METAXAS & ASSOCIATES
ATTORNEYS AT LAW

NEWSLETTER - Latest legal updates

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ENERGY

Italian government backpedals and modifies the new measure to stop PV on agricultural land

During a visit to the Tuscan factory of inverter producer Power-One Italy SpA, Italy's new minister of environment, Antonio Clini, stated that the ministry does not support the installation of ground-mounted solar power plants on agricultural land. Clini said that Italy's National Energy Plan would therefore focus on the development of photovoltaic (PV) installations on industrial and residential surfaces. The minister also said that the ministry is willing to cooperate with the renewable energy sector to produce energy at a lower cost, adding that the government will need to support research and development activities into renewable technologies.

According to US inverter manufacturer Power-One Inc., the parent company of Power-One Italy, Clini also praised the inverter producer for investing 3.5 percent of its revenues in R&D.

However, just before passing legislation including this measure that would cancel incentives for new ground-mounted photovoltaic (PV) power plants installed on agricultural land and would endanger many investments, generating uncertainty among power plant operators, the Italian government added a stipulation to the law that aims to prevent a potentially damaging solar boom. The approved version of the law, which was published in the official journal on the 24^{th} of January, still includes a provision that gives project developers one year to complete projects that have already obtained authorization or that have started the authorization process.

Nevertheless, according to the final version of the law, power plants greater than 1 MW will be ineligible for the one-year extension. The previous version of the measure could have allowed large-scale PV plants to take advantage of the one-year delay and the abolishment of former limitations to register in 2013 for the uncapped incentive program “Quarto Conto Energia.” Some Italian renewable energy associations had complained that the one-year extension could have caused an installation boom that would have rapidly consumed the remaining budget for solar incentives.

UK government loses feed-in-tariff case

In late October, the DECC proposed reducing the FIT for small-scale photovoltaic installations by more than 50 percent and said it planned to bring forward the cutoff date for the old FIT from Mar. 31, 2012 to Dec. 12, 2011.

Last month, the High Court concluded that cuts to the UK’s solar feed-in tariffs, which fell in the middle of an ongoing public consultation on changes to the FIT scheme, were illegal – a decision that followed a legal challenge by the Friends of the Earth association and the solar firms HomeSun and Solarcentury. Friends of the Earth stated that an appeal by the government “means solar businesses can't be sure what tariff payment solar projects installed now will receive” and added that “the uncertainty is crippling businesses and costing jobs.”

A DECC spokesperson said that the government hoped it can secure a hearing “as soon as possible” and noted that the government “disagrees with the court's decision.” Friends of the Earth is also calling on the government to increase the budget for solar in order to allow more people to benefit from the technology

The UK Court of Appeal has upheld this High Court ruling. The ruling means that small-scale photovoltaic (PV) installations registered before April 1 will be eligible to receive the FIT rate of 43.3 pence per kWh. In late October, the DECC proposed reducing the FIT for small-scale PV installations by more than 50 percent and said it planned to bring forward the cutoff date for the old FIT to Dec. 12, 2011. The DECC issued a statement on the new ruling, saying it would seek permission to appeal to the Supreme Court. Energy and Climate Change Secretary, Mr. Huhne, explained that the DECC proposed the changes to the FIT because it aims at maximizing the number of installations using the available budget.

Spanish government approves solar moratorium

The Spanish government announced last Friday that it has approved a royal decree (RDL 1/2012) that will temporarily suspend the pre-allocation process and incentives for new renewable energy projects. It is not clear when the pre-allocation process and incentive programs will resume, but the government made assurances that the measure would not affect Spain's ability to meet EU renewable energy targets.

The measure is not retroactive and will therefore not affect any projects that have already been registered. Minister of Industry, Energy and Tourism José Manuel Soria said the measure was a first step aimed at solving the country's "tariff deficit," which has ballooned to €24 billion ($31.5 billion).

Over the last few years, the price of electricity paid by Spanish consumers has not reflected the actual cost of producing electricity, creating the so-called tariff deficit. As a result, the government now owes electric companies billions.

