

***Case No COMP/M.4685 -
ENEL / ACCIONA /
ENDESA***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 05/07/2007

***In electronic form on the EUR-Lex website under document
number 32007M4685***



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 05-VII-2007

SG-Greffe(2007) D/204293/4

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties:

Dear Sir/Madam,

**Subject: Case No COMP/M.4685 - Enel/ Acciona/ Endesa
Notification of 31.05.2007 pursuant to Article 4 of Council Regulation
No 139/2004¹**

1. On 31/05/2007, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation No 139/2004 by which Enel S.p.A. ("Enel", Italy) and Acciona S.A. ("Acciona", Spain) acquire within the meaning of Article 3(1)(b) of the Council Regulation joint control of the undertaking Endesa S.A. ("Endesa", Spain) by way of a joint takeover bid and an agreement entered into by ENEL and Acciona. Enel and Acciona will subsequently sell certain ENEL and Endesa businesses and assets in Spain and Italy, as well as related businesses in France, Poland and Turkey, to the German corporation E.on AG ("E.on").
2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of Council Regulation (EEC) No 139/2004 and does not raise serious doubts as to its compatibility with the common market and with the EEA Agreement.

I. THE PARTIES

3. ENEL is an Italian electricity operator, active in the generation, distribution and supply of electricity, mainly in Italy, where it is the main provider of electricity to both domestic and industrial users and also in Spain, Bulgaria, Romania, Slovakia, Russia, France, and North and South America. It is also active in the purchase and

¹ OJ L 24, 29.1.2004 p. 1.

sale of natural gas for domestic electricity generation and gas operations in Italy where ENEL is the second operator in the gas distribution and supply business.

4. Acciona is a corporate group primarily based in Spain whose main lines of business are the development and management of infrastructure and real estate projects, the provision of transport, urban and environmental services, and the development and operation of renewable energies.
5. Endesa is a Spanish electricity operator that is also active in other European countries (though to a limited extent), in particular: Portugal, France, Italy, Germany and Poland. In addition, Endesa is active in South America and North Africa. In Spain, Endesa is also present in the gas sector. Endesa's shares are listed on the Madrid and the New York Stock Exchange.

II. THE CONCENTRATION

6. The notified concentration consists of the acquisition of joint control over Endesa by Enel and Acciona, as a result of the public bid and the agreements described below.
7. On 26/03/2007 ENEL and Acciona agreed to acquire joint control of Endesa by launching a joint public bid for the shares in Endesa that they do not already own or control. In a parallel operation, that does not have community dimension and will therefore be examined by the national competition authorities, Acciona will acquire sole control over Endesa's renewable energy business
8. On 02/04/2007 ENEL, Acciona and E.on agreed that ENEL and Endesa will transfer to E.on a number of rights and assets, including ENEL's existing electricity generation, distribution and supply business in Spain (except for its stake in EUFER²), certain additional Endesa's assets located in Spain, and Endesa's current business in Italy, together with related businesses in France, Poland and Turkey. These businesses do not fall within the scope of the notified concentration since ENEL and Acciona will not acquire any lasting control over them.
9. ENEL and Acciona have stated in their notification to the European Commission that in the interim period lasting until the abovementioned transfers to E.on or to an independent third party, the Viesgo Businesses and Endesa Italia will be held separate and managed independently from Acciona, ENEL and Endesa, under the supervision of (an) independent trustee(s) furnished with all the necessary authority and resources. The appointment of the trustee(s) for Endesa Italia and for the Viesgo Businesses will be in compliance with the Commission's Notice and draft Notice on Remedies and Commission's standard text for Divestiture Commitments.³ Enel and Acciona also confirmed to the Commission that the trustee(s) will be in place as of the date in which they acquire joint control of Endesa⁴.

² EUFER is a joint venture between Enel and the third Spanish electricity operator Unión Fenosa SA, active in generation of electricity from renewable resources.

³ Commission Notice on remedies acceptable under Council Regulation 4064/89 and under Commission Regulation 447/89; Commission's model texts for divestiture commitments and the trustee mandate under the ECMR, 2 may 2003.

