

***Case No COMP/M.2684 -
EnBW / EDP /
CAJASTUR /
HIDROCANTABRICO***

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**REGULATION (EEC) No 4064/89
MERGER PROCEDURE**

Article 6(2) NON-OPPOSITION
Date: 19/03/2002

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 19/03/2002

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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(2) DECISION

To the notifying parties:

Dear Sir/Madam,

**Subject: Case No COMP/M.2684 - EnBW / EDP / CAJASTUR / HIDROCANTÁBRICO
Notification of 4 February 2002 pursuant to Article 4 of Council Regulation
No 4064/89¹**

1. On 4 February 2002, the Commission was notified of a proposed merger under Article 4 of Council Regulation (EEC) No 4064/89 (the "Merger Regulation")², in which the undertakings ELECTRICIDADE DE PORTUGAL S.A. (EDP), ENERGIE BADEN-WÜRTTEMBERG A.G. (EnBW) and CAJA DE AHORROS DE ASTURIAS (Cajastur), would acquire joint control of the Spanish firm HIDROELÉCTRICA DEL CANTÁBRICO S.A. (Hidrocantábrico), by means of purchase of shares and contract of management.
2. After examining the notification, the Commission has concluded that the operation fell within the scope of Council Regulation (EEC) No 4064/89.
3. The parties have submitted undertakings designed to eliminate the competition concerns arising from the transaction. Subject to full compliance with these undertakings, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the functioning of the EEA Agreement.

¹ OJ L 395, 30.12.1989 p. 1; corrigendum OJ L 257 of 21.9.1990, p. 13; Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9. 7. 1997, p. 1, corrigendum OJ L 40, 13.2.1998, p. 17).

² OJ L 395, 30.12.1989, p. 1; corrigendum OJ L 257, 21.9.1990, p. 13; Regulation last amended by Regulation (EC) No 1310/97 (OJ L 180, 9. 7. 1997, p. 1, corrigendum OJ L 40, 13.2.1998, p. 17).

I. THE PARTIES

4. EDP is mainly active in the production and distribution of electricity in Portugal, where it is the incumbent electricity utility. EDP operates as well in the sectors of gas and telecommunications in Portugal.
5. EnBW is active in electricity generation, transmission, distribution, trading and supply of electricity, mainly in the Southwest of Germany. Other business activities comprise the supply of gas and district heating, telecommunications, waste recycling and financial services. EnBW is jointly controlled by the French undertaking Electricité de France (EDF) and Zweckverband Oberschwäbische Elektrizitätswerke (OEW), an association of nine public districts in the Southwest of Germany³.
6. EDF is a state-owned company whose main activities are the generation, transmission, distribution and trading of electricity in France. Through EDF/RTE, a division of EDF, it operates the national electricity grid and interconnectors with neighbouring countries. Through its subsidiary EDF International ("EDFI"), a holding company, EDF owns shares in electricity companies in various European countries. It is also involved in the construction sector, the maintenance of electricity generating plants and transmission grids, recycling and city lighting.
7. Cajastur is a savings bank⁴, whose core business consists of retail deposit taking and mortgage lending. Cajastur also provides other banking services such as general consumer lending facilities and lending to small and medium sized companies.
8. Hidrocantábrico is mainly active as a generator, distributor and supplier of electricity in Spain and as a distributor and supplier of gas and telecommunications in the Spanish region Asturias.

II. THE OPERATION

9. The proposed operation is the acquisition of joint control over Hidrocantábrico by EDP, EnBW and Cajastur, through the acquisition vehicle ADYGESINVAL S.L. (Adygesinval).
10. In 2001, Hidrocantábrico was the target of different operations aimed at acquiring control over it. In particular, the Commission authorised three proposed public offers for the Spanish utility, presented respectively by (1) EDP/Cajastur/Compañía de Seguros y Reaseguros (Cáser)⁵, (2) the German undertaking RWE⁶, and (3) the Spanish Grupo Villar Mir and EnBW through the acquisition vehicle Ferroatlántica, a company belonging to Grupo Villar Mir to be jointly controlled by EnBW after the conclusion of the operation⁷. After the implementation of the competing bids,

³ Case COMP/M. 1853-EDF/ENBW.

⁴ Cajastur's legal status is that of a "Caja de Ahorros", a non-profit making credit institution.

⁵ Case COMP/M.2340 - EDP / Cajastur / Cáser / Hidroeléctrica del Cantábrico.

⁶ Case COMP/M.2353 - RWE / Hidroeléctrica del Cantábrico.

⁷ Case COMP/M.2434 - Grupo Villar Mir / EnBW / Hidroeléctrica del Cantábrico.

the distribution of Hidrocantábrico's shares was: (1) Ferroatlántica: 60%; (2) Adygesinval (owned by EDP and Cajastur on a 50% basis): 19%; (3) Cajastur: 10%; (4) Cáser: 5%; (5) Treasury stock: 2%; and (6) free float: 4%.

11. On 4 December 2001, EnBW, EDP, Cajastur and Cáser entered into a Shareholders' Agreement which shall govern the relations among the notifying parties as jointly controlling shareholders of Hidrocantábrico and of Cáser as a minority (non-controlling) shareholder. The objective of the parties to the said agreement is to control 100% of the share capital of Hidrocantábrico, preliminarily through the acquisition vehicle Adygesinval⁸. To this end, EnBW has assigned to Adygesinval its rights over the Hidrocantábrico's shares acquired by Ferroatlántica⁹, though subject to several suspensive conditions (in particular, clearance from the competition authorities)¹⁰. Furthermore, Adygesinval intends to purchase the shares currently held as free-float.

III. CONCENTRATION

12. Further to the aforementioned Shareholders' Agreement, after the completion of the operation EDP will hold [...] of Hidrocantábrico's shares, EnBW [...] thereof and Cajastur [...].
13. The Agreement sets forth detailed rules regarding the appointment of Hidrocantábrico's management and the passing of resolutions both at Board's meetings and at the General Assembly. As regards the Board of Directors, the agreement foresees two possibilities: (i) in respect of Hidrocantábrico, it shall be made up of 14 directors: 4 appointed and removed by EnBW, 3 by Cajastur, 5 by EDP and the remaining two will hold the position of Chairman and CEO; and (ii) as regards Adygesinval, it shall be made up of 12 directors to be appointed and removed as follows: 3 of them by Cajastur, 4 by EDP and 3 by EnBW (the remaining two will hold the positions of Chairman and CEO). [...]¹¹
14. Resolutions will be passed according to the following rules with regard to "Limited Reserved decisions" (which comprise in particular the approval of the business plan and the budget). These resolutions will be adopted by consensus of EDP, EnBW and Cajastur; however, the position of EnBW can be overruled by EDP and Cajastur after a conciliation procedure. In case EDP overrules EnBW's opposition to the adoption of a resolution regarding "Limited reserved matters", EnBW is granted an irrevocable put option right. The important financial consequences for EDP in case EnBW exercised such a right (EDP will be bound to acquire all of EnBW's shares in Hidrocantábrico at a strike price to be calculated in accordance with a pre-defined formula) are likely to have a clear deterrent effect on EDP (the parties estimate that the price to be paid would account for around [5-20%] of EDP's turnover). No overruling is foreseen in case EDP or Cajastur oppose a decision concerning Limited Reserved matters.

