



**MOURGELAS & ASSOCIATES**

*Law Firm*

# Mourgelas Energy & Environment Legal Bulletin

**Vol. 1**, June 2010

# Editorial

Welcome to our first issue of Mourgelas Energy and Environment Legal Bulletin. It represents the culmination of significant efforts by our law firm in the field of energy and environmental law. The aim of the Bulletin is to provide our readers worldwide not simply with a brief overview of the relevant areas of energy law in Greece, but more importantly to function as a forum for introducing and discussing new and forthcoming developments which would otherwise be unavailable to non-experts. Thus, we hope that the information provided here will prove commercially valuable to your company or organization.

This is an exciting time for energy projects in Greece, particularly in the renewable energy sector, which all accounts show that it is booming. On top of this the new government has announced generous investment incentives and is on course to eliminate all of the bureaucratic hurdles that were once associated with investing in Greece. We strongly believe that this is the best time to invest in Greece's energy sector and the wider field of green economy.

We have chosen to discuss the following topical issues:

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- Green sector investments and incentives p. 8
- Energy service companies and improvement of energy end-use efficiency requirements p. 9
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- The highly problematic nature between the Treaty of Lisbon and the Energy Charter Treaty p. 13

As always, we look forward to your comments and suggestions and would be happy to respond to any queries you have on any matter of Greek law and practice.

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## Draft Code for the Supply of Electric Power

Pursuant to the electronic archive of the Greek Regulatory Authority for Energy (RAE) (updated as of March 30, 2010), 61 entities have received licenses for the supply of electric power to end customers, among which one may find some of the big players in the international energy market. As a consequence, a number of electricity supply agreements have already been concluded between suppliers and customers such as supermarket chains, hotels, malls, large medical centers, etc.

This increased demand requires the existence of a well defined regulatory framework since the existing one is plagued with gaps and cannot realistically serve the contemporary needs of the burgeoning market. With this in mind a draft Code for the Supply of Electric Power has been prepared by RAE which defines the rights and obligations of customers and suppliers of electric power during the negotiation and conclusion of their mutual supply contract. The draft Code moreover spells out their mutual obligations and has been available for public consultation from 5 March until 23 April 2010. Until mid June it is expected that RAE shall submit to the competent Ministry the final draft of the Code after amending it pursuant to the inputs /comments raised during the public consultation procedure, which were quite significant. The original Code was introduced in 2001 by Ministerial Decree 4524/2001 which was premised on Law 2773/1999 on the Liberalization of the electric power market and is still in force. The new draft Code aims to harmonise the existing Code with the recent EC Directives (including the Directive 2009/72/EC). It in fact succeeds in reforming the entirety of the text, including of course the status of rights and obligations of the parties (customers and suppliers).

In summary, the main provisions of the new draft Code are the following:

- It is expressly provided that the suppliers are obliged to submit supply proposals following respective requests of those categories of customers to which they supply electric power; the minimum content of the application for submission of Supply Proposal is stipulated in the draft Code. In fact it is provided that the supplier is obliged to respond to the application within a maximum of 7 business days;
- The general terms of the supply contract are also provided, as a minimum content, and any provision to the contrary are null and void. This is true also in respect of any contractual stipulation that limits or releases the supplier from his obligations;
- The minimum term of the supply contract is one (1) year from the date of commencement of the supply;
- The supplier is entitled to request a guarantee for future payments which may not be higher than the actual or expected two month consumption;
- Unless otherwise agreed in the supply contract the customer may terminate it at any time without any adverse consequence. With respect to termination by the supplier, the Code provides for minimum time limits for the reinstatement of any violations that are attributable to him. Special termination provisions apply for vulnerable Customers;
- High and medium voltage customers are exceptionally entitled to a supply of electric power from more than one supplier at any given time;
- Suppliers must establish within a month from the issuance of the supply license appropriate customer service facilities;

- Suppliers are obliged to draft, publicise and abide by a Code of Conduct in order to ensure consumer protection. Moreover, they must make available to RAE and the public the type of data stipulated in the Code, particularly supply invoices, geographical coverage or limitations of services, method of payment, customer service information, financial data, etc.; In addition, suppliers are obliged to create and make publicly available standardised instruments such as those pertaining to electric power services, General Terms of Supply Contract, Application for Supply Contract Amendment, Supply Contract Termination, Objection to the Consumption Bill, etc. RAE is entitled to publicise on its website examples of calculating yearly supply invoice expenditures as well as tools of for comparative calculations.