⁴ As regards Endesa Italia, Enel and Acciona stated that it may take some days to provide the trustee with the necessary access and powers in relation to the management of Endesa Italia since Enel and Acciona

III. COMMUNITY DIMENSION

10. The combined aggregate worldwide turnover of Enel, Acciona and Endesa is above €5,000 million (Enel EUR 38,513 million; Acciona EUR 6,272; Endesa EUR 20,580 million) and their respective aggregate Community-wide turnover is above €250 million (Enel EUR 38,139 million; Acciona EUR [...]; Endesa EUR [...] million). Moreover, Enel, Acciona and Endesa do not achieve more than two thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension under Article 1(2) of the Merger Regulation.

IV. ASSESSMENT

11. Each of Endesa, Acciona and Enel is, in addition to electricity, active in some markets which are vertically related to the electricity markets. These markets are some gas markets (such as gas infrastructures, gas distribution, wholesale and retail supply and supply to CCGTs), coal mining (used by coal-fired power plants) as well as CO₂ emission's rights and financial electricity trading. However, none of these markets is affected within the meaning of the ECMR.

12. In particular, given the different geographic scope of the parties' activities and given that, as explained above, the scope of the notification excludes the activities which will be sold to E.on, the only affected markets as a result of the transaction are some electricity markets in Spain.

A. Relevant product markets

13. On the basis of previous decisions of the Commission⁵, the notifying parties have defined the following relevant product markets in the electricity sector: generation and wholesale supply of electricity; transmission; distribution and retail supply.

(i) Generation and wholesale supply of electricity – special regime electricity

14. The Spanish Competition Authority (Tribunal de Defensa de la Competencia "TDC") and the Spanish energy regulator (CNE) have examined the possibility of defining a specific product market for the so-called "special regime" electricity. Special regime electricity is electricity generated by generators not exceeding 50 MW of capacity (mainly through renewable sources). Such electricity was until recently regulated by the Spanish Authorities and was not freely traded on the market. In light of this, the national authorities have in former decisions considered such segment as constituting a separate market.

15. However, given that, due to a change in the relevant legislative framework, such electricity can now be traded on the spot as well as through bilateral agreements, both TDC and CNE have in their most recent decisions pointed towards a possible wider definition of the electricity wholesale market (including both special regime and ordinary electricity)⁶. The Commission's market investigation confirmed the

will not immediately be able to exercise powers over the management of that company. As regards Viesgo, the trustee will be in place as of the date of acquisition of control.

⁵ COMP M. 3440 ENI/EDP/GDP, COMP M.4110 E.on/Endesa

⁶ TDC Report in case C77/02 Ibernova/Gamesa.

existence of elements pointing towards a single generation and wholesale supply of electricity that includes electricity produced through the special regime.

(ii) Technical restrictions

16. In relation to Spain, the TDC has also identified a market for the supply of electricity in the context of technical restrictions⁷. The Commission has also on several occasions considered the provision of regulating/balancing power and reserve capacity as constituting one (or more) separate market(s)⁸. For this market (these markets), the terms “balancing power”, or “ancillary services” have partly been used in these decisions.⁹

(iii) Retail supply

17. As regards retail supply, according to the results of the market investigation, a further distinction could be made between: (a) large industrial customers connected to the high voltage grid and (b) smaller industrial, commercial and domestic customers connected to the low-voltage grid¹⁰. A further distinction could also be made between electricity retail supply to (a) eligible customers having switched to the free market and (b) eligible customers that have remained in the regulated market.

(iv) Conclusion

18. However, for the purpose of the present decision it is not necessary to conclude on the precise scope of any of the relevant product markets described above as, under any alternative market definition, the proposed operation does not give rise to competition concerns.

B. Relevant geographic markets

(i) Generation and wholesale supply

19. In line with previous Commission's decisions, the notifying parties defined the above-referred markets (with the exception of electricity distribution), as at most national in scope¹¹.

20. The Commission notes that the TDC has previously defined the Spanish wholesale and generation electricity market as constituted by three different markets (i.e. mainland Spain, the Canary Islands and the Balearic Islands). However, given that neither Enel nor Acciona have any activities in the Canary Islands and the Balearic Islands, the transaction will bring about no change in any of these territories and therefore, for the purposes of the assessment of the present transaction, the ultimate definition of the relevant geographic market can be left open.