⁸ [...]

⁹ [...]

¹⁰ [...]

¹¹ [...]

15. In the light of the above, it can therefore be concluded that, further to the implementation of the notified concentration, Hidrocantábrico will be jointly controlled by EnBW, EDP and Cajastur, the operation bringing about a lasting change in the structure of control of the Spanish electricity undertaking. The notified operation constitutes therefore a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

IV. COMMUNITY DIMENSION

16. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion¹² in 2000. Each one of these undertakings has a Community-wide turnover in excess of EUR 250 million, but they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State.
17. The notified operation has therefore a Community dimension.

V. COMPETITIVE ASSESSMENT

(1) Product markets

18. According to previous Commission decisions, the definition of the relevant product market(s) in the electricity sector must take into account the existing degree of liberalisation thereof¹³.
19. With reference to the Spanish electricity sector, the Spanish Competition Court (*Tribunal de Defensa de la Competencia*) has asserted that "*the relevant product market must be defined as the generation of electricity that is bought and sold through the pool or wholesale market. On the supply side in this market, electricity from the generators is in competition with that from the special regime over 50 MW and from imported electricity. On the demand side, there are the distributors [who sell electricity to tariff customers], retailers [who sell electricity to eligible customers] and eligible customers. It also includes the electricity sold via bilateral contracts [i.e., between generators and eligible customers], in so far as these contracts are agreed upon in a system of free competition*"¹⁴. Exporters of electricity to third countries are also included in the demand side of the wholesale market. Until 2003, Spanish generators are not allowed to conclude direct contracts with retailers (they can only sell electricity in the pool or to eligible customers)¹⁵. External agents, on the other hand, can conclude contracts with Spanish retailers.

¹² Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 2.3.1998, p25). To the extent that figures include turnover for the period before 1.1.1999, they are calculated on the basis of average ECU exchange rates and translated into EUR on a one-for-one basis.

¹³ Cases IV/M.1557 - EDF / Louis Dreyfus and COMP/M.1853 - EDF / EnBW.

¹⁴ Report C-60/00 on the Endesa/Iberdrola proposed merger.

¹⁵ Article 21 of Royal Decree-Law No 6/2000 of 23 June 2000 on urgent measures to step up competition in goods and services markets.

20. Eligible customers in the Spanish market are those consumers, regardless of their level of consumption, who are supplied at a nominal voltage of more than 1 000 volts¹⁶. From 1 January 2003, all consumers of electricity, without distinction, will have the status of eligible customers. Eligible customers in Spain who wish to buy electricity under the liberalised system have currently three options: (a) through the pool, (b) by means of "bilateral contracts" with generators or foreign operators or (c) through contracts with retailers. The market for eligible customers potentially represents 54% of consumption in Spain, but during the last months those who have actually chosen to buy electricity in the liberalised market (directly through the pool, via bilateral contracts or contracts with retailers) represent less than one third of total consumption¹⁷. In other words, around two thirds of the electricity bought in the wholesale market is purchased by distributors, for subsequent supply to tariff customers and one third is purchased by exporters, retail sellers and eligible customers.
21. The pool comprises: (i) the daily market, which represents more around 85% of the total electricity sold in the wholesale market; there is a single price for each hourly period, the hourly marginal price¹⁸; and (ii) the intra-daily market (around 15% of total electricity sold in the wholesale market): energy which is not sold in the daily market can be sold subsequently in this intra-daily market. Together with this organised wholesale market, there exist bilateral contracts between generators/external agents and eligible customers, that nevertheless represent less than 1% of total sales in the wholesale market.
22. In view of the above, it is possible to conclude, in line with a recent Commission decision¹⁹, that the relevant product markets for the purposes of the assessment of this case comprise respectively:
- (1) the electricity offered through the wholesale market: the pool and bilateral contracts between eligible customers and generators; and
 - (2) the retail market: the electricity offered subsequently by retailers to eligible customers.

¹⁶ Article 6 of Royal Decree-Law No 6/1999 of 16 April 1999 on urgent measures to liberalise markets and strengthen competition.

¹⁷ Source: OMEL.

¹⁸ The daily market is a balanced market: energy sold is equal to energy bought. The remuneration of each seller is calculated as the product of the energy sold and the hourly marginal price and, similarly, the payment obligations of each buyer are calculated as the product of energy bought and the hourly marginal price. The daily market is used to make transactions for the next day by means of the submission of offers for sale or purchase. These offers are submitted to OMEL, the market operator, and are included in a matching procedure for the purposes of the next day's trading, which will cover 24 consecutive hourly periods. The market operator will match the offers for sale and purchase of electricity using a simple matching method, which obtains, in an independent manner, the marginal price and the volume of energy needed from each generating unit, for purchase in each hourly period. In this way, the marginal price is obtained for each hourly period according to the offer made for the sale of electricity by the holder of the last generating unit which is needed to feed into the system in order to meet the demand.

¹⁹ Case COMP/M.2434 - Grupo Villar Mir / EnBW / Hidroeléctrica del Cantábrico.

(2) Geographic market

23. The relevant geographic market for the supply of energy on the liberalised market(s) has been traditionally considered by the Commission to be no wider than national²⁰. Such a market delineation has been confirmed, as far as Spain is concerned, by four recent Commission decisions²¹.
24. In particular, imports to the Spanish market are constrained by the limited interconnection capacity currently available. The commercial interconnection capacity between Spain and neighbouring countries nowadays amounts to approximately 1 900-2 100 MW: (1) 1 000-1 100 MW with France; (2) 600-650 MW with Portugal; and (3) 300-350 MW with Morocco. This represents approximately 6.6% of the capacity needed at peak demand times²². Further, the regulatory framework and the structure of supply (i.e., the organisation of the wholesale market) differ from those of other neighbouring national electricity systems, such as France's and Portugal's.
25. The aforementioned market delineation has not been altered as yet by the political agreement arrived at by the Governments of Spain and Portugal on 14 November 2001²³ calling for the creation of an Iberian electricity market. The agreement provides for the progressive convergence of the electrical systems of the two countries, the coordination of the operators charged with the management of the systems, the strengthening of the interconnections between Spain and Portugal and the application of a common set of principles (free competition, transparency, efficiency and objectivity) aimed at ensuring equal treatment for national operators and operators from the other country. This political agreement notwithstanding, the emergence of a truly Iberian market will still be hindered in the coming years by the limited interconnection capacity available between Spain and Portugal, and furthermore, will depend on the progressive implementation of a number of successive steps, that include not only technical measures on the electrical grids and interconnectors but also the elimination of regulatory and administrative barriers and the harmonisation of the functioning and management methods of the systems' operators.
26. Consequently, for the purposes of the assessment of the notified operation the relevant geographic markets for electricity offered through the wholesale and retail activities are made up of mainland Spain.

