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Consultation response on Energinet's methodology for procurement of countertrade energy - reference 21/01999

Dansk Energi welcomes Forsyningstilsynet's consultation on the methodology for procurement of so-called countertrade energy.

It is Dansk Energi's opinion, that Energinet over the past 1.5 years has not shown any willingness to investigate alternative countertrade models with less impact on the Danish wholesale market areas than the model proposed from the beginning. On the contrary, Energinet has chosen a countertrade model, that sustains heavy cross-border capacity reductions in the Danish intraday market without adequately justifying such an invasive market intervention.

Energinet's proposed model would allow Tennet to force a large local surplus of German generation against the price direction into the DK1 bidding zone through the application of a pre-defined forced market outcome, consisting of a large TSO driven offer of electricity combined with the simultaneous removal of south-bound cross-zonal capacity.

This practice would take place during a market timeframe purposed for commercial trade among market participants and across borders. It would prevent Danish or Nordic generation from using intraday market cross-zonal capacity on the Danish-German border to access the German market. Furthermore, this practice would entail a magnitude that in comparison with the volumes in the Danish day-ahead and intraday markets would render it significant in the price formation.

In summary, Dansk Energi does not consider the proposed countertrade model compliant with neither the European electricity market regulation nor with EU-treaty rules of competition and free movement of goods, as the proposed model is based on a reintroduction of heavy cross border capacity reductions in a market timeframe purposed for cross border trade among market participants.

Dansk Energi subsequently encourages Forsyningstilsynet to reject the proposed countertrade model.

Remarks on Energinet’s justification of an intraday countertrade model

For simplicity, Dansk Energi will use Energinet’s term “countertrade” in this consultation response. However, for the record Dansk Energi would like to emphasise that the grid congestion in question is not on the Danish-German border but internally in Germany. This is an essential precondition to maintain a focus on the grid congestion as an internal German challenge that neighboring Member States can assist to relieve to the best of their reasonable ability.

In section 2.3 Energinet highlights the following elements of justification for the proposed new methodology.

- 2.3.1 Increased countertrade volume (and operational security)
- 2.3.2 Joint Declaration and Tennet Commitments
- 2.3.3 The 70% rule
- 2.3.4 Prices (for countertrade)
- 2.3.5 Development of balancing platforms

Additionally in section 2.4 Energinet highlights environment and climate effects as a justification for the proposed new methodology

Dansk Energi will address these lines of justification in the following paragraphs.

Comments regarding 2.3.1

In section 2.3.1.1 of the countertrade methodology Energinet highlights that the current volume of countertrade surpasses a (in the methodology undefined) threshold for operational security according to Energinet’s assessment without quantifying any substance of this alleged breach and possible mitigation measures. On this basis, Energinet deems it necessary to reduce the magnitude of the handling of large volumes of countertrade close to the operational hour without identifying which volumes of countertrade can be handled at which timeframes to remain within a given quantified threshold of operational security.

As there are alternative countertrade models that would serve this rather unsubstantiated purpose, Dansk Energi considers this argumentation to be incomplete and inadequate to justify a reintroduction of cross-border capacity reductions in a market timeframe purposed for cross-border trade among market participants.

Comments regarding 2.3.2 & 2.3.3

In section 2.3.2 Energinet highlights that the ‘Joint Declaration’ no longer obliges Energinet to guarantee a certain amount of countertrade and that ‘Tennet Commitments’ does not oblige Energinet to guarantee a certain amount of countertrade. Consequently, there is no legally binding level on the volumes of countertrade that Energinet must accept from Tennet.

Despite the lack of a legally binding level for the countertrade volume that Energinet must accept from Tennet, Energinet attempts to introduce a justification not to reject any parts of a countertrade request from Tennet in section 2.3.3.3 In Dansk Energi’s perspective, the very general references to the Treaty in section 2.3.3.3 do not successfully constitute an overriding justification for an obligation to accept any given countertrade request from Tennet.

