

Case No COMP/M.4197 - E.ON/Endesa

Only the Spanish text is authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 21

Date: 20/12/2006



COMISIÓN EUROPEA

Bruselas, 20.12.2006

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PUBLIC VERSION

Commission Decision

of 20.12.2006

**relating to a proceeding pursuant to Article 21 of Council Regulation (EC) No 139/2004
on the control of concentrations between undertakings**

(Case No COMP/M.4197 – E.ON/Endesa)

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(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, and in particular Article 21 thereof,

Having given the Spanish authorities the opportunity to make known their views on the preliminary position of the Commission,

Whereas:

- (1) On 3 November 2006, the Spanish Minister of Industry, Tourism and Trade adopted a resolution modifying some of the conditions that the Spanish Energy Regulator (“CNE”) imposed on the proposed concentration between E.ON A.G. (“E.ON”), an energy company with its seat in Düsseldorf, Germany, and Endesa S.A. (“Endesa”), an energy company with its seat in Madrid, Spain.
- (2) The present decision concerns the compatibility of some of the modified conditions with Article 21 of Council Regulation (EC) No 139/2004 (the “Merger Regulation”).¹

I. THE NOTIFIED OPERATION

- (3) On 21 February 2006, E.ON announced its intention to launch a cash offer for the acquisition of the entire share capital of Endesa. The same day, E.ON filed with the Spanish Stock Markets Authority (“CNMV”) the prospectus of the tender offer. The CNMV informed E.ON that this offer was competing with that already launched by the Spanish energy company Gas Natural SDG S.A. (“Gas Natural”).

¹ OJ L 24/1, 29 January 2004.

- (4) E.ON is a company (Aktiengesellschaft) with its seat in Düsseldorf with its main activities in the electricity and gas sectors, which are carried out throughout Europe and in the United States. E.ON's shares are listed on all German stock exchanges as well as on the New York Stock Exchange. E.ON's shares are widely held and none of its shareholders owns more than 5% of E.ON's shares.
- (5) Endesa is a company constituted according to Spanish law with its seat in Madrid, that is active in the energy sector in Spain as well as in other European countries, South America and North Africa. Endesa's shares are listed on the Madrid and the New York Stock Exchange and are also widely held. Its shareholders include Spanish companies and international investors.
- (6) On 16 March 2006, E.ON notified to the Commission the concentration arising from this bid under the Merger Regulation. On 25 April 2006, the Commission adopted a decision pursuant to Article 6(1)(b) of the Merger Regulation, whereby it (i) established that this operation constituted a concentration with a Community dimension pursuant to Articles 1 and 3 of the Merger Regulation and (ii) declared it compatible with the common market.²

II. BACKGROUND INFORMATION

Gas Natural competing bid

- (7) On 5 September 2005, Gas Natural filed its intention to launch a cash and shares offer bid for the entire share capital of Endesa with the CNMV. Gas Natural's prospectus was authorised by the CNMV on 27 February 2006, after receiving all regulatory approvals, including the Spanish Council of Ministers' authorisation pursuant to the applicable Spanish competition rules and CNE's authorisation.
- (8) The period for acceptance of Gas Natural's bid by Endesa's shareholders started to run on 6 March 2006 and had an initial duration of 45 calendar days. However, the expiry date has been suspended following two injunctions of Spanish Courts.
- (9) In particular, on 21 March 2006, a Spanish Commercial Court issued an order suspending both Gas Natural's bid and the execution of an agreement concluded between Gas Natural and Iberdrola concerning the sale of some assets in case of a successful bid for Endesa. The suspension was conditional upon Endesa presenting a caution of EUR 1 billion, in order to repair any possible damages that may arise from the adoption and maintenance of the interim measures. On 3 April 2006, Endesa presented the caution. On 5 April 2006, the CNMV informed the market of the suspension of Gas Natural's bid.
- (10) On 21 April 2006, the Spanish Supreme Court decided to suspend the Council of Ministers' merger decision conditionally authorising Gas Natural to acquire Endesa. This order also subjected the suspension to Endesa presenting a caution of EUR 1 billion. To this end, the caution presented before the Commercial Court could be used. The Spanish Government and Gas Natural appealed the Supreme Court's injunction but the appeal was rejected on 19 June 2006. On 28 July 2006, Gas

² See Case No COMP/M. 4110 E.ON/Endesa, decision of 25 April 2006.

Natural lodged an application before the Spanish Constitutional Court concerning the Supreme Court order.

- (11) Endesa has recently requested that the above-mentioned interim measures be lifted.

New Spanish legislative measures

- (12) As indicated, E.ON launched its offer over Endesa on 21 February 2006. However, a few days after the announcement by E.ON of a public bid over Endesa, the Spanish Council of Ministers adopted a new urgent legislative measure, Royal Decree-Law 4/2006 (the “Royal Decree”), increasing the supervisory powers of CNE³.
- (13) Pursuant to this Royal Decree, the acquisition by any company of more than 10% of the share capital, or any other participation conferring significant influence, in a company (directly or indirectly) active in a regulated sector⁴ or in certain other activities has to be previously approved by CNE. CNE has to apply a legal test based on the following general grounds:
- (a) the existence of significant risks or negative (direct or indirect) effects on regulated activities or certain activities subject to administrative intervention;
 - (b) the protection of the public interest in the energy sector and in particular the guarantee of proper maintenance of sector policy objectives, with special consideration given to assets deemed to be strategic⁵;
 - (c) the possibility that an entity undertaking regulated activities or certain activities subject to administrative intervention cannot guarantee the exercise of these activities, as a result of any other activities of the acquirer or the target entity;
 - (d) public security.
- (14) The same authorisation is required for the acquisition of assets.
- (15) It should also be mentioned that a transitional provision of the Royal Decree establishes that the new rules are applicable to all pending operations, but not to those operations already authorised by CNE (such as Gas Natural’s bid)⁶. In

³ Royal Decree-Law 4/2006, of 24 February, modifying the functions of the Comisión Nacional de Energía, ratified by the Spanish Assembly by Resolution of 23 March 2006.

⁴ Regulated activities mainly comprise the transport and distribution of gas and electricity.

⁵ The Royal Decree defines as strategic the following assets: natural gas basic network, international gas pipelines (Spain being destination/transit country), electricity transport infrastructure, non-mainland (i.e. islands and extra peninsular territories) infrastructures for generation transport and distribution of electricity, nuclear power plants and thermal plants using domestic coal.

