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NEW SIGNIFICANT AMENDMENTS TO THE BULGARIAN ENERGY LEGISLATION

RESUME

On 22 July 2015 the Bulgarian Parliament adopted amendments to the Energy Act ("**EA**") and the Act on Energy from Renewable Sources ("**AERS**"), which will have a significant affect across the electricity value chain. The most critical amendments are the introduction of a mandatory contribution to a new fund "Energy System Security" by all electricity GenCos of 5% of their annual revenues and the possibility for RES GenCos to sale the produced electricity at price for surplus on the balancing market or at free negotiated prices.

BACKGROUND

In the last couple of years, the Bulgarian energy sector experienced serious financial imbalances, which led to a worsening of the financial status of the incumbent wholesale company public provider NEK EAD. In the course of the discussions on the new electricity prices for the forthcoming price period July 2015- June 2016, it was determined that the so-called "*price for obligations toward society*" has to be significantly increased for the business clients on the free electricity market. The increase led to immediate negative reaction by the large industrial companies, which triggered an urgent reconsideration of the electricity prices along the electricity value chain by the energy regulator. As a result, members of Parliament have proposed a Bill for amendment and supplementation of the Energy Act (the "**Bill**"), which was finally adopted on 22 July 2015 by the Bulgarian Parliament. The Bill should be published and enter into force on 24.07.2015. The Bill also proposes changes to the AERS, as described below.

PROPOSALS

Among others, the Bill proposes the following changes to the Energy Act:

- **Establishment of a new fund "Security of the electro energy system" ("Fund")** in the form of a corporate legal entity which aims to compensate the shortage of funds to cover the costs of the public provider – NEK, resulting from its mandatory obligation to purchase generated electricity under long term PPAs and under regulated prices, including for previous regulatory periods. All GenCos of electricity in Bulgaria will be obliged to provide mandatory monthly instalments to the Fund, amounting to **5% of their monthly revenues** from sold electricity, VAT exclusive. Electricity traders, which import electricity in Bulgaria, are also required to contribute to the Fund by instalments amounting to **5% of their**

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monthly revenues from imported electricity. The amounts due to the Fund will be considered as public state receivables and may be coercively collected by the National Revenue Agency. The right of NEK to be compensated through the Fund may not be subject to offset or seizing.

- Mandatory obligation for all GenCos of electricity, which provide availability to the public provider NEK (i.e. RES GenCos, lignite coal TPPs, the Kozloduy NPP, the HPPs of NEK etc.), **to provide to the Energy and Water Regulatory Commission ("EWRC") their Power Purchase Agreements within 14 days** of their conclusion. On its side, the EWRC shall publish the contracts on its official website. Notwithstanding any confidentiality provisions in the agreements, GenCos may not refuse publication.

The Bill also proposes the following changes to the Act for the Energy from Renewable Sources:

- The electricity generated by the RES GenCos will be purchased under the respective FiT only up to the amount of the newly introduced threshold, determined by the new definition "*Net specific generation of electricity*", which is to be determined by the EWRC by 31 July 2015. This new threshold intends to substitute the currently predetermined average annual duration of work in accordance with the EWRC's decision for setting of the price of the respective type of generation source (e.g. for some wind GenCos 2250 a.h. and for some PV GenCos 1450 a.h.). The generated electricity above the new threshold will not be purchased, as it is currently, at the electricity price of NEK for the end suppliers, but at the price for **"surplus" paid at the balancing market**. RES GenCos will have the possibility to sell the surplus on the liberalized market (by bilateral agreements or on a power exchange basis).
- RES GenCos, which utilised funds under a **national or EU support schemes** for construction of the power plants, and were commissioned before the entry into force of the AERS, will have their FiT adapted to the FiT, set out by the EWRC for projects supported by national and/or EU schemes. Furthermore, those GenCos will have to recover to NEK or the respective end suppliers within 6 months from the entry into force of the Bill, taking in mind the difference in the FiT since the commissioning of the power plant.
- The **possibility to amend the commercial schedules (TPS files)** of balancing groups with RES GenCos will be limited to the emergency situations set out in Art. 73 of the EA (such as prevention of breakdowns where human health or life is endangered, where the integrity of the electric power grid is endangered, in case the system, and respectively the network or the customers, risk sustaining substantial physical damage, in case of impossibility to maintain the balance between generation and consumption in the electric power grid, or in case of any deviation from the intersystem schedules for exchange with neighbouring operators).

