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

Only the Spanish text is authentic.

REGULATION (EC) No 139/2004

MERGER PROCEDURE

Article 21

Date: 26/09/2006

COMISIÓN EUROPEA

Bruselas, 26.09.2006

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PUBLIC VERSION

Commission Decision

of 26 September 2006

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

(Case No COMP/M.4197 – E.ON/Endesa)

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(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

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

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

Whereas:

(1) On 27 July 2006, the Spanish Energy Regulator ("CNE") adopted a decision submitting to a number of conditions the proposed concentration between E.ON A.G. ("E.ON"), an energy company with its seat in Düsseldorf, Germany and Endesa S.A. ("Endesa"), an energy company with its seat in Madrid, Spain.

(2) The present decision concerns the compatibility of such conditions with Article 21 of Regulation (EC) No 139/2004 (the "Merger Regulation")[1].

I. THE NOTIFIED OPERATION

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

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[1] OJ L 24, 29 January 2004, p. 1.

(4) E.ON is a company (Aktiengesellschaft) with its seat in Düsseldorf with its main activities in the electricity and gas sectors, which are carried out throughout Europe and in the United States. E.ON's shares are listed on all German stock exchanges as well as on the New York Stock Exchange. E.ON's shares are widely held and none of its shareholders owns more than 5% of E.ON's shares.

(5) Endesa is a company constituted according to Spanish law with its seat in Madrid, that is active in the energy sector in Spain as well as in other European countries, South America and North Africa. Endesa's shares are listed on the Madrid and the New York Stock Exchange and are also widely held (there are only two shareholders holding more than 5% of its shares[2]). Its shareholders include Spanish companies and international investors.

(6) On 16 March 2006, E.ON notified to the Commission the concentration arising from this bid under the Merger Regulation. On 25 April 2006, the Commission adopted a decision pursuant to Article 6(1)(b) of the Merger Regulation, whereby it

(i) established that this operation constituted a concentration with a Community dimension pursuant to Articles 1 and 3 of the Merger Regulation; and

(ii) declared it compatible with the common market[3].

II. BACKGROUND INFORMATION

Gas Natural competing bid

(7) On 5 September 2005, Gas Natural filed its intention to launch a cash and shares offer bid for the entire share capital of Endesa with the CNMV. Gas Natural's prospectus was authorised by the CNMV on 27 February 2006, after receiving all regulatory approvals, including the Spanish Council of Ministers' authorisation pursuant to the applicable Spanish competition rules, and CNE's authorisation.

(8) The period for acceptance of Gas Natural's bid by Endesa's shareholders started to run on 6 March 2006 and had an initial duration of 45 calendar days. However, the expiry date has been suspended following two injunctions of Spanish Courts.

(9) In particular, on 21 March 2006, a Spanish Commercial Court issued an order suspending both Gas Natural's bid and the execution of an agreement concluded between Gas Natural and Iberdrola concerning the sale of some assets in case of a successful bid for Endesa. The suspension was conditional upon Endesa presenting a caution of EUR 1 billion, in order to repair any possible damages that may arise from the adoption and maintenance of the interim measures. On 3 April 2006, Endesa presented the caution. On 5 April 2006, the CNMV informed the market of the suspension of Gas Natural's bid.

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[2] Caja Madrid with 9.9% of Endesa's share capital and the French company Axa with 5.4%. Chase Nominees Ltd and State Bank and Trust Co. own on behalf of their clients respectively 5.7% and 5% of Endesa's share capital. The German bank Deutsche Bank AG directly owns 3.4% of Endesa's share capital and 1.8% on behalf of clients.

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

(10) On 21 April 2006, the Spanish Supreme Court decided to suspend the Council of Ministers' merger decision conditionally authorising Gas Natural to acquire Endesa. This order also subjected the suspension to Endesa presenting a caution of EUR 1 billion. To this end, the caution presented before the Commercial Court could be used. The Spanish Government and Gas Natural appealed the Supreme Court's injunction but the appeal was rejected on 19 June 2006. On 28 July 2006, Gas Natural lodged an appeal against the Supreme Court order before the Spanish Constitutional Court.

New Spanish legislative measures

(11) As indicated, E.ON launched its offer over Endesa on 21 February 2006. However, a few days after the announcement by E.ON of a public bid over Endesa, the Spanish Council of Ministers adopted a new urgent legislative measure, Royal Decree-Law 4/2006 (the "Royal Decree"), increasing the supervisory powers of CNE[4].

(12) Pursuant to this Royal Decree, the acquisition by any company of more than 10% of the share capital, or any other participation conferring significant influence, in a company (directly or indirectly) active in a regulated sector[5] or in certain other activities has to be previously approved by CNE. CNE has to apply a legal test based on the following very general grounds:

(a) the existence of significant risks or negative (direct or indirect) effects on regulated activities or certain activities subject to administrative intervention;

(b) the protection of the public interest in the energy sector and in particular the guarantee of proper maintenance of sector policy objectives, with special consideration given to assets deemed to be strategic[6];

(c) the possibility that an entity undertaking regulated activities or certain activities subject to administrative intervention cannot guarantee the exercise of these activities, as a result of any other activities of the acquirer or the target entity;

(d) public security.

The same authorisation is required for the acquisition of assets.

(13) It should also be mentioned that a transitional provision of the Royal Decree establishes that the new rules are applicable to all pending operations, but not to

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

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

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

those operations already authorised by CNE (such as Gas Natural's bid)[7]. In practice, the only pending operation covered by this provision was E.ON's bid, which at the moment of its launch did not require CNE's approval[8].

The Commission's infringement procedure concerning the Royal Decree

(14) On 3 May 2006, the Commission opened an infringement procedure against Spain with regard to the Royal Decree, by sending the Spanish authorities a letter of formal notice pursuant to Article 226 of the Treaty.

(15) According to the Commission's position, the provisions of the Royal Decree granting special powers to CNE could be contrary to fundamental principles of EC law such as the freedom of capital movement (Article 56 of the Treaty) and the right of establishment (Article 43 of the Treaty). This in particular because the grounds on the basis of which CNE may grant or refuse its authorisation are vague and indeterminate and therefore give this authority wide discretionary powers and raise concerns as to the proportionality of the measure.

(16) Spain replied to this letter of formal notice by letter of 25 July 2006.

(17) In parallel with the adoption of the present decision, the Commission decided to send a reasoned opinion to Spain regarding the compatibility of the Royal Decree with Articles 43 and 56 of the Treaty (Infr. No 2006/2222).

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

(18) Pursuant to the new Royal Decree, on 23 March 2006, E.ON requested CNE to authorise (unconditionally) the proposed acquisition of Endesa. On 27 July 2006, CNE adopted a decision submitting this operation to the following conditions:

"**First.-** During a term of ten years from the effective acquisition of Endesa, E.ON AG (hereinafter E.ON), as parent company of the group, shall maintain Endesa, S.A. (hereinafter Endesa) as parent company of its group.

According to the corporative commitments explicitly assumed by E.ON, the transaction which is subject to this authorisation shall not lead to the disappearance of the companies of Endesa group, nor the reorganisation of both groups. Endesa or any of the companies belonging to its group shall not merge with E.ON 12 or with any of the companies of E.ON group. In addition, Endesa shall maintain its registered office and board of directors in Spain.

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

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

Second.- E.ON shall maintain its subsidiary Endesa duly capitalized. To this end, Endesa shall meet a debt service ratio expressed in terms of net financial debt /EBITDA lower than 5,25.

E.ON shall inform the CNE, on a quarterly basis, on the evolution of the mentioned ratio.

Third.- During the period 2006-2010 the companies belonging to the group resulting from the E.ON-Endesa concentration that develop regulated activities or hold strategic assets in Spain, shall only be able to distribute dividends if the earnings made (defined as cash-flow or sum of net benefit of the year and amortizations) are sufficient in order to serve both their investment commitments and the sum of the financial debt amortization and the corresponding financial expenses.

Before the end of 2010, this Commission shall assess the evolution of the financial situation of the companies acquired by E.ON that develop regulated activities or hold strategic assets in Spain, as well as the future investment plans of E.ON within the frame of these regulated activities and strategic assets. In view of this evolution, this Commission may extend the application of the present condition during a term of five years from that moment.

Fourth.- E.ON shall assume and carry out all the investments in regulated gas activities, both as regards transmission and distribution, as well as investments in strategic assets within the natural gas industry as defined in Function 14 of the Eleventh Additional Provision. Third 1 of law 34/1998, of 7 October, included in Endesa's investment plans for period 2006-2009, observing the geographical distribution thereof.

E.ON shall assume Endesa's investment commitments in gas transmission networks established in the document "Planning of the energy and gas industries. Development of distribution networks 2002-2011", approved by the Council of Ministers and submitted to the Parliament, as well as in "Framework Report on natural gas and electric energy demand and its coverage" drafted by the CNE. In this sense, E.ON shall observe the agenda for realisation of the infrastructures set forth in the aforementioned planning.

In addition, E.ON shall carry out, at least on an annual basis, the investments in distribution facilities anticipated by Endesa, set forth in its business plan.