²⁰ Cases IV/M.1659 - Preussen Elektra/EZH; Case IV/M 1557 - EDF/Louis Dreyfus; Case COMP/M 1673 - VEBA/VIAG; Case COMP/M 1803 - Electrabel/Eon; and Case COMP/M 1853 - EDF/EnBW.

²¹ Case COMP/M.2353 – RWE/Hidroeléctrica del Cantábrico, Case COMP/M.2340 – EDP/Cajastur/ Cáser / Hidroeléctrica del Cantábrico, Case COMP/M.2434 - Grupo Villar Mir / EnBW / Hidroeléctrica del Cantábrico and Case COMP/M.2620 - Enel / Viesgo.

²² Source: *Comisión Nacional de la Energía* (National Energy Commission).

²³ Protocol of collaboration between the Administrations of Spain and Portugal in view of the creation of the Iberian electricity market, signed in Madrid on 14 November 2001.

(3) Assessment

The Spanish market

27. The activities of the notifying parties and the target company in the liberalised part of the Spanish electricity sector are relatively limited. Among them, only Hidrocantábrico has generation activities in Spain, its share in terms of total installed capacity being around 5% in 2001. Neither EDP nor EnBW or EDF operate as producers in the Spanish electricity market²⁴. However, EDP, EnBW and EDF are allowed to operate as exporters into and importers from the Spanish market, since they are authorised to act in Spain as external agents sellers as well as external agents buyers.
28. With regard to the wholesale market, Hidrocantábrico's share in terms of sales to the pool's daily market was [between 5 and 10 %] in 2000 (around [5 to 10%] in 2001). EDP has traditionally not offered electricity to the Spanish pool (the first time was in December 2001) and EnBW's sales have been negligible. EDF's exports (the long term contract with *Red Eléctrica Española* included) accounted for [less than 5 %] of total demand during the period June-December 2001. On the other hand, and as far as the retail market for electricity is concerned, Hidrocantábrico's share in terms of supply to eligible customers was around [5-10%] in 2001, while the combined market share of EDP, EnBW and EDF was below 1%. In conclusion, the proposed operation would result in relatively limited horizontal overlaps in the Spanish wholesale and retail electricity markets.
29. Notwithstanding the above, and in line with the Commission decision in the case COMP/M.2434 - Grupo Villar Mir / EnBW / Hidroeléctrica del Cantábrico, the proposed operation must be assessed in the light of the high degree of concentration on the Spanish electricity market and of its isolation due to a shortage of interconnections with other systems.
30. In particular, the Commission concluded in the referred case, after an in-depth investigation, that the Spanish electricity market is characterised by the existence of a duopolistic dominant position by the firms Endesa and Iberdrola²⁵, on the basis of (1) their shares of total installed generating capacity (Endesa 46% and Iberdrola 37% in 2001); (2) their shares of sales to the wholesale market (Endesa 47% and Iberdrola 27% in 2000, and 44% and 34% respectively between January and May 2001); and (3) their ability to set prices in the wholesale electricity market (60 to 80% of cases in the daily market). This duopolistic scenario has not been altered since by the recent divestiture by Endesa of Viesgo (which accounts for around 5% of the total installed capacity in Spain) which brought the entry of a new operator, Enel²⁶.
31. Endesa and Iberdrola play a pivotal role in the Spanish wholesale market, their capacity being necessary to provide the additional supply needed on the market in order to meet the demand, especially at times of peak demand. This means that the combined supply of the rest of the generators is insufficient to satisfy demand and the pivotal firms can increase their prices in response to demand, generally without fear of losing business. Moreover, the marginal price-setting

²⁴ Both EDP and EDF have nevertheless a participation in the company ELCOGAS (4% and 29%, respectively).

²⁵ This finding confirmed the approach taken by the Spanish Competition Court in two cases: (1) Report C-60/00 on the Endesa/Iberdrola merger; and (2) Report C-54/00 on the Unión Eléctrica Fenosa/Hidroeléctrica del Cantábrico merger.

²⁶ Case COMP/M.2620 - Enel / Viesgo.

capabilities of Endesa and Iberdrola in the Spanish wholesale market are enhanced by the technological composition of their installed capacity (the generation mix).

32. Further to the considerations set out above regarding the market power of the two main Spanish operators, it shall be taken into account that there exists a number of barriers to entry into the Spanish generating market, such as (1) access to potential production sites and hydroelectric and fuel resources; (2) installation costs; (3) the necessary diversification of the generation mix; and especially (4) the shortage of interconnection capacity with France, on which exports to the Spanish market from non-Iberian European countries have to rely. In particular, the limitations stemming from the shortage of existing interconnection capacity between Spain and other European countries outside the Iberian Peninsula prevent exports to the Spanish market from playing an active role in promoting competition on the Spanish electricity market²⁷.
33. In this context, and in line with its decision in the referred case COMP/M.2434, the Commission takes the view that the notified operation, for the reasons set out in detail below, would strengthen the aforementioned duopolistic dominant position on the wholesale electricity market in Spain. In particular, as a result of the merger there would no longer be the incentives that existed beforehand for EDF to promote or accept a substantial expansion of the interconnection capacity between France and Spain. This would both eliminate the existing Spanish generating companies' main potential independent competitor (accounting for around [55-65%] of total imports to Spain and more than [60-70%] of imports through the French-Spanish interconnectors) and maintain the isolation of the Spanish electricity market from other European electrical systems outside the Iberian Peninsula. The operation would therefore have the effect of consolidating the existing joint dominant position on the Spanish electricity market, which would be protected from potential competition from operators based in other European countries outside the Iberian Peninsula by an entry barrier constituted by the limited international interconnection capacity, without any real prospects for significant further development.
34. In effect, EdF, which jointly controls EnBW, is nowadays the main exporter into the Spanish market and, as such, the main alternative to the Spanish generators and therefore the main source of potential competition on the Spanish oligopolistic wholesale electricity market. EDF has extensive generating capacity with low variable costs in France, largely due to its nuclear electricity, which puts it in a position to supply power to the Spanish wholesale market when demand is low.
35. Due to higher relative prices for electricity in Spain²⁸ and an excess in its production capacity, EdF has been traditionally interested in increasing its exports into the Spanish market. This interest corresponds as well to a pan-European supply strategy pursued by EdF. Before the acquisition of

²⁷ The share of total electricity demand in Spain which is met by imports across the French/Spanish border currently stands at only around 3 to 3.5% (6 500 to 8 000 GWh). The inadequacy of the interconnection with France, which isolates the Spanish electricity market, is clearly demonstrated by the capacity ratio and the interconnection capacity with France in relation to demand at peak times, which are less than 2.5% and 3.3% respectively for Spain. It may thus be concluded that imports are extremely limited as a result of this restricted commercial interconnection capacity. A comparison between the installed interconnection capacities of other European States reveals that Spain has the lowest value as a percentage of the capacity needed at peak demand times (see decision in Case No COMP/M.2434).

