Case No COMP/M.3986 – Gas Natural/Endesa

Only the English text is authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Declaring the lack of Community dimension
Date: 15/11/2005

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 15.11.2005

C(2005) 4468

PUBLIC VERSION

COMMISSION DECISION

of 15.11.2005

declaring the lack of Community dimension

(Case No COMP/M.3986 – Gas Natural/Endesa)

I. FACTUAL BACKGROUND

1. On 5 September 2005, the Spanish energy company Gas Natural announced its intention to launch a public bid for the entire share capital of Endesa, another Spanish energy company. On 6 September 2005 the Board of Directors of Endesa declared Gas Natural's bid hostile.

2. On 12 September 2005 Gas Natural notified the concentration arising from this bid to the Spanish competition authority. The procedure before the Spanish competition authority is still pending. On 7 November 2005, the Minister of Economy, upon request from the Competition Service (Servicio de Defensa de la Competencia), referred the case to the Competition Court (Tribunal de Defensa de la Competencia) for a "second phase" investigation.

3. Shortly after the announcement of Gas Natural's public bid, Endesa approached the Commission's Services and submitted that this proposed concentration has a Community dimension and should consequently be notified to the Commission under Article 4 of Council Regulation (EC) No 139/2004 (the "Merger Regulation"),[1] and not be dealt with by the Spanish competition authority.

4. On 19 September 2005 Endesa submitted two documents explaining more in detail its arguments and requesting the Commission to formally decide on its competence to deal with the case. Endesa also sent a copy of those documents to the Spanish competition authority.

5. In its submissions, Endesa claimed, in particular: (i) that the 2004 turnover figures to take into account are those elaborated on the basis of the new International Financial Reporting Standards ("IFRS") rather than those audited, and (ii) that a number of other adjustments should be made to these IFRS accounts for 2004 in order to comply with the requirements of the Commission Notice on calculation of turnover[2]. On the basis of the figures obtained in this way, Endesa submits that in 2004 it did not achieve more than two-thirds of its Community-wide turnover in Spain. On this basis, Endesa concludes that the concentration has a Community dimension within the meaning of Article 1 of the Merger Regulation, as the two undertakings concerned did not both achieve more than two-thirds of their respective Community-wide turnover in one and the same Member State[3].

6. On 26 September 2005, the Commission wrote to Gas Natural, asking to clarify on which basis it notified the concentration to the Spanish competition authority and to comment on Endesa's submissions. Gas Natural answered to this letter on 3 October 2005. In its reply, Gas Natural stated that, for the purpose of identifying the competent competition authority, it had used the public figures as set out in Endesa's audited accounts for 2004. According to Gas Natural, these accounts show that Endesa (like

---

1 OJ L 24, 29.1.2004 p. 1.

2 Commission Notice on calculation of turnover under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, OJ C 66, 2.3.98, page 25.

3 See Article 1(2) and (3) of the Merger Regulation, according to which a concentration has a Community dimension when certain turnover thresholds are met (which is undisputedly the case for the Gas Natural/Endesa concentration), "unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State".

Gas Natural) achieved more than two-thirds of its Community-wide turnover in Spain in 2004.

7. Also on 26 September 2005 the Commission wrote to Endesa, asking a number of clarifications with regard to its submissions. Moreover, on 4 October 2005, the Commission provided Endesa with a copy of Gas Natrual's comments on its initial submissions and asked Endesa to comment. Endesa answered to these requests respectively on 5 and 7 October 2005.

8. On 6 October 2005, the Spanish competition authority wrote to the Commission to explain that it disagreed with most of the arguments developed by Endesa in its documents of 19 September 2005 and that it considered to be competent to assess the present concentration.

9. On 25 October, the Commission provided Gas Natural with a copy of Endesa's submissions of 5 and 7 October 2005 and gave Gas Natural the possibility to comment. On 26 October 2005, the Commission sent a further letter to Gas Natural, Endesa and the Spanish competition authority inviting them to provide their views with respect to the interpretation of Article 5 of the Merger Regulation in the light of point 40 of the Commission Notice on the calculation of turnover[4]. At the same time, the Commission provided the Spanish competition authority with a copy of Endesa's submissions of 5 and 7 October 2005, giving it the possibility to express its views on any of the relevant issues.