The draft Code does not include a chapter on the quality of services supplied. Nonetheless, RAE has set out quality benchmarks and has requested all concerned parties to provide their justified opinion with a view to enhancing quality control in the Code during a future amendment stage.

Another item which has not been included in the draft Code concerns suppliers of last resort, provided by Directive 2009/72/EC. RAE envisages that it will be working with the competent Ministry with the expectation by March 2011 it will have implemented Article 49 of the Directive.

*Viki Topalidou*

## Update on Greek Solid Waste Management Legislation

### A. Review of the general legal framework for solid waste management

#### 1. Implementation of EU waste management law in Greek legislation

The Greek legislation on waste management comprises mainly provisions implementing Community Directives. It is a fact, however, that this implementation process takes place significantly slower than what is appropriate under European law. Moreover, the relevant administrative measures required for the implementation of the Directives into domestic legislation are not always given timely effect. As a result, the Ministerial Decision 50910/2727/2003, currently regulating waste management in Greece, implements Directive 1975/442/EEC (as amended by Directive 1991/156/EEC), which however has already been repealed by Directive 2006/12/EC, not yet incorporated in Greek law. Considering the fact that Directive 2006/12/EC has meanwhile been repealed by Directive 2008/98/EC, there are plenty of changes due very soon in the Greek waste management legislation. According to recent announcements of the Minister of Environment, Energy and Climate Change, a series of important developments in the field of waste management should be expected until the end of 2010, including the reform of the existing legal framework in terms of adaptation to Directive 2008/98/EC and the implementation of several projects of waste management facilities construction in the course of implementation of the National Strategic Reference Framework 2007-2013 as well as by means of Public Private Partnerships (PPPs).

#### 2. Competent waste management operators

According to the existing Greek legislation on solid waste management, solid waste producers/holders are obliged to hand this over to a competent waste

management operator, unless they are able to recover or dispose of it on their own in accordance with existing law standards. While the municipalities are competent for the collection and transport of waste, for all further duties including temporary storage, disposal and recovery of waste as well as maintenance of waste management facilities the entities responsible are those that are officially designated as "Solid Waste Management Operators". Solid Waste Management Operators need to be organized under the legal form of a "Société Anonyme" established by the respective municipalities of each region or, alternatively, as an association of different municipalities. Solid Waste Management Operators are by law allowed to assign to private persons and legal entities the execution of waste management services.

#### 3. Licensing procedure for waste management

Both the tasks of collection and transport as well as those of storage, disposal and recovery can only be performed after obtaining a license issued by the competent prefecture. Such licenses can only be granted after submission of a study presenting the exact terms of organization and operation in view of the accomplishment of the respective task. Especially in case of storage, disposal and recovery, one must additionally submit further studies in order to also obtain an environmental permit. Establishments or undertakings carrying out their own waste disposal at the place of production or carrying out recovery of their own waste may be exempted from the above mentioned permit requirements. Such exemptions can only be granted on the basis of a declaratory act issued by the Secretary General of the Region.

## B. Regulation of the sustainable management of packaging and other specific products

### 1. General outline of the existing legal framework

Specific aspects of waste management are regulated by specialized provisions, such as those regulating the sustainable management and recovery of specific waste categories. The principal instrument in this respect is Law 2939/2001 setting out the general principles for the sustainable management of packaging in general as well as of all other products which are in any way recoverable. Additionally, a number of particular ministerial decisions and presidential decrees have been issued regulating waste management with respect to particular products such as used tyres and oils, batteries and accumulators, electrical and electronic equipment, etc.