⁶ Gas Natural had to obtain CNE authorisation for its bid under the pre-existing rules because it is itself an undertaking active in the regulated energy sector in Spain. This authorisation was granted before the entry into force of the Decree Law.

practice, the only pending operation covered by this provision was E.ON's bid, which at the moment of its launch did not require CNE's approval⁷.

The Commission's infringement procedure concerning the Royal Decree

- (16) On 3 May 2006, the Commission opened an infringement procedure against Spain with regard to the Royal Decree, by sending the Spanish authorities a letter of formal notice pursuant to Article 226 of the Treaty⁸.
- (17) According to the Commission's position, the provisions of the Royal Decree granting special powers to CNE could be contrary to fundamental principles of EC law such as the freedom of capital movement (Article 56 of the Treaty) and the right of establishment (Article 43 of the Treaty). This in particular because the grounds on the basis of which CNE may grant or refuse its authorisation are vague and indeterminate and therefore give this authority wide discretionary powers and raise concerns as to the proportionality of the measure. Spain replied to this letter of formal notice by letter of 25 July 2006.
- (18) Having analysed the Spanish reply to the letter of formal notice, the Commission still took the view that the special powers provided for by the Spanish law may unduly restrict the freedom of capital movement and the right of establishment and therefore delivered a reasoned opinion on 29 September 2006. In a letter dated 29 November 2006, the Spanish authorities replied to this reasoned opinion, restating the points made in their previous reply to the letter of formal notice.

III. MEASURES ADOPTED BY SPAIN IN RELATION TO THE E.ON/ENDESA CONCENTRATION

- (19) Pursuant to the new Royal Decree, on 23 March 2006, E.ON requested CNE to authorise (unconditionally) the proposed acquisition of Endesa. On 27 July 2006, CNE adopted a decision submitting this operation to a number of conditions ("CNE's decision"). CNE's decision was adopted and entered into force without prior communication to (and approval by) the Commission (see below section IV).
- (20) On 10 August 2006, E.ON lodged an administrative appeal before the Spanish Minister of Industry, Tourism and Trade (also simply, "the Minister") against CNE's decision, requesting in particular the declaration that the CNE is not competent to impose conditions; alternatively, that the bid be unconditionally authorised; alternatively, that some of the conditions be annulled or modified⁹.

⁷ Under the then applicable Spanish legislation, CNE was not competent to give its prior approval to such an operation. CNE was only required to grant a prior authorisation for the acquisition of stakes in any undertaking by companies directly involved in regulated activities in Spain. Not being involved in regulated activities in Spain, E.ON did not therefore have to obtain CNE's prior authorisation for its bid. Moreover, CNE had to apply a much narrower test based only on the ground mentioned above sub (a).

⁸ Infr. No 2006/2222.

⁹ CNE's decision has also been appealed by Endesa, Iberdrola, Gas Natural and the Association of minority shareholders in energy companies (Asociación de Accionistas Minoritarios de Empresas Energéticas).

- (21) On 3 November 2006, the Minister decided on E.ON's administrative appeal and adopted a resolution partially modifying CNE's conditions. E.ON publicly declared that it accepted the modified conditions.
- (22) On 16 November 2006, CNMV authorised E.ON's bid. The acceptance period for this bid was however suspended, as a consequence of the national stock market legislation, because of the suspension by national courts of Gas Natural's competing bid¹⁰. Following CNMV's authorisation, on 17 November 2006, Endesa requested the lifting of the above-mentioned interim measures.¹¹

IV. THE COMMUNICATION AND STAND-STILL OBLIGATION UNDER ARTICLE 21 OF THE MERGER REGULATION

- (23) Pursuant to Article 21 of the Merger Regulation, the Commission has the exclusive competence to assess the competitive impact of concentrations with a Community dimension as defined in Articles 1 and 3 of the Regulation.
- (24) Article 21 provides that Member States shall not apply their national legislation on competition to such operations. Moreover, Member States can adopt measures which could prohibit, submit to conditions or in any way prejudice such operations only if
 - (i) the measures in question protect interests other than those taken into account by the Merger Regulation and
 - (ii) these measures are necessary and proportionate for the protection of interests compatible with the general principles or other provisions of Community law.
- (25) Public security, plurality of media and prudential rules are interests recognised as being legitimate ("recognised interests"). Measures genuinely aiming to protect one of these recognised interests and clearly in compliance with the principles of proportionality and non discrimination, which are liable to prohibit, submit to conditions or prejudice a concentration with a Community dimension can be adopted and enter into force without prior communication to and approval by the Commission.
- (26) In accordance with Article 21(4), second indent, of the Merger Regulation, national measures liable to prohibit, submit to conditions or prejudice a concentration with a Community dimension for the protection of any other interest must be communicated to the Commission before their adoption and entry into force. The Commission must then decide whether such measures are necessary and proportionate for the protection of an interest compatible with EC law and do not constitute a breach of general principles or other provisions of Community law, e.g. a means of arbitrary discrimination or a disguised restriction to the freedom of establishment or of the free movement of capital.

¹⁰ See Hecho Relevante No 72583 communicated to CNMV on 16 November 2006.

¹¹ See Hecho Relevante No 72619 communicated to CNMV on 16 November 2006.

- (27) In order to ensure the *effet utile* of Article 21(4), second indent, of the Merger Regulation, read in conjunction with Article 10 EC (obligation of loyal cooperation), that provision should apply whenever there are reasonable doubts as to whether national measures, which are liable to affect and, in particular, prohibit, submit to conditions or prejudice a concentration with a Community dimension genuinely aim to protect a “recognised interest” and/or comply with the principles of proportionality and non discrimination¹².
- (28) By letter of 27 March 2006, the Commission Services (Directorate-General for Competition) reminded these principles to the Spanish authorities with regard to the decision that CNE had to adopt on E.ON’s bid. In this context, DG Competition invited the Spanish authorities:
- (a) to transmit to the Commission any draft negative or conditional decision which CNE might consider to adopt regarding E.ON’s proposed acquisition of Endesa, and
 - (b) not to adopt and implement such a decision before the Commission had verified that it is necessary and proportionate for the protection of an interest compatible with EC law.
- (29) On 24 April 2006, Spain replied to this letter declaring that it disagreed with the position expressed by Directorate-General for Competition and, in particular, considered that the measures that CNE may adopt pursuant to the Royal Decree would not be subject to the stand-still obligation provided for by Article 21(4) of the Merger Regulation.

