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Newsletter

Latest Legal Updates

M&A Law Firm's recent practice highlights:

- *For one more consecutive year M&A Law Firm has been ranked as a leading law firm in the field of Energy, EU and EU competition law by the distinguished international guides **"Chambers & Partners"** and **"Legal 500"***
- *M&A Law Firm represents major RES producers in landmark trial against the Greek State and Greek Market Operator before the Hellenic Council of State in the dispute over the retroactive cuts on FiTs*
- *M&A Law Firm advises major electricity suppliers in the tendering process of NOME auctions*
- *M&A Law Firm advises leading RES producer in the legal due diligence and contractual takeover of a wind park in a 5.5 million euros project*

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Energy

Greece to become the 3rd EU country to import American LNG

On December 4 the US Ambassador to Greece Geoffrey Pyatt pointed that Greece would be the third European country to begin importing American liquefied natural gas (LNG), after Poland and Lithuania.

Speaking at the Greek Economy conference organised by the American-Hellenic Chamber of Commerce (AmCham) in Athens, the American diplomat said: "*Energy is an obvious area of growth. There is clear interest from American companies, and I'm also encouraged that there is such a convergence between US and Greek policy views on this critical sector"*. "*Greece is at the tipping point in terms of establishing itself as a major European energy hub*," Pyatt said, citing natural gas projects like the Trans Adriatic Pipeline (TAP), the Floating Storage Regasification Unit (FSRU) in Alexandroupolis, the upgraded Revithousa terminal and the Greece Bulgaria Interconnector (IGB) as examples of Greece's energy potential.

"You also see it in upstream projects now moving forward, in the hydrocarbon sector, but also renewables where we have increased interest recently from big American companies like General Electric (GE)," the US Ambassador said.

"I was very glad to hear European Commission Vice President (for Energy Union) Maroš Šefčovič's remarks at the recent Greek Energy Forum here in Athens. Our speeches were nearly mirror images of each other and showed the real convergence of interests on energy issues between Europe and the US. We agreed on the importance of energy diversification, on Greece's regional role, and a point that the Prime Minister made in the US, which is that, in looking at energy diversification in Europe, almost every major new energy route coming into Europe will pass through Greece," Pyatt said, adding that the policies and practices that the Greek government will put into place are critical not just for the country but for the larger vision of European energy security and diversification.

"The IGB Interconnector for instance, has the potential to open up the whole Balkan energy island, using Greece as the entry point to get away from the current dependence on monopoly suppliers that characterises many of the Balkan countries," said Pyatt, who has advocated the need for the EU to lessen Europe's dependence on gas supplies from Russia's Gazprom.

European energy security

Brussels approves the Energy exchange and target model schedules

In the fourth review bailout negotiations in Athens, the lender representatives consented to energy sector-related delays concerning the bailout program and agreed that the preparations leading to the establishment of a local energy exchange as well as the target model are on the right track.

The lender representatives held meetings with officials from the Regulatory Authority for Energy (RAE), the Electricity Market Operator (LAGIE), Greece's power grid operator (IPTO) and the Athens stock exchange, while technical details and schedules concerning the energy exchange and target model were presented and examined. What is more, RAE is expected to have approved spot market regulations by the end of June.

The energy exchange's aim will be to harmonize the Greek energy market with all European markets, generate greater competition and transparency, and offer energy supply security to the country's energy mix through diversified energy sources, including greater renewable energy participation.

The establishment of the energy exchange has been incorporated into the Target Model, a process entailing the electricity wholesale market's harmonisation with EU law.

The switch from Greece's current daily energy program to the target model system is scheduled to take place following the first quarter of 2019, once IPTO has finalized a new system code; however, this also depends on the progress of preparations for the establishment of the forward market, day-ahead market and intra-day market.

Under the aforementioned scheme, firms which are interested in providing the software for the balancing market, face a late-March deadline while the winning bidder is expected to be announced in April. Provided that, this project will take one year to be completed, the Greek electricity market would have been able by then, to bridge with the Italian market, which will represent the target model's first practical application.

Additionally, authorities are examining the possibility of an intermediate stage that would initially only bridge the day-ahead market. However, this seems unlikely, meaning that all markets will need to be bridged as one move.

EU electricity distributors should not be allowed to police themselves - The ''EU DSO body'' idea

The European Parliament's industry and energy committee (ITRE) recently adopted its position on reforming the EU's internal energy market. This position represents a part of the negotiations on the Commission's 'Clean Energy for All Europeans' package.

