



**METAXAS & ASSOCIATES**  
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## **NEWSLETTER** - *Latest legal updates*

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## COMPETITION

### Commissioner-designate Almunia's public hearing in the European Parliament

The financial crisis was at the centre of the Economic and Monetary Affairs Committee's hearing of Joaquín Almunia, Commissioner-designate for competition policy. Mr Almunia presented ways in which competition policy can help European Union's growth. According to Mr Almunia's view, "competition policy is an essential tool for the EU to be competitive on the global stage".

Members of the European Parliament asked about his views on state aid to financial institutions and how to ensure that this aid to banks does not encourage reckless practices by the knowledge that they will always be bailed out. Mr Almunia replied that bailed out banks would be required to restructure, and that it was important to ensure a level playing field and avoid the "moral hazard" effect. The Commission would study very carefully how public money is used and in its analysis how banks use state aid there will be no distinction between different types of banks.

Regarding penalties for companies' anti-competitive practices, Mr Almunia said that fine revenue goes directly to the EU budget and that therefore no individual country is entitled to it.

Members of the European Parliament were also interested in Mr Almunia's suggestion of the need to look into the issue of fiscal races and the possibilities of collective redress. The development of effective co-ordination procedures is highly important, as well as abuse avoidance. To a question about tax advantages and their consequences for competition policy Mr Almunia replied that "you cannot have competition through tax advantages, although Member States retain sovereignty".

When the issue of state aid regulation in the transport sector was brought up, and more specifically legislation on state aid to ports, Mr Almunia said that

the application of competition rules to the transport sector is extremely important and that, together with the Transport Commissioner, he expected that there would be conclusions relating to ports in the near future.

*Public consultation on review of competition rules for the motor vehicle sector launched by the European Commission*

The European Commission is inviting comments' submissions by 10 February 2010 on its proposal for a revised Block Exemption Regulation and Guidelines on motor vehicle sales and repair agreements. Block exemptions relieve companies from the need to analyse individually whether certain categories of agreements comply with EU rules on restrictive business practices. The current Regulation (1400/2002) is due to expire in May 2010. The draft texts are in line with the Communication of 22 July 2009 on the review of the competition regime for the motor vehicle sector. In particular, following stakeholders' comments, the Commission considers that a specific block exemption is no longer warranted for the sale of new cars and commercial vehicles. However, the Commission proposes to adopt a new block exemption for repair and maintenance services, where competition appears to be more limited. It also proposes to adopt guidelines dealing with specific issues for both motor vehicle sales and repair.

The Commission's evaluation has shown that the European markets for motor vehicle distribution are fairly open, with relatively low barriers to entry. The expansion of the model ranges gives consumers more choice within each car segment and price levels are highly competitive. No evidence was found that agreements between vehicle manufacturers and dealers would continue to require different treatment as compared to agreements in any other sector. The Commission therefore proposes to apply the general competition rules from 31 May 2013, after a three-year adaptation period, granted to take account of brand-specific long-term investments made by dealers.

The general rules are currently set out in block exemption Regulation 2790/1999 on vertical agreements, which is due to expire on 31 May 2010, and which will be replaced by a new regulation. Issues such as multi-branding, imposition of resale prices and parallel trade in the EU will be addressed in the proposed sector-specific guidelines, aimed at assisting companies in assessing the compatibility of their agreements with the competition rules.

The market for repair and maintenance is less competitive. In particular, structural factors such as the brand-specific nature of the markets and the prevalence of "captive" spare parts intrinsically limit competition. Moreover, the Commission has had to intervene to protect competition in these markets and has noted that manufacturers sometimes refuse to honour warranties when a vehicle has been repaired outside the authorised networks.

In view of the potential competition problems on the motor vehicle aftermarkets, the Commission proposes limiting the benefit of the block exemption for service and repair agreements to operators with a market share of up to 30%. This would make it easier for the Commission or for national competition authorities to prevent carmakers from sheltering their repair networks against competition from independent repairers, for instance by withholding technical information.

The Commission also intends to include particular provisions on the supply of spare parts in a new sector-specific block exemption regulation. These are intended to ensure that independent repairers can obtain carmaker-branded parts, as well as to ensure that component suppliers can put their brand on component or spare parts and can continue to supply spare parts to the aftermarket. The Commission proposes that the sector-specific guidelines should also clarify various aspects affecting competition in the aftermarkets, such as the consequences if a vehicle manufacturer refuses to honour warranties where vehicles have been repaired in independent repair shops.

## ENERGY

### *Regulatory aspects of the integration of wind generation in European electricity markets*

The increasing pressure on Member States to deliver low-carbon, secure forms of energy, concentrates their efforts on increasing their deployment of renewable energy and especially of wind generation. However, wind generation's unique characteristics, give rise to new issues relating to the design of the market and network arrangements of the regulatory regime. European energy regulators are considering these issues to ensure that the regime facilitates the deployment of wind generation and does not inhibit market integration.

CEER (Council of European Energy Regulators), with its report on 10 December 2009 aims to present European energy regulators' thoughts on how wind generation should be integrated into the market and network arrangements and would highlight areas for further consideration in light of its increasing deployment. The paper begins by reviewing the current and expected role of wind generation, in light of the legal framework, to provide a context for assessing the policy impacts. It outlines the role of support schemes as a key issue for wind generation but also for energy customers, although this is an issue for governments rather than regulators.

