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Fra: Katrine Nissen
Sendt: 5. september 2014 10:47
Til: Mike Alsing Pii; Camilla Brovang
Emne: VS: reply on memo Article 30/110 TFEU

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Fra: [redacted]
Sendt: 5. september 2014 10:36
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Emne: reply on memo Article 30/110 TFEU

Dear Ms Nissen,

In June your authorities have provided us with a memo on the Danish renewable electricity funding system and in particular the compatibility with Articles 30 and 110 TFEU. In view of the exchanges of view that took place before the summer and subsequent contacts of your authorities with Vice-president Almunia, please find below our reply to the memo. Unfortunately, we do not share your assessment. The Commission position was confirmed in recent decisions like the German EEG 2014 – Reform of the Renewable Energy Law. We are however available to discuss solutions for compatibility with Article 30/110 TFEU as well as other outstanding issues in the pending renewable energy support cases.

Kind regards,

[redacted]

On 20 June 2014, the Danish authorities submitted a memo on "The Danish renewable electricity funding system" which outlines their position on the PSO tariff's compliance with EU law, in particular Articles 30 and 110 of the Treaty. The Danish authorities have argued that

- (1) the PSO tariff is not an integral part of the aid measures,
- (2) the PSO tariff complies with Articles 30 and 110 of the Treaty and
- (3) in any case, the notified aid scheme can be declared compatible with the internal market.

We would like to thank the Danish authorities for the memo which has been carefully analysed. However, the services of the Commission cannot agree with these arguments and take the preliminary view that the financing of aid schemes for renewable energy production through the PSO tariff poses a problem under Articles 30 and 110 of the Treaty, for the following reasons:

- 1. The PSO tariff cannot be dissociated from the aid schemes:** The Court has repeatedly held that the Commission, when assessing a State aid notification, must also consider how the aid is financed (Joined Cases C-261/01 and C-262/01, *Belgium v Eugene Van Calster and Felix Cleeren et al.*, EU:C:2003:571, paragraph 46). The Court has also held that the breach of other Treaty provisions can prevent the approval of the aid if there is an indissoluble link between the aid and that breach (Case 74/76, *Iannelli v Meroni*, EU:C:1977:51, paragraph 14). Where a Member State finances the aid for domestic producers through a charge that is levied on imported and domestic products alike, the indissoluble link is present, since the charge has the effect of further exacerbating the distortion on the product market caused by the aid as such. This additional distortive effect must therefore be taken into account in the State aid assessment in the context of the procedure of Article 108 (Case 47/69, *France v Commission*, EU:C:1970:60). For that matter, it is not necessary that the charge exclusively finances the aid, since the additional distortive effect can already be present if a sizable share of the charge's revenue goes into the aid (In 2013, 70% of the PSO tariff went into financing renewables).
- 2. The financing of the aid schemes is not compliant with Articles 30 and 110:** The Danish authorities have argued that the PSO tariff does not offset a burden imposed on domestic production, but merely finances measures of energy policy, some of which would not be realised on market terms (such as renewable energy production). However, the objective of the tariff as such is not relevant when examining whether the tariff offsets a burden imposed on domestic production: To the extent that the PSO tariff finances renewable support, it relieves domestic renewable producers from a part of their production costs and has the effect of offsetting a cost burden which the producers would normally have to bear themselves. The fact that this only concerns some domestic producers (renewables) does not matter, since renewable producers abroad are burdened with the tariff without receiving anything in return. Therefore, the aid and the PSO tariff have the combined effect of burdening imported renewable electricity to a higher degree than domestically produced renewable electricity.
- 3. An aid scheme cannot be declared compatible if the aid scheme or its financing violate other Treaty provisions:** The Danish authorities argue that territorial restrictions with discriminatory effect belong to a category of negative effects of the aid that can be outweighed by the aid's positive effects. This is not true: The Court of Justice has ruled in the *Van Calster and Cleeren* case that where a charge specifically intended to finance aid proves to be contrary to other provisions of the Treaty, for example Articles 30 and 110, the Commission cannot declare the aid scheme of which the charge forms part to be compatible with the common market (Joined Cases C-261/01 and C-262/01, *Belgium v Eugene Van Calster and Felix Cleeren et al.*, EU:C:2003:571, paragraph 48). The *Åland Vindkraft* case (Case C-573/12, *Ålands Vindkraft AB v Energimyndigheten*, EU:C:2014:2037) does not alter this assessment: The Court only stated that a Member State may restrict the access to its national support system to domestic producers (Article 34). It did not say that the Member State can additionally finance this support system by making competitors in other Member States pay for it (Articles 30 and 110).

In conclusion, the Commission's services hold the view that the financing of the notified State aid does not comply with Articles 30 and 110 of the Treaty and that the discrimination needs to be removed before the State aid can be approved. This can be done through remedies of three different kinds, concerning respectively the levy (e.g. amending the modalities of collection of the levy), the income of the levy (e.g. measures to benefit imported products through interconnection projects) or the support scheme (e.g. opening up the national support to imports from other MS). We therefore would like to invite the Danish authorities to make concrete proposals with a view of alleviating the above concerns.