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# GREEK LAW DIGEST

The Official Guide to Greek Law

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## Kitsakis-Xylaki-Vlassis Law Office

INVESTING IN ENERGY  
Recent and forthcoming reforms in the energy market

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2nd EDITION



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**Greek Law Digest (GLD)**

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# GREEK LAW DIGEST

## ■ ENERGY- MINERALS



NOMIKI BIBLIOTHIKI

# INVESTING IN ENERGY

## Recent and forthcoming reforms in the energy market

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In August 2015, the Greek Government and the Bank of Greece, after a long period of negotiations with its creditors, entered into a new bail-out agreement with its creditors. A Memorandum of Understanding (MoU) was subsequently signed between Greece and the European Commission, acting on behalf of the European Stability Mechanism (ESM). In this document, Greece vowed to undertake ambitious objectives in terms of reforming the energy market in a way that is not solely confined to implementation of EU-law requirements, but which also aims at “achieving European best practices”, as the text states.

What this means exactly is described in detail in the provision of section 4.3 of the MoU. Section 4.3 contains a thorough list of legislative initiatives that the Greek government needs to undertake. This catalog can be found in Law 4336/2015, by which the legislator officially approved the MoU signed by the government. This report will strive to present an account – though not an exhaustive one – of the path that the Greek energy market is entering into after the 3<sup>rd</sup> MoU, the scope of which – in terms of reforming the energy market – is basically limited to the gas and electricity markets.

### **GAS MARKET**

Regarding the gas market, the MoU envisages further liberalisation steps (considering that the unbundling of gas transmission from other activities has already taken place), which focus on the distribution and supply of gas. The legislator has already implemented those obligations with the same law approving the MoU, namely Law 4336/2015.

#### **What are the main features of liberalization?**

The main scope of liberalising the gas market is to render every customer in the retail market an eligible customer within the meaning of Directive 2009/73/EC. According to this Directive, the customer should be free to switch suppliers at any time, bound of course by his specific contractual obligations. Article 82 of the reformed law 4001/2011 provides for a detailed account of the various categories of eligible customers. The tool chosen to achieve this kind of market-opening is the unbundling of distribution system operators (DSO) from gas suppliers, the procedure, timeframe (starting from the 30<sup>th</sup> of May 2016 with the unbundling of accounts) and legal details of which are being extensively stated in the law. Next to the unbundling of existing gas suppliers from the distribution activity, the legislator provides for the possibility of new players entering the market by applying for a license as a DSO or/and as a supplier for a certain geographical area (article 80 of Law 4001/2011).

## Who is the owner of the networks?

Networks ownership affects the value of each company. It therefore seems pertinent to discuss the relevant provision in the law. In the future, the ownership of the distribution network will be split. The “old” network, which had been constructed by the incumbent DEPA S.A. remains part of its assets. The same applies to any improvements of the same network that will be undertaken by the DSO (Distribution System Operator).

On the other hand, elements of the Network that can be considered an extension of the existing network will be part of the DSO's assets. A slight potential of frictions seems to exist at this point on whether we have to deal with an extension of the existing network or an improvement of it.

While the overhaul of the gas market was the subject of this first legislative initiative (as a “prior” to the disbursement of the first tranche to the Greek government), most of the remaining provisions have yet to be implemented. We will attempt to give an overview of the basic features of forthcoming reforms in the energy market, based on the rich debate that has already taken place.

## RENEWABLE ENERGY MARKETS

### How is the current RES aid scheme going to be reformed?

With reference to Renewables, Greece is currently implementing a feed-in tariff system, which is market-independent, operating on a fixed-price basis. However, concerning projects of a certain capacity (more than 500 kW or 3 MW of installed electricity capacity with reference to wind energy) the ***Guidelines on State aid for environmental protection and energy 2014-2020*** created the obligation for Member States to design a market-based scheme, whereby “aid is granted as a premium in addition to the market price (premium) whereby the generators sell its electricity directly in the market” (Nr. 124 par. a of the *Guidelines on State aid for environmental protection and energy 2014-2020*). Future legislation will aim at implementing this provision.