In order to facilitate control and follow-up of the investment commitments on distribution, E.ON shall, within three months from the eventual acquisition of Endesa, file with the Ministry of Industry, Tourism and Commerce, with the affected Autonomous Communities and with the CNE, the aforementioned plan of investment in regulated activities. Such plan shall provide detailed information on the said investments by zones or regions, as well as its timing, so that the competent authorities can exert the corresponding control, and verify that the investments are made when and where necessary in order to reach as quick as possible appropriate standards of service quality. The investment plan shall distinguish between high, and low voltage facilities. Investments in high voltage shall detail the specific facilities and which of the assets will be financed by the company itself and which will be financed by the users.

E.ON shall provide the Ministry of Industry, Tourism and Commerce, the CNE and the affected Autonomous Communities on a yearly basis and prior to 1 April, information on the investments actually carried out, with a breakdown by each Autonomous Community, accounting for the extent to which the aforementioned investment commitments have been fulfilled. The CNE will publish annually the referred information on an aggregate form.

Fifth.- E.ON shall assume all the investment commitments in regulated activities within the energy industry included in Endesa's investment plan for period 2006-2009. These shall include those regarding energy distribution, including the geographic distribution thereof.

E.ON shall assume Endesa's investment commitments in electricity transmission networks included in the document "Planning of the energy and gas industries. Development of distribution networks 2002-2011", approved by the Council of Ministers and submitted to the Parliament, as well as in "Framework Report on natural gas and electric energy demand and its coverage" drafted by the CNE. In this sense, E.ON shall observe the agenda for realisation of the infrastructures set forth in the aforementioned planning. In addition, E.ON shall maintain the investment commitments in other strategic assets as nuclear power plants.

In order to facilitate control and follow-up of the investment commitments in distribution, E.ON shall, within three months from the eventual acquisition of Endesa, file with the Ministry of Industry, Tourism and Commerce, with the affected Autonomous Communities and with the CNE, the aforementioned plan of investment in regulated activities. Such plan shall provide detailed information on the said investments by zones or regions, as well as its timing, so that the competent authorities can exert the corresponding control, and verify that the investments are made when and where necessary in order to reach as quick as possible appropriate standards of service quality. The investment plan shall distinguish between high, and low voltage facilities. Investments in high voltage shall detail the specific facilities and which of the assets will be financed by the company itself and which will be financed by the users.

E.ON shall provide the Ministry of Industry, Tourism and Commerce, the CNE and the affected Autonomous Communities on a yearly basis and prior to 1 April, information on the investments actually carried out, with a breakdown by each Autonomous Community, accounting for the extent to which the aforementioned investment commitments have been fulfilled. The CNE will publish annually the referred information on an aggregate form.

Sixth.- As from January 2010, E.ON shall inform this Commission on a yearly basis on the future investment plans in gas and electricity regulated assets and in gas and electricity strategic assets.

Seventh.- E.ON shall maintain the marginal operative life of Endesa's generation plants under ordinary regime for the same period planned by Endesa, without prejudice of the shut down authorisation established in articles 135 and subsequent of Real Decree 1955/2000, of 1 December.

Eighth.- E.ON must guarantee supply of natural gas to the Spanish market at least in the annual amounts of gas projected in the natural gas supply plans submitted by Endesa to the CNE for preparation of the "Informe Marco sobre la Demanda de

Energía Eléctrica y Gas Natural, y su Cobertura" (Framework Report on Electricity and Natural Gas Demand and its Coverage).

Ninth.- In view of greater public safety risks entailed by nuclear asses, E.ON must arrange to assign the ordinary management of the nuclear plants in which it holds an equity stake to the other owners of those plants.

In no event will E.ON participate in decision making regarding the provision of services, manufacture and supply of equipment and systems, and supply of fuel destined for nuclear power plants.

In addition, in the case of Ascó I, which is owned by Endesa, E.ON must arrange to sell 100% of its interest.

Tenth.- Having regard to the unique characteristics of the systems on islands and away from mainland Spain, and to the special dependence of those assets on the supply security, E.ON must arrange to dispose of the assets of this nature owned by Endesa.

Eleventh.- In order to eliminate the risks the deal would imply for the security of supply, and concretely for the sector-specific policy on the promotion of use of domestic energy sources and coal, E.ON must arrange to dispose of the following Endesa plans included in the National Coal Mining Plan for 2006-2012: thermal plants of Compostilla, Complejo Minero Eléctrico de Teruel and the interest in Anllares.

Twelfth.- The disposal of the assets referred to by conditions nine, ten and eleven shall require authorization from the Spanish National Energy Commission in exercise of Function 14, as provided in Additional Provision 11.3.1 of Act 34/1998 of 7 October 1998, without prejudice such other compulsory authorizations as may apply.

The acquirers of those assets must fulfil the requirements of legal, technical and economic-financial capacity set forth in Royal Decree 1955/2000 of 1 December 2000.

Thirteenth.- Conditions nine, ten and eleven must be fulfilled within a maximum of […] after the acquisition of effective control of Endesa. E.ON must quarterly inform the Spanish National Energy Commission on the degree of compliance with those conditions.

Fourteenth.- The acquisition by any party of equity stakes of more than 10% of the share capital or any such other as carries significant influence in Endesa will require prior authorization from the CNE as provided in Additional Provision 11.3.1, Function 14 of Act 34/1998 of 7 October 1998.

The same authorization will be required for direct acquisition of Endesa assets used in the activities provided for in the first paragraph of section 1 of the aforesaid Function 14.

Fifteenth.- By reason of E.ON's corporate governance system, it shall not treat with preferment its own interests as parent company if they affect negatively reliability of supply in Spain, when adopting strategic decisions affecting Endesa.

Sixteenth.- The breach of the conditions and obligations hereby imposed may give rise to the revocation of this authorisation by the CNE by means of the corresponding administrative procedure.

Once the revocation procedure has started, this Commission shall decide on the provisional suspension of the exercise of the voting rights corresponding to Endesa's shares acquired by E.ON as a consequence of the clearance of the public tender offer. In any case, E.ON's governing body shall limit its acts to the ordinary management of the company, refraining from carrying out or concerting any transaction which falls outside the ordinary activity of the company.

The revocation of the authorisation shall imply the obligation to transfer Endesa's shares acquired by E.ON as a consequence of the clearance of the public tender offer, within the term of [ ]. For this purpose, all mandatory authorisations must be obtained. In the meantime, and until the transmission of Endesa's shares finishes, the suspension of the voting rights attached to the shares of the aforementioned company, whose shares are pending to be transmitted, as well as the limitation of the authorities of the governing body to the ordinary management of the company shall subsist, within the terms indicated in the above paragraph.

Seventeenth.- If, during the term of 10 years from the effective acquisition of Endesa, a company intends to acquire or acquires, whether directly or indirectly, a percentage of the share capital of E.ON or the voting rights thereof higher than 50%, E.ON shall communicate such a circumstance to the CNE who, prior process of the appropriate proceeding, may revise the content of the present Resolution. The said revision, given the existence of grounded reasons for understanding that such a change in the ownership may affect the protection of the public interest in the energy industry, may imply E.ON's obligation to transfer to a third party, which shall be authorised by the CNE, all of Endesa shares held by E.ON, whether directly or indirectly.

Eighteenth.- The CNE may address the Government for it to adopt the necessary measures in order to guarantee energy supply in emergency situations regarding shortage or true risk in the provision thereof, as well as lack of any of the primary energy sources, in accordance with article 10 of Law 54/1997, of 27 November, and article 101 of Law 34/1998 of 7 October.

Nineteenth.- Each and every condition established in the present authorization has an essential character and are considered essential in order to mitigate the risks observed in this Resolution, in such a way that the Resolution would not have been issued without the accompanying conditions".

(19) The CNE's decision was adopted and entered into force without prior communication to (and approval by) the Commission.

(20) On 10 August 2006, E.ON lodged an administrative appeal before the Spanish Minister of Industry, Tourism and Trade against some of CNE's conditions[9]. The Minister has three months to adopt his decision.

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

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

(21) Pursuant to Article 21 of the Merger Regulation, the Commission has the exclusive competence to assess the competitive impact of concentrations with a Community dimension as defined in Articles 1 and 3 of the Regulation.

(22) Member States shall not apply their national competition law to such operations. Moreover, Member States can adopt measures which could prohibit, submit to conditions or in any way prejudice such operations only if

(i) the measures in question protect interests other than those taken into account by the Merger Regulation and

(ii) these measure are necessary and proportionate for the protection of interests compatible with EC law and do not constitute a means of arbitrary discrimination or a disguised restriction to the freedom of establishment or of the free movement of capital or, in any other respect, a breach of general principles or other provisions of Community law.

(23) Public security, plurality of media and prudential rules are interests recognised as being legitimate ("recognised interests"). Measures genuinely aiming to protect one of these recognised interests and clearly in compliance with the principles of proportionality and non discrimination, which are liable to prohibit, submit to conditions or prejudice a concentration with a Community dimension can be adopted and enter into force without prior communication to (and approval by) the Commission.

(24) National measures liable to prohibit, submit to conditions or prejudice a concentration with a Community dimension for the protection of any other interest must be communicated to the Commission before their adoption and entry into force. The Commission must then decide whether such measures are necessary and proportionate for the protection of an interest compatible with EC law and do not constitute a means of arbitrary discrimination or a disguised restriction to the freedom of establishment or of the free movement of capital or, in any other respect, a breach of general principles or other provisions of Community law.

