure.

120. At the same time, the Court held that it cannot be demanded to demonstrate, on the basis of a precise inquiry, that in the particular case the public authorities incited the public undertaking to take the aid measure in question. The Court left open the possibility to demonstrate imputability by reference to certain indicators arising from the circumstances of the case and the context in which that measure was taken and from which it can be inferred that the measure is imputable to the State.

121. Without being exhaustive or prescriptive, indicators which can be used in this respect are:

- Could the TSO take the decision without taking into account requirements of the public authorities?
- To what extent was guidance provided by the authorities to be taken into account?
- To what extent is the TSO integrated in the structures of the public administration?
- The nature of the activities and the exercise of them on a market in normal competitive conditions.
- The legal status of the TSO.
- The intensity of the supervision of the public authority.

[37] Case C-482/99 French Republic v Commission (Stardust), [2002] ECR I-4397, at para 52.

122. The most direct way of demonstrating imputability would be in cases where the provision of the financial compensation is governed by law instructing the TSO to act in accordance with the rules set out in the law. However, from the information provided by Denmark it is stated that the TSO was established by law and it is understood that the law did not include specific provision instructing the TSO on how to carry out its obligations concerning regulating power. However, no details were provided to assess the relationship between the Danish State and the TSO as set out in law and as to whether any guidance or instructions were given to the TSO in this respect.

123. In such situation it has to be assumed that imputability cannot be concluded by way of a direct involvement of Denmark in the decision made by the TSO. Therefore, indirect indications of imputability need to be analysed.

124. In this respect it is noted that the Minister may appoint 8 out of 11 board members, including the chairman. Also Denmark submitted that the Minister may take any decision regarding the business of the TSO on a written basis and through modifications to the Articles of Association. While these elements indicate a close supervision of the public authority over the TSO indicating towards imputability, Denmark did not provide further details on the background and reasons for these provisions or to whom such decisions are addressed.

125. At the same time, the TSO is essentially governed by private law and can take decision without the consent of the Minister which rather indicates towards the absence of imputability. Denmark, while acknowledging the possibility of the government to intervene, emphasizes that the decision by the TSO to enter into a contract with Dong Energy was concluded without any involvement of the authorities. Neither did they specifically sanction an agreement.

126. It can be understood that in the highly regulated energy market, Denmark ensured close supervision and control over the TSO without necessarily exercising its control over the TSO in all cases, in particular in areas which are typically the responsibility of the TSO. Such routine businesses may well be left to the discretion of the TSO.

127. However, Denmark only submitted statements that the government, or governmental bodies, were not involved in the decision making process. No further information was provided as already noted above. In particular, Denmark did not provide information to assess to what extent the TSO is bound by instructions to contract in the regulating power market.

128. In these circumstances, on the basis of the information available indicating a close supervision of the public authority over the TSO, the Commission considers that it cannot be established without doubt that the contract is not imputable to the Danish State.

3.2.1.2. Selective advantage

129. The Commission observes that the agreement is concluded with one undertaking to provide regulating power in east Denmark, as compared to all undertakings which could potentially provide such power. Therefore the measure is found to be selective. However, the agreement remunerates Dong Energy for providing certain (regulating power) services. If the price set reflects a normal market price for those services at normal conditions, no advantage may be involved.

130. As regards the price set, Denmark states that the TSO acted as a prudent market investor and that the contracted amount for the obligation of Dong Energy to be able to deliver

600 MW of reserves reflects the theoretical market price. No further information was provided to allow for an assessment of the actual price concluded in relation to the market price. For instance, no analysis or considerations were provided to make a comparison with the normal price paid in the market for regulating power in a similar situation. No information was provided in relation to the normal duration of such agreement.

131. Therefore, in view of the absence of any such information, the Commission has doubts as to whether the measure confers an advantage to Dong Energy.

3.2.1.3. Distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it affects trade between Member States

132. The Commission observes that Dong Energy operates on different markets across Europe. The agreement concluded between the TSO and Dong Energy risks to strengthen the financial position of Dong Energy compared to undertakings with which it is in competition. Accordingly, the measure risks distorting competition affecting trade between Member States.

3.2.2. Preliminary conclusion on the existence of aid

133. Therefore, based on the elements mentioned above and the information available at this stage, the Commission has doubts as to the existence of State aid regarding the specific agreement concluded between the TSO and Dong Energy. In particular, the Commission has doubts as to whether the measure is imputable to the Danish State and confers an advantage to Dong Energy.

3.2.3. Compatibility of State aid

134. Denmark did not submit any information to assess the compatibility of contract between the TSO and Dong Energy in case it would be found to constitute State aid. The Commission may declare aid compatible with the internal market, provided that the conditions set out in Article 107(3)c TFEU are met. According to settled case-law, it is for the Member State to put forward any grounds of compatibility and to demonstrate that the conditions thereof are met[38].

135. The Commission notes that, given that Denmark considers that the contract is concluded on market terms between independent undertakings without any involvement of the State and does not constitute aid, it has not brought forward any grounds for its compatibility.

136. Therefore, on the basis of this preliminary analysis, the Commission has doubts as to whether the contract between the TSO and Dong Energy, if found to constitute State aid, complies with the Treaty.

[38] Case C-364/90 *Italy* v *Commission* [1993] ECR I-2097, paragraph 20; Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Others* v *Commission* [1999] ECR II-3663, paragraph 140.

3.2.4. Preliminary conclusion

137. As regards the agreement between the TSO and Dong Energy, the Commission has at this stage doubts as to the existence of State aid and the compatibility of the possible State aid granted to Dong Energy with the internal market. Consequently, in accordance with Article 4(4) of Regulation (EC) No 659/1999 the Commission has decided to open the formal investigation procedure, thereby inviting Denmark to submit its comments as well as the requested information.

4. DECISION

138. In the light of the foregoing considerations, concerning the aid in support of energy production from CHP plants authorised by the Commission decision N602/2004, the Commission has accordingly decided that the measure constitutes existing aid within the meaning of Article 1 of the Procedural Regulation. In addition, the measure is in any event compatible with the internal market in accordance with Article 107(3)(c) TFEU. For this reason, the Commission does not propose any appropriate measures.

139. The Commission reminds Denmark that, in accordance with Article 108(3) TFEU, plans to refinance, alter or change this aid have to be notified to the Commission pursuant to provisions of the Commission Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (now Article 108 TFEU)[39].

Opening of the formal investigation procedure

140. In the light of the foregoing considerations, concerning the agreement between the Danish TSO and Dong Energy, the Commission, acting under the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, requests Denmark to submit its comments within one month of the date of receipt of this letter and to provide all such information as may help to assess the measure. In particular, the Commission requests Denmark to provide information on the imputability of the contract to the Danish State and whether the terms of the contract confer an advantage to Dong Energy.

141. The Commission wishes to remind Denmark that Article 108(3) of the Treaty on the Functioning of the European Union has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

142. It requests your authorities to forward a copy of this letter to the potential recipients of the aid immediately.

143. The Commission warns Denmark that it will inform interested parties by publishing this letter and a meaningful summary of it in the Official Journal of the European Union. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the Official Journal of the European Union and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

[39] OJ L 140, 30.4.2004, p.1

144. If this letter contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of this letter. Your request should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
Directorate for State Aid
State Aid Greffe
B-1049 Brussels
Belgium
Fax No: (0032) 2-296.12.42

For the Commission

Joaquín ALMUNIA
Vice-President