One of the first reactions to the new measure came from Spanish solar association ASIF, which said that the decision would cost hundreds of thousands of jobs. The association called the measure "surprising, unfair, unnecessary and incomprehensible." Until now, the annual cap for photovoltaics had been about 400 MW. RD 2012 says specifically that the law will not affect the net-metering scheme currently being developed. The net-metering scheme is intended to encourage the deployment of small-scale solar installations

Greek proposal on local content requirement premium FIT

The representatives of four of the most important companies operating in the photovoltaic sector in Greece (EXEL GROUP, HELIOSPERA, ALUMIL, MECHATRON, NOE/ALUSET) presented a coherent and thorough proposal for introducing specific economic incentives to photovoltaic investors, who choose locally produced equipment (local content requirement bonus). This proposal was prepared in light of the legislative proposal to be submitted by the Ministry of Environment, Energy and Climate Change to the Greek Parliament and addresses an issue long discussed and considered by other Member States, as well.

On the same occasion, the Managing Partner of Law Firm "Metaxas & Associates", Dr. A. Metaxas that was assigned by the abovementioned Greek companies to deliver a legal opinion on the matter, analyzed the main legal aspects of the adoption of a relevant regulation by the Greek Ministry of Environment, Energy and Climate Change. Especially, he focused on the compatibility of such a measure in its different variations with European State Aid and WTO Law.

The main conclusions of his legal opinion consist of the following points:

1. Taking into account the case law of the Court of the EU and the nature and function of the Greek FiT Mechanism it may be argued that it is questionable if a measure consisting in the provision of a targeted feed-in-tariff premium granted to investors using photovoltaic equipment produced in Greece does not even constitute a "state" aid within the meaning of Art. 107 (1) of the Treaty for the Functioning of the European Union (TFEU). However, it is not unlikely that the European Commission might raise objections, given the difficulty in defining the exact legal meaning of "state aid" and its parameters and the often observed divergences between the case law of the Court of the EU and the Commission's practice in interpreting and applying the prohibition rule of Article 107 par.1 TFEU in the course of the examination of FiT Schemes.

2. Furthermore, in the event that such a supporting measure is considered to constitute state aid, EU State Aid Law provides for specific categories of exemptions, the application of which may render a measure ad hoc compatible with the common market. More specifically, given the serious distortion of the Greek economy, consisting of deep recession and high unemployment rates, the invocation of the exemption of article 107 par. 3 (b) TFEU may render the support of the local photovoltaic production compatible with the common market, provided the ability of the photovoltaic sector to have a key role in boosting the Greek economy.

3. Moreover, such a measure containing economic incentives may also be considered compatible aid on the basis of Article 107 par.3 (c), as far as the promotion of the photovoltaic sector in Greece is in line with the fundamental aim of the European Union to promote sustainable environmental growth and thus promote renewable energy resources. In this context, though, any possible distortions of competition are examined in a stricter way by the European Commission. However, given the problems the Greek photovoltaic sector faces due to the present economic conditions in Greece and the limited character of the proposed measure in terms of its size and duration, the case of its compatibility with EU State Aid Law is strongly defendable.

4. However, it is of great importance to be mentioned that the only institution competent to assess the compatibility of the proposed measure is the European Commission, to which the measure has to be notified. In addition, the proposed measure cannot be put into effect before the Commission has delivered its decision approving it (so called "stand still clause").

5. In any case, the said legal opinion also examined the alternative to give economic incentives to investors using photovoltaic equipment of European origin, which raises no issues of compatibility with European state aid law, whereas possible tensions with the rules of the World Trade Organization may be easier avoided.

6. Lastly, the example of Italy, where a relevant measure is already in force, may indeed provide useful guidance for the implementation of a feed-in-tariff bonus with a local content requirement.

ENVIRONMENT

Meeting the waste water treatment challenge

Between 2007 and 2013, some 14 billion EUR will be spent across the EU on infrastructure for the collection or treatment of waste water under the Urban Waste Water Treatment Directive (UWWT). The aim is to ensure that human and industrial waste doesn't adversely affect human health and the environment. The latest report on implementation of the Directive, for the period 2007/2008, shows that work is progressing well but that collection and treatment compliance rates could still improve. It reveals that most longstanding EU Member States (EU-15)1 maintained good standards of waste water treatment and improved on treatment of sensitive waters, while newer Members States (EU-12) improved on overall collection and treatment.

STATE AID

Commission adopts new rules on services of general economic interest (SGEI)

After extensive public consultations, the European Commission has adopted a revised package of EU state aid rules for the assessment of public compensation for services of general economic interest (SGEI). The new package clarifies key state aid principles and introduces a diversified and proportionate approach with simpler rules for SGEIs that are small, local in scope or pursue a social objective, while better taking account of competition considerations for large cases.

