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Legal assessment of Energinet's new countertrading model

1. Introduction

Danish TSO Energinet has recently devised a proposal for a new countertrading model to be applied when neighboring TSOs request assistance from Energinet with handling imbalances in their grid areas ("the Model"). In particular, the Model is aimed at handling such requests from German TSO TenneT, which has made extensive use of such requests to Energinet in previous years.

Energinet has recently submitted the Model to The Danish Utility Regulator for approval pursuant to relevant Danish sector laws. The Model is described in detail in a memorandum published in connection with this hearing[1].

We have been asked by Dansk Energi and Wind Demark to provide an assessment of whether the Model will be compatible with (i) the EU competition rules and (ii) the EU rules on the free movement of goods.

In section 2 below, we will present our conclusions on these questions. Section 3 below contains a brief presentation of the factual background of the case, including the wholesale electricity market, the concept of countertrading, and the Model itself. In section 4 below, we will present our analysis of whether the Model is compatible with the EU competition rules. In section 5 below, we will present our analysis of whether the Model is compatible with the EU rules on the free movement of goods.

2. Conclusion

It is our conclusion that the Model is very likely incompatible with the EU competition rules. In our assessment, implementation of the Model will very likely entail abuse of a dominant position by Energinet, specifically by

[1] "Metode for indkøb af modhandelsenergi", enclosed as **Annex 1**.

limiting export capacity from Denmark (and further north) to Germany (and further south) within the intraday electricity market and by selling electricity from Germany on the Danish market at below-market prices.

Further, it is our conclusion that the Model is very likely incompatible with EU rules on the free movement of goods. In our assessment, implementation of the Model will clearly constitute a quantitative restriction or a measure having equivalent effect, specifically by limiting export capacity from Denmark (and further north) to Germany (and further south) within the intraday electricity market, and the restriction/measure is very unlikely to be justified under Article 36 TFEU or by overriding requirements relating to the public interest.

3. Factual background

3.1. The wholesale electricity market

Both the Model and the current countertrading model that it is intended to replace are operated on the wholesale electricity market.

Broadly speaking, the wholesale electricity market is comprised of three interconnected markets: The day ahead market, the intraday market, and the balancing market.

On the day ahead market, electricity generators and suppliers sell electricity to customers in need thereof (and financial traders) for use the following day. Buyers and sellers submit bids to electricity exchanges, where such trading is carried out, for each hour of the relevant day. The exchanges then calculate the market prices for each of those hours, which are then applied to all trades made within the relevant hours. If transmission capacity between areas is available, sale bids from one area can be matched with purchasing bids from another, and the relevant amounts of electricity will then be transferred between the areas.

The day ahead market in relation to a given day is open until 12 noon the day before, and prices for that day are published at 1 PM the day before.

After the day ahead market closes, the intraday market opens (at 2 PM the day before the relevant day). The intraday market is used by market participants to balance their positions ahead of the balancing market in order to reduce imbalance costs. On this market, customers that have not purchased sufficient electricity for the following day on the day ahead market or generators/suppliers that have not sold their volumes on the day ahead market can trade their remaining amounts. Trading can be done in the intraday market until 1 hour before the electricity is to be supplied and otherwise functions in the same manner as trading on the day ahead market.

The balancing market runs in parallel to the intraday market during the day of operation (i.e. not the day before). Unlike the day ahead and intraday markets, the balancing market is not run by electricity exchanges, but rather by Energinet in Denmark and its counterparts in other areas.

On the balancing market, Energinet ensures that any remaining discrepancies between electricity generation and electricity consumption within each hour of the day are balanced out. This is done in order to ensure stability in the system. Energinet does this by paying electricity generators to generate more/less electricity or paying consumers to consume more/less in the event that there is insufficient electricity available within a given hour – or the inverse in the event that an excess of electricity is expected to be generated within a given hour.

3.2. Countertrading

Countertrading is an instrument applied by TSOs such as Energinet in order to mitigate imbalances internally in their grids.

Countertrading entails that a TSO in a given area requests that a neighboring TSO assists it with either acquiring or disposing of electricity in order to achieve balance in its own area. For instance, if there is an excess of electricity generation within the area of a TSO, that TSO can request that a neighboring TSO pays generators/consumers within the neighbor-TSO's area not to generate or to consume more, respectively, so that there will be less export to the requesting area and, consequently, better balance.

In Denmark, countertrading is primarily made use of at the request of TenneT. According to Energinet, almost all payments to reduce generation and/or increase consumption in Denmark from 2018 to 2021 were made to accommodate countertrading requests by TenneT[2]. Consequently, when discussing the functioning and effects of the Model in the following, we will generally refer to TenneT rather than neighboring TSOs in general.

3.3. The Model

It is our understanding that under the current countertrading model, countertrading requests from TenneT are handled largely in the same manner as Energinet's own balancing needs, i.e. by paying operators to increase or reduce generation or consumption in the balancing market.

Further, it is our understanding that under the Model, countertrading will essentially be carried out as follows:

- When Energinet receives a countertrading request from TenneT, Energinet will accommodate that request by trading on the intraday market
    - Thus, if TenneT has requested a reduction of generation north of the DK1-DE/LU border, Energinet will offer the relevant amount of electricity for sale in on the intraday market[3]
    - Energinet/TenneT will simultaneously reduce cross-border capacity available for trade on the intraday market by submitting an adjusted NTC (Net Transfer Capacity) to the Single Intraday Coupling (SIDC) reflecting the requested counter trade
- Energinet will initially place the relevant bids on the intraday market during the trading windows agreed upon with TenneT
    - It must be assumed that these windows will be placed as early as possible in the intraday market time frame as Energinet is of the view that balancing large countertrade volumes close to the operational hour presents operational challenges (see Annex 1, section 2.3.1.2). Also, as explained, the bids concern electricity that TenneT needs to dispose of, and TenneT will therefore want to ensure that the bids are placed before too many potential buyers in the intraday market have already purchased the amounts they need.

[2] See Annex 1, section 2.3.1.

[3] In principle, the opposite is also possible, but in practice, countertrading requests from TenneT are essentially always aimed at reducing generation/increasing consumption in Denmark.

- The bids will be placed at prices within a minimum/maximum price range defined by TenneT. Similarly to the placement of the trading windows, it must be assumed that this price range will generally be below market level as TenneT will wish to ensure that the bids are matched in order to dispose of the electricity in question.

- Matched bids reduce the planned market flow towards TenneT's area (i.e. south of the Danish/German border) (referred to as "the Limitation" in the following). Typically, the flow is reduced to 0 so that no further exports in that direction are possible or reversed to an import to DK1.

- Bids that could not successfully be matched at the minimum price set by TenneT are withdrawn from the market at the end of the agreed trading window. Energinet subsequently informs TenneT that the bids could not be matched and that TenneT must unilaterally make the necessary remedial actions to ensure safe operation of the power system.

This explanation of the Model is assumed to be accurate in the following.

4. The Model very likely entails abuse of a dominant position by Energinet

4.1. Introduction

As mentioned in section 3.3 above, the Model entails that Energinet will be limiting export capacity, in practice from Denmark (and further north) to Germany (and further south). This will happen whenever the Model is made use of.

Based on experience with such countertrade requests from neighboring TSOs (particularly TenneT) to date, it is likely that the Model will be made use of for a considerable portion of the possible hours throughout the year. Thus, the current countertrading model that the Model is intended to replace has been made use of for approximately half the hours of the year[4], and Energinet expects countertrading volumes to increase going forward[5]. As explained in the hearing documents mentioned above, this is part of the reason for the introduction of the Model[6].

The Model will thus entail that Energinet will be limiting export capacity from Denmark in the intraday market for a considerable portion of the year.

Further, as also explained in section 3.3 above, the Model will entail that Energinet will very likely be selling electricity on the Danish intraday market at below-market prices.

As will be explained in the following, it is our assessment that these measures will very likely constitute an abuse of a dominant position by Energinet.

[4] App. 3,500 hours in both 2020 and 2021.

[5] See Annex 1, section 2.3.3.1.

[6] See Annex 1, section 2.3.1.

4.2. The TFEU prohibits abuse of a dominant position

It follows from Article 102 of the Treaty on the Functioning of the European Union ("TFEU") that undertakings occupying a so-called dominant position (see section 4.4 below) are prohibited from abusing that position:

> "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…"

It follows from the case law of the European Commission ("Commission"), which enforces the EU competition rules including Article 102 TFEU, and the Court of Justice of the European Union ("CJEU") that the behavior of an operator will be contrary to this prohibition if the following conditions are satisfied[7]:

1) The operator in question is an undertaking (see section 4.3 below)

2) The operator occupies a dominant position on the relevant market (see section 4.4 below).

3) The behavior in question constitutes an abuse of that dominant position (see section 4.5 below)

4) The behavior is capable of having an effect on trade between EU Member States (see section 4.6 below)

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 (see section 4.7 below)

As will be explained in the following, it is our assessment that the measures mentioned in section 4.1 above very likely satisfy all of these conditions. It is therefore our assessment that the Model will very likely entail abuse of dominance contrary to Article 102 TFEU.

4.3. Condition 1: Energinet is an undertaking in relation to transmission of energy

It follows from the case law of the Commission and the CJEU that an operator is considered an undertaking for the purposes of Article 102 TFEU if that operator is engaged in economic activity[8]. Any activity consisting of offering goods and/or services on a market is considered economic activity in this context.

This applies regardless of whether the activity in question is carried out for profit[9]. What is decisive is the nature of the activity rather than the actual aims of the operator in question: If the activity is of a nature that

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[7] See e.g. decision of the Commission of 18 July in case AT.39711, "Qualcomm", and decision of the Commission of 17 December 2018 in case AT.39849, "BEH Gas".

[8] See e.g. judgement of the CJEU of 23 April 1991 in case C-41/90, Höfner, paragraph 21.

[9] See e.g. decision of the Commission in cases IV/33.384 and IV/33.378, "FIFA 1990 world cup", recital 43, and judgement of the CJEU of 1 July 2008 in case C-49/07, "MOTOE", paragraphs 27-28.

is typically carried out on a market, the activity will be considered economic, even if the specific operator in question operates on a non-profit basis.

This definition also applies regardless of whether the operator in question is part of the public administration[10]. Public bodies will also constitute undertakings if they carry out activities consisting of offering goods and/or services on a market.