²⁸ The wholesale electricity market in Spain offers attractive prices to operators based in other countries. The price level applied to eligible customers is generally between 20 and 30% higher than in France.

significant generation capacity in Spain, EDF's only way to increase substantially its presence in the Spanish market was through an increase of its exports into Spain. Due to the referred scarce interconnection capacity between France and Spain and the level of saturation of interconnectors for electricity transmitted from the French border into Spain²⁹, any substantial increase in exports will require first an increase in that capacity³⁰. To this effect, EDF has supported in the past several projects for the increase of interconnection capacity.

36. A substantial increase in exports into Spain, once the interconnection capacity has been expanded, would give rise to greater competition in the Spanish electricity market, thereby weakening the existing oligopoly. In particular, the market investigation in the case COMP/M.2434 revealed that a relatively large increase in low cost electricity exports to Spain would have notable effects on the level of prices charged on the Spanish wholesale market, pushing electricity prices down and weakening the oligopolists' ability to set prices in the pool³¹. Such an increase in supply on the wholesale market would lead not only to a reduction in the relative market shares of the two main Spanish operators but also, and more importantly, to a weakening of their respective power to set prices in the pool. Provided that exports to the Spanish wholesale market consist of low-cost electricity (for example electricity generated by nuclear power stations in France), those exports would displace offers of more expensive electricity in the formation of the marginal price, thereby introducing competitive forces into the market. The scenario described, in which sales by foreign operators contribute to a lowering of prices, either directly (setting the marginal price) or indirectly (forcing the main operators to offer electricity at lower prices), would of course take place to a greater extent the greater the volume of exports to the Spanish market.

²⁹ The average level of saturation since 1999 has been around 90%.

³⁰ Even under the existing capacity allocation system, which allows EDF to use most of the available commercial capacity (around [70-80%]), EDF cannot achieve a significant presence on the Spanish market as a foreign exporting operator without a large increase in interconnection capacity between France and Spain. In effect, Hidrocantábrico's electricity generating capacity stands at around 2 175 MW. In order to succeed in placing on the Spanish market an equivalent amount of additional electricity as a foreign exporter, in other words through exports from France, EDF would first have to secure an increase in interconnection capacity of at least 3 000 MW, bringing the total commercial interconnection capacity to over 4 000 MW.

³¹ The fall in prices that took place on the Spanish market between 2000 and 2001 as a result of the increase in hydroelectric power generation illustrates the effects of an increase in the amount of low-priced energy offered in the pool. In effect, the sharp increase in hydroelectric power generation observed in Spain between the months of November 2000 and March 2001 led to a significant drop in the price of electricity, by up to 42%. Taking as a reference a longer period, if periods of 13 consecutive months (March 1999/March 2000 and March 2000/March 2001) are taken into account, an increase in the supply of hydroelectricity of 22 811 GWh caused electricity prices to fall by a little over 30% over the time periods observed. The above-mentioned increase in the supply of electricity is quantitatively and qualitatively comparable to that which would result from a substantial increase in the interconnection capacity between France and Spain. Firstly, and given that with the current capacity (1100 MW) exports from France account for 6,5 to 8 TW/h, an increase of extra 3000 MW, i.e. a scenario in which there would be a total of 4 000 MW of commercial interconnection capacity, would lead to an increase in supply of some 20-24 TW/h per year. Secondly, from a qualitative standpoint, the energy exported to Spain could be expected to be electricity generated by plants with low marginal costs, which could therefore be supplied to the Spanish wholesale market at lower prices than those traditionally prevailing on that market.

37. This scenario, however, will change after the proposed operation. In particular, by acquiring joint control over Hidrocantábrico, EDF will obtain an important foothold in Spain³², without however increasing neither its exports into Spain nor the interconnection capacity between this country and France. EDF will stop being a mere external agent (exporter) and will jointly control one of the operators in the Spanish market. The combination of (joint) control of an important amount of domestic generation capacity in the Spanish market, resulting from the proposed operation, with the use of a majority of the existing interconnection capacity, will bring about predictably a qualitative change in the strategic interests of EDF. Thus, EDF would logically be more interested in exploiting its comfortable situation on the oligopolistic Spanish market, taking advantage of the supracompetitive prices prevailing in the pool, than in boosting exports to Spain by increasing interconnection capacity.
38. This is due to the fact that a substantial increase of the interconnection capacity, and the resulting increase of imports into the *pool*, will entail a substantial decrease of the prices in the latter. Such a decrease of prices will have an impact on Hidrocantábrico's profits (and, indirectly, on EDF's). Given Hidrocantábrico's generation *mix*, such a reduction of prices will be probably further accompanied by a relative reduction of the amount of electricity sold by it, particularly that produced at higher marginal costs. This decrease in the amounts sold by Hidrocantábrico and in the prices of the *pool* will reduce EDF's profit stemming from the exploitation of the Spanish company, and will not be compensated by the increase of EDF's exports into the Spanish market (those exports being also paid at the lower marginal price resulting from the opening up of the market).
39. Hence, it will be advantageous for EDF to maintain the existing status quo with high prices enabling it to maximise profits and recoup its investment. In this sense, the strategy allowing EDF to maximise its profits will not consist anymore of a substantial increase of the interconnection capacity but of a relatively limited development of Hidrocantábrico's generation capacity and of EDF's sales to the Spanish market without jeopardising the current level of prices in the pool. Indeed, through the expansion of the generation capacity of Hidrocantábrico in Spain, EDF will maintain total control over the impact of its decision in the structure of capacity in the Spanish market, while an increase in interconnection capacity would not only benefit EDF but also other operators established beyond the Iberian Peninsula, with whom EDF will have to compete in order to get a substantial use of the new interconnection capacity (in particular in an auction system).
40. In sum, EDF, once obtained a significant presence in the Spanish market, will be interested in the maintenance of the barrier to entry constituted by a clearly insufficient interconnection capacity. The decision to oppose such an increase in interconnection, however, does not eliminate EDF's strategic alternatives to grow in the Spanish market, which will consist, as explained above, in developing Hidrocantábrico's generation capacity. In other words, the lack of increase of the interconnection maintains the barriers to entry into the Spanish markets for operators not established in this country, without significantly affecting, however, EDF's strategic alternatives. As noted in the Case COMP/M.2434, it is not unreasonable to conclude in this regard that, without denying the functional autonomy and management independence of EDF/RTE (the operator of the French grid), interconnection capacity between France and Spain will not be substantially increased

³² Furthermore, the specific features of Hidrocantábrico's generation mix (electricity produced essentially by thermal power stations) appear to dovetail neatly with those of EDF (essentially nuclear power).

if this is likely to be clearly detrimental to EDF's interests and, consequently, those of its owner, the French State, which holds the power to take the final decisions on the issue³³.