10. On 27 October 2005, the Spanish competition authority wrote to the Commission stating that it did not have any further comment on the adjustments and gave its opinion with regard to Article 5 of the Merger Regulation in the light of paragraph 40 of the relevant Commission Notice. On 2 November 2005, Gas Natural and Endesa provided their views with respect to this issue. Additionally, Gas Natural submitted new comments with regard to Endesa's adjustment proposals based on Endesa's submissions of 5 and 7 October 2005. In its comments, Gas Natural included new adjustment proposals that it considered that Endesa had omitted. On 4 November 2005, a copy of these adjustment proposals was sent to Endesa, which provided comments on 9 November 2005.

III. ASSESSMENT OF THE COMMISSION'S COMPETENCE

11. As indicated, Endesa argues that, contrary to Gas Natural[5], in 2004 it did not achieve more than two-thirds of its Community-wide turnover in Spain. As a consequence, in Endesa's view, Gas Natural's bid gives rise to a concentration with a Community dimension within the meaning of Article 1 of the Merger Regulation.

12. In this respect, Endesa acknowledges that the figures indicated in its 2004 legally audited accounts suggest that it did achieve more than two-thirds of its Community-wide turnover in Spain. It argues, however that these figures, elaborated on the basis of the applicable Spanish accounting standards, are not the more reliable figures to take in to account in this case. In its view, the Commission should take instead into account

---

4 See footnote 2 supra.

5 Gas Natural is jointly controlled by Repsol YPF and La Caixa, both of which also achieved in 2004 more than two-thirds of their Community-wide turnover in Spain.

figures elaborated by Endesa in April 2005 on the basis of the new IFRS, which are, in Endesa's view, designed to better reflect the economic strength of the companies concerned.

13. Endesa also argues that the main adjustments realised to transpose the figures resulting from the 2004 legally audited accounts under the new IFRS should be done in any event to comply with the requirements of Article 5 of the Merger Regulation and of the Commission Notice on calculation of turnover.

14. Moreover, Endesa argues that, in order to comply with the requirements of the Commission Notice on calculation of turnover, a number of other adjustments should be done to the figures obtained applying the new IFRS. Without these additional adjustments (or at least some of them), Endesa's conclusion on the Community dimension of the concentration at issue would not hold, because the figures submitted by Endesa under the new IFRS still suggest that it achieved more than two-thirds of its Community-wide turnover in 2004 in Spain.

15. Gas Natural and the Spanish competition authority strongly disagree with the use of the figures elaborated on the basis of the new IFRS as well as with most of the other adjustments proposed by Endesa. In particular, they noted that only legally audited accounts should be used to establish whether the concentration has a Community dimension.

16. Moreover, Gas Natural and the Spanish competition authority argue that a part of the turnover of the Spanish telecommunication and cable TV holding company Auna Operadores de Telecomunicaciones ("Auna") corresponding to Endesa's jointly controlling participation in this company should be included in the aggregated turnover of Endesa.

17. In the following paragraphs, the Commission will examine those issues as follows: it will first clarify the principles concerning the reference to figures different from those of the audited accounts (a), it will then examine the possibility to refer to the IFRS figures (b), and it will finally assess the specific adjustments proposed by Endesa and Gas Natural (c).

a) The principles concerning the reference to figures different from those of the audited accounts

18. As clarified in the Notice on the calculation of turnover; "*the fact that the thresholds of Article 1 of the Merger Regulation are purely quantitative, since they are only based on turnover calculation instead of market share or other criteria, shows that their aim is to provide a simple and objective mechanism that can be easily handled by the companies involved in a merger in order to determine if their transaction has a Community dimension and is therefore notifiable*" (point 5).

19. For the purpose of Article 1 of the Merger Regulation, the turnover of the undertakings concerned must therefore be calculated on the basis of reliable, objective and easily identifiable figures. This is the reason why point 26 of the Notice on calculation of turnover clearly states that "*as a general rule the Commission will refer to audited or other definitive accounts (…) The Commission is, in any case, reluctant to rely on management or any other form of professional accounts in any but exceptional circumstances*".

20. In this respect, the general principle is therefore that, for the purpose of Article 1 of the Merger Regulation, the turnover must be calculated on the basis of the undertakings' legally audited accounts, and only in exceptional circumstances the Commission can depart from this principle.

21. In the present case, it is generally accepted that, on the basis of the turnover figures indicated in Endesa's legally audited accounts for 2004, this company achieved more than two-thirds of its Community-wide turnover in Spain. Endesa however argues (i) that the 2004 turnover figures which should be taken into account are those elaborated on the basis of the IFRS rather than those legally audited and (ii) that a number of adjustments should be made to its legally audited figures in order to comply with the requirements of Article 5 of the Merger Regulation and of the Commission Notice on calculation of turnover. It is therefore for Endesa to provide sufficient elements showing the existence of exceptional circumstances which justify the reference to turnover figures different from those indicated in its legally audited accounts.

b) The reference to the IFRS figures

22. Endesa argues that for the calculation of its 2004 aggregate and Community turnover, the Commission should refer to the IFRS figures essentially because: (i) those figures are more reliable and accurate than those legally audited and better reflect the company's economic strength, (ii) those figures allow a uniform application of EU merger control, and (iii) the application of the IFRS is mandatory for Endesa.