As the Danish TSO, Energinet carries out a range of activities. Some of these activities are of a public interest nature. For instance, Energinet is charged with ensuring balance between electricity consumption and supply within its area of responsibility. This is not an activity that is typically carried out for profit, but rather one that is carried out in the public interest to maintain a well-functioning and stable electricity grid.

It has been established in case law that such public interest activities may not be considered economic and that operators carrying out such activities may therefore not constitute undertakings for the purposes of Article 102 TFEU.

However, it also follows from case law that when an operator carries out both economic and non-economic activities, it must be considered an undertaking when carrying out the economic activities[11]. Even though some of its activities may be of a public interest/non-economic nature, Energinet must therefore be considered an undertaking when carrying out economic activities.

The Commission has consistently held that transmission of energy constitutes an economic activity – and, more specifically, that a TSO must be considered an undertaking when limiting electricity transmission capacity within its area.

Thus, the Commission has on several occasions considered cases concerning limitations of transmission capacity by TSOs. These cases include case AT.40461 concerning restrictions imposed on transmission capacity to/from Denmark by German TSO TenneT (i.e. similar to the Limitation) and case AT.39351 concerning restrictions imposed on transmission capacity to/from Denmark by Swedish TSO Svenska Kraftnät.

In both of these cases, the Commission very definitively concluded that transmission of electricity is an economic activity and that imposing restrictions on transmission capacity to/from other grid areas is part of that economic activity.

In the Svenska Kraftnät case, the Commission stated as follows[12]:

> "SvK is an entity engaged in economic activities, insofar as it provides its services on the electricity transmission market, and is therefore considered to be an undertaking within the meaning of Article 102 TFEU."

In the TenneT case, the Commission stated as follows[13]:

[10] See e.g. judgement of the CJEU of 23 April 1991 in case C-41/90, "Höfner", paragraphs 22-23.

[11] See e.g. judgement of the CJEU of 12 July 2012 in case C-138/11, "Compass-Datenbank", paragraphs 35-38.

[12] See decision of the Commission of 14 April 2010 in case AT.39351, "Swedish interconnectors", recital 23.

[13] See decision of the Commission of 7 December 2018 in case AT.40461, "DE/DK interconnector", recital 52.

> "There is no doubt that TenneT is engaged in economic activities. TenneT offers the services of electricity transmission on its high-voltage transmission network against a fee. Therefore, it is concluded that TenneT is an undertaking for the purposes of Article 102 of the Treaty."

The Commission has also concluded that transmission of electricity constitutes an economic activity in a number of state aid cases[14].

Regardless of Energinet's public interest activities, Energinet must therefore clearly be considered an undertaking in the present case as the case relates to activities within transmission of energy. Condition 1 is therefore satisfied.

4.4. Condition 2: Energinet is dominant on the market for transmission of electricity in Denmark

It is settled case law that an undertaking is to be considered dominant when it occupies a position on the relevant market "…which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers"[15].

The relevant market is the market for the goods/services that the behavior relates to, including all goods/services that are regarded as substitutable with those by customers[16] (called the product market), within the area where supply and demand of those goods/services takes place under sufficiently homogenous conditions[17] (called the geographic market).

In a number of previous decisions concerning transmission of electricity, the Commission has defined the relevant product market as the market for the transmission of electricity, as no other goods/services are substitutable for this. The relevant geographic market has been defined as the network of the TSO in question, as transmission of electricity through the network of a given TSO is not substitutable for transmission through the network of another TSO (located elsewhere)[18].

Based on this consistent case law, it is highly likely that the relevant market in relation to the measures under the Model should be defined as the market for transmission of electricity within Energinet's area (i.e. Denmark).

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[14] See e.g. decision of the Commission of 26 May 2014 in case SA.35695, "Aid for the interconnection of Cyclades islands with the National Mainland Interconnected Transmission System", recital 29, and decision of the Commission of 31 July 2012 in case SA.33823, "Aid for an electricity cable between mainland Finland and Aland", recitals 42-43.

[15] See judgement of the CJEU of 14 February 1978 in case C-27/76, "United Brands", paragraph 65.

[16] See Commission notice on the definition of the relevant market for the purposes of Community competition law (97/C 372/03), paragraph 7.

[17] *Ibidem*, paragraph 8.

[18] See e.g. decision of the Commission of 7 December 2018 in case AT.40461, "DE/DK interconnector", recitals 41-50, decision of the Commission of 14 April 2010 in case AT.39351, "Swedish interconnectors", recitals 16-21, decision of the Commission of 14 August 2008 in case COMP/M.5154, "CASC JV", recitals 18-22, and decision of the Commission of 22 August 2008 in case COMP/M.4922, "EMCC", recitals 11-15.

For the same reasons, the Commission has also consistently held that each TSO network constitutes a natural monopoly where no competition takes place[19]. The Commission has therefore also found that TSOs occupy a dominant position in relation to transmission of electricity within their areas[20].

The same applies in the present case. Energinet owns the Danish transmission grid and is not exposed to competition for transmission of electricity within its area. This is recognized by Energinet itself[21] and by the Danish government[22]. Energinet can therefore clearly act independently of any competition. This is illustrated by the present case – an electricity supplier or trader wishing to transmit electricity across the Danish/German border has no alternative but to make use of Energinet's transmission network.

Under such circumstances, Energinet must clearly be considered dominant on the relevant market. Condition 2 is therefore satisfied.

4.5. Condition 3: The Model very likely entails abuse of Energinet's dominant position

4.5.1. Partitioning national energy markets and discriminating between energy customers based on nationality has been considered abusive in case law

Article 102 TFEU prohibits any abuse of a dominant position. Article 102 contains a number of examples of abuses, but that list of examples is not exhaustive.

In the above-mentioned decisions concerning TenneT and Svenska Kraftnät, the Commission considered that practices whereby a TSO curtails capacity on the interconnectors between its area and the areas of neighboring TSOs may constitute an abuse of those TSOs' positions of dominance. The Commission considered that such behavior may have the effect of partitioning the internal market along national borders and discriminating between potential customers based on nationality:

> "TenneT gives priority access to its network to domestic electricity production, in particular during the hours when the domestic wind-based electricity production is high, by limiting access of the electricity coming from West Denmark via the DEDK1 interconnector (see recitals (29)-(31)). This has been implemented by significantly limiting the commercial capacity of the DE-DK1 interconnector (see recitals (32)-(33)). In the preliminary assessment the Commission concluded that that behaviour may have resulted in partitioning of the internal market and discrimination between network users based on their place of residence in breach of Article 102 of the Treaty and Article 54 of the EEA Agreement."[23]

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[19] See e.g. decision of the Commission of 7 December 2018 in case AT.40461, "DE/DK interconnector", recital 54, decision of the Commission of 14 April 2010 in case AT.39351, "Swedish interconnectors", recital 25, decision of the Commission of 14 August 2008 in case COMP/M.5154, "CASC JV", recital 19, and decision of the Commission of 22 August 2008 in case COMP/M.4922, "EMCC", recital 12.

[20] See e.g. decision of the Commission of 14 April 2010 in case AT.39351, "Swedish interconnectors", recital 24, and decision of the Commission of 7 December 2018 in case AT.40461, "DE/DK interconnector", recital 55 (note that the Commission uses the phrasing "may be dominant" in the latter).

[21] See report by Energinet of 16 January 2019, "Introduktion til elmarkedet" (enclosed as **Annex 2**), page 5, first new paragraph.

[22] See proposal for revision of the Danish Act on Energinet, the Danish Act on Electricity Supply, and the Danish Act on Natural Gas Supply (L 99 20-21) (excerpt enclosed as **Annex 3**), page 7, right column, first paragraph.

[23] See decision of the Commission of 7 December 2018 in case AT.40461, "DE/DK interconnector", recital 60. See also decision of the Commission of 14 April 2010 in case AT.39351, "Swedish interconnectors", recital 27.

This is in line with consistent case law from the Commission and the CJEU.

It is settled case law of the CJEU that behavior by a dominant undertaking which has the effect of partitioning markets along national borders is contrary to Article 102 TFEU[24]. This does not only apply to behavior which partitions markets completely and makes cross-border trade impossible, but also to behavior which artificially creates dissimilar trading conditions across borders, placing competitors on one side of the border at a competitive disadvantage. For instance, in the seminal *United Brands* judgement, the CJEU found that creating artificially different price levels across borders was sufficient to constitute such an abusive market partitioning[25]. This is also e.g. explicitly stated in the judgement of the CJEU in case C-501/06 P, "GlaxoSmithKline"[26]:

> "The Court has, moreover, held in that regard, in relation to the application of Article 81 EC and in a case involving the pharmaceuticals sector, that an agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the Treaty's objective of achieving the integration of national markets through the establishment of a single market. Thus on a number of occasions the Court has held agreements aimed at partitioning national markets according to national borders or making the interpenetration of national markets more difficult, in particular those aimed at preventing or restricting parallel exports, to be agreements whose object is to restrict competition within the meaning of that article of the Treaty (Joined Cases C-468/06 to C-478/06 Sot. Lélos kai Sia and Others [2008] ECR I-7139, paragraph 65 and case-law cited)."[27] (emphasis added)

As this statement shows, not only behavior which entirely prevents cross-border trade, but also behavior which makes interpenetration of national markets "more difficult" or "restricts" exports is considered to have the object of restricting competition and, thus, to be contrary to the EU competition rules.

It is also settled case law of the CJEU that discrimination based on nationality (as well as other forms of discrimination) is prohibited under Article 102 TFEU[28]. Discrimination based on nationality may also be contrary to Article 18 TFEU.

The Commission has applied these principles in cases concerning restrictions on imports and exports in the energy sector in a long line of cases, including e.g.:

- AT.39351 – Svenska Kraftnät (concerning limitation of electricity transmission capacity between Sweden and Denmark)[29]

- AT.39767 – BEH Electricity (concerning contract clauses prohibiting electricity customers from re-selling electricity outside of a particular EU Member State)[30]

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[24] See e.g. judgement of the CJEU in case 27/76, "United Brands", paragraphs 233-234, and judgement of the CJEU in case C-501/06 P, "GlaxoSmithKline", paragraph 61.

[25] See e.g. judgement of the CJEU in case 27/76, "United Brands", paragraph 233.

[26] See judgement of the CJEU in case C-501/06 P, "GlaxoSmithKline", paragraph 61.