### What are the main elements of the new sliding Feed In Premium (FIP) scheme?

- According to available information, the fixed payment will no longer apply. Instead, RES generators will participate on the Greek spot market, operated by the Hellenic Electricity Market Operator S.A.(LAGIE).
- On top of the market price, beneficiaries will receive a premium. The methodology for calculating the premium is expected to be based, inter alia, on a “specific market price”. The latter shall take a technology-specific approach, in order to reflect the average production cost of the various technologies, thereby taking the specificities of variable RES technologies into consideration.
- Finally, the time-reference for the market price shall be one month, which is considered adequate in order to tie RES generators to the electricity market price signals and create appropriate incentives. The tariffs will reflect RES generation cost and will include a reason-

able rate of return. As of January 2017, all operating aid shall be granted through a bidding process, which will then be the reference for the tariffs.

- The premium is foreseen to be a sliding one, in order to avoid overcompensation and most probably with a “floor”, so as to provide the system with some stability.

- Finally, the balancing of the transmission system has been a concern of the regulatory framework (Nr. 124 par. b of the *Guidelines on State aid for environmental protection and energy 2014-2020*). In order for the RES generators to participate in the market, a forecast for their expected generation is necessary. To that end and in order to avoid any favourable treatment of competing companies with a big RES portfolio who could easily assume the costs of such a forecast, the so-called “aggregators” (in this case, specialised service providers who will facilitate the participation of RES generators on the energy market) shall become a part of the market. It is not yet clear which legal responsibilities those generators will assume and if the cost of their service will become part of the reference tariffs for the aid.

## ELECTRICITY MARKET

Fundamental reforms are still pending, and have done so for arguably a very long time. The MoU and Law 4336/2015 envisage certain steps aimed at opening the market by promoting competition. An array of structural changes are intended as well as provisional measures, which will be replaced in 2017, when the so-called “target model” will apply.

### a) The Transmission system

The most politically controversial matter concerns the ownership unbundling of the transmission system operator, ADMIE S.A. from PPC S.A. and whether this will take place via privatisation of the company or in another way. The MoU and the subsequent October 2015 report on Greece’s compliance by the EU Commission do not insist on privatising ADMIE, as long as the government can come up with proposals that can achieve equivalent results in terms of enhancing competition. Today PPC S.A. is the sole shareholder of ADMIE S.A., whereby the Hellenic Republic controls, directly and indirectly, 51 % of the ordinary shares of PPC S.A.

The issue is not a new one. A tender regarding the sale of 66% of the company’s shares had reached its final stage just before it was abandoned due to political circumstances in late 2014. The August 2015 MoU and Law 4336/2015 call once more for a complete ownership unbundling from PPC but leave options open for its implementation.

### What could be an alternative to Privatisation?

Although the possibility of implementing the model of an Independent System Operator (ISO) is foreseen in Directive 2009/72/EC, this option was quickly abandoned in favour of a complete ownership unbundling. As the October progress-report states: “At the end of the process the Hellenic Republic will hold 51% of ADMIE, with a strategic investor (another TSO) holding 20% and 29% on the stock market. The HR and the investor will co-decide on the CEO and the business plan, and the shares of ADMIE and of PPC held by the HR will be

managed accordingly to the ‘unbundling within the State’ principles contained in art. 9 of Directive 2009/72/EC”.

### What is an “unbundling within the State”?

An “unbundling within the State” means that both ADMIE and PPC are foreseen to be owned (by majority) by the Greek State. This could prove to be in conflict with Directive 2009/72/EC, which requires that the same person is not allowed to control both the vertically integrated undertaking, in that case the PPC, and the transmission system operator. That situation of an “unbundling within the State” is actually foreseen in Recital 23 of Directive 2009/72/2009 and can result in various forms of implementation. Nevertheless, it is to be expected, that a proposal, which would consist of two Ministries controlling each a sector (generation/supply – transmission) – like the one currently being discussed –, would probably be faced with reluctance.

