

EN

***Case No COMP/M.6540 - DONG ENERGY BORKUM
RIFFGRUND I HOLDCO/ BOSTON HOLDING/
BORKUM RIFFGRUND I OFFSHORE WINDPARK***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 6(1)(b) NON-OPPOSITION
Date: 10/05/2012



EUROPEAN COMMISSION

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

Brussels, 10.5.2012
C(2012) 3222 final

PUBLIC VERSION

MERGER PROCEDURE

To the notifying parties

Dear Sir/Madam,

**Subject: Case No COMP/ M.6540 - DONG ENERGY BORKUM RIFFGRUND I
HOLDCO/ BOSTON HOLDING / BORKUM RIFFGRUND I
OFFSHORE WINDPARK
Commission decision pursuant to Article 6(1)(b) of Council Regulation
No 139/2004¹**

1. On 29 March 2012, the European Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004² by which DONG Energy Borkum Riffgrund I HoldCo GmbH ("DE Holdco", Germany) – controlled by DONG Energy A/S ("DONG Energy", Denmark) – and Boston Holding A/S (Denmark) – controlled by KIRKBI Invest A/S (Denmark), which is ultimately controlled by the Kirk Kristiansen family, and William Demant Invest A/S (Denmark), which is controlled by the Oticon Foundation – acquire within the meaning of Article 3(4) of the Merger Regulation joint control of the undertaking Borkum Riffgrund I Offshore Windpark A/S GmbH & Co. oHG ("Borkum Riffgrund I", Germany), by way of contribution of cash and acquisition of assets.

I. THE PARTIES

2. DONG Energy is mainly active in Northern Europe in exploration and production of natural gas and oil, power generation and sale of energy.

¹ OJ L 24, 29.1.2004, p. 1. With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this decision.

² OJ L 24, 29.1.2004, p. 1 (the "Merger Regulation").

3. KIRKBI Invest A/S is active in the provision of play materials and experiences as well as teaching materials for children and operation of visitor attractions.
4. William Demant Invest is active in the supply of products and equipment to aid the hearing and communication of individuals and non-invasive orthopaedics, development of assisted reproductive technology solutions and investment in commercial real estate.
5. Borkum Riffgrund I will own, operate and maintain an offshore wind farm located in the North Sea.

II. THE OPERATION AND THE CONCENTRATION

6. The transaction concerns the acquisition of joint control over Borkum Riffgrund I by DE Holdco and Boston Holding [...]. After the transaction both DE Holdco and Boston Holding will hold each a 50% shareholding in Borkum Riffgrund I.
7. The management decisions, covering all strategic decisions, [...] will be taken by unanimity therefore each of DE Holdco and Boston Holding will have joint control over the Joint Venture.
8. The Joint Venture will own the wind farm installations and will be the holder of the necessary permits issued by German authorities and will have its own management. [...].
9. In accordance with the German Renewable Energies Act, the Joint Venture can either claim a feed-in tariff for the electricity that it produces or directly sell its power production in the market [...].
10. Therefore, Borkum Riffgrund I will be a full-function joint venture performing on a lasting basis all the functions of an autonomous economic entity.
11. The transaction is a concentration within the meaning of Article 3.(4) of the Merger Regulation.

III. EU DIMENSION

12. The undertakings concerned had in 2010 a combined aggregate world-wide turnover of more than EUR 5 000 million³ (DE Holdco⁴: EUR 7,331 million, Boston Holding⁵: EUR [...] million). DE Holdco and Boston Holdings had a Union-wide turnover in excess of EUR 250 million (DE Holdco⁶: EUR [...] million, Boston Holding⁷: EUR [...] million) and they did not achieve more than two-thirds of their aggregate Union-wide turnover within one and the same Member State. Borkum Riffgrund I had no turnover in 2010. The notified operation therefore has a Union dimension.

³ Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C95, 16.04.2008, p1).

⁴ Turnover of Dong Energy.

⁵ Turnover of Kirkbi A/S and William Demant Holding Group.

⁶ Turnover of Dong Energy.

⁷ Turnover of Kirkbi A/S and William Demant Holding Group.

IV. RELEVANT MARKETS

13. There are no horizontal overlaps or vertical relationships between the parents; there are only two horizontal overlaps and two vertical relationships between Dong Energy and Borkum Riffgrund I.
14. The horizontal overlaps occur in i) generation and wholesale of electricity in Germany and ii) the market for the development, construction and operation of wind farms.
15. The vertical relationships arise between i) the development, construction and operation of wind farms (upstream) and generation and wholesale supply of electricity (downstream) and ii) the generation and wholesale of electricity (upstream) and the retail supply of electricity in Germany (downstream).

