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Newsletter

Latest Legal Updates

M&A Law Firm's recent practice highlights:

- M&A Law Firm represents major RES producers in landmark trial against the Greek State and Greek Market Operator before the Hellenic Council of State in the dispute over the retroactive cuts on FiTs
- M&A Law Firm advises major electricity suppliers in the tendering process of NOME auctions
- M&A Law Firm represents leading natural gas supplier in multi million dispute over anticompetitive practices of former monopolistic supplier.
- M&A Law Firm advises leading RES producer in the legal due diligence and contractual takeover of a large wind park in a 5.5 million euros project.

In this issue:

Issue 5
October-November 2017

Company Law:

- Out-of-court workout holds promise for firms in debt
- CJEU rules on bad debts' VAT refund – Major significance for Greek companies

Energy Law:

- NOME auctions: Important amendments of the respective regulatory framework
- First RES auctions for PV and Wind Energy capacity in coming April

State Aid:

- Commission confirms that most Greek measures for the Hellenic Defence Systems do not constitute state aid
- CJEU's latest judgment on the notion of State Aid

Out-of-court workout holds promise for firms in debt

The procedure, known as the out-of-court workout, aims to restructure and adjust the debts of the above entities, taking into account the financial situation and particularities of each one. It also provides the debtor and its creditors with the opportunity to come to a debt settlement agreement.

The law foresees that any natural person who can become bankrupt (according to the Greek Bankruptcy Law), and any legal entity with an income deriving from its business activity as a Greek tax resident, can take advantage of the Extrajudicial Debt Settlement as a debtor. This law excludes self-employed workers (e.g. doctors and lawyers).

The procedure is initiated either by the creditors or by the debtor wishing to be submitted to the law by filing an online application before the Special Secretariat for Private Debt Management (EGDIX), via the dedicated electronic platform hosted on EGDIX's official site. Following the submission, EGDIX appoints a coordinator from their registry who is in charge of bringing the debtor in contact with its creditors and supervising the overall procedure in order to reach a debt settlement agreement. During the negotiation stage, which cannot exceed seven months, the debtor and the creditors proceed with their counter offers.

A crucial point is the fact that, according to the negotiation principle, the parties are free to negotiate and determine the content of the final agreement themselves by agreeing on an interest rate reduction, capitalisation grace periods, payment in installments, write-off etc. In this way, the law protects both the viability of the debtor and small-scale creditors.
On the other hand, in case of the Greek State and the Social Security Funds participating to the settlement as creditors, the law provides some additional mandatory rules setting restrictions to the free negotiation principle (i.e. no grace period, no more than 120 installments, only cash payments etc).

It is worth noting that, from the date of the coordinator's invitation to the creditors and for a time period of 70 days, any enforcement measures against the debtor, regarding the

settlement, are automatically suspended. Under certain conditions, the suspension can be extended for four months. Moreover, the law provides the possibility (not the obligation) of the agreement's judicial ratification by means of a court ruling. However, the judicial ratification is required in order for the agreement to legally bind the non-contracting creditors.

The platform through which the interested parties can fall within the regulation of the law, was set up on the August 3, 2017 and will remain in force until December 31, 2018.

As an overall assessment, the Extrajudicial Debt Settlement proceeding is a flexible, extrajudicial procedure, with minimal publicity aiming to a long term settlement of debt. In particular, the introduction of the electronic platform and the online application procedure reduces the administrative costs incurred by the debtor. Crucial is the fact that the procedure is not subject to the condition of payment cessation as it is the case for bankruptcy and pre-bankruptcy rehabilitation.

However, it is worth saying that any debt obligations created after December 31, 2016 do not fall within the scope of the law. Moreover, when the Greek State and/or Social Security Funds participate to the procedure as creditors, the agreement is subject to the prior issuance of ministerial decisions. It remains to be seen how this promising procedure corresponds in practice to the contemporary needs of the business world and how adaptable it is to current developments, especially to the substantial specificities of the Greek economy.

CJEU rules on bad debts' VAT refund – Major significance for Greek companies

Significant impact to Greek enterprises following the Court of Justice of the European Union recent decision in case C-246/16 (Enzo Di Maura), which ruled that Member States do not have the power to exclude the refund of VAT altogether in case of total or partial non-payment of the price. According to the Court, such prohibition by the Member States would violate fundamental principles of EU Law.