V. THE COMMISSION DECISION OF 26 SEPTEMBER 2006 PURSUANT TO ARTICLE 21 OF THE MERGER REGULATION

- (30) On 26 September 2006, the Commission adopted a decision relating to a proceeding pursuant to Article 21 of the Merger Regulation (“the first Commission Article 21 decision”), by which it declared that Spain had violated Article 21 of the Merger Regulation.
- (31) In particular, in Article 1 of this decision the Commission stated that Spain had violated Article 21 of the Merger Regulation due to the adoption, without prior communication to and approval by the Commission, of CNE’s decision subjecting E.ON’s acquisition of control over Endesa to a number of conditions (conditions one to seventeen and nineteen of that decision) contrary to Articles 43 and 56 of the EC Treaty and, as far as condition nine is concerned, to Article 97 of the Euratom Treaty.
- (32) Moreover, in Article 2 of this decision, Spain was required to withdraw without delay the conditions imposed by CNE’s decision which had been declared incompatible with Community law.

¹² See Commission decision of 20 July 1999 in case M.1616 – *BSCH/Champalimaud (interim measures)*, paragraphs 65-67.

VI. THE INFRINGEMENT PROCEDURE FOR NON COMPLIANCE WITH THE FIRST COMMISSION ARTICLE 21 DECISION

- (33) Not having been informed of any concrete measures taken for the withdrawal of the conditions illegally imposed by CNE's decision, on 18 October 2006, the Commission addressed to Spain a letter of formal notice pursuant to Article 226 EC for failure to comply with Article 2 of the Commission decision.
- (34) On 25 October 2006, the Spanish authorities replied to the letter of formal notice, stating that they did not fail to comply with Article 2 of the Commission decision, which did not identify any specific deadline for the withdrawal of CNE's conditions declared incompatible with EC law.

VII. THE DECISION OF THE SPANISH MINISTER

- (35) As indicated, on 3 November 2006, the Spanish Minister of Industry, Tourism and Trade decided on E.ON's administrative appeal against CNE's decision and adopted a resolution partially modifying CNE's decision ("the Minister's decision"). In particular, the Minister's decision modified CNE's conditions first to third, sixth, eighth to eleventh and fourteenth to sixteenth. The decision withdrew CNE's twelfth, thirteenth and nineteenth conditions. The fourth, fifth, seventh and seventeenth conditions were left unchanged. The modifications introduced by the Minister's decision will be briefly described below.
- (36) CNE's first condition imposed a number of corporate requirements on E.ON (i.e. to maintain Endesa as the parent company of its group for a period of 10 years, to maintain the companies of Endesa group as they stand now, and to keep Endesa's registered office and board of directors in Spain). The Minister's decision reduced the duration of the condition to five years, slightly modified its scope of application, and imposed on E.ON a new requirement concerning the continuity of Endesa's brand.
- (37) CNE's second condition imposed on E.ON the obligation to ensure that Endesa maintains a certain debt service ratio. The Minister's decision limited the duration of this condition to 3 years.
- (38) CNE's third condition allowed the companies of Endesa's group active in so-called regulated sectors¹³ or holding what are described as strategic assets to distribute dividends only if the earnings they generate are sufficient to cover their planned investments and the financial debt amortization and interest expenses. The requirement was imposed for the period 2006-2010, but CNE retained the power to extend it for other 5 years. The Minister's decision removed the reference to strategic assets and the possibility for CNE to extend the duration of the condition for another 5 years.

¹³ This refers to the sectors regulated under Spanish energy legislation, i.e. in particular the sectors which are subject to the Spanish legislation concerning the regulated electricity price.

- (39) By the sixth condition, CNE obliged E.ON to report, from the year 2010 onwards, on future investments in both so-called regulated activities and what is described as strategic assets. The Minister's decision limited the duration of the condition until 2015.
- (40) CNE's eighth condition required E.ON to commit to the natural gas supply plans submitted by Endesa to CNE. The Minister's decision substituted CNE's condition by obliging E.ON not to divert to markets other than Spain the annual natural gas supplies projected in plans submitted by Endesa to CNE and contracted by Endesa. Moreover, the Minister limited the duration of the condition until 2009.
- (41) CNE's ninth condition required E.ON (i) to assign the ordinary management of the nuclear plants in which Endesa holds a participation to the co-owners of those plants, (ii) not to participate in decision-making regarding the provision of services, manufacture and supply of equipment and systems, and supply of fuel to nuclear power plants and (iii) to divest the only nuclear plant solely owned by Endesa. The Minister's decision substantially modified this condition. Pursuant to the modified condition, E.ON is required to ensure that Endesa fulfils all legal obligations concerning nuclear energy and complies with all agreements with third parties regarding the management of nuclear power plants as far as security and uranium procurement is concerned. Moreover, E.ON has to annually inform CNE of any incident affecting the production of electricity.
- (42) CNE's tenth condition obliged E.ON to divest Endesa's assets outside mainland Spain. The Minister's decision substituted the divestment of assets by a condition obliging E.ON to keep within the Endesa Group, for a period of 5 years, the companies which own generation, distribution and transport assets in non-mainland electricity systems.
- (43) CNE's eleventh condition required E.ON to divest Endesa's power plants using domestic coal. The Minister's decision substituted these divestiture requirements by an obligation for E.ON to ensure that Endesa's plants use domestic coal at least in the annual quantities foreseen in the national mining plan 2006-2012¹⁴.
- (44) By the fourteenth condition, CNE required its prior authorization for the acquisition of more than 10% of Endesa's share capital (or any participation granting significant influence over the company) or for the acquisition of certain assets of Endesa as provided by the modified Función 14 of the Electricity Sector Law. The Minister's decision eliminated the explicit reference to Función 14 and generally required any acquisition of equity stakes in Endesa's share capital to be subject to the applicable rules of the Spanish legal system.
- (45) By the fifteenth condition, CNE obliged E.ON not to give preference to its own interests as a parent company when adopting strategic decisions concerning Endesa insofar they negatively affect the security of energy supply in Spain. The Minister's decision modified the present condition by requiring E.ON not to adopt strategic decisions, regarding Endesa and affecting security of supply, contrary to the Spanish legal order.

¹⁴ Plan Nacional de la Minería del Carbón 2006-2012.

- (46) Finally, CNE's sixteenth condition established that the breach of the conditions and obligations imposed by CNE may give rise to the revocation of CNE's authorisation. The Minister's decision eliminated from the sixteenth condition the reference to the power to withdraw the authorisation in case of breach of the conditions and obligations attached to it. Following this modification, the condition indicates that such a breach will give rise to the corresponding proceedings under the applicable sanctioning systems foreseen in Spanish energy law.