### Are there any obstacles for strategic investors?

Veto rights in relation to management and business plans can be considered a form of control. In that case, since such rights appear to be part of the general framework of the future unbundling, it seems that investors coming from the controlling – again directly or indirectly – shareholder of any company active in the generation or the supply side of the market are not eligible. Accordingly, the text of the MoU makes explicit reference to “another TSO” as the only meaning of the term “strategy investor”. On the other side, from a regulatory perspective there is no such impediment as to the remaining 29% of shares that will be listed on the stock market.

### Implementation of Law 4335/2015

Law 4389/2016 proceeds with the implementation of the provisions of Law 4335/2015 regarding the full ownership unbundling of the Greek Electricity TSO, ADMIE S.A., from PPC S.A. Given the precarious financial condition of the Hellenic Republic, buyer of 51% of the Shares of the ADMIE, the law provides for a rather complex procedure, which seems to serve the dual-purpose of both paying a fair price to the vendor PPC S.A. while at the same time avoiding any real budgetary costs for the Hellenic Republic (HR). The main steps for attaining such a result are the following:

- The General Assembly of PPC shall approve the sale and transfer of shares of ADMIE amounting to at least 25% of its share capital to a holding company (to be established in the future). The HR shall be the sole shareholder of that company called DES ADMIE. This way, the HR will acquire a 25% of direct control over ADMIE.

Furthermore the Holding Company shall become the assignee of all tax claims of the HR (towards PPC and ADMIE generated by the entire transaction, up to a total amount not exceeding the amount required for the acquisition of the above mentioned 25% of the share capital of ADMIE S.A. Such claims may be used as a security in order for the Holding Company to get access to bridge financing for the acquisition of said 25%.

- The General Assembly of PPC shall also proceed with the approval of a sale and transfer of at least 20% (but no more than 24%) of the share capital of ADMIE to a strategic investor. The strategic investor shall be the highest bidder in an international tender process. The law defines the term “strategic” in the following way: In order for an investor to participate, he shall be either (a) an electricity transmission system operator which is a member of the European Network of Transmission System Operators for Electricity (ENTSO-E) or an electricity transmission system operator participating in an electricity transmission system operator which is a ENTSO-E or (b) a joint venture in which a System Operator, who falls under (a), participates.
- Moreover the GA of PPC shall decide on the formation of a second holding company of which PPC shall be the sole shareholder. PPC will contribute to this company 51% of the shares it holds on ADMIE through an increase of share capital of the Holding Company and a contribution, in kind, of shares issued by ADMIE SA, corresponding to 51% of the share capital of ADMIE SA. Furthermore the GA shall decide upon a) the reduction of PPC’s share capital for the purpose of the distribution in kind to its shareholders and b) the transfer, as a result of the distribution in kind, to its existing shareholders of the shares it holds in the holding company. In that way, the HR, as the major shareholder of PPC today, acquires a majority stake of that 51% and becomes – combined together with the above 25% already acquired through the first holding company – the major shareholder of ADMIE. Additionally, this structure attempts to satisfy the regulatory requirements for an “unbundling within the state” as provided for in the progress report of October 2015 concerning the MoU between the HR and its creditors.

In addition to the above, the holding company is obliged to apply promptly (without undue delay) for its listing in the regulated securities market of the Athens Stock Exchange. As PPC is a listed company and ADMIE not and the shareholders of PPC would get ADMIE’s shares and give-up PPC’s shares, the legislator attempts to render those two elements (PPC’s shares – ADMIE’s shares) comparable, in order to encounter any objections by the shareholders of PPC that could hinder the reduction of capital or any other decision to be taken by the GA of the Company.

- Finally, the GA of ADMIE will undertake an increase of its share capital through capitalisation of reserves, followed by a reduction of share capital and subsequent payment to its shareholder of the amount resulted of such reduction. This amount will form a major part of the total amount paid to PPC as the price for the sale of ADMIE’s shares.

The law provides for a very tight timeframe for implementing the above described plan. The most striking example of this is that the international bidding tender for the preferred strategic investor must be concluded by the end of October 2016.

