

# Kluwer Competition Law Blog

## The Bulgarian National Electricity Company sanctioned for abuse of dominance on the market of balancing energy of renewables

Eleonora Mateina, Anastasiya Grunova (Tsvetkova, Bebov and Partners) · Tuesday, January 7th, 2020

The Bulgarian Commission for Protection of Competition (“**BCPC**”) imposed a fine amounting to BGN 315 612 the National Electricity Company EAD (“**NEK**”) for abuse of dominance – infringement of Art. 21, para. 1 of the Bulgarian Competition Protection Act (“**BCPA**”) (corresponding to Art. 102 TFEU).

The BCPC found that NEK unilaterally and unjustifiably modified the hourly forecast schedules submitted by the producers of electricity from renewable sources (“**RES producers**”). Additionally, for more than 4 years NEK allocated to the RES producers – members of the special balancing group of NEK, additional unreasonable costs for imbalances through the application of Section IV of its Methodology for allocation of imbalances (“**the Methodology**”).

Before jumping into the details of the decision a brief overview of the sector and its main players will be made.

### Overview

As a member of the European Union, Bulgaria was required to adjust its national legislation as to follow the European energy packages and reach market liberalization and regional connectivity.

The market liberalization process is long, difficult and not fully completed. The process includes, *inter alia*, major transformations in institutional level such as restructuring of the state-owned companies in the sector in order to match the European institutional framework (*e.g.* transformation from vertical integrated state-owned company responsible for all activities as transmission, distribution and production to a new matrix of independent legal authorities for each activity).

Namely, the regulator, state energy companies and agencies are the ones to impose market behaviour and act as to stimulate the free market and its liquidity.

Main players in the power sector in Bulgaria are NEK, part of Bulgarian Energy Holding and owner of 80% of all hydro power plants in Bulgaria, historically last resort supplier and also,

coordinator of special balancing energy groups; ESO – transmission system operator and owner of high voltage grid; BEH – Bulgarian Energy Holding, a state-owned company, sole owner of several power plant subsidiaries; and KEVR – the national energy and water regulatory commission, which is the Bulgarian energy regulator, established as results of Third energy package, part of ACER.

The power distribution grid in Bulgarian is no longer state-owned, as it was subject to privatization and currently is owned and maintained by 3 distribution system operators – EON, EVN and CEZ.

There are also private production plants – more in the RES sector, as well as coal power plants and nuclear power plant.

Bulgaria has also transposed the provisions of EU law aiming to incentivize RES Producers. After an initial rush, the RES capabilities dramatically increased and become a major burden for NEK.

### **Bulgarian Balancing Electricity Market**

The Balancing Electricity Market was established in Bulgaria on 01.06.2014 as part of market liberalization. The balance in the electricity system is achieved by preparation and submission by the consumers and producers to the transmission system operator hourly schedules for their power consumption/production amounts. These schedules must be as close as possible to their expected consumption and production. Any discrepancy between pre-ordered energy quantities and actual consumption or production leads to imbalance in the system, which are penalized by high imbalances prices to be paid by the members of balancing groups.

The balancing market model stimulates maximum accurate consumption/production forecasting and adherence to the schedule, as balancing energy prices are set to constitute a financial sanction for failure to comply with the submitted nominations.

In order to reduce the risks of imbalances and reduce their size, various balancing groups are created, bringing together consumers and producers of electricity. Each balancing group has its own coordinator. The coordinator is responsible for managing the group schedules and informing ESO for its group aggregate nomination.

The purpose and main function and responsibility of the balancing group coordinator is to oversee the overall group balance and in the event of a deviation from the initially submitted schedules to use the established instruments available on the market in order to reduce the imbalances. If it fails, the group enter into the balancing energy market, which serves as a sanction for their failure to handle the imbalances on the other markets (Day-ahead; intraday; or over-the-counter segment).

A fact to mention is that the prices in this market segment (balancing energy market) are often economically disadvantageous for market players, and **the group coordinator should strive to minimize their involvement into the balancing energy market**. Since it is expected that all market participants are driven by maximization of their profit.

It shouldn't be overlooked the possible attempts of speculative participation on the balancing market, which, of course, does not correspond with the original concept of a balancing market, but cannot be excluded as a possibility at all.

## The infringement

With its decision No. 833/18.07.2019 BCPC finds that NEK, acting as coordinator of balancing group, abused its dominant position on the balancing market of electricity producers from renewable energy sources at preferential prices on the territory of Bulgaria by imposing unfair trading conditions to RES producers by:

### 1) Unilaterally altering the forecast hourly production schedules

BCPC established that NEK generated unjustified additional costs of imbalances on RES producers by altering the forecast hourly production schedules submitted to ESO – the transmission system operator by the RES producers – members of the special balancing group of NEK.

Since the launch of the balancing market on 01.06.2014 until 23.07.2015, as a coordinator of the balancing group, NEK unilaterally and unjustifiably had been changing the hourly forecast schedules submitted by RES producers for their electricity production amounts. In practice, after a RES producer submitted its daily schedule forecast for electricity production, NEK was supposed to submit an identical schedule. However, NEK submitted unilaterally (i.e. without informing the respective RES producer) a different schedule, usually providing for less production. Under the rules in force, ESO used as reference the submitted schedule with lower values of produced electricity. These changes made it practically impossible to the RES producers to meet the amounts set by a third party – NEK. As a result, the RES producers were financially burdened by the artificially increased imbalances they generated and had to pay.

### 2) Unilaterally allocating additional financial costs for imbalances

BCPC also established that in the period between 01.06.2014 and 01.10.2018, NEK has allocated to the RES producers' additional costs for imbalances, without any reasonable grounds.

By applying Section IV of its own Methodology for allocation of imbalances in the special balancing group, NEK unilaterally and unjustifiably imposed on the RES producers' additional financial costs which do not represent imbalances allocation and do not reflect the costs objectively incurred for the energy system.

The rules adopted by NEK under Section IV of the Methodology allow the company to adjust to the RES producers' costs for imbalances **that ESO had not recorded and accordingly had not charged to the NEK.**

As a result of these changes, the balancing group coordinator – NEK financially benefited, and the RES producers were financially burdened by the artificially increased imbalances for them.

The total amount of the overcharged amounts for imbalances collected by NEK through the application of Section IV of the Methodology compared to those due to ESO as an absolute value amounts to a total of BGN 113,160,621 (approx. EUR 58 mil)

## Current status

The BCPC decision has been appealed by NEK before the Administrative Court – Sofia Region. The case is currently pending at first instance.

## Conclusion

This decision strongly demonstrates that liberalizing and opening up a sector, that has historically been governed by the state and state-controlled actors, is a challenge that goes far beyond updating the regulatory framework.

This decision could be taken as an indicator of the maturity of the liberalized electricity market in Bulgaria. It condemns the actions of the balancing group coordinator, who ambiguously violates his obligations and acts to the detriment of the producer group for which he is responsible.

The fact that this decision sanctions the actions of a state-owned company gives another hint that it is precisely those players who should dictate behaviour in a liberalized market and who by far fail to do their part.

As a follow up to this decision- it would be interesting whether RES producers affected by the sanctioned infringement will be willing to initiate private damages claims against NEK. Although Bulgarian courts do not have much experience with similar claims, it is evident from the BCPC decision that the suffered damages could amount to millions of EUR.

Further, this decision would most likely impact the currently pending Energy Market Sector analysis, initiated by the BCPC in 2018 and not yet achieved (<http://reg.cpc.bg/Dossier.aspx?DossID=300052406> ).

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