METAXAS & ASSOCIATES
ATTORNEYS AT LAW

NEWSLETTER OCTOBER 2021

NOTE FROM THE EDITOR

M&A LAW FIRM'S PRACTICE HIGHLIGHTS

THE ENERGY SECTOR

COMPETITION & ANTITRUST

STATE AID

"THE LAW FIRM THAT SHAPES THE ENERGY MARKET"

NOTE FROM THE EDITOR

In the second half of 2021, Metaxas & Associates Law Firm managed to remain fully active and maintain its position in our core practice areas of Energy, EU Law, State Aid and International Dispute Settlement. Thus, significant cases and legal mandates have been added to our practice highlights.

Crucial developments and activities in the European legal landscape have caught our eye. So, in this Issue we present:

- A critical overview of two major energy-related decisions released by the CJEU, namely on the independence of NRAs, on the application of the Energy Charter Treaty in intra-EU disputes and on compatibility of capacity payments
- Investment Arbitration considerations for Project Finance in the Energy Sector
- Prof. Dr. Antonis Metaxas' input in the special editorial of 'Lawyer Magazine' on the Digital Markets Act (DMA)
- In the PPC antitrust saga, the EC approval for the latest measures proposed by Greece for the lignite-fired generation.
- 5th Athens Conference on EU Energy Law and Policy | Current Trends in Energy Transition.

> M&A Law Firm will sponsor the prestigious '5th Athens Conference on EU Energy Law and Policy | Current Trends in Energy Transition', organized by the Hellenic Energy Regulation Institute. This significant scientific event is about to take place, virtually, on December 10th, 2021

M&A's LAW FIRM PRACTICE HIGHLIGHTS

PUBLICATIONS

Opinion 1/17 – Prof. Metaxas' latest scientific publication on International Investment Arbitration and EU law

Prof. Dr. A. Metaxas' latest publication titled **'Opinion 1/17: Autonomy of EU Legal Order and the Conflicting Context of International Investment Arbitration' has been published in the latest issue of the renowned scientific Journal 'European Papers | A Journal on Law and Integration'. The article focuses on critical points in the CJEU's arguments related to the notion of autonomy of EU Law in the context of international investment arbitration**

Between business and COVID-19 reality

Maria-Konstantina Lili-Kokkori (LL.M.) and **Konstantina Meletiadou** (LL.M.), both Associates at M&A Law Firm, published an article in European State Aid Law Quarterly (Vol. 20, Issue 2/2021, Lexxion Publisher, Berlin, Germany) under the title **'Greece: Between business and Covid-19 reality'**.

