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STATE AID

Commission approves restructuring aid for National Bank of Greece

The European Commission has found the restructuring plan of the National Bank of Greece (NBG) to be in line with EU state aid rules. The measures already implemented and those envisaged in the future will enable the bank to fully restore its long term viability, while limiting the distortions of competition brought about by the state aid granted.

Commission Vice President in charge of competition policy Joaquín Almunia said: "Through the restructuring plan, NBG will focus its activities on the strong Greek and Turkish banking operations and improve their efficiency. This will ensure that the bank can continue financing the Greek economy on a sustainable basis."

Since 2008, Greece and the Hellenic Financial Stability Fund (HFSF) have granted repeated capital and liquidity support to NBG. The Commission temporarily approved the public support measures in July 2012 and opened an in-depth investigation to assess the compatibility of the measures with EU state aid rules (see IP/12/860). Greece notified the restructuring plan for NBG in June 2014.

NBG has already started to implement significant rationalisation measures such as a voluntary staff retirement scheme, salary cuts, branch closures and further cost cutting initiatives in Greece and South Eastern Europe. The restructuring plan continues this effort. It provides for a further restructuring of international operations and Greek non-core activities and a reinforcement of Greek banking operations, mainly through a rationalisation of operating expenses, a reinforcement of the net interest income and prudent risk management. NBG will decrease its shareholding in its Turkish subsidiary Finansbank, which will strengthen the capital position of NBG, but it will retain a majority shareholding. Finansbank has been steadily profitable over the last years. The implementation of these commitments will be monitored by an independent trustee.

The Commission assessed the plan under its state aid rules for the restructuring of banks during the crisis (see IP/09/1180, IP/10/1636 and IP/11/1488). In its assessment, the Commission has taken into account the fact that most of NBG's difficulties do not come from excessive risk taking but primarily from the sovereign debt crisis and the related exceptionally protracted and deep recession which started in 2008. In view of those exceptional circumstances, the aid is less distortive and creates less moral hazard than large aid for financial institutions which had accumulated excessive risks. The Commission therefore concluded that a relatively limited downsizing of NBG would be sufficient to limit distortions of competition and, in particular, requested no downsizing of the Greek banking activities.

Shareholders and subordinated debt holders have contributed significantly to reducing the amount of capital aid that had to be injected by the state, respectively through their participation in the successive capital increases and in the liability management exercises. Moreover the state aid injected did not bail out historical shareholders who have been almost completely diluted.

The Commission therefore concluded that the restructuring plan was in line with its rules on banking restructuring during the crisis.

Commission approves restructuring aid for Piraeus Bank

The European Commission has found the restructuring plan of Greek bank Piraeus, including the integration of several Greek banks, to be in line with EU state aid rules. The measures already implemented and those planned will enable Piraeus to fully restore its long term viability, while limiting the distortions of competition created by the large amount of state aid granted. Greece has notified a restructuring plan for Piraeus in June 2014.

Since July 2012, Piraeus has acquired several Greek banking activities, which had been resolved (Agricultural Bank of Greece (ATE)) or put to sale by foreign banks (Millennium Bank Greece (MBG), Geniki and the branches of Cypriot banks in Greece. It has integrated these banks within a very short time, has started to rationalise their operations and has already achieved significant synergies. The restructuring plan continues this effort through a reduction of operating

expenses, an increasing net interest income and a prudent risk management. The plan also provides for a significant downsizing of Piraeus' international operations, which are loss making. The implementation of these commitments will be monitored by an independent trustee.

The Commission assessed the plan under its state aid rules for the restructuring of banks during the crisis (see IP/09/1180, IP/10/1636 and IP/11/1488). In its assessment, the Commission acknowledged that most of Piraeus' difficulties do not come from excessive risk-taking but from the sovereign debt crisis and the exceptionally protracted and deep recession which started in 2008. In view of those exceptional circumstances, the aid is less distortive and creates less moral hazard than aid for financial institutions which accumulated excessive risks. The Commission therefore concluded that less extensive compensatory measures would be needed to mitigate the distortions of competition brought about by the large state aid, and in particular has not requested any downsizing of Piraeus' Greek banking activities. However, the bank will downsize its foreign activities to ensure (i) that the benefits of the aid are channelled towards the financing of the Greek economy, and (ii) that the aid does not distort competition in foreign markets where Piraeus competes with non-aided banks.

Piraeus received more aid than other large Greek banks, compared to its risk-weighted assets at 31 March 2012. However, Piraeus reduced the amount of aid needed through capital enhancing acquisitions, buy-backs of subordinated debt at significant discounts to par, and capital increases. Indeed, Piraeus regained access to capital markets and raised significant amounts of private money in 2013 and 2014, which allowed it to repay part of the aid received.