VIII. THE COMMISSION'S PRELIMINARY POSITION PURSUANT TO ARTICLE 21 OF THE MERGER REGULATION AND THE REPLY OF SPAIN

- (47) On 29 November 2006, the Commission informed the Spanish authorities of its preliminary conclusion that a number of the conditions imposed by the Minister's decision were incompatible with Article 21 of the Merger Regulation ("the Commission preliminary assessment").
- (48) On 15 December 2006, Spain replied to the above Commission's letter ("the Spanish authorities' reply"). The arguments developed by Spain will be referred to in the relevant sections of this Decision.

IX. COMPATIBILITY OF THE NEW MEASURES ADOPTED BY SPAIN WITH ARTICLE 21 OF THE MERGER REGULATION

Introduction and general considerations

- (49) As indicated above, the Minister's decision partially modified CNE's decision (i) by withdrawing some of the conditions imposed by CNE, (ii) by reducing the duration or the scope of some other conditions, (iii) by clarifying the requirements of certain conditions, and (iv) by modifying or replacing some other conditions through the imposition of different or additional requirements on E.ON (hereinafter, the "new requirements").
- (50) In the framework of the ongoing infringement procedure pursuant to Article 226 EC concerning the Spanish failure to comply with the first Commission Article 21 decision (Infr. No 2006/2429), the Commission will evaluate whether the modifications sub (i), (ii) and (iii) are sufficient to comply with that decision and, therefore, to eliminate the infringement contested to the Spanish authorities. In this respect, it should be clarified that the assessment made in the first Commission Article 21 decision concerning the conditions imposed by CNE and not modified by the Spanish Minister remains valid¹⁵.
- (51) In the present Decision, the Commission will only assess the compatibility with Article 21 of the Merger Regulation of the new requirements imposed on E.ON.
- (52) In this respect, it should be noted that the imposition of these requirements makes a concentration with a Community dimension (the E.ON/Endesa concentration)

¹⁵ In the framework of the on-going infringement procedure the Commission will however take into account the fact that the Spanish authorities gave explicit assurances that the Minister's decision completely eliminated the power to revoke the authorisation granted to E.ON in case of violation of one or more conditions (see below points 95-97).

subject to a number of (new) conditions or obligations. Indeed, on the one hand, these requirements are imposed in the framework of the authorisation procedure established by the Royal Decree that specifically concerns certain acquisitions, including concentrations, in regulated sectors. On the other hand, the failure by E.ON to comply with the new requirements would expose it, if not to the risk of the revocation of the conditional authorisation, at least to penalties or to injunctions by the competent administrative authorities and, in case of civil or administrative enforcement actions, by national courts (see further the discussion in points 95-97). The Minister's decision therefore constitutes a measure taken by a Member State within the meaning of Article 21(4) of the Merger Regulation.

- (53) The Minister's decision was adopted and entered into force without prior communication to and approval by the Commission. Considering that at the time of the adoption of such decision there were reasonable doubts as to whether the new requirements imposed on E.ON genuinely aimed to protect a “recognised interest” (public security, plurality of the media and prudential rules) and/or complied with the principles of proportionality and non-discrimination and the provisions of Community law (see below the assessment of the compatibility of such requirements), this in itself implies a violation of the communication and stand-still obligation provided for in Article 21(4) of the Merger Regulation (see above points 23-29). Such a violation has not been contested in the Spanish authorities' reply.
- (54) In this regard, the Commission considers useful to underline that the above conclusion cannot be put into question by the argument of the Spanish authorities that the modified conditions, having a limited impact on the concentration at issue, may be justified by other reasons, such as general economic policy objectives. It is indeed clear that national measures pursuing general economic policy objectives cannot, as such, be considered as protecting a “recognised interest”. Such measures therefore must be communicated to the Commission and approved by it, in accordance with Article 21(4) third subparagraph of the Merger Regulation. By failing to do so, the Spanish authorities thus failed to comply with communication and stand-still obligation provided for in Article 21(4) of the Merger Regulation.
- (55) In the Commission's view, this violation is sufficient for it to conclude that the Minister's decision is contrary to Article 21 of the Merger Regulation.
- (56) This violation of the communication and standstill obligation does not however deprive the Commission of its power to assess, pursuant to Article 21(4) of the Merger Regulation, the new requirements imposed on E.ON in order to establish whether they are necessary and proportionate for the protection of an interest compatible with EC law and do not constitute a breach of general principles and other provisions of Community law¹⁶.
- (57) In this context, it should first of all be pointed out that, in the Commission's view, the legal basis on which both CNE's decision and the Minister's decision have been adopted - i.e. Royal Decree Law 4/2006 - is contrary to Articles 56 and 43 EC (see above points 16-18). In this regard, the Commission notes that the Minister's decision¹⁷ is based on the assumption that, in accordance with the jurisprudence of

¹⁶ See Case C-42/01 Portugal v Commission [2004] ECR I-6079.

¹⁷ See pages 66 to 69.

the Spanish Constitutional Court, a Spanish administrative authority is obliged to apply a Spanish legal text even if it is contrary to Community law. The Commission considers that this assumption is contrary to the principles of primacy and direct effect of Community law. The Court has repeatedly held that not only national courts, but also all administrative bodies are subject to the obligation to refuse if necessary to apply any provision of national law conflicting with Community law and that individuals may therefore rely on such a provision of Community law against them¹⁸. Therefore, the Commission considers that the mere fact that the new requirements imposed by the Minister are based on a national legislative measure contrary to Articles 56 and 43 EC is sufficient to consider such requirements as contrary to Community law. Moreover, the Minister's decision, insofar as it refuses to assess the compatibility of Spanish legal provisions with Community law, constitutes by itself a violation of fundamental principles of Community law. Such a violation has not been contested in the Spanish authorities' reply.