23. The Commission considers, in contrast, that Endesa has not provided sufficient elements showing the existence of exceptional circumstances which justify the reference to turnover figures different from those indicated in its legally audited accounts.

24. First, Endesa was legally required to elaborate its official 2004 consolidated annual accounts according to Spanish accounting principles. Moreover, this requirement was also in accordance with the then applicable Community accounting rules, as well as the accounting obligations for electricity undertakings under the applicable Community rules, namely Article 19(1) of Directive 2003/54.[6] On the other hand, Endesa is not obliged to prepare audited consolidated accounts in accordance with IFRS standards until the year beginning 1 January 2005.[7] Endesa was obliged to elaborate IFRS accounts for 2004 for comparative purposes only, i.e. to allow for a comparison of the new 2005 IFRS accounts with those of the previous year. This

---

6 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/EC, OJ 2003 L 176, p. 37. This provision reproduces Article 14(2) of Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, OJ 1997 L 27, p. 20.

7 Article 4, Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards, OJ 2002 L 243, p. 1, as implemented by Commission Regulation (EC) No 707/2004 of 6 April 2004 amending Regulation (EC) No 1725/2003 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council, OJ 2004 L 111, p. 3.

also explains why Endesa was not required by law to have the IFRS accounts for 2004 audited. Moreover, the latter are not definitive and may be subject to further amendments, because the IFRS standards to which the 2005 accounts must be prepared have not yet been finalised in all respects. In order to provide a proper basis for comparison, the IFRS accounts prepared for 2004 will have to be adapted to reflect any developments in the IFRS standards which are required to be taken into account in the audited 2005 accounts, which can only be prepared after the expiry of the 2005 financial year. In this regard, it should also be noted that, in its IFRS accounts, Endesa itself stated that the recorded figures could be reconsidered following possible modifications of the relevant rules or of their interpretation.

25. Second, the Commission does not accept Endesa's argument that the IFRS accounts prepared by it should be preferred to the audited accounts prepared to the legally applicable Spanish accounting standards for 2004 because the IFRS accounting principles would reflect more accurately the economic strength of the undertakings involved in a transaction. The objective of measuring the economic strength of undertakings neither requires or permits the Commission, in an individual case of application of Articles 1 and 5 of the Merger Regulation, to enter into a general assessment of the merits of different approaches to accounting provided for in Community law or in the laws of the Member States, in particular when audited accounts exist to only one such standard and that standard was the one required by both national and Community law at the material time. This would be at variance with the equally valid objective of applying simple and objective conditions for determining Commission competence in merger cases, as well as with the general principle of legal certainty. The Commission's role, as further described in the Notice on the calculation of turnover, is confined to examining specific adjustments which are required by the terms of Article 5 of the Merger Regulation.

26. Moreover, the fact that the Community legislator envisages that the international accounting standards adopted under Regulation No 1606/2002 should result in a true and fair view of the financial position of an undertaking, does not imply, *ipso facto*, the technical superiority of such standards for the purpose of Article 5 of the Merger Regulation, relative to the accounting standards applicable under the laws of the Member States up to 1 January 2005. Indeed, the giving of such a "true and fair view" was also a criterion under the Community legislation governing such preceding national accounting standards.[8] Regulation No 1606/2002 does not make any such judgment.[9]

27. Finally, the Commission does not agree that in the present case the reference to the IFRS figures would be preferable as to ensure a uniform application of EC merger control. Indeed, the use of the unaudited IFRS figures in this case would create a disparity of treatment with regard to all the other cases in which the Commission

---

8 See Article 2(3) of the Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies, OJ 1978 L 222, p. 11, to which Article 3(2), first indent, of Regulation No 1606/2002 makes express reference.

9 Regulation No 1606/2002 was adopted pursuant to Article 95(1) EC as a harmonising measure; its recitals indicate that the legislator's primary concern was to achieve convergence of standards and comparability of the accounts of publicly traded Community companies, including where possible the adherence to truly global standards.

referred to figures elaborated on the basis of the national standards in the 2004 audited accounts.

