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Case No COMP/M.4685 – ENEL / ACCIONA / ENDESA

Only the Spanish text is authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 21
Date: 05/12/2007

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 05/12/2007

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PUBLIC VERSION

Commission Decision

of 5th December 2007

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.4685 - Enel/Acciona/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 4 July 2007, the Spanish Energy Regulator ("CNE") adopted a decision submitting to a number of conditions the proposed acquisition of joint control by the Italian company Enel Energy Europe S.r.l. ("Enel") and the Spanish company Acciona S.A. ("Acciona") of Endesa S.A. ("Endesa"), an energy company with its headquarters in Madrid, Spain.

(2) On 19 October 2007, following an appeal lodged by Enel and Acciona, the Spanish Minister of Industry, Tourism and Trade ("the Minister") adopted a resolution ("the Minister's decision") modifying some of the conditions that the CNE imposed on the above mentioned transaction.

(3) The present decision concerns the compatibility of some of the conditions imposed by the CNE's decisions as modified by the Minister's decision with Article 21 of Council Regulation (EC) No 139/2004 (the "Merger Regulation").[1]

I. THE PARTIES

(4) 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

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1 OJ L 24/1, 29 January 2004.

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 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.

(5) 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.

(6) 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.

II. THE CONCENTRATION

(7) The concentration consisted of the acquisition of joint control over Endesa by Enel and Acciona, as a result of the public bid and the agreements described below.

(8) On 26 March 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 therefore was not be examined by the Commission, Acciona was to acquire sole control over Endesa's renewable energy business

(9) On 02 April 2007 Enel, Acciona and E.on agreed that Enel, Acciona 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 EUFER[2]), certain additional Endesa's assets located in Spain, and Endesa's current business in Italy, France, Poland and Turkey.

(10) On 31 May 2007, Enel and Acciona notified to the European Commission the proposed acquisition of joint control of Endesa. The scope of such notification was limited to the net assets of Endesa and did not include the assets to be sold on to E.on. On 5 July 2007 the Commission adopted a decision pursuant to Article 6(1)(b) of the Merger Regulation, whereby it (i) established that the proposed 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].

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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 COMP M. 4685 Enel/Acciona/Endesa.

III. BACKGROUND INFORMATION

Previous Article 21 decisions adopted by the Commission: the E.on case

(11) On 25 April 2006 the Commission cleared the proposed acquisition of control by E.on of Endesa by means of a takeover bid announced on 21 February 2006.

(12) A few days after the announcement by E.on of the 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].

(13) Pursuant to this Royal Decree, CNE adopted on 27 July 2006 a decision subjecting E.on to a number of conditions. These conditions were partially modified by the Minister of Industry, Tourism and Trade ("the Minister") on 3 November 2006.

(14) On 26 September 2006 and 20 December 2006, the Commission adopted two decisions ("the Article 21 decisions") by which both the conditions imposed by CNE and the conditions imposed by the Minister were declared incompatible with Community law.

(15) In particular, Article 1 of the Article 21 decisions states that the Kingdom of Spain has violated Article 21 the Merger Regulation due to the adoption, without prior communication to and approval by the Commission, of CNE's and the Minister's decisions, which subject E.on's acquisition of control over Endesa to a number of conditions incompatible with Community law.

(16) In addition, Article 2 required the Kingdom of Spain to withdraw the conditions imposed by CNE and the Minister which had been declared incompatible with Community law.

(17) Given that the Spanish authorities did not comply with the Commission's Article 21 decisions, on 21 March 2007 the Commission decided to initiate Court proceedings against the Kingdom of Spain. The application was lodged on 11 April 2007 (case C-196/07).

The Commission's infringement procedure concerning the Royal Decree under Internal Market Rules

(18) 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 (Infr. No 2006/2222).

(19) According to the Commission's position, the provisions of the Royal Decree granting special powers to CNE could be contrary to fundamental principles of

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

Community law, principally 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. Spain replied to this letter of formal notice by letter dated 25 July 2006.

(20) Having analysed the Spanish reply to the letter of formal notice, the Commission still took the view that the special powers provided for by the Spanish law unduly restricted the freedom of capital movement and the right of establishment and therefore delivered a reasoned opinion on 29 September 2006. Given that the Spanish authorities did not modify the Royal Decree in question, on 24 January 2007 the Commission decided to refer Spain to the European Court of Justice. The application was lodged on 19 April 2007 (case C-207/07).

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 Merger Regulation.