[27] See decision of the Commission of 7 December 2018 in case AT.40461, "DE/DK interconnector", recital 60. See also decision of the Commission of 14 April 2010 in case AT.39351, "Swedish interconnectors", recital 27.

[28] See e.g. judgement of the CJEU of 29 March 2001 in case C-163/99, "Portugal v Commission", paragraph 46.

[29] See decision of the Commission of 14 April 2010 in case AT.39351, "Swedish interconnectors", recital 27.

[30] See decision of the Commission of 10 December 2015 in case AT.39767, "BEH Electricity", recital 49-50.

- AT.39816 – Gazprom (concerning contract clauses prohibiting electricity customers from reselling natural gas outside of a particular EU Member State and clauses with equivalent effects)[31]

- AT.40335 – Transgaz (concerning a strategy to restrict natural gas exports by underinvesting in or delaying investment in necessary infrastructure, charging high interconnection tariffs for exports to other Member States, and restricting or delaying exports with reference to vexatious technical arguments)[32]

- AT.40461 – TenneT (concerning limitation of electricity transmission capacity between Germany and Denmark)

All of these cases were settled with commitment decisions by the Commission. The Commission therefore did not definitively conclude that the behavior concerned by the decisions was contrary to Article 102 TFEU (or otherwise contrary to the EU competition rules).

However, the fact that the Commission has carried out such a large number of investigations in cases concerning a wide range of restrictions on imports/exports between EU Member States in the energy sector – in recent years alone – is a very strong indication that the Commission considers such behavior very likely to be contrary to the EU competition rules.

The CJEU has also found such measures within the energy sector to be contrary to the EU competition rules. In its judgement in case C-393/92, "Almelo" the CJEU found that an exclusive purchasing clause imposed on a number of local electricity distributors in the Netherlands by a regional electricity distributor was contrary to Articles 101 and 102 TFEU. The clause in question prohibited those distributors from importing electricity from other Member States, and the CJEU found that this was contrary to the EU competition rules, in part because:

> "Those contractual relationships have the cumulative effect of compartmentalizing the national market, inasmuch as they have the effect of prohibiting local distributors established in the Netherlands from obtaining supplies of electricity from distributors or producers in other Member States"[33].

Like the Commission, the CJEU thus also considers that restrictions on imports/exports of electricity with the effect of partitioning national markets are contrary to the EU competition rules.

As will be explained in the following, the Model will have the effect of partitioning national markets in the same manner as the cases referenced above.

4.5.1. The Limitation has the effect of partitioning national energy markets and discriminating between energy customers based on nationality

Just like the measures considered by the Commission in the TenneT and Svenska Kraftnät cases, the Limitation will have the effect of partitioning the inner market for electricity along national lines, specifically by separating the Danish market (and further north) from the German market (and further south).

Thus, the Limitation will have the effect that, for a considerable number of hours of the year, operators from Denmark and further north will be unable to export electricity to Germany or further south in the intraday

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[31] See decision of the Commission of 24 May 2018 in case AT.39816, "Gazprom", recital 40.

[32] See decision of the Commission of 6 March 2020 in case AT.40335, "Transgaz", recital 31.

[33] See judgement of the CJEU of 27 April 1994 in case C-393/92, "Almelo", paragraph 39.

market. By contrast, operators from Germany and further south will be able to export electricity to Denmark and further north in that market whenever they desire (as long as this is technically possible). A considerable difference in trading conditions between those two areas will thus have been created, and interpenetration of the markets will have been made considerably more difficult.

Equally, the Limitation will have the effect that operators from Germany and further south will be prevented from obtaining supplies of electricity from distributors/producers located in Denmark and further north during the hours in question. Thus, the Model will also have the same types of effects that the CJEU considered contrary to EU competition rules in the Almelo case mentioned above[34].

The effect of the Limitation may, as a starting point, be smaller in scope than the effects of the measures in the TenneT and Svenska Kraftnät cases. In those cases, exports in one direction were made entirely impossible, while in the present cases, exports may only be impossible for a certain number of hours of the year. Also, the restriction will only apply to the intraday market, while exports in the day ahead market will still be possible.

However, as explained in section 4.5.1 above, it is not a requirement that a restriction on exports must be total in order for it to constitute an abuse of dominant position based on the case law of the Commission and the CJEU.

According to the case law of the Commission and the CJEU, it is sufficient that a measure is capable of having a detrimental effect on competition in order for the behavior to constitute an abuse of a dominant position. In relation to measures concerning restrictions on exports and imports in the energy sector, the Commission and the CJEU have considered such measures abusive if they merely make interpenetration of the national markets "more difficult" or if they create appreciably different trading conditions on each side of the national borders (e.g. different prices as in the *United Brands* case).

As described above, this will clearly be the case in relation to the Limitation. The Limitation will create a substantial difference in access to the intraday market between the areas north and south of the Danish/German border, respectively, and will deprive operators located north of that border of the opportunity to export to the markets south of the border on the intraday market for a considerable portion of the year (app. half – or more, based on Energinet's expectations, cf. above), considerably reducing the opportunities for those operators to penetrate those markets.

In fact, it must be assumed that the Limitation will have the exact types of effects that the Commission anticipated that the behavior at issue in the TenneT case would have (albeit on a smaller scale):

> "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.
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> 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 consum-

[34] See judgement of the CJEU of 27 April 1994 in case C-393/92, "Almelo".

> ers 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."[35] (emphasis added)

The Limitation will have all of these effects: Electricity generators in Denmark and further north will be at a competitive disadvantage due to their reduced opportunities for cross-border trade; their ability to reap the profits from exporting to Germany and further south will be reduced; price differences between the areas will be artificially maintained (as exports from low-price to high-price areas would otherwise reduce price differences); and ultimately, the distorted prices will lead to distorted investment incentives.

Thus, according to the Commission's decision in the TenneT case, Northern Germany is characterized by overproduction and lack of transmission capacity for a considerable portion of hours[36], which was largely the reason why TenneT chose to limit transmission capacity to/from Denmark in that case. When overproduction and lack of transmission capacity in Germany can be solved by sending electricity to Denmark and restricting exports to Germany (as per the Model), this takes away the incentive for German electricity generators to reduce capacity and for the German transmission operators (such as TenneT) to invest in sufficient transmission capacity.

In addition to having the same effects as the measure at issue in the TenneT case, the Model will have additional distortive effects.

As described in section 3.3 above, the Model will very likely entail that electricity from Germany will be placed for sale on the Danish intraday market at below-market prices. This will distort competition and prices on the wholesale electricity markets in several ways. Firstly, the offering of German electricity for sale on the Danish intraday market at below-market prices will necessarily result in lower prices on that market. Secondly, it must also be expected that this offering will result in lower prices on the Danish day ahead market. Thus, when potential customers in the day ahead market know that electricity will be available for below-market prices on the intraday market for a considerable portion of the year, it must be expected that a number of such customers will choose not to purchase electricity on the day ahead market and instead wait until the intraday market opens, thus leading to reduced demand and, consequently, reduced prices on the day ahead market.

These effects will further exacerbate the partitioning of the Danish and German markets: Not only will operators north of the Danish/German border be prevented from exporting south of the border for a substantial portion of the year, they will also be subjected to competition from electricity sold at below-market prices, leading to lower prices on the wholesale electricity markets. Conversely, operators from Germany will be able to sell their electricity in Denmark even during hours with higher electricity prices in Germany than in Denmark. During such hours, such operators would normally be exposed to competition from Danish generators (who would wish to export to Germany in order to sell at the higher prices there), but instead, they will be both shielded from that competition AND able to access the Danish demand due to the artificial influence of the Model.

In our assessment, it is very likely that these detrimental effects on competition will be sufficient for this behavior to be considered an abusive partitioning of the markets based on the case law of the Commission and the CJEU described above.

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[35] See decision of the Commission of 7 December 2018 in case AT.40461, "DE/DK interconnector", recital 65-66.

[36] See decision of the Commission of 7 December 2018 in case AT.40461, "DE/DK interconnector", recitals 14 and 29.

For the same reasons, it is also very likely that the behavior will be considered to entail an abusive discrimination based on nationality. As explained above, the Model will thus entail that operators south of the Danish/German border will have better access to cross-border trade than operators north of that border, and operators north of the border will be forced to sell at lower prices (even disregarding the export restrictions) due to the influx of German electricity at below-market prices.

For these reasons, it is our assessment that the Model is very likely to entail an abuse of Energinet's dominant position. Specifically, the Limitation and the offering of German electricity in Denmark at below-market prices will do so by partitioning the markets along national lines and by discriminating based on nationality. Condition 3 is therefore very likely satisfied.

4.6. Condition 4: The abuse of Energinet's dominant position is capable of having an effect on trade

As mentioned in section 4.2 above, an abuse must comprise the internal market or a substantial part of it and be capable of having an effect on trade between Member States in order to be contrary to Article 102 TFEU.

It is settled case law that if a measure affects at least the territory of an EU Member State, it can be regarded as comprising a substantial part of the internal market[37]. As the abusive measures in this case (cf. section 4.1 above) will affect trade on both sides of the Danish/German border, this condition is therefore clearly satisfied.

The condition that the Model must be capable of having an effect on trade between EU Member States is also clearly satisfied, as the Limitation entails precisely that trade between EU Member States on opposite sides of the Danish/German border is prevented during hours where the Model is made use of, and the selling of German electricity in Denmark at below-market prices specifically constitutes trade between EU Member States.

Condition 4 is therefore clearly satisfied.

4.7. Condition 5: It is unlikely that the abuse can be objectively justified or outweighed by efficiencies

4.7.1. Introduction

It follows from the case law of the CJEU that a behavior that would otherwise be abusive and contrary to Article 102 TFEU may be legal if that behavior can be objectively justified. The same may be the case if the dominant undertaking can show that the behavior produces pro-competitive effects (efficiencies) which are substantial and outweigh the anti-competitive effects of the behavior[38].

It follows from the case law of the Commission and the CJEU that in order to constitute objective justification or efficiencies outweighing an otherwise abusive behavior, that behavior must be indispensable in order to accomplish the alleged pro-competitive objectives of the behavior and must also be proportional to these objectives. If it is possible to accomplish these objectives without the abusive behavior or with less anti-

[37] See judgement of the CJEU of 7 October 1999 in case T-228/97, ""Irish Sugar", paragraph 99.

