

***Case No COMP/M.4110 -
E.ON / ENDESA***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 6(1)(b) NON-OPPOSITION
Date: 25/04/2006

***In electronic form on the EUR-Lex website under document
number 32006M4110***



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 25/04/2006

SG-Greffe(2006) D/202193

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

PUBLIC VERSION

To the notifying party:

Dear Sir/Madam,

**Subject: Case No COMP/M.4110 - E.ON/Endesa
Notification of 16.03.2006 pursuant to Article 4 of Council Regulation
No 139/2004¹**

1. On 16/03/2006, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 (“the Merger Regulation”) by which the undertaking E.ON AG (E.ON, Germany) acquires within the meaning of Article 3(1)(b) of the Council Regulation control of the whole of the undertaking Endesa S.A. (Endesa, Spain) by way of public bid announced on 21/02/2006.
2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of Council Regulation (EEC) No 139/2004 and does not raise serious doubts as to its compatibility with the common market and with the EEA Agreement.

I. THE PARTIES

3. E.ON is an energy company with its main activities in the electricity and gas sectors, which are carried out throughout Europe and in the United States². E.ON is, however,

¹ OJ L 24, 29.1.2004 p. 1.

² E.ON has five market units: the Central Europe market unit operates the electricity business and downstream gas business in Central Europe, the Pan-European Gas market unit is engaged in the upstream and midstream gas business in Europe, the UK market unit is operating the electricity business

not active in Endesa's home market, Spain. E.ON's shares are listed on all German stock exchanges as well as on the New York Stock Exchange.

4. Endesa is a Spanish electricity operator that is also active in other European countries (though to a limited extent), in particular: Portugal, France, Italy, Germany and Poland. In addition, Endesa is active in South America and North Africa. In Spain, Endesa is also present in the gas sector³. Endesa's shares are listed on the Madrid and the New York Stock Exchange.

II. THE OPERATION

5. On 21/02/2006 E.ON announced its intention to launch a public tender offer for the acquisition of the entire issued share capital of Endesa. The offer is conditional upon the acquisition of at least 50.01% of Endesa's share capital⁴.
6. By the proposed acquisition of Endesa E.ON intends to extend its activities into new geographic markets, i.e. Spain and South America, in which E.ON is currently not active. According to the notifying party, the parties' activities complement each other with regard to geographic markets, energy sources and market competence. A combination of their activities would enable both companies to benefit from future developments to be expected on the European markets, i.e. increased market integration and cross-border trading. Additionally, E.ON has submitted that the transaction would increase energy reserves and security of supply in the EU.

III. CONCENTRATION

7. As a result of this transaction, E.ON will exercise sole control over Endesa. The proposed transaction therefore constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

IV. COMMUNITY DIMENSION

8. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5,000 million⁵. Each of them have 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. The notified operation therefore has a Community dimension.

V. COMPETITIVE ASSESSMENT

A. RELEVANT MARKETS

and gas business in the UK, the Nordic market unit is operating in the electricity and gas business in Northern Europe, and in addition, there is a U.S. Midwest market unit which is active in the regulated and non-regulated utility business predominantly in Kentucky.

³ In Italy, Endesa supplies natural gas to its own power stations (see paragraph 58)

⁴ E.ON's bid competes with Gas Natural's bid over Endesa, announced on 05/09/2005.

⁵ 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).

Relevant product markets

9. In energy cases, the Commission has in the past differentiated between two broad sectors: electricity and natural gas.⁶

Electricity markets

10. The notifying party considers that, based on Commission precedents, the following relevant product markets in the electricity sector could be distinguished: (i) generation and wholesale supply; (ii) transmission; (iii) distribution and (iv) retail supply. As regards retail supply, a further distinction could be made between: (a) large industrial customers connected to the high voltage grid and (b) smaller industrial, commercial and domestic customers connected to the low-voltage grid.
11. The market investigation has to a large extent confirmed this approach. However, some competitors and customers consider in relation to France, Italy, Spain and Poland that, in view of the ongoing liberalization process, it is still appropriate to make a distinction between electricity retail supply to (a) eligible customers having switched to the free market and (b) eligible customers that have remained in the regulated market. As the German market is fully liberalised, there is no distinction between a regulated and non regulated market.
12. E.ON has also pointed out some particularities with regard to Spain, where the Spanish NCA (Tribunal de Defensa de la Competencia, “TDC”) has identified a market for the supply of electricity in the context of technical restrictions⁷. The Commission has also on several occasions considered the provision of regulating/balancing power and reserve capacity to constitute one (or more) separate market(s)⁸. For this market (these markets), the terms “balancing power”, or “ancillary services” have partly been used in these decisions.⁹ For the purpose of this decision it is not necessary to define these markets.

Natural gas markets

13. The notifying party states that the Commission has in the past distinguished several markets for natural gas: (i) wholesale supply¹⁰, (ii) storage; (iii) transmission, (iv) distribution and (v) retail supply. In particular, retail supply can be divided into (a) the supply of natural gas to large industrial customers; (b) to small customers and (c) to

⁶ Case COMP/M.3440 ENI/EDP/GDP.