(25) In order to ensure the *effet utile* of Article 21(4) of the Merger Regulation, read in conjunction with Article 10 EC (obligation of loyal cooperation), the same shall apply in case of serious doubts as to whether national measures liable to prohibit, submit to conditions or prejudice a concentration with a Community dimension genuinely aim to protect a "recognised interest" and/or comply with the principles of proportionality and non discrimination[10].

(26) By letter of 27 March 2006, the Services of Directorate-General for Competition (DG Competition) reminded these principles to the Spanish authorities with regard to the decision that CNE had to adopt on E.ON's bid. In this context, DG Competition invited the Spanish authorities:

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

(a) to transmit to the Commission any draft negative or conditional decision which CNE might consider to adopt regarding E.ON's proposed acquisition of Endesa, and

(b) not to adopt and implement such a decision before the Commission had verified that it is necessary and proportionate for the protection of an interest compatible with EC law.

(27) On 24 April 2006, Spain replied to this letter declaring that it disagreed with DG Competition and, in particular, considered that the measures that CNE may adopt pursuant to the Royal Decree would not be subject to the stand-still obligation provided for by Article 21(4) of the Merger Regulation.

V. THE COMMISSION'S PRELIMINARY POSITION RELATING TO INTERIM MEASURES PURSUANT TO ARTICLE 21 OF THE MERGER REGULATION AND THE REPLY OF SPAIN

(28) On 3 August 2006, the Commission informed the Spanish authorities of its preliminary conclusion that at least some of the conditions imposed by CNE's decision were incompatible with Article 21 of the Merger Regulation and that it might be necessary for the Commission to require Spain to suspend and communicate the measure in question to the Commission for assessment in accordance with that provision.

(29) In particular, the Commission estimated in its letter that there were serious doubts as to whether some of the conditions imposed by CNE's decision genuinely aimed to protect public security, complied with the provisions of the Treaty on free movement of capital and freedom of establishment and the principles of proportionality and non discrimination. The Commission therefore concluded that *prima facie* it appeared that the adoption and the entry into force of such a decision was contrary to Article 21(4) of the Merger Regulation and invited Spain to submit its observations on the preliminary assessment.

(30) On 10 August 2006, Spain replied to the above Commission's letter. In its reply, Spain argued that the communication and stand-still obligations provided for by Article 21(4) of the Merger Regulation are inapplicable to the present case insofar as CNE's decision is justified on public security grounds (security of supply). Moreover, Spain considered that the conditions imposed by CNE are proportionate and non discriminatory and do not hinder the free movement of capital and freedom of establishment.

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

(31) On 21 August 2006, the Commission informed the Spanish authorities of its preliminary conclusion that most of the conditions imposed by CNE's decision were incompatible with Article 21 of the Merger Regulation.

(32) On 13 September 2006, Spain replied to the above Commission's letter. The arguments developed by Spain will be referred to in the relevant sections of this decision.

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

(33) In the present case, it is clear that by CNE's decision of 27 July 2006 (hereinafter also simply "CNE's decision") an authority of Spain submitted a concentration with a Community dimension (the E.ON/Endesa concentration) to a number of conditions. That decision therefore constitutes a measure taken by a Member State within the meaning of Article 21(4) of the Merger Regulation. Moreover, the conditions imposed by CNE are liable to appreciably prejudice the implementation of a concentration with Community dimension. Failure by E.ON to abide by any of the conditions imposed by CNE's decision would expose it to the revocation of the conditional authorisation (see further the discussion in points 125-127 of the effect of the sixteenth and nineteenth conditions). In addition, certain of the conditions, namely the ninth, tenth and eleventh, require E.ON to dispose of assets which form part of the subject-matter of the concentration[11].

(34) The CNE's decision was adopted and entered into force without prior communication to (and approval by) the Commission. Considering that at the time of the adoption of CNE's decision there were at least serious doubts as to whether the conditions imposed on E.ON by CNE decision genuinely aimed to protect a "recognised interest" and/or comply with the principles of proportionality and non discrimination (see below the assessment of the compatibility of the conditions), this in itself implies a violation of the communication and stand-still obligation provided for in Article 21(4) of the Merger Regulation.

(35) In its reply to the Commission's preliminary position, Spain argued that the rules concerning the functioning of CNE (in particular the deadlines for the adoption of its decision and the principle of positive administrative silence) made impossible to notify any draft decision. The Commission reiterates however that, in the light of the principle of supremacy of EC law, Spain cannot rely on lacunae in its own legal order or, in any event, on questions concerning its administrative organisation to justify the violation of the communication obligation provided for by Article 21(4) of the Merger Regulation.

(36) Moreover, Spain cannot justify the violation of Article 21(4) of the Merger Regulation claiming that such a violation is due to an independent authority such as CNE, whose role would be foreseen and recognised by EC law[12]. Member States are indeed liable for violations of EC law irrespective of the national authority which determined the breach[13]. It is moreover worth recalling that, according to a well-

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11 See in this respect Case COMP/M.1346 EdF/London Electricity, paragraph 11. Member States can apply regulatory provisions under national law, in so far as such application is aimed not at the concentration itself but at the conduct of undertakings on the market.

12 The reference to this argument does not prejudice to the compatibility of CNE's powers with EC law. The Commission notes that it has already opened two infringement proceedings against Spain in this respect (Infr. No 2006/2222 and Infr. No 2004/2242)

13 See by analogy Case C-173/03 Traghetti del Mediterraneo (not yet reported), where the Court of Justice held that "the principle that a Member State is obliged to make good damage caused to individuals as a result of breaches of Community law for which it is responsible applies to any case in which a Member State breaches Community law, whichever is the authority of the Member State whose act or omission was responsible for the breach" (paragraph 30). In the same sense, see also, for instance, Case C- 224/01

established case law, the obligation to apply Community law, even if it may conflict with national law, binds administrative authorities as well as courts[14].

(37) The violation mentioned in point 34 of the communication and stand-still obligation provided for by Article 21(4) of the Merger Regulation does not deprive the Commission of its power to assess, pursuant to this provision, the conditions imposed by CNE in order to establish whether they are compatible with EC law[15]. In the following points the Commission will therefore undertake such an assessment (distinguishing between different groups of conditions) in the light of, in particular, Articles 56 and 43 of the Treaty[16].

(38) Considering that, according to the Spanish authorities, most of (if not all) the conditions are based on public security grounds (among which CNE includes considerations related to the security of energy supply), before assessing the conditions imposed by CNE it is useful to briefly examine the notion of public security in the light of the EC case-law.

The notion of public security

(39) For the assessment of the present case it should be reminded that, according to a well established case-law, the requirements of public security, as a derogation from the fundamental principles of free movement of capital and freedom of establishment, must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the Community institutions. Thus, public

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Köbler [2003] ECR I-10239, paragraph 31, and Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur and Factortame [1996] ECR I-1029, paragraphs 33 and 34.

14 Case 106/77, Simmenthal, [1978] ECR 629, paragraphs 17-21; Case 103/88, Fratelli Costanzo, [1989] ECR 1839, paragraphs 30-33; Case C-198/01, Consorzio Industrie Fiammiferi, [2003] ECR I-8055, paragraph 49. In these cases, the Court concluded that national administrative authorities have to disapply national law incompatible with directly applicable EC provisions, even if such authorities are not entitled to make a preliminary reference to the Court of Justice pursuant to Article 234 EC.

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

16 Article 56(1) of the Treaty provides for that "*Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited*". According to the nomenclature set out in Annex I to –Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ L178 of 8.7.1988 p.5-18), direct investment in the form of participation in an undertaking by means of a shareholding is to be considered a capital movement (List item 1A). The explanatory notes appearing in that annex state that direct investment is characterised, in particular, by the possibility of participating effectively in the management of a company or in its control. Thus, the acquisition of controlling stakes in domestic companies by other EU investors is also considered to be a form of capital movement (Communication of the Commission on certain legal aspects concerning intra-EU investment, OJ C 220, 19/07/1997, p.15-18, paragraph 2.3). Likewise portfolio investment operations between Member States are to be considered capital movements (List item III A 1). The Communication of the Commission on certain legal aspects concerning intra-EU investment stipulates that: "*The acquisition of controlling stakes in domestic companies by an EU investor, in addition to being a form of capital movement, is also covered under the scope of the right of establishment"* (OJ C 220, 19/07/1997, p.15-18, paragraph 2.4). In this sense, Article 43 of the Treaty governing the right of establishment provides that "*[…] restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited*".

security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society[17].

(40) With specific regard to the energy sector, the Court of Justice of the European Communities specified that measures necessary to ensure a minimum level of energy supplies in the event of a crisis may fall under the notion of public security.[18] In general, either appropriate regulation of general application or measures permitting an adequate specific reaction by the public authorities to forestall a given threat to public security will be sufficient to safeguard this interest and will, if such measures are proportionate and non-discriminatory, be less restrictive than the establishment of prior conditions as to ownership of relevant undertakings[19]. Community legislation recognizes the legitimacy of such measures in Article 3(2) of Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC[20], which sets out under which conditions Member States can make use of public service obligations in order to safeguard public security in the energy sector[21].