The committee supported new rules on electricity distribution system operators (DSOs) that could change the design of Europe's electricity market. They include creating a new EU-level entity for DSOs, an "EU DSO body".

This body would promote coordination amongst the Europe Union's approximately 2,750 DSOs and pave the way for them to take on more tasks to ensure their grids are smarter, flexible and capable of integrating more renewable energy resources.

Nevertheless, without the right legal framework, the EU DSO body has the potential to hinder, rather than facilitate, the transition to a renewable energy future, as it would let DSOs create their own rules and largely police themselves.

The risks of self-regulation

The EU DSO body will provide technical expertise in developing rules and best practices to promote a more flexible, clean and decentralised energy system.

The new body will also be responsible for drafting regulations known as 'network codes'. Network codes are binding legal instruments that aim to harmonise the internal electricity market. They are key to improving competition within the internal energy market and ensuring that renewables and demand response are properly embedded in the market.

What's more, the drafting process for the regulations could be drawn out if the EU DSO tried to secure agreements from all of the potential 2,750 members and may result in ambition being diluted.

Enabling a cleaner energy system and effective competition

Through its position, the ITRE committee attempts to improve some of the EU DSO body's governance issues by:

- Requiring the EU DSO body to act independently from the interests of its members to ensure effective competition in energy markets;
- Ensuring robust regulatory oversight of the EU DSO by ACER – the European Agency for the Cooperation of Energy Regulators; and
- Clarifying that independent regulators – national regulators and ACER – will oversee the implementation of and compliance with network codes, not the industry itself.

These measures correct the flaws in the Commission's proposal. However, the European Parliament appears to undermine these improvements by also proposing to open up the EU DSO body's membership to existing EU-level associations who represent DSOs. Many, however, also represent the interests of energy utilities, which may try to protect and advance their interests over potential competitors and new market players.

This is clearly at odds with the obligation of DSOs to act as neutral market facilitators. If the interests of these stakeholders are reflected in the best-practice reports, recommendations and network codes drafted by the EU DSO body, the market may become biased.

The European Parliament and the European Council will soon enter into trilogues and it is imperative that the outcome of the negotiations on this matter increase the EU DSO body's legitimacy and ensure its proper functioning. The Parliament and the Council must guarantee that the new entity plays a positive and proactive role in transforming Europe's energy system and supports further deployment and integration of renewable energy.

If the proposed safeguards are too weak, there is a danger that the EU DSO body and the regulations it drafts will hinder the integration of renewables, storage and demand response into the grid. This may ultimately delay and increase the costs of the transition to a smarter, more flexible and decarbonised energy system and jeopardise the European Union's commitments to address climate change.

State Aid

Application of state aid and competition law rules to the health sector reinforced by the General Court of the EU

Judgment: T-216/15, 05.02.2018
Dovera zdravotna poist'ovna et al v. European Commission

The General Court has annulled a decision of the EU Commission finding no state aid because the recipient of the measure, a Slovak health insurance body, was not an undertaking.

According to the General Court, a health insurance body has to be considered an undertaking and is therefore susceptible to benefit from State aid where it offers goods and services on a market and is in competition as regards the quality and scope of services with operators seeking to make a profit and has the ability to make, use and distribute part of its profits, notwithstanding the social and solidarity nature of certain other features of the health system.

The General Court reached this conclusion after having checked first whether the health insurance body met three cumulative criteria which would mean that it should be considered as not pursuing an economic activity. These are: a) the existence of a social aim of a health insurance scheme, b) the implementation of the principle of solidarity by this scheme and, c) the supervision by the State. In this respect, the General Court found that the second criterion was not fulfilled.

On the one hand, health insurance companies' ability to seek and make a profit showed that, regardless of the performance of their public health insurance task and of State supervision, they were pursuing financial gains and, consequently, their activities in the sector fell within the economic sphere. Therefore, the strict conditions framing the subsequent use and distribution of profit which may result from those activities does not call into question the economic nature of such activities.

On the other hand, the existence of a certain amount of competition as to the quality and scope of services provided by the various bodies within the Slovak compulsory health insurance scheme also had a bearing on the economic nature of the activity. Indeed, the companies could freely supplement the compulsory statutory services with related free services, such as better coverage for certain

complementary and preventive treatment in the context of the basic compulsory services or an enhanced assistance service for insured persons. They compete through the 'value for money' over the cover they offer and, therefore, on the quality and efficiency of the purchasing process.