EStAL EUROPEAN STATE AID LAW QUARTERLY

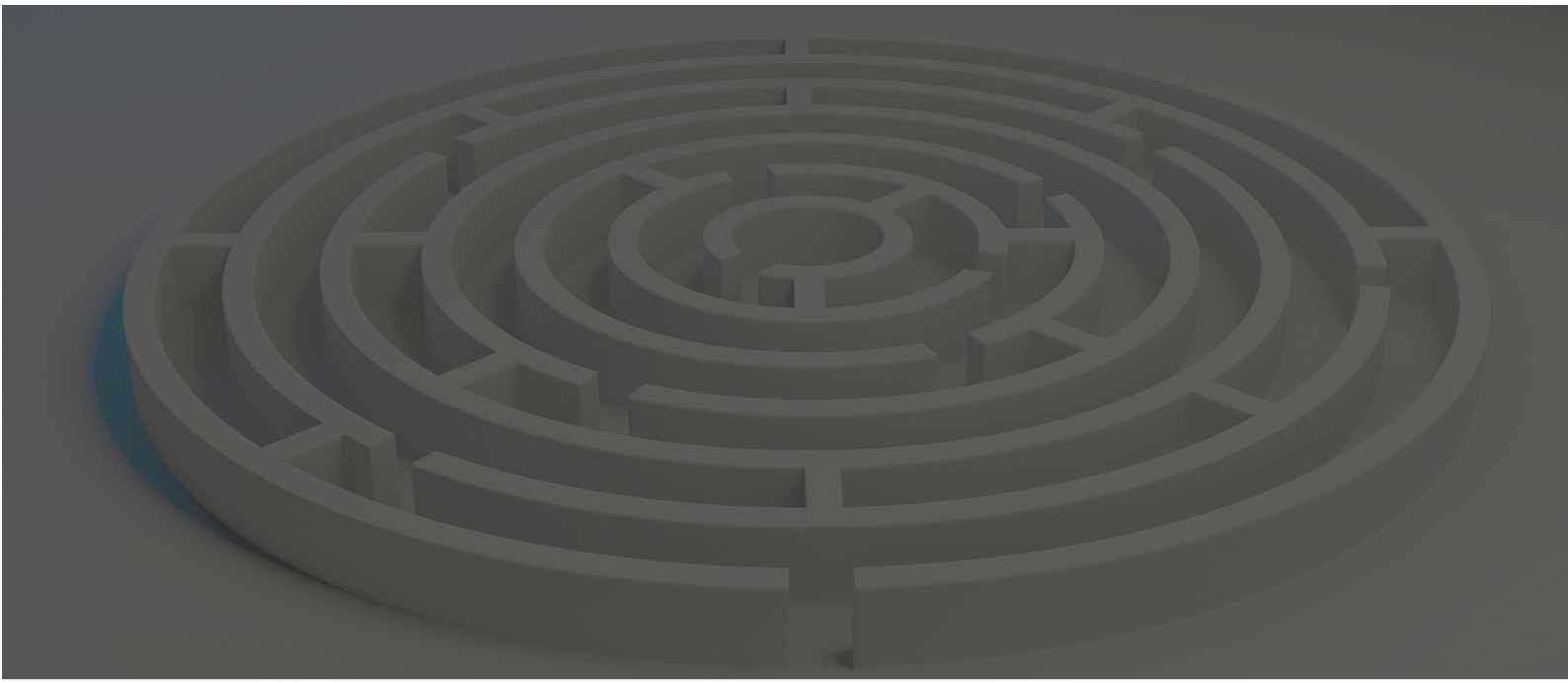
CONFERENCES

- The '**Renewable and Storage Forum'** hosted by energypress.gr, took place on **October 13 & 14, 2021. Prof. Dr. A. Metaxas** was invited, amongst other key decision-makers, high ranked politicians, distinguished academics and business leaders, to chair the Conference session "Hydrogen, Biogas, Green Fuels: The findings of the Ministry of Energy Committee | Flagship projects in Greece and abroad | Chances and challenges for the dynamic integration in the energy balance". Ms. **Vassiliki Koumpli**, Senior Associate at Metaxas & Associates and Senior Research Fellow of the Hellenic Energy Regulation Institute, was also invited to participate as speaker in the session "The Operation of the RES and Storage Market: PPAs - structural, technical, legal and financial issues".

Hellenic Energy Regulation Institute

- **M&A Law Firm** will sponsor the prestigious '**5th Athens Conference on EU Energy Law and Policy | Current Trends in Energy Transition',** organized by the Hellenic Energy Regulation Institute. This significant scientific event is about to take place, virtually, on December 10th, 2021. The Conference constitutes a leading forum for the exchange of views of academics, major energy players and stakeholders interested in energy investments in Greece and is considered as the top meeting point for research and academic dialogue.

PRACTICE HIGHLIGHTS



- An **Italian and a German Multinational** granted **Metaxas & Associates Law Firm** the Mandate to act as their legal advisor on the acquisition and development of a large PV and Storage Investment portfolio.
- A Greek **leading energy** supplier hired **M&A Law Firm** to provide legal consulting and guidance for the deployment of its natural gas operations.
- **M&A Law Firm** Firm was given the mandate to act as legal advisor to the **Hellenic Hydrocarbon Resources Management (HHRM)** on the reassessment and modification of **offshore safety provisions in hydrocarbon activities** and on necessary adaptation of the existing legal framework for the **safe storage of CO2.**
- **M&A Law Firm** has been granted a **Mandate** to act as legal advisor of the Municipality of Megalopolis in the preparatory process and design of the **updated Territorial Just Transition Plan (ESDIM)** towards its **decarbonisation** effort to ensure **a fair development transition by 2023**, in the framework of Greece's transition to a differentiated mixture of electricity production that will not be based on lignite.