Commission Vice-President in charge of competition policy, Joaquín Almunia, stated: "The new SGEI package provides Member States with a simpler, clearer and more flexible framework for supporting the delivery of high-quality public services to citizens which have become even more necessary in these crisis times. The Commission's duty, of course, is to ensure companies entrusted with services of general interest do not get overcompensated, which safeguards competing activity and jobs, and guarantees an efficient use of scarce public resources."

Commission extends crisis rules for banks

The European Commission has updated and prolonged a set of temporary state aid control rules to assess public support to financial institutions during the crisis. The main provisions consist in explaining how to ensure that the State is adequately remunerated if – as is increasingly likely in the future - Member States decide to recapitalise their banks using instruments, such as ordinary shares, for which the remuneration is not fixed in advance. A revised methodology was also agreed concerning the remuneration of guarantees for banks' funding needs – the bulk of the support to date – to ensure the fees that banks pay reflect their intrinsic risk, rather than the risk related to the Member State concerned or the market as a whole. The rules will apply as long as required by market conditions.

In 2008-2009, the European Commission adopted special state aid rules to allow Member States to support the banking system during the financial crisis for the sake of financial stability without undue distortions of competition in the European Union's single market. The crisis rules have proven their value in ensuring that banks restructure when changes to their business models are required to ensure their long-term viability, e.g. if they are heavily reliant on risky activities. By also ensuring that shareholders and hybrid capital holders bear a fair share of the burden, the Commission ultimately reduced the amount of taxpayers' money used to support the banks.

TRANSPORT

Europe's Airports 2030: Challenges Ahead

The 10 key facts and figures

- Airports matter - almost 800 million passengers used EU airports in 2010, a third of the world market, almost three times more than when air traffic was liberalised in the early nineties.
- Aviation is one of Europe's most competitive sectors. Airports are a vital part of our aviation system and airports are increasingly important to our economy. Europe has for historic and geographical reasons established a strategic position as an aviation "hub" for the world.
- But competition is increasing. Half of the world’s new traffic added during the next 20 years will be to, from, or within the Asia Pacific region. Over the next five years, air transport growth will be driven mainly by regions like Asia Pacific, the Middle East and Latin America.
- Faced with intense global competition, there are two major challenges facing European airports: capacity and quality.
- Europe’s airports are facing a capacity crunch. Air traffic in Europe will nearly double by 2030. Yet Europe will not be in a position to meet a large part of this demand due to a shortage of airport capacity.
- Already today 5 major European airport hubs are at saturation - operating at full capacity: Düsseldorf, Frankfurt, London Gatwick, London Heathrow, Milan Linate (Eurocontrol).
- By 2030, on current trends 19 key European airports will be at saturation, including for example, Paris CDG, Warsaw, Athens, Vienna and Barcelona1. The resulting congestion could mean delays affecting 50% of all passenger and cargo flights (see detail in annex).

- Airport capacity must be optimised. Also, noise restrictions must be proportional to the identified noise problem.
- Quality and efficiency of services at airports must be improved. Today, 70% of all delays to flights are already caused by problems due to the turnaround of aircrafts at airports (delays caused by airlines or their ground-handlers, airports or other parties involved in the turn around process).
- The overall quality of ground-handling services has also not kept with evolving needs especially in terms of reliability and resilience, safety and security. Disruptions experienced have shown the need for increased coordination of ground operations for European airports and the network as a whole (knock-on effects) so as to ensure continuity of airport operations.

The Airport Package

To face these challenges, the European Commission has today adopted a policy document and three legislative proposals:

- to help tackle a shortage of capacity at Europe's airports;
- to improve the quality and efficiency of ground-handling services; and
- to improve the transparency of the decision making process on noise restrictions.

TELECOMMUNICATIONS

Digital Agenda: Turning government data into gold

The Commission has launched an Open Data Strategy for Europe, which is expected to deliver a €40 billion boost to the EU's economy each year. Europe's public administrations are sitting on a goldmine of unrealised economic potential: the large volumes of information collected by numerous public authorities and services. Member States such as the United Kingdom and France are already demonstrating this value. The strategy to lift performance EU-wide is three-fold: firstly the Commission will lead by example, opening its vaults of information to the public for free through a new data portal. Secondly, a level playing field for open data across the EU will be established. Finally, these new measures are backed by the €100 million which will be granted in 2011-2013 to fund research into improved data-handling technologies.

These actions position the EU as the global leader in the re-use of public sector information. They will boost the thriving industry that turns raw data into the material that hundreds of millions of ICT users depend on, for example smart phone apps, such as maps, real-time traffic and weather information, price comparison tools and more. Other leading beneficiaries will include journalists and academics.

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