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COMMENTS

The changes to the legislation, as outlined above, will be yet another adverse measure affecting the majority electricity GenCos and consequentially, the electricity value chain in Bulgaria. As already announced in the media by associations of the wind and PV GenCos, the changes could lead to further financial difficulties following the previously introduced revenue reduction measures, such as the 20 % fee on revenues, the preliminary access to grid prices, the balancing charges, etc.

- **The 5% of revenue instalment to the Fund:** The introduction of the **5% mandatory instalment for the security of energy system Fund** carries features of a hidden tax or a fee, rather than the declared contribution to a fund. The Bill itself specifies that the contribution shall be considered as a public state receivable. Such types of hidden taxes are usually vulnerable from the point of view of compliance with the Constitution of the Republic of Bulgaria. For instance, the very similar 20% fee on RES GenCos introduced in 2013, was declared as unconstitutional by the Bulgarian Constitutional Court. This mandatory instalment could, in practice, be interpreted as a diminution of the FiT, and as such, its compliance with Bulgarian law is questionable.

As to the obligation for electricity traders, importing electricity in Bulgaria to contribute to the Fund, it should be noted that this measure could constitute a breach of EU law and freedom of movement of goods.

The intended instalments are likely aiming to reduce NEK's financial burden from the mandatory purchase of energy under long term PPAs, however, as a mechanism, it is incomplete and incoherent with the specific provisions of the EA related to (i) the principal forbidding cross subsidies, (ii) the transfer of all costs related to the obligations towards society to end clients, and (iii) the principles for preferential treatment of the RES generated electricity under the AERS. It also raises questions with respect to breach of international investment protection instruments, i.e. Bilateral Investment Treaties and/or the Energy Charter Treaty. Furthermore, the legislative text does not provide any clarity as to the methodology for the management and control of expenditure of the collected amounts. Last but not least, if the collected amounts are transferred to NEK, this could breach EU and Bulgarian State Aid rules.

- **Confidentiality of PPAs:** Several political parties and NGOs have appealed for the transparency and publicity in the energy sector that resulted in specific request to **publish all the contracts** in the energy sector. As the majority of PPAs were already published more than a year ago, the proposal seems more like a populist manoeuvre considering the forthcoming local elections.
- **New thresholds for payment of FiTs:** The adopted substitution of the "*annual average duration of work*" threshold with a new "*net specific production of electricity*", represents in practice a **modification of the FiT payment**

conditions and it could potentially have adverse negative effect on the revenue stream of the RES GenCos. The unclear provisions of the Bill do not shed sufficient light onto the practical application of the new mechanism authorising EWRC to determine the net specific production, including the parameters to be considered by it. It is clear though that the generated electricity above the threshold will be purchased at a much lower price than the currently applied **as the price for "surplus" paid at the balancing market** (recently ranging between BGN/MWh 0.00 and 30.00, approx. Euro/MWh 15.00), **or the free market price** (recently ranging between BGN/MWh 72.00 - 76.00, approx. Euro/MWh 36.00- 38.00) **are considerably lower than the** currently applied NEK's energy mix regulated price (BGN/MWh 114,10, approx. 58,33 Euro/MWh.). This will put additional pressure on the revenues of the RES GenCos, unless they are able to find clients for the surplus on the liberalized market to mitigate the loss to some extent.

- **Limitation of the possibilities for curtailment via balancing:** The adopted limitation on modification of generation forecast schedules (TPS files) of the coordinators of balancing groups, including RES GenCos, aims to limit the arbitrary intervention of NEK on those schedules, which incurred significant costs to RES GenCos in the past year. This measure has been requested by RES GenCos for a long period of time now and its implementation should lead to the indented results.

The adopted amendments seem to open door for more disruptions and turmoil across the electricity sector rather than providing pragmatic solutions. The already demonstrated rush in adopting the Bill at first and second reading by the Parliament, and the planned urgent next steps without sufficient time for public discussions and assessment of the effects of the new provisions, is concerning and it raises more questions rather than it provides answers. In any case, it seems that from a legislative point of view the summer will be hectic and hot.

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