C - 718/18 Commission v. Germany on the independence of NRAs

The Court of Justice of the EU (CJEU) found on September 2, 2021 in case C-718/18 that Germany failed to properly transpose various provisions of the main EU Energy Directives of the Third Energy Package, namely 2009/72 (electricity) and 2009/73 (gas). In particular, according to the CJEU, the allocation of responsibilities in German energy law is not in line with the envisaged responsibilities reserved exclusively for National Regulatory Authorities (NRAs). In other words: the Court pointed out that there is tendency to political influence on decisions on network-bound energy in Germany. **But what does this mean in detail? Will German Energy Law now have to undergo fundamental revision?**

The case refers to the issue of State control over network bound energy; an energy issue that can also be found in other jurisdictions. **How much are governments allowed to interfere with energy regulation?** What can Transmission System Operators that remain part of Vertically Integrated Undertakings (VIUs) do and what is not allowed in light of the 'effective unbundling' goal?

Germany, being a Member State with a long tradition of reluctance towards energy market liberalization, now received a spectacular beating by the CJEU for the way in which its energy regulation is currently organized.

The ruling does not come entirely unexpected, as the Court has previously taken a strict line on the independence of NRAs in a case involving Belgium in December 2020 (C-767/19 Commission v Belgium). That case was concerned with cross-border exchanges yet the question about influence was also at its core. This is part of a bigger effort by the European Commission (EC) to ensure independence of NRAs throughout Europe. Three years ago, a study has been commissioned on that issue and currently there is another request for services by the EC on 'Assessing the Independence and Effectiveness of NRAs in the field of Energy – Support for a Commission Report on Member States Compliance with the Principle of Independence'. That assessment shall commence in November 2021 and take nine months to be completed. Thus, the EC is determined to tackle the issue of Independence of NRAs with renewed vigor.

C - 741/19 Moldova v. Komstroy on Energy Charter Treaty and intra – EU disputes

An international treaty, i.e. the Energy Charter Treaty (ECT), used by energy companies to claim compensation from governments who thwart their investments, was ruled incompatible with EU law by the Court of Justice of the EU (CJEU) on September 2, 2021.

The ECT allows companies to sue foreign countries through a private arbitration mechanism called an investor-state dispute settlement (ISDS) over decisions that affect their energy investments. Recently, it has been leveraged against countries like the Netherlands over its coal phase out. But Europe's top Court ruled that the treaty cannot be used in lawsuits between EU countries because the process undermines the role of EU courts.

The ruling puts into question the legality of ongoing claims, like those against the Netherlands. In line with the 2018 Achmea v Slovakia ruling, which found that the ISDS process was incompatible with EU law, the Court accepted that "the preservation of the autonomy and specific character of EU law precludes the Energy Charter Treaty from being able to impose the same obligations on the Member States among themselves".

Environmental campaigners applauded the ruling because "given the scale of the climate crisis, it's not only abhorrent that EU companies have used the ECT to claim compensation, but it's now confirmed that it's also illegal". However, implementing the decision will be rather complex since it will be up to EU countries to defend themselves using this decision, with countries like the Netherlands now having more firepower in contesting the claims

Investment Arbitration considerations for Project Finance

A typical project finance transaction involves one or more sponsors (equity investors) and a syndicate of banks providing loans as well as hedging instruments. The borrower is usually a project company established ad hoc for a specific project such as, in the energy sector, a pipeline or wind farm.

Policy measures by the host State, e.g. the tariff at which electricity can be sold, play a key role in ensuring the financial viability of the project. Project finance actors should carefully consider their options in the event of regulatory changes, including potential investment treaty protection, from the outset of the project.