41. In the light of the factors outlined above, it can therefore be concluded that the most advantageous strategy for EDF, following implementation of the merger, would be to align its commercial strategy on that of the other Spanish electricity companies, within the framework of the existing duopoly. EDF, like the other generators, would earn large profits as long as prices remained high in the pool. EDF, as an exporter to Spain, would also continue to benefit from the higher level of prices in Spain than in France. Under such circumstances it would be highly unlikely that other competitors not established in Spain could successfully compete on the Spanish market, given the limited interconnection capacity, even if the new capacity allocation system was to grant them greater access thereto³⁴.
42. It is possible thus to conclude, that EdF will lose after the merger any incentive to promote or accept any further substantial increase in interconnection capacity between France and the Iberian Peninsula. Being the scarcity of such interconnection capacity an unbeatable barrier to entry into the Spanish market, the operation will result in the consolidation of Spain as an "electricity island", preventing operators established in other European (non-peninsular) countries to compete effectively in the Spanish market and therefore reinforcing the current collective dominant position in the said market.

The Portuguese and French markets

43. The transaction is not likely to have any substantial effects in the markets for electricity in Portugal and France, where EDP and EDF have respectively very strong positions as the incumbent electricity utilities.

³³ EDF/RTE is entrusted with the task of operating the electricity grid in France, which includes taking decisions on the allocation and increase of the interconnection capacity between France and Spain by either upgrading existing lines or planning new ones. In carrying out these tasks, EDF/RTE claims that it enjoys financial and operational independence and has resources of various kinds necessary for fulfilling them. Nevertheless, as noted in the referred Case COMP/M.2434, from a legal and organisational standpoint, EDF/RTE is a division of EDF and has no separate legal personality [Article 12 of Law No 2000-108 of 10 February 2000]. Furthermore, the Director of EDF/RTE is appointed by the French Energy Minister from a shortlist of three candidates submitted up by the Chairman of EDF. In any event, both EDF and EDF/RTE form part of one and the same economic unit, an industrial group belonging to the French State. Under such circumstances, decision-making on key issues or strategic decisions for the operation of EDF/RTE are clearly subordinated to the French authorities, and in particular the Energy Ministry, without prejudice to the powers of the electricity regulator, the Commission de Régulation de l'Electricité (CRE). Thus, the French State is ultimately responsible for decisions on interconnection issues. In particular, EDF/RTE must submit to the approval of the Ministry of Energy, every two years at the latest, the plan on the development of the public transport grid.

³⁴ Available commercial capacity on the French/Spanish interconnection amounts approximately to [500-600%] MW (total commercial capacity of 1 100 MW minus the [500-600%] MW reserved under the long-term contract between EDF and REE). Account also has to be taken of the fact that there is no guaranteed commercial interconnection capacity for third parties since the only commercial capacity guarantee is reserved for the EDF/REE contract. Even assuming that the allocation mechanism were altered so as to offer foreign suppliers greater interconnection capacity, the total amount of imported electricity offered to the Spanish wholesale market would represent a market share of less than 2%. Being on such a small scale, those offers would not be able to significantly influence prices in the pool.

44. On the one hand, the acquisition of a relatively minor actor, in terms of generation capacity and electricity production, will not increase to a significant degree EDP's and EdF's potential for retaliation in Spain with regards to Spanish companies willing to compete aggressively in the Portuguese or French markets. Hidrocantábrico (see the figures set out in previous sections) is a minor actor, with no particular advantages, compared to companies like Endesa or Iberdrola.
45. Further, even if we were to assume that the merger will imply the disappearance of potential "ex novo" entrants³⁵ both in the Portuguese (EDF and Hidrocantábrico) and French markets (EDP and again Hidrocantábrico), the impact of the merger in these countries, given the number of other potential competitors, will be negligible. Moreover, EDF does not operate as yet in the Portuguese liberalised electricity market (it has only some de minimis activities in the bound system), where Endesa and to a lesser extent Iberdrola seem to be stronger external competitors. Finally, both EDP and Hidrocantábrico not only have never been active in the French market but have a very small size compared to the dimensions of the market in France.

Co-ordination of competitive behaviour

46. EDP and EnBW/EdF are active both in the Spanish electricity market, home territory of their joint venture Hidrocantábrico, and in neighbouring geographic markets.
47. As regards a possible co-ordination of competitive behaviour in France and/or Portugal, it has to be pointed out that EDF and EDP have no activities in each other's home liberalised markets³⁶ and that they do not compete with each other in any other market in Europe (apart from the Spanish market). Further, there is no indication that the transaction will have as its object or effect a co-ordination of the competitive behaviour of EDP and EnBW/EdF.
48. As far as the Spanish market is concerned, there is no evidence that the transaction will result in a co-ordination of the parties' competitive behaviour with respect to their activities as external agents in the Spanish wholesale market (exports from and imports into Spain). [...]

VI. UNDERTAKINGS SUBMITTED

49. In order to remove the competition concerns resulting from the proposed transaction, EDF/RTE and EDF have re-submitted the undertakings that had been accepted by the Commission in relation to the case COMP/M.2434³⁷. These undertakings, none of which has been implemented as yet, are annexed to the decision (Annexes I and II) and form an integral part thereof.

Undertakings offered by EDF/RTE

50. EDF/RTE undertakes to adopt the measures and implement the works necessary to increase the commercial interconnection capacity France-Spain according to the following phases:

³⁵ As indicated in the next section, there are no indications that the transaction will lead to a co-ordination of the behaviour of EDP and EDF in France and Portugal.

³⁶ It shall be noted I this regard that EDF only participates in some plants of the Portuguese bound system.

³⁷ Case COMP/M.2434 - Grupo Villar Mir / EnBW / Hidroeléctrica del Cantábrico.

- (1) 300 additional MW through the technical improvement of existing lines before the end of 2002
 - (2) 1200 additional MW through the construction of a new line [...]. This additional capacity could be increased up to [...] MW after verification of the technical and economic feasibility of this last amount of increase.
 - (3) 1200 additional MW through the construction of an alternative line, the doubling of an existing line or the reinforcement of the French lines, at mid term, inasmuch as studies on technical and economic feasibility, to be carried away before the end of 2002, will justify such works .
51. The increase of commercial capacity shall bring about an available capacity equivalent to 75% of the additional increase during 85% of the hours of the year.
 52. The aforementioned deadlines can be extended in the event that the works will not be concluded for reasons which are not attributable to EDF/RTE. Further, the Commission wants to precise, in line with its previous decision in the Case COMP/M.2434, that as far as the third phase of the increase in interconnection is concerned, and without prejudice of the fact that the concrete determination of the timetable for the works shall result from the aforementioned feasibility studies, the undertakings include nevertheless a relevant time framework (the construction must be implemented "at mid term"). The exact determination of this time framework will depend upon the particular project to be implemented (construction of a new line, doubling or reinforcement of existing lines). To this effect, and according to the investigation undertaken by the Commission, this time framework must be interpreted as including a period of 4 to 8 years after the culmination of the referred studies.
 53. One (several) third person(s) or entity(ies) (*tiers certificateurs*) will be nominated to monitor the fulfilment of the undertakings. They shall be approved by the Commission. In particular, they shall receive from EDF/RTE all the information and assistance necessary in order to fulfil their tasks, and they will inform regularly on the implementation of the undertakings and, if needed, they may propose to the Commission all necessary measures to guarantee the respect of the undertakings, among others the production of feasibility studies alternative and/or complementary to those to be submitted by EDF/RTE. Likewise they shall take into account, when fulfilling their tasks, all information or studies by third interested parties, in particular by the Spanish *Comisión Nacional de la Energía* and/or REE.