⁷ See TDC report in case C94/05 Gas Natural/Endesa, of 5 January 2006, hereinafter the “TDC report”. In cases of technical restriction, in order to satisfy the demand for energy in one particular area, OMEL (Spanish market operator) and REE (Spanish system operator) must order a generation plant (generally the closest to the area affected by the energy shortage) to increase production and therefore, energy is not generated via the wholesale market system.

⁸ See e.g. case COMP/M. 3268 Sydkraft/Grange or case COMP/M. 3440 EDP/ENI/GDP.

⁹ See cases COMP/M. 3440 EDP/ENI/GDP and COMP/M. 2947 - Verbund/EnergieAllianz.

¹⁰ Understood by the Commission as covering transactions between traders/resellers.

electricity generation plants using combined cycle gas turbines (CCGTs)¹¹. The market investigation has largely confirmed this approach.

14. Regarding Germany, E.ON points out that due to historical reasons, two sub-segments should be distinguished with respect to the wholesale market: (i) the market for the supply of gas to regional distribution companies and (ii) the supply to local distribution companies.

Other markets: electricity trading and CO₂ emission rights

15. E.ON and Endesa are both active in electricity trading and in the market for emissions (carbon) trading. In past cases, the Commission has concluded that these markets constitute separate product markets.¹²

Relevant geographic markets

Electricity markets

16. E.ON submits that the Commission has in the past considered that the above-referenced electricity markets, i.e. Spain, Germany, Italy, France and Poland, are at most national in scope. The European Commission has, in past decisions, mostly defined the electricity markets as being national in scope.¹³ Occasionally, it has left open the possibility of wider than national markets.¹⁴
17. For Spain, E.ON points out some particularities. E.ON refers to the TDC report which considered the *generation and wholesale supply* market in Spain as comprising three markets (i.e. mainland Spain, the Canary Islands and the Balearic Islands). The *technical restrictions* market would be local in scope, coinciding with the area affected by the restriction. The *transmission* market covers the Spanish part of the Iberian Peninsula.¹⁵ The *distribution* market is considered to be local, because each of the grids, owned by the Spanish operators, constitutes a separate local market. With regard to *retail supply*, although the notifying party considers it to be not smaller than national, some third parties consider the retail supply to small customers in Spain to be local in scope.
18. On the other hand, several respondents in the market investigation consider the geographic scope of the generation and wholesale electricity market in Spain as also comprising Portugal (i.e. an “Iberian market”), due to the interdependence and process of integration of both areas. However, these replies are limited in number and both the Commission and the Spanish TDC report have considered that it is too early to consider

¹¹ Case COMP/M. 3440 ENI/EDP/GDP and Case COMP/M. 3696 E.ON/MOL.

¹² Case COMP/M. 3868 DONG/ELSAM/ENERGI E2 and Case COMP/M. 3268 SYDKRAFT/GRANINGE.

¹³ See for instance Case COMP/M.3440 ENI/EDP/GDP.

¹⁴ Case COMP/M. 3268 SYDKRAFT/GRANINGE and COMP/M. 3665 ENEL/SLOVENSKE ELEKTRARNE.

¹⁵ Case COMP/M.3057 - CVC/REE/Iberdrola.

the existence of an Iberian market due to the lack of sufficient interconnection between these two countries.¹⁶

19. For Italy, E.ON points out that the Commission has found that the wholesale market might be divided into several regional markets, i.e. North, Macro-South, Macro-Sicily and Sardinia.¹⁷
20. The Commission considers in general that in light of Council Directive 2003/54/CE the possible emergence of wider than national markets needs to be examined.¹⁸ Based on the market investigation, the electricity markets in Spain, Italy, France, Poland and Germany are likely to be still not wider than national in scope¹⁹. In particular market participants have pointed out that the lack of available interconnection capacity militates in favour of the persistence of national markets. In addition, according to third parties, price differences between Member States further confirm the existence of national markets. Some of the respondents have referred to the emergence of a European-wide market and refer to a current trend towards promoting a single European market. The vast majority of the respondents have pointed out that a single European electricity market has not yet arisen. .
21. The Commission considers that for the purpose of the present case, it is not necessary to conclude on the precise scope of the relevant geographic markets for electricity in France, Poland, Germany, Italy and Spain as, under any alternative market definition, the proposed operation does not give rise to competition concerns.

Natural gas markets

22. The notifying party puts forward that based on Commission precedents for Germany the German gas markets are not wider than national²⁰. With respect to Italy, France, Poland and Spain E.ON also reaches this conclusion.

¹⁶ Case COMP/M.3440 ENI/EDP/GDP and Case COMP/M. 3448 EDP/Hidroeléctrica del Cantábrico.

¹⁷ Case COMP/M. 3729 EDS/AEM/EDISON.