The General Court added that, assuming that some health insurance bodies were not seeking to make a profit, they amount to undertakings all the same, provided that the offer exists in competition with that of other operators that are seeking to make a profit. Where other operators on the market in question are seeking to make a profit, the entities involved would have to be considered undertakings too 'by contagion'.

Some lessons can be learnt by this judgement are the following: Firstly, the delineation between the economic activity of health insurance and social security schemes, which do not fall within the ambit of Competition and State aid law, was once again at stake, (Case-law Poucet & Pistre, C-159/91; FFSA and Others, C-244/94; Cisal, C-218/00; AOK Bundesverband and Others, C-355/00; AG2R Prévoyance, C-437/09). In accordance with well-established case law, the General Court resorted to the body of evidence technique to reach the overall conclusion that the entity at stake behaves like an undertaking. Key elements were the commercial and managerial autonomy and the competition with profit-driven operators.

What is more, after the Iris Judgment (T-137/10), where a decision of the EU Commission not to open formal proceeding against public hospitals in relation with alleged over-compensation was annulled, the General Court confirms its principle in favour of the full application of State aid law to the health sector. By contrast, the EU Commission appears more inclined to close its eyes to and ignore distortions of competition in light of social considerations.

The stringent approach of the General Court is likely based on the belief that social and solidarity goals should not be a blanket for excessive expenses, unnecessary competition distortions, hurdles to innovation and, at the end of the day, stagnation and a poor level of services. In this view, the Commission may not purely abstain from monitoring whether a public financing to health insurance bodies (like in the case at hand) or hospitals is indeed necessary, justified and limited to what is required.

Furthermore, the judgment appears unclear, however, as to the respective weight of the criteria taken into account by the General Court and notably the one on the existence on the concerned market of

profit-driven operators. It cannot be ruled out that the General Court paid attention to strengthen the reasoning of its decision to minimize the risk of appeal and possible annulment by the ECJ.

The existence on the concerned market of profit-driven operators makes the other operators become undertakings 'by contagion'. However, the judgment leaves unanswered the question to what extent operators are undertakings when on the contrary none of them is profit driven.

In this respect, the General Court seems to have been ill at ease in rebutting arguments raised from the AOK judgment (referred to above). According to this judgment, where bodies have a degree of freedom to compete to a certain extent in order to attract persons seeking insurance, that competition does not automatically call into question the non-economic nature of their activity, particularly where that element of competition was introduced in order to encourage the sickness funds to operate in accordance with principles of sound management. In our opinion, the General Court has overstated the scope of the AOK case law. In this case, the sickness funds were not competitors since there was a system of neutralisation and compensation between each other so that they were deprived of financial autonomy and were part of a single system of sickness funds. In addition, they did not compete with private operators. Put in other words, they did not form separate entities enjoying autonomy (one of the constituting elements of an undertaking) and there was not a market for services open to competition.

Finally, on a more general level, it cannot ruled out that the rather extensive notion of undertaking developed by the General Court in this judgment could have an impact going beyond the matter of health insurance. It might be of relevance to other areas where entities are assigned tasks of general interest while providing goods or services on a market where other independent operators are active.

Commission approves electricity capacity mechanisms to ensure security of supply in France, Germany, Greece

The European Commission has approved under EU State aid rules electricity capacity mechanisms, among others, in France, Germany and Greece. The Commission found that the measures will contribute to ensuring security of supply whilst preserving competition in the Single Market.

More specifically:

1) Capacity reserve – Germany

The Commission has approved German plans to introduce a capacity reserve measure (or 'Kapazitätsreserve'), which mandates German network operators to procure up to 2 Gigawatt of capacity that will be held in reserve outside the market. The reserve is set to start in October 2019 and will cover three consecutive periods of two years, lasting until 2025.

The Commission opened an in-depth investigation in April 2017. During the investigation, Germany has demonstrated the need for the measure and committed to adapt the design of the reserve to ensure it complies with EU State aid rules, in particular the 2014 Guidelines on State Aid for Environmental Protection and Energy:

Support is provided to address a **clearly identified and quantified security of supply risk**: Germany does not expect structural capacity shortages in the future, but the capacity reserve aims to safeguard against extreme and unforeseen developments during the ongoing reform of the German electricity market ('Energiewende') and to manage the phase-out of nuclear electricity generation.

The volume to be contracted every two years is defined on the basis of an assessment performed by the German Transmission System Operators (also every two years). This means that the volume procured will take into account market developments. During the in-depth investigation, Germany committed to modify how the need for and the size of the capacity reserve are calculated to better reflect market realities. The maximum size of the reserve is in any event limited to 2 Gigawatt.