(41) The conditions imposed by CNE should be examined in the light of this strict interpretation of the notion of public security.

Corporate requirements (first condition)

(42) By the first condition, CNE required E.ON

(a) to maintain Endesa as the parent company of its group for a period of 10 years,

(b) to maintain the companies of Endesa group as they stand now (i.e. without merging them with any company of E.ON's group or reorganising the structure of Endesa's group); and

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

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

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

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

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

(c) to keep Endesa's registered office and board of directors in Spain.

(43) CNE justifies the above condition on the basis of what is described as the strategic position of Endesa in the Spanish energy market and the risks or negative effects that the conversion of Endesa into a subsidiary of an international conglomerate group may bring to the Spanish public interest in the field of security of supply. In particular, CNE refers to the negative effects that the transfer of Endesa's decisional centre outside Spain could involve for the security of supply as well as the necessity to keep Endesa as the head company of its group, in order to control and supervise the assets subject to conditions and avoid any transfer of income putting at risk these assets. In addition, CNE makes reference to the explicit corporate commitments undertaken by E.ON with respect to the structure and organisation of Endesa.

(44) The Commission considers that such requirements, significantly limit E.ON's freedom to decide the structure of its group after the acquisition of control over Endesa and, therefore, represent a restriction of the freedom of establishment and the free movement of capital.

(45) In this respect, it is worth recalling that, according to the EC case-law, "the right of establishment covers all measures which permit or even merely facilitate access to another Member State and the pursuit of an economic activity in that State by allowing the persons concerned to participate in the economic life of the country effectively and under the same conditions as national operators. Cross-border merger operations, like other company transformation operations, respond to the needs for cooperation and consolidation between companies established in different Member States. They constitute particular methods of exercise of the freedom of establishment, important for the proper functioning of the internal market, and are therefore amongst those economic activities in respect of which Member States are required to comply with the freedom of establishment laid down by Article 43 EC"[22]. By limiting E.ON's freedom to merge some companies of its group with companies of Endesa's group and to reorganise the latter group after the acquisition of control over Endesa, the requirements in question clearly restrict E.ON's freedom of establishment.

(46) In this regard Spain cannot validly claim that under EC and national energy law vertically integrated companies are not free to decide the structure of their group as they have to keep separate certain regulated and non regulated activities (legal unbundling). The existence of these legal obligations does not as such mean that nationally authorities can create obstacles to the freedom of establishment by imposing additional obligations not foreseen by EC law.

(47) Moreover, contrary to what Spain claims, the fact that E.ON declared that it would maintain (or committed to maintain) Endesa as a separate company (or group of companies) with its base in Spain does not in itself justify CNE's decision to formally impose a binding condition on the basis of such a declaration or commitment. Indeed, as stated in the Commission's preliminary position, the formal imposition of a binding condition implies the far-reaching legal consequences stemming from the combined application of the sixteenth and nineteenth conditions

22 Case C-411/03 SEVIC Systems [2005] ECR I-10805, paragraphs 18 and 19.

(see at points 125-127), thereby adding an unnecessary and disproportionate burden on E.ON.

(48) It should also be underlined that, contrary to what Spain seems to imply, E.ON's declarations concerning its intention to maintain its offer for Endesa after CNE's decision do not show that its economic freedom was not restricted by CNE' decision. These declarations may well be justified by the confidence on the fact that, pursuant its legal actions in Spain and the Commission's intervention, the conditions imposed by CNE would be withdrawn or declared void[23].

(49) In any event, to be contrary to Articles 43 and 56 of the Treaty it is sufficient that national measures create obstacles to the freedom of establishment and the free movement of capital, without it being necessary that such measures completely impede the exercise of these fundamental freedoms. In this regard, it can be recalled that, according to a well-established case-law, "a restriction on freedom of establishment is prohibited by Article 52 [now 43] of the Treaty even if of limited scope or minor importance"[24].

(50) It should finally be noted that the fact that E.ON challenged the condition in question only with regard to its duration and clarity before the Spanish Minister of Industry, Tourism and Trade does not mean that this condition restricts E.ON's economic freedom only in those respects. In assessing the compatibility of this condition with Articles 43 and 56 of the Treaty, the Commission cannot be limited by E.ON's litigation strategies, which may be influenced by a large number of subjective elements clearly irrelevant from an EC law perspective.

(51) This being clarified as to the existence of a restriction of E.ON's freedom of establishment and the free movement of capital, it should be noted that such restriction is not necessary and proportionate for the protection of a legitimate public interest and does not comply with the principle of non discrimination.

(52) As indicated, CNE mentions in its decision that, in view of what is described as Endesa's strategic importance to ensure energy supply in Spain, the mere fact that it becomes a subsidiary of E.ON (which is only active outside Spain) may create risks or negative effects for the public interest in Spain regarding security of supply. This claim is however completely unsubstantiated, as CNE does not explain:

(i) why such risks or negative effects would be created by E.ON's acquisition of control over Endesa and

(ii) why they would disappear (or be reduced) if E.ON fulfils the corporate requirements described above.

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[23] In any event, E.ON will have take a definitive decision on the possible withdrawal of its offer only following a request from CNMV to modify the prospectus of this offer, to take into account the conditions imposed by CNE.

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

(53) In its reply to the Commission's preliminary position, Spain did not provide such explanations, but simply reiterated CNE's vague arguments.

(54) In this respect, it should also be considered that CNE's supervisory and regulatory powers, as well as those of other competent authorities such as the Spanish Nuclear Safety Council ("CSN"), would not be affected by a possible merger of Endesa with some company of E.ON's group or by the possible transfer of Endesa's registered office and board of directors outside Spain. Contrary to what Spain appears to argue in its reply to the Commission's preliminary position, the Spanish authorities would continue to exert their control over one of the main operators active in the Spanish market (and in particular over the management and the development of the regulated activities and what are described as strategic assets in Spain) irrespective of the location of its headquarters and governing bodies[25].

(55) The degree of control depends on the nature of the assets in question. Community law, and in particular Directive 2003/54/EC and Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC[26] foresee that the national energy regulator exercises a supervision of all transport and distribution assets (Article 21 of Directive 2003/54/EC and Article 25 of Directive 2003/55/EC). In addition, Member States may give supervision powers to the national energy regulator with respect to tendering procedures for new electricity production capacity (Article 7 of Directive 2003/54/EC) and with respect to authorisations for the construction of new gas pipelines (Article 4 of Directive 2003/55/EC). Moreover, the Euratom treaty, Commission Regulation (Euratom) No 302/2005 of 8 February 2005 on the application of Euratom safeguards[27] and the Nuclear Safety Action Plan lay down the framework for the supervision exercised by CSN.

(56) In addition to these tasks of national regulation and supervision authorities derived from Community and Euratom law, Member States may grant additional powers to energy regulators, as long as these powers do not violate Community and Euratom law, and in particular Directives 2003/54/EC and 2003/55/EC and Regulation (Euratom) No 302/2005. Spain has granted such additional powers to CNE, in particular with respect to the regulated market for electricity, without limiting the exercise of these powers vis-à-vis to companies having their headquarters and governing bodies in Spain.

(57) Moreover, the first condition imposed upon E.ON by CNE goes far beyond the supervision powers that CNE enjoys in its status as an energy regulator. Such a condition therefore has a discriminatory character because CNE would not have the power to impose similar requirements on energy operators outside the case of its control of the acquisition of regulated assets.

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25 Law on the Electricity Sector 11th Additional Provision, section 3(1) *Función 14*, as amended, states that CNE's supervisory powers will apply to activities subject to "administrative intervention". Such intervention is not conditioned to the location in Spain of the registered office or governing bodies of the companies.

26 OJ L 016, 23.1.2004, p. 74.

27 OJ L 54. 28.2.2005, p. 1.

(58) In the absence of any objective justification to impose the corporate requirements established by CNE's decision, it appears that these requirements simply aim at ensuring, for economic policy reasons, that Endesa's headquarters and decision-making centres remain within the Spanish territory and are not transferred to another Member State. Such requirements therefore constitute a means of arbitrary discrimination or a disguised restriction to the free movement of capital and freedom of establishment.

Financial and investment requirements (second to fifth conditions)

(59) By the second to fifth conditions, CNE imposed on E.ON a number of financial and investment requirements.

(60) The financial requirements:

(i) impose on Endesa the obligation to maintain a certain debt service ratio; and

(ii) allow the companies of Endesa's group active in regulated sectors or holding what are described as strategic assets to distribute dividends only if the earnings they generate are sufficient to cover their planned investment and the financial debt amortization and expenses (this requirement has been imposed for the period 2006-2010, but CNE retains the power to extend it for other 5 years).

(61) The investment requirements concern the realisation by E.ON of a number of investments related to electricity and natural gas activities and what are described as strategic assets. In particular, CNE imposed on E.ON the obligation to maintain the investments included in

(i) Endesa's investment plans[28],

(ii) a Government planning for transport activities in the electricity and natural gas sector[29] and

(iii) a CNE report on electricity and natural gas demand and its coverage[30].