Applying the reasoning of the Court to the Greek practice, it arises that the prohibition by Greek VAT Law of the refund of VAT on bad debts violates EU Law. Accordingly, apart from the necessity for Greek VAT Law to change, the above Court decision provides the legal ground for Greek enterprises to judicially claim back the VAT on bad debts they have been burdened with. M&A Law Firm already advises clients on the respective legal possibilities.

NOME auctions: Important amendments of the respective regulatory framework

On October 17, 2017 the Regulatory Authority for Energy (RAE) published its Decision No 850/2017, introducing an amendment to Articles 7 and 9 of the Forward Products Auction Code (FEPAC).

According to this amendment, a mechanism is introduced for the control of the use/physical delivery to the Greek Day Ahead Market of the electricity quantities acquired in the Forward Products Auctions.

Specifically, for 2017 this percentage of use is set at 30 percent, and for the two semesters of 2018 the percentages are set at 50 percent and 70 percent, respectively. With regard to the new market entrants, the administratively defined cap is set for 30 percent for 2018. It is worth noting that this percentage of use is calculated retrospectively, i.e. the use should have taken place during the three months prior to the auction.

Concerns have been raised about this new provision as it can be claimed that it results in a de facto exclusion from the auctions of eligible suppliers who cannot meet the 30 percent requirement, since they are new entrants to the market. As result, new entrants who have not fulfilled this retroactively defined and assessed criterion of 30 percent use in the Greek retail market are a priori excluded from the auction since they were not aware of the restriction when they became active in the supply market.

The aforementioned concern is based on the scope of the NOME auctions, which is the liberalisation of the energy sector in Greece and the enhancement of the free access of suppliers in the Greek electricity market in compliance with EU rules. In particular, the NOME auction model was established only as a temporary transitional model until full liberalisation of the energy market.

It is under this premise that FEPAC and its following amendment must be applied and guarantee gradually increasing competition in the energy supply market. Thus, a limitation such as the aforementioned amendment of FEPAC seems to serve purposes non-compliant with EU legislation.
More specifically, the restriction in question, which is included in the export restrictions initiated by RAE setting a minimum percentage of use of forward products electricity in the Greek retail market, runs counter to the provisions of Articles 26 and 35 of the Treaty on the Functioning of the European Union (TFEU) establishing the free movement of goods and prohibiting quantitative restrictions as well as Directive 2009/72 EC establishing the obligation to promote fair competition and easy access to suppliers in the electricity market.

In this regard, the European Commission recently expressed its concerns regarding the 30 percent restriction imposed by RAE to the last NOME auction. The EC pointed out that the aim of the amendment imposing export restrictions can also be served by alternative measures in line with the EU legislation and will not exclude foreign EU companies from the auctions.

Considering the above, it is crucial for the liberalisation of the Greek energy market and the application of the EU rules of free trade and prohibition of quantitative restrictions to address such constraints in this matter, which is of high interest both to Greek and EU companies willing to participate in NOME auctions.

As a concluding remark, one may note that it is clear the liberalisation process of the Greek energy market will play a very significant role in the ongoing negotiations between Greece

and its creditors for the positive conclusion of the third review of the current memorandum.

First RES auctions for PV and Wind Energy capacity in coming April

The first round of RES auctions offering 100 MW for wind energy installations and 100 MW for photovoltaic installations is expected to take place in April. Separate auctions are being planned for these two RES technologies. Two ministerial decisions needed to establish a new legal framework concerning RES installations and their related auction terms, including the number of rounds to be staged, are on the final stretch. The Greek proposal on RES capacity installation auctions has been approved by the European Commission. The plan will also include two neutral pilot auctions open to investors representing both wind and solar RES technologies.

The current plan covers a three-year period, from 2018 to 2020. An additional program will also be adopted based on a strategic energy plan expected in 2019 and looking forward all the way to 2030. The current plan foresees one PV auction per year offering investors a total capacity of at least 100 MW. In other words, three PV auctions offering at least 300 MW should be expected between 2018 and 2020. The same goes for the wind energy sector.