- The capacity mechanism is open to **different potential capacity providers** to ensure competition, i.e. to both power plants and demand response operators. During the Commission's in-depth investigation Germany agreed to modify the terms under which demand response operators can participate in the capacity reserve, in order to allow them to compete on equal footing with generation units.
- Costs to electricity consumers are kept down by **regular, competitive tenders**: The network operators will procure the necessary capacity in competitive bidding processes taking place every second year. They are then allowed to recover the remuneration granted to beneficiaries of the reserve through network tariffs.
- **Potential distortions to competition are limited**: The strategic reserve will be used only after all market-based solutions to the scarcity problem are fully exhausted. In addition, power plants will not be allowed to return to the market once they have participated in

the reserve. This will ensure that the reserve does not distort the functioning of the market.

2) Demand response scheme – France

The Commission has approved French plans to introduce a scheme aimed at supporting the development of demand response in France by means of annual tenders. Demand response means that consumers temporarily reduce part or all of their electricity consumption. It can contribute to security of electricity supply, especially during consumption peaks in winter, while being more environmentally friendly than building new conventional plants. Under the French measure, both industrial and residential demand response operators are eligible to participate in the tenders.

The measure will be in place between 2018 and 2023. It will support the development of the French demand response sector by giving electricity consumers temporary financial support in exchange for participating in the electricity market. The measure complements the market-wide capacity mechanism in France approved by the Commission in November 2016.

France has demonstrated that the measure is necessary to boost the demand response sector in the country, where extreme demand peaks during cold weather are likely to occur. The demand response sector in France is still facing learning costs, which might prevent its development despite the economic and environmental benefits it can bring.

Several features of the measure ensure its proportionality and keep down electricity costs, such as pre-defined limits to the remuneration and excluding the most expensive offers, if the auction is not sufficiently competitive. The French authorities also committed to limiting the support for the most polluting type of demand response operators, such as those using "behind the meter" diesel generators.

On this basis, the Commission has found that the capacity mechanism complies with EU State aid rules, and in particular with the 2014 Energy and Environmental Aid Guidelines.

3) Interruptibility scheme – Greece

The Commission has approved amendments to and the prolongation for two years of an existing interruptibility scheme in Greece, which aims at ensuring security of electricity supply. Under the scheme, electricity users agree to reduce their electricity consumption at short notice in exchange for

a fixed payment. This can be necessary for instance at times of difficult weather conditions when electricity demand may exceed supply.

The Commission had approved the original scheme in 2014 for a period of three years. The scheme has proven its value during the tight supply situations in December 2016 and January 2017, when electricity cuts were avoided thanks to the reduction of the consumption of the participants in the scheme. Greece has also committed to in parallel implement **reforms in the electricity market** which aim at remedying the underlying regulatory failures.

The Greek network operator, ADMIE, will organise tenders every three months to procure a maximum of 1,600 megawatts of interruptible capacity. Compared to the previous scheme, Greece has introduced certain changes that will lead to a **more targeted and more competitive procurement** of the capacity, reducing costs to Greek consumers. In particular, Greece has lowered the overall size of the scheme, the minimum size of individual bids as well as the maximum allowed bid price. Moreover, Greece has reduced the reaction time for all participants to 5 minutes, giving the network operator the possibility to react even more quickly to unexpected scarcity situations.

On this basis, the Commission concluded that the scheme complies with EU State aid rules, and in particular with the 2014 Guidelines on State Aid for Environmental Protection and Energy.

(The non-confidential version of the decision will be published under case number SA.48780 in the State aid register on the Commission's competition website once any confidentiality issues have been resolved.)

Competition Law

The limit of RES auction capacity for solar projects raised to 20 MW

The Energy Ministry has recently delivered a ministerial decision raising the capacity limit of solar energy projects which are going to take part in the upcoming RES auctions, to 20 MW from the previous level of 10 MW set by the the Regulatory Authority for Energy- RAE.

Prior to this revision, the RAE proposal had offered capacities of between 1 MW and 10 MW for major-scale photovoltaic projects taking part in the RES auctions.

The reason of the aforementioned change was to enable RES auction participation for a number of prospective solar projects with capacities ranging between 10 and 20 MW.

In a different case, the investors of solar energy projects within the above capacity range would have needed to wait for combined wind and solar energy RES auctions, where they would have been up against far bigger investors. This combined category will concern projects with capacities exceeding 20 MW.