28. The Commission, therefore, considers that it cannot make any adjustment to Endesa's 2004 audited accounts for the sole reason that such an adjustment is foreseen in the 2004 IFRS accounts prepared by Endesa.

c) The specific adjustments

29. Endesa argues that, even if the Commission does not accept to refer to the IFRS figures for the calculation of its turnover, a number of adjustments to its 2004 legally audited accounts should be done in any event pursuant to Article 5 of the Merger Regulation and of the Notice on the calculation of turnover.

i) Elimination of the revenues of the distribution companies allegedly representing a mere "pass through" (Table A.2).

30. Endesa submits that in Spain, electricity distribution companies are required by national law to "collect" from their final customers a tariff which is designed to remunerate also other operators active in the electricity system, like the transmission system operator Red Eléctrica de España and electricity generators. Endesa, therefore, maintains that under the IFRS the turnover of the electricity distribution companies is not represented by the amount that they "collect" as tariff from the final customers, and largely "pass through" to other system operators, but only by the recognised remuneration fixed by the public authorities for their activity (distribution of electricity).

31. On this basis, Endesa claims that the amounts "collected" by its distribution companies and "passed through" to other operators (in particular the transmission system operator and the electricity generators) should be deducted from the revenues recorded in its legally audited accounts.

32. The Commission has, however, already clarified that it is not appropriate in this case to generally refer to Endesa's IFRS figures for the calculation of its turnover. Nor has Endesa provided sufficient elements to convince the Commission that such an adjustment to its legally audited accounts is justified under the terms of Article 5 of the Merger regulation and the Notice on calculation of turnover.

33. In this respect, it should be borne in mind that the Notice on calculation of turnover does not refer to a concept of "passing through" (parts) of amounts derived by undertakings from the sale of products and the provision of services. In particular, the Commission does not agree with Endesa that the Notice refers to this concept when it states in general terms that the turnover should reflect as accurately as possible the economic strength of the undertakings involved (point 7) and that, in case of services, the factors to be taken into account in calculating turnover are much more complex, since the commercial act involves a transfer of "value" (point 11). These general principles do not dictate that amounts paid by the customers to a given undertaking for products and accounted for as part of that undertaking's audited turnover should be excluded from its turnover because they are (allegedly) "passed through" to other undertakings. Moreover, the Commission considers that, under the given circumstances, the Spanish electricity distribution companies cannot be assimilated to undertakings acting merely as intermediaries, whose turnover may

consist solely of the amount of commissions which they receive (point 13). It is clear indeed that the activity of the distribution companies does not consist in intermediating a transaction between the final customer and the electricity generators or the transmission system operator.

34. This being clarified, it should be noted that in the Spanish electricity system the distribution companies are not only required to transport the electricity on their distribution networks, but also to supply the electricity to the customers who decide to remain in the regulated system (where the price of the electricity and the conditions of supply are not freely negotiated between the parties, but established by the public authorities). The distribution of electricity entails the sale to end users of goods previously purchased by distributors and cannot be assimilated to a service provided to generators or other operators within the Spanish system.

35. In order to distribute electricity, companies have to acquire it from the generators, be it via the OMEL pool or otherwise. The expenditures connected with the purchase of the electricity should therefore be regarded as costs of the distribution companies, which are logically covered by the (regulated) price that they charge to the final customers. Equally, the use of the transmission grid to transmit electricity from generators to final customers is a necessary component of the economic activity of the distributors which needs to be covered by customer revenues. The fact that the price paid by the distributor for these inputs is also regulated, at least to some extent, by the public authorities does not change the character of this relationship or of the economic activity of the distributor. This is also shown by the fact that the risk of non-payment by the final customers of the (regulated) price for the supplied electricity is borne by the distribution companies and not by the transmission system operator, the electricity generators, or OMEL. Furthermore, any liability related to non-performance of obligations under the contract with the end customer is borne by the distributor[10]. There is, therefore, no reason to deduct those costs from the turnover of the distribution companies.

36. In the light of the foregoing, the Commission is not convinced that the amounts arrived from the sale of electricity in question, which were considered as revenues in its 2004 legally audited accounts, should be deducted from Endesa's aggregate turnover.

ii) Elimination of revenues from gas exchanges allegedly implying no economic consideration (Table A.4)

37. Endesa indicates that, under the Spanish accounting standards, gas swaps should be generally considered as revenues and expenditures. It maintains however that, under the IFRS, swaps agreements whereby companies deliver and receive the same amount of gas without any economic consideration should not be considered as revenues.

---

10 The fact that the Spanish system establishes specific mechanisms to reduce this risk does not contradict this conclusion. In fact, if in a given case these mechanisms prove to be ineffective, the corresponding loss of revenues is suffered by the distribution companies and not by the generators and the transmission system operator.

