NEWSLETTER

Latest legal updates

Issue 2 ***October 2007***

In this issue :

ENVIRONMENTAL LAW

- ***The Public Power Corporation (ΔΕΗ Α.Ε.) has been fined for breaches against the environmental legislation***

COMPANY LAW – CORPORATE GOVERNANCE

- ***Amendment of the Greek Law on Public Limited Companies ("A.E.")***

COMPETITION LAW

- ***CFI judgment in Microsoft case***
- ***EU – China competition policy dialogue***
- ***China adopts its first anti-monopoly law***
- ***OTE A.E. fined for Competition Law breaches***

BUSINESS STRATEGY

- ***Equity Transfers in China: A short introduction***

STATE AID

- ***Second Memorandum on the revised draft general block exemption Regulation***
- ***Recovery of State aid awarded to Olympic Airways***

ENVIRONMENTAL LAW

The Public Power Corporation (Greece) fined for breaches against the environmental legislation

Following an announcement by the Hellenic Ministry for the Environment, Physical Planning & Public Works on 24 September 2007, a fine of 1 million Euro has been imposed to the Public Power Corporation S.A. (Δημόσια Επιχείρηση Ηλεκτρισμού Α.Ε.) for exceeding the emission limits of atmospheric pollution. The decision to fine PPC was taken after inspections at several power plants in Greece, which revealed that PPC was liable for exceeding sulphur dioxide emission limits, hourly and daily limits of sulphur dioxide gas emissions, as well as the daily limits of dust emissions relevant to public health, and thereby breaching the obligations undertaken by Greece under the Kyoto Protocol.

According to the Kyoto Protocol, Greece is allowed by 2010 to increase carbon dioxide emissions to 25% in comparison to the respective levels back in 1990. Nevertheless, EU Commissioner for Environment, Stavros Dimas, observed that Greece has already reached that limit since 2006.

Since December 2004 the national system for controlling greenhouse gases emissions is in operation and monitors 141 energy units, 30 of which belong to the PPC. This system has set out specific emission levels of carbon dioxide and exceeding those leads to an obligation to buy 'polluting rights'. During the period 2005-2007 Greece has had the right to emit 213 million tons of carbon dioxide, out of which approximately 156 million originate from the PPC. The latter, by 2005 had reached the permissible limits, whereas by 2006 it had already exceeded them. Therefore, the PPC has been compelled to buy out the right of exceeding emission limits in particularly favourable terms, namely, for the amount of 80 million Euros. In his comment on the decision, the Greek Minister for Environment, George Souflias, stressed that energy production in the country has to be managed with respect to the methods minimizing the negative impact on the environment and protecting public health. Minister Souflias also declared his decisiveness to implement all

measures available in order to ensure that the PPC plants are managed in the prescribed way.

For further information see:
http://www.minenv.gr/download/2007-09-24.prostima.se.deh.doc

COMPANY LAW

Amendment of the Greek Law on Public Limited Companies ("A.E.")

Greek Company Law has recently gone through important adjustments with the enactment of Law 3604/2007 amending the Public Limited Companies Law 2190/1920. The reform aims at simplifying the management of corporations, the clarification of certain structural issues, ensuring responsible and effective management and enabling larger freedom of choice in the co-operation between parties involved. Briefly speaking, the recent amendments reflect the need for a modernization of the former obsolete and rather dysfunctional provisions, in order to make Greek public limited companies more competitive in the international market. Certainly, many of the provisions enacted derive form recent EU legislation which has now been incorporated in the Greek Public Companies Law.

The main characteristic of the new Law is the partial removal of several burdens imposed on public limited companies by the previous legislation. In particular, the issue of governmental monitoring and intervention in the A.E. companies did not correspond to today's needs and was considered as bureaucratic obstacles. Consequently, the reduction of administrative intervention, especially for small and medium-size companies, brings more flexibility and freedom from the abundance of administrative dysfunctions.

In this context, the obligation to publish announcements in the press has been abolished in two types of cases. The new law provides that unlisted companies may prescribe in their Articles that General Meeting calls shall not be publicly announced, and where that is not the case such announcements shall only have to be published in one newspaper. Furthermore, a new

announcement in the press is no longer necessary in cases of General Meeting reiteration due to lack of quorum in the first assembly.