Some major- scale investment plans have already been made by «PPC Renewables» with a 200-MW solar energy park in the western Macedonia region, as well as «Juwi» with a major-scale solar energy project in the west Macedonia region as well.

RES auctions for wind, large-scale solar and small-scale solar projects are expected to take place separately, in July.

Despite the efforts of staging the combined RES auction for bigger projects within the current year, given various preparation difficulties, this auction is more likely to be held in the first quarter of 2019.

Greece has issued Law 4529/2018 implementing the EU Antitrust Damages Directive 2014/104/EU ("the Antitrust Damages Directive")

On 23.03.2018 Greece has issued Law 4529/2018 implementing the EU Antitrust Damages Directive 2014/104/EU with retroactive effect from 27.12.2016 as this was the deadline set by the Directive for its implementation. The Law applies to actions for damages for infringements of EU and /or Greek competition law. Law 4529/2018 applies the principle of full compensation which includes actual damage, loss of profit and interest from the time when the harm occurred until the time when compensation is paid.

It is noted that decisions of the Greek and EU Competition Authorities finding an infringement of Greek and/or EU competition law, which are not subject to appeal, as well as final decisions of the competent Greek and EU review Courts are binding before a Greek Court trying an action for damages. Final decisions issued in other Member States finding an infringement of EU competition law and/or national competition law, which is applicable in parallel and pursues the same object with

EU competition law, also constitute full evidence of the infringement before a Greek Court trying an action for damages.

With regard to the disclosure of evidence, at the request of either party in proceedings related to an action for damages, the Court may order the other party or a third party to disclose relevant evidence which lies in that party's control. The relevant request must be reasoned and the disclosure of evidence is limited to what it is proportionate taking account of the legitimate interests of all parties and third parties concerned. Law 4529/2018 adopts the presumption that cartel infringements cause harm. This presumption is rebuttable. A major novelty of Law 4529/2018 compared to the general rule of Greek law is that plaintiff is not required to produce full evidence of the damage suffered. If it is established that it is practically impossible or excessively difficult for the plaintiff to precisely quantify the harm suffered on the basis of the available evidence, the Court is empowered to estimate the likely amount of harm taking into account, in particular, the nature and scope of the infringement and plaintiff's diligence in collecting the necessary evidence. The Court may ask for the assistance of the Greek competition authority, if it deems this to be appropriate.

According to the Law the territorial competence to hear claims for damages due to the infringement of competition law is vested for the entire Greek territory to specialized sections to be set up in the Athens First Instance Court and the Athens Appeal Court. This provision will apply to lawsuits which will be filed from 16 September 2018 onwards.

Commission opens investigation into German grid operator TenneT for limiting cross border electricity capacity with Denmark

The European Commission has opened a formal investigation to assess whether German grid operator TenneT's limitation of capacity from Western Denmark into Germany breaches EU antitrust rules. The Commission and TenneT are engaged in constructive discussions on commitments to address those concerns.

TenneT TSO GmbH (TenneT) is the largest of the four German transmission system operators that manage the high-voltage electricity network in Germany. Transmission system operators transport electricity from generation plants to large industrial electricity consumers and to regional or local

electricity distribution operators, which in turn deliver electricity to households and other smaller industrial consumers.

The Commission's antitrust investigation will focus on indications that TenneT may be reducing the amount of transmission capacity available on the electricity interconnector at the border between Western Denmark and Germany.

- *If proven, this behaviour may breach EU antitrust rules, specifically on the abuse of a dominant market position (Article 102 of the Treaty on the Functioning of the European Union), as it would amount to discrimination against non-German electricity producers and to a segmentation of the Single Market for energy –*

Procedural background

Article 102 of the Treaty on the Functioning of the European Union prohibits the abuse of a dominant market position which may affect trade between Member States. The implementation of this provision is defined in the Antitrust Regulation (Council Regulation No 1/2003), which can be applied by the Commission and by the national competition authorities of EU Member States.

Article 11(6) of the Antitrust Regulation provides that the initiation of proceedings by the Commission relieves the competition authorities of the Member States of their competence to also apply EU competition rules to the practices concerned. Article 16(1) of the same Regulation provides that national courts must avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated.

There is no legal deadline for bringing an antitrust investigation to an end. The duration of an investigation depends on a number of factors, including the complexity of the case, the cooperation of the undertakings with the Commission and the exercise of the rights of defence.

An opening by the Commission of a formal investigation does not prejudge its outcome.

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