[38] See "Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings" (2009/C 45/02), section D, and the case law cited therein.

competitive means, objective justification or efficiencies may not be invoked as a defense, and the behavior will remain contrary to Article 102 TFEU[39].

4.7.2. Energinet's stated reasons for implementing the Model

In connection with the ongoing hearing concerning the Model, Energinet has put forward the following reasons for implementing the Model:

- Increased countertrade volume: The amount of countertrading carried out by Energinet at the request of TenneT has been increasing from 2018 to 2021. According to Energinet, this entails a risk to the security of operation for Energinet's grid as it is difficult to balance the requested volumes using the current model, in particular because there is insufficient time to carry out the balancing between the time of the countertrade and the time of operation where the electricity amount must be balanced[40].

- Joint declaration and TenneT commitments: The Danish and German governments signed a joint declaration in 2017 committing the parties to making certain minimum trading capacities across the Danish/German border available to the day ahead markets. In 2018, TenneT offered commitments to the Commission to increase trading capacity across the Danish/German border in connection with the above-mentioned TenneT case. According to Energinet, these commitments entail an obligation for Energinet to assist TenneT with countertrading in order to ensure that these capacities are available[41].

- The Electricity Market Regulation: Regulation 2019/943 on the internal market for electricity obligates TSOs to make at least 70 % of the available capacity on interconnectors available to the market. According to Energinet, the regulation also obligates Energinet to assist with countertrading if neighboring TSOs request this in order to maintain 70 % trading capacity in the day ahead market. Conversely, Energinet does not believe that the 70 % rule applies to the intraday market, meaning that it is legal for Energinet to limit transmission capacity in this market as described above[42].

- Prices: According to Energinet, the prices for the countertrading carried out by Energinet in order to accommodate requests from TenneT have gone up considerably since 2017. According to Energinet, a more cost-efficient model should therefore be put in place[43].

- The MARI platform: According to Energinet, the introduction of the MARI platform in the Nordics for balancing energy entails that it will no longer be practically/technically possible for Energinet to make use of the current countertrading model where the necessary countertrading is carried out in the balancing market[44].

- Environmental considerations: According to Energinet, the current countertrading system has made it attractive for wind energy generators to make countertrading bids to cease production. In Energinet's view, it might therefore lead to less CO2 emissions if another model was implemented where

[39] See "Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings" (2009/C 45/02), section D, and the case law cited therein.

[40] See Annex 1, section 2.3.1.

[41] *Ibidem*, section 2.3.2.

[42] *Ibidem*, section 2.3.3.

[43] *Ibidem*, section 2.3.4.

[44] *Ibidem*, section 2.3.5.

more operators can participate in bidding for the necessary countertrading volumes so that less environmentally friendly generators could handle the volumes in question and cease production instead of the wind generators[45].

4.7.3. Energinet's stated reasons for implementing the Model are very unlikely to constitute a valid justification of the Model

Based on our discussions with Dansk Energi and Wind Denmark, it is our understanding that Energinet currently has several alternatives to implementing the Model:

- Decline requests for countertrading: If Energinet wishes to avoid the alleged harmful effects of the current countertrading model, Energinet can simply decline requests for countertrading from neighboring TSOs (including TenneT) or accept them to a lesser extent. Neither Energinet's joint declaration with TenneT nor TenneT's commitments to the Commission create a legal obligation for Energinet to accept such requests, much less to accept such an extensive use of such requests (see below for more on this)[46]. We are also not aware of any other basis for such a legal obligation.

- Countertrading in the balancing market: Energinet could continue to carry out countertrading in the balancing market in the same manner that Energinet has done to date. It is our understanding that this is neither legally nor practically impossible for Energinet (although it may be more difficult and costly – see below for more on this).

- Countertrading later in the intraday market: If Energinet wishes to carry out countertrading in the intraday market (as contemplated in the Model), Energinet could carry out the countertrading towards the end of the intraday market timeframe for each day rather than implementing a model where this countertrading may (and likely will) start at the very beginning of that timeframe. This would entail that the market would remain open for the majority of the normal timeframe (as Energinet would have no need to close the market until the countertrading was carried out), and operators north of the Danish/German border would retain the ability to export to areas south of the border with only a slight limitation.

In the following, we are assuming that this is accurate.

Based on this, it is our assessment that it is very unlikely that the reasons given by Energinet for implementing the Model will be sufficient to constitute objective justification and/or efficiencies outweighing the anti-competitive effects of the Model. In particular, it is unlikely that the Model can be considered indispensable or proportionate to achieving the objectives set out in Energinet's reasoning as all of these objectives could be achieved using the less anti-competitive alternatives set out above.

The risk to the security of operation due to increased countertrade volumes highlighted by Energinet could thus be mitigated by declining requests for countertrading or (to a lesser extent) by countertrading later in the intraday market. The latter would give Energinet more time between the countertrading and the time of operation to carry out the necessary balancing.

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[45] *Ibidem*, section 2.4.

[46] We have not carried out an assessment of whether any other basis for such a legal obligation for Energinet exists, but we are not aware of any such other basis.

In addition to this, it must be assumed that it would be possible to carry out the necessary balancing within the amount of time available under the current model if more resources were dedicated to doing so. The necessary security of operation could thus be achieved using less anti-competitive means (the current model), but at greater cost. Based on this, it is very unlikely that Energinet's concerns in relation to security of supply will be considered a valid defense for the Model. In its past case law, the Commission has very firmly rejected the notion that a TSO may employ more anti-competitive means to manage supply if less invasive ones are available, even if the latter are more costly, e.g. in the above-mentioned TenneT case[47]:

> "Indeed TenneT, like any other TSO, cannot resort to behaviour which contravenes Union competition rules and impedes the functioning of the internal electricity market on the basis that it would otherwise have to incur extra-costs."

In relation to the joint declaration and TenneT commitments, even if it is assumed that these instruments do entail an obligation for Energinet to assist TenneT with countertrading, they do not obligate Energinet to employ the specific form of countertrading contemplated under the Model. Countertrading later in the intraday market or in the balancing market would be sufficient to satisfy such an obligation, and using the more anti-competitive form of countertrading contemplated under the Model therefore cannot be considered justified by such an obligation.

Also, the joint declaration is no longer in force[48], and it is highly unlikely that the TenneT commitments create any legal obligations for Energinet. Commitments, generally speaking, are offered to the Commission by a party to a case and may be made binding upon that specific party by the Commission, but do not create obligations for third parties. If they did, those third parties would be addressees of the Commission's decision and would need to be treated as parties to the case with all the rights to be heard, to appeal etc. that this would entail.

In accordance with this, the TenneT commitments are addressed exclusively to TenneT, and it is explicitly stated in the commitments that they are not addressed to Energinet and that Energinet has not consented to them[49]:

> "[Energinet] is neither addressee of the proceedings in case COMP/AT.40461, nor has [Energinet] consented to the Commitments. By consequence, the Commitments apply only to the TenneT Guaranteed Hourly NTC…"

It is therefore highly unlikely that the TenneT commitments actually do create such an obligation for Energinet. The fact that it is stated in the commitments that TenneT intends to make use of countertrading through Energinet in order to fulfill the commitments (as Energinet points out in the hearing documents) does not create such an obligation. This is merely a statement of TenneT's plans, which is in no way binding upon Energinet.

Similarly, the alleged obligations for Energinet under the Electricity Market Regulation also do not obligate Energinet to use *this* specific form of countertrading, but rather only to assist with countertrading in general.

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[47] See decision of the Commission of 7 December 2018 in case AT.40461, "DE/DK interconnector", recital 67.

[48] See Annex 1, section 2.3.2.

[49] See "Proposal of Commitments under Article 9 of Council Regulation (EC) No. 1/2003, Case COMP/AT.40461 – DE/DK Interconnector", section 10.

As less anti-competitive options (countertrading later in the intraday market and countertrading in the balancing market) are available, these obligations therefore cannot justify the more anti-competitive Model.

Further, based on the hearing materials published by Energinet concerning the Model, we are not aware of any basis for such obligations on Energinet under the Electricity Market Regulation, nor are we aware of any other basis for this outside the Electricity Market Regulation. We have not carried out an assessment of this, but if correct, this obviously also entails that the Electricity Market Regulation is not a valid justification for the Model.

As explained above, the Commission has roundly rejected higher costs as a justification for anti-competitive measures (capacity limitations in particular) by TSOs in its past case law. The higher prices for countertrading pointed to by Energinet in the hearing documents for the Model are therefore also very unlikely to be accepted as a valid justification for the Model.

In relation to the MARI platform, even if the introduction of this platform *does* entail that countertrading in the balancing market will no longer be a viable option for Energinet, countertrading later in the intraday market or declining requests for countertrading will remain viable alternatives. The introduction of the MARI platform therefore also cannot be considered a valid justification.

Further, it is stated in a Q&A to Annex 1 published by Energinet[50] that it *is* possible to continue the current balancing market countertrade after the automatization of the current Nordic platform[51] and that, to Energinet's knowledge, there is *no* prohibition against TSOs establishing a balancing market countertrade solution outside of the MARI platform[52]. Assuming that this is correct, it is thus neither legally nor practically impossible for Energinet (although it may be more difficult and costly) to continue countertrading in the balancing market as previously. This of course further undermines the validity of this justification.

Finally, the environmental considerations pointed out by Energinet could certainly be addressed by either countertrading later in the intraday market (which would allow for the same operators to participate as the Model) or by declining countertrade requests. Again, less anti-competitive alternatives are thus available.

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As the objectives of implementing the Model stated by Energinet can thus be achieved without implementing the Model and/or using less anti-competitive means, it is very unlikely that the stated reasons will be considered sufficient justification for the Model to not be abusive.

It should also be noted that the burden of proof for such a defense would be on Energinet, meaning that Energinet would need to demonstrate with sufficient certainty that the Model is objectively justified and/or that the pro-competitive effects of the Model outweigh its anti-competitive effects. As of writing, Energinet has made no attempt to do so.

For these reasons, it is our assessment that the reasons for implementing the Model currently stated by Energinet are very unlikely to be considered a valid justification of the Model.

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[50] "Q&A - NY MODHANDELSMODEL (August 23rd 2021)", enclosed as **Annex 2**.

[51] See Annex 2, section 2.1 A).