Project finance as an investment in the host State?
Investment treaty protection under an international investment agreement (IIA) between the home State of the investor and the host State of the project usually requires (i) a qualifying investment, (ii) in the territory of the host State. The definitions of 'investment' found in various IIAs can differ, but there are commonalities among them. These requirements have proven to be fertile ground for debate in respect of certain types of financial investments. It should also be noted that ICSID arbitration tribunals have decided in several cases that loans and/or hedging instruments can constitute an investment in the host State.

Practical considerations for project finance lenders
If seeking to maximise IIA protection, project finance lenders will first have to ensure that such protection is available under an IIA between the home State of the investor and the host State of the project. Project finance lenders should also pay attention to the location of their financial investment. This can be difficult to determine, for example where money is provided to a holding company and then transferred to project companies in different jurisdictions by way of inter-company loans. In such a scenario, a proper contractual description of the purpose of the loan can support the finding of an investment in the territory of the host State where the project company is located.

With respect to intra-EU scenarios, where the home and host States are both EU-Member States, there is a further layer of complexity. In its 2018 judgment in Achmea v Slovakia, the CJEU found that intra-EU bilateral investment treaty arbitration is incompatible with EU law. Most recently, in its judgment dated 2 September 2021 in Komstroy v Moldova, the CJEU held that its Achmea ruling applies likewise to the ECT as a multilateral investment treaty (for details, see our earlier post on the Komstroy judgment).

Finally, when participating in a project finance transaction, banks may wish to assess, ex ante, the investment protection considerations laid out above. As noted, the particular combination of home and host States determines the potentially applicable IIAs, so to the extent that there are options for the structuring of the transaction involving different such combinations, an upfront assessment may help maximise the chances of successfully invoking IIA protections. Such upfront assessment might also enable more realistic appreciation of the expected loss given default due to negative policy measures.

Antitrust: EC approves Greek measures to increase access to electricity for PPC's competitors

The European Commission (EC) has made legally binding, under EU antitrust rules, measures proposed by Greece to allow the competitors of Public Power Corporation (PPC), the Greek state-owned electricity incumbent, to purchase more electricity on a longer-term basis. Greece submitted these measures to remove the distortion created by PPC's exclusive access to lignite-fired generation, which the EC and EU courts had found to create an inequality of opportunity in Greek electricity markets. The proposed remedies will lapse when existing lignite plants stop operating commercially (which is currently expected by 2023 or, at the latest, by 31 December 2024).
In particular, the measures proposed by Greece set out that:

- PPC will sell quarterly forward electricity products on the organised exchanges of the Hellenic Energy Exchange (HEnEx). As a result, buyers will obtain electricity at a stable price every day during the quarter in question.
- PPC will obtain a net seller position on HEnEx, meaning that its sales of the forward electricity products in question should exceed its purchases by a certain volume.
- The obligations on PPC in terms of the timing of the sales and of the deliveries will give PPC's competitors the ability to hedge against price volatility for a sufficiently long period in advance.

Digital Markets Act: Inaugurating Europe's Digital Decade

On December 15, 2020, the European Commission (EC) announced its proposal of an ambitious and comprehensive set of new rules for all digital services operating in the EU, i.e. the Digital Services Act (DSA) and the Digital Markets Act (DMA). This set of new rules will apply across the EU in order to create a safer digital space where the users' fundamental rights are protect-ed, and to establish a level playing field for businesses.

In particular, the DMA establish-es a set of narrowly defined objective criteria for qualifying large online platforms as a 'gate-keepers'; companies with a strong economic and durable position in the internal market thanks to their functioning as gateways for business users to reach their customers. These companies control at least one 'core platform service' (e.g., search engines, social networking services, operating systems, etc.), and have a lasting, large user base in multiple EU countries.