As for the neutral pilot auctions to be open to both technologies, the plan includes one auction for the first half of 2019 and a second session in 2020. Investors will be offered a total of 200 MW at each session. The plan also foresees auctions for non-mature projects, a category concerning wind energy installations in areas where capacity is available but RES production licenses have not been submitted. The submarine cable connection between Polypotamos (Evia island) and coastal Nea Makri (northeast of Athens), as well as the Cyclades interconnection represent two such cases. The auctions for non-mature projects are expected to offer a total capacity of approximately 300 MW.

Auctions are also being planned for strategic PV investments by major-scale enterprises. A capacity of at least 300 MW is expected to be offered for this category. Auctions are not being planned for other RES sub-categories (biomass, biogas, small hydropower units) and thermal energy stations as the current level of investor interest is not strong enough.

Commission confirms that most Greek measures for the Hellenic Defence Systems do not constitute state aid

The European Commission has concluded that Greek measures for Hellenic Defense Systems fall outside the scope of EU State aid control because they protect Greece's essential security interests. Greece however has to recover up to €55 million of public support for civil activities of Hellenic Defense Systems, which distorted competition in breach of EU State aid rules.

Hellenic Defense Systems S.A. (or Ellinika Amyntika Systimata A.E. - **HDS**) is a Greek company, which is almost fully-owned by the Greek State. HDS manufactured both defence-related products (e.g. infantry weapons, ammunition, weapon systems, aircraft fuel tanks) as well as civil-use products (e.g. small pistols, explosives for construction works, fireworks).

During the period 2004-2011, Greece granted a number of support measures to HDS. These measures included a direct grant by the State of €10 million, a capital increase of €158 million and several State guarantees for loans of up to €942 million.

The EU Treaty fully recognises the right of Member States to take measures they consider necessary to protect their essential security interests in connection with the production of military products (Article 346 of the Treaty on the Functioning of the European Union). Such measures are excluded from assessment under EU State aid rules. At the same time, public support for civil activities of defense companies have to comply with EU State aid

rules. The requirements for companies in difficulty are set out in the applicable EU Guidelines on State aid for the rescue and restructuring of companies in difficulty.

The Commission's in-depth investigation of the Greek measures in favour of HDS has concluded that:

The vast majority of Greek measures for HDS fall outside scope of EU State aid control because they served Greek security interests. The Commission concluded that a large proportion of the measures (namely the full €10 million direct grant by the State, and most of the capital increase and State guarantees) supported HDS's military production and concerned exclusively products necessary for the protection of Greece's essential security interests. Therefore, the Commission concluded that the measures are exempted from State aid assessment.

Some Greek measures (worth up to €55 million) for HDS' civil activities amounted to illegal State aid in breach of EU rules. The Commission also concluded that, on the other hand, a small proportion of the Greek measures supported the civil activities of HDS. These are therefore subject to conditions under EU State aid rules. Since HDS was a company in financial difficulties, these conditions are set out in the then applicable 2004 EU Guidelines on State aid for the rescue and restructuring of companies in difficulty. In particular, they would have required Greece to submit a credible restructuring plan to restore the company's long-term viability as well as propose compensatory measures to mitigate the distortions of competition created by the aid.

In the absence of such a restructuring plan and compensatory measures, the Commission concluded that these measures constitute illegal State aid, which now needs to be recovered by Greece.

In mid-2013, in the context of the regular review of its past EFSF financial assistance programme, Greece undertook to adopt an irrevocable decision about the future of HDS. As a result, Greece has effectively split the previous HDS entity into a company for defense-related products and a separate company for civil activities. The first company for defense-related products is called Hellenic Defense Systems Industrial Commercial Ltd (HDS military). The separate company for civil activities alone is liable to repay the illegal State

aid and is due to be liquidated. This effective split of HDS military should help ensure that any eventual future support necessary for the essential security interests would not be subject to review under State aid rules.

Background

Hellenic Defence Systems S.A. is 99.8% owned by the Greek State, 0.18% by Piraeus Bank (a private financial institution) and 0.02% by private individuals. Since 2004, the company has been in financial difficulties.

