



## **METAXAS & ASSOCIATES**

ATTORNEYS AT LAW

### **NEWSLETTER** - *Latest legal updates*

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## ELECTRONIC COMMUNICATIONS

### **“M&A” Law Firm advises leading Greek Mobile Network Operator on the compatibility of the mobile telephony duty with EU Law**

“Metaxas and Associates” Law Firm has drafted a legal opinion on specific questions posed by a Greek mobile network operator regarding the compatibility with EU Law of the duty on mobile network subscribers that is imposed to all mobile telephony subscribers in Greece.

Because of the interchangeability of certain services provided both by mobile telephony carriers and fixed telephony carriers, non compatibility with EU Law was found, among others, in the form of the grant of an illegal advantage to fixed telephony carriers due to the selective tax burden on mobile telephony carriers.

It should be further noted, that the Greek government most recently enacted a legal provision, art. 70 of Law 3842/2010, amending art. 33 of Law 3775/3009. By the above mentioned provision, wireless internet connections to the web are exempted from the imposition of the duty on mobile telephony subscribers, in those situations involving exclusively data connections, with a view to “reassuring the same treatment for the use of the web, through fixed telephony lines for which there is not an imposition of the duty”.

However, as far as an objective justification for the general imposition of the duty does not exist, the problem of compatibility of the duty on mobile telephony with EU Law still stands, along with the possibility of mobile telephony carriers to appeal before the European Commission.

### **Commission measures to deliver fast and ultra-fast broadband in Europe**

The “Digital Agenda for Europe” aims, among others, to give all European citizens and businesses access to a fast and ultra-fast broadband internet connection. On 20th September 2010 the Commission presented several

measures that set out a common regulatory approach for access to new high-speed fibre networks, propose a 5-year policy programme for radio spectrum and outline how best to encourage private and public investment in fast and ultra-fast broadband networks.

The Broadband package aims to ensure that consumers have access to the very fast internet that will enable citizens to shop, learn, socialize and interact online. With connection speeds over 50Mbps/sec it is even possible to offer remote diagnostic examinations to patients wherever they are in the EU, ensuring constant remote back-up to the health professionals looking after people who are forced to stay at home due to their illness.

The Commission's Recommendation on New Generation Access networks (NGA networks) will encourage the investment in very high speed fibre networks as it provides regulatory certainty to telecom operators, ensuring an appropriate balance between the need to encourage investment and the need to safeguard competition.

"Digital Agenda" also targets to bring basic broadband internet to all European citizens, including those living in isolated areas, by 2013 and to ensure that, by 2020, all European citizens will have access to internet with higher speeds (30 Mbps or higher), although it is obvious the high costs of building new infrastructures combined with the lower density of demand may deter telecoms companies from installing the necessary broadband infrastructure. The Commission outlines how to encourage private and public investment in high and ultra-high speed networks, inter alia by using the EU's Structural Funds and the European Investment Bank.

These measures will also benefit small and medium sized businesses, as high speed broadband connections would enable such businesses to connect to "cloud" services. These are applications or tools that are stored on an internet server and can be accessed as and when a business needs them. This option is very advantageous to companies that might have bought a very expensive software that would be not very frequently used.

The Commission's Recommendation on Next Generation Access networks has indicated how national telecoms regulators should regulate access to ultra-fast fibre networks, ensuring an appropriate balance between the need to encourage investment and the need to safeguard competition.

## ENERGY

### **Commission adopts strategic energy Communication: "Energy 2020, a strategy for competitive, sustainable and secure energy"**

Energy Commissioner Oettinger has launched (12 November 2010) a key document outlining his medium term priorities. This covers the period up to 2020, with another strategic document signaled for next year covering the EU's energy strategy to 2050. In addition, in the coming weeks the Commission is set to adopt a Communication on Infrastructure Priorities for the EU's energy sector.