Worth mentioning in this respect is the general obligation set by law for all persons undertaking the production, packaging or distribution of recoverable packages and other products to either organize a system for waste management on their own or participate in an existing collective system. Such systems have to undergo a particular procedure and meet specific requirements set by law. Consequently, several systems of sustainable waste management applicable to packaging or otherwise have been established. All such systems operate under the supervision of a National

Organization (E.O.E.D.S.A.P.–“National Organization for the Alternative Management of Packaging and Other Products”), which is competent for granting the necessary permissions and for performing the respective audits.

### 2. Forthcoming amendments

On January 2010 a draft bill was published for public consultation by the Ministry of Environment, Energy and Climate Change, foreseeing a series of amendments to the existing legal framework for the sustainable management of packaging and other products. The amendments introduced by this draft bill mainly provide for the following developments: a) Enhancement of the efficiency of E.O.E.D.S.A.P; b) Assurances as to the non-profit character of all particular systems of sustainable waste management; and c) Amendment to the calculation method for the fees paid by the municipalities to the waste management operators, henceforth depending on the quantity of waste delivered and, thus, aiming to make sustainable waste management of packaging economically reasonable for the municipalities. The draft bill was submitted to the Greek parliament on March 2010 and has not yet been adopted.

Dr. Lazaros Sidiropoulos

## Financing of Investments in the “Green Economy” Sector

Despite the current financial downturn, or to put it in another way, as a reaction to it, Greece seems to be determined to emphasise the promotion of the so called “green economy”, considering this sector as its principal exit from the recession. For this reason a series of new actions and policies related with the financing of investment projects in the green sector have been announced for the very near future. According to an announcement by the Ministry of Environment, Energy and Climate Change, an overall budget of **5,5 billion€** is intended to be made available for “green” projects and actions expected to take place in the following years.

Considerable public funding for “green economy” projects is expected to derive from the Greek National Strategic Reference Framework (ESPA) under the 4th European Community Support Framework from 2007 to 2013. The Greek Parliament passed on March 2010 a new law (Law 3810/2010) in order to revise ESPA; more precisely, the procedures of application, assessment and approval of ESPA projects undergo thereby drastic changes with the view to their simplification and in order to speed up the pace of absorption of the respective European funding.

Another important instrument for financing investment projects in the “green economy” as well as in many other sectors of economic activity more generally is the so called “Development Law”, which shall provide considerable financial aids and incentives to investments exceeding certain thresholds, possibly including cash grants, tax allowances or other forms of subsidies. Since the former Development Law (L. 3299/2004) is no longer in force as of the beginning of this year, investors will have to wait for the new law on investments, a draft of which was published for public consultation on May 2010 by the Greek Ministry of Economy, Competitiveness and

Shipping. Although it is not yet possible to be aware in full of the precise content of this new bill, since the Ministry did not present a full draft but only a text encompassing the basic principles of the forthcoming bill, the main scope of the new bill is to introduce favorable provisions for investments by simplifying and speeding-up the procedures of examination of the relevant applications for financing.

A new draft bill has also been announced to be published soon, introducing the so called “Green Fund”. The Green Fund shall have the legal form of a Société Anonyme operating under the supervision of the Ministry of Environment, Energy and Climate Change and is intended to become the main instrument for the financing of projects and actions of environmental interest.

Several other programs of support for “green” business activities are also expected to be announced within the next months. Among others an investment program for the environmental reconstruction of existing industrial areas as well as for the construction of 3 new “green” industrial areas and of 10 “environmental business parks” was already announced by the Minister of Economy, Competitiveness and Shipping and the Minister of Environment, Energy and Climate Change.

Finally, it should be remarked that investments in “green economy” projects are definitely going to benefit also from other measures aiming to promote financial development more generally. One should note in this respect the new draft bill, aiming to simplify relevant procedures and substantially shorten the overall time needed for the establishment of a company, which was submitted to the Greek Parliament on May 2010.