38. The Commission has, however, already clarified that for the calculation of Endesa's turnover it cannot refer to its IFRS figures. In addition, the Commission also considers that Endesa has not provided sufficient elements to show that this adjustment to its legally audited accounts is justified under the provisions of Article 5 of the Merger regulation and the Notice on calculation of turnover.

39. As it results from Endesa's legally audited accounts, those swaps should indeed be considered as operations whereby Endesa sells and purchases the corresponding amount of gas. This is also shown by the fact that there are separate invoices for these transactions. The fact that the sale and purchase price is the same does not have any relevance in this regard, but only means that Endesa does not realise any margin from those operations considered together. The turnover however reflects the amounts received as payments for the sale of goods and services and not the margin realised from a certain kind of operation.

40. The Commission, therefore, considers that Endesa has not provided sufficient elements to show that the revenues from gas swaps, recorded as revenues in its legally audited accounts, should be deducted from its turnover.

iii) Reclassifications of other captions of the income statement and other adjustments of a minor amount (Table A.6)

41. In its submission of 19 September, Endesa did not provide a breakdown of the items comprised in this adjustment but argued that they were included under the "extraordinary income" caption in the audited Consolidated Annual Accounts, whereas it was attributed to the "operating revenue" caption of the Annual Consolidated Accounts under IFRS. Gas Natural and the SCA comments on this adjustment are therefore limited given the absence of a clear description of the nature of this adjustment.

42. In its reply of 5 October to the Commission request of information, however, Endesa clarifies that this proposed adjustment comprises the following amounts:

	Adjustment in € millions		
Concept	**Spain and Portugal**	**Rest of Europe**	**Total Europe**
Adjustments of provisions in relation to past sales	-25	-8	-33
Adjustment due to divestment	-10	0	-10
Deduction of coal premiums	-9	0	-9
Others	-5	0	-5
Total	-49	-8	-57

43. As regards the proposed adjustment for divestments, Endesa submits that it corresponds to the elimination of the revenues of Netco Redes, which was sold

during the 2004 financial year. Irrespective of its treatment under IFRS, this adjustment is acceptable under the Commission Notice on calculation of turnover.

44. With respect to the other three proposed adjustments, two of them ("deduction of coal premiums" for consumption of indigenous coal, on which Endesa submits that it corresponds to regularisations for excessive payments collected in previous years, and adjustments of "provisions in relation to past sales") are based on regularisations or adjustments of provisions, and therefore the Commission could only take them into account once they have been legally audited. The last proposed adjustment ("others") is totally unsubstantiated and therefore cannot be taken into account.

iv) Elimination of the alleged State aids to indigenous coal producers (Table B.2)

45. Endesa argues that the compensation paid to it for the obligation to acquire coal from national sources in reality represents a State aid to the Spanish coal producers. On this basis, Endesa considers that, as indicated in the Notice on calculation of turnover[11], those aids should be excluded from its turnover, even if they were considered as revenues in its 2004 legally audited accounts.

46. The Commission is however not convinced by this argument, which is clearly contradicted by a State aid decision adopted by the Commission in 2001.[12]

47. First, in this decision the Commission did not qualify the measures in question as State aids. It simply stated that, even if those measures should be considered as State aids, they would be justified by the public service obligation imposed on the electricity producers to acquire coal from national produces in order to ensure the security of supply of electricity within the terms of Articles 3(2) and 8(4) of Directive 96/92/EC.[13]

48. Second, the Commission decision clearly states that these measures entirely benefited the electricity producers.[14] Those measures provide indeed for the payment of a premium to the electricity producers, calculated with regard to the quantity of electricity generated from national coal and not to the quantity of indigenous coal purchased.[15] The premium was awarded in respect of coal because it is Spain's sole indigenous energy source.[16] Moreover, because the premium was regarded as a potential aid to the electricity industry and not to the coal industry, it was analysed under the EC aid rules rather than those of the ECSC Treaty.

---

11 Point 16 of the Notice states: "*With regard to aid granted to undertakings by public bodies, any aid relating to one of the ordinary activities of an undertaking concerned is liable to be included in the calculation of turnover if the undertaking is itself the recipient of the aid and if the aid is directly linked to the sale of products and the provision of services by the undertaking and is therefore reflected in the price*".

12 See Commission decision of 25.07.2001 in State aid case NN 49/99.

13 Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, cited above. See paragraph 117 of the decision.