IV.1. HORIZONTAL OVERLAPS

IV.1.A Product market definition

Generation and wholesale of electricity

16. In previous decisions the Commission has considered the generation and wholesale supply of electricity to constitute one separate relevant product market, distinct from other markets in the electricity sector, i.e. transmission, distribution and retail supply⁸.
17. The Parties do not contest the above product market definition.
18. However, in the absence of competition concerns, there is no need to precisely define the product market for the purpose of this decision.

Development, construction and operation of wind farms

19. In a previous decision the Commission identified a possible market for the development and promotion of wind farms although finally leaving the market definition open.⁹
20. Based on the notifying party's description of the proposed market in the abovementioned case, the development and promotion of wind farms was described as basically comprising the following stages: (i) choice of the location and assessment of wind conditions, (ii) administrative procedures and environmental authorisation, (iii) acquisition of the necessary rights on the land and procurement of wind generators, (iv) license to connect the wind farm to the transmission network, (v) construction and (vi) start-up.¹⁰
21. In the present transaction DONG Energy has been and will be in charge of the development of the Wind Farm. Often, the wind farm developer - being responsible for the construction - will also provide related operation and maintenance services in

⁸ COMP/M.5224 - *EDF/BRITISH ENERGY*, paragraph 10; COMP/M.3868 - *DONG/ELSAM/ENERGI E2*, paragraph 228.

⁹ Case No COMP/M.5366 – *IBERDROLA RENOVABLES/GAMESA*, paragraphs 9-14.

¹⁰ *Idem*, paragraph 10.

close cooperation with the various equipment suppliers as is the case in the Transaction. In DONG Energy's view, the provision of operation and maintenance services should therefore form part of the market for the development, construction and operation of wind farms.

22. In addition, it was noted in COMP/M.5366 – *IBERDROLA RENOVABLES/GAMESA* that these wind farms can be developed by undertakings for their own use (in order to generate electricity for its sale into the wholesale market) or for their sale to third parties. The majority of respondents in the market investigation in that case considered that the development and promotion of wind farms for their sale to third parties does not constitute a separate product market but forms a part of a wider market comprising development and promotion of all wind-farms, regardless of whether or not they are intended for sale to third parties.¹¹
23. However, in the absence of competition concerns, there is no need to precisely define the product market for the purpose of this decision.

IV.1.B Geographic market definition

Generation and wholesale of electricity

24. In previous decisions the Commission has found that the electricity wholesale supply market in Germany is national in scope.¹²
25. The parties argue that the exact geographic market definition can be left open for the purpose of the present case as the present transaction does not raise any doubts even under consideration of a narrow geographic market definition.
26. In the absence of competition concerns, there is no need to precisely define the geographic market for the purpose of this decision.

Development, construction and operation of wind farms

27. The Commission's market investigation in COMP/M.5366 – *IBERDROLA RENOVABLES/GAMESA* confirmed the notifying party's view about the national scope of the market. This conclusion was based on existence of differences in legislation and regulation of the sector which exist in each EU member state, the need to have a good network of local business contacts, as well as different administrative steps that need to be taken in the course of the wind-farm development.¹³ However, the Commission has eventually left open the precise geographic definition of the market for the development and promotion of wind farms.¹⁴
28. The parties also argue that, for the purpose of the proposed transaction, the exact delineation can also be left open.

¹¹ Idem, paragraphs 11-13.

¹² COMP/M.5467 - *RWE/ESSENT*, paragraphs 235-236; COMP/M.5604 - *DONG/KOM-STROM*, paragraph 7.

¹³ Id. at paragraph 16.

¹⁴ COMP/M.5366 - *IBERDROLA/RENOVABLES/GAMESA*, paragraph 17.

29. In the absence of competition concerns, there is no need to precisely define the geographic market for the purpose of this decision.

IV.2. VERTICALLY RELATED MARKETS

IV.2.A Product market definition

Retail supply of electricity

30. This market comprises sales of electricity to final consumers. The Commission further divided the market for retail supply into separate markets for (i) large/industrial (load-measured) customers and (ii) household/small commercial (non-load measured) customers.¹⁵

31. For the purpose of this decision, however, the precise delineation of the product market will be left open in the absence of competition concerns.