The present Communication identifies clearly the new Commission's key objectives, notably:

- a) The Internal Energy Market; where the Commission notes that more action is needed, including (i) infrastructure – see below, (ii) “forceful” competition policy, (iii) use of existing mechanisms to further integrate the energy market and (iv) a review in 2011 on how to include renewable energy into the market (“the necessary requirements for a pan-European trade in renewable energy should be defined on the basis of best practice”);
- b) infrastructure, where investments “of around 1 trillion Euro will be needed by 2020”. The Commission notes that “it cannot be assumed that all the necessary investments will be delivered by the market alone”, and Commission will therefore adopt a new “infrastructure strategy” shortly;
- c) the need for additional measures to achieve the EU's energy efficiency objectives; a new Energy Efficiency Plan is announced for early 2011 and “will be followed by concrete regulatory proposals in the course of that year”,

- which may include the “revision of the energy taxation”;
- d) that the Commission “will propose measures to help consumers better participate in the energy market, on switching suppliers, billing, compliant handling, dispute resolution);
  - e) a new initiative on technology, including new Technology Road Maps, four new large scale European projects, a 1 billion Euro initiative “to support the frontier research needed to deliver science necessary for low-carbon energy breakthroughs”;
  - f) “reinforced energy partnerships with key suppliers and transit countries”.

### **Private electricity suppliers complain about Greece’s failure to comply with EU Energy and Competition Law**

Following EU Commission’s letter of formal notice to Greece regarding its concerns about the distortions of competition in the Greek electricity market, several private electricity trading companies have expressed their opposition to the imposition of PSO related costs, as well as to certain Grid Control Code amendments expected to result in further market distortions in the Greek electricity market.

First, these companies contest the PSO (Public Services Obligations) calculation methodology, as the calculation of the PSO charges is strictly based on elements provided by PPC. In practice, PPC is the only provider and recipient of the PSO levy. PSO primarily refers to electricity supply to consumers in non-interconnected islands and isolated micro-networks, with the same billing policy, per consumer category, as the one for the Interconnected System. Private electricity suppliers also complain about the provisions for the regulated price of Capacity Availability Certificates (CAC) that are extended until 30 September 2011. Currently, the regulated price is set to €45,000/MW/year. The CAC mechanism aims to reduce power producers’ business risk by guaranteeing part of their fixed costs regardless of

wholesale prices fluctuations in the Greek electricity market in deviation of tendering for new capacity.

The companies refer also to the variable cost recovery mechanism, a mechanism of regulated remuneration for all power producers that should have been already abolished and replaced by standard Code provisions. This transitional (non market) mechanism is now turned into a permanent and inefficient mechanism of power producers' payments by the HTSO against an also regulated price always at the cost of electricity suppliers and traders. According to this mechanism, power plants operating following HTSO Dispatch Orders and not recovering their total cost from the wholesale daily market shall be remunerated by this additional amount to be paid also by electricity suppliers and traders through additional charges (uplifts).

## STATE AID

### **Commission opens in-depth state aid investigation into Greek aid for textile producer United Textiles and its lending banks**

On 27 October 2010, the European Commission announced that it has opened an in-depth state aid investigation into Greek measures to support a textile producer, United Textiles, which is in financial difficulty. The Commission is concerned that United Textiles S.A. received aid repeatedly since at least 2007, without respecting the EU's State aid rules. The Commission will also investigate whether some of the measures could have transferred an undue advantage to the company's lending banks.

United Textiles has been in difficulty since 2004 and most of its operations, as well as funding from its main shareholder and lending banks were stopped from 2008. The Commission has requested many times information from the Greek authorities, in order to clarify whether the company had received state aid and it seems that United Textiles has been indeed subject to repeated State interventions since 2007. Moreover, United

Textiles' lending banks may have benefitted from state guarantees granted to the company, as the guarantees covered existing loans. This circumstance may have conferred an undue advantage to the banks.

According to the 2004 EU guidelines on rescue and restructuring aid, a company in difficulty may receive state aid under strict conditions that are set in these guidelines. These guidelines define that a company is allowed to be granted a rescue aid by the State only once in 10 years. The Commission doubts that this principle has been complied with in the specific case.

### **Commission publishes consultation on state aid rules for shipbuilding**

On 5 October 2010, the European Commission launched a public consultation regarding the application of the EU Framework on state aid rules for shipbuilding and how this could be reformed in the future. The current shipbuilding Framework, which takes into account the characteristics of the shipbuilding industry, including provisions about the use of aid for innovation, has been in force since January 2004 and it is due to expire on 31 December 2011, after being extended twice by the Commission. It contains provisions that are unique for the shipbuilding industry, including provisions about the use of aid for innovation, provisions for facilitating the closure of non-viable capacity and specific rules on aid for shipyards located in less developed regions.

