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STATE AID

Prolongation of the Greek temporary Scheme for loan guarantees

(State Aid N 308/2009)

By electronic notification of 15 July 2011 Greece notified the prolongation of the existing guarantee scheme ("Greek temporary scheme for loan guarantees" N 308/2009). The existing aid scheme has been approved by the Commission on 3 June 2009 (N 308/2009).

In view of the continued volatility of financial markets and the uncertainty about the economic outlook, the Commission decided that a prolongation until end 2011 of the Temporary Community Framework measures targeted to facilitate companies' access to finance was justified in order to assure a gradual return to normal state aid rules while limiting their impact on competition. The Commission observed that the prolongation of the scheme is a response to the continuing difficulties that enterprises in Greece experience in obtaining funding by the banks. Even though in broad terms the health of the banking sector has improved compared with the situation one year ago, the recovery is still fragile as the future evolution of financing remains uncertain. Thus the risk persists that the banking system may not be ready to sustain the recovery when credit demands picks up.

Against this background and taking into account the residual fragility of the recovery process and the possibility of setbacks in that process, the continuation of the guarantee scheme ("Greek Temporary Scheme for loan guarantees" N 308/2009) can be deemed necessary to facilitate companies' access to finance. The Commission considers that an abrupt withdrawal of the scheme might put further stress on the recovery process. The Commission therefore considers that the prolongation of the scheme until the end of 2011 is appropriate, necessary and proportional to remedy a serious disturbance of the Greek economy.

On the basis of the above, the notified prolongation of the guarantee scheme ("Greek Temporary Scheme for loan guarantees" N 308/2009) does not alter the Commission's previous assessment in the decision of 3 June 2009. As regards the amendment concerning the duration of the guaranteed loan which can be up to 10 years, the Commission noted that this amendment is in conformity with the Temporary Union Framework.

On the basis of these considerations, the prerequisites for the compatibility of schemes with Article 107(3)(b) TFEU that have been established by the Temporary Community Framework continue to apply. Furthermore, the Commission considers that the notified prolongation of the existing guarantee scheme ("Greek Temporary Scheme for loan guarantees" N 308/2009) accompanied by stricter conditions until 31 December 2011 complies with the Requirements of the Temporary Union Framework and is therefore compatible with the internal market.

Consultation on the new texts regarding the application of State aid rules to Services of General Economic Interest (SGEI)

The European Commission published the proposals for the new texts regarding the application of state aid rules to Services of General Economic Interest (SGEI) for consultation of Member States and stakeholders before submitting a final text to the College. The new rules are expected to be adopted by the end of January 2012. The Commission has already consulted extensively on the revision of the so-called "Monti-Kroes" package of rules applying to services that are of general interest but of economic nature, in other words where public and private sector cohabit.

In his speeches on the subject, Vice President Almunia has stated that the main objective is to have clearer and simpler rules to make life easier for the public authorities and the service providers, to put less emphasis on local services that often involve small compensation amounts and focus more on

the services that have a cross-border impact. He plans to extend the range of social services that are exempted from prior scrutiny - currently only hospitals and social housing benefit from such safe heaven - and to introduce a specific *de minimis* rule to exclude the very small and local services. The ultimate goal is to contribute to making services of general economic interest more efficient, because public finances in many countries are under heavy pressure and taxpayers' money should be carefully spent.

See the proposals for new texts regarding the application of state aid rules to Services of General Economic Interest (SGEI) in the following link:

http://ec.europa.eu/competition/state_aid/legislation/sgei.html#review

Emission Rights: ECJ delivers judgment in Netherlands NOx State aid case

On 8 September 2011, the ECJ delivered its long-awaited judgment in the *Commission v Netherlands* appeal, overturning the judgment of the General Court and reinstating the conclusion of the Commission that the Dutch NOx emissions trading scheme constituted a State aid. The Court confirmed, however, that a Member State may challenge a decision of the European Commission approving State aid, on the grounds that the Member State considers the measure not to involve aid at all.

The Commission had decided that the Dutch emissions trading scheme for nitrogen oxides constituted State aid, but was compatible with the common market. The scheme involved setting an emissions ceiling for large industrial facilities, together with the free allocation of tradable permits, and fines for exceeding permitted emissions. The Netherlands appealed that decision to the General Court, which ruled that the scheme did not amount to State aid. The Commission appealed to the ECJ on both the question of the admissibility of the appeal and the substantive issue of whether the scheme constituted State aid.

On the admissibility question, Germany, Slovenia, and the United Kingdom intervened in support of the Netherlands. In dismissing the Commission's

appeal on this ground, the ECJ held that even though the emissions trading scheme had been approved by the Commission, its classification as State aid entailed legal consequences such as periodic reporting to the Commission, and was therefore challengeable in an application for annulment.

On the substantive question, however, the ECJ upheld the Commission's appeal (and rejected the cross-appeal of the Netherlands), ruling that the design of the scheme amounted to State aid. In particular, the scheme involved a burden on State resources and was selective, since it was limited to large industrial facilities rather than applying to all undertakings that were subject to NOx emissions restrictions.

A striking aspect of the judgment is the suggestion that State revenue is foregone (and therefore State resources are involved) if an undertaking complies with the emissions ceiling through the purchase of emissions allowances, and thereby avoids a fine. This conclusion has potential implications for the design of many government policies which involve fines as a sanction, and it will be interesting to see whether the Commission and European Court will adopt this reasoning outside the context of emissions trading.

ENERGY

Speaking with one voice – the key to securing our energy interests abroad

On 07 September 2011, the EU Commission in line with the Energy 2020 strategy, adopted a Communication on security of energy supply and international cooperation, setting out for the first time a comprehensive strategy for the EU's external relations in energy. Improved coordination among EU Member States in identifying and implementing clear priorities in external energy policy is central to the approach outlined by the Commission.