[52] See Annex 2, section 2.1 C).

5. The Model is very likely incompatible with the EU rules on the free movement of goods

5.1. Introduction

As mentioned in section 3.3 above, the Model entails that Energinet will be limiting export capacity, in practice from Denmark (and further north) to Germany (and further south). This will happen whenever the Model is made use of.

Based on experience with such countertrade requests from neighboring TSOs (particularly TenneT) to date, it is very likely that the Model will be made use of for a considerable portion of the possible hours throughout the year. Thus, the current countertrading model that the Model is intended to replace has been made use of for approximately half the hours of the year, and Energinet expects that the volume of countertrading will increase going forward (cf. above). As explained in the hearing documents mentioned above, this is part of the reason for the introduction of the Model[53].

The Model will thus entail that Energinet will be limiting export capacity from Denmark in the intraday market for a considerable portion of the year.

As will be explained in the following, it is our assessment that these measures will very likely constitute a quantitative export restriction or a measure having equivalent effect, which is incompatible with the EU rules on the free movement of goods.

5.2. The TFEU prohibits quantitative restrictions on exports

It follows from Article 35 TFEU that quantitative restrictions on exports are incompatible with the EU rules on the free movement of goods:

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

In the context of Article 35 TFEU, the term "exports" refers to trade between Member States, i.e. exports from one Member State to another. It does not apply to exports to a country outside of the EU.

It follows from the case law of the CJEU that a measure will constitute a quantitative restriction on exports between Member States incompatible with Article 35 TFEU if the following conditions are met:

1) The measure takes place in a non-harmonized area (see section 5.3 below)

2) The measure relates to "goods" for the purposes of the TFEU (see section 5.4 below)

3) The measure has a cross-border element (see section 5.5 below)

4) The measure constitutes a quantitative restriction or a measure having equivalent effect to a quantitative restriction on exports (see section 5.6 below)

5) The measure is ascribable to a Member State (see section 5.7 below)

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[53] See Annex 1, section 2.3.1.

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 (see section 5.8 below)

As will be explained in the following, it is our assessment that the measures mentioned in section 5.1 above very likely satisfy all of these conditions. It is therefore our assessment that the Model will very likely constitute a quantitative export restriction or a measure having equivalent effect, which is incompatible with Article 35 TFEU.

5.3. Condition 1: The internal market for transmission of electricity is not subject to exhaustive harmonization (non-harmonized area)

The EU rules on the free movement of goods (Articles 34-36 TFEU) are only applicable where a given product is not covered by harmonizing EU legislation or is only partially covered by harmonizing EU legislation. Where a matter has been subject to exhaustive harmonization at EU level, any national measure relating thereto must be assessed in the light of the provisions of that harmonizing measure, and primary law (including the rules on the free movement of goods)[54] does not apply.

In its case law to date, the CJEU has not considered the internal marked for transmission of electricity to have been subject to exhaustive harmonization.

In case C-648/18, Hidroelectrica, it was submitted by the National Energy Sector Regulatory Authority in Romania (ANRE) and the Romanian Government that Article 35 TFEU did not apply in the present case, given that there is legislative harmonization at EU level in the sector concerned (i.e. the internal market for electricity).[55]

The CJEU stated that:

> "It is settled case-law that any national measure relating to an area which has been the subject of exhaustive harmonisation at EU level must be assessed in the light of the provisions of that harmonising measure and not in the light of the provisions of primary law (judgment of 18 September 2019, VIPA, C-222/18, EU:C:2019:751, paragraph 52 and the case-law cited).
>
> In that regard, it is sufficient to note that the events in the main proceedings are not within the temporal scope of Regulation 2015/1222. Those events took place between December 2014 and February 2015, whereas that regulation entered into force, in accordance with Article 84 thereof, only on 14 August 2015, the 20th day following that of its publication in the Official Journal of the European Union on 25 July 2015.
>
> Furthermore, as noted by the Advocate General in point 35 of his Opinion, Directive 2009/72, as a set of rules governing the internal market in electricity, does not fully harmonise that market and does not set out specific rules for electricity trading. As is apparent from Article 3 of that directive, the directive establishes merely a number of general principles that Member States must follow with a view to achieving a competitive, secure and environmentally sustainable market in electricity.

[54] See e.g. judgement of the CJEU of 1 July 2014 in case C-573/12, Ålands Vindkraft, paragraph 57, and judgement of the CJEU of 4 October 2018 in Case C-242/17, paragraph 52.

[55] See judgement of the CJEU of 17 September 2020 in case C-648/18, Hidroelectrica, paragraph 24.

> It follows that Article 35 TFEU is applicable in the present case, as the Court has held that electricity comes within the scope of the TFEU rules on the free movement of goods (see, to that effect, judgments of 27 April 1994, Almelo, C-393/92, EU:C:1994:171, paragraph 28, and of 11 September 2014, Essent Belgium, C-204/12 to C-208/12, EU:C:2014:2192, paragraph 122)."

Although the CJEU did not include Regulation 2015/1222 in its assessment, as Regulation 2015/1222 was not in force at the time of the disputed measures, it is clear from this case that both the Advocate General and the CJEU found that the internal market for electricity was not subject to exhaustive harmonizing legislation.

Based on this, it is our assessment that condition 1 is very likely to be satisfied.

5.4. Condition 2: Electricity constitutes "goods" for the purposes of TFEU

Articles 35 TFEU encompass exports of goods and products of any type. Any goods may be covered by the Treaty articles, provided it has economic value.

In its judgement in case 7/68, Commission v Italy, the CJEU stated that:

> "By goods, within the meaning of the Treaty, there must be understood products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions."[56]

It follows from the case law of the CJEU that electricity constitutes goods for the purposes of TFEU. In its judgement in case C-393/92, Almelo, the CJEU stated:

> "In Community law, and indeed in the national laws of the Member States, it is accepted that electricity constitutes a good within the meaning of Article 30 of the Treaty. Electricity is thus regarded as a good under the Community's tariff nomenclature (code CN 27.16). Furthermore, in its judgment in Case 6/64 Costa v ENEL [1964] ECR 1141 the Court accepted that electricity may fall within the scope of Article 37 of the Treaty."[57]

This has also been confirmed by the CJEU in later cases[58].

Condition 2 is therefore clearly satisfied.

5.5. Condition 3: The measure (the Model) has a cross-border element

The scope of Article 35 TFEU is limited to obstacles in trade between Member States. A cross-border element is therefore necessary for a case to be evaluated under this provision. Purely national measures, affecting only domestic goods, fall outside the scope of Articles 34-36 TFEU. For a measure to fulfil the cross-border requirement, it is sufficient that it is capable of either indirectly or potentially hindering intra-EU trade[59].

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[56] See judgement of the CJEU of 10 December 1968 in case C-7/68, "Commission v Italy".

[57] See judgement of the CJEU of 27 April 1994 in Case C-393/92, Almelo, paragraph 28.

[58] See judgement of the CJEU of 11 September 2014 in case C-204/12 to C-208/12, Essent Belgium, paragraph 122, and judgement of the CJEU of 17 September 2020 in case C-648/18, Hidroelectrica, paragraph 28.

[59] See judgment of the CJEU of 11 July 1974 in case 8/74, Dassonville, paragraph 5, and judgment of the CJEU of 5 December 2000 in case C-448/98, Guimont, paragraph 18.

According to established case law, a national measure will not fall outside the scope of the prohibition in Articles 34-35 TFEU because the hindrance it creates is slight and/or because it is possible for products to be marketed in other ways[60]. Even if a measure is of relatively minor economic significance, is only applicable to a very limited geographical part of the national territory, or only affects a limited number of imports/exports or economic operators, it may constitute a prohibited measure having equivalent effect[61] .

As the measures in this case (cf. section 5.1 above) will affect trade on both sides of the Danish/German border, this condition is clearly satisfied.

The condition that the Model must be capable of either indirectly or potentially hindering intra-EU trade is also clearly satisfied, as the Limitation entails precisely that trade between EU Member States on opposite sides of the Danish/German border is prevented during hours where the Model is made use of.

Condition 3 is therefore clearly satisfied.

5.6. Condition 4: Quantitative restriction or measure having equivalent effect

5.6.1. Definition of "quantitative restriction and measures having an equivalent effect"

Quantitative restrictions have been defined as measures which amount to a total or partial restraint on imports, exports, or goods in transit and any encumbrance having the same effect[62].

Under Article 34 TFEU, the term "quantitative restriction and measures having an equivalent effect" has been defined very broadly. In case 8/74, Dassonville, the CJEU stated that:

> "All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions."[63]

This definition has been repeated in a number of judgements from the CJEU.

In early case law from the CJEU, it was established that Article 35 TFEU only applies if the measure in question discriminates against the production or trade of another Member State. This principle was established in the Groenveld case, where the CJEU stated:

> "That provision concerns national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade in such a way as to provide a particular advantage for national production or for the domestic market of the State in question at the expense of the production or of the trade of other Member States."[64]

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[60] See judgement of the CJEU of 5 April 1984 in case 177/82, Van de Haar, judgement of the CJEU of 14 March 1985 in case 269/83, Commission v France and judgement of the CJEU of 5 June 1986 in case 103/84 Commission v Italy.

[61] See e.g. judgement of the CJEU of 7 May 1997 in case C-321/94, Pistre, paragraph 44.

[62] See judgment of the CJEU of 12 July 1973 in case 2/73, Riseria Luigi Geddo v Ente Nationale Risi.

[63] See judgment of the CJEU of 11 July 1974 in case 8/74, Dassonville, paragraph 5.

[64] See judgement of the CJEU of 8 November 1979 in case C-15/79, Groenveld, paragraph 7.

However, in some of its more recent case law, the CJEU has introduced an alternative approach to the last requirement of the Groenveld test, i.e. "at the expense of the production or of the trade of other Member States"[65].

In the Gysbrechts case[66], the CJEU dealt with Belgian legislation prohibiting the seller from requesting any payment in advance or in the 7 day "withdrawal" period during which a consumer can withdraw from a distance contract. In this judgement, the CJEU confirmed the definition established in Groenveld. Nonetheless, it reasoned that, although the prohibition on receiving advance payments was applicable to all traders active in the national territory, its actual effect was generally greater on cross-border sales made directly to consumers, and thus on goods leaving the market of the exporting Member State, than on the marketing of goods in the domestic market of that Member State. Therefore, the CJEU found that the measure constituted a measure having equivalent effect to a quantitative restriction on exports[67] .