(22) Article 21 provides that Member States shall not apply their national legislation on competition 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 measures are necessary and proportionate for the protection of interests compatible with the 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) In accordance with Article 21(4), third subparagraph, of the Merger Regulation, 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 has then to decide whether such measures are necessary and proportionate for the protection of an interest compatible with EC law and do not constitute a breach of general principles or other provisions of Community law, e.g. a means of arbitrary discrimination or a disguised restriction to the freedom of establishment or of the free movement of capital.

(25) In order to ensure the *effet utile* of Article 21(4), third subparagraph, of the Merger Regulation, read in conjunction with Article 10 EC (obligation of loyal cooperation), that provision should apply whenever there are reasonable doubts as to whether national measures, which are liable to affect and, in particular, 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[5].

V. THE RECENT MEASURES ADOPTED BY THE SPANISH AUTHORITHIES

(26) Pursuant to the provisions of the Royal Decree, the Spanish authorities have adopted the following decisions:

- On 26 April 2007, CNE adopted a decision authorising Enel, subject to certain conditions, to raise its stake in Endesa beyond 10% up to a stake which does not require the launch of a takeover bid according to Spanish law. This authorisation was requested by Enel on 1 March 2007 following its acquisition of a non-controlling 24,99% stake in Endesa. These conditions were appealed by Endesa before the Ministry on 28 May 2007.

- On 4 July 2007, CNE adopted a decision authorising Enel and Acciona, subject to certain conditions, to acquire joint control over Endesa following the launch of a joint takeover bid over that company. This authorisation had been requested by the parties on 3 May 2007.

- On 30 August 2007, and following the appeal lodged by Endesa , the Minister adopted a decision modifying some of the conditions imposed by CNE in its decision of 26 April 2006.

- On 19 October 2007, and following an appeal lodged by Enel and Acciona against CNE's decision of 4 July, the Minister adopted a decision modifying some of the conditions imposed by CNE in its decision of 4 July 2007.

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

(27) On 21 September 2007, the Commission informed the Spanish authorities of its preliminary conclusion that a number of the conditions imposed by the CNE's decisions (including the modifications made by the Minister's decision of 30 August 2007) were incompatible with Article 21 of the Merger Regulation ("the Commission Preliminary Assessment").

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

(28) On 22 October 2007, Spain replied to the Commission's Preliminary Assessment ("the Spanish authorities' reply").

(29) Given that the conditions imposed by CNE on ENEL by its decision of 26 April referred to an acquisition of a non-controlling interest by Enel in Endesa, the Commission did not take any action at that stage on the basis of Article 21 since no merger of a community dimension existed at that stage.

(30) The situation was different as regards CNE's decision of 4 July 2007 since the conditions imposed by this decision, explained in more detail below, refer to a transaction for which the Commission has sole jurisdiction.

(31) However, since the conditions imposed by CNE's decision of 26 April (and modified by the Minister on 30 August 2007) related to the acquisition of a non-controlling stake affected the subsequent acquisition of Enel's joint control of Endesa, the Commission considered in its Preliminary Assessment that such conditions would also prejudice the realisation of a Community-dimension merger. Therefore the Commission considered in its Preliminary Assessment that both CNE's decision of 26 April (as modified by the Minister), insofar as it affected the subsequent transaction, and CNE's decision of 4 July infringed Article 21 of the Merger Regulation.

(32) However, in the Spanish authorities' reply it is stated that CNE's decision of 4 July and the Minister's decision of 19 October have superseded the previous CNE's and Minister's decisions conditionally authorising Enel to increase their stake in Endesa up to 25%. As a result, the conditions imposed by such decisions, and which were challenged by the Commission's Preliminary Assessment, do not have any effect.

(33) Therefore the scope of the present Commission's decision is limited to the assessment of the conditions imposed by the CNE decision of 4 July 2007 as modified by the Minister's decision of 19 October 2007.

(34) The additional arguments developed by Spain in relation to the compatibility with Community law of each and every condition will be assessed in the relevant sections of this decision.

VII. THE CONDITIONS IMPOSED BY CNE AND THE MODIFICATIONS MADE BY THE SPANISH MINISTER

(35) The conditions imposed by CNE's decision of 4 July are the following:

> "**ONE**.- ACCIONA and ENEL will maintain ENDESA, S.A. as an independent company, with full operating responsibility in implementing its business plan, and as head of its group. Its brand, registered office, governing body and effective management and decision-making centre will remain in Spain.
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> **TWO**.- ACCIONA and ENEL will submit a detailed weekly report to CNE describing and, if necessary, giving the reasons for, any financial operations or policies giving rise to significant alterations in ENDESA's financial situation, and any operations between ENDESA and companies controlled by ACCIONA or ENEL or in which ACCIONA or ENEL have a direct or indirect

shareholding of 20% or more, such as transfers of funds, assets, rights and/or contracts, which may have an adverse effect on the independent management of ENDESA or on its operating or financial solvency. ENDESA's dividend policy must be understood to be affected by this condition. The first report will be submitted within 90 days of the takeover of ENDESA.