- (58) Additionally, the Commission considers that the fact to submit a cross-border operation, such as the E.ON/Endesa concentration, to a number of requirements which limit the economic freedom of the undertakings concerned after the concentration, represents a restriction of the free movement of capital and freedom of establishment and is not necessary and proportionate for the protection of an interest compatible with EC law. In this regard, it should be recalled that, to restrict the freedoms provided for by Articles 43 and 56 of the Treaty, it is sufficient that national measures create obstacles to the freedom of establishment and the free movement of capital, without it being necessary that such measures completely impede the exercise of these fundamental freedoms. Indeed, according to a well-established case-law, "a restriction on freedom of establishment is prohibited by Article 52 [now 43] of the Treaty even if of limited scope or minor importance"¹⁹.
- (59) It should also be underlined from the outset that, contrary to what Spain claims, the fact that E.ON publicly declared that it accepted the modified conditions does not in itself justify the Minister's decision to formally impose such conditions with the legal consequences described below in points 95-97. In assessing the compatibility of these requirements with EC law, the Commission cannot be limited by E.ON's declarations or strategies, which may be influenced by a large number of subjective elements and commercial considerations clearly irrelevant from an EC law perspective.
- (60) Considering that, according to the Spanish authorities, most of the new requirements are based on public security grounds (among which considerations related to the security of energy supply are included), before specifically assessing such requirements it is useful to briefly examine the notion of public security in the light of the EC case-law.

The notion of public security

¹⁸ Case 103/88 *Fratelli Costanzo v Comune di Milano* [1989] ECR 1839, paragraph 32 and Case C-224/97 *Erich Ciola v Land Vorarlberg* [1999] I-2517, paragraphs 29 to 34.

¹⁹ Case C-9/02 *De Lasteyrie du Saillant* [2004] ECR I-2409, paragraph 43. See also Case C-49/89 *Corsica Ferries France* [1989] ECR 4441, where it is stated that "the articles of the EEC Treaty concerning the free movement of goods, persons, services and capital are fundamental Community provisions and any restriction, even minor, of that freedom is prohibited" (paragraph 8).

- (61) For the assessment of the present case it should be reminded that, according to a well established case-law, the requirements of public security, as a derogation from the fundamental principles of free movement of capital and freedom of establishment, must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the Community institutions. Thus, public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society²⁰.
- (62) With specific regard to the energy sector, the Court of Justice of the European Communities specified that measures necessary to ensure a minimum level of energy supplies in the event of a crisis may fall under the notion of public security.²¹ In general, either appropriate regulation of general application or measures permitting an adequate specific reaction by the public authorities to forestall a given threat to public security will be sufficient to safeguard this interest and will, provided that such measures are proportionate and non-discriminatory, be less restrictive than the establishment of prior conditions as to ownership of relevant undertakings²². Community legislation recognizes the legitimacy of such measures in Article 3(2) of Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC²³ and in Article 3(2) of Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC²⁴, which set out under which conditions Member States can make use of public service obligations in order to safeguard public security in the energy sector.²⁵ Furthermore, Community legislation has established a common framework within which Member States shall define general, transparent and non-discriminatory security of supply policies compatible with the requirements of a competitive internal gas market (Council Directive 2004/67/EC of 26 April 2004 concerning measures to safeguard security of

²⁰ Case C-503/99 *Commission v Belgium* [2002] ECR I-4809, paragraph 47, C-483/99, *Commission v France*, [2002] ECR I-4781, paragraph 48, and Case C-463/00 *Commission v Spain* [2003] ECR I-4581, paragraph 72.

²¹ Case C-503/99 *Commission v Belgium* [2002] ECR I-4809, paragraphs 46 and 48, and Case C-463/00 *Commission v Spain* [2003] ECR I-4581, paragraphs 71 and 73. See also Case 72/83 *Campus Oil* [1984] ECR 2727, paragraphs 34 and following.

²² This can be inferred from Case C-503/99 *Commission v Belgium* [2002] ECR I-4809, paragraph 49.

²³ OJ L 176, 15.7.2003, p. 37. Directive amended by Council Directive 2004/85/EC (OJ L 236, 7.7.2004, p. 10).

²⁴ OJ L 176, 15.7.2003, p. 57. Directive amended by Council Directive 2004/85/EC (OJ L 236, 7.7.2004, p. 10).

²⁵ Article 3(2) of Directive 2003/54/EC foresees that "[...] Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including security of supply [...]. Such obligations shall be clearly defined, transparent, non discriminatory, verifiable and shall guarantee equality of access for EU electricity companies to national consumers. In relation to security of supply, energy efficiency/demand-side management and for the fulfilment of environmental goals, as referred to in this paragraph, Member States may introduce the implementation of long term planning, taking into account the possibility of third parties seeking access to the system".

natural gas supply²⁶) as well as a framework within which Member States are to define transparent, stable and non-discriminatory policies on security of electricity supply compatible with the requirements of a competitive internal market for electricity (Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment.)²⁷

- (63) The new requirements imposed on E.ON should be examined in the light of this strict interpretation of the notion of public security and of the relevant Community legislation.

Brand requirement (first condition)

- (64) The Minister's decision introduced in the first condition imposed by CNE a new requirement concerning the obligation for Endesa to maintain its brand for a five years period. The Minister's decision and the Spanish authorities' reply provide no reason for the imposition of such an additional requirement. In this respect, the reply simply states that this requirement complies with the principle of proportionality and that it is in line with the commitments undertaken by E.ON, as well as to the first condition, as imposed by CNE, taken as a whole.
- (65) The Commission considers that this new requirement significantly limits E.ON's freedom to decide its business strategies after the acquisition of control over Endesa. Indeed, decisions concerning the use of brands may be an important part of these strategies, particularly after a concentration. In this regard, it should be noted that, even if the conditional authorisation granted to E.ON could not be revoked in case of violation of the present requirement, the imposition of this additional obligation, which is not foreseen by the general Spanish legislation, purports to legally bind E.ON and may expose E.ON, in case of its violation, to the risk of penalties or injunctions by the competent administrative authorities and, in the context of civil or administrative enforcement actions, by national courts (see below points 95-97). Therefore, the imposition of this new requirement creates an obstacle to the realisation of a cross-border operation, giving rise to a restriction of the freedom of establishment and the free movement of capital.
- (66) Such a restriction is not necessary and proportionate for the protection of a public interest. As a matter of fact, the Commission fails to understand which public interest would be protected by the maintenance of Endesa's brand for a five years time, nor any indication in this regard is provided in the Minister's decision or in the Spanish authorities' reply. In any event, as regards the alleged interest to protect "general economic policy criteria", that the Spanish authorities have invoked in general terms in their reply, it should be recalled that it is settled case-law that economic grounds, including economic policy objectives of a Member State, can

²⁶ OJ L 127, 29.4.2004, p. 92–96.

²⁷ OJ L 33, 4.2.2006, p. 22–27.

never serve as justification for obstacles to the fundamental freedoms recognised by the Treaty²⁸.