The approach from the Gysbrechts case was endorsed in the New Valmar case[68], a case in which undertakings with a place of establishment within the territory of a Member State were required to draw up all invoices relating to cross-border transactions exclusively in the official language of that State. If this was not done, the invoices concerned would be declared null and void by the national courts of their own motion. Here, the primary criterion for the CJEU appeared to be whether the actual effect of a measure was greater on goods leaving the market of the exporting Member State[69]. It held that such a restriction indeed fell within the scope of Article 35 TFEU.

The CJEU followed the same approach in the Hidroelectrica judgement, where national measures prioritizing the supply of electricity on the national market were considered as measures having equivalent effect to a quantitative restriction within the meaning of Article 35 TFEU because of a greater effect on electricity exports than on marketing of electricity in the domestic market of that Member State[70].

Thus, it follows from the case law of the CJEU that it is not a requirement under Article 35 TFEU that the restriction or measure discriminates against the production or trade of another Member State. It is sufficient that the actual effect of the measure is generally greater on cross-border sales, and thus on goods leaving the market of the exporting Member State, than on the marketing of goods in the domestic market of that Member State. Interestingly, in the Gysbrechts case[71], the effects of the barrier primarily hampered the trading activities of companies established in the Member State of export and not in the Member State of destination, which is also the case in relation to the Model.

A similar interpretation of the case law above from the CJEU can be found in the Commission Notice "Guide on Articles 34-36 of the Treaty of the Functioning of the European Union (TFEU)[72].

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[65] See judgement of the CJEU of 14 July 1981 in case 155/80, Oebel, and judgement of the CJEU of 16 May 2000 in case C-388/95, Kingdom of Belgium v Kingdom of Spain, paragraph 41.

[66] See judgement of the CJEU of 16 December 2008 in case C-205/07, Gysbrechts and Santurel Inter.

[67] See judgement of the CJEU of 16 December 2008 in case C-205/07, Gysbrechts and Santurel Inter, paragraphs 40-44.

[68] See judgement of the CJEU of 21 June 2016 in case C-15/15, New Valmar.

[69] See judgement of the CJEU of 21 June 2016 in case C-15/15, New Valmar, paragraph 36. See also judgement of the CJEU of 14 June 2018 in case C-169/17, Asociación Nacional de Productores de Ganado Porcino, paragraph 29.

[70] Judgement of the CJEU of 17 September 2020 in case C-648/18, Hidroelectrica, paragraph 33.

[71] Judgement of the CJEU of 16 December 2008 in case C-205/07, Gysbrechts and Santurel Inter.

[72] Commission Notice "Guide on Articles 34-36 of the Treaty of the Functioning of the European Union (TFEU) (2021/C 100/03), section 6 (Export Restrictions (Article 35 TFEU)).

Finally, it is clear from the case law of the CJEU that it is not requirement that the restriction or measure has an appreciable effect. It is sufficient to demonstrate that the restriction or measure actually or potentially has a negative effect on trade between Member States. In the recent VIPA judgment, the CJEU went as far as to say that minor restrictive effects, provided they are neither too indirect nor too uncertain, suffice to show the existence of a measure having equivalent effect within the meaning of Article 35 TFEU[73].

5.6.2. The Model constitutes a quantitative restriction or at least a measure having equivalent effect

As mentioned in section 3.3 above, the Model entails that Energinet will be limiting export capacity, in practice from Denmark (and further north) to Germany (and further south). This will happen whenever the Model is made use of, which, based on experience with such countertrade requests from neighboring TSOs (particularly TenneT) to date, will be for a considerable portion of the year.

When the Model is made use of, export capacity will be reduced to 0 in the intraday market, meaning that no export of electricity is possible from Denmark (and further north) to Germany (and further south). Therefore, the Model not only affects electricity generators and suppliers from Denmark, but also electricity generators and suppliers from Member States further north. Similarly, the Model not only restricts import of electricity into Germany, but also import of electricity to Member States further south. Thus, the Model not only restricts export of electricity from Denmark to Germany. It undermines the very principle of the internal market, i.e. the right to free movement of goods originating in Member States and of goods from third countries which are in free circulation in the Member States.

This constitutes a clear quantitative restriction on exports.

In case C-648/18, Hidroelectrica, the CJEU dealt with a national Romanian provision requiring national electricity generators to supply all the electricity at their disposal on platforms managed by the sole designated operator of commercial services in the national electricity market. This requirement meant that it was not possible for generators in Romania to negotiate direct export agreements with foreign buyers. The CJEU found this provision to be contrary to Article 35 TFEU.

Before the CJEU, the National Energy Sector Regulatory Authority in Romania (ANRE) and the Romanian Government submitted that the requirement imposed on producers to offer for sale all the electricity available to them on the centralized national market did not apply to exports alone. In order to establish that the legislation at issue in the main proceedings did not have restrictive effects on electricity exports, they referred to statistical data showing a rise in those exports[74] .

The CJEU rejected these arguments by stating:

> "It is, however, apparent from the order for reference that the effect of the provisions at issue in the main proceedings, as interpreted by ANRE, deprive Romanian electricity producers who have obtained trading licences in other Member States, the electricity markets of which function together with that of Romania, of the opportunity to trade in electricity bilaterally and, as the case may be, to export electricity directly to those markets. However, by preventing bilateral trading between electricity producers and their potential clients, those provisions impliedly prohibit direct exports and

[73] See judgement of the CJEU of 18 September 2019 in case C-222/18 VIPA, paragraph 84.

[74] See judgement of the CJEU of 17 September 2020 in case C-648/18, Hidroelectrica, paragraph 30.

> mean that electricity produced in the Member State in question is intended more for internal consumption, as the Romanian Government itself acknowledged.
>
> The statistical data relied on by ANRE and the Romanian Government showing a rise in exports from the electricity market in Romania are not such as to invalidate those considerations, in so far as it cannot be excluded that the level of exports would be even higher but for the provisions at issue in the main proceedings. Those data allow only the conclusion that the legislation at issue in the main proceedings does not have the effect of preventing all exports from the electricity market in Romania, which is not disputed in the main proceedings.
>
> Accordingly, the legislation at issue in the main proceedings has a greater effect on electricity exports in that it prohibits direct exports from electricity producers from Romania by prioritising the supply of electricity on the national market. Such legislation therefore constitutes a measure having equivalent effect to a quantitative restriction within the meaning of Article 35 TFEU."[75]

Thus, it is not a requirement that all export of electricity is prevented by the Model for Article 35 TFEU to apply. It is sufficient that the restriction or measure actually or potentially has a negative effect on trade between Member States. That is clearly the case in relation to the Model.

Based on the above it is clear that the Model constitutes a quantitative restriction or at least a measure having equivalent effect.

Condition 4 is therefore clearly satisfied.

5.7. Condition 5: The restriction or measure (the Model) is ascribable to a Member State

5.7.1. Case law from the CJEU

Articles 34-36 TFEU only applies to measures "taken" by Member States. The term "Member State" has been interpreted very broadly by the CJEU. It is the Member States and their authorities in the broadest sense that are the primary subjects of these provisions. Conversely, it is likely correct to state that "purely" private companies and private citizens are not covered by the prohibition.

The Commission has interpreted and described the case law of the CJEU as follows in the Commission Notice "Guide on Articles 34-36 of the Treaty of the Functioning of the European Union (TFEU)[76]:

> "Articles 34-36 TFEU deal with measures taken by the Member States. These provisions have been interpreted broadly to bind not only national authorities, but also all other authorities of a country, including local and regional authorities[77], as well as the judicial or administrative bodies of a Member State[78]. This evidently covers measures taken by all bodies established under public law as "public bodies".

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[75] See judgement of the CJEU of 17 September 2020 in case C-648/18, Hidroelectrica, paragraphs 31-33.

[76] See Commission Notice "Guide on Articles 34-36 of the Treaty of the Functioning of the European Union (TFEU) (2021/C 100/03), section 6 (Export Restrictions (Article 35 TFEU)).

[77] See judgement of the CJEU of 25 July 1991 in case C-1/90 Aragonesa de Publicidad v Departamento de sanidad.

[78] See judgement of the CJEU of 3 March 1988 in case 434/85, Allen & Hanburys, paragraph 25, and judgement of the CJEU of 13 March 2008 in case C-227/06 Commission v Belgium, paragraph 37.

> In addition, Articles 34-36 TFEU may apply to measures taken by non-state actors or other bodies established under private law, provided they fulfil certain sovereign functions or their activities may be attributed to the State otherwise. Indeed, measures taken by a professional body which has been granted regulatory and disciplinary powers by national legislation in relation to its profession may fall within the scope of Article 34 TFEU[79].
>
> The same applies to activities of bodies established under private law but which are set up by law, mainly financed by the Government or compulsory contribution from undertakings in a certain sector and/or from which members are appointed by the public authorities or supervised by them and can be therefore attributed to the State[80]. In Fra.bo, the Court found Article 34 TFEU to apply horizontally to a private-law certification body. Products certified by this body were considered by national authorities to be compliant with national law. And, by virtue of this competence acquired de facto, the certification body had the power to regulate the entry of products, in this case copper fittings, into the German market[81]. […]
>
> Although the term 'Member State' has been interpreted broadly, it generally does not apply to 'purely' private measures, or measures taken by private individuals or companies, as these are not attributable to the State. […]"

In the earlier case law of the CJEU, more specifically the Buy Irish case[82], the CJEU had to rule on whether a marketing campaign called "Buy Irish" was contrary to the rules on the free movement of goods, including whether the campaign was ascribable to the Irish State. The campaign was administered by The Irish Goods Council, a private company in the form of a company limited by guarantee with no share capital. It was registered in accordance with Irish company law. The members of the Management Committee were appointed by the Minister for Industry, Commerce and Energy. Finally, the Irish Government covered the greater part of its expenses and defined the aims and the broad outline of the campaign[83].