Under EU State aid rules, companies in difficulty may receive State aid only under certain strict conditions, set out in the applicable Commission Guidelines on State aid for the rescue and restructuring of companies (now the 2014 Rescue and Restructuring Aid Guidelines(see full text here), and previously the 2004 Rescue and Restructuring Aid Guidelines (see full text here)). This is to avoid that companies rely on public money instead of running an effective business and competing on the merits.

As a matter of principle, EU State aid rules require that illegal State aid is recovered in order to remove the distortion of competition created by the aid. There are no fines under EU State aid rules and recovery does not penalise the company in question. It simply restores equal treatment with other companies. The Commission has set out in its decision the methodology to calculate the value of the aid to be recovered from HDS.

CJEU's latest judgment on the notion of State Aid

«*Article 107(1) TFEU must be interpreted as meaning that a national measure, such as that at issue in the main proceedings, placing an obligation on both private and public undertakings to purchase electricity produced by cogeneration with the production of heat does not constitute intervention by the State or through State resources.*»

The request for a preliminary ruling under Article 267 TFEU submitted by the Sąd Najwyższy (Supreme Court, Poland), made by decision of 16 April 2015 and received at the Court on 3 July 2015, in the proceedings. This request for a preliminary ruling concerns the interpretation of Article 107(1) TFEU and Article 108(3) TFEU.

The request has been made in proceedings between ENEA S.A. and the Prezes Urzędu Regulacji Energetyki (president of the Office for the regulation of energy, Poland; 'URE') concerning the imposition of a financial penalty on ENEA for breach of its obligation to purchase electricity produced by cogeneration with the production of heat ('electricity produced by cogeneration') from energy sources connected to the network and situated in the Republic of Poland.

The dispute in the main proceedings and the questions referred for a preliminary ruling. For the period from 1 January 2003 to 1 July 2007, the Law on energy provided for a support scheme for electricity produced by cogeneration by imposing an obligation to purchase. That obligation applied to undertakings selling electricity to end users, including producers and suppliers acting as intermediaries, and required that a quota of the total sales of electricity by those undertakings to end users, in this instance a minimum of 15% for the year 2006, be produced by cogeneration.

ENEA is a company which produces and sells electricity and is wholly owned by the Polish State. For the year 2006, ENEA did not fulfil its quota obligation to purchase electricity produced by cogeneration since only 14.596% of its total electricity sales to end users was produced by cogeneration. Consequently, by decision of 27 November 2008, the president of the URE imposed a financial penalty on ENEA.

ENEA brought an action against that decision, but the action was dismissed at first instance. The financial penalty was reduced on appeal but the appeal was dismissed as to the remainder. ENEA therefore appealed on a point of law to the referring court. In support of that appeal, ENEA, for the first time, raised the claim that the obligation to purchase electricity produced by cogeneration constituted new State aid, which was unlawful, given that it had not been notified to the European Commission. According to ENEA, it follows that imposition of the financial penalty was also unlawful.

With regard to the classification of the obligation at issue as 'State aid' within the meaning of Article 107(1) TFEU, the referring court considers that the requirements that a selective advantage be conferred and that there be a possible distortion of competition or effect on trade between Member States are satisfied. It also considers that the purchase obligation is attributable to the State given that it is imposed by law. However, it entertains doubts as to whether there is intervention through State resources.

In that regard, the Sąd Najwyższy (Supreme Court, Poland) notes that ENEA was bound to sell to end users a minimum quota of electricity produced by cogeneration, either by producing such electricity itself or by purchasing it from third party producers. In the latter case, the purchase price of electricity produced by cogeneration was to be set by mutual agreement between the undertaking subject to the purchase obligation and the producer of such electricity. The president of the URE had the power, when approving the tariff charged by electricity companies, to fix the price of electricity produced by cogeneration at a level that he considered reasonable when calculating the maximum price that could be charged when selling electricity to end users.