¹⁸ Case COMP M 3883 CENTRICA/GAZ DE FRANCE/SPE.

¹⁹ This is in line with the Commission's past decisions. In Case COMP/M. 3448 EDP/Hidroeléctrica del Cantábrico, the Commission left open the geographic market definition for electricity wholesale and retail in Spain and Portugal, however, the decision hinted to national markets. Additionally, in Case COMP/M.3440 ENI/EDP/GDP, the Commission concluded that the Portuguese gas and electricity markets are national in scope. In Case COMP/M. 3729 EDF/AEM/EDISON, the Commission has found that the wholesale electricity market in Italy might be divided into several regional markets, i.e. North, Macro-South, Macro-Sicily and Sardinia, and in any event is not wider than national. In Case COMP/M.1673 VEBA/VIAG, the Commission concluded that the German electricity markets were national in scope. In Case COMP/M.3210 EDF/EDFT, the Commission left open the geographic scope of the electricity markets in France, however, the decision indicates that the limits in the available interconnection capacity, low percentages that imports represent in domestic consumption, the presence of significant price differences between Member States and national regulation seemed to point towards a national markets for generation; for transport, distribution and retail supply the scope of the markets seemed to be national or smaller than national.

²⁰ For Germany: Case COMP/M. 3294 EXXONMOBIL/BEB, Case COMP/M.1673 VEBA/VIAG, Case COMP/M.2822 EnBW/ENI/GVS.

23. With regard to Spain, E.ON supports TDC's market definition, i.e. that storage, transmission and retail markets are national, whereas the distribution market is local in scope, coinciding with the area covered by the administrative authorisation
24. The market investigation has largely confirmed this delineation for the five countries concerned. It should be pointed out, however, that with respect to the wholesale supply market, some respondents have indicated that there is a progressive trend towards widening the scope of the market, due to the liberalisation process, the harmonisation of the legislative framework through Directive 2003/55/EC, as well as increasing cross-border trade.
25. The Commission considers that it is not necessary to conclude on the precise scope of the relevant geographic markets for gas in France, Poland, Germany, Italy and Spain as, under any of the likely alternative market definitions, the proposed transaction would not raise serious doubts as to its compatibility with the common market.

Other markets: electricity trading and CO₂ emission rights

26. As regards electricity trading, E.ON takes the view that the market is EEA-wide, considering the large number of energy exchanges throughout Europe. In past cases, the Commission has left open the exact geographic market definition.²¹
27. According to E.ON, the CO₂ emission rights market is EEA-wide in scope because the certificates can be issued in all Member States and prices are transparent throughout Europe. In line with the Commission's past decisions and on the basis of the existing legal provisions, the market is rather likely to be EU-wide, as the other EEA countries are not covered by the emission trading scheme.²²

Conclusion

28. For the purpose of the present case, it is not necessary to conclude on the precise scope of the relevant product and geographic markets (excluding the market for CO₂ emission rights) as, under any alternative market definition, the proposed operation does not give rise to competition concerns.

B. COMPETITIVE ASSESSMENT

Introduction

29. Both parties are present in the electricity and gas sector in the EEA. The parties have very limited overlapping activities in electricity markets in Germany, France, Italy and Poland. However, E.ON does not carry out activities in Spain, where Endesa is predominantly active. The competitive assessment below is therefore mainly focused on the effects of the proposed concentration in these five Member States.
30. In the Commission's market investigation views on the proposed merger have been sought from principal customers and competitors as well as from national energy regulatory authorities. Several market players have voiced concerns about the

²¹ Case Case COMP/M. 3268 SYDKRAFT/GRANINGE.

²² Case COMP/M. 3868 DONG/ELSAM/ENERGI E2.

functioning of the electricity and gas markets in Germany and Spain, but many of these general concerns relate to the existing regulatory framework and are not claimed to be linked specifically to the notified transaction.²³

31. The market investigation has also brought some generic concerns about E.ON becoming the first “pan-European energy operator”. Allegations that this would give the company the ability and incentives to block expansion of interconnection capacities between Member States and/or that multi-market contacts between E.ON and other players would give rise to appreciable concerns have not been substantiated and would in any case need to be balanced against the ability and incentive of any company with activities in several Member States to be able to viably transport natural gas or electricity within the group. Neither has the claim that E.ON, in this capacity as a “pan-European energy operator” with an alleged anti-competitive advantage in terms of ability to meet incipient demand for European supply solutions, been substantiated. To the extent that there is indeed such an incipient demand, it is difficult to see how, at the current stage of market development (see also paragraph 71 below), the proposed transaction could have negative effects in this regard.

