METAXAS & ASSOCIATES
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Newsletter

Latest Legal Updates

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Dr. A. Metaxas, Managing Partner of M&A Law Firm, participated in a workshop organized by FSR held in Florence, Italy, on 29-30 October. The workshop brought together legal practitioners, regulators, policy makers and academics from across the EU to discuss energy law and policy issues of cross-cutting interest.

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1. Energy Dialogues

"Metaxas & Associates" Law Firm would like to inform you about the forthcoming conference "Energy Dialogues", an important initiative of the Hellenic Energy Regulation Institute (http://www.energy-regulation.eu/el/) and Energypress, which takes place for the second time and aims at establishing an open scientific dialogue for important issues that have a significant impact on the energy market. The conference will take place in the Conference Room "Hermes" at A.C.C.I. on Monday 14 December 2015 at 10.00 am.

The event will focus on three current and crucial subject areas: a) the restructuring of the Greek electricity market, b) the opening of the retail electricity market, and c) the establishment of a new support framework for Renewable Energy Sources. The Minister of Environment and Energy, Mr. Skourletis, will hold the introductory speech and all leading institutional market players of the Energy Market will participate in the respective panels.

Dr. A. Metaxas, Chairman of the Hellenic Energy Regulation Institute (University of Athens and Managing Partner of Metaxas & Associates Law Firm) has the scientific supervision of the "Energy Dialogues".

For more information, please click ***here***.

2. Florence School of Regulation (FSR)

The Florence School of Regulation (FSR) (http://fsr.eui.eu/Home.aspx) is one of the world leading academic institutions in the field of energy regulation, constituting an important think tank which works closely with the European Commission and provides a European forum where academics and practitioners shape EU energy policies.

A workshop organized by FSR and held in Florence, Italy, on 29-30 October, brought together legal practitioners, regulators, policy makers and academics from across the EU to discuss energy law and policy issues of cross-cutting interest. The workshop consisted of six broader issues, namely big energy data; renewable energy auctions across the EU; the future of the LNG market; the implementation and enforcement of Network Codes; electricity

storage; and the new market design initiative of the European Commission with regard to the organization of the electricity market at the national, regional and EU level.

It is worth mentioning that the discussion which took place in the context of the latter panel focused on, *inter alia*, the restructuring of the Greek energy market under the provisions of the third Memorandum, the aim of which is to facilitate the compliance of the Greek regulatory framework with EU legislation and policies.

It is obvious that, in the run-up to the substantive liberalization of the electricity and natural gas markets, the Greek energy market and its regulatory particularities attract the attention of a wide range of scientists and experts specializing in energy regulation.

It should be finally mentioned that, Dr A. Metaxas, Chairman of the Hellenic Energy Regulation Institute, participated in the workshop following an invitation by the organizers, with whom he recently cooperated in the context of a multi-disciplinary study on the regulatory parameters of Capacity Mechanisms in EU electricity markets.

For more information on the event, please click ***here***.

3. State Aid

Commission decides on selective tax advantages for Fiat in Luxembourg and Starbucks in the Netherlands are illegal under EU state aid rules

Following in-depth investigations, which were launched in June 2014, the Commission has concluded that Luxembourg has granted selective tax advantages to Fiat's financing company and the Netherlands to Starbucks' coffee roasting company. In each case, a tax ruling issued by the respective national tax authority artificially lowered the tax paid by the company.

Tax rulings as such are perfectly legal. They are comfort letters issued by tax authorities to give a company clarity on how its corporate tax will be calculated or on the use of special tax provisions. However, the two tax rulings under investigation endorsed artificial and complex methods to establish taxable profits for the companies. They do not reflect economic reality. This is done, in particular, by setting prices for goods and services sold between companies of the Fiat and Starbucks groups (so-called "transfer prices") that do

not correspond to market conditions. As a result, most of the profits of Starbucks' coffee roasting company are shifted abroad, where they are also not taxed, and Fiat's financing company only paid taxes on underestimated profits.