14 See paragraphs 105 and 106 of the decision.

15 This is an important point of distinction with the Commission's decision of 27 November 1991 in Case IV/M.156 Cereol/Continentale Italiana.

16 See paragraph 124 of the decision.

49. Moreover, the premium enabled its recipients, such as Endesa, to market electricity generated using indigenous coal, purchased at freely negotiated prices, at a lower price in the course of its ordinary electricity generating activity.

50. In such a situation, the Commission considers that Endesa has not demonstrated that the premium in question, which was considered as revenue in its 2004 legally audited accounts, should be deducted from its turnover.

v) External costs and security and diversification costs (Table B.2)

51. This adjustment includes various items which form part of the bill paid by liberalised customers to traders and that can be grouped together into two wider groups: (i) supply diversification and security costs, which include concepts such as the nuclear moratorium, second part of the nuclear fuel cycle and interrumpability compensation costs to distributors, and (ii) permanent cost, which include compensation for supply outside the peninsula and costs of the System Operator, the Market Operator (OMEL) and the Spanish Energy Commission.

52. In the amounts invoiced to its customers in 2004, Endesa Energía has included the permanent, security and diversification costs indicated above amounting to € 55 millions. Endesa considers that, given that it does no receive any revenue whatsoever for these concepts but rather collects these amounts for other recipients (except for the compensation for supply outside the peninsula in which case Endesa is the recipient), these incomes should be deducted from its consolidated turnover according to point 19 and point 21 of the Commission notice on calculation of turnover on the need to eliminate taxes, levies and discounts from turnover.

53. Gas Natural does not agree with Endesa's approach, in particular as regards the duty (or cost) applied by the Spanish Energy Commission to services provided and activities undertaken in the electricity sector. Gas Natural considers that the entities subject to the duty are the ones that conduct transport and distribution activities, and not the consumers.

54. The Commission considers that these amounts, although they are reflected in the bill paid by the customers, are in practical terms foreseen in order to cover the costs of certain activities that are necessary for the correct functioning of the electricity market. The beneficiaries of these activities are all the operators active in this market, including the distributors. These costs are necessary for the development of the commercial activities carried out by electricity companies and cannot be considered as simple add-on services paid by the customers and on which they can decide. Therefore, these costs are costs that electricity companies have to afford in order to be active in the market.

55. In the light of the above, the Commission considers that the adjustment "Permanent costs and security and diversification costs" is not justified in accordance with Article 5 (1) of the Merger Regulation and the Commission Notice on calculation of turnover.

vi) Assets assigned to Endesa (Table B.2)

56. This adjustment corresponds to electricity distribution facilities (for example, the expansion of the distribution network) developed by certain customers that are later on transferred to the electricity distributor. Endesa considers that these assignments of assets are not a common practice for Endesa in order to invest in its distribution network, although recognises that such practices take place every year.

57. However, the Commission considers that Endesa has not provided convincing arguments to conclude that this adjustment is correct, because from the accountancy point of view, this transfer has to be considered in itself as an income, irrespective of whether the transferred assets are themselves income-generating. Moreover, the Commission considers that this type of practice appears to be common or, at least, it is not an extraordinary practice. Therefore, the Commission considers that the adjustment "Assets assigned to Endesa" is not in accordance with Article 5 (1) of the Merger Regulation and the Commission Notice on calculation of turnover.

vii) Elimination of additional compensation of extra costs for non-mainland systems allegedly relating to prior years (Table B.3)

58. In its 2004 legally audited accounts Endesa recorded certain revenues corresponding to an additional compensation of extra costs for non-mainland systems and clearly stated that these revenues related to 2004. Now it however claims that part of this compensation refers to the years 2001-2003 and therefore should be deducted from its 2004 turnover.

59. The Commission considers that Endesa has not clearly demonstrated that these revenues included in the 2004 legally audited accounts actually relate to prior years. Moreover, even if Endesa had provided such a demonstration, the Commission considers in any event that this would not be sufficient to depart from the principle to refer to the audited accounts' figures. It would indeed be contrary to the principles of legal certainty and predictability, which characterise the rules on jurisdiction, to refer turnover figures different from those of the audited account on the basis of a very complex and debatable *ex post facto* reassessment regarding the years to which the different revenues actually relate.

viii) Recording of additional revenues at Endesa Italia (Table B.4)

60. This adjustment comprises two items: (i) the stranded costs recognised to Endesa Italia amounting to € 169 million, and (ii) a tariff revision made by the Italian Electricity and Gas Authority entailing the refund of € 30 million previously billed by Endesa Italia. This tariff revision was recorded as a reduction of revenues.