Spain

32. The Spanish electricity sector is highly concentrated with the presence of two main competitors, Endesa and Iberdrola. According to the TDC report, Endesa holds a market share of nearly 40% in *electricity generation and wholesale*, with 33% of the *installed capacity*. Iberdrola is the second main operator with a market share respectively of 26% and 32%. Regarding *retail supply*, Endesa has a market share of 35% in the supply to large industrial customers and a share of 40% in the supply to small customers. Iberdrola is the first supplier with a market share respectively of 38% and 42%.
33. In the natural gas market Gas Natural is by far the leading operator in the wholesale supply market with a market share of 62%²⁴. It has a market share of 84% of the distribution market and it is the main player in the retail supply market with market shares of 52% in the supply to large industrial customers, 90% in the supply to small customers and 41% in the supply to CCGTs. The second operator in the retail supply market is Iberdrola, far behind Gas Natural. Endesa is only a minor player in this market through its subsidiary Carboex, which has a market share of 3% of the wholesale gas market. Carboex supplies gas only internally to Endesa which resells it in the retail market²⁵. At *retail level*, Endesa has a market share of 5% in the market for the supply to large industrial customers and 3.5% of the supply to small customers.

²³ The Commission has recently opened infringement procedures against 17 Member States not having opened up their energy markets properly (see IP/06/430). Moreover, the Commission launched an inquiry into competition in gas and electricity markets on 13 June 2005. The preliminary findings of this inquiry have been summarised in a report which is currently subject to public consultation (see http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/energy/)

²⁴ According to the TDC Report, in 2004, Gas Natural supplied a total of 17.61 Bcm in Spain, 12.78 Bcm internally to Gas Natural and the remaining to Enagas. The second competitor was ENI Group which supplied a total of 5.40 Bcm to Iberdrola (3.12 Bcm), Cepsa (1.14 Bcm) and Unión Fenosa (1.14 Bcm). Carboex supplied internally to Endesa 0.85 Bcm.

²⁵ Endesa’s CCGTs are entirely supplied by Gas Natural.

34. With respect to gas storage, Endesa is not currently active in this market.²⁶ In the transmission market, Enagas holds 90% of the transmission network and acts as the Technical System Operator. In the *distribution market*, Endesa holds 6% of the network (Gas Natural holds 84%) and has a 2% market share in term of the amount of gas transported through the network (Gas Natural holds 88%).
35. As stated above, E.ON is not active in the electricity and gas sectors in Spain.
36. Both the Commission and the TDC have previously pointed out the duopolistic structure of the electricity generation and wholesale market in Spain, given Endesa and Iberdrola's respective positions²⁷. However, such a duopoly will not be reinforced as a result of the proposed transaction, considering that E.ON has no existing activities in Spain. Moreover, the market investigation has confirmed the existence of barriers to the import/export of electricity into/from Spain. Respondents in the market investigation have pointed out that the Spanish market is still an "energy island" due to the low interconnection capacity with neighbouring countries (in particular, France), operational and regulatory barriers.²⁸ Therefore, the possibility for E.ON to import electricity into Spain is very limited only.
37. Certain third parties have additionally pointed out that the present operation would entail the disappearance of E.ON as a potential competitor from the national electricity generation markets. However, E.ON cannot be regarded as a likely potential market entrant in Spain. In particular, E.ON has unsuccessfully tried to enter the Spanish electricity markets on a stand-alone basis in the past: it withdrew from the Spanish market in January 2004, when it disposed of its shareholding in Unión Fenosa. In fact, other major EU players that have recently entered the Spanish market have done so via takeovers of national companies (e.g. EDP of Portugal over Hidrocantabrico or Enel of Italy over Viesgo).
38. Although, generally, third parties did not seem to be seriously concerned about the effects on the electricity markets in Spain in the short run, some have voiced concerns regarding the effects that the proposed concentration may have in the medium and long term, as a result of the vertical integration of gas and electricity companies. Certain third parties have alleged that the present transaction could reinforce Endesa's dominant position in the generation and wholesale market in Spain as consequence of E.ON's access to low cost gas which E.ON could bring into Spain with a view to supplying Endesa's CCGTs. Such third parties have, however, not provided any convincing arguments as to why E.ON would be able to provide Endesa with natural gas at a significantly lower price level than is currently possible for Gas Natural. If anything, it would appear that Gas Natural, based on its incumbency advantages, its existing import activities and its significantly greater volumes would be at a competitive advantage.

²⁶ Endesa has a non-controlling 21% interest in Reganosa regasification plant (which will become operational at the end of 2006) and a jointly controlling 20% interest in the Saggas regasification plant (operational in the second quarter of 2006).

²⁷ See Case COMP/M. 2353 RWE/Hidroeléctrica del Cantábrico and TDC report.

²⁸ In Spain, Royal Decree-Law 5/2005 forbids dominant agents (i.e. those having a market share above 10%) to import electricity coming from third countries.