(62) CNE does not question the financial strength of E.ON (on the contrary acknowledges that E.ON's solvency is "strong"[31]). However, CNE bases the financial requirements on the need to prevent risks for Endesa's future financial stability and investments. Additionally, CNE argues that E.ON could have the incentive to reduce investments in regulated activities and other assets which are described as strategic in order to increase the dividends and offset the huge

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28 Endesa's Strategic Plan 2006-2009.

29 "Planificación de los sectores de electricidad y gas. Desarrollo de las redes de transporte 2002-2011"(Planning for electricity and gas sectors. Development of transport networks 2002-2011).

30 "Informe Marco sobre la demanda de energía eléctrica y gas natural, y de su cobertura" (Framework report on electricy and natural gas demand, and its coverage)

31 Cf. Sections 7.1.1.1 and 11.2 of CNE's decision.

investment made for the acquisition of Endesa. Such a reduction of investments would put in danger the security of supply as regards its continuity and quality. Moreover, CNE adds that E.ON's current investment plans in other markets may negatively affect future investments in regulated activities and what are described as strategic assets in Spain.

(63) The Commission considers that the imposition of the financial and investment requirements mentioned in points 60 and 61 is contrary to EC law, as it creates an obstacle to the free movement of capital and freedom of establishment which is not necessary and proportionate for the protection of the declared public interest to ensure public security and security of energy supply and gives rise to a discriminatory treatment.

(64) Contrary to what Spain seems to imply in its reply, the fact that this condition creates an obstacle to the free movement of capitals and freedom of establishment but may not completely prevent the exercise of these freedoms by E.ON does not modify the assessment of the present requirements under Articles 43 and 56 of the Treaty (see point 49).

(65) In this context, it is first of all clear that the imposition of the financial and investment requirements in question significantly limits E.ON's economic freedom following the acquisition of control over Endesa, thereby creating an obstacle to the exercise of the rights provided for by the EC rules on the free movement of capital and the freedom of establishment[32]. The mere fact that under national law the Spanish authorities can generally impose, in certain circumstances, investment requirements to energy companies, does not mean that the specific imposition of the financial and investment requirements in question – well beyond the general sectoral rules – do not constitute an obstacle to the free movement of capital and the freedom of establishment.

(66) Moreover, in the Commission's view, such an obstacle has a discriminatory character under several respects because:

(a) CNE obliged E.ON to maintain a particular debt service ratio and limit the distribution of dividends, while (i) before the notified operation, Endesa was not subject to such obligations and (ii) CNE would not have the power to impose such constraints on energy operators outside the case of acquisition of regulated assets;

(b) CNE obliged E.ON (i) to realise a number of investments contemplated in planning documents, which were only partially binding for Endesa (and more generally, for other energy operators) before the notified operation and (ii) CNE did not have the power to impose to energy operators some of these requirements outside the case of acquisition of regulated assets[33];

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32 Cf. Cases C-367/98, Commission v Portugal, [2002] ECR I-4731; C-483/99, Commission v France, [2002] ECR I-4781; C-503/99, Commission v Belgium, [2002] ECR I-4809; C-463/00, Commission v Spain, [2003] ECR I-4581; C-98/01, Commission v United Kingdom, [2003] ECR I-4641.

33 As acknowledged by CNE in its decision (section 8.2) and, under the current Spanish energy legislation (Article 4 of Law 54/1997, on the Electricity Sector and Article 4 of Law 34/1998, on the Hydrocarbons Sector), the only compulsory investments are those related to (a) in the electricity sector, the transport

(c) in its decision concerning Gas Natural's proposed acquisition of control over Endesa[34] (i) CNE also obliged Gas Natural to maintain the same debt ratio, but only for a 3-year time period whereas the duration of E.ON's obligation is not specified and might be considered as indefinite and (ii) CNE limited Gas Natural's freedom to distribute dividends for a similar period of time but did not foresee an extension thereof (while a five-year extension can be imposed on E.ON), despite the fact that CNE did not show in any way that different financial situations required this different treatment[35].

(67) In its reply Spain argues that the obligation to maintain a certain debt ratio does not have an indefinite duration since it cannot go beyond to the 10-years duration established in the first condition. The Commission notes however that there is no clarity as to the duration of this condition which might be interpreted as being indefinite. Moreover, the argument developed by the Spanish authorities does not reply to the Commission's objection that the requirement in question has a longer duration than that imposed on Gas Natural and, more generally, does not explain why such an obligation would be necessary and proportionate for the protection of overriding public interests.

(68) Concerning the different treatment reserved to Gas Natural regarding the distribution of dividends, Spain seems to argue that this is due to the entry into force of the Royal Decree which was not applicable when Gas Natural's offer was authorised.

(69) The Commission notes however that none of the changes introduced by the Royal Decree justifies the stricter treatment reserved in this regard to E.ON's bid. In any event, as explained in the reasoned opinion sent to the Spanish authorities in the framework of infringement procedure No 2006/2222, the Commission considers that the increase of CNE's powers by this Royal Decree is in itself contrary to Articles 43 and 56 of the Treaty. The Commission also considers that the obstacle in question is not necessary and proportionate for the protection of public security and security of energy supply. Indeed, the fact that most of the financial and investment requirements were not mandatory on Endesa before the notified operation indicates that the imposition of such requirements was not strictly necessary to reach the objectives allegedly pursued by CNE. In addition, the fact that CNE could not impose far reaching financial and investment obligations of this sort upon energy operators outside the case of the acquisition of regulated (or so-called strategic)

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networks and (b) in the natural gas sector, basic network pipelines, LNG regasification capacity and storage infrastructure. All other planning in investments are considered to have informative character and therefore, not binding.

34 See CNE decision of 8 November 2005, first and second conditions.

35 On the contrary, from section 7.1.1 of the CNE's decision it appears that E.ON's financial situation is not only comparable to Gas Natural's, but it is even better with respect to some ratios, and in particular with respect to those ratios measuring the debt service. In particular, the ratio net debt + investments / EBITDA is much better for E.ON than for Gas Natural prior the transaction, both for 2004 and 2005. Moreover, compared with 2005 Gas Natural' debt + investments / EBITDA ratio, the combined E.ON/Endesa's ratio would be slightly higher in 2006, but lower again for 2007 and 2008. Therefore, it is doubtful that, post transaction, the group E.ON/Endesa would present a higher financial risk than the group Gas Natural/Endesa.

assets seems to show that the Spanish legislator considered that less restrictive measures (such as specific *ex post* interventions by competent authorities) would allow to ensure a sufficient level of public security and security of energy supply.

(70) More in general, the Commission considers that, except for assets which are subject to the supervision of the national regulator according to Article 23 of Directive 2003/54/EC and Article 25 of Directive 2003/55/EC, i.e. transmission and distribution networks, any other obligations relating to the so-called "strategic assets" are a disproportionate restriction on the new owner of the company and not consistent with free movement of capital and freedom of establishment rules. Specifically for nuclear assets, the Commission notes that Euratom already provides a supervision mechanism for civil nuclear investments and that specific regulation applies in the nuclear safety field.

(71) It should also be noted that the fact that E.ON declared that it would ensure (or committed to ensure) the realisation of the investments contemplated in certain planning documents does not in itself justify CNE's decision to formally impose binding conditions - with the legal consequences stemming from the combined application of the sixteenth and nineteenth conditions (see at points 125-127) - on the basis of such declarations or commitments.

(72) Finally, the fact that in the framework of the administrative appeal brought before the Minister E.ON contested the requirements in question only in certain respects cannot as such mean that the aspects not challenged are compatible with EC law (see point 50).

Reporting requirement (sixth condition)

(73) By the sixth condition, CNE obliges E.ON to report, from year 2010, on future investments in both regulated activities and what is described as strategic assets. CNE does not provide any explicit justification for such a requirement and therefore it is difficult for the Commission to ascertain the reasons behind this condition.

(74) The Commission considers that the imposition of the requirement in question may limit E.ON's economic freedom following the acquisition of control over Endesa, thereby creating an obstacle to the exercise of the rights provided for by the provisions of the EC Treaty on the free movement of capital and the freedom of establishment, and that it gives rise to a discriminatory treatment.

(75) This requirement a has a discriminatory character, since CNE obliges E.ON to report on future investments in what are described as strategic assets even if CNE does not have the power to impose similar general and far-reaching reporting obligations to energy operators outside the case of acquisition of regulated assets.

(76) Concerning Spain's argument that this condition is "innocuous" and "easily fulfilled" and does not significantly limit E.ON's economic freedom, the Commission recalls that a restriction of the fundamental freedoms is contrary to EC law even if of limited scope or minor importance (see point 49)[36].

[36] See Case C-9/02 De Lasteyrie du Saillant [2004] ECR I-2409, paragraph 43. See also Case C-49/89 Corsica Ferries France [1989] ECR 4441, where is stated that "the articles of the EEC Treaty concerning

Requirements concerning the life of power plants and the supply of gas (seventh and eighth conditions)

(77) By the seventh condition, CNE required E.ON to maintain the marginal operative life of Endesa's generation plants under ordinary regime as planned by Endesa. By the eighth condition, CNE required E.ON to commit to the natural gas supply plans submitted by Endesa to CNE[37].