The referring court also notes that the case in the main proceedings is very similar to the case which gave rise to the judgment of 13 March 2001, Preussen Elektra (C-379/98, EU:C:2001:160) in so far as the purchase obligation imposed on companies is funded by the financial resouces of those companies. However, in contrast to the case giving rise to that judgment, in the main proceedings here, most of the undertakings bound by the purchase obligation are public undertakings wholly owned by the Polish State. In that context, the referring court considers it necessary to seek from the Court of Justice an interpretation of its case-law, in the light of the specific facts of the main proceedings. In those circumstances, the Sąd Najwyższy (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

Must Article 107 TFEU be interpreted as meaning that the obligation to purchase electricity produced by cogeneration, as laid down in Article 9a(8) of the [Law on energy] constitutes State aid? In the event of an affirmative answer to Question 1, must Article 107 TFEU be interpreted as meaning that an electricity undertaking treated as an emanation of a Member State and bound to perform an obligation classified as 'State aid' may invoke

infringement of that provision in proceedings before a national court? In the event of an affirmative answer to Questions 1 and 2, must Article 107 TFEU in conjunction with Article 4(3) TEU be interpreted as meaning that where an obligation imposed by national law is inconsistent with Article 107 TFEU, a financial penalty may not be imposed on an undertaking that has failed to comply with that obligation?

By its first question, the referring court asks, in essence, whether Article 107(1) TFEU must be interpreted as meaning that a national measure placing an obligation on both private and public undertakings to purchase electricity produced by cogeneration constitutes State aid.

It should be recalled at the outset that categorisation as 'State aid' within the meaning of Article 107(1) TFEU requires four conditions to be satisfied, namely, that there be intervention by the State or through State resources, that the intervention be liable to affect trade between Member States, that it confer a selective advantage on the beneficiary and that it distort or threaten to distort competition (judgments of 17 March 1993, Sloman Neptun, C-72/91 and C-73/91, EU:C:1993:97, paragraph 18, and of 19 December 2013, Association Vent De Colère and Others, C-262/12, EU:C:2013:851, paragraph 15).

It is apparent from the decision of the referring court that it considers the last three of those conditions to be satisfied in the present case. Accordingly, it is necessary to reformulate the first question as seeking to ascertain whether Article 107(1) TFEU must be interpreted as meaning that a national measure, such as that at issue in the main proceedings, placing an obligation on both private and public undertakings to purchase electricity produced by cogeneration constitutes intervention by the State or through State resources. In that regard, it should be noted that, for it to be possible to classify advantages as 'State aid' within the meaning of Article 107(1) TFEU, they must be granted directly or indirectly through State resources and be attributable to the State (judgments of 16 May 2002, France v Commission, C-482/99, EU:C:2002:294, paragraph 24, and of December 19th 2013, Association Vent De Colère and Others, C-262/12, EU:C:2013:851, paragraph 16).

First, in order to assess whether a measure is attributable to the State, it is necessary to examine whether the public authorities were involved in the adoption of that measure (judgments of 16 May 2002, France v Commission, C-482/99, EU:C:2002:294, paragraph 52, and of 19 December 2013, Association Vent De Colère and Others, C-262/12, EU:C:2013:851, paragraph 17). In that regard, it is sufficient to point out that the obligation at issue in the main proceedings, to supply electricity produced by cogeneration, was imposed by the Law on energy, and that measure must therefore be regarded as attributable to the State (see, to that effect, judgment of 19 December 2013, Association Vent De Colère! and Others, C-262/12, EU:C:2013:851, paragraph 18).

Secondly, the condition that there must be intervention by the State or through State resources is satisfied not only where aid is granted directly by the State but also where it is granted by public or private bodies established or designated by the State with a view to administering the aid (judgments of 22 March 1977, Steinike & Weinlig, 78/76, EU:C:1977:52, paragraph 21, and of 13 March 2001, PreussenElektra, C-379/98, EU:C:2001:160, paragraph 58).

A measure consisting, inter alia, in an obligation to purchase energy may thus fall within the definition of 'aid' even though it does not involve a transfer of State resources (judgment of 19 December 2013, Association Vent De Colère and Others, C-262/12, EU:C:2013:851, paragraph 19 and the case-law cited). Article 107(1) TFEU covers all the financial means by which public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Even if the sums corresponding to the aid measure are not permanently held by the Treasury, the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as 'State resources' (judgments of 16 May 2002, France v Commission, C-482/99, EU:C:2002:294, paragraph 37; of 17 July 2008, Essent Netwerk Noord and Others, C-206/06, EU:C:2008:413, paragraph 70; and of 19 December 2013, Association Vent De Colère and Others, C-262/12, EU:C:2013:851, paragraph 21).