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

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

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

¹⁰ COMP M. 4110 Eon/Endesa

¹¹ TDC Report in case C94/05 Gas Natural/Endesa

21. The market investigation has largely confirmed the geographic market definition proposed by the parties.
22. Some of the respondents to the market investigation consider the geographic scope of the generation and wholesale electricity market in Spain as also comprising Portugal (i.e. an “Iberian market”), due to the increasing interdependence and integration of both areas in view of the possible creation of the so-called "MIBEL" (Mercado Ibérico de la Electricidad). However, the MIBEL is still not functioning. Moreover, the lack of sufficient interconnection limits imports and exports between these two countries¹². Consequently, both the Commission and the Spanish TDC report have estimated that so far the existence of an Iberian market has to be dismissed.

(ii) Market for technical restrictions

23. According to Commission's previous decisions, the *technical restrictions* market would be local in scope, coinciding with the area affected by the restriction¹³.

(iii) Market for distribution

24. With respect to distribution, each Spanish operator possesses its own distribution network. Distribution networks do not overlap one with the others. The networks have, therefore, consistently been considered as constituting separate local markets¹⁴. The market investigation has confirmed the geographic market definition proposed by the parties.

(iv) Conclusion

25. For the purpose of the present case it is however not necessary to conclude on the precise scope of the relevant geographic markets described above as, under any alternative market definition, the proposed operation does not give rise to competition concerns.

C. Competitive Assessment

26. Both parties are present in the electricity sector in the EEA. The parties have very limited overlapping activities in electricity markets in Portugal, Germany and Greece. However, in none of these three countries does the transaction give rise to horizontally or vertically affected markets. The competitive assessment below is therefore focused on the effects of the proposed concentration in Spain, where Endesa is mainly active.

(i) Generation and wholesale of electricity in mainland Spain

27. The assessment of the impact of the transaction in generation and wholesale of electricity is made at the level of mainland Spain, the only area in which the transaction gives rise to horizontal overlaps. In any case, it is to be noted that i) only the power plants in mainland Spain make sales' offers to the organized market, and ii) the acquiring parties are not present in other Spanish areas

¹² COMP M. 3440 ENI/EDP/GDP, COMP M.4110 E.on/Endesa, TDC Report in case C94/05 Gas Natural/Endesa

¹³ COMP M.4110 E.on/Endesa

¹⁴ Case Comp/M.3440 ENI/EDPGDP

(Balearic and Canary islands). Any wider consideration of the geographic market would, therefore, lead to lower combined market shares.

28. In terms of installed capacity, Endesa's current share is [20-30]%, while the acquiring parties' shares are [0-5]% (Acciona), [0-5]% (Enel/Viesgo) and [0-5]% (EUFER). Post transaction, taking into account the transfer of Enel/Viesgo and part of Endesa's assets to E.on, as well as the transfer to Acciona of Endesa's renewable generation activities, the parties' combined market share would be [20-30]% (Endesa [10-20]%, Acciona [5-10]%¹⁵ and EUFER [0-5]%) and would only slightly exceed Endesa's pre-merger market share.
29. In terms of production, the parties' pre-merger combined market share is [30-40]% ([20-30]% Endesa, [0-5]% Acciona, [0-5]% Viesgo and [0-5]% EUFER), while post transaction the combined market share would be [20-30]% (Endesa [20-30]%, Acciona [0-5]% and EUFER [0-5]%), lower than the pre-merger market share.

Non-coordinated effects

30. It could be argued that the transaction would lead to the removal of Acciona as an independent player (see below). However, even in this case the transaction would bring about a very limited increment of the combined share of installed capacity and no increment (rather a reduction) of market shares in terms of production. Moreover, any removal of Acciona is not likely to lead to any significant non-coordinated effect in the market, in particular in the light of the corresponding reinforcement of the independent player Viesgo, previously controlled by Enel and which will be controlled by E.on. After the transaction, Viesgo's generation capacity will increase from [0-5]% to [5-10]% whereas its market share (in terms of production) will increase from [0-5]% to [5-10]%. Moreover, a number of other competitors such as Iberdrola, Unión Fenosa, and Gas Natural will remain active in this market.
31. In light of the foregoing, the transaction is not likely to create competition problems on the market for generation and wholesale of electricity in mainland Spain.
32. On the narrower segment of electricity produced under the special regime, the parties' combined market shares is currently rather limited: around [20-30]% (Endesa [5-10]%, Acciona [10-20]% and EUFER [0-5]%). As explained above, upon completion of the transaction, Endesa will exit this sector and only Enel (through its participation in Unión Fenosa) and Acciona will be active on this segment. Endesa's exit of this segment is not likely to create competitive concerns given that other players such as Iberdrola, Unión Fenosa, Gas Natural or EDP/Hidrocantábrico will remain active in this sector and will be able to exercise a competitive constraint on Enel and Acciona