On the contrary, Energinet itself highlights the lack of specification on countertrade obligations in Regulation 943, and additionally Energinet itself refers to the principle of proportionality as

a justification to reject countertrade requests if operational security is endangered. Energinet's counter argument to these considerations is that TSOs are generally bound to use a methodology for procurement of countertrade energy that reduces the risk of rejection of countertrade requests under normal circumstances. Both the deduction and consequence of this statement seems somewhat vague and unsubstantiated.

Dansk Energi does not consider this to be an adequate justification for refusing to reject countertrade requests in any case and we sustain that there is no legal binding for Energinet to accept any given countertrade request Tennet may propose.

As there is no specific legal binding on the volume of countertrade that Energinet must accept, Energinet's claim of operational security distress due to increased countertrade volumes is subsequently self-inflicted without a viable justification. In Dansk Energi's perspective, this is not a valid justification for sustaining a methodology that reintroduces cross-border capacity reductions in a market timeframe purposed for cross-border trade among market participants.

Comments regarding 2.3.4

In section 2.3.4 Energinet highlights that a justification for the change of countertrade model is that Tennet's cost of countertrade in Denmark has increased significantly since 2017. However, in 2021 Tennet's cost of countertrade has decreased significantly compared to 2020, and the average price for the activated Danish down regulation in 2021 is comparable to the years prior to 2020.

In 2021 Energinet has received 4954 GWh from Tennet for down regulation purposes.

Out of these 4954 GWh, 1530 GWh was used as netting (i.e. used for up regulation purposes in Denmark/the Nordics) for which Tennet has received an average price of 628 DKK/MWh resulting in a revenue for Tennet of DKK 961 million.

The remaining 3424 GWh was down regulated by Danish market participants at an average price of -90 DKK/MWh resulting in a cost for Tennet of DKK 308 million.

The net result for Tennet in 2021 of the issued 4954 GWh down regulation request in Denmark is consequently a net revenue of DKK 653 million. This outcome does not support the notion that Tennet is facing unnecessary excessive costs for its down regulation requests in Denmark - particularly as it is the outcome achieved in a countertrade that respects the rules of cross-border trade in the internal market.

The ability for Tennet to ensure an even more beneficial market outcome than this lies in Tennet's own ability to alleviate internal German grid congestion and the relevant neighboring TSO's ability to cooperate on regional countertrade solutions that does not introduce cross-border capacity reductions in markets purposed for cross-border trade among market participants. Subsequently, Energinet's argumentation in section 2.3.4 - that an increased negative price for countertrade (in 2020) justifies a new countertrade model that reintroduces cross-border capacity reductions - is misguided in Dansk Energi's perspective.

Comments regarding 2.3.5

Energinet implicitly puts forward two deadlines for ending the current countertrade model and moving to the proposed intraday countertrade model. One deadline in November 2022 with the implementation of the Nordic Activation Optimisation Function and one deadline in 2024 with the MARI-platform implementation.

In Section 2.3.5.1 Energinet argues that after the implementation of the Nordic Activation Optimisation Function in November 2022, it is no longer a possibility to use the current activation of countertrade ('special regulation'). However, in Energinet's document "Q&A - NY MODHANDELSMODEL (August 23rd, 2021)", Energinet concludes in section 2.1A that it would in fact be possible to continue the current countertrade solution after the implementation of the Nordic Activation Optimisation Function in November 2022 but highlights that it would require a modified IT-solution. <https://energinet.dk/-/media/DE9EB5CA9724421C9291C1D54F6674C2.PDF?la=da>

In Section 2.3.5.2.1 Energinet highlights challenges with the use of 'special regulation' after the MARI-platform implementation in 2024. Energinet does not establish a direct prohibition towards the use of balancing market countertrade on the MARI-platform – only that it cannot be 'special regulation' but must be according to marginal price.