This is illegal under EU state aid rules: Tax rulings cannot use methodologies, no matter how complex, to establish transfer prices with no economic justification and which unduly shift profits to reduce the taxes paid by the company. It would give that company an unfair competitive advantage over other companies (typically SMEs) that are taxed on their actual profits because they pay market prices for the goods and services they use.

Therefore, the Commission has ordered Luxembourg and the Netherlands to recover the unpaid tax from Fiat and Starbucks, respectively, in order to remove the unfair competitive advantage they have enjoyed and to restore equal treatment with other companies in similar situations. The amounts to recover are €20 - €30 million for each company. It also means that the companies can no longer continue to benefit from the advantageous tax treatment granted by these tax rulings.

Commission opens in-depth investigations into French plans to remunerate electricity capacity

The European Commission has opened an in-depth investigation to assess whether French plans for a country-wide capacity mechanism and a tender for a new gas-fired power plant in Brittany are in line with EU State aid rules.

Capacity mechanisms are measures designed to ensure electricity security of supply. Typically, capacity mechanisms offer additional rewards to electricity capacity providers, on top of income obtained by selling electricity on the market. This is in return for maintaining existing capacity or investing in new capacity needed to guarantee the security of electricity supplies. These additional rewards may have an impact on competition in the internal electricity market and have to be assessed under EU State aid rules.

France plans to implement a national market-wide capacity mechanism where capacity obligations are traded between electricity capacity providers (e.g. power plants or demand side operators) and electricity suppliers. The aim is to ensure that there is sufficient capacity

for the production of electricity and that such production meets the demand, in particular during extreme winter demand peaks.

The Commission has concerns that these plans to remunerate electricity capacity could, in the case of the country-wide capacity mechanism, favour certain companies over their competitors and hinder the entry of new players, and in the case of the gas-fired power plant in Brittany, support only one type of technology or solution. More specifically, the Commission has concerns that the capacity mechanism planned by France in its current form favours certain companies over their competitors and hinders the entry of new players. Moreover, the Commission will assess whether the objectives of the mechanism could not be reached with less costly and less distortive measures. The Commission will also examine whether the planned mechanism is indeed suitable to encourage investments into new capacity.

Commission opens in-depth investigation into Hungarian investment support for Paks II nuclear power plant

The European Commission has opened an in-depth state aid investigation into Hungary's plans to provide financing for the construction of two new nuclear reactors in Paks. The Commission will in particular assess whether a private investor would have financed the project on similar terms or whether Hungary's investment constitutes state aid. If the project is found to involve state aid, the Commission will investigate whether as planned it would lead to distortions of competition in particular on the Hungarian energy market.

Under the EU Treaty Member States are free to determine their energy mix. The Commission's role is to ensure that when public funds are used to support companies, this is done in line with EU state aid rules, which aim to preserve competition in the Single Market.

In May 2015, the Hungarian authorities notified plans to invest in the construction of two nuclear reactors at the Paks site. At this stage, the Commission has concerns that this investment may not be on market terms, as Hungary argues. The Commission will therefore assess in-depth the business case for the construction, operation and decommissioning of

the two reactors on the basis of the agreed transaction terms and in view of the EU's energy market projections.

If its assessment shows that state aid is involved, the Commission would in particular have to make sure that the project does not lead to distortions of competition in the Hungarian energy market or other undue distortions in the Single Market. To be found compatible with EU rules, an aid measure also needs to be proportionate to the objectives pursued and address a genuine market failure, meaning that the project could not be realised by market forces alone, without state support. Finally, the investment by Hungary must be adequately remunerated.

The opening of an in-depth inquiry gives interested third parties an opportunity to comment on the measure. It does not prejudge the outcome of the investigation.