(78) CNE does not provide any specific justification for the imposition of the requirement concerning the operative life of power plants. It merely refers to this as one of the measures (in addition to the conditions concerning the disposal of assets and the transfer of management examined in points 86-117) aiming at mitigating the risks that the acquisition of Endesa's shares by E.ON may represent for what are described as strategic assets (and implicitly, for the security of energy supply). With respect to the obligation of assuming Endesa's current natural gas supply commitments, CNE alleges that this requirement aims at minimising the risk for the security of energy supply.

(79) The Commission considers that the imposition of the requirements in question significantly limits E.ON's economic freedom following the acquisition of control over Endesa, thereby creating an obstacle to the exercise of the rights provided for by the EC rules on the free movement of capital and the freedom of establishment which is not necessary and proportionate for the protection of the security of energy supply and gives rise to a discriminatory treatment.

(80) In this regard, Spain cannot validly argue that such requirements do not significantly limit E.ON's economic freedom since

(i) E.ON did not specifically attack this condition and

(ii) the Spanish legislation generally requires companies to maintain production capacity and foresees serious sanctions.

(81) On the first point, Commission recalls that the fact that E.ON did not challenge a given condition does not mean that this condition does not restrict E.ON's economic freedom (see point 50). On the second point, it should be noted that, if Spanish regulation generally requires companies to maintain production capacity and foresees serious sanctions, this shows that it was not necessary for CNE to impose a specific condition in this regard with the far-reaching consequences stemming from conditions sixteen and nineteen (see points 125-127).

(82) In the Commission's view, the obstacle created by the requirements in question is not justified on public interest grounds. CNE's claim on the need of the requirements in question to mitigate the risks that the acquisition of Endesa's shares by E.ON may

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the free movement of goods, persons, services and capital are fundamental Community provisions and any restriction, even minor, of that freedom is prohibited" (paragraph 8).

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

represent for what are described as strategic assets or for the security of energy supply is clearly unsubstantiated. No further clarifications on this point have been brought by Spain in its reply to the Commission's preliminary position.

(83) Moreover, the requirements at issue have a discriminatory character, since CNE obliged E.ON to follow Endesa's plans with regard to the maintenance of the marginal operative life of generation plants and the supply of gas, even if those plans were not binding for Endesa before the notified operation.

(84) The fact that end-user tariffs are regulated under Spanish law should not alter this principle. Even if end-user tariff regulation implicitly contained an assumption by CNE on the available power plants, such an assumption would not constitute an obligation on the company to invest or operate in a certain way.

(85) In addition, the requirement imposed on E.ON with regard to the supply of natural gas is clearly unjustified and disproportionate in the light of the considerations developed in CNE's decision itself. Indeed, CNE expressly acknowledged (i) that Endesa's imports of liquefied natural gas could not be considered strategic assets and (ii) that, even if post-transaction E.ON should decide to divert part of Endesa's LNG to other markets, the effect of such action in the Spanish energy market would be limited because Endesa's supply contracts represent less than 10% of the total natural gas consumption in Spain[38]. Finally, the fact that other operators controlling higher shares of natural gas consumption in Spain are not bound by their supply plans highlights the disproportionate and discriminatory nature of this condition.

Requirements concerning the disposal of assets and the transfer of management (ninth to thirteenth conditions)

Transfer of management of jointly owned nuclear plants and disposal of solely owned nuclear plants (ninth condition)

(86) By the ninth condition, CNE required E.ON

(i) to assign the ordinary management of the nuclear plants in which Endesa holds a participation to the co-owners of those plants,

(ii) not to participate in decision-making regarding the provision of services, manufacture and supply of equipment and systems, and supply of fuel to nuclear power plants and

(iii) to divest the only nuclear plant solely owned by Endesa.

(87) CNE does not put into question E.ON's competence or reliability in the nuclear field. The imposition of the ninth condition is essentially reasoned by arguing that E.ON's acquisition of control over Endesa would create the risk that decisions concerning power plants are taken in view of short term business interests and following criteria which may not coincide with the Spanish public interest and sectoral policy. According to CNE, this would be very dangerous considering the importance of power plants for the security of electricity supply and, more generally,

[38] See section 5.3.2 of CNE's decision.

for public security (due to the risk of accidents and/or terrorist attacks). CNE refers in particular to the fact that the legal requirements regarding safety of nuclear plants differ in Spain and Germany and to the practice of current Spanish operators to adhere to standards of safety and investment in safety which exceed those required by law, and finds that there is a risk that E.ON would have difficulties in adhering to these legal and extra-legal standards. Moreover, CNE considers that the decisions concerning nuclear assets should remain within the jurisdiction of the Spanish regulator, in order to allow a very efficient supervision. CNE finally states that, if nuclear assets were owned by foreigners, the national security interest would be completely safeguarded only by requiring the new owners to forgo management and convert their acquisition into a merely financial investment.

(88) The Commission considers that the imposition of the requirements in question significantly limits E.ON's economic freedom following the acquisition of control over Endesa, thereby creating an obstacle to the exercise of the rights provided for by the EC Treaty and Euratom Treaty rules on the free movement of capital and the freedom of establishment. Such an obstacle is not justified on public interest grounds and is contrary to the principles of proportionality and non discrimination.

(89) First of all the Commission reminds that, contrary to what CNE argues, nuclear safety is not an exclusively national competence but a shared competence[39], that nuclear safeguards and nuclear fuel supply policy are even exclusive Community (Euratom) competencies[40], and that users of nuclear fuels and nuclear installations are subject to a specialised agency or service[41].

(90) In the Commission's view, CNE did not provide any element indicating that E.ON's acquisition of control over Endesa would create a genuine and sufficiently serious threat for nuclear security, safety and/or for the security of energy supply.In its reply to the Commission's preliminary position, Spain did not provide any further element, but simply reiterated CNE's vague arguments.

(91) As indicated in the Commission's preliminary position, after the E.ON/Endesa concentration, the nuclear power plants concerned would continue to be owned (or co-owned) and managed (or co-managed) by Endesa. The control currently exerted by the Spanish authorities or by Commission's safeguard inspectors would not change in any way after the acquisition of Endesa's shares by E.ON. A change in the ownership of a nuclear power plant does not affect the competences of nuclear safety and safeguards supervisors at Community and national level; therefore the present operation cannot be considered to put at risk the efficient supervision of nuclear installations.

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39 See Case C-29/99 Commission v Council [2002] ECR I-11221. Moreover, it is worth noting that in the field of nuclear safety, the Council opted for a non binding soft-law approach and pursued an "Action Plan" instead of following the Commission's proposal on binding legislation.

40 Articles 2(d), 2(e), 52 to 76 and 77 to 85 EA.

41 For nuclear fuel supplies users have to submit their supply contracts to the Euratom Supply Agency, (see articles 52 and 60 EA), and under Regulation (euratom) No 302/2005 the operators and the owners of nuclear installations are subject to controls by the Commission's Safeguards Inspectors.

(92) In addition, to the extent that CNE regards it as desirable that security or safety standards be maintained that exceed the minimum standards currently foreseen in Spain, it is open to Spain to provide for such higher standards in specific regulatory measures or recommendations of general application to all operators in the sector, provided that these measures are in conformity with EC and Euratom primary and secondary legislation. Furthermore, it is completely unsubstantiated why, according to CNE, E.ON's business interests would be different from those of Endesa's current shareholders (which include a large number of international investors) or why E.ON's interests would be more orientated to short term business considerations and/or less compatible with the Spanish public interest and sectoral policy. No clarification on those points was brought by the reply of Spain to the Commission's preliminary assessment.

(93) In this regard, it is clear that simply assuming, without any supporting element, that an operator from another Member State, having most of its activities outside Spain, would have short term businesses considerations contrary to the Spanish interest would be completely unreasonable and contrary to basic principles of EC law.

(94) In its preliminary position, the Commission also considered that it was completely unsubstantiated why the sale of Endesa's nuclear plant to another company or its management by another co-owner to the exclusion of Endesa would better guarantee the nuclear security or the security of energy supply. Spain replied that, according to the Royal Decree, the sale of a nuclear plant will be subject to prior authorisation by CNE and, therefore, CNE will ensure that the acquirer does not put in danger nuclear safety and security of supply. This argument however does not reply to the Commission's concern since it does not justify why such sale would be needed to better guarantee the nuclear security or the security of energy supply.

(95) The Commission stated in its preliminary assessment that the requirement imposed by CNE in reality seems to be motivated by energy policy considerations concerning the need to keep nuclear plants under the control of a Spanish company, due to what is described as their strategic importance for the country. The mere fact that a Spanish company owning and managing nuclear plants may become part of a wider European group appears to be opposed by CNE as contrary to this energy policy objective. In its reply, Spain argued that this argument is proven wrong by the fact that a foreign company such as EDP (via Hidrocantábrico) has a 15.5% participation in a Spanish nuclear plant. However, the Commission notes that the fact that in the past cases the Spanish authorities did not oppose to EDP's investment in nuclear plants does not in itself show that, in the present case, these authorities are not opposing, for energy policy reasons, to E.ON's entry in the ownership and/or management of a power plant.