Such circumstances must, however, be distinguished from those in which undertakings, mostly private undertakings, are not appointed by the State to manage a State resource, but

are merely bound by an obligation to purchase using their own financial resources (judgments of 17 July 2008, Essent Netwerk Noord and Others, C-206/06, EU:C:2008:413, paragraph 74, and of 19 December 2013, Association Vent De Colère and Others, C-262/12, EU:C:2013:851, paragraph 35).

It should be noted in that regard that the mechanism at issue in the main proceedings required electricity suppliers to sell a quota of the electricity produced by cogeneration accounting for at least 15% of their annual electricity sales to end users. The President of the URE set the maximum tariffs for sale of electricity to end users, so that the financial burden resulting from that purchase obligation could not be systematically passed on to end users by undertakings.

It is thus apparent from the information before the Court that, in certain circumstances, electricity suppliers purchased electricity produced by cogeneration at a higher price than that charged to end users, which resulted in extra costs for the suppliers. Consequently, given that those extra costs cannot be passed on entirely to end users and are not financed by a compulsory contribution imposed by the State or by a full offset mechanism (see, to that effect, judgments of 17 July 2008, Essent Netwerk Noord and Others, C-206/06, EU:C:2008:413, and of 19 December 2013, Association Vent De Colère and Others, C-262/12, EU:C:2013:851), it must be concluded, as the Advocate General observed in point 86 of his Opinion, that the supply undertakings were not appointed by the State to manage a State resource, but were funding a purchase obligation imposed on them by having recourse to their own financial resources.

As regards the argument put forward by ENEA and the Commission that most of the undertakings bound by the purchase obligation were public undertakings governed by private law and therefore that obligation could be regarded as being financed through State resources, it should be noted that the resources of public undertakings may be regarded as State resources where the State is capable, by exercising its dominant influence over such undertakings, of directing the use of their resources in order to finance advantages to the benefit of other undertakings (see, to that effect, judgment of 16 May 2002, France v Commission, C-482/99, EU:C:2002:294, paragraph 38).

As the Advocate General noted in points 91, 94 to 96 and 100 of his Opinion, the mere fact that the State held the majority of the capital in some of the undertakings subject to the purchase obligation does not lead to the conclusion that, in the main proceedings, the State exercised a dominant influence that enabled it to direct the use of the resources of those undertakings within the meaning of the case-law referred to in the preceding paragraph.

It appears that the purchase obligation applied equally to all electricity suppliers, regardless of whether their capital was predominantly held by the State or by private operators. In addition, it is not clear from the information submitted to the Court, in particular from the information provided at the hearing, that ENEA's conduct was dictated by instructions from public authorities. On the contrary, it was indicated that the decision to decline offers for the sale of electricity produced by cogeneration during the year 2006 was the result of wholly autonomous business decisions.

Moreover, contrary to the Commission's submissions, the fact that the measure is attributable to the Member State concerned, as established in paragraph 22 above, does not mean that it may be inferred that Member State exercises a dominant influence over an undertaking in which it is the majority shareholder, within the meaning of the judgment of 16 May 2002, France v Commission (C-482/99, EU:C:2002:294, paragraphs 38 and 39). There is nothing in the State's conduct as legislator to suggest that it exercised such influence in its capacity as majority shareholder in an undertaking.

As regards the argument of ENEA concerning the fact that monies collected as a result of financial penalties imposed for the failure to comply with the purchase obligation are to be transferred to the national fund for environmental protection and water management, none of the evidence before the Court makes it possible to determine whether such monies were, at the time of the material facts, allocated for the support of undertakings producing electricity by cogeneration. Accordingly, the answer to the first question is that Article 107(1) TFEU must be interpreted as meaning that a national measure, such as that at issue in the main proceedings, placing an obligation on both private and public undertakings to purchase electricity produced by cogeneration does not constitute intervention by the State or through State resources.

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