The CJEU found that the activities of the Irish Goods Council were ascribable to the Irish State. The CJEU stated:

> "It is thus apparent that the Irish Government appoints the members of the Management Committee of the Irish Goods Council, grants it public subsidies which cover the greater part of its expenses and, finally, defines the aims and the broad outline of the campaign conducted by that institution to promote the sale and purchase of Irish products. In the circumstances the Irish Government cannot rely on the fact that the campaign was conducted by a private company in order to escape any liability it may have under the provisions of the Treaty.[84]

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[79] See Judgement of the CJEU of 18 May 1989 in joined Cases 266/87 and 267/87, R v Royal Pharmaceutical Society of Great Britain, and judgement of the CJEU of 15 December 1993 in case C-292/92, Hünermund.

[80] See judgement of the CJEU of 24 November 1982 in case 249/81, Commission v Ireland (Buy Irish); judgement of the CJEU of 13 December 1983 in case 222/82, Apple and Pear Development Council; judgement of the CJEU of 5 November 2002 in case C-325/00, Commission v Germany ("Markenqualität"), and judgment of the CJEU of 13 March 2008 in case C-227/06, Commission v Belgium.

[81] See judgement of the CJEU of 12 July 2012 in case C-171/11, Fra.bo Spa v Deutsche Vereinigung des Gas und Wasserfaches eV (DVGW) — Technisch Wissenschaftlicher Verein, paragraphs 31-32.

[82] See judgement of the CJEU of 24 November 1982 in case 249/81, Commission v Ireland (Buy Irish).

[83] See judgement of the CJEU of 24 November 1982 in case 249/81, Commission v Ireland (Buy Irish), paragraphs 10-13.

[84] See judgement of the CJEU of 24 November 1982 in case 249/81, Commission v Ireland (Buy Irish), paragraphs 15.

In the Markenqualität case[85], the CJEU had to rule on whether the use of the designation "Markenqualität aus deutschen Landen" (quality label for produce made in Germany) was contrary to the rules on the free movement of goods, including whether the quality label and the administration of the quality label was ascribable to the German State. The quality label was administered by a Fund, which carried out its activities through a private limited company (CMA).

The German Government argued that the activities of CMA did not fall within the competence of public authorities and therefore fell outside the scope of the rules on free movement of goods. It argued that unlike the situation in the Buy Irish case, the CMA did not merely have the legal form of a private capital company, but its organs were set up in accordance with private law rules and its resources were supplied by economic operators – not by the Member State[86].

Finally, the German Government argued that, although the Fund was effectively a public law body, it was only able to influence the CMA's organs through three members of the CMA's Supervisory Board (out of 26) appointed by the Fund. Other than this, the influence of the State on the CMA was limited to the collection and supervision of the contributions paid to the CMA, which came exclusively from the private sector[87].

The CJEU examined this and found that the contested scheme was to be considered a public measure ascribable to the German State[88]. The CJEU stated:

> "In that regard, it must be recalled that the CMA, although set up as a private company is:
>
> - established on the basis of a law, the AFG, is characterised by that law as a central economic body and has, among the objects assigned to it by that law, the promotion, at central level, of the marketing and exploitation of German agricultural and food products;
>
> - is bound, according to its Articles of Association, originally approved by the competent federal minister, to observe the rules of the Fund, itself a public body, and additionally to be guided, in particular in relation to the commitment of its financial resources, by the general interest of the German agricultural and food sector;
>
> - is financed, according to the rules laid down by the AFG, by a compulsory contribution by all the undertakings in the sectors concerned.
>
> Such a body, which is set up by a national law of a Member State and which is financed by a contribution imposed on producers, cannot, under Community law, enjoy the same freedom as regards the promotion of national production as that enjoyed by producers themselves or producers' associations of a voluntary character (see Case 222/82 Apple and Pear Development Council [1983] ECR 4083, paragraph 17). Thus it is obliged to respect the basic rules of the Treaty on the free movement of goods when it sets up

[85] See judgement of the CJEU of 5 November 2002 in case C-325/00, Commission v Germany ("Markenqualität").

[86] See judgement of the CJEU of 5 November 2002 in case C-325/00, Commission v Germany ("Markenqualität"), paragraphs 14-15.

[87] See judgement of the CJEU of 5 November 2002 in case C-325/00, Commission v Germany ("Markenqualität"), paragraph 16.

[88] See judgement of the CJEU of 5 November 2002 in case C-325/00, Commission v Germany ("Markenqualität"), paragraph 21.

a scheme, open to all undertakings of the sectors concerned, which can have effects on intra-Community trade similar to those arising under the scheme adopted by the public authorities.

Furthermore, it must be observed that:

- the Fund is a public law body;
- the CMA is required to respect the Fund's guidelines;
- the financing of the CMA's activities, under legislation, comes from resources which are granted to it through the Fund, and
- the Fund supervises the CMA's activities and the proper management of the finances which are granted to it by the Fund.

In those circumstances, it must be held that the Commission could rightly take the view that the contested scheme is ascribable to the State.

Thus it follows that the contested scheme must be considered to be a public measure for the purpose of Article 30 ascribable to the State."[89]

In the Fra.bo case[90], the CJEU found Article 34 TFEU to apply horizontally to a private-law certification body (DVGW). Notably, DVGW was a non-commercial, private body whose activities were not financed by the German State and which were not subject to the controlling influence of the German State.

The CJEU examined whether, "in the light of inter alia the legislative and regulatory context in which it operates, the activities of a private-law body such as the DVGW has the effect of giving rise to restrictions on the free movement of goods in the same manner as do measures imposed by the State"[91]. Products certified by DVGW were considered by national authorities to be compliant with national law. The CJEU found that, by virtue of its authority to certify the products, DVGW in reality held the power to regulate the entry into the German market of products such as the copper fittings at issue in the main proceedings and that the body was thus covered by Article 34 TFEU[92] .

Thus, the Fra.bo case shows that even a non-commercial, private body whose activities are not financed by the State and are not subject to the controlling influence of the State may be subject to Article 34-35 TFEU if the body, in reality, holds the power to regulate the entry of goods into the Member State or the export of goods out of the Member State.

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[89] See judgement of the CJEU of 5 November 2002 in case C-325/00, Commission v Germany ("Markenqualität"), paragraphs 17-21.

[90] See judgement of the CJEU of 12 July 2012 in case C-171/11, Fra.bo Spa v Deutsche Vereinigung des Gas und Wasserfaches eV (DVGW) — Technisch Wissenschaftlicher Verein.

[91] See judgement of the CJEU of 12 July 2012 in case C-171/11, Fra.bo Spa v Deutsche Vereinigung des Gas und Wasserfaches eV (DVGW) — Technisch Wissenschaftlicher Verein, paragraph 26.

[92] See judgement of the CJEU of 12 July 2012 in case C-171/11, Fra.bo Spa v Deutsche Vereinigung des Gas und Wasserfaches eV (DVGW) — Technisch Wissenschaftlicher Verein, paragraphs 31-32.

5.7.2. The Model is a public measure ascribable to the Danish State

Based on the case law from the CJEU, the Model will – if implemented - clearly constitute a public measure ascribable to the Danish State.

In our assessment of this, we have placed particular emphasis on the following:

- Energinet is an independent public enterprise owned 100 % by the Danish Ministry of Climate, Energy and Utilities. The fact that Energinet is owned 100 % by the Danish State creates a very strong presumption of controlling influence by the Danish State on Energinet.

- Energinet is established on the basis of a law ("Lov om Energinet" – Statutory order no. 1097 of 8 November 2011 with later changes). Among the responsibilities assigned to Energinet by that law are to own, operate, and develop the transmission systems for electricity in Denmark.

- It follows from section 5 of that law and section 8 of the articles of association of Energinet that the Minister of Climate, Energy and Utilities can decide on any matters concerning Energinet's affairs, except the election of the management, which is decided by the board of directors (which is also controlled by the Minister of Climate, Energy and Utilities (see below)). The Minister can, as representative of the sole owner (the Danish State), exercise the same powers as a sole owner of a public limited company. It follows from section 8 of the articles of association of Energinet that the Minister exercises his power over Energinet by written notices addressed to the board of directors. Any notice from the Minister shall as soon as possible be entered into the minutes of the board of directors and signed by the members of the board of directors at the next meeting. Energinet must submit a copy of the decisions of the Minister of Climate, Energy and Supply to the Danish Business Authority no later than 2 weeks after the decision has been notified to Energinet.

- The Minister of Climate, Energy and Utilities elects 8 out of 11 members of the board of directors, of which 2 members are elected at the recommendation of the electricity sector. The Minister of Climate, Energy and Utilities can at any time remove the members elected by the Minister (see section 9 of the articles of association of Energinet). The remaining 3 members of the board are elected by the employees of Energinet. The Minister also appoints the chairman of the board. Thus, the Danish State has decisive influence on the board of directors in Energinet, which in turn elects the members of the management. In the Markenqualität case[93], the CJEU emphasized the fact that 3 out of 26 members of the board of directors were elected by a public fund.

- Energinet is financed by the Danish State. According to section 7 of the articles of association of Energinet, the equity of Energinet at its time of foundation amounted to DKK 3,013.9 million. Moreover, the majority of the revenue of Energinet is collected via tariffs paid by consumers via their electricity and gas bills. These tariffs must be approved by the Danish Energy Regulatory Authority.

- The Minister of Climate, Energy and Utilities supervises Energinet's activities and the proper management of the finances, both directly and through the board of directors. According to section 8 of the articles of association of Energinet, the Minister must decide on the approval of the annual report. Moreover, the board of directors (the majority of which is appointed by the Minister) must ensure that the bookkeeping and financial reporting of Energinet is carried out in a manner that is satisfactory taking into account the conditions of Energinet's business.

[93] See judgement of the CJEU of 5 November 2002 in case C-325/00, Commission v Germany ("Markenqualität").

- Energinet owns, operates, and develops the transmission systems for electricity in Denmark, which entails that Energinet holds the power to regulate/control the export of electricity from the Danish market (and further north) and into the German market (and further south). In the Fra.bo case[94], the CJEU emphasized the power of the body in question to regulate the entry of products into the German market and found the body to be covered by Article 34 TFEU.

Based on the case law of the CJEU, it is clear that a body like Energinet, which is (1) 100 % owned by the Danish State, (2) established under national law of a Member State, (3) pursuant to the articles of association is under decisive influence from the Minister of Climate, Energy and Utilities, (4) where the majority of the board members are elected by the Minister, (5) is financed by the Danish State and by contributions imposed on consumers (tariffs), (6) where the activities and the proper management of the finances are supervised by the Minister, and (7) which holds the power to regulate/control the export of electricity from the Danish market (and further north) and into the German market (and further south) is subject to Article 35 TFEU and thus obliged to respect the basic rules of the Treaty on the free movement of goods when it sets up a scheme which can have effects on intra-Community trade similar to schemes adopted by public authorities[95] .