39. Leaving aside the issue of future cost for natural gas, the market investigation has also indicated the existence of significant barriers to import gas, through pipelines, into Spain. Pipelines for the import of natural gas currently lack spare capacity and are blocked by long term contracts. The two current pipelines by which natural gas is imported into Spain are: Lacq-Calahorra²⁹ (gas from Norway) and Maghreb (gas from Algeria). A new international pipeline, Medgaz pipeline, will start importing natural gas from Algeria in 2009. Endesa has a participation of 12% in this pipeline.³⁰
40. Due to the reduced percentage of national production of gas most of the natural gas supplied is imported into Spain (31.6% via pipelines and 68.4% via LNG tankers)³¹. LNG tankers import natural gas originating from Qatar, Nigeria, Oman, Libya and the United Arab Emirates. Spain does not procure natural gas from Russia and the North of Europe as E.ON does. New imports of natural gas into Spain are therefore more likely to take place via LNG tankers. However, E.ON is currently not active in the LNG sector, in Spain or elsewhere.
41. For the above reasons, it has to be concluded that the investigation, having regard to the structure of the market, has not provided any evidence that E.ON would be in any better position than other competitors to start supplying natural gas into Spain, let alone that it would be in a position to do so at such favourable conditions that it would further strengthen Endesa's position on the electricity market.
42. Certain third parties have also raised concerns as to the negative impact of the proposed operation in gas procurement. In particular, it has been argued that the proposed operation would reinforce the buying power of the new entity, which will combine E.ON's procurement capabilities in the North of Europe and Russia with Endesa's long-term contracted procurement in the South of Europe. Moreover, it has been argued that the combined entity would have a comparative advantage in the negotiation of supply agreements with gas producers.
43. This argument does not seem valid, given the current situation of the market and the parties' activities. Firstly, Endesa purchases only limited volumes from producers (e.g. Sonatrach of Algeria) and its requirements are mainly covered by importers, in particular Gas Natural. In particular, Endesa procures more than [...] of its natural gas requirements directly from Gas Natural ([...] bcma out of total of [...] bcma). The remaining part is imported from Algeria, Nigeria and Qatar. Secondly, E.ON and Endesa's supply sources do not overlap, given that E.ON purchases its natural gas from Russia, Norway, the Netherlands, Germany, the United Kingdom and Denmark. Lastly, all quantities sourced by E.ON are transported by means of pipelines. However, the existing lack of transit capacity would impede significantly imports into Spain. As stated above, E.ON is not active in LNG and, therefore, is unlikely to contribute significantly to Endesa's buying power in this sector.

²⁹ At present, the Lacq-Calahorra pipeline between France and Spain would be the only possibility for E.ON to transport natural gas into the Spanish market. However, this pipeline operates with a very limited annual capacity of only 2.5 billion m³/a (compared, e.g., to the Maghreb-Europe pipeline with a capacity of 11.5 billion m³/a) and its capacity is almost entirely used by Gas Natural.

³⁰ The other shareholders are Iberdrola (12%), BP (12%), Gaz de France (12%), Total (12%), Cepsa (20%) and Sonatrach (20%).

³¹ 97% of the natural gas supplied into Spain comes from imports.

Germany

44. As regards Germany, the vast majority of respondents to the Commission's market investigation did not consider that the merger would give rise to adverse effects on the relevant energy markets. However, a limited number of customers have indicated that the proposed merger would result in the elimination of an alternative electricity supplier in the market or would eliminate a potential gas supplier.
45. The German electricity sector is subdivided vertically into national interconnected companies, regional companies and local distribution companies (in particular municipal electricity undertakings). The electricity generated and that imported by power importers is delivered to different customer groups over the extra high voltage and high voltage networks (380/220 kV), i.e. the transmission system. The regional supply companies deliver electricity via low voltage (below 20 kV) and sometimes medium voltage (20-110 kV) lines to municipal electricity undertakings and also to final customers. They also generate electricity themselves on a small scale. At the lowest distribution level, municipal electricity undertakings supply only final consumers over low voltage lines. The municipal electricity undertakings, too, generate some electricity themselves, but they use it to cover their own needs³².
46. By far the largest proportion of electricity in Germany is generated by four vertically integrated energy suppliers: E.ON, RWE, Vattenfall and EnBW. In *generation* (installed capacity) RWE Power is market leader, with a [30-40%] market share (2004 data), followed by E.ON ([20-30%]), Vattenfall ([10-20%]) and EnBW ([10-20%]). Other companies jointly represent [10-20%]. In the *wholesale market* RWE is also the leading firm, with a market share of [35-45%], followed by E.ON ([20-30%]), EnBW ([10-20%]) and others representing approximately [15-25%]³³. The operation and management of the high voltage grid (*transmission*) is for more than [75-85%] controlled by the same four majors: RWE is again the strongest player with [30-40%], closely followed by E.ON with [25-35%] and Vattenfall Europe ([25-35%]), whereas EnBW represents a somewhat smaller part of this market ([5-15%]). In electricity *distribution* E.ON is the strongest player with a [20-30%] market share, RWE has [15-25%], followed at some distance by EnBW ([<10%]) and Vattenfall Europe [<5%]. Other companies jointly represent [35-45%]. E.ON is, furthermore, active in *retail supply* of electricity, both to large industrial customers and to small customers (private, commerce and public institutions). In the retail electricity *supply to large industrial customers* RWE is market leader ([20-30%]), closely followed by E.ON ([15-25%]), EnBW ([10-20%]) and Vattenfall ([10-20%]). The remaining part of this market consists of smaller players, such as MVV, EWE, RheinEnergie and others. In the market for retail *supply to small customers* E.ON leads ([5-15%]), followed by RWE ([5-15%]), and RWE and EnBW [should read: EnBW and Vattenfall] with [<10%] and [<10%] respectively. Other companies, including EWE and RheinEnergie, collectively represent [55-65%] of this market.