Dr. Lazaros Sidiropoulos

## The new Draft Bill regulating the ESCOs and other issues related to the Improvement of Energy End-Use Efficiency

A new draft bill implementing Directive 2006/32/EC on energy end-use efficiency and energy services was published for public consultation on March 2010 by the Greek Ministry of Environment, Energy and Climate Change, but has not yet been submitted to the Greek Parliament.

The draft bill includes a set of policies and measures aiming to promote the reduction of energy consumption by consumers and the improvement of energy end-use efficiency. It also sets the conditions for the development of a market of energy services. In this new setting great importance is attached to the so called energy service companies (ESCO). According to the draft bill ESCOs shall deliver energy services or other energy efficiency improvement measures to a user's facility or premises and accept the financial risk of so doing. Thus, the payment for the services delivered shall be based on the achievement of energy efficiency improvements and on the satisfaction of the agreed performance criteria.

More specifically, the draft bill sets out the basic principles of the so called "energy performance contracts" (EPC), agreed between consumers and ESCOs, pertaining, among others, to the conditions of payment, the participation of third parties with a view to financing and the supply of equipment. Specific reference is made also to the relationship between ESCOs and public legal entities. Moreover, a particular type of registration procedure in respect of all ESCOs operating in the country is

envisaged. Equally, a list of more concrete requirements to be fulfilled by ESCOs shall be included in a presidential decree to be issued within 3 months following the issuance of the bill.

Apart from the stipulations regulating the operation of ESCOs and the respective EPCs, the draft bill aims to regulate a wide range of issues related to the improvement of energy efficiency. Thus, an overall national indicative energy savings target of 9 % for the period until 2016 is being set out, combined with some references on the methodology of its calculation as well as on the Energy Efficiency Action Plans (EEAP) to be periodically submitted to the Commission. Further stipulations refer to the improvement of energy end-use efficiency in the public sector, as well as to some obligations of energy distributors, distribution system operators and retail energy sales companies and, moreover, to the performance of energy audits.

Finally, the draft bill foresees the issuance of a Joint Ministerial Decision within 6 months after the issuance of the bill, which shall establish specific funding mechanisms or other initiatives in order to promote the improvement of energy end-use efficiency and the development of a market of energy services. Also envisaged is the issuance of yet another ministerial decision providing specifically for the granting of subsidies for actions related to the accomplishment of the above targets.

**Dr. Lazaros Sidiropoulos**

## The new Law on Renewable Energy Sources

In the beginning of December 2009 a number of amendments to the existing legal framework on Renewable Energy Sources (RES) were presented for public consultation by the Greek Ministry of Environment, Energy and Climate Change. The law, which was finally adopted by the Greek parliament on May 2010, introduces, among others, the following significant changes:

### Targets

The law sets a national target share of 20% RES in the final energy consumption by 2020, exceeding thus the respective target of 18% laid down for Greece in Directive 2009/28/EC on the promotion of the use of energy from RES.

### Licensing

The legal framework establishing the licensing procedure for RES projects is revised and radically simplified. Several new amendments (such as the introduction of the possibility of simultaneous and parallel applications for more than one of the required permits, instead of the existing step-by-step application procedure) shall provide for a reduction to the overall time needed for the completion of the licensing procedure. The competent authority for the issuance of production licenses will henceforth be the Regulatory Authority for Energy, the competence of which was up to this day restricted to delivering opinions to the competent Ministry. Moreover, a wide range of cases is henceforth fully exempted from the obligation to obtain a production license or any other form of exemption decision, including photovoltaic projects with a capacity of up to 1 MW as well as wind energy projects with a capacity of up to 100 kW.

### Environmental terms

Several amendments aim specifically to shorten and simplify the environmental licensing procedure. RES investors will henceforth only need to obtain one instead of two environmental permits. The issuance of a preliminary environmental permit which was up to now necessary in order to obtain a production license will no longer be required. Therefore, the issuance of a production license will no longer depend on the fulfillment of environmental terms. Moreover, a great number of cases are fully exempted even from the remaining obligation to obtain an Approval of Environmental Terms, including photovoltaic projects with a capacity of up to 0,5 MW, wind energy projects with a capacity of up to 20 kW as well as all photovoltaic and wind turbines installed on buildings and in industrial facilities regardless of their capacity.