Gas supply requirement (eighth condition)

- (67) By the eighth condition, CNE required E.ON to commit to the natural gas supply plans submitted by Endesa to CNE²⁹. The Minister's decision modified this condition by specifying (i) that it binds E.ON until 2009, (ii) that it concerns the volumes of gas already contracted by Endesa and (iii) that these volumes of gas should not be diverted to other markets different from the Spanish one.
- (68) In its Article 21 decision the Commission has already established that the gas supply requirement imposed by CNE's decision is contrary to Article 21 of the Merger Regulation. In its preliminary assessment, the Commission considered that it was not clear whether the modification introduced by the Minister's decision simply clarified the scope of the requirements already imposed by CNE or imposed a new requirement on E.ON.
- (69) The Spanish authorities' reply indicated that the modifications introduced by the Minister's decision only clarify the condition imposed by CNE. In the light of this clarification provided by the Spanish authorities' reply, the Commission has decided not to assess this condition in the present Decision, which can thus be treated as falling into the category of the non modified conditions (see above point 49-50).

Nuclear power plants (ninth condition)

- (70) CNE's ninth condition, as modified by the Minister's decision, essentially requires E.ON to ensure that Endesa fulfils all existing obligations concerning the management of nuclear power plants. Moreover, E.ON has to inform CNE of any incident affecting production.
- (71) In this regard, in the Spanish authorities' reply it is clarified that this condition, as modified by the Minister's decision, does not impose on E.ON any additional obligation which is not foreseen by the general Spanish legislation and/or by agreements between Endesa and other energy operators.
- (72) On the basis of this clarification, and taking into account that the Spanish authorities have given explicit assurances that the conditional authorisation granted to E.ON could not be revoked in case of violation of this modified condition (see below points 95-97), the Commission considers that it is not necessary, at this stage, to adopt a decision of incompatibility pursuant to Article 21 of the Merger Regulation in respect of this condition.

Assets outside mainland Spain (tenth condition)

²⁸ See Case C-265/95 *Commission v France* [1997] ECR I-6959, paragraph 62, Case C-398/95 *SETTG* [1997] ECR I-3091, paragraph 23, and Case C-367/98 *Commission v Portugal* [2002] ECR I-4731, paragraph 52.

²⁹ Plans submitted by Endesa to CNE for the elaboration of CNE's "Informe Marco sobre la demanda de energía eléctrica y gas natural, y de su cobertura" (Framework report on electricity and natural gas demand, and its coverage).

- (73) The Minister's decision modified CNE's tenth condition by converting the requirement to divest of non-mainland assets into an obligation for E.ON to keep with the Endesa Group, for a period of 5 years, Endesa's companies owning assets in generation, distribution or transport in non-mainland electricity systems.
- (74) In the Commission's view, such a requirement significantly limits E.ON's freedom to decide the structure of its group and/or sell certain companies after the acquisition of control over Endesa. Also in this regard, it should be noted that, even if the conditional authorisation granted to E.ON could not be revoked in case of violation of the present requirement, the imposition of this additional obligation, which is not foreseen by the general Spanish legislation, purports to legally bind E.ON and may expose E.ON, in case of its violation, to the risk of penalties or injunctions by the competent administrative authorities and, in the context of civil or administrative enforcement actions, by national courts (see below points 95-97).
- (75) The imposition of this requirement therefore represents an obstacle to the realisation of a cross-border operation, restricting the freedom of establishment and the free movement of capital³⁰. In this respect, as to the alleged minor impact of this condition on E.ON's economic freedom, it should be recalled that a restriction on freedom of establishment is prohibited by the Treaty even if of limited scope or minor importance (see above point 58). Moreover, such a restriction cannot be regarded as minor, having regard both to the extent to which it limits E.ON's freedom regarding certain assets and to the economic significance of those assets.
- (76) In this regard Spain cannot validly claim that under EC and national energy law vertically integrated companies are not free to decide the structure of their group as they have to keep separate certain regulated and non regulated activities (legal unbundling). The existence of these legal obligations does not as such mean that national authorities can create unjustified obstacles to the freedom of establishment by imposing additional obligations not foreseen by EC law.
- (77) This restriction of E.ON's freedom of establishment and the free movement of capital is not justified on public interest grounds and is contrary to the principles of proportionality and non discrimination. In particular, as regards the alleged interest to protect "general economic policy criteria", the Commission recalls that such a ground cannot serve as justification for obstacles to the fundamental freedoms recognised by the Treaty (see above point 66).
- (78) Moreover, the Minister's decision and the Spanish authorities' reply do not provide any element indicating why, by requiring E.ON not to transfer to other operators (or to a subsidiary outside the Endesa group) Endesa's companies owning non-mainland assets, the security of energy supply would be better protected. In addition, the Minister's decision contradicts the previous condition imposed by the CNE's decision, which casts serious doubts on the possibility for the Spanish authorities to justify such restrictions. Moreover, the present condition has a discriminatory

³⁰ This is without prejudice to the question whether a national rule of general character imposing an obligation, or providing for the possibility of imposing an obligation, to keep certain regulated assets within a given company or group of companies - without any relation with a concrete cross-border operation - may in itself represent an unjustifiable restriction of the freedom of establishment and the free movement of capital.

character since (i) Endesa was not previously subject to such an obligation, (ii) no similar requirement was imposed on Gas Natural and (iii) the Spanish authorities would not, to the Commission's current knowledge, have the power to impose such prohibition on energy operators outside the case of acquisition of regulated assets.

- (79) Furthermore, the fact that before examining the proposed concentration the Spanish authorities did not consider necessary to impose similar requirements in order to protect public security (for instance in the framework of the Gas Natural/Endesa concentration³¹) is also a clear indication that the present condition is not necessary to pursue a legitimate public interest and does not comply with the principle of proportionality.