³² See also Case No COMP/M.1673 – VEBA/VIAG.

³³ E.ON has submitted that wholesale data refers to generation including export of electricity but excluding imports.

47. In the electricity sector, Endesa is only active in the *retail supply* to industrial customers, with a market share of [$<1\%$]³⁴. Endesa supplies its large industrial customers through bilateral contracts ([...] MWh, in 2005) and exchange contracts ([...] MWh, in 2005). Endesa has no generation, wholesale, transmission or distribution activities in this country, nor does it engage in electricity retail supply to small customers. Endesa has confirmed that it has developed a network of commercial offices in order to service its international customers at a European level. The Frankfurt office of Endesa only deals with large industrial customers in Germany. Endesa's activities are mainly related to the supply of electricity and the sale of energy related services to these customers and it considers that its current portfolio represents [$<1\%$] of the German industrial market. In 2006, Endesa services [...] clients to which [...] GWh of electricity is delivered, equivalent to an expected turnover of EUR [...] million. The number of clients has not increased during the last three years (2004-2006).
48. The German Competition Authority (Bundeskartellamt) prohibited planned acquisitions by E.ON of regional utilities on the grounds that it would strengthen the joint dominant position enjoyed by E.ON and RWE on, inter alia, the market for electricity supply to large industrial customers³⁵. However, even assuming that such a duopoly exists today, such a position of joint dominance would not be reinforced as a result of the proposed transaction, given the very minor activities of Endesa in the German electricity retail market. With a market share of [$<1\%$] in electricity retail supply to large industrial customers, as well as the presence of significant, much stronger actual competitors such as established players EnBW and Vattenfall and a number of smaller competitors, the disappearance of Endesa will not change the market structure significantly. Moreover, Endesa is not active in any other electricity markets. Absent any indication that the company had any particularly strong potential as a new entrant, the proposed transaction does not give rise to the elimination of potential competition in the German electricity markets.
49. As regards the gas sector, E.ON is active in the wholesale market (supply to regional and local distribution companies, with a market share in 2004 of [40-50%] and [20-30%] respectively), in (high pressure) transmission of natural gas ([30-40%]), distribution over the local grid ([20-30%]), storage ([15-25%]) and retail supply to large industrial customers ([20-30%]), electricity generation plants ([25-35%]) and small customers ([5-15%]). E.ON does not produce natural gas in Germany.
50. Unlike E.ON, Endesa has no activities in the natural gas markets in Germany. There are also no indications that it had any plans to enter this market or that it would have any particularly strong potential as a new entrant.
51. In the light of the above, the proposed transaction does not change E.ON's position in the natural gas sector in Germany, and therefore does not have a competitive impact on these gas markets.

³⁴ Endesa Energía obtained the license to supply electricity to eligible customers in Germany in 2001. The energy for the supply to German customers is sourced through Endesa trading, a licensed wholesaler in Germany. The electricity is purchased through bilateral trades and through the EEX and LPX power exchanges.

³⁵ E.g. Case B8 – 21/03 EAM Energie AG/Stadtwerke Eschwege of 12.09.2003.

52. In the light of the very minor incremental market share held by Endesa in electricity retail supply and in the absence of any indication that Endesa could be considered a likely potential entrant in the German gas market, it must be concluded that any effects of the proposed transaction on the German energy markets can only be very limited and will not lead to a significant impediment to effective competition on these markets.

France

53. In the electricity sector in France, Endesa is present via its subsidiary SNET³⁶. SNET accounted for [$<5\%$] of the total installed capacity in France in 2004; whereas this was [$<5\%$] in terms of generation. E.ON has no presence in *electricity generation* in France.

54. Both Endesa and E.ON are active in the *retail supply market*. E.ON's presence in this market is limited to the supply, under [...], to [...] (market share of [$<1\%$] in 2004). Endesa's 2004 market share in the supply to large industrial customers is [$<5\%$], whereas its supply to small industrial customers and services was [$<1\%$]. E.ON is not active in the supply of electricity to small industry and services (eligible and non-eligible).

55. E.ON has submitted that Endesa is not active in the French natural gas market and that, so far, it has no licence to supply or trade gas in France. E.ON is active in *wholesale and retail supply to large industrial customers* with 2005 market shares in each segment of respectively [$<5\%$] and [$<1\%$].