### Tariffs

A new table of feed-in tariffs (FIT) is being introduced, foreseeing higher FITs for most RES categories, except for photovoltaics which for the most part remain unchanged. In addition, according to the new law the listed FITs shall be further increased up to 15-20%, in case an investment in a RES project takes place without any form of state subsidy. This last provision exceptionally does not apply, however, to photovoltaic projects.

#### Installation in terms of spatial planning

The so called “Special Framework for Spatial Planning for RES”, setting the conditions of installation of RES projects, undergoes considerable amendments in view of making the terms for installation of RES projects more favourable for investors. Thus, a number of restrictions regarding the areas in which the installation of RES projects is allowed to take place was abolished, whereby some specific aspects which were so far ambiguous are now being definitely clarified.

#### Green buildings

The draft bill also introduces certain amendments to the recently issued Law 3661/2008 on the improvement of energy performance for buildings. The obligation incumbent on owners of new buildings as well as on owners of older buildings undergoing a major renovation with a total floor

area over 1000m<sup>2</sup> to meet a set of minimum requirements regarding their energy performance is now extended to all buildings regardless of their floor area. Additionally, new provisions are being introduced aiming to promote the use of RES for covering the energy needs of new buildings, with specific targets set for the end of 2019 (and 2014 as regards public buildings).

#### One stop shop

Finally, a new agency shall be established at the new Ministry of Environment, Energy and Climate Change which is expected to operate as an “one stop shop”, providing all interested investors with necessary information and assistance with regard to all matters related to RES investment projects.

**Dr. Lazaros Sidiropoulos**

## Legislative and Administrative Measures for the Improvement of the Energy Performance of Buildings

On January 2010 the Ministry of Environment, Energy and Climate Change published for public consultation the drafts of two legal texts, aiming in this way to complete a set of legislative and regulatory efforts to promote the improvement of the energy performance of buildings. Both the draft of a Joint Ministerial Decision referred to as “Regulation of the Energy Performance of Buildings” as well as the draft of a Presidential Decree “on Energy Inspectors” were long expected, both being necessary instruments for the execution of Law 3661/2008 “on the Reduction of the Energy Consumption of Buildings” (implementing Directive 2002/91/EC), since they include all technical details for its application. On April 2010 the Regulation of the Energy Performance of Buildings was finally issued (Joint Ministerial Decision 5825/2010), but it shall come into effect 3 months after the day of its publication.

After both aforementioned acts will come into effect, the application of a series of new measures and procedures, as already foreseen in Law 3661/2008 (which was meanwhile amended and improved by article 10 of the new law on RES, issued on May 2010), will be finally made possible, aiming to fully change the existing construction requirements and procedures of building inspections. All new buildings as well as all existing buildings undergoing major renovation must meet a set of minimum requirements regarding their energy performance. More specifically, after the completion of the construction or renovation owners are obliged to apply for an energy performance certificate. This certificate is also necessary each time a building is sold or rented. The energy performance of buildings will be calculated on the basis of several factors, such as their thermal characteristics, heating installation and hot water supply, air-conditioning installations, ventilation, their position and orientation, and others.

Further measures include, moreover, the filing of an energy performance study as a requirement for the issuance of a building license and the mandatory regular inspection of boilers operated by non-renewable fuel as well as of air-conditioning systems of more than 12kW. All the above inspections and the certification of buildings shall be carried out by qualified experts, designated as “energy inspectors”.

Worth mentioning in this respect is a particular program which has been announced by the Greek government and which aims to offer the possibility of financing projects for the improvement of the energy performance of buildings. This program which is entitled “Saving costs at home” was first announced in July of 2009 by the Ministry of Development, but was not launched as planned. In March 2010 the Ministry of Environment, Energy and Climate Change announced that this program will finally be launched as soon as the aforementioned “Regulation of the Energy Performance of Buildings” will officially come into effect, i.e. by July 2010.