## **b) Capacity Market**

### **What are the main characteristics of the new FRM?**

FRM stands for Flexibility Remuneration Mechanism and is an essential element of the Greek Capacity Market. The general rationale of such a mechanism is the need to address the inflexibility of demand for energy coupled with the fluctuation of supply. This inflexibility is caused, on the one side, by the development and prioritized participation of variable RES units and

on the other side by the need for system reliability and security of supply. Important amounts of stand-by power capacities are required. The concrete mechanism focuses on fast ramping requirements that can be met only by gas plants. The commitment of the generation units for this function is supposed to cause additional costs that need to be compensated.

Greece adopted a capacity mechanism in 2005, which was never implemented. Instead, a preliminary capacity mechanism based on payment of predetermined (regulated) fees to capacity providers was put in place. This mechanism ceased to exist at the end of 2015. The recently enacted Art. 143D of Law 4001/2011 provides for a further alternative of the same preliminary mechanism called the “transitory electricity flexibility remuneration mechanism” (FRM). Under the (current legal) framework the following categories of generators are eligible for such remuneration: a) combined cycle gas turbine, b) open cycle gas turbine c) combined Heat and Power, for the part of the power produced that is not being remunerated through the RES scheme and d) hydro. The total per unit remuneration is set to 45e/kW for the total period of 12 months since 1.5.2016, while the total remuneration shall not exceed 15 m Euro per production unit. The TSO will be monitoring payments, thereby maintaining financial neutrality.

Before the publication of the new law, the European Commission ruled on the FRM from the perspective of State Aid law. The decision (State Aid n SA.38968 (2015/N) Greece) is important because it sets time limits to the operation of the scheme and makes specific reference to the plans of the Hellenic Republic to implement the “EU target model” thereby modifying the parameters (such as the price cap for the energy-only market) of future capacity mechanisms.

Finally, in the general legal framework concerning security of supply, the FRM can be seen as the supply-side equivalent of the newly introduced demand-side related measure of “interruptibility”.

### **c) The retail Market - NOME**

An essential element of this quite heavy reform package of the Greek energy market concerns the liberalisation of the retail market of electricity. Today over 90% of the market is controlled by PPC S.A. That is bound to change in the future, leading primarily to a 25% reduction of PPC’s market-share in the retail and wholesale markets, and with the objective of further reducing it to 50% by 2020. This will be accomplished by implementing a framework similar to that introduced by the French NOME system of auctions. The aim here is to give the rest of the supply market preferential access to “cheap energy” produced by the PPC’s lignite plants, thereby reducing sourcing costs for the other players. While important elements of the mechanism such as the preassigned capacity, the total amount of withdrawal rights and the allocation rules are not yet established, the discussions are proceeding rapidly during the last few months.

Interestingly enough, despite the fact that the previous plan of part-privatisation (30% of the company’s production asset base and 30% of its customer base – Law 4273/2014) of PPC appears to have been abandoned, the MoU keeps an open window, as it states that *“in case it is not possible to reach an agreement on NOME by the end of October 2015, the authorities will agree with the institutions structural measures to be immediately adopted”*.

In order to implement the above mentioned provisions of Law 4336/2015 regarding a mechanism to be put in place that would reduce the market power of PPC under 50% until

2020, the Greek Government approved a plan for the operation of the NOME mechanism referred to in Law 4336/2015 (decision 38, national gazette B 1593) on 6.6.2016. The plan distinguishes between the current structure of the market (mandatory pool) and the future one, where forward contracts between the participants will be possible. Under the current regulatory framework suppliers other than PPC will purchase from the latter specific virtual forward products through a bidding process. PPC will be under the obligation of physical delivery of the products. The bidding process will be organised and monitored by the Market Operator LAGIE S.A. As already mentioned, only energy suppliers are eligible to participate as buyers. Art. 2.3.2 of the decision makes explicit reference to the methodology for establishing the lowest price in the bidding process. Finally, the decision provides for specific characteristics of the virtual forward products. They shall be of a nature that enables the buyers to steadily enter the retail market. The buyers shall also have to right to trade with those products in a secondary market.

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