Alongside the Communication, the Commission proposed a Decision setting up an information exchange mechanism for intergovernmental agreements in

the field of energy between Member States and third countries. It will extend and complement the notification procedure already applicable to gas agreements to all forms of energy. Furthermore, it will also provide for an instrument to exchange information at EU level before and after negotiations with third countries. The proposed mechanism is set to strengthen the negotiating position of Member States vis-à-vis third countries, while ensuring security of supply, proper functioning of the internal market and creating legal certainty for investment.

EU starts negotiations on Caspian pipeline to bring gas to Europe

In Brussels, 12 September 2011, the European Union has adopted a mandate to negotiate a legally binding treaty between the EU, Azerbaijan and Turkmenistan to build a Trans Caspian Pipeline System. This is the first time that the European Union has proposed a Treaty in support of an infrastructure project. The Treaty will be concluded by the EU after decision by all 27 Member States that the European Commission should lead the negotiations on behalf of them all.

This decision is a direct follow-up of the visit of President José Manuel Barroso and Energy Commissioner Günther Oettinger to Baku and Ashgabat in January 2011 and their meetings with Presidents Aliyev and Berdimuhamedov. It constitutes a milestone in the realisation of the Southern Corridor and is the first operational decision as part of a co-ordinated and united external energy strategy, as proposed in the European Commission's Communication on security of energy supply and international cooperation - "The EU Energy Policy: Engaging with Partners beyond Our Borders" - adopted on 7 September.

Energy Commissioner Oettinger stated that: "Europe is now speaking with one voice. The trans-Caspian pipeline is a major project in the Southern Corridor to bring new sources of gas to Europe. We have the intention of achieving this as soon as possible."

The Trans-Caspian Pipeline agreement will set the basis for the construction of a submarine pipeline connecting Turkmenistan to Azerbaijan, and in turn link this pipeline to infrastructure that will bring gas from Central Asia to the EU. The Southern Corridor aims at supplying Europe with gas coming directly from the Caspian basin and the Middle East. It intends to increase security of supply for European households and industry by diversifying gas sources and routes, thus minimising dependence on few suppliers and potential gas cuts.

Discussions with Azerbaijan and Turkmenistan will focus on inter alia a treaty setting out legal commitments between the European Union, Turkmenistan and Azerbaijan, the bilateral arrangements necessary for Turkmenistan and Azerbaijan to achieve the commissioning, building, and operation of the trans-Caspian pipeline itself, and the legal framework that will apply to filling the pipeline with gas from Turkmenistan, including an appropriate recognition of commercial arrangements. Over the last months, the EU has engaged in a regular dialogue with Azerbaijan and Turkmenistan, which figure among the key potential gas suppliers for Nabucco, ITGI (Interconnector Turkey- Greece-Italy) and TAP (Trans-Adriatic Pipeline).

Energy markets: Commission welcomes adoption of new rules on wholesale electricity and gas trading

The EU has adopted new stringent rules on wholesale energy trading. The main objective is to prevent use of insider information and other forms of market abuse which distort wholesale energy prices and normally mean that businesses and consumers pay more for their energy than they need to. The new law will enter into force by the end of this year. For the first time energy trading will be screened at EU level to uncover abuses. National authorities in Member States will put in place penalties to help stop and prevent market manipulation.

PUBLIC PROCUREMENT

General Court dismisses appeal by Evropaiki Dinamiki against Commission procurement procedure despite procedural errors by Commission

On 9 September 2011, the General Court dismissed an appeal by the Greek company Evropaiki Dinamiki (European Dynamics) in relation to a procurement process organised by the European Commission. Although the Commission had breached the procedural requirements when setting the deadline for submission of requests for information following a correction to the contract notice and a corresponding extension of the deadline for submission of the tender, the General Court held that European Dynamics had not demonstrated that the procedural breach had a specific impact on the tender submitted by the consortium led by it. The General Court also dismissed claims that the Commission had breached the principle of equal treatment and had committed a manifest error of assessment in the evaluation of the tender submitted by the European Dynamics consortium.

MERGERS / COMMUNICATIONS

Commission approves acquisition of ING Car Lease by BMW

The European Commission has cleared under the EU Merger Regulation the proposed acquisition of ING Car Lease, the car leasing business of the Dutch global financial institution ING, by the German car manufacturer Bayerische Motoren Werke AG ("BMW").

The Commission found that the transaction would result in only limited overlaps between ING Car Lease and BMW's own existing car leasing activities. In all the markets concerned, the merged entity will continue to face several strong, effective competitors with significant market shares.

The Commission particularly examined whether current rivals of ING in the car leasing business could be denied access to BMW cars. But it concluded

that the merged entity would have neither the ability nor the incentive to shut out its competitors given its position on the markets concerned.

The Commission, therefore, concluded that the transaction, notified for regulatory clearance on 22 August 2011, would not significantly impede effective competition in the European Economic Area (EEA)¹ or any substantial part of it

BMW is primarily a worldwide automobile and motorcycle manufacturer, headquartered in Germany. Besides developing, producing and marketing these vehicles, it also provides operational leasing services with fleet management, "stand-alone" fleet management and financial leasing, mainly under its "Alphabet" brand. Alphabet operates local and international fleets, which consist of over 300,000 multi-brand vehicles worldwide.

ING Car Lease is active across Europe in the car leasing and fleet management business. Its primary focus is multi-branding operational leases, but it has also some more limited activities regarding "stand-alone" fleet management, short term rentals and financial leases.

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