Undertakings offered by EDF

54. In order to solve the competition problems raised by its acquisition of joint control over Hidrocantábrico, EDF undertakes to support the increase in interconnection between France and Spain and particularly the commitments of EDF/RTE mentioned above, according to the referred phases.
55. To that effect, EDF undertakes to participate in the activities of the group of users established by EDF/RTE and to furnish RTE the elements in its possession that could be useful for the implementation of the studies on technical and economic feasibility regarding the building of new lines or other projects for the reinforcement of the interconnection between France and Spain.

56. Further, EDF undertakes to remunerate, if need be, the third person(s) or entity(ies) that will be nominated to monitor the fulfilment of the undertakings subscribed by EDF/RTE.

Assessment

57. As the Commission already indicated in its decision in the referred case COMP/M.2434, the aforementioned undertakings will mitigate in the future the isolation of the Spanish market for electricity, increasing significantly the possibility for operators established beyond the Pyrenees to compete in the said market. The increase in interconnection capacity will make possible an increase in the exports of electricity into the Spanish market, which will positively affect both the level of prices in the pool and the ability of the members of the existing duopoly to determine them.
58. Therefore, the undertakings offered by EDF/RTE and EDF are adequate to prevent the reinforcement of the dominant position of Endesa and Iberdrola that would result, after the merger, from the foreseeable maintenance in the future of the current (clearly insufficient) electrical interconnection capacity between France and Spain.
59. Finally, the Commission intends to precise again that, contrary to the statement of EDF/RTE in its submission of undertakings (in particular, its Preliminary Declaration), EDF/RTE constitutes an undertaking concerned for the purposes of Article 8 (2) of the Merger Regulation, and therefore susceptible of assuming commitments entered into with a view to rendering the notified operation compatible with the Common Market. This results, without prejudice of the alleged independence of EDF/RTE from EDF, from both entities being part of the same industrial group ownership of the French State³⁸.
60. In sum, having regard to the above mentioned considerations, the proposed operation, provided that the undertakings contained in the Annexes incorporated to this Decision are fully respected, will not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in a substantial part of the common market. Therefore, the operation is declared compatible with the common market and the functioning of the EEA on the basis of Article 6 (2) of the Merger regulation, on condition that the parties comply with the following commitments:
- (a) the increase in the interconnection capacity set out in Chapter 2 of Annex I (which are subject to change by the Commission pursuant to Chapter 4 of Annex I);
 - (b) the compliance with any measure imposed by the Commission upon recommendation of the *tiers certificateurs* to make the parties comply with their commitment as indicated in paragraph 8 of Chapter 3 of Annex I.
61. The above aspects of the commitment constitute conditions, as only by fulfilling them (subject to any change pursuant to Chapter 4 of Annex I), can the structural change on the wholesale market for electricity in Spain be achieved. The remaining aspects of the commitment constitute obligations as they concern the implementing steps which are necessary to achieve the structural change that is sought. In particular, this relates to the provisions relating to the *tiers certificateurs*

³⁸ See footnote 31.

entrusted with the monitoring of the fulfilment of the undertakings (Chapter 3 of Annex I, with the exception of the issue referred to in letter b above).

VII. CONCLUSION

62. The Commission concludes that the undertakings submitted by EDF/RTE and EDF during the course of the proceedings are sufficient to address the competition concerns raised by this concentration. Accordingly, subject to full compliance with the undertakings, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the functioning of the EEA Agreement. This decision is adopted in application of Article 6(2) of Council Regulation (EEC) No 4064/89.

For the Commission

Mario MONTI
Member of the Commission
(signed)

Dossier. CAS COMP M 2684 EDP/ EnBW/ CajAstur - Hidroeléctrica del Cantábrico
ENGAGEMENTS DE EDF-RTE

1. DECLARATION LIMINAIRE DE EDF-RTE

EDF-RTE, gestionnaire du réseau *français* de transport d'électricité, est un service placé « au sein d'Électricité de France ». Ainsi, il s'agit d'une entité ne disposant pas d'une personnalité juridique propre. Pour autant, EDF-RTE est "*indépendant sur le plan de la gestion des autres activités d'Électricité de France*" (article 12, alinéa 2 de la loi du 10 février 2000).

Cette indépendance est attestée principalement par l'article 12 de la loi précitée qui a prévu:

- Le mode de désignation de son directeur et la protection dont il bénéficie pendant la durée de ses fonctions (troisième alinéa): il est nommé pour 6 ans par le ministre chargé de l'énergie sur proposition de trois candidats par le président d'EDF et après avis de la Commission de Régulation de l'Électricité (ci-après la "CRE"). Le Directeur de RTE ne peut être démis de ses fonctions que dans l'intérêt du service, par le ministre chargé de l'énergie, après avis motivé de la CRE ;
- Le fait que le Directeur de RTE rend compte de ses activités à la CRE et non à la Présidence ou à la Direction Générale d'EDF (ibidem) ;
- L'existence d'un lien de subordination exclusif entre les agents de RTE et le Directeur de RTE, la Direction Générale d'EDF ne pouvant donner aucune instruction aux agents de RTE (alinéa 5) ;
- L'existence d'un budget propre à RTE (alinéas 6 et 7) ;
- Les pouvoirs de gestion confiés au Directeur de RTE: celui-ci est seul responsable de la gestion de RTE et dispose du pouvoir d'engager les dépenses liées à son fonctionnement et à l'accomplissement de ses missions (alinéa 7).

En outre, l'indépendance de RTE est assurée par d'autres articles de la loi du 10 février 2000:

- L'article 13 qui interdit aux agents de RTE ayant eu à connaître des informations confidentielles, l'exercice d'un certain nombre d'activités (dont la liste doit être axée par un décret à intervenir) ;
- L'article 14 qui dispose que RTE soumet d'une part son programme annuel d'investissements à l'approbation de la CRE et, d'autre part, le schéma bi-annuel de développement du réseau public de transport à l'approbation du ministre chargé de l'électricité après avis de la CRE ;
- L'article 16 qui soumet les agents de RTE à une stricte obligation de confidentialité. Il en résulte que ceux-ci ont interdiction de communiquer aux autres services d'EDF des informations confidentielles concernant les autres utilisateurs du réseau;
- L'article 23 qui impose à RTE de conclure avec EDF des protocoles en vue de déterminer les conditions d'accès au réseau et de leur utilisation par cette dernière ;

- L'article 38 qui confère à la CRE le pouvoir de se prononcer sur tout différend entre un gestionnaire de réseau et un utilisateur relativement à l'accès au réseau et à son utilisation. Ainsi, la CRE peut être saisie par RTE ou EDF si un litige de cette nature venait à les opposer.