Particularly, European energy regulators consider three areas where integration of wind generation needs to be factored into policy decisions: electricity market arrangements, network access arrangements, and the concept of an offshore supergrid. CEER's report on this matter should be considered as a first step in discussions with stakeholders. This report is intended to highlight the most important issues in integrating wind generation and to seek feedback from stakeholders as to how they should be addressed. The conclusions from this consultation will serve to inform regulators' future work and understanding of the issues as they affect wind

generation.

Stakeholders interested in the regulatory implications of integrating wind generation into European electricity markets are invited to respond to this consultation submitting their comments by **18 February 2010**.

*ERGEG publishes status review on regulatory aspects of smart metering*

On 16 November 2009, the European Regulators' Group for Electricity and Gas (ERGEG) published a status review on the regulatory aspects of smart metering in the gas and electricity sectors. The third energy reform package and Directive 2006/32 on energy end-use efficiency (OJ 2006 L114/64) both contain provisions regarding the installation of "intelligent metering systems", with the aim of better informing customers of their consumption and helping to increase energy efficiency awareness. The status review is based on responses to questionnaires sent to national regulatory authorities in May 2009 and provides an overview of the state of play regarding the introduction of smart meters in ERGEG member and observer countries. It focuses, in particular, on four areas: meter value management; roll-out policy; access to data and privacy issues; and functional and technical aspects. The review found a wide variety in the approaches taken to smart metering, with a clear lack of common definitions to key concepts. The ERGEG found that in most countries the responsibility for the meters, including installation, maintenance, meter reading, data management, etc., lies with the distribution system operator. Finland, Greece, Italy, Spain and Sweden are already proceeding to a roll-out of electricity smart meters (and it is under discussion in a further 11 countries). In gas, only Italy has a planned roll-out. This review will be used to initiate discussion on ERGEG future work on Guidelines of Good Practice on regulatory aspects of smart metering policy in Europe.

## PUBLIC PROCUREMENT

### *ECJ rules that Greece has breached Utilities Directive by using selection criteria that could deter foreign tenderers*

On 12 November 2009, the European Court of Justice (ECJ) handed down a ruling on an action brought by the European Commission alleging that Greece has breached its obligations under Directive 93/38 (the Utilities Directive). According to ECJ, Greece had breached the obligation to ensure that there was no discrimination between tenderers. The contract notice contained a clause relating to certification of qualifications that deterred foreign tenderers and so treated them differently to national tenderers. In addition, the contract notice confused the selection and award criteria. The award criteria included criteria relating to the ability of the tenderer to perform the contract properly. Such criteria were not aimed at identifying the tender which was the most economically advantageous.

### *Commission brings procurement infringement proceedings against Greece*

On 20 November 2009, the European Commission announced that it has brought public procurement infringement proceedings against Greece in relation to two cases. The first case relates to the award of urban planning contracts without prior advertisement. The second case relates to Greece's non-compliance with a judgment of the European Court of Justice, regarding professional qualifications of engineers.

#### **Urban planning contracts**

The European Commission has decided to formally request Greece to review contracts for cadastral mapping and urban planning services awarded by the municipalities of Vasilika, Kassandra, Egnatia and Arethousa which were not included in the original contract by using the negotiated procedure without

publication of a contract notice. This formal request takes the form of a "reasoned opinion", the second stage of the infringement procedure laid down in Article 226 of the EC Treaty. If there is no satisfactory reply within two months, the Commission may refer the matter to the European Court of Justice.

The Commission considers that the conditions provided for by the Directives 92/50 (on the coordination of procedures for the award of public service contracts) and 2004/18 (on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts) for the use of the negotiated procedure without publication of a contract notice are not fulfilled in relation to the contested contracts.

### **Professional qualifications of engineers**

The European Commission has decided, under Article 228 of the EC Treaty, to send a reasoned opinion to Greece requesting information on the measures they have taken to comply with a judgment of the European Court of Justice of 23.10.2008 (C-274/05) regarding the recognition of professional qualifications of engineers. The Commission will also send a letter of formal notice to Greece under Article 228 regarding a judgment of the Court of 2.7.2009 (C-465/08) on the implementation of a Directive on professional qualifications.

The Court held that Greece has failed to fulfil its obligations under Directive 89/48/EEC by refusing to recognise diplomas, in particular for engineers, awarded by the competent authorities of another Member State under a franchise agreement. Greece also violated its obligations under that same Directive by providing for the application of compensatory measures in more cases than those allowed, and by checking the level of the educational establishment that issued the diploma. Finally, Greece violated Directive 89/48/EEC by not allowing, in the public sector, the reclassification, at a higher grade, of persons recruited at a level lower than that to which they



would have been entitled if their diplomas had been recognised in accordance with that Directive.

Greece provided information on the measures it has taken to comply with judgment C-274/05 but they are not sufficient in order to comply with the conclusions of the European Court of Justice. In this context, Greece also announced the adoption of measures implementing Directive 2005/36/EC but no such draft measures have yet been submitted.

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