4. Energy

The first State of the Energy Union Report shows how much progress has been made since the adoption of the Energy Union Framework Strategy

The Energy Union Framework Strategy (IP/15/4497) created a new momentum to bring about the transition to a low-carbon, secure and competitive economy. The Commission has also committed to report annually on the state of the Energy Union in order to address the key issues and steer the policy debate. The State of the Energy Union Report, published for the first time on 18 November 2015, looks at progress made over the previous nine months, identifies key action areas for 2016 and provides policy conclusions at Member State, regional and European level. This is a central element to monitor the implementation of this key priority of the Juncker Commission.

The State of the Energy Union also presents key building blocks for a governance mechanism leading to more predictable, transparent and stable policies, in order to deliver on the objectives of the Energy Union. The guidance on integrated national energy and climate plans included in the State of the Energy Union provides the basis for Member States to start developing their plans for the period from 2021 to 2030. The tabled methodology on key indicators is the first step towards measuring and monitoring the

delivery of the Energy Union. The State of the Energy Union is also accompanied by 28 factsheets providing an assessment of delivering the Energy Union for each Member State.

Maroš Šefčovič, the Vice-President responsible for the Energy Union, said: "Nine months down the road, we can say with confidence that we are on track to deliver the Energy Union. My messages for 2016 are clear. First, the EU should continue to lead in the transition to a low-carbon economy. Second, that transition should be socially fair and consumer-centred. And third, the geopolitical challenges that we faced this year will not go away. 2016 will also be the year in which we will lay the foundations of a robust governance system bringing predictability and transparency, which is what investors need. In sum: 2016 will be a year of delivery!"

Miguel Arias Cañete, Commissioner for Climate Action and Energy, said: "The Energy Union is starting to take shape. A lot of progress has been made in these few months but we should now move to full scale delivery of all actions needed. This will be my focus in 2016: presenting the legislation to make our electricity market work better, to further increase the share of renewables, to bring down our energy consumption and to ensure security of our gas supply. With this, the EU's energy system will be stronger and all conditions will be set for the EU's transition toward a low-carbon energy system. As all eyes turn towards negotiations in Paris, this a renewed pledge for European leadership and our commitment to the international efforts to fight climate change."

Commission unveils key energy infrastructure projects to integrate Europe's energy markets and diversify sources

The European Commission has adopted a list of 195 key energy infrastructure projects which will help deliver Europe's energy and climate objectives and form key building blocks of the EU's Energy Union. The projects – known as Projects of Common Interest (PCIs) – will enable the gradual build-up of the Energy Union by integrating the energy markets in Europe, by diversifying the energy sources and transport routes. In addition, the PCI's adopted will help bring an end to the energy isolation of some Member States. They will also boost the level of renewables on the grid, bringing down carbon emissions. PCIs benefit from accelerated permitting procedures and improved regulatory conditions and may be

eligible for financial support from the Connecting Europe Facility (CEF). A budget of €5.35 billion has been allocated to trans-European energy infrastructure under the CEF from 2014-20, helping projects of common interest to get implemented faster and making them more attractive to investors.

The list of projects is an update of the PCI list adopted in October 2013. The list includes 108 electricity, 77 gas, 7 oil and 3 smart grids projects. A good balance between electricity and gas projects was achieved also thanks to the identification of clear priority projects in the regional context. For a project to be included in the list, it had to demonstrate significant benefits for at least two Member States; contribute to market integration and further competition; enhance security of supply, and reduce CO_2 emissions.

The projects will benefit from a number of advantages, such as strengthened transparency and improved public consultation, accelerated permit granting procedures (binding three-and-a-half-years' time limit), and improved, faster and better streamlined environmental assessment.

In principle, energy infrastructure should be financed by the market and through tariffs paid by users. However, to meet the huge investment challenge the EU has set up funds like the Connecting Europe Facility (CEF) and the European Fund for Strategic Investment (EFSI), which will help leverage the investment needed. Under CEF, in 2014 and 2015, €797 million has been allocated to co-finance studies and construction works to help implement the PCIs.