An important reduction of regular monitoring of small companies has also been effected by the new legislation, since previously the law compelled all public limited companies to undergo regular audits by certified auditors. According to the new formulation of law companies are henceforth separated into three categories: i) companies that fulfil two of the three criteria of article 42 (balance sheet of 2.5 million Euro, minimum net turnover 5 million Euro, 50 workers), will be submitted to regular audits by certified auditors, ii) companies that do not fulfil two of the three above-mentioned criteria but have minimum turnover over 1 million Euro, will be submitted to audits by members of the Economic Chamber of Greece, and iii) companies that do not fulfil two of the three above-mentioned criteria and do not have a turnover exceeding 1 million Euro will not be subject to regular audits.

Finally, for the purpose of strengthening the competitiveness of Greek companies internationally, a significant amount of other provisions have been amended, such as those concerning the responsibilities of the Board, the General Meeting, the strengthening of shareholders' interests and minority protection, and the methods of company dissolution.

Overall, it is important to note that the overall reduction of administrative monitoring and intervention in relation to the registration and running of public limited companies has increased the responsibility of the legal counsels as well as corporators. Moreover, one further even more significant consequence of the recent amendments is that the new Law has amplified the courts' involvement in the supervision of companies, which raises concerns about the ability of the already overloaded greek judicial system to perform its enhanced role efficiently.

COMPETITION LAW

CFI delivers judgement in Microsoft case

On September 17, 2007 the Court of First Instance delivered its judgment on *Microsoft Corp.* v *Commission of the European Communities* (Case T-201/04). The judgement concerns the validity of a 497 million-fine imposed on Microsoft by the European Commission in 2004 for an infringement of Article 82 EC. The CFI verified that Microsoft had abused its dominant position by refusing to supply its competitors with 'interoperability information' and to authorise them to use that information to develop and distribute products competing with its own products on the work group server operating system market between October 1998 and 2004, as well as by tying Windows Media Player with the Windows PC operating system.

However, in its decision, the Commission had ordered that a monitoring trustee should be appointed by the Commission from a list of persons drawn up by Microsoft, which would have the responsibility to issue opinions on whether Microsoft was complying with the decision and on any issue that might be of interest with respect to the enforcement of the decision. Furthermore, the monitoring trustee was to have access to Microsoft's assistance, information, documents, premises and employees and to the source code of the relevant Microsoft products. The CFI found that by establishing a mechanism of a monitoring trustee with autonomous powers of investigation the Commission had went far beyond what applies to its ability to appoint its own expert. The CFI found that the establishment of a monitoring trustee with autonomous investigation powers differs from the situation where the Commission appoints its own expert to advice during an investigation, and that such a mechanism has no legal basis in Community law. In particular, the Court criticised the trustee's extensive access right to information, documents etc. and the fact that no time limit had been envisaged for the trustee's intervention. The Court also considered that none of the provisions of Community law authorises the Commission to require an

undertaking to bear the costs which the Commission itself incurs as a result of monitoring the implementation of remedies.

In her speech on September 17, 2007 the EU Commissioner for Competition Policy, Neelie Kroes, referred to the Commission's decision of 2004 as a landmark decision, giving consumers more choice in software markets and maintaining incentives for all companies in those markets to innovate for the benefit of consumers. She also stressed that the Decision set an important precedent concerning of the obligations of dominant companies to allow competition in high tech industries in particular.

For further information on the judgement see PRESS RELEASE No 63/07 (17/09/2007) at:
http://curia.europa.eu/en/actu/communiques/cp07/aff/cp070063en.pdf

Neelie Kroes speech (SPEECH/07/539, 17/09/2007) may be found at:
http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/539&format=HTML&aged=0&language=EN&guiLanguage=en

EU-China Competition Policy Dialogue

In 2003, EU and China started the "EU-China Competition Policy Dialogue" with the primary objective of establishing a permanent forum for consultation between China and the EU, as well as of enhancing the EU's technical and capacity-building assistance to China regarding competition law. The importance of co-operation in this area is clear when it is taken into account that trade between China and the EU doubled between 2000 and 2005 and Europe today is China's largest export market.

For more information about the EU Commission's approach regarding trade and competition in China, see:
http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130875.pdf

China adopts its first Anti-monopoly law

On August 30th 2007 the Standing Committee of the Chinese National People's Congress passed the country's first anti-monopoly law, which will come into effect on August 1st 2008, marking the end of the legislative process that started in 1994.

One of the main objectives of the legislation is to strengthen the investigation and supervision of foreign merger operations affecting major enterprises in sensitive sectors and issue guidelines for improving the system for identifying industries with offshore operations. As sensitive sectors the Chinese Government has classified military-related manufacturing, power production and grids, petroleum, gas and petrochemicals, telecom manufacturing, coal, civil aviation and shipping.