(96) On this basis, the Commission therefore considers that this requirement constitutes a means of arbitrary discrimination or a disguised restriction to the free movement of capital and freedom of establishment. Spain contests this conclusion to the extent that CNE's decision only limits the ordinary management of nuclear plants and only requires divestitures when such limitation to management is not possible. The Commission however recalls once again that, in order to be contrary to Articles 43 and 56 of the Treaty, it is sufficient that national measures create obstacles to the freedom of establishment and the free movement of capital, without it being necessary that such measures completely impede the exercise of these fundamental freedoms (see point 49). Moreover, the Commission notes that EU companies have

participations in nuclear power plants in other Member States. As far as Spain is concerned, the Commission recalls that, as stated in point 95, EDP (through Hidrocantábrico) has a 15.5% participation in the nuclear power plant of Trillo. Furthermore, the French company Suez (via Electrabel) controls nuclear assets in Belgium and the Swedish company Vattenfall owns participations in nuclear power plants in Germany. In none of these cases, the foreign ownership and management of nuclear plants creates specific problems of public security and security of supply going beyond the general concerns in this sector than can be and are addressed by general sectoral measures.

(97) Finally, in view of the elements highlighted above, the Commission considers that the requirement at issue is also in breach of the provisions of the Euratom Treaty[42] prohibiting discriminations on grounds of nationality and providing for the freedom of establishment.

(98) In any event, it appears that less restrictive measures (such as the imposition of specific and well defined requirements concerning the management of nuclear plants and/or the preservation of a minimum number of competent personnel familiar with applicable norms) could have allowed Spain to overcome the alleged problems created by E.ON's acquisition of Endesa.

Disposal of assets outside mainland Spain (tenth condition)

(99) By the tenth condition, CNE asked E.ON to divest Endesa's assets outside mainland Spain.

(100) CNE underlines the specificities of such regulated assets, noting in particular that they imply higher costs (because of their isolated nature) and therefore require an appropriate compensation. While so far Endesa ensured the supply of energy outside mainland Spain, CNE considers that this supply would be at risk if Endesa was controlled by a company having, like E.ON, its central decision-making bodies in another country. According to CNE, such a company could have business strategies which may not correspond to the interest of ensuring energy supplies in the isolated areas outside mainland Spain.

(101) The Commission considers that the imposition of the requirement in question significantly limits E.ON's economic freedom following the acquisition of control over Endesa, thereby creating an obstacle to the exercise of the rights provided for by the EC rules on the free movement of capital and the freedom of establishment. Such an obstacle is not justified on public interest grounds and is contrary to the principles of proportionality and non discrimination.

(102) Also in this case, CNE did not provide any element indicating that E.ON's acquisition of control over Endesa would create a genuine and sufficiently serious threat for the security of energy supply. Nor any such element has been provided in the reply of Spain to the Commission's preliminary position.

(103) After the E.ON/Endesa concentration, Endesa would continue to own and manage its assets outside mainland Spain under the same regulatory regime. The acquisition of

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[42] Articles 92 to 100 EA, in particular art 97.

Endesa's shares by E.ON does not appear to affect these assets. Above all, CNE does not explain: (i) why E.ON's business interests regarding the supply of energy outside mainland Spain would be different from those of Endesa's current shareholders and (ii) why the sale of Endesa's assets to another company would guarantee such supply. Again, no such explanation has been provided in the reply of Spain to the Commission's preliminary position.

(104) The real reason for the requirement at issue appears again linked to energy policy considerations concerning the maintaining of these assets, considered strategic, under the control of a Spanish company. Also this condition therefore constitutes a means of arbitrary discrimination or a disguised restriction to the free movement of capital and freedom of establishment.

(105) Moreover, the Commission considers that less restrictive measures (such as the imposition of public service obligations according to Article 3(5) of Directive 2003/54/EC, and the institution of adequate compensation mechanisms in respect of energy supplies in the isolated areas outside mainland Spain, without discrimination between suppliers) could have allowed to overcome any perceived risks for the security of energy supply outside mainland Spain.

Disposal of power plants using domestic coal (eleventh condition)

(106) By the eleventh condition, CNE asked E.ON to divest Endesa's power plants using domestic coal.

(107) CNE notes that the Spanish authorities support the use of domestic coal for power generation, not only for social reasons, but also, and above all, to ensure energy supply. According to CNE, the Spanish authorities have not however created an express obligation to use domestic coal, but only foresee a support for electricity prices and other forms of incentive. In such a context, according to CNE, E.ON's acquisition of control over Endesa would represent a risk for the Spanish objectives regarding the use of domestic coal. This essentially because E.ON's business interests may not coincide with the public interest expressly or tacitly pursued by other power producers in this respect.

(108) The Commission considers that the imposition of the requirement in question significantly limits E.ON's economic freedom following the acquisition of control over Endesa, thereby creating an obstacle to the exercise of the rights provided for by the EC rules on the free movement of capital and the freedom of establishment. Such an obstacle is not justified on public interest grounds and does not comply with the principles of proportionality and non discrimination.

(109) Once again, the Commission indeed considers that CNE did not provide any element indicating that E.ON's acquisition of control over Endesa would create a genuine and sufficiently serious threat for the security of energy supply.

(110) Also in this case, CNE does not explain at all: (i) why E.ON's business interests regarding the use of domestic coal would be different from those of Endesa's current shareholders, and (ii) why the sale of Endesa's plants to another company would better guarantee such use and the security of energy supply. No such explanation has been provided in the reply of Spain to the Commission's preliminary position.

(111) Also the requirement at issue seems to be merely inspired by the policy goal to keep under the control of a Spanish company assets considered to be strategic for the country. Such a condition therefore constitutes a means of arbitrary discrimination or a disguised restriction to the free movement of capital and freedom of establishment. In its reply to the Commission's preliminary assessment, Spain argued that the absence of such a policy objective is shown by the fact that some companies from other Member States such as the Portuguese EDP (via Hidrocantábrico) and the Italian ENEL (via Viesgo) currently own power generation plants in Spain using domestic coal. However, the fact that in the past the Spanish authorities did not oppose to these companies' investments in coal plants does not in itself show that, in the present case, these authorities are not opposing, for energy policy reasons, to E.ON's entry in the ownership of coal plants.

(112) On the contrary, the fact that other EU companies active in other Member States operate domestic coal plants in Spain without any problem for the security of supply shows that the requirements imposed on E.ON in this regard are unnecessary and disproportionate.

(113) The Commission also recalls that community law sets the framework within which Member Sates can increase their security of energy supply through the use of indigenous fuel sources. The relevant pieces of community legislation are Directive 2003/54/EC, and in particular Articles 3 and 11 thereof, and Council Regulation (EC) No 1407/2002/EC of 23 July 2002 on State aid to the Coal Industry[43].

(114) Article 3(2) of Directive 2003/54/EC foresees that "*[...] Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including security of supply [...]. Such obligations shall be clearly defined, transparent, non discriminatory, verifiable and shall guarantee equality of access for EU electricity companies to national consumers. In relation to security of supply, energy efficiency/demand-side management and for the fulfilment of environmental goals, as referred to in this paragraph, Member States may introduce the implementation of long term planning, taking into account the possibility of third parties seeking access to the system*". Member States have to inform the Commission of any measure taken in this respect. Spain recently adopted a new legislative measure (Royal Decree-Law 7/2006), which foresees the possibility of State aid for coal fired power plants and a system of incentives for the preferential dispatching of power plants using domestic coal[44]. It has therefore put into place less restrictive measures allowing to overcome the alleged problems identified by CNE.

(115) Furthermore, the Commission reminds that Regulation (EC) No 1407/2002/EC allows Member States to subsidise indigenous coal up to the level of the prevailing world market price (see Articles 4 and 5(3) of the Regulation). One of the objectives of this Council Regulation is to ensure that Member States can provide a minimum level of indigenous coal in order to increase the security of energy supply. Spain

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43 OJ L 205/1, 2 August 2002. Regulation amended by the 2003 Act of Accession.

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

currently provides State aid to its coal industry under this Regulation[45]. The Commission considers that this should suffice to meet the objective of increasing the security of energy supply by the means of using domestic coal.

(116) In this regard, Spain merely states that the suggested measures cannot be imposed by CNE because this body would not be competent for adopting such measures. However, the Commission notes that CNE could have asked the Spanish government to adopt such measures if it considered them necessary. In any event, the Commission reiterates that Spain cannot rely on lacunae in its own legal order or, in any event, on questions concerning its administrative organisation to justify the violation of Article 21 of the Merger Regulation.

Twelfth and thirteenth conditions

(117) The twelfth and thirteenth conditions refer to the implementation of the ninth to eleventh conditions. Insofar as the latter conditions are not justified on public interest grounds and do not comply with the principles of proportionality and non discrimination, the twelfth and thirteenth condition are also incompatible with Article 21 of the Merger Regulation.

Conditions concerning CNE's decision-making powers (fourteenth, fifteenth, sixteenth, seventeenth and nineteenth conditions)

(118) A number of conditions imposed by CNE concern its own decision-making powers, either

(i) requiring CNE's prior authorization for the acquisition of participations in Endesa (fourteenth condition) or

(ii) granting CNE the power to review or withdraw its (conditional) authorisation in certain circumstances (fifteenth, sixteenth, seventeenth and nineteenth conditions).

(119) In particular, by the fourteenth condition, CNE requires its prior authorization for the acquisition of more than 10% of Endesa's share capital (or any participation granting significant influence over the company) or for the acquisition of certain assets of Endesa[46].