EDF-RTE dispose donc d'une autonomie de gestion et d'une indépendance financière garanties par la loi du 10 février 2000 et par la CRE. Son activité se limite strictement, de par la loi, à la gestion du réseau de transport, ce qui exclut toute prise d'intérêt ou de participation dans le capital d'un producteur d'électricité, quel qu'il soit.

Compte tenu de cette situation, EDF-RTE considère qu'il constitue, au regard du droit de la concurrence (cf notamment CJCE 23 avril 1991, affaire C-41/90, Rec.p.1-1979 et 17 février 1993, affaire C-159/91, Rec.p.1-067 ; cf également le considérant n° 12 du règlement 4064/89), une entreprise distincte de EDF. A ce titre, EDF-RTE estime qu'il ne saurait être considéré comme une "entreprise concernée" au sens du règlement 4064/89, ni comme une "partie intéressée" au sens du règlement 447/98.

EDF-RTE rappelle, au demeurant, que tout au long de la procédure EDF/OEW/EnBW, il a été considéré comme une "partie tierce intéressée".

C'est en se référant expressément à cette situation juridique que EDF-RTE, faisant suite à son intention déjà annoncée précédemment de développer les interconnexions avec l'Espagne et dans l'esprit de transparence attaché à sa mission de gestionnaire de réseau, accepte de souscrire aux engagements suivants qui relèvent de sa responsabilité exclusive, sous le contrôle du Ministre chargé de l'énergie et de la CRE, de veiller à assurer un niveau de développement optimal aux infrastructures de transport d'électricité et aux interconnexions avec les pays voisins.

2. NATURE DES ENGAGEMENTS SOUSCRITS PAR EDF-RTE

EDF-RTE s'engage à prendre les mesures et à exécuter les travaux nécessaires y compris la mise à disposition des ressources financières, à fixer par les autorités compétentes, pour procéder à une augmentation de la capacité commerciale d'interconnexion France-Espagne selon les étapes suivantes

1. 300 MW supplémentaires à travers l'amélioration technique des lignes existantes avant fin 2002
2. 1200 MW supplémentaires à travers la construction d'une nouvelle ligne [...]. Cette capacité supplémentaire pourra être portée à [...], après vérification de la faisabilité technicoéconomique de cette dernière valeur.
3. 1200 MW supplémentaires à travers la construction d'une ligne alternative, le dédoublement d'une ligne existante ou bien le renforcement des lignes françaises, à moyen terme, dans la mesure où des études de faisabilité technico-économique à accomplir avant fin 2002 justifieraient de tels travaux.

L'augmentation de capacité commerciale d'interconnexion devra donner lieu à une capacité disponible équivalente à 75% de l'augmentation additionnelle pendant 85% des heures de l'année.

Si les travaux pour lesquels EDF-RTE est responsable n'étaient pas achevés dans les délais indiqués ci-dessus pour des raisons non imputables à EDF-RTE, EDF-RTE pourra demander à la Commission la prolongation du délai établi pour la terminaison des travaux, pour une période correspondant aux retards résultant directement des raisons non imputables à EDF-RTE. Ce délai supplémentaire pourra être refusé par la Commission si les raisons du retard des travaux sont imputables à EDF-RTE.

On entend comme raisons non imputables à EDF-RTE:

- l'absence des autorisations légales nécessaire à la réalisation de la liaison
- le refus de la Commission de Régulation de l'Électricité d'approuver les investissements en cause
- une contestation devant les tribunaux conduisant à la suspension des autorisations préalablement obtenues ou à des délais supplémentaires pour la réalisation de l'ouvrage;
- une décision gouvernementale interdisant la réalisation ;
- l'absence de collaboration de Red Eléctrica de España (REE), et notamment l'absence de financement et de réalisation de la part des travaux qui lui incombe ;
- Les limitations de la capacité disponible qui résulteraient de règles d'exploitation imposées par REE qui seraient plus restrictives que les règles généralement admises par les gestionnaires des réseaux de transport européens ;
- force majeure liée à des calamités naturelles.

Les engagements décrits ci-dessus peuvent faire l'objet d'une révision en cas de changements substantiels du marché espagnol. Ces changements devraient entraîner (condition sine qua non pour la révision des engagements) une situation de concurrence effective dans le marché qui fait l'objet de la décision de la Commission (marché libéralisé « au gros » : pool et contrats bilatéraux). Dans ces circonstances, le niveau d'augmentation de la capacité d'interconnexion pourrait être revu. Le changement de la situation du marché espagnol pourra être constaté a) par des études réalisées par un(des) expert(s) indépendant(s) sous réserve de vérification et acceptation de l'/les études) par la Commission européenne b) par les autorités compétentes espagnoles sous réserve de vérification et révision par la Commission européenne c) par la Commission européenne, suite à une enquête de marché.

Les obligations inhérentes à ces engagements commencent à courir à partir de la date de la décision d'approbation par la Commission.

EDF-RTE s'engage à prendre les mesures nécessaires pour entreprendre des études de faisabilité visant à augmenter la capacité commerciale d'interconnexion France Espagne au-delà des capacités susmentionnées.

3. TIERS CERTIFICATEURS

Dans un délai de deux semaines à partir de la date de la décision de la Commission EDF-RTE devra proposer à la Commission le nom d'au moins deux personnes ou d'un groupe de personnes indépendantes ou bien d'une ou plusieurs institutions ou un ensemble d'institutions qu'ils considèrent appropriés pour être nommés tiers certificateur(s). Le(s) tiers certificateur(s) devront avoir l'expérience, la compétence et l'indépendance nécessaires pour contrôler d'une façon objective la mise en oeuvre des engagements. Il incombe à EDF-RTE de fournir à la Commission toutes les informations qui lui permettront de vérifier si le(s) tiers certificateur(s) remplit(ssent) ces conditions. EDF est chargé de la rémunération, si nécessaire, de chaque tiers certificateur pour tous les services rendus lors de l'exécution de leurs tâches, et le système de la rémunération doit être tel qu'il n'entrave pas l'indépendance et l'efficacité du tiers certificateur dans l'exercice de sa mission. Nonobstant cette prise en charge de la rémunération, EDF n'aura aucun droit d'accès aux informations fournies au tiers certificateur par EDF-RTE.

Il appartient à la Commission d'approuver la nomination du(es) tiers certificateur(s).

Si le(s) tiers certificateur (s) proposé(s) est (sont) rejeté(s) par la Commission, EDFRTE proposera dans un délai de 5 jours ouvrables à partir de la date du rejet de la Commission au moins deux autres possibles tiers certificateurs ou groupes de tiers certificateurs (personnes ou institutions).

Si ce(s) tiers certificateurs) est(sont) à nouveau rejeté(s) par la Commission, celle-ci désignera le(s) tiers certificateurs) à nommer par EDF-RTE.

EDF-RTE nommera le(s) tiers certificateurs) 5 jours ouvrables après son(leur) approbation définitive par la Commission.