Furthermore, Energinet concludes in section 2.1C in the document "Q&A - NY MODHANDELSMODEL (August 23rd, 2021)" that to their knowledge, there is no prohibition against TSOs establishing a balancing market countertrade solution outside the MARI platform (as previously suggested by Dansk Energi in a letter in January 2021).

Dansk Energi subsequently does not consider the two implied deadlines for the entry into the suggested intraday countertrade model to be overriding and crucial. It is neither legally nor practically impossible for Energinet to continue with some sort of balancing market countertrade solution after both the Nordic Activation Optimisation Function in November 2022 and the MARI-platform implementation in 2024. Especially when also keeping in mind that Energinet is not obliged to accept any given volume of countertrade request. Developing a modified balancing market countertrade model may require efforts and cooperation that Energinet has not yet planned on, but it is not impossible.

It is reasonable to assume that if relevant TSOs wish to include new resources into countertrade, they must establish a cooperation on this inclusion within the rules of cross-border trade in the internal market before referring to cross-border capacity reductions in a market timeframe purposed for trade among market participants across borders. On this basis, Dansk Energi does not consider the justification for the proposed model in section 2.3.5 adequate for an approval of the proposed methodology.

Comments regarding 2.4

In section 2.4 Energinet calls for an investigation of the role of wind power in the current countertrade with regards to the European CO₂-emissions. However, this call for an investigation is in Dansk Energi's perspective not substantiated in relevant electricity market regulation and we will subsequently disregard this section. We encourage Forsyningstilsynet to disregard it accordingly.

Overall assessment of the proposed methodology

In essence and as stated by Dansk Energi in Energinet's consultation on the methodology, the central task of a TSO is not to arrange a border specific market setup according to climate effects or according to the costs of specific market dispatches. The central task of a TSO is to facilitate markets that provide correct price and investments signals in compliance with EU-regulation.

Energinet's proposed methodology seeks to address an internal German issue – lack of capacity in Tennet's transmission grid – which has previously resulted in heavy reduction of capacity on the Danish-German border. While this was solved with the Joint Declaration and Tennet Commitments in 2017-2018, Energinet's proposed methodology rolls back these advances and reintroduces a heavy reduction of cross-border capacity on the Danish-German border – this time in the intraday market timeframe.

A reasonable assumption based on Energinet's argumentation on moving the countertrade away from the operational hour is that the countertrade will take place early in the intraday market timeframe resulting in heavy reductions of cross border capacity. This assumption is confirmed by Energinet's previously articulated emphasis on conducting the countertrade at the very opening of the intraday market.

The proposed methodology will therefore entail an intraday market in DK1 with heavily reduced export capacity towards Germany and an intraday market in Denmark, where Energinet directly or through a third party is by far the largest market participant. Furthermore, the proposed methodology will sustain a distorted day-ahead market price formation in Denmark.

Dansk Energi has already emphasised that there are alternative countertrade options available as suggested in the letter "Analyse af alternative modhandelsmodeller DK1-DE" to Energinet in January 2021. Among the suggested options were

- a continued use of the existing countertrade model but with a cap on the volumes
- the inclusion of Nordic resources in a common Nordic TSO-TSO market for 'special regulation'

Energinet has so far refused to develop any of the proposed alternative options.

Additionally, Energinet has not investigated even another alternative option which is to conduct the countertrade at the very end of the intraday market time frame to avoid heavy reductions of cross-border capacity in the intraday market.

All in all, the impacts of Energinet's proposed countertrade model do not constitute efficient elements in a well-functioning wholesale market. As it remains clear that there are alternative countertrade options with less impact on the cross-border trade capabilities between Denmark and Germany, Dansk Energi does not consider Energinet's proposed methodology compliant with neither the European electricity market regulation nor with EU-treaty rules of competition and free movement of goods.