Coordinated effects

33. Despite the small impact the transaction will have on generation capacity and wholesale electricity market, a structural link will be created between Endesa and Unión Fenosa through the joint venture EUFER, jointly controlled by Enel and Unión Fenosa.

¹⁵ Acciona acquires current Endesa's renewable assets.

34. EUFER is a minor player in the market of electricity generation and wholesale supply ([0-5]%), only active in special regime generation ([0-5]% of special regime generation and wholesale supply).
35. One of the respondents to the market investigation raised concerns in relation to possible risks of coordinated behavior between Endesa, Acciona and ENEL, in addition to Unión Fenosa (as controlling shareholder of EUFER, together with ENEL). Specifically, the concerns refer to substantial possibilities of coordination and information exchange between the parties, because of their joint participation in the administrative board of the acquired company, and the fact that any competitive strategy in the market implemented by the parties will be subject to the major interests of the common asset –Endesa- rather than the individual interests of the two controlling shareholders. As explained below, none of these concerns have been confirmed by the market investigation.
36. The suggestion that ENEL, Endesa and Acciona would coordinate their competitive behavior is already covered above under non-coordinated effects. Moreover, Enel's partner in Endesa (Acciona) will not have any incentive not to compete with EUFER in the renewables sector which will be exited by Endesa. In any case, would Endesa and Acciona be considered together as one group acting on the market, this would not alter the competition analysis in this case.
37. A potential concern is that the notified merger could facilitate coordination within the Spanish wholesale electricity market, in particular between Endesa and Iberdrola, by aligning the interests of Acciona and Enel with those of Endesa. However the Commission's analysis does not suggest that merger removes a significant competitive constraint on the market in view of the fact that there already exist significant structural links between the various market players. Moreover the notified merger is likely to strengthen the competitive constraint that Viesgo exerts on the merged entity and Iberdrola.
38. As regards the risk that EUFER will sacrifice its individual activities for the benefit of Endesa and will cease to exercise a competitive constraint on Endesa, such risk is unlikely given that Enel's partner in the EUFER joint venture will not have any economic incentive to stop competing with Endesa since it does not participate to Endesa's profits. In any case, would Endesa, Acciona and EUFER to be considered together as one group acting on the market, this would not alter the competition analysis in this case.
39. It is also unlikely that the link created between Unión Fenosa and Endesa through the joint control of the former with ENEL over EUFER, will create any change in the pre-merger ability and incentive for Unión Fenosa and Endesa to coordinate their competitive behavior since these two companies are already associated in several joint ownership and operation of power generation plants. Indeed, the two companies are the only partners of one joint venture (Central Térmica de Anllares, A.I.E.) and both have participations in a number of other joint ventures active in the electricity and gas market in Spain¹⁶. Moreover Endesa, EUFER and Acciona are already part of another joint venture¹⁷, and the information that would be

¹⁶ Centrales Nucleares Almaraz-Trillo, A.I.E.; Planta de Regasificación de Sagunto S.A. and Regasificadora del Noroeste.

¹⁷ Parque Eólico de Barbanza, SA, Endesa and Acciona have a joint participation of [...] % and [...] % respectively, together with EUFER [...] %.

shared between ENEL and Unión Fenosa in the context of the management of EUFER would in any way be extremely limited, which will not enable them to coordinate non-special regime businesses. Finally, post-transaction Endesa and Unión Fenosa will account for [20-30]% and [10-20]% of the Spanish electricity generation and wholesale market, and will be in a competitive environment with a number of significant competitors, the market leader being Iberdrola with a market share of [20-30]%.