Condition 5 is therefore clearly satisfied.

5.8. Condition 6: The measure (the Model) is not justified

5.8.1. Introduction

It follows from the case law of the CJEU that a national measure contrary to Article 35 TFEU may be justified on one of the grounds stated in Article 36 TFEU and/or by overriding requirements relating to the public interest provided that the measure is proportionate to the legitimate objective pursued.

In order to be justified on grounds of Article 36 TFEU or by overriding requirements relating to the public interest, a State measure has to comply with the principle of proportionality[96]. The principle of proportionality necessitates that the means chosen by the Member States are confined to what is actually appropriate and necessary to safeguard the legitimate objective pursued[97]. Simply put, appropriateness requires that the measure in question is suitable for attaining the desired objective, whereas necessity requires that the means chosen do not restrict the free movement of goods more than what is necessary. In this context, it must be assessed whether there are any means which have a less restrictive effect on intra-Union trade, but which nevertheless reach the same result. Hence, an important element in the analysis of the justification provided by a Member State is the existence of alternative measures. On several occasions, the CJEU has found that

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[94] See judgement of the CJEU of 12 July 2012 in case C-171/11, Fra.bo Spa v Deutsche Vereinigung des Gas und Wasserfaches eV (DVGW) — Technisch Wissenschaftlicher Verein.

[95] See also Judgement of the CJEU of 5 November 2002 in case C-325/00, Commission v Germany ("Markenqualität"), paragraphs 18.

[96] See judgement of the CJEU of 22 January 2002 in case C-390/99, Canal Satélite Digital, paragraph 33; judgement of the CJEU of 7 June 2007 in case C-254/05, Commission v Belgium, paragraph 33 and case-law cited; and judgement of the CJEU of 24 April 2008 in case C-286/07, Commission v Luxembourg, paragraph 36.

[97] See judgement of the CJEU of 15 November 2005 in case C-320/03, Commission v Austria, paragraph 85, and judgement of the CJEU of 15 November 2007 in case C-319/05, Commission v Germany (Garlic), paragraph 87 and case-law cited.

State measures were not proportionate due to the fact that alternative (less restrictive) measures were available[98].

It is for the Member State which claims to have a reason justifying a restriction on the free movement of goods to demonstrate specifically the existence of a reason relating to the public interest, the need for the restriction, and the proportionality of the restriction in relation to the objective pursued[99]. The justification provided by the Member State must be accompanied by appropriate evidence and/or by an analysis of the appropriateness and proportionality of the restrictive measure adopted and by precise evidence substantiating its arguments[100]. In this respect, a mere statement that the measure is justified on one of the accepted grounds or the absence of analysis of possible alternatives will be deemed unsatisfactory[101]. However, the CJEU has noted that the burden of proof cannot be so extensive as to require the Member State to prove positively that no other conceivable measure could enable that objective to be attained under the same conditions[102].

As both Article 36 TFEU and overriding requirements relating to the public interest constitute exceptions to the free movement of goods, they are to be interpreted narrowly.

5.8.2. Energinet's stated reasons for implementing the Model

In connection with the ongoing hearing concerning the Model, Energinet has put forward reasons for implementing the Model. These reasons are described in section 4.7.2 above.

5.8.3. Energinet's stated reasons for implementing the Model are very unlikely to constitute a valid justification of the Model

As explained in section 4.7.3 above, it is our understanding that Energinet currently has several (less restrictive) alternatives to implementing the Model.

Based on this, it is our assessment that it is very unlikely that the reasons given by Energinet for implementing the Model will be sufficient to constitute a valid justification under Article 36 TFEU or as overriding requirements relating to the public interest. In particular, it is unlikely that the Model can be considered proportionate to achieving the objectives set out in Energinet's reasoning as all of these objectives could be achieved by less restrictive measures.

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[98] See judgement of the CJEU of 20 May 1976 in case 104/75, De Peijper; judgement of the CJEU of 15 March 2007 in case C-54/05, Commission v Finland, paragraph 46, and judgement of the CJEU of 20 September 2007 in case C-297/05, Commission v Netherlands, paragraph 79, where the CJEU details available alternatives to the contested measures.

[99] See judgement of the CJEU of 8 May 2003 in case C-14/02, ATRAL, paragraph 69.

[100] See judgement of the CJEU of 8 May 2003 in case C-14/02, ATRAL, paragraph 69, and judgment of the CJEU of 7 June 2007 in case C-254/05, Commission v Belgium, paragraph 36.

[101] See judgement of the CJEU of 10 April 2008 in case C-265/06, Commission v Portugal, paragraph 40-47.

[102] See judgement of the CJEU of 10 February 2009 in case C-110/05, Commission v Italy, paragraph 66; and judgment of the CJEU of 23 December 2015 in case C-333/14, Scotch Whiskey Association, paragraph 55.

The risk to the security of operation due to increased countertrade volumes

The CJEU has held that the protection of a secure energy supply can constitute a ground of public security within the meaning of Article 36 TFEU[103].

However, the measure must still be proportionate, which requires that the means chosen do not restrict the free movement of goods more than what is necessary. If alternative (less restrictive) measures are available which are able to achieve the same objectives, then the measure is disproportionate.

As explained in section 4.7.3 above, the risk to the security of operation due to increased countertrade volumes highlighted by Energinet could be mitigated by declining requests for countertrading or (to a lesser extent) by countertrading later in the intraday market. The latter would give Energinet more time between the countertrading and the time of operation to carry out the necessary balancing.

In addition to this, it must be assumed that it would be possible to carry out the necessary balancing within the amount of time available under the current model if more resources were dedicated to doing so. The necessary security of operation could thus be achieved using less restrictive means (the current model), but at greater cost. Based on this, it is very unlikely that Energinet's concerns in relation to security of supply will be considered a valid defense for the Model. In its past case law, the CJEU has very firmly rejected administrative and economic considerations as sufficient to justify measures which are more restrictive to trade than other possible measures[104].

In the Peijper case, the CJEU stated:

> "In particular Article 36 cannot be relied on to justify rules or practices which, even though they are beneficial, contain restrictions which are explained primarily by a concern to lighten the administration's burden or reduce public expenditure, unless, in the absence of the said rules or practices, this burden or expenditure clearly would exceed the limits of what can reasonably be required."[105]

Similarly, in case C-648/18, Hidroelectrica, the Advocate General stated as follows in his opinion:

> "However, 'regular supply' is not necessarily the same as 'supply at the best price'. The latter does appear to be the real aim of the legislation at issue which, according to the Romanian Government, seeks to prevent the increase in prices inherent in the need to import electricity.
>
> If purely economic or commercial considerations were able to justify a prohibition on direct exports, the very principle of the internal market would be undermined. That is not the same as the Member States being able to invoke public security or public interest grounds to prevent exports of electricity in emergencies caused by exceptional circumstances. However, to do so systematically, for no other purpose than to prevent the market from operating freely and obtain a better price for domestic consumers, to my mind goes beyond the legitimate grounds

[103] See judgment of the CJEU of 10 July 1984, Campus Oil and Others, paragraph 34, and judgement of the CJEU of 17 September 2020 in case C-648/18, Hidroelectrica, paragraph 36.

[104] See namely judgement of the CJEU of 20 May 1976 in case 104/75, De Peijper.

[105] See namely judgement of the CJEU of 20 May 1976 in case 104/75, De Peijper, paragraph 18.

for restricting exports authorised by Article 36 TFEU and the public interest grounds that justify quantitative restrictions on exports or measures having equivalent effect.[106]

Joint declaration and TenneT commitments

Reference is made to our remarks under section 4.7.3 above, which are also applicable in relation to possible justifications under the EU rules on the free movement of goods.

As mentioned above in section 4.7.3, even if it is assumed that these instruments do entail an obligation for Energinet to assist TenneT with countertrading, they do not obligate Energinet to employ the specific form of countertrading contemplated under the Model. Countertrading later in the intraday market or in the balancing market would be sufficient to satisfy such an obligation, and using the more restrictive form of countertrading contemplated under the Model therefore cannot be considered justified by such an obligation.

Electricity Market Regulation

Reference is again made to our remarks under section 4.7.3 above, which are also applicable in relation to possible justifications under the EU rules on the free movement of goods.

As less restrictive means (countertrading later in the intraday market and countertrading in the balancing market) are available, these obligations cannot justify the more restrictive Model.

Prices

As explained above, the CJEU has roundly rejected reduction of administrative burdens or public expenditure as a justification for choosing more restrictive measures. The higher prices for countertrading pointed to by Energinet in the hearing documents for the Model are therefore also very unlikely to be accepted as a valid justification for the Model.

The MARI Platform

Reference is again made to our remarks under section 4.7.3 above, which are also applicable in relation to possible justifications under the EU rules on the free movement of goods.

Environmental considerations

Although environmental considerations can constitute a legitimate aim within the meaning of Article 36 TFEU, the measure must still be proportionate, which requires that the means chosen do not restrict the free movement of goods more than what is necessary.

The environmental considerations pointed out by Energinet could certainly be addressed by either countertrading later in the intraday market (which would allow for the same operators to participate as the Model) or by declining countertrade requests. Again, less restrictive measures are thus available.

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[106] See opinion of the Advocate General in judgement of the CJEU of 17 September 2020 in case C-648/18, Hidroelectrica, points 74-75.

As the objectives of implementing the Model stated by Energinet can thus be achieved without implementing the Model and/or by using less restrictive measures, it is very unlikely that the stated reasons will be considered sufficient justification in relation to Article 36 TFEU or in relation to overriding requirements relating to the public interest.

It should also be noted that the burden of proof for such a defense would be on Energinet, meaning that Energinet would need to demonstrate with sufficient certainty that the Model is objectively justified. This burden of proof is described in more detail in section 5.8.1 above. As of writing, Energinet has made no attempt to do so.

For these reasons, it is our assessment that the reasons for implementing the Model currently stated by Energinet are very unlikely to be considered a valid justification of the Model.

Condition 6 is therefore very likely satisfied.

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Herlev, 3 February 2022

Asbjørn Dalum Andersen

Asbjørn Godsk Fallesen