56. Considering the parties' limited activities in the French market, and the presence of strong competitors, in particular the market leader EdF with market shares in the range of 80-90% in transmission, storage and distribution respectively, the present operation is unlikely to significantly affect competition in the French electricity markets. The situation is similar in the gas markets, where GdF holds a similarly strong position.

57. Third parties have unanimously expressed not to have serious concerns regarding the possible impact of proposed transaction and were of the opinion that the competitive structure of the relevant energy markets would remain unchanged.

Italy

58. As regards the electricity sector, E.ON is not present in *electricity generation* in Italy³⁷. Through its subsidiary Endesa Italia, Endesa is present in the electricity generation³⁸, where in terms of installed capacity it has a market share of [$<10\%$]³⁹. Both parties are

³⁶ Endesa holds a 65 % interest in SNET. The remaining shares are held by the French state and EdF.

³⁷ In Livorno Ferraris (VC), E.ON Italia Produzione, a 100% subsidiary of E.ON Kraftwerke GmbH, has obtained the necessary permission ("Autorizzazione Unica") issued by the Ministry of Productive Activities (MAP) for the construction of a gas-fired power plant (CCGT, performance class 800 MW). First site preparation activities have taken place.

³⁸ Endesa generates electricity mainly through thermal plants ([80-90%] of its installed capacity in Italy), the rest being accounted for by hydroelectric energy and, to a very limited extent, by wind energy ([$<10\%$]).

³⁹ Endesa Italia's shareholders are Endesa (80%) and the municipality owned energy company ASM Brescia (20%).

active in the *wholesale supply of electricity*, Endesa's share amounting to approximately [5-15%] and E.ON having a share of [<5%] in this market segment⁴⁰.

59. E.ON has submitted that Endesa has some activities in *electricity distribution* (Enel Distribuzione clearly being market leader with approximately [80-90%]). However, E.ON is not active in this market segment⁴¹. Both parties are also present in the market for *retail supply of electricity to industrial customers*, where Endesa operates via Ergon Energia⁴². Endesa has submitted that its 2004 retail supplies in Italy (it only supplies to large industrial customers) amounted to [...] TWh. Based on E.ON's estimated total volume of this market segment, namely [...] TWh in 2004, this would represent a market share of around [<5%]. E.ON is only a minor player, representing [<1%] of the total electricity supply to large industrial customers. Through its subsidiary Thüga Italia., E.ON provides a total amount of [...] TWh of *electricity to small customers* in Italy, thus having a market share well below 1%. Endesa is not active in the supply to small customers in Italy.
60. On the Italian natural gas markets, Endesa supplies its own power stations; the company does not supply to third parties. The market investigation has confirmed this. In particular, Endesa supplied [...] TWh to its own electricity generation plants in 2004, whereas this increased to [...] TWh in 2005. E.ON Ruhrgas is only a small player, with a market share of [<1%] of total Italian *production and import*. E.ON does not supply natural gas to Italian power plants. Additionally, E.ON is present on the Italian *wholesale market* through its subsidiary E.ON Ruhrgas, but its market share is well below 1%; Endesa does not serve the Italian wholesale market. Furthermore, E.ON has some activities ([<10%]) in *gas distribution*, through its subsidiary Thüga Italia, and it *supplies natural gas to small customers* (domestic and small commercial) in Italy ([<5%]) where Endesa is not present.
61. Given the minor incremental market shares in those electricity markets where the parties' activities overlap ([<5%] at most, i.e. E.ON's position in electricity wholesale supply), the operation appears unlikely to have a significant impact on competition in the Italian electricity sector. The electricity wholesale and retail supply markets are characterised by the presence of strong competitors such as ENEL, Edison and EGL, each holding substantial market shares. In view of this market structure it is unlikely that the combined entity would be able to act to a considerable extent independently from its competitors, customers and ultimately consumers post-merger. E.ON has, furthermore, pointed at the absence of relevant interconnectors, as a result of which E.ON would not

⁴⁰ E.ON does not have any activities in the wholesale supply of electricity in the zonal market of Sardinia, where Endesa's generation capacity has been found to be indispensable to cover the demand for 67% of the time. In case COMP/M. 3729 EDS/AEM/EDISON Endesa's market share in Sardinia was 30.8% (2004), whereas its share in the zonal markets of North, Macro-South and Macro-Sicily ranged from 4.1% to 7.7%. The decision does not specify E.ON position on these zonal markets, but "others" represented jointly 0.5% to 6.1%. Even when combining the maximum share of "others" with Endesa's market share in each of these three zonal markets, this would not give rise to serious doubts as to the compatibility of the proposed transaction with the common market.

⁴¹ The notifying party could not provide further details. Endesa's reply in the market investigation has not confirmed the existence of such activities, but given that E.ON is not active in electricity distribution in Italy at all, the proposed transaction would not have a competitive impact on this market.

⁴² Ergon Energia is jointly controlled by Endesa and ASM Brescia.

be able to sell significantly higher amounts of electricity than today in to the Italian markets in the near future.