61. Since on 31/12/2004 the collection method and timetable for the payment of the first item was not defined, Endesa did not account for it on the basis of the principle of prudence. However, Endesa submits that between the closing of Endesa's financial year on 31/12/2004 and the date of its submission to the Commission, the Italian Government has approved and clearly indicated the mechanism by which the stranded cost will be paid, and, in fact, the first instalment of this reimbursement was paid on 31/07/2005.

62. With respect to the second item, the tariff revision was cancelled but, since an appeal has been filed against the cancellation, Endesa did not re-record this amount on the basis of the principle of prudence. However, Endesa considers that, since this

revenue is derived from sales of electricity which have been effectively paid to the company, the fact that the application of the principle of prudence entails that this amount is provided for should not have as consequence a decrease in the turnover.

63. Given that the principle of prudence is one of the most important accountancy principles, the Commission considers that it can only consider its application or non-application in the light of legally audited accounts. The acceptance of changes in the audited annual accounts of an undertaking based on subsequent changes by an undertaking concerned in the application of the principle of prudence rather than on the criteria laid down in the Merger Regulation and in the Commission notice on calculation of turnover would entail high uncertainty and a great margin of discretion in the calculation of the turnover.

64. Therefore, the Commission considers that this adjustment is not in accordance with Article 5 (1) of the Merger Regulation and the Commission Notice on calculation of turnover.

ix) Deduction of discounts taxes and levies (Table B.5)

65. This adjustment corresponds to a duty amounting to 1.5% of the quantities invoiced to the customers and that is paid by the electricity distribution companies to the local authorities (i.e. "Ayuntamientos") given the use that these companies make of the public domain to carry out their commercial activities. Endesa considers that this amount constitutes a tax that should be deducted from its consolidated turnover in accordance with the Commission notice on calculation of turnover.

66. Neither Gas Natural nor the Spanish CA agree with this approach as they consider that this duty is in structure (i.e. it does not appear in the invoice) and in nature totally different from other taxes and is in fact a cost that the undertakings concerned have to afford.

67. The Commission agrees with the approach of Gas Natural and the Spanish CA, and considers that there are sufficient arguments, in the light of the information provided so far by these parties and by Endesa, to conclude that this duty is a cost rather than a deductible tax.

68. Therefore, the Commission considers that this adjustment is not in accordance with Article 5 (1) of the Merger Regulation and the Commission Notice on calculation of turnover.

x) Other adjustments proposed by Endesa (Table A.1, A.2, A.3, B.6 and B.1)

69. In addition to the adjustments examined above, Endesa proposed other adjustments to its 2004 legally audited accounts concerning the elimination of capitalized expenses of in-house work, the elimination of the alleged intra-group sales of electricity to its trading companies realised through the pool[17], the elimination of

[17] It is not necessary either to address Endesa's submission, in the alternative to its "pass through" argument rejected in sub i) above, that purchases by its distribution company from the OMEL electricity pool should be considered as intra-group sales. Endesa has not provided any concrete evidence that any such adjustment, even if permitted under the Merger Regulation, would be such as to reduce its Spanish turnover to less than two-thirds of its Community-wide turnover.

revenues from jointly controlled companies and corrections in relation to the purchase or sale of companies after the expiry of the 2004 financial year.

70. The Commission considers however that it is not necessary to conclude on this point, since the concentration at issue would not have a Community dimension even if those adjustments were accepted.

xi) Adjustments proposed by Gas Natural

71. In its submission dated on 2 November, Gas Natural indicated that Endesa had omitted some adjustments that should be considered by the Commission. These adjustments refer to the calculation of the turnovers of Endesa Italia and SNET and are the following ones:

- Netting in Italy (Endesa Italia): Endesa should have applied the netting of electricity purchases and sales, if accepted in Spain, also to the transactions carried out by Endesa Italia. This adjustment would imply the deduction of €301.7 million in Endesa Italia's turnover.

- Deferred income related to income for connection fees (Endesa consolidated): an amount of € 15 million derived from connection rights that Endesa should account for in 2004 as this amount forms part of invoices issued to end customers in 2004.

- Non-consolidated companies (Endesa consolidated): Gas Natural indicated that there are some companies on which Endesa has sole control and whose turnover has not been added by Endesa to its total turnover. These companies are Endesa Transportista, Alicante SAU, Almusafes Servicios Energéticos, Meridional de Gas SAU and Energías de Graus. Endesa indicates that these group companies were not consolidated due to their extremely low economic significance (0.1% of the total revenues). The Commission considers that, irrespective of their economic significance, the turnover of undertakings that come within the terms of Article 5(4)(b) of the Merger Regulation has to be accounted for, and, according to Endesa, this adjustment for the above-mentioned companies amounts to € 15.8 million.