The Commission therefore concluded that the restructuring plan was in line with its rules on banking restructuring during the crisis.

ENERGY

ECJ finds that the exclusive rights to lignite granted to PPC violate EU law

On July 17 2014, the Court of Justice of the European Union (ECJ) issued its decision (C-553/12) by which it set aside the judgment of the General Court in Case *DEI v Commission*, by which the latter had annulled the Commission's decision on the granting or maintaining in force by the Hellenic Republic of rights in favor of DEI for the extraction of lignite.

By its decision, the Commission had found, inter alia, that the grant and maintenance of the exclusive licence to DEI to explore and exploit lignite in Greece was contrary to Article 106(1) TFEU, read together with Article 102 TFEU, since it created a situation of inequality of opportunity between economic operators as regards access to primary fuels for the purposes of generating electricity and allowed DEI to maintain or reinforce its dominant position on the Greek wholesale electricity market by excluding or hindering any new entrants.

With its judgment, the General Court had annulled the Commission's decision by pointing out that the Commission «*had not established that privileged access to lignite was capable of creating a situation in which, by the mere exercise of its exploitation rights, [DEI] could have been able to commit abuses of a dominant position on the wholesale electricity market or was led to commit such abuses on that market*».

«*By finding simply that [DEI], a former monopolistic undertaking, continues to maintain a dominant position on the wholesale electricity market by virtue of the advantage conferred upon it by privileged access to lignite, the Commission has neither identified nor established to a sufficient legal standard to what abuse, within the meaning of Article 102 TFEU, the State measure in question has led or could lead DEI*».

However, the Commission brought an action for the annulment of the judgment of the General Court relying principally on the false interpretation and application of Article 106 TFEU by the latter court while arguing that it had erred in holding that the Commission was required to identify and establish the conduct constituting abuse of dominant position to which the State measure in question had led, or could have led, DEI.

Indeed, the ECJ sided with the Commission's pleas and reiterated its settled case law by noting that, pursuant to Article 106(1) TFEU, a Member State is in breach of the prohibitions laid down therein in conjunction with Article 102 TFEU, if it adopts any law that creates a situation in which a public undertaking or an undertaking on which it has conferred special or exclusive rights, merely by exercising the preferential rights conferred upon it, is led to abuse its dominant position or when those rights are liable to create a situation in which that undertaking is led to commit such abuses.

The outstanding point of the ECJ judgment lies in its finding that it is not necessary that any abuse should actually occur in order for Article 106 in conjunction with Article 102 TFEU to be applicable. This of course was not a novelty in relation to relevant settled case law of the ECJ, but it seems that the General Court had taken another view.

The ECJ set aside the judgment of the General Court and referred the case back to it so as to adjudicate on the pleas raised before it on which the General Court had not ruled.

Restoration of the interconnection between Greece and Italy

On Friday, 25 July 2014, the Greek independent transmission system operator (ADMIE) together with TERNA, the operator of the Italian transmission system, organized a common event on the occasion of the restoration of the electricity cable interconnecting Greece and Italy. The interconnection, whose total capacity amounts to 500 MW, had been closed for the past six months due to restoration works and in now ready to be put back into operation. The electricity cable extends along 313 Km, from which 160 km have been built underwater, and is jointly operated by ADMIE and TERNA.

During the above event, TERNA expressed its intense interest in acquiring the 66% of ADMIE, which it considers a key move in line with its integrated planning in becoming a strategic player in the interconnections between Mediterranean countries. Besides, as the Greek Deputy Minister of Environment, Energy and Climate Change highlighted, TERNA has already proposed the construction of an

additional electricity line, interconnecting the two countries, and this proposal is under consideration by its Greek counterpart.

Commission authorises UK Capacity Market electricity generation scheme

The European Commission has concluded that the proposed UK Capacity Market is in line with EU state aid rules. The scheme aims to ensure that sufficient electricity supply is available to cover consumption at peak times. The Commission found in particular that the scheme will contribute to ensuring the security of energy supply in the United Kingdom (UK), in line with EU objectives, without distorting competition in the Single Market. This is the first time that the Commission has assessed a capacity market under the new provisions on capacity markets in the new Environmental and Energy State Aid Guidelines (see IP/14/400).

Under the Capacity Market, the Great Britain System Operator will organise annual centrally-managed auctions to procure the level of capacity required to ensure generation adequacy. Auctions will be open to existing and new generators, demand side response (DSR) operators and storage operators. The UK has also committed to opening the participation to new interconnectors as of 2015.

The measure will be financed through a levy on electricity suppliers.