The program shall apply to buildings constructed before 1 January 1980 and which are mainly used as residences and located in areas with a “zone price” under 1.500 €/m<sup>2</sup>. The financing will concern specific actions of improvement of the buildings’ energy performance (thermal insulation of the shell and the door frames of the buildings, installation of insulating glass units, replacement of old boilers and installation of solar water heaters). The concrete form of the financial aid will depend mainly on the annual income of the owners and will consist of direct subsidies covering 30% of the total costs for owners with an annual income not exceeding €15.000, or of loan interest subsidies for owners with an annual income not exceeding €30.000 combined with certain tax exemptions.

Dr. Lazaros Sidiropoulos

## The Treaty of Lisbon and the Energy Charter Treaty

The Treaty of Lisbon, or to use its formal title 'Treaty for the Functioning of the European Union' ('TFEU') entered into force on 1 December 2009. Under the TFEU the Union has exclusive competence for the pursuance of a common commercial policy, including foreign direct investments ('FDIs'). Such competence encompasses the conclusion of treaties concerning inter alia the pre-investment stage, investment protection, expropriation requirements and dispute settlement mechanisms. The treaty does not define 'foreign direct investments'. Although broad interpretations of FDIs could amplify the competence of the Union, portfolio investments cannot be covered by such definition and as a consequence are excluded from the Union's competence.

The Energy Charter Treaty ('ECT') was signed in 1994 by the European Communities and its member states and entered into force in 1998. The ECT is a multilateral treaty in the field of energy and contains provisions on investment protection, trade, transit, competition, environmental concerns and dispute settlement. The ECT's definition of investments is wider than foreign direct investments. A mismatch between the scope of the Union's competences (i.e. the content of the notion 'foreign direct investments') and the competence of the member states as ECT contracting parties for foreign non-direct investments is inevitable and relevant to the settlement of investor-states disputes.

Under public international law the change of internal functioning of the European Union does not have an impact on the force of the ECT or bilateral investment treaties ('BITs') concluded by its member states. Three consequences are highlighted here. First, EU member states are obliged to take all appropriate steps to eliminate any incompatibilities with the EC/EU Treaties. Before the entry into force of the TFEU, in 2009, the European Court of Justice ('ECJ') found Sweden and Austria in breach of such obligation (Article 307 of the Treaty of the European Communities (Article 357 TFEU)), because BITs

concluded between these member states and third states impeded possible restrictions on movements of capital and payment, which according to TEC Articles 57(2), 59 and 60(1) could be adopted by the Council. The time periods needed for renegotiations were found inherently incompatible with the practical effectiveness of the Council's measures, while suspension/denunciation of the treaties were too uncertain in their effects to guarantee that the measures adopted by the Council could be applied effectively. One can guess that the European Commission, which is acting as the negotiator for such agreements (TFEU Article 218(3)), will be renegotiating new treaties with third states upon termination of existing treaties between the member states and third countries. Nonetheless, it is unclear what would be the case concerning Part III of the ECT on Investment Promotion and Protection.

Secondly, concerning investor-state dispute settlement ECT Article 26(3) provides as fora for the resolution of such disputes the ICSID, arbitration under UNCITRAL rules and arbitration under the Stockholm Chamber of Commerce. Nonetheless, the ICSID Convention is not open for signature to regional economic integration organisations, such as the EU. To the extent that under the TFEU the Union has exclusive competence, investors of ECT contracting parties are impeded from accessing a central forum for the resolution of investment disputes under the ECT.

Thirdly, and as a consequence of the EU's incapacity to become a party to the ICSID Convention, EU member states can be brought before an ICSID arbitral tribunal or any other arbitral tribunal for that matter and found in breach of ECT obligations because they have conformed to the Union's exclusive competence measures. This was the case before the Lisbon treaty (AES v. Hungary and Electrabel v. Hungary cases (ICSID)) and is still the case after its entry into force.

Danai Azaria