In conclusion:

1. Dansk Energi does not consider the proposed methodology compliant with the Regulation on the internal market for electricity [Regulation (EU) 2019/943]

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2. Dansk Energi does not consider the proposed methodology compliant with the EU-treaty rules of competition and free movement of goods [Article 102 and article 35 of the Treaty on the Functioning of the European Union]

On this basis, Dansk Energi encourages Forsyningstilsynet to reject the proposed countertrade model. The concerns are elaborated in the following.

1. Dansk Energi does not consider the proposed methodology compliant with the Regulation on the internal market for electricity [Regulation (EU) 2019/943]

Regulation (EU) 2019/943 on the internal market for electricity aims to avoid the reduction in cross zonal capacity due to internal congestion in one bidding zone.

In the proposed methodology, Energinet claims that the 70% rule of reduction in cross-zonal capacity is only a valid consideration for the day-ahead market and not the intraday market.

Dansk Energi does not see any basis for such a claim. Article 16.8 in Regulation 943 explicitly states that “Transmission system operators shall not limit the volume of interconnection capacity to be made available to market participants as a means of solving congestion inside their own bidding zone”. The regulation does not state that this principle only applies to the Single Day-ahead Coupling (SDAC) and excludes the Single Intraday Coupling (SIDC)

Furthermore, we see no justification as to why the day-ahead and intraday markets should be treated differently regarding the principles of allocation of cross-border capacity in Regulation 943. Both markets are NEMO-operated markets purposed for trade among market participants across national borders as opposed to the balancing market, where monopoly system operators purchase balancing services from market participants.

The regulation identifies principles and rules for allocation of cross-border capacity highlighting that it should be non-discriminatory, give efficient economic signals to market participants and TSOs involved and maximise the opportunities for market participants to participate in cross-zonal trade.

Specifically, in section 2.3.3.2 of the proposed methodology, Energinet claims that ACER recommendation 01/2019 and ACER’s preliminary focus on monitoring day-ahead-market compliance of the 70% rule is an indication that ACER considers the 70% rule complied with if 70% capacity is allocated to the day-ahead market alone.

In ACER’s Webinar on the “ACER 70% Target Report” on January 21st 2021, ACER does not support such a claim. At approximately 06:50 in the recorded webinar, ACER highlights that: *“a few important elements of the recommendation are that it focuses on the day-ahead timeframe....”*. *“This by no means implies that capacities that is offered in subsequent timeframes such as intraday or balancing is neglected, it simply puts the emphasis on the need to offer 70% at the day-ahead timeframe as much as possible and only under exceptional circumstances where this is not possible to complement this later on in the subsequent timeframes”*. <https://www.youtube.com/watch?v=hta2D605FWs>

Furthermore, ACER's recent recommendation 02/2021 on the revision of the CACM Regulation does not suggest that the 70% rule in article 16.8 should apply only to the Single Day-ahead Coupling (SDAC) and exclude the Single Intraday Coupling (SIDC). On the contrary, section 11.2 of Annex 4 of ACER's recommendation 02/2021 in Dansk Energi's view further emphasises that the 70% rule is valid for the intraday market as default.

The status quo of article 16.8 in Regulation 943 must therefore be that the 70% rule is in force regarding the intraday market.

Consequently, Energinet's fundamental premise for reintroducing restrictions on cross-border trade (that the 70% rule is not in force in the intraday market) is not valid in Dansk Energi's perspective. Therefore, in our view the proposed model must be rejected.

2. Dansk Energi does not consider the proposed methodology compliant with the EU-treaty rules of competition and free movement of goods [Article 102 and article 35 of the Treaty on the Functioning of the European Union]

Dansk Energi's preliminary assessment

In the legal assessment of:

"COMMISSION DECISION of 7.12.2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement Case AT.40461 – DE/DK Interconnector"

the European Commission states in paragraph 5.5:

"In its preliminary assessment, the Commission concluded that TenneT's behaviour of limiting commercial capacity on the DE-DK1 interconnector is capable of having anticompetitive effects.