Use of domestic coal (eleventh condition)

- (80) By the modified condition eleven, the Minister's decision obliges E.ON, for a five-year period, to ensure that Endesa's power plants using domestic coal continue to use such an energy source as foreseen in the national mining plans.
- (81) The Commission considers that the imposition of the requirement in question significantly limits E.ON's economic freedom following the acquisition of control over Endesa. Also in this regard, it should be noted that, even if the conditional authorisation granted to E.ON could not be revoked in case of violation of the present requirement, the imposition of this additional obligation which is not foreseen by the general Spanish legislation, purports to legally bind E.ON and may expose E.ON, in case of its violation, to the risk of penalties or injunctions by the competent administrative authorities and, in the context of civil or administrative enforcement actions, by national courts (see below points 95-97).
- (82) The imposition of the requirement in question therefore creates an obstacle to the realisation of a cross-border operation, restricting the exercise of the rights provided for by the EC rules on the free movement of capital and freedom of establishment. In this respect, as to the alleged minor impact of this condition on E.ON's economic freedom, it should be recalled that a restriction on the freedom of establishment is prohibited by the Treaty even if of limited scope or minor importance (see above point 58). Moreover, such a restriction cannot be regarded as minor, having regard both to the extent to which it limits E.ON's freedom and the economic significance of the assets concerned. Furthermore, this condition is also clearly incompatible with EC rules on free movement of goods, and in particular to Article 28 EC.
- (83) The obligation to buy domestic coal is not justified on public interest grounds and does not comply with the principles of proportionality and non discrimination.
- (84) The Minister's decision argues that this condition is necessary in order to ensure the use of domestic coal, thereby reducing the Spanish dependency on foreign energy sources. However, this decision does not provide any element indicating that E.ON's acquisition of control over Endesa would create a genuine and sufficiently serious threat for the security of energy supply. Moreover, the Minister's decision does not

³¹ In this regard, it should be noted that under the legal regime applicable to the Gas Natural/Endesa concentration (prior to the adoption of Royal Decree-Law 4/2006) CNE already had to assess the impact of the transaction on security of supply.

explain why E.ON's business interests regarding the use of domestic coal would be different from those of Endesa's current shareholders.

- (85) The Commission recalls that Community law sets the framework within which Member States can increase their security of energy supply through the use of indigenous fuel sources. The relevant pieces of Community legislation are Directive 2003/54/EC, and in particular Articles 3 and 11 thereof, and Council Regulation 1407/2002/EC on State aid to the Coal Industry.³²
- (86) Article 3(2) of Directive 2003/54/EC foresees that "[...] *Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including security of supply [...]. Such obligations shall be clearly defined, transparent, non discriminatory, verifiable and shall guarantee equality of access for EU electricity companies to national consumers. In relation to security of supply, energy efficiency/demand-side management and for the fulfilment of environmental goals, as referred to in this paragraph, Member States may introduce the implementation of long term planning, taking into account the possibility of third parties seeking access to the system*". Member States have to inform the Commission of any measure taken in this respect. Spain recently adopted a new legislative measure (Royal Decree-Law 7/2006), which foresees the possibility of State aid for coal fired power plants and a system of incentives for the preferential dispatching of power plants using domestic coal³³. Spain has therefore already put into place less restrictive measures allowing the alleged problems identified by the Spanish authorities to be overcome.³⁴
- (87) Furthermore, the Commission reminds that Regulation (EC) No 1407/2002/EC allows Member States to subsidise indigenous coal up to the level of the prevailing world market price (see Articles 4 and 5(3) of the Regulation). One of the objectives of this Council Regulation is to ensure that Member States can provide a minimum level of indigenous coal in order to increase the security of energy supply. Spain currently provides State aid to its coal industry under this Regulation³⁵. In the Commission's view, this suffices to meet the objective of increasing the security of energy supply by the means of using domestic coal.
- (88) Finally, as regards the alleged interest to protect "general economic policy criteria", the Commission recalls that such a ground cannot serve as justification for obstacles to the fundamental freedoms recognised by the Treaty (see above point 66).

³² OJ L 205/1, 2 August 2002.

³³ See Royal Decree-Law 7/2006 of 23 June 2006 adopting urgent measures in the energy sector.

³⁴ Royal Decree-Law 7/2006 might constitute State aid for the power plants receiving the subsidies. It appears that Spain has not notified Royal Decree-Law 7/2006 to the Commission under Article 88 (2) EC treaty. The Commission thus reserves the right to open an ex officio investigation under the State aid rules.

³⁵ The Commission has authorised State aid for the Spanish coal industry for the years 2003 to 2005 (see Commission decision State aid C 14/2004 of 21 December 2005). Spain has notified State aid for the Spanish coal industry for the years 2006 to 2010 to the Commission in spring 2006. This notification is currently under assessment.

Supervisory powers (fourteenth condition)

- (89) By the modified condition fourteen, the Minister's decision requires, in general terms, that any acquisition of stakes in Endesa's share capital should be subject to the applicable rules of the Spanish legal system.
- (90) Considering that this modified condition does not impose on E.ON any additional obligation which is not foreseen by the general Spanish legislation, and taking into account that the Spanish authorities have given explicit assurances that the conditional authorisation granted to E.ON could not be revoked in case of violation of this modified condition (see below points 95-97), the Commission considers that it is not necessary, at this stage, to adopt a decision of incompatibility pursuant to Article 21 of the Merger Regulation in respect of this condition. However, at this stage, the Commission maintains its view, already expressed in the reasoned opinion of 29 September 2006, that the authorisation procedure established by the Royal Decree constitutes a violation of Community law that the Commission may decide to bring before the Court of Justice in accordance with Article 226 EC.

Strategic decisions affecting security of supply (fifteenth condition)

- (91) Condition fifteen, as modified by the Minister's decision, requires E.ON not to adopt strategic decisions, regarding Endesa and affecting security of supply, contrary to the Spanish legal order.
- (92) In the Commission's view, the fact to insert such obligation in the text of a conditional authorisation may significantly affect E.ON's economic freedom after the realisation of the present concentration. This is all the more so considering that the condition in question is vaguely drafted and, therefore, grants the Spanish authorities a very large margin of appreciation with regard to its interpretation and implementation. In such a situation, it could not be excluded that, in the implementation of the present modified condition, the Spanish authorities may impose on E.ON additional obligations which are not foreseen by the general Spanish legislation, which purport to legally bind E.ON and which may expose E.ON, in case of violation of such obligations, to the risk of penalties or injunctions by the competent administrative authorities and, in the context of civil or administrative enforcement actions, by national courts (see below points 95-97).
- (93) In the Commission's view, the lack of precision of the fifteenth condition, as modified by the Minister's decision, does not enable individuals to be apprised of the extent of their rights and obligations deriving from Article 56 EC Treaty, with the result that such condition must be regarded as contrary to the Community law principle of legal certainty. The particularly broad discretion retained by the Spanish authorities in this sphere represents a serious threat to the free movement of capital and may end by negating it completely³⁶.
- (94) Finally, the Commission considers that this condition cannot be justified on public interest grounds. In particular, as regards the alleged interest to protect "general economic policy criteria", the Commission recalls that such a ground cannot serve as

³⁶ C-463/00, Commission v Spain, [2003] ECR I-4581, paragraphs 75-76.

justification for obstacles to the fundamental freedoms recognised by the Treaty (see above point 66).