40. Risks of coordination between the largest group comprising Endesa, Union Fenosa, EUFER and Acciona may also be excluded given i) the limited amount of information which Enel would access; ii) the fact that EUFER is only a minor player compared with Unión Fenosa and the latter's entire portfolio, which will not have any incentives not to compete with Acciona; iii) the lack of benefits for Enel deriving from a coordination between Union Fenosa and Acciona and iv) the fact that a structural link already exists between Unión Fenosa, EUFER, Endesa and Acciona¹⁸. Finally, the market investigation has showed that in Spain special regime plants are often jointly owned by the main players in the Energy market
41. The same respondent (see par.35) has voiced concerns about the strengthening of the position of ENEL and E.on. It has been argued that there is a risk of coordinated behaviour of these two large European players, fuelled by the existence of multi-market contacts and by the agreements between Acciona, ENEL and EON. However, allegations that this would give to EON and Enel the ability and incentive to block expansion of interconnection capacities between Member States have not been substantiated and would in any case need to be balanced against the ability and incentive of each of these companies, with activities in several Member States, to be able to viably transport natural gas or electricity within the group. The mere conclusion of the sale agreement of 2 April 2007 is not sufficient to conclude that the links between ENEL and EON have been strengthened by the present transaction.
42. As a consequence of the transaction Endesa will dispose of its renewable assets. Renewable electricity is normally dispatched as the first one at zero price at the beginning of the merit curve. Such disposal will not affect materially the merit curve. At the same time Endesa is divesting to an independent player Viesgo /EON drawing rights (of nuclear-based electricity for 450 MW); one thermoelectrical power plant (coal-based "Los Barrios"); one gas- fuelled power plant (Foix) including a CCGT power plant of 800 MW and 1 CCGT. Normally the largest (and lower) part of the merit curve is constituted by the thermoelectrical, nuclear and gas-based electricity. This is where normally the demand is met in off-peaks moments. Therefore the fact that some capacity in this sector of the curve is freed-up and transferred to an independent player such as Viesgo-EON could have positive effects because it brings more competition between the different players in this part of the curve. (Endesa is actually producing around 50% of coal and fuel-gas based electricity and around 40% of nuclear electricity out of the total electricity generated in Spain¹⁹. Viesgo does not have any nuclear assets and only has a limited position in gas and CCGT).

¹⁸ See footnote 17.

¹⁹ Source: TDC's report on case C94/05 Gas Natural/Endesa, page 150.

43. Furthermore, as the market investigation has showed, energy markets in Europe are still considered national markets because, inter alia, of the lack of interconnection between countries, different technical regulations regarding access conditions, markets organizations, etc. Therefore, a theory of possible coordinated effects at the European level should be considered hypothetical and highly unlikely.

(ii) Market for resolution of technical restrictions

44. The transaction will not give rise to any type of overlap in this market, rather the contrary. Since Acciona and EUFER are only present in generation under the special regime, they do not participate in this market as these types of power plants are never called to solve technical restrictions.

45. In addition, given that Endesa is an important actor in this market, the divestment of part of its assets to E.on will reduce its market share in two of the three areas in which it is active (Andalucía, from [20-30]% to [20-30]% and Cataluña, from [60-70]% to [30-40]%), while in the third one it will remain unchanged (North Spain, [0-5]%).

(iii) Markets for distribution and retail supply of electricity

46. The transaction will not lead to any type of material overlap in these markets. As regards distribution networks, these are natural monopolies which do not overlap in the same geographical area and since Viesgo (together with Endesa, the only company who has distribution assets) is excluded from the scope of the notification, any theoretical overlap is eliminated. As regards retail supply, for which Endesa's market shares vary from [10-20]% up to [40-50]% depending on the product market considered, there is only a minimal overlap due to Acciona's only customer in the liberalized market, which is completely negligible.

VI. CONCLUSION

47. Against the background of the above analysis it can be concluded that the proposed concentration does not raise serious doubts as to its compatibility with the common market or the EEA Agreement.

48. For the above reasons, the Commission has therefore decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EC) No 139/2004.

For the Commission,
(Signed)
Neelie KROES
Member of the Commission