Furthermore, the law bans monopolistic arrangements, such as cartels and other forms of collusion, and provides for the investigation and prosecution of monopolistic practices, while protecting monopolistic arrangements that promote innovation and technological advancement. It also prohibits monopolies from using their dominant status in the market to restrain competition, fix prices, enforce package sales, and refuse or enforce trade.

For further information see:
http://english.mofcom.gov.cn/aarticle/counselorsreport/westernasiaandafricareport/200709/20070905075539.html

OTE A.E. fined for Competition Law breaches

The Greek telecommunications company OTE A.E. has been fined €20.000.000 for a serious and continuous breach of article 2 of the Greek Competition Law (N. 703/1977). The Hellenic Telecommunications & Post Commission, the National Regulatory Authority for the electronic communications and postal services market, concluded after investigating OTE's broadband-services (the "Conn-X-package") during the time period 2004-2006, that the company had

abused its dominant position by practicing a "margin-squeeze" policy on its wholesale and retail prices in the Greek broadband market. As a result alternative suppliers had to either provide their customers with broadband services at a loss in order to compete with OTE or withdraw from the market. Since such practice was likely to hamper economic growth and development of other actors in the relevant market and thereby decrease competition, it was found to be a serious breach of competition law.

For further information see:
http://www.eett.gr/opencms/sites/EETT/NewsReleases/PressReleases/DT26_07_07_2.html

BUSINESS STRATEGY

Equity Transfers in China: A short introduction

Metaxas&Associates and ***China Solutions LLC*** offer combined legal services to companies or individuals who want to expand their economic activities to China (PRC). China Solutions LLC have drafted following short client's note concerning equity transfer issues:

Below we explore some of the fundemental mechanics and issues arising from the transfer from one off-shore (i.e., non-Chinese) investor to another off-shore investor of an equity interest in a foreign invested enterprise (e.g., a joint venture or a wholly foreign invested enterprise) established in China.

Fundamental Structure

The fundamental structure is as follows:

(i) One of the off-shore investors, a manufacturer, eager to take advantage of lower labor costs, invested directly into China in the mid-90's (the "First Investor"). The First Investor established a joint venture (the "JV") with a Chinese counterpart (the "Local

Investor”). Due to a variety of factors, the First Investor did not establish a special purpose holding company (e.g., a Hong Kong company) (“SPHC”) through which to invest in the JV. Rather, the First Investor invested directly into the JV.

(ii) Ten years later, the First Investor is re-structuring its operations because it no longer has a competitive edge in manufacturing. Instead, the First Investor is focusing on post-sales services, which deliver a higher profit margin. Therefore, the First Investor wants to divest its equity interest in the JV and has found a second off-shore investor (the “Third Investor”) that is eager to expand its manufacturing presence in China in order to sell its products to the growing Chinese market.

(iii) Thus, in short, the First Investor will sell its equity interest in the JV to the Third Investor. Due to operation of law, the Local Investor must approve this transfer and has a right of first refusal of the transfer. Furthermore, the transfer must be approved by the approval authorities (the “Approval Authorities) that first approved the estabishment of the JV.

(iv) The Third Investor, under the advice of counsel, will not directly own the subject equity interest. Rather, the Third Investor will establish a non-Chinese SPHC and the SPHC will hold the equity interest in the JV. Under this structure, if in the future the Third Investor transfers its equity interest in the JV, it is not likely to require the approval of the Local Investor or the Approval Authorities.

Fundamental Assumptions

We assume that all commercial terms have been agreed upon between the First Investor and the Third Investor. We also assume that the Local Investor

will not utilize its right of first refusal and will approve the equity transfer. We also assume that the Third Investor has conducted an adequate legal and financial due diligence to understand the liabiltiies and the risks corresponding to its acquisition.

Application Materials

The Approval Authorities must approve the transfer in order for it to become effective. Although the Approval Authorities may excercise some discretion in determining which documents must be submited to the Approval Authorities, the material application documents will comprise the following:

(i) the equity transfer agreement between the First and Third Investor;

(ii) the revised articles of association of the JV, reflecting the new investor and any other changes agreed upon between the Third Investor and the Local Investor; and

(iii) the board resolution of the JV unanimously approving the transfer and the revised articles of association.

Critical Issues to Consider

There are a number of critical issues to be considered in this transfer.