The results of the consultation will help the Commission determine whether to continue to apply the Framework, modify it or let it expire in 2011.

The shipbuilding framework provides the rules for the Commission to assess whether State support to shipbuilding is compatible with the European internal market. The general principle is that state support for shipbuilding may be granted under the common EU state aid rules, except where the specific provisions of the Shipbuilding Framework apply.

The Commission notes that shipbuilding is also eligible for aid under the common state aid rules, and so it will assess whether a specific regime for the

sector is still necessary. The Commission may examine other issues relevant to state aid for shipbuilding, although the consultation is in principle limited to the current scope of the Shipbuilding Framework.

### **General Court partially annuls Commission's decision related to state aid granted to Olympic Airways and Olympic Airlines**

On 13 September 2010, the General Court annulled, in part, a decision of the European Commission relating to state aid granted to Olympic Airways and Olympic Airlines. In September 2005, the Commission found that receipt by Olympic Airways and Olympic Airlines of various forms of subsidies from the Greek state constituted unlawful state aid. Such forms were the payment by Olympic Airlines of low rents for the sub-leasing of aircraft, the payment to Olympic Airways of an over-valuation of the assets transferred to the new airline on its creation, the payment by the Greek State instead of Olympic Airways of certain bank loans and asset leasing payments, as well as the direct payment of an advance to that company, and the continued forbearance of the Greek State towards Olympic Airways' non-payment of taxes and social security contributions. By the terms of the decision, Greece was required to recover the various aid elements immediately.

Since Greece had failed to fulfill this obligation, the European Court of Justice ruled in 2008 that Greece had breached its obligations to recover this aid. Meanwhile, Greece, Olympic Airways and Olympic Airlines sought the annulment of the Commission's 2005 decision.

The General Court concluded that the Commission erred in finding that the unlawful aid granted to Olympic Airways after Olympic Airlines took over its flying activities could be recovered from Olympic Airlines, as an indirect beneficiary. Such a circumstance cannot, by itself, lead to the conclusion that Olympic Airlines was the effective recipient of that aid.

However, the aid paid to Olympic Airways prior to the creation of Olympic Airlines could be recovered from the latter due to the financial continuity



between the two companies. The General Court found that the Commission had erred in its examination of the low rent paid for the sub-leasing of aircraft, in comparison with the rents that would have been paid to private lessors. In relation to the alleged over-valuation of assets transferred to Olympic Airlines, the General Court found that the Commission erred by failing to examine individually whether various intangible assets, such as slots, represented proper market value. These aspects of the Commission's decision were annulled. However, the General Court concluded that the Commission had not erred in finding that the repayment by the Greek state of certain loans and rent, a direct payment of an advance, and the Greek state's forbearance of certain taxes and social security contributions constituted unlawful state aid.

## **PUBLIC PROCUREMENT**

### **Commission refers Greece to Court over award procedures for urban planning contracts**

Following the reasoned opinion that the European Commission sent to Greece in November 2009, regarding the direct award of public service contracts for cadastral mapping and planning services by the municipalities of Vasilika, Kassandra, Egnatia and Arethousa, the Commission has decided on 30 September 2010 to refer Greece to the Court of Justice, as it is considered that Greece has failed to fulfill its obligations under EU public procurement rules. By awarding directly the above public service contracts, Greece breached the EU rules that are set to ensure fair and transparent competition for public contracts in Europe, thereby creating opportunities for European companies while ensuring best value for public money. Despite the Commission's reasoned opinion, Greece has not taken so far any measures to remedy the breach.

Transparent tendering procedures required under EU public procurement rules mean more competition, stronger safeguards against corruption and better service and value for money for taxpayers. In this particular case though, the municipalities of Vassilika, Kassandra, Egnatia and Arethousa directly awarded six public service contracts for cadastral mapping and urban planning purposes to the same company. The scope of these contracts was re-negotiated some time later, enabling the selected company to provide more services for the municipalities than were foreseen under the original contracts, increasing, furthermore, the contracts' value. According to the Commission's view, the contracts were so substantially modified that the authorities should have awarded new contracts following an open procedure under EU public procurement rules. As this did not happen and no prior publication of a contract notice was published, the Commission concluded that the Greek authorities breached EU rules and the conclusion of these contracts was unlawful.

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