"First, the limitation of trading possibilities on the DE-DK1 interconnector means that electricity generators in Western Denmark and more generally in the Nordic countries are at a competitive disadvantage compared to those in Germany. They are therefore prevented from reaping the benefits of the internal market by exporting electricity to the German, Luxembourg and Austrian (until 30 September 2018) bidding zone when this would be in their interest."

"Second, TenneT's behaviour contributes to the maintenance of price differences between the German, Luxembourg and Austrian (until 30 September 2018) bidding zone and West Denmark in an artificial manner, which could have resulted in higher prices for electricity consumers in the first area. In the long term, distorted electricity prices provide the market with distorted signals and thereby lead to inefficient investment both in generation and transmission capacity. Overall TenneT's behaviour therefore undermines the Union's efforts to achieve an integrated internal electricity market."

The European Commission thus operates with the term 'commercial capacity' in terms of cross-zonal transmission capacity. Furthermore, in paragraph 5.1, the European Commission

defines the relevant product market for the assessment of discrimination between network users, based on their place of residence as “the market for the wholesale supply of electricity”.

The definition ‘the market for the wholesale supply of electricity’ is not exclusively defined as the Single Day-ahead Coupling (SDAC) and therefore does not exclude the Single Intraday Coupling (SIDC) in its consideration. The term ‘commercial capacity’ is not defined exclusively as day-ahead cross-border transmission capacity and therefore does not exclude intraday cross-border transmission capacity in its consideration. Dansk Energi subsequently does not consider Energinet’s proposed methodology compliant with the antitrust principles supporting the existing conclusion in the European Commission’s preliminary assessment of anticompetitive effects in the AT.40461 – DE/DK Interconnector case.

Conclusion of external legal assessment

In addition to these considerations, Dansk Energi and Wind Denmark have jointly commissioned an external legal assessment of the compliance of Energinet’s proposed countertrade model with the EU competition rules and the EU rules of the free movement of goods. Given that Energinet has alternative options to the proposed model, the conclusion of the external legal assessment is that Energinet’s proposed countertrade model

- very likely entails abuse of a dominant position by Energinet and
- is very likely incompatible with the EU rules on the free movement of goods

These conclusions are based on article 102 of the Treaty on the Functioning of the European Union and article 35 of the Treaty on the Functioning of the European Union

Article 102 of the Treaty on the Functioning of the European Union reads:

“Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers
 ...”

According to the enclosed legal assessment, a behavior very likely entails abuse of a dominant position under article 102 if the following conditions are met:

1. The operator in question is an undertaking
2. The operator occupies a dominant position on the relevant market
3. The behavior in question constitutes an abuse of that dominant position
4. The behavior is capable of having an effect on trade between EU Member States
5. There is no objective justification for the behavior in question, and the anti-competitive effects of the behavior are not outweighed by efficiencies/pro-competitive effects

As all the conditions are very likely met, according to the enclosed legal assessment, the proposed model very likely entails abuse of a dominant position by Energinet.

Article 35 of the Treaty on the Functioning of the European Union reads:

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“Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States”.

According to the enclosed legal assessment, a behavior is very likely incompatible with the EU rules on the free movement of goods under article 35 if the following conditions are met:

1. The measure takes place in a non-harmonized area
2. The measure relates to “goods” for the purposes of the TFEU
3. The measure has a cross-border element
4. The measure constitutes a quantitative restriction or a measure having equivalent effect to a quantitative restriction on exports
5. The measure is ascribable to a Member State
6. The measure is not justified on one of the grounds stated in Article 36 TFEU, nor by overriding requirements relating to the public interest

As all the conditions are very likely met according to the enclosed legal assessment, the proposed model very likely constitutes a quantitative export restriction or a measure having equivalent effect.

The elaborated justification for these considerations is enclosed in the document *“Honoré, Fallesen & Andersen Advokatfirma, Legal assessment of Energinet’s new countertrading model, 3rd February 2022”*

Dansk Energi remains available for further elaboration.

Yours sincerely,

Dansk Energi
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