The applicants must maintain ENDESA duly capitalised. ENDESA must comply with a debt service ratio (net financial debt/EBITDA) of less than 5.25 for a minimum of five years from the takeover of ENDESA. The applicants must inform CNE of the evolution of this ratio each quarter from the date of the takeover of ENDESA. The first report must be submitted within 60 days of the takeover of ENDESA and should give details of the specific items included in the calculation so that they can be validated by the CNE.

THREE.- ACCIONA and ENEL will assume and carry out, through their control over ENDESA, all the investments in regulated gas and electricity activities (both transmission and distribution) and the investments committed by ENDESA in strategic assets in both sectors (as defined in Function 14 of Additional Provision No 11(3)(1) of Law 34/98) included in: (1) the latest investment plans announced by ENDESA for 2006-2011 described in this Decision, (2) the document *Planning of the gas and electricity sectors. Development of the transmission networks 2002-2012* approved by the Council of Ministers and submitted to the Parliament, and (3) the CNE's *Framework report on the demand for electricity and natural gas and its coverage*.

ACCIONA and ENEL will also comply with the time limits for implementing the infrastructures referred to in the above-mentioned documents.

This obligation is understood not to affect any duly substantiated adaptation of ENDESA's investment plans to exceptional circumstances arising in the sector, such as alterations in energy demand or in the regulatory conditions.

In employing its funds, ENDESA will give priority to financing and implementing the above-mentioned plans. During the period 2007-2012, the ENDESA companies which carry out regulated activities or have strategic assets in Spain will be able to distribute dividends only when the funds generated by them (defined as cash flow or net profit for the year plus depreciation) are sufficient to meet both their investment commitments and servicing of the financial debt and related financial expenses.

In order to facilitate the control and monitoring of their investment commitments for distribution, ACCIONA and ENEL will submit to CNE, three months from the takeover of ENDESA, the above-mentioned plan for investment in regulated activities, giving details of the investments in distribution by area or district and the timescale for this investment plan. For the gas sector, the investment plan will draw a distinction between high- and low-pressure facilities. For high-pressure investments, the plan will include details of specific facilities and specify the assets financed by the company itself and those financed by users. For the electricity sector, the investment plan will distinguish between high- and low-pressure facilities. For high-pressure investments, the plan will include details of specific facilities and

specify the assets financed by the company itself and those financed by the users.

ACCIONA and ENEL will submit annually to CNE, by 1 April each year, information on the investments actually made, broken down by Autonomous Community, stating the degree of compliance with the investment commitments.

FOUR.- In view of the special nature of nuclear assets with respect to public security, ACCIONA and ENEL must comply with the following obligations in the year in which they assume control of ENDESA:

1. to assume and maintain the current obligations and regulations concerning nuclear energy, specifically compliance with all the codes and agreements with the other partners concerning management of nuclear plants as regards security and supply of uranium;

2. to maintain a clearly identified and auditable organic unit at ENDESA, which will be assigned responsibility for the company for defining policies, monitoring, and taking decisions concerning the management of the nuclear assets, both at the Ascó I plant and at the other plants jointly owned with other companies. This organic unit will be structured in such a way as to ensure at least ENDESA's current level of technical and professional solvency in the nuclear area;

3. to ensure that ENDESA draws up an annual report detailing its activities during the year in the nuclear area, investment plans for the following year and the strategic guidelines for at least the next five years. The report will include detailed information on at least the following: strategic nuclear and management policy, shutdowns and incidents at the plants, supply, maintenance, corporate governance situation at the companies that manage the jointly-owned plants, training plans, human resources, research, development, innovation, and any other matter affecting security. The report will also indicate those of ENDESA's activities which are carried out with its own resources and those which are carried out with outside resources. The report will be sent to CNE after it has been submitted for examination and approval by ENDESA's Board of Directors.

FIVE.- ACCIONA and ENEL will, for a period of five years from acquisition of ENDESA, ensure that the aggregate annual consumption of each plant owned by ENDESA currently consuming national coal is not less that the aggregate annual amounts specified for consumption by these plants in the 2006-2012 National Coal Mining Plan.