IV.2.B Geographic market definition

32. In previous decisions, the Commission considered the market for supply of large industrial customers to be national and the market for the supply to small customers and households in Germany to be regional, although it left the definition of the latter market open.¹⁶

33. For the purpose of this decision, however, the precise delineation of the geographic market will be left open in the absence of competition concerns.

V. COMPETITIVE ASSESSMENT

V.1 HORIZONTAL OVERLAPS

Generation and wholesale supply of electricity

34. The Joint Venture and DONG Energy only have a limited horizontal overlap in the German market for generation and wholesale supply of electricity. Their combined market share (when the wind farm is fully operational) will not exceed [0-5]% on the narrowest market.

35. In addition, the said horizontal overlap is pre-existent to the transaction.

36. In light of the above, the Commission considers that the notified operation does not raise serious doubts as to its compatibility with the internal market as a result of this horizontal overlap.

¹⁵ COMP/M.5496 *VATTENFALL/NUON ENERGY*, paragraph 14.

¹⁶ COMP/M.5604 - *DONG/KOM-STROM*, paragraph 9.

Development, construction and operation of wind farms

37. Borkum Riffgrund I is DONG Energy's first wind farm in Germany therefore no horizontal overlap occurs at national level; its market share in Germany would reach less than [0-5]%. If the market's geographic scope were EEA-wide, the combined share would be less than [0-5]%.
38. In addition, the said horizontal overlap is pre-existent to the transaction.
39. In light of the above, the Commission considers that the notified operation does not raise serious doubts as to its compatibility with the internal market as a result of this horizontal overlap.

V.2 VERTICALLY RELATED MARKETS

Development, construction and operation of wind farms (*upstream*) – generation and wholesale supply of electricity (*downstream*)

40. The combined market shares of Dong Energy and the Joint Venture would be small at both levels ([0-5]% upstream and [0-5]% downstream) therefore foreclosure appears unlikely.
41. In addition, the said horizontal overlap is pre-existent to the transaction.
42. In light of the above, the Commission considers that the notified operation does not raise serious doubts as to its compatibility with the internal market as a result of this vertical relationship.

Generation and wholesale supply of electricity (*upstream*) – retail supply of electricity (*downstream*)

43. The transaction gives rise to a vertical relationship between the generation and wholesale of electricity and the retail supply of electricity to small (non-load measured customers) in Germany. At the narrowest level, Dong Energy had in 2011 an [80-90]% market share downstream in the region of Lübeck, through Stadtwerke Lübeck¹⁷.
44. The notifying parties expect that the Joint Venture will primarily participate in the German statutory remuneration scheme for electricity from renewable energies and thus receive feed-in tariffs from the network operator. However, during the remuneration period of 20 years, the operator of the Wind Farm may opt for direct marketing of the produced electricity, i.e. either selling the electricity on the energy stock exchange or supplying directly customers such as *Stadtwerke* or industrial customers on a contractual basis. Only in case of direct marketing, Stadtwerke Lübeck would be a potential direct customer of Borkum Riffgrund I.
45. In 2011 Dong Energy only supplied [very small proportion] of the electricity purchased by Stadtwerke Lübeck. These supplies accounted for only [an insignificant amount] of Dong Energy's wholesale of electricity in Germany in 2011. Even if Stadtwerke Lübeck procured all of its electricity from the Joint Venture, there would be no foreclosure effects due to Stadtwerke Lübeck's moderate size as a

¹⁷ [...].

purchaser of electricity on the German upstream market for wholesale supply.¹⁸ In 2011, Stadtwerke Lübeck's purchase volume ([...] GWh) accounted for [very low proportion] of the total sales of electricity in the market for generation and wholesale supply in Germany.

46. Furthermore, neither Boston Holding nor its parent companies have interests in any of the activities of the Dong group or of the joint venture; therefore the proposed operation does not change the competitive situation.

VI. CONCLUSION

47. For the above reasons, the Commission has decided to declare the transaction compatible with the internal market and with the functioning of the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation.

For the Commission
(signed)
Neelie KROES
Vice-President

¹⁸ In 2009 the Commission assessed DONG Energy's acquisition of KOM-STROM, another German wholesale energy supplier, from Essent (Case No COMP/M.5604-Dong/ KOM-STROM). KOM-STROM had marginal supplies to Stadtwerke Lübeck at that time. At paragraph 17 of the Decision, the Commission noted that "*Even if SW Lübeck procured all of its electricity from KOM-STROM, no foreclosure effects would occur due to SW Lübeck's moderate size as a purchaser of electricity on the German upstream market for wholesale supply.*" The same reasoning applies in the present situation.