The legal consequences in case of violation of one or more conditions (sixteenth condition)

- (95) The sixteenth condition imposed by CNE's decision specified that the violation of the requirements imposed on E.ON could have led to the revocation of the conditional authorisation of the E.ON/Endesa concentration. The text of the sixteenth condition as modified by the Minister's decision does not explicitly mention such a possibility any more, even if its motivation seems to imply that, in the Spanish legal system, the power to revoke a conditional authorisation in case of non compliance with one or more conditions exists also in the absence of any express reference in the text of the decision³⁷. However, the Minister's decision states that in this case, although legally possible, the revocation of the conditional authorisation may not be the most appropriate reaction in case of violation of a condition.
- (96) In its preliminary assessment, the Commission indicated that the Minister's decision did not appear to exclude the possibility to revoke the authorisation granted to E.ON, maintaining at least a state of uncertainty in this respect. In their reply, the Spanish authorities gave explicit assurances that the Minister's decision completely eliminated the revocation power. In particular, they underlined that the “conditions” imposed by CNE have lost their “conditional character” and have been converted into “ancillary obligations”, since no consequences are established in case of violation thereof. On the basis of such explicit indication, the Commission therefore considers, in the exercise of its discretion as regards non-notified measures that fall within the scope of Article 21 of the Merger Regulation, that it is not necessary to address in the present incompatibility Decision those conditions which merely restate existing obligations under Spanish law. The Commission reserves the right to take action pursuant to Article 21 of the Merger Regulation in respect of such conditions at a future date, including in particular in circumstances where national measures purport to obtain the revocation of the authorisation of E.ON's acquisition of control over Endesa on grounds of the breach of such conditions.
- (97) Even if one were to accept the explanations given in Spain's reply regarding the exclusion of any power of revocation for breach of conditions, this does not however mean that the conditions to which the authorisation has been made subject, are deprived of any legal value, to the extent that they impose additional obligations which are not foreseen by the general Spanish legislation. First, such obligations may still be restrictive of freedoms protected by Community law because they create a state of legal uncertainty and because it cannot be presumed that natural or legal persons will not comply with binding legal obligations imposed by the public authorities, even if no system of sanctions is expressly foreseen.³⁸ In addition, the

³⁷ See pages 144 to 147 of the Minister's decision. In this respect, the Minister's decision refers to a judgment of the Spanish Tribunal Supremo which seems to imply that such revocation power always exists when of an administrative authorisation is made subject to conditions (see *recurso de casación* n° 1756/92, Spanish Supreme Court judgment of 16 March 2000).

³⁸ In this regard, it can be recalled, by analogy, the case-law of the Court clarifying that “the incompatibility of provisions of national law with provisions of the Treaty, even those directly applicable, can be

text of the sixteenth condition as modified by the Minister's decision makes a general reference to the procedures foreseen by the Spanish law concerning the energy sector, including the possibility to impose penalties. Second, in the Commission's view, it is possible (and, in any event, it cannot be excluded) that, under Spanish law, CNE or any other competent authority could order E.ON to comply with the conditions and take any appropriate measure in order to ensure their respect. Moreover, it is possible (and, in any event, cannot be excluded) that, in certain circumstances, interested third parties or public authorities may bring actions before a national court to request an injunction ordering E.ON to comply with the conditions.

X. CONCLUSION

- (98) On the basis of the foregoing, the Commission has come to the conclusion that Spain violated Article 21 of the Merger Regulation (and in particular paragraphs 2, 3 and 4 thereof) since:
- (a) the adoption and the entry into force of the decision of the Spanish Minister of Industry, Tourism and Trade of 3 November 2006, without prior communication to (and approval by) the Commission violates the specific communication and standstill obligation provided for by such provision; and
 - (b) the Spanish Minister of Industry, Tourism and Trade submitted E.ON's acquisition of control over Endesa (i.e. a concentration with a Community dimension) to a number of modified conditions incompatible with the provisions of the EC Treaty on the free movement of capital and the freedom of establishment and, as far as concerns modified condition eleven, the free movement of goods, and thereby unduly interfered with the Commission's exclusive competence to decide on a concentration with Community dimension.
- (99) The assessment made in the first Commission Article 21 decision concerning the conditions imposed by CNE and not modified by the Spanish Minister remains valid.
- (100) It is therefore appropriate to require the Spanish authorities to withdraw without delay, and in any event by 19 January 2007, the modified conditions imposed by the decision of the Spanish Minister of Industry, Tourism and Trade of 3 November 2006 which have been declared incompatible with Community law.

definitively eliminated only by means of binding domestic provisions having the same legal force as those which require to be amended. Mere administrative practices, which by their nature are alterable at will by the authorities and are not given appropriate publicity, cannot be regarded as constituting the proper fulfilment of a Member State's obligations under the Treaty, since they maintain, for the persons concerned, a state of uncertainty as regards the extent of their rights as guaranteed by the Treaty" (see, for instance, Case C-367/98 *Commission v Portugal* [2002] ECR I-4731, paragraph 41, Case C-151/94 *Commission v Luxembourg* [1995] ECR I-3685, paragraph 18, and Case C-358/98 *Commission v Italy* [2000] ECR I-1255, paragraph 17).

HAS ADOPTED THIS DECISION:

Article 1

Spain violated Article 21 of Regulation (EC) No 139/2004 due to the adoption and entry into force, without prior communication to and approval by the Commission, of the decision of the Spanish Minister of Industry, Tourism and Trade of 3 November 2006 which subjects E.ON's acquisition of control over Endesa to a number of modified conditions (modified conditions one, ten, eleven and fifteen) which are incompatible with Articles 43 and 56 of the EC Treaty and, as far as concerns modified condition eleven, Articles 28 of the EC Treaty, therefore unduly interfering with the Commission's exclusive competence to decide on a concentration with Community dimension.

Article 2

Spain shall withdraw by 19 January 2007 the modified conditions imposed by the decision of the Spanish Minister of Industry, Tourism and Trade of 3 November 2006 which have been declared incompatible with Community law by Article 1 of the present decision.

Article 3

This decision is addressed to the Kingdom of Spain.

Done at Brussels, 20.12.2006

For the Commission, signed,
Neelie KROES
Member of the Commission