Union of European green energy producers
Съюз на европейските производители на зелена енергия

**TO THE MEMBERS OF**
**THE PETITION COMMITTEE**
**OF THE EUROPEAN PARLIAMENT**

# PETITION

Honorable Members,

1. This is an official complaint against Bulgaria for violation of article 106(1) TFEU in regards to article 102 TFEU. We find that both the enactment and the subsequent application of §18 of the Final and additional provisions in the Bulgarian Energy act (§18) are directly violating the above treaty provisions. §18 establishes different conditions for similar entities, forcing the three Bulgarian Energy Distribution Companies to abuse their dominance. Such a practice is clearly forbidden in the case-law of the CJEU starting as early as C-30/87, in which the court states: *"public authorities may not ... enact or maintain in force any measure contrary to the rules of the Treaty"*[1]. The facts are as follows:
2. On 24 July 2015, Bulgaria has adopted §18 of the Final and additional provisions in the Bulgarian Energy act. This paragraph created a differential regime for similar entities. The amendment affected 273 renewable energy producers (RES), who received funding under Measures 311 and Measure 312 of the Rural Development Program (RDP). All these companies were now tied to purchasing price of decision c14 of 01.07.2014 instead of their original purchasing price. The number of affected by §18 companies is limited to 273 – all companies that received aid under the above two measures. This is declared in a letter from the Energy and Water Regulatory Commission (EWRC) of Bulgaria[2].
3. This fact is alarming, because according to the wording of §18, the new provision is aimed at all companies that "are built with funds from a national or European support scheme." The term support scheme has a clear definition in Article 21 of the Additional Provisions of the Bulgarian Renewable Energy Act (BREA). This definition was transposed from the definition in Article 2(k) of Directive 2009/28/EC. The very same definition was later on adopted in the new 2018/2001/EC Directive.

[1] C-30/87 Bodson v Pompes Funebres des Regions Liberees SA, paragraph 34
[2] Letter №E-01-00-2 of 17/03/2016

4. As under its obligations under Article 4(1) of Directive 2009/28/EC, Bulgaria has adopted a National Renewable Energy Action Plan. In this plan all of the National and European support schemes were meticulously listed under sections 4.3, 4.4 and 4.5 of that plan[3]. Measure 311 and Measure 312 of the RDP were not listed as a support scheme, as they do not constitute such as under the national or European definition. For this reason we find that the application of §18 to the 273 companies that were beneficiaries of Measure 311 and Measure 312 is completely erroneous. According to article 21(6) of the Energy Act EWRC is responsible for the control and application of the price mechanisms by the three Energy Distribution Companies. For this reason we find the state of Bulgaria responsible for the Energy Distribution Companies' behavior.
5. This situation is alarming because all companies that were funded from national or European support schemes were not affected from §18, while the provision was erroneously applied to the companies that received funding from the RDP. Up to the present moment there is no complete list of all companies that were funded from national and European support schemes. This is so, due to the fact that the obligation to declare such funding was not backed by any sanction in §18. As a result the Bulgarian Energy Efficiency Agency (BEEA) has a very short list of such companies which they have shared with us[4]. It is surprising that to this day §18 do not apply even to those highly limited number of companies that have voluntarily declared their support scheme funding. In essence, there is arbitrary application of §18 on criteria other than those listed in §18 itself.
6. Companies funded under the RDP, were additionally split in two different groups by §18. The criterion used was whether the selected company started operating their RES before or after the adoption of the BREA. Companies that have started operating before this law was adopted are directly affected by §18, while those that have started operating after the entry into force of BREA are not. This provision is creating additional layer of unequal treatment of otherwise similar entities.
7. To summarize – three different companies managing a RES, with identical investment costs can fall under three completely different legal regimes depending on the EWRC's discretion. Lets assume company one is funded by a support scheme - it can continue to operate at its original price decision. If company two is funded by RDP measures and launched after BREA it could continue operate under its original price decision as under article 31(8) of BREA. And lastly – a company funded by RDP's measures and launched before BREA cannot sell under its original price decision and contract and continues to work under purchasing price of decision c14 of 01.07.2014.

[3] Available at https://www.me.government.bg/bg/themes/nacionalen-plan-za-deistvie-za-energiyata-ot-vazobnovyaemi-iztochnici-1187-0.html

[4] BEEA Letter РД-07-13 of 22.01.2018

We are attaching two graphics to illustrate the three different legal regimes for similar entities.

8. From the above mentioned facts of the case it is evident that Bulgaria has put in a position the three Bulgarian Energy Distribution Companies to abuse their dominance and purchase the energy from the 273 RES funded under RDP for a price lower than the one they had to do under their contract obligations. On the other hand the same Energy Distribution Companies had purchased the energy of companies that used funding from national and European support scheme for their creation at a price higher than the one they are supposed to by law.
9. The above stated facts are a violation of Article 21(1) of the Bulgarian Protection of Competition Act. More importantly they are a violation of Article 106(1) TFEU in conjunction with article 102 TFEU. As the CJEU has ruled in the famous Hofner case *"a state would violated Article 86(1) if it placed an undertaking in such a dominant position that the very exercise of these exclusive rights could not avoid being abusive"*[5] In the Merci Convenzionali case, the court states that: *"such abuse may in particular consist in imposing on the persons requiring the services in question unfair purchase prices"*[6]. In essence, there is an unjustified distortion of the rules of competition in the Bulgarian Energy Market, due to a serious violation of EU law.
10. For the abovementioned reasons we urge the European Parliament to:
    a. Start a procedure under 226 TFEU.
    b. Notify all competent European Institutions
    c. Advice the European Commission to start proceedings under 258 TFEU.
    d. Issue a recommendation to Bulgaria to enforce correct application of §18 or to repeal it.
    e. Notify us in reasonable time of the actions the committee has desided to pursue.

Kind Regards,
Union of European Producers of Green Energy (UEGEP)

[5] C-41/90 Klaus Höfner and Fritz Elser v Macrotron GmbH. Paragraph 29
[6] C-179/90 Merci Convenzionali Porto di Genova SpA v. Siderugica Gabrielli SpA, paragraph 18