Since the adoption of the first PCI list in 2013, 13 projects have been completed or will be commissioned before the end of 2015. Furthermore, some 62 projects are expected to be completed by the end of 2017. The Commission has played a key role in getting many of these projects off the ground, either through political action and facilitating common agreement between two countries on the way forward or by providing technical and/or financial support to the projects.

The list of PCIs is updated every two years with the aim to integrate newly needed projects and remove obsolete ones.

5. Antitrust

General Court rulings uphold TV and computer monitor tubes cartel decision

Recent judgments by the EU General Court in the TV and computer monitor tubes cartel (cases T-82/13Panasonic/MTPD, T-84/13 Samsung SDI, T-91/13 LG Electronics, T-92/13 Philips and T-104/13 Toshiba) upheld the majority of the Commission's decision, regarding both the substantive issues and the general principles followed to set the level of fines.

These judgments are very important for several reasons. First of all, they confirm the Commission's right to sanction cartels that concern products made from components of foreign origin and that are not themselves sold within the European Economic Area (EEA). The General Court confirmed in particular that the Commission had jurisdiction notwithstanding the fact that the cartels were formed outside the EEA. The cartel arrangements directly influenced the setting of prices and of volumes delivered to the EEA either as direct sales or as processed products.

Second, the General Court also agreed with the Commission's substantive assessment of the case, except for the individual participation of Toshiba as it considered that the Commission had not sufficiently established Toshiba's awareness of the overall cartel. The General Court found that the different sets of meetings (either in Europe or Asia) and different product variations were an integral part of a single and continuous infringement of EU antitrust rules. The cartel members continued their collusion even after alternative technologies (such as Liquid Crystal Displays, "LCD") started to replace the product and took action to jointly counter a decline in demand.

Third, some of the cartel members in this case formed joint ventures through which they continued their participation in the cartels. The General Court confirmed the Commission's decision, in line with established case law, that parent companies were liable for the illegal anticompetitive behaviour of joint ventures irrespective of the ownership shares. The General Court confirmed this for both joint ventures and rejected arguments based on lack of awareness of the joint ventures' participation in the cartels. The General Court agreed with the Commission's assessment on the participation of Philips, LG Electronics and Panasonic prior to creation of the joint ventures.

Finally, the General Court confirmed the fines methodology, including the Commission's leniency assessment. However, it reduced the fines for Panasonic, Toshiba and MTPD as it found that the companies provided more detailed value of sales figures than what the Commission had used. Importantly, it agreed with the Commission that Samsung SDI had downplayed the nature of the cartel and that the contacts with other parties were clearly collusive.

Court of the confirms cartel facilitator's liability

A recent ruling by the Court of the EU upheld an earlier General Court judgment (case T-27/10) and thereby a Commission decision of 2009 to hold AC Treuhand liable under EU antitrust rules for facilitating cartels.

This Court ruling (case C-194/14 P) is a landmark judgment since this is the first time the Court of Justice ruled on the so called "facilitation" of cartels – such as the organisation of a cartel by a consultancy firm. Particularly, this ruling is important for two reasons. First, the Court confirmed that the service agreement between AC Treuhand and suppliers of heat stabilisers constituted an illegal agreement under EU competition rules. Agreements that distort competition in the EU are caught by Article 101 of the Treaty on the Functioning of the European Union (TFEU), irrespective of whether the parties operate in the same market. Moreover, the Court held that the effectiveness of Article 101 TFEU, that prohibits anticompetitive business practices, would be endangered if facilitators, such as AC Treuhand, could escape liability. Second, the Court confirmed that the Commission was entitled to fix the fine as a lump sum instead of using value of sales as a basis for setting the fine. AC Treuhand, as a consultancy firm, was not active on the markets for tin stabilisers and ESBO/esters, and therefore did not have any sales in those markets.

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