The Commission assessed the measure under its new state aid Guidelines on Energy and Environmental Protection (see IP/14/400). As required by the Guidelines, the UK has only introduced the Capacity Market following a thorough investigation of its necessity and the potential for alternative measures to contribute to ensuring the security of supply objective. The use of auctions should ensure aid granted is limited to the minimum necessary.

The Capacity Market is part of the comprehensive UK Electricity Market Reform that also includes other support measures, such as the UK compensation to energy intensive users for indirect costs of carbon price floor (see IP/14/577), the Contract for Difference (CfD) scheme (see IP/14/866) and the planned support

for the construction and operation of a new nuclear power plant at Hinkley Point in Somerset (see IP/13/1277). The Commission's in-depth investigation in relation to the latter is ongoing.

Commission approves German renewable energy law EEG 2014

The European Commission has found the new German Renewable Energy Act (EEG 2014) to be in line with EU state aid rules. The EEG 2014 provides support for the production of electricity from renewable energy sources and from mining gas. It also reduces the financial burden on energy-intensive users and certain auto-generators by reducing their level of payment of the EEG-surcharge. Finally, the EEG 2014 provides that the aid will be progressively allocated through tenders which will gradually be opened to operators located in other Member States. The Commission has concluded that the EEG 2014 will further EU environmental and energy objectives without unduly distorting competition in the Single Market.

In April 2014 Germany notified a draft law for supporting renewable energies. The Commission's assessed its compatibility under the provisions of its new Energy and Environmental Aid Guidelines adopted in April 2014 (the Guidelines, see IP/14/400 and MEMO/14/276). The EEG 2014 entered into force on 1 August 2014. The yearly budget for the support of renewable electricity is estimated at around € 20 billion.

Producers of renewable electricity will be obliged to sell on the market. They will obtain support in the form of market premiums paid on top of the market price for electricity. Until 31 December 2016 the market premiums will be determined by reference to administratively set reference values. In the case of solar installations on the ground, a pilot tender will be organised. It will determine the level of the premiums and allocation of the aid between participants to the tender. As of 2017, tenders should be generalised but a new law is required to introduce them. The support to renewable electricity is therefore approved until 31 December 2016.

Small installations (below 100 kW) will continue to benefit from feed-in tariffs and are not obliged to sell on the market. This part of the scheme was approved for 10 years.

The support system under the EEG 2014 is financed from the EEG-surcharge that is to be paid by suppliers in respect of the electricity supplied to end consumers in Germany and by auto-generators (i.e. electricity producers for self-consumption). Reductions are provided for energy-intensive users in sectors which are eligible for such reductions under the Guidelines. These reductions are allowed by the Guidelines on competitiveness grounds, since these sectors are both electro-intensive and exposed to international trade.

Reductions are also granted under the EEG 2014 to certain auto-generators. Reductions for auto-generators using small installations are allowed as they are below the de minimis threshold. Reductions for auto-generators using renewable energy sources are also allowed since they are in line with the logic of the EEG-surcharge system. Reductions for auto-generators which are energy-intensive are also allowed under the Guidelines. For other types of installations, the reductions will need to be reviewed and eventually adapted to the requirements of the Guidelines. Germany has committed to review them in due time and re-notify amendments to the Commission by 2017. On that basis the Commission could also conclude that the exemptions and reductions granted under the EEG 2014 to auto-generators were in line with the Guidelines. The yearly budget of the reductions is estimated at around EUR 5 billion.

UK High Court: Solar industry companies are eligible for compensation for losses suffered due to unlawful retrospective cuts to FiT system

On 9 July 2014, the UK High Court of Justice delivered its judgment in Case *Breyer Group Plc & Ors v. Department of Energy and Climate Change* ruling on the £ 132 million compensation claim of 14 British solar industries against the Government for state measures introducing retrospective changes to the Feed-In-Tariff Scheme, under which PV producers are paid for generating renewable energy.

The Court recognized the Government's liability to compensate PV energy producers stemming from its policy regarding the application of unlawful early cuts to the Feed-In-Tariff scheme introduced in late 2011. According to the judgment, the claimant companies suffered losses because of the government intervention on their concluded contracts. The signed or concluded contracts represented an element of the marketable goodwill in the claimants' businesses and therefore are "possessions" for the purposes of Article 1 Protocol 1 of the European Convention on Human Rights. The Court found that the measures applying retrospective changes to FiTs in 2011 amounted to an "unlawful interference" with these possessions that was not justified. Therefore, the PV companies are in principle entitled to just satisfaction for damages suffered as a result of this interference.