EDF-RTE est obligé de fournir aulx) tiers certificateurs) toutes les informations et assistance nécessaires pour l'accomplissement de sa(leur) mission. Le(s) tiers certiflcteur(s) devront être astreints au secret professionnel pour toutes les informations qui leur seront communiquées dans l'exercice de leur mission. Ils ne pourront en faire aucun autre usage que celui strictement défini dans le cadre des présents engagements.

En parallèle avec la proposition du (des) tiers certificateur(s), EDF-RTE soumettra à la Commission un projet de lettre de mission détaillant le contenu de celle-ci et les tâches à remplir par le(s) tiers certifleateur(s). Cette lettre de mission sera modifiée sur demande de la Commission en vue d'assurer qu'elle est en ligne avec les engagements ci-dessus. Le(s) tiers certificateurs) sera(ont) notamment tenu(s) de

veiller à ce que les études de faisabilité concernant l'augmentation de la capacité commerciale d'interconnexion tiennent compte de la situation du marché espagnol et des possibilités d'exportation de tous les opérateurs établis en-deça des Pyrénées. La Commission approuvera les termes de cette lettre de mission, qui devra être irrévocable sauf si un motif valable peut être donné à la Commission pour justifier la désignation d'un nouveau tiers certificateur.

Le(s) tiers certificateur(s) a(ont) un rôle de surveillance et en même temps il(s) a(ont) le droit de proposer à la Commission Européenne toutes les mesures que le(s) tiers certificateur(s) jugera(ont) nécessaire(s) pour garantir le respect de chacun des engagements. Sur la base des propositions du/es tiers certificateurs) la Commission Européenne pourra adopter les mesures qu'elle estimera nécessaire pour garantir le respect de chacun des engagements. Le(s) tiers certificateurs) doit(vent) présenter à la Commission des rapports trimestriels sur le respect des engagements et sur les progrès faits pour respecter les engagements.

Le(s) tiers certificateur(s) chargé(s) de la vérification de l'accomplissement des engagements pris par EDF-RTE fera(ont) rapport à la Commission sur le contenu des informations fournies par EDF notamment en vue de constater si : LDI' omet de fournir des informations nécessaires pour l'accomplissement des études, si EDF donne des indications inexacts, dénaturées ou incomplètes.

En vue de vérifier que l'augmentation de capacité commerciale d'interconnexion a donné lieu à une capacité disponible équivalent à 75% de l'augmentation additionnelle pendant 85% des heures de l'année, la mission du tiers certificateur expirera 2 ans après la réalisation des travaux ayant donné lieu à une augmentation de la capacité commerciale d'interconnexion France-Espagne jusqu'à un niveau de 2600 MW à 3000 MW. En outre, si le tiers certificateur constate l'impossibilité d'atteindre les objectifs d'augmentation d'interconnexion prévus dans ces engagements, pour des raisons techniques, économiques ou liées à des autorisations, il en fera rapport à la Commission qui pourra autoriser de mettre fin à sa mission.

4. CLAUSE DE REVISION DES ENGAGEMENTS

Sur demande de EDF-RTE, et après avoir reçu l'opinion du tiers certificateur, la Commission peut étendre les délais prévus dans les engagements décrits ci-dessus ou réviser le contenu de ces engagements en cas de circonstances exceptionnelles qui justifieraient une extension ou une révision. Une telle demande doit spécifier les circonstances exceptionnelles qui, d'après le tiers certificateur, justifieraient une telle extension des délais ou une telle révision du contenu des engagements.

5. NATURE DES CHARGES QUI SERAIENT IMPOSEES A EDF-RTE

Bien entendu, si une des parties concernées ne satisfaisait pas aux conditions et charges qui lui seraient imposées dans la décision de la Commission autorisant l'opération de concentration "EDP/ EnBW/ CajAstur - Hidroeléctrica del Cantábrico" et que ce nonrespect desdites conditions et charges était susceptible de faire obstacle au respect par EDF'-RTE de ses propres engagements (ce qui serait en particulier le cas pour ce qui concerne la rémunération du tiers certificateur par EDF'), les engagements visés cidessus seraient caducs.

ANNEX II

COMMITMENTS **given by Électricité de France** **in case**

COMP.M 2684 EDP/EnBW/Hidroeléctrica del Cantábrico.

Électricité de France (EDF) recognise the necessity to proceed to an increase in the interconnection capacity between France and Spain and thereby strengthen competition on the Spanish market.

EDF commits itself to support, within the limits of its competences and in due respect of the competences of EDF-RTE, the increase of the interconnection capacity between France and Spain, the commitments of EDF-RTE to increase the commercial interconnection capacity between France and Spain and to finalise the works for which the latter is responsible in accordance with the following stages:

1. 300 additional MW through the technical improvement of the existing lines before the end of 2002.
2. 1 200 additional MW through the construction of a new line parallel [...]; this additional capacity could be increased [...] after verification of the technical and economical feasibility of such increase.
3. 1 200 additional MW through the construction of an alternative line, the doubling of an existing line or the reinforcement of the French lines, at medium term, to the extent that the studies concerning the technical and economical feasibility to be accomplished before the end of 2002 justify such works.

According to the commitment given by EDF-RTE, the increase of the commercial capacity should lead to an available capacity equivalent to 75% of the additional increase during 85% of the hours of the year.

In order to facilitate a significant increase in the interconnection capacity between France and Spain in accordance with the commitments provided by EDF-RTE, EDF commits itself:

- to participate in the work of the user group set up by EDF-RTE in parallel to the intergovernmental working group,
- to provide RTE with the elements in its possession that could be useful for the elaboration of the technical and economical studies regarding the implementation of the works referred to in point (3) above and aiming at reinforcing the interconnection capacity between France and Spain.

Moreover, EDF commits itself to remunerate the third party/ies entrusted with the monitoring of the implementation of the commitments entered into by EDF-RTE and approved by the Commission for all services rendered in the execution of its/their task. The remuneration system must be such as not to impede the independence and efficacy of the third party/ies in the exercise of its/their mission. Notwithstanding the taking in charge of the remuneration, EDF will have no right of access to the information given by EDF-RTE to the third party/ies referred to above.

As mentioned, EDF will adopt all measures necessary to support EDF-RTE in the elaboration of the above-mentioned technical and economical studies which are aimed at increasing the interconnection capacity between France and Spain.

The progress of the studies will be detailed in a bi-annual report of EDF to the European Commission.

The third party/ies entrusted with monitoring the implementation of the EDF-RTE commitments will provide the Commission with a report on the contents of the information given by EDF, in particular in order to report whether EDF omits supplying the information necessary for the implementation of the studies or supplies incorrect, misleading or incomplete indications.

In case of non respect by EDF-RTE of the time-limits laid down for the accomplishment of the works increasing the interconnection capacity between France and Spain, and taking into account a possible prolongation thereof, the Commission could request EDF to adopt the measures required to divest its participation in Hidroeléctrica del Cantábrico [...]. Prior to adopting such a decision, the Commission will provide EDF the opportunity of being heard, in particular as to the development of competition in the Spanish electricity sector.

Paris,

Gérard Wolf
Directeur Coordination Groupe
Électricité de France