62. As regards the natural gas markets, given that Endesa's gas supply activities are entirely captive, the impact of the proposed transaction on competition in the merchant market can only be minor. Third parties in the Commission's market investigation have not expressed concerns regarding the impact of the proposed transaction.

Poland

63. In 2005, Endesa tried to enter the electricity sector in Poland through the acquisition of the Dolna Odra plants, which represent approximately [$<10\%$] of the total *installed capacity*. However, following E.ON's announced plans to make a public tender offer for Endesa, the privatisation of Dolna Odra is being reconsidered by the Polish government and it is currently uncertain whether this acquisition can be completed⁴³. E.ON has a very minor presence in this market via non-controlling shareholdings in two Polish electricity generation companies (through Ostrowski Zaklad Ciepowniczy SA with an installed capacity of [...] MW and Energetyka Ciepna Opolszczyzny SA with [...] MW, out of a total market of 34,700 MW, in 2004). Assuming that the Dolna Odra acquisition will be completed, the combined share of E.ON and Endesa is [$<5\%$]. The increment as a result of the subject envisaged operation is only [$<1\%$].
64. Through SNET, Endesa controls the Bialystock cogeneration plant which represents less than 1% of the total Polish *wholesale market*. E.ON, through its participation in the two non-controlling shareholdings (see details above), supplied small amounts of electricity to [...] regional distribution companies.
65. Unlike Endesa, E.ON is present in the *distribution market* (via E.ON Ruhrgas) and in the *retail supply market* via its non-controlling shareholdings in the above-referenced companies. E.ON's presence in these markets is minimal, however.
66. As regards the Polish natural gas markets, E.ON is active in the *retail supply* of natural gas, but its market share stays well below 1% (approximately [$<1\%$] in 2005). Endesa is not active in the natural gas markets in Poland.
67. Considering the parties' very limited activities in the Polish energy sector, and bearing in mind that a major part of power generation is still controlled by the State, the proposed concentration is unlikely to have a significant effect on competition in Poland. The results of the market investigation support this conclusion.

Alternative geographic market definitions

68. As stated above, the market investigation has shown that electricity and gas markets in Spain, Italy, France, Poland and Germany are generally likely to be still not wider than national in scope. However, even if the Commission were to consider that these countries were part of wider geographic markets, the notified concentration would not raise competition concerns. On the basis of such wider markets, which could comprise

⁴³ According to press reports, instead of privatizing the Dolna Odra power plants, the government plans to create a Polish national energy "champion" called PGE ("Polska Grupa Energetyczna"); Dolna Odra is to become part of it. According to the government's plans, PGE is to include BOT, PSE, two utilities from Lodz, Dolna Odra and distribution company L6 based in Eastern Poland.

E.ON and Endesa's home markets (i.e. Spain and Germany) and their neighbouring countries, the notified concentration would not raise competition concerns.

69. If the market is analysed as comprising Spain and its neighbouring markets, the market position of Endesa and E.ON would be significantly lower in both the electricity and gas markets. E.ON is not active in Portugal and its market position in France, as seen above, is minor only (not more than 1%).
70. If the market is analysed as comprising Germany and its neighbouring markets, again the proposed concentration will not raise competition concerns. Endesa is only active in the neighbouring countries France and Poland, and only to a limited extent in electricity markets. In each of Germany, France and Poland, where the parties activities overlap in the electricity markets, the incremental market share as a result of the proposed operation is minor only (less than 1% in each of these countries, see competitive assessment above). Broadening the market beyond Germany, so as to include its neighbouring countries, would dilute the parties' combined market share and therefore not lead to competition concerns.
71. The Commission's investigation has indicated that pan-European gas and electricity markets are not expected to arise in the near future⁴⁴, in the light of the lack of current interconnection capacity and given that rapid expansion of the available capacity of the existing capacity is not realistic in the short term. Even on an overall EU-wide basis, E.ON has submitted that the proposed operation would not reach 15% in both electricity and gas markets.

Other markets: electricity trading and CO₂ emission rights market

72. The present operation does not create competition concerns either in electricity trading or in the market for CO₂ emission rights. As far as financial trading of electricity is concerned, the parties' combined market share at EEA-wide level is well below 10%. E.ON and Endesa are both active in the Nordpool and in the EEX in Germany. E.ON's share of the Nordpool and EEX markets does not exceed [5-15%] and [5-15%] respectively. Endesa's trading activities in these pools, however, are very limited and in any event, the parties' combined market share regarding trading is below 15% irrespective of the geographic market definition.
73. With respect to the CO₂ emission rights market, the parties' combined market share in the EU is approximately [<10%]. E.ON has been allocated a share of approximately [<5%] of the total emissions rights and Endesa [<5%].

VI. CONCLUSION

74. Against the background of the above analysis it can be concluded that the proposed concentration does not raise serious doubts as to its compatibility with the common market or the EEA.
75. For the above reasons, the Commission has therefore decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA

⁴⁴ With the exception of the electricity trading and CO₂ emission rights markets.

Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EC) No 139/2004.

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