The applicants based their compensation claim on a previous High Court decision that was confirmed by the Supreme Court in Spring 2012, pursuant to which, the early cuts in FiTs by 50%, announced by the Department of Energy and Climate Change (DECC) in 2011 on a six-week notice, were unlawful and unfair. This reduction of the original subsidy rate was designed to affect installations that had achieved eligibility and whose owners had concluded contracts with a rate fixed for 25 years.

The recent High Court's decision, against which the DECC is expected to be appealing, establishes the Solar industries' right to recover damages in relation to the government's unlawful acts, setting a precedent in the field of PV policy regulation in the UK. As the Court accepted, the PV producers have the right to legal certainty arising from their signed or concluded contracts.

ANTITRUST

Commission fines Servier and five generic companies for curbing entry of cheaper versions of cardiovascular medicine

The European Commission has imposed fines totalling €427.7 million on the French pharmaceutical company Servier and five producers of generic medicines

– namely, Niche/Unichem, Matrix (now part of Mylan), Teva, Krka and Lupin – for concluding a series of deals all aimed at protecting Servier's bestselling blood pressure medicine, perindopril, from price competition by generics in the EU. Through a technology acquisition and a series of patent settlements with generic rivals, Servier implemented a strategy to exclude competitors and delay the entry of cheaper generic medicines to the detriment of public budgets and patients in breach of EU antitrust rules.

Commission Vice-President Joaquín Almunia, in charge of competition policy, said: "Servier had a strategy to systematically buy out any competitive threats to make sure that they stayed out of the market. Such behaviour is clearly anti-competitive and abusive. Competitors cannot agree to share markets or market rents instead of competing, even when these agreements are in the form of patent settlements. Such practices directly harm patients, national health systems and taxpayers. Pharmaceutical companies should focus their efforts on innovating and competing rather than attempting to extract extra rents from patients."

Perindopril is a blockbuster blood pressure control medicine and used to be Servier's best-selling product. Servier held significant market power in the market for the perindopril molecule as no antihypertensive medicines other than the generic versions of perindopril were able to meaningfully constrain Servier's sales and prices. Servier's patent for the perindopril molecule expired, for the most part, in 2003. Generic competitors continued to face a number of so-called "secondary" patents relating to processes and form but these provided a more limited protection to what Servier described as its "dairy cow". Producers of cheaper, generic versions of perindopril were intensively preparing their market entry.

In order to enter the market and overcome the remaining obstacles, generic companies sought access to patent-free products or challenged Servier's patents that they believed were unduly blocking them. There were very few sources of non-protected technology. In 2004 Servier acquired the most advanced one, forcing a number of generic projects to stop and therefore delaying their entry. Servier recognised that this acquisition merely sought to "strengthen the defence mechanism" and the technology was never put to use.

With this way to the market cut off, generic producers decided to challenge Servier's patents before courts. However, between 2005 and 2007, virtually each time a generic company came close to entering the market, Servier and the company in question settled the challenge. This was not an ordinary transaction where two parties decide to settle a patent claim outside of court to save time and costs. Here, the generic companies agreed to abstain from competing in exchange for a share of Servier's rent. This happened at least five times between 2005 and 2007. One generic company acknowledged that it was being "bought out of perindopril". Another insisted that "any settlement will have to be for significant sums", to which it also referred as a "pile of cash". In total, cash payments from Servier to generics amounted to several tens of millions of euros. In one case, Servier offered a generic company a licence for 7 national markets; in return, the generic company agreed to "sacrifice" all other EU markets and stop efforts to launch its perindopril there. Servier thus gained the certainty that the generic producers would stay out of the national markets and refrain from legal challenges for the duration of the agreements.

It is legitimate – and desirable – to apply for patents, including so-called 'process' patents, to enforce them, to transfer technologies and to settle litigation. However, Servier misused such legitimate tools by shutting out a competing technology and buying out a number of competitors that had developed cheaper medicines, to avoid competing on their own merits. Such behaviour violates EU antitrust rules that prohibit the abuse of a dominant market position (Article 102 of the Treaty on the Functioning of the European Union – TFEU). Each of the settlements between Servier and its generic competitors was also an anti-competitive agreement prohibited by Article 101 TFEU.

Experience shows that effective generic competition drives prices down significantly. The market entry of generic medicines reduces dramatically the prices of the medicine concerned and brings large benefits to patients and public budgets. In 2007, prices of generic perindopril dropped on average by 90% compared to Servier's previous price level in the UK. This occurred when the only remaining legal challenger in the UK obtained the annulment of Servier's then most important patent. In internal documents, Servier however commented

proudly on their "great success = 4 years won", referring to the expiry of the perindopril molecule patent back in 2003.

The Commission based its fines on its 2006 Guidelines on fines. In setting the level of the fines, the Commission took into account the duration of each infringement and its gravity.

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