This modern rulebook, which includes a list of obligations and prohibitions for gatekeepers, will foster innovation, growth as well as competitiveness and will pro-vide users with new, better, and reliable online services. It will al-so support the scaling up of smaller platforms, SMEs, and start-ups, providing them with easy access to customers across the whole single market while lowering compliance costs. Furthermore, the new rules will prohibit unfair conditions im-posed by online platforms that have become or are expected to become gatekeepers to the single market.

Even though the DMA shares similar objectives as competition law, the way of achieving those is different. More precisely, the DMA seeks to pre-empt certain practices or impose specific obligations with a view to increasing market contestability, reducing entry barriers, stimulating innovation from rivals and companies depended on gatekeepers to reach consumers and, ultimately, ensuring that consumers enjoy a healthy digital environment. On the contrary, competition law addresses, case-by-case business conduct disrupting competition in the internal market by applying the rules laid down in Articles 101 and 102 TEFU.

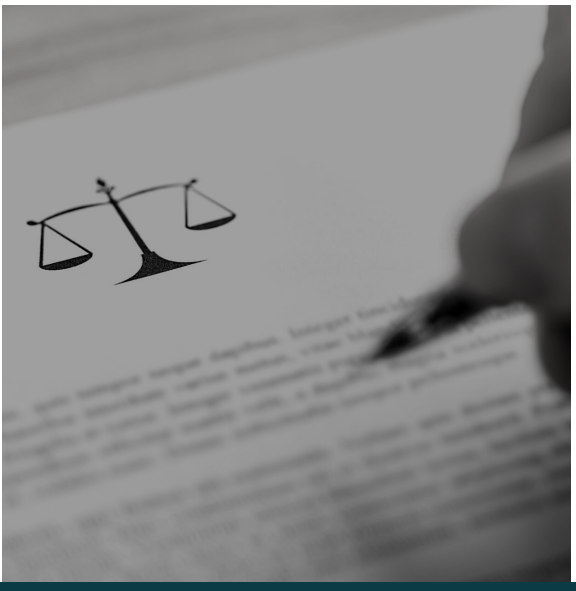
This differentiated approach is necessitated by the complexity and the fast-evolving nature of digital markets. In this context, national competition agencies welcome the EC's initiative in respect of the DMA and will con-tribute to the making of Europe's Digital Decade.

State Aid: CJEU reverses 'Tempus' judgment over the UK capacity market

In July 2014, the European Commission (EC) decided not to raise objections to the aid scheme establishing a UK capacity market mechanism. However, Tempus – a group with an interest in the capacity market – took the view that the EC could not conclude, following nothing more than a preliminary examination and in the light of the information available at the time of the decision, that the planned aid scheme did not raise doubts as to its compatibility with the internal market. As a result, in 2018 the General Court decided to annul the EC's decision on the compatibility of the capacity market, on procedural grounds, i.e., that the EC should have concluded that there were doubts which should have led it to initiate the formal investigation procedure.

Following an appeal of the EC questioning the facts' legal characterisation as indications capable of establishing the existence of doubts as to the measure's compatibility, on September 2, 2021, the Court of Justice of the European Union (CJEU) – despite confirming the incompatibility of the said measure with the State aid rules – reversed the above ruling. In particular, it accepted that the EC is not required, on its own initiative and in the absence of any evidence to that effect, to seek all information which might be connected with the case before it. If that was the case, the preliminary examination procedure would be turned into 'an ex officio measure, thereby nullifying the Commission's discretion in establishing whether there are doubts as to the compatibility of a measure with the [EU] market'.

Although, the EC later conducted an investigation and cleared the scheme as proper, the ruling is deemed largely symbolic, particularly given the UK's withdrawal from the EU last year.



METAXAS & ASSOCIATES
ATTORNEYS AT LAW

M & A Law Firm
154 Asklipiou Str.
11471, Athens, Greece
Tel. + 30 210 33 90 748
Fax + 30 210 33 90 749

SUPERVISING EDITOR

Sophia Ganiatsou L.L.B.

EDITORS

Konstantina Meletiadou LLB, LLM
Maria-Konstantina Lili-Kokkori LLB, LLM
Alexandra Kornilaki LLB