(i) Ensure the post-transfer structure complies with the foreign investment catalogue. Provided that the Third Investor's equity interest is not greater than the percentage that the First Investor held, this is not likely to be an issue. This is normally an issue when the foreign investors' equity interest exceeds a threshold set out in the catalogue (e.g., 50 percent).

(ii) Ensure unanimous approval by the JV's board. Note how the Third investor is utilizing a SPHC in order to avoid this issue in the future.

(iii) Consider the tax implication of payment of the transfer price, which is largely the concern of the First Investor. Payment may be subject to certain witholding tax by the Chinese tax authorities.

(iv) Consider how to unwind the transaction if the Approval Authorities do not approve the transfer.

(v) Consider how to manage the transition period commencing after the application is submitted to the Approval Authorities and contiuing up to application approval. Issues may include board decisions, management decisions, appointments, contractual obligations and profit distributions.

Conclusion

An equity transfer can be a smooth and orderly process if there is sufficient planning. It is critical to consider the entire process as you plan, negotiate, document and impliment the transfer process.

STATE AID

Second Memorandum on the revised draft general block exemption Regulation

The DG Competition has released a Second Memorandum on the revised draft General Block Exemption Regulation (GBER). The GBER aims at consolidating existing Block Exemption Regulations in the field of state aid into one single instrument. The draft GBER is based on Enabling Regulation Nr. 994/98 and can only cover aid measures for which the Council has explicitly provided legislative powers to the Commission. The draft GBER is divided into two main parts – one of procedural nature aiming at harmonising all horizontal and procedural aspects applying to the different aid areas concerned, and one more substantive part containing the conditions that apply to each of the types of aid contained in the Regulation.

The draft regulation covers the types of aid already subject to existing block exemption regulations, namely, aid to SMEs, research and development aid for SMEs, aid for disadvantaged and disabled workers, training aid and regional aid. Although the sector-specific Block Exemption Regulations in the transport, agriculture and fisheries sectors have not been included in the GBER, the Regulation introduces two new types of state aid - environmental aid and aid in the form of risk capital. Furthermore, the R&D sector of the draft GBER applies also to large enterprises.

The draft GBER has been discussed in a first Advisory Committee with the Member States in July 2007, and published in the Official Journal (OJ C 210, 8/9/2007, p. 14) for the mandatory consultation of interested third parties. The draft remains to be re-assessed within the Commission and re-discussed by a second Advisory Committee, before the adoption and publication of the final version of the Regulation, which is scheduled for spring 2008.

The Second Memorandum on the revised draft General Block Exemption Regulation (September 2007) may be found at:

http://ec.europa.eu/comm/competition/state_aid/reform/revised_final_memorandum_gber.pdf

State Aid awarded to Olympic Airways must be recovered

On September 12th 2007 the European Court of First Instance presented its judgement in the case of *Olympiaki Aeroporia Ypiresies AE v Commission* (Case C-68/03). The case concerns a Commission Decision of 2002 whereby Greece was found to have failed its obligations by not recovering part of an earlier aid granted to Olympic Airways, as well as new aid granted unlawfully after 1998. The Decision was confirmed by the European Court of Justice in 2003 (Case C-415/03). In that case the recipient company of the state aid in question, Olympic Airways, asked the Court to review the validity of the 2002 Commission Decision regarding both the earlier restructuring aid and the new, non-notified, aid. The CFI rejected all of Olympic Airways' claims concerning the restructuring aid after concluding that Greece had not submitted any revised restructuring plan after the abandonment of the first plan in 2000, and that the Commission was right in its observation that neither the company's short-term nor its long-term viability had been restored by the contribution. However, in regard of the new, non-notified aid, the CFI partially annulled the Commission Decision due to lack of an adequate statement of reason.

The press release on the Judgement, PRESS RELEASE No 56/07 (12/09/2007) can be found at:

http://curia.europa.eu/en/actu/communiques/cp07/aff/cp070056en.pdf

----

For further information please contact:

80 Ippokratous Street

106 80 Athens

Tel: 210-3390748

Fax: 210-3390749

e-mail: info@metaxaslaw.gr

www.metaxaslaw.gr

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, or stored in any retrieval system of any nature without prior permission. Application for permission for other use of copyright material including permission to reproduce extracts in other published works shall be made to the publishers. Full acknowledgment of author, publisher and source must be given.

Nothing in this newsletter shall be construed as legal advice. The newsletter is necessarily generalised. Professional advice should therefore be sought before any action is undertaken based on this newsletter.