(120) The Court of Justice has found measures laying down a procedure of prior authorisation restrict, by their very purpose, the free movement of capital[47]. In

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

46 This condition refers in particular to assets affected to the development of the activities foreseen in 11th Additional Provision of the Law on the Electricity Sector, section 3(1) *Función 14*, as amended, (i.e. regulated activities and activities subject to administrative intervention involving a relationship of special subjection).

47 See joined cases C-515/99 and C-527/99 to C-540/99, Reisch and Others [2002] ECR I-02157 paragraph 32, and case C-302/97, Konle, [1999] ECR I-03099 paragraph 39.

addition, measures affecting the position of persons acquiring a shareholding in a company are liable as such to deter investors from other Member States from making such investments and, consequently, constitute a restriction on the movement of capital[48]. In its reply, Spain does not discuss the (il)legality of this condition but merely refers to the on-going infringement procedures (Infr. No 2006/2222) opened by the Commission against the Royal Decree.

(121) By the seventeenth condition, CNE retains, for a 10-year period, the power to withdraw or review its authorisation in case of any (direct or indirect) acquisition by a third party of more than 50% of E.ON's share capital or voting rights.

(122) The Court of Justice has concluded[49] that state measures liable to impede the acquisition of shares in undertakings and dissuade investors in other Member States from direct investments may render the free movement of capital illusory, and thus constitute a restriction thereof. Granting CNE the discretionary power to withdraw or review its authorisation - which may amount to an obligation for E.ON to sell Endesa's shares - in case of any (direct or indirect) acquisition of more than 50% of E.ON's share capital or voting rights may dissuade potential investors from direct investments in E.ON as the possible sale of Endesa's shares may affect E.ON's market value or financial attractiveness .

(123) Contrary to Spain's views, the fact that a similar violation might have been committed by the German authorities at the time of the E.ON/Ruhrgas operation does not affect the (il)legality of the condition imposed by CNE[50].

(124) Moreover the Commission already clarified that the fact that E.ON did not challenge a given condition does not mean that this condition does not restrict E.ON's economic freedom (see point 50)

(125) The sixteenth condition establishes that the breach of the conditions and obligations imposed by CNE may give rise to the revocation of its authorisation (which would imply the obligation to sell Endesa's shares and can even lead to the immediate suspension of E.ON's voting rights over the acquired Endesa's shares). Read in conjunction with the nineteenth condition (according to which each and every condition imposed by CNE has an essential character for the authorisation of E.ON's acquisition of control over Endesa), the sixteenth condition could imply that any (even minor) breach of a requirement established by any of the conditions imposed by CNE may entail the revocation of the authorisation and therefore the obligation to sell Endesa's shares.

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48 See case C-98/01, Commission v United Kingdom, [2003] ECR I-4641 paragraph 47, case C-463/00, Commission v Spain, [2003] ECR I-4581 paragraphs 61-62.

49 See e.g. case C-367/98, Commission v Portugal, [2002] ECR I-4731 paragraph 52 and case C-483/99, Commission v France, [2002] ECR I-4781 paragraph 41.

50 See, to that effect, inter alia, Case 232/78 Commission v France [1979] ECR 2729, paragraph 9; Case 325/82 Commission v Germany [1984] ECR 777, paragraph 11; Case C-146/89 Commission v United Kingdom [1991] ECR I-3533, paragraph 47; and Case C-5/94 Hedley Lomas [1996] ECR I-2553, paragraph 20.

(126) Spain argues that the sixteenth condition could justify the revocation of CNE's authorisation only following a "substantial" breach of the conditions putting in danger the security of supply. However, the Commission notes that this is not specified in the wording of the condition, which may allow a different interpretation. In any event, it is far from clear which violation of the conditions could be considered to be substantial and to put in danger the security of supply. The ambiguity of the text of this condition may in itself generate uncertainties for E.ON, thereby hindering its economic behaviour.

(127) The wide power retained by CNE with regard to the possible revocation of its authorisation should be considered in conjunction with certain conditions imposing very general and vague requirements on E.ON. Such requirements grant CNE a very large margin of appreciation with regard to their interpretation and implementation. This is in particular the case for the fifteenth condition, whereby CNE obliges E.ON not to give preference to its own interests as a parent company when adopting strategic decisions concerning Endesa insofar they negatively affect the security of energy supply in Spain. In its reply, Spain contests this point by referring to case-law of the Spanish Supreme Court, which would clarify that the inclusion of undetermined legal concepts does not imply a discretionary power. However, the Commission reiterates that the lack of precision of the fifteenth condition does not enable individuals to be apprised of the extent of their rights and obligations deriving from Article 56 of the Treaty, with the result that such rules must be regarded as contrary to the Community law principle of legal certainty. The administrative authorities have in this sphere a particularly broad discretion which represents a serious threat to the free movement of capital and may end by negating it completely[51].

(128) Thus, the Commission considers that the abovementioned conditions create great uncertainties over E.ON's economic activity following the acquisition of control over Endesa, by submitting it to a very wide control by CNE with the constant threat of the review and/or revocation of CNE's authorisation decision. Such conditions therefore create an obstacle to the exercise by E.ON of the rights provided for by the EC rules on the free movement of capital and the freedom of establishment. Moreover, the fourteenth and seventeenth conditions may deter investors form acquiring significant participations in Endesa (or certain assets of Endesa) and/or more than 50% of E.ON's capital or voting rights, thereby creating a more general obstacle to free movement of capital and the freedom of establishment.

(129) The abovementioned obstacles are not justified on public interest grounds and are incompatible with the principles of proportionality and non discrimination. The Commission recalls that, according to the Court of Justice[52], the safeguarding of energy supplies in the event of a crisis may fall within the ambit of a legitimate public interest in the sense of Article 58 I b) of the Treaty. In the present case, however, the public interest considerations invoked are not limited to, or even to be demonstrably related to, the safeguarding of energy supplies in the event of a crisis.

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

52 See case C-503/99, Commission v Belgium, [2002] ECR I-4809 paragraph 46; case C-483/99, Commission v France, [2002] ECR I-4781 paragraph 47, case C-463/00, Commission v Spain, [2003] ECR I-4581 paragraph 71.

Thus, the invocation of this objective does not justify restrictions within the meaning of Article 56 of the Treaty.

(130) In this regard, it appears that there would be less restrictive measures to eliminate specific problems for public security and security of energy supply which might potentially arise due to Endesa's and E.ON's decisions or behaviour following the proposed transaction and/or decisions or behaviour of future hypothetical investors having acquired certain assets of Endesa or more than 50% of E.ON's capital or voting rights. Indeed, appropriate regulation of general application, or measures permitting a (proportionate) specific reaction by the public authorities to forestall any given threat to public security or security of energy supply possibly arising from such decisions or behaviour would allow to safeguard such public interests without excessive restrictions to the free movement of capital and the freedom of establishment.

(131) Moreover, the Commission considers that the requirement not to give preference to E.ON's own interests as a parent company when adopting strategic decisions concerning Endesa which negatively affect the security of energy supply in Spain has a discriminatory character, since no similar obligation exists for any other energy operator active in Spain. In its reply to Commission's preliminary assessment, Spain did not show that the alleged specificities of the governance rules of German companies would justify such different treatment.

VIII. CONCLUSION

(132) On the basis of the foregoing, the Commission has come to the conclusion that Spain violated Article 21 of the Merger Regulation (and in particular paragraphs 2, 3 and 4 thereof) since:

(a) the adoption and the entry into force of CNE's decision of 27 July 2006 without prior communication to (and approval by) the Commission violates the specific communication obligation provided for by such provision; and

(b) CNE submitted E.ON's acquisition of control over Endesa (i.e. a concentration with a Community dimension) to a number of conditions contrary to the EC rules on the free movement of capital and the freedom of establishment, and therefore unduly interfered with the Commission's exclusive competence to decide on a concentration with Community dimension.

(133) The fact that CNE's decision has been challenged before the Minister of Industry, Tourism and Trade does not change the conclusion of point 132, as this administrative appeal did not prevent the entry into force of CNE's decision and did not suspend its effects. Moreover, the outcome of such procedure cannot be predicted. In such a situation, the fact that CNE's decision may be subject to modifications does not prevent the Commission from reaching a conclusion on the illegality of this decision as it stands. Indeed, a modification of CNE's decision in order to bring it in line with EC law would merely eliminate the infringement declared by the present decision.

HAS ADOPTED THIS DECISION:

Article 1

Spain violated Article 21 of Regulation (EC) No 139/2004 due to the adoption, without prior communication to and approval by the Commission, of CNE's decision of 27 July 2006 which subjects E.ON's acquisition of control over Endesa to a number of conditions (conditions one to seventeen and nineteen of that decision) which are contrary to Articles 43 and 56 of the EC Treaty and, as far as condition nine is concerned, to Article 97 of the Euratom Treaty.

Article 2

Spain shall withdraw without delay the conditions imposed by CNE by its decision of 27 July 2006 which have been declared incompatible with Community law by Article 1 of the present decision.

Article 3

This decision is addressed to the Kingdom of Spain.

Done at Brussels, 26.09.2006

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