- Revenue from swap contracts amounting to €16 millions to be deducted from Endesa Italia's turnover.

- Revenue related to "Green Certified" acquisitions in 2003 and 2004 by Endesa Italia amounting to € 23 million should be deducted as it is not revenue but a reduced cost.

- Reversion of certain provisions in Endesa Italia amounting to € 13 million.

- Elements of cost that should be considered as reduced sales in Endesa Italia's turnover amounting to € 116 million.

- Deduction of external costs which should not form part of Endesa Italia's turnover amounting to € 13 million.

- Income from amounts charged in advance (SNET): Gas Natural indicates that in SNET's turnover for 2004 it is included an amount of € 45 million

corresponding to the recognition in the profit and loss account of the reversal of deferred revenue paid by EDF in advance for the period 1996-2011 and therefore it does not correspond to the activities of 2004.

- Certain purchases made by EDF from SNET would constitute a pass through item against SNET's revenues, and therefore should be deducted from SNET turnover.

- Some intra-group sales between Endesa and SNET amounting to € 37 millions which should be eliminated from Endesa's consolidated turnover.

72. Except for the adjustment in the third indent of the immediately preceding paragraph, which Endesa acknowledged and the Commission considers fully justified, the Commission does not take a final position on the other adjustments since they do not have any impact in the final conclusion of this decision.

d) Conclusion

73. On the basis of the foregoing, the Commission considers that most of the adjustments proposed by Endesa are not in accordance with the provisions of Article 5 of the Merger Regulation and the Notice on the calculation of turnover and, therefore, cannot be accepted.

74. As shown by the table below, without it being necessary to take a final position on certain of the adjustments proposed by Endesa (above sub x) or on the adjustments proposed by Gas Natural (above sub xi), the rejection of the adjustments analysed above sub i) to ix) is sufficient to conclude that, in 2004, Endesa realised more than two-thirds of its aggregate Community-wide turnover in Spain. For this reason, the Commission considers that the Gas Natural/Endesa concentration does not have a Community dimension within the meaning of Article 1 of the Merger Regulation.

	Millions of Euros				
	Spain and Portugal	**Rest of Europe**	**Total Europe**	**Latin America**	**Total Endesa Group**
Consolidated Revenues under Spanish GAAP	**11,320**	**2,605**	**13,925**	**4,140**	**18,065**
Adjustments					
A.1. Reclassification of revenues from capitalized expenses of in-house work on fixed assets.	-138	-21	-159	-40	-199
A.2. Elimination of revenues of the electricity business in Spain not acceptable under IFRS.	-1,069		-1,069		-1,069
A.3. Elimination of revenues from proportionally consolidated companies.	-62		-62		-62
A.4. Elimination of revenues from gas exchanges.	0		0		0
A.5. Elimination of adjustment for inflation.				-12	-12
A.6. Reclassifications of other captions of the income statement and other adjustments of a minor amount.	-10	0	-10	269	259
Total	**10,041**	**2,584**	**12,625**	**4,357**	**16,982**

	Millions of Euros				
	Spain	**Rest of EU**	**Total EU**	**Non-EU countries**	**Total Europe**
Revenues for 2004 under IFRS [18]	9,850	2,749	12,599	26	12,625
Adjustments					
B.1. Correction of revenues from purchases or sale of companies.	-3	564	561	0	561
B.2. Adjustment of subsidies.	0	0	0	0	0
B.3. Estimate of additional compensation of extra costs of non-mainland systems relating to prior years.	0	0	0	0	0
B.4. Recording of additional revenues at Endesa Italia.	0	0	0	0	0
B.5. Deduction of discounts taxes and levies.	0	0	0	0	0
B.6. Revenues from jointly-controlled companies.	0	0	0	0	0
C.3. Additional revenues from solely controlled companies	16				
Total	**9,863**	**3,313**	**13,176**	**26**	**9,856**
	74.86%	**25.14%**	**100%**	**-**	**-**

[18] The amounts indicated in the previous Table for "Spain and Portugal" (EUR 10,041 million), have been split in the present Table according to their geographic allocation: Spain EUR 9,850 million, Portugal EUR 165 million, Non-EU countries EUR 26 million.

IV. CONCLUSION

75. On the basis of the above-mentioned considerations, the Commission considers that the concentration arising from Gas Natural's bid for Endesa does not have a Community dimension within the meaning of Article 1 of the Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.

Done at Brussels, 15.11.2005

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