SIX.- ACCIONA and ENEL will, during a period of five years from the acquisition of ENDESA, maintain the companies that currently manage the transmission, distribution and generation assets of the mainland and non-mainland electricity systems within the ENDESA Group.

SEVEN.- The following obligations will be met in relation to ENDESA's fuel supply contracts:

1. The managing and operating centre for all ENDESA's fuel supply contracts will be maintained independently as an integral part of ENDESA's structure.

2. ENDESA will continue to be the owner of the current and future contracts for meeting the demand for fuel, even when these contracts can be negotiated jointly with other contracts as part of a larger portfolio. In addition, except in duly substantiated cases, ENDESA's contracts: (1) if negotiated jointly with other contracts of the applicant companies or of their investees, will not include unfavourable stipulations relating to the structure and conditions negotiated for the other contracts in that portfolio, without prejudice to possible adaptations to the operation of the destination markets; (2) will not establish clauses specifying specific circumstances for the event of a change of control of the parties; and (3) will make preferential provision for a direct contractual relationship of supply with the supplier, independently of the applicant companies, with which the contract is negotiated.

3. ACCIONA and ENEL must guarantee the supply of natural gas to the Spanish market, in at least the annual amounts stipulated by ENDESA in its 2007-2011 plans. This obligation is understood not to prevent any duly substantiated adaptation of ENDESA's plans.

4. ACCIONA and ENEL will ensure that ENDESA draws up an annual report detailing its supply policies, with special reference to the matters relating to safety of supply and those mentioned in point 2 above. This report will be submitted to ENDESA's Board of Directors for examination and approval and to CNE. In addition, ENEL and ACCIONA will each draw up an equivalent report supplementing that of ENDESA, detailing in particular the relative treatment given to ENDESA with regard to the applicants' other purchases of supplies. The first reports will be submitted within 120 days of the takeover of ENDESA. CNE may request clarifications or additional information if it considers this necessary.

EIGHT.- Once a year or in any event at CNE's request, ENEL will submit to it a detailed report setting out the aspects of its short-, medium- and long-term corporate strategy affecting Spanish public interest or security. Aspects of ENEL's corporate strategy, both at ENDESA and at the holding company to be set up under the Agreement on Shares of ENDESA entered into by ENEL and ACCIONA on 26 March 2007, affecting these interests will be taken to mean aspects relating to strategic assets, regulated activities and other activities particularly subject to administrative control, as defined in Function 14 of Additional Provision No 11(3)(1) of Law 34/98 of 7 October 1998. The first report will be submitted within 90 days of the takeover of ENDESA.

NINE.- Within ten days following the meetings of ENDESA S.A.'s shareholders or board of directors, ENEL will inform the CNE of the items on the agenda discussed, the decisions adopted, and the votes taken by its representatives (together with the reasons for these votes) concerning items on the agenda affecting Spanish public interest or security, as defined above. On the basis of the information received, the CNE may, within a month of the shareholders' or board of directors' meeting and after hearing ENEL and ENDESA, give a reasoned order requesting revocation of any decision which

required the vote of ENEL's representatives at any stage of its adoption, if CNE considers that the decision may be detrimental to Spanish public interest or security, in accordance with the criteria laid down in the function exercised in adopting this Decision, in order to prevent the additional risks set out in it deriving from the Italian government's powers over ENEL.

TEN.- The CNE may revoke this authorisation, including partial revocation consisting of modification of the conditions, subject to carrying out of the related administrative procedure, in the following cases:

- Cases of particular seriousness for the Spanish public interest or security deriving from the risks inherent in the operation being authorised.

- In the event of reiterated non-compliance with condition NINE above.

- In the event of a substantial alteration to the nature of ENDESA, as defined in condition ONE above, or an alteration to ENDESA's control structure, in relation to which the risks of the operation have been assessed.

- In the event of a substantial alteration, through legal transactions with any of ENDESA's assets, to ENDESA's essential structure.

ENEL ENERGY EUROPE, S.r.L. and ACCIONA, S.A. must provide CNE with the information it needs in order to assess whether or not the last two conditions for revocation listed above are fulfilled.

In cases of revocation, once the procedure has been initiated the CNE may decide to provisionally suspend exercise of the voting rights over the shares of ENDESA, S.A. acquired, as a result of the acquisitions hereby being authorised, by the company/ies in question.

In the event of total revocation of the authorisation, shares of ENDESA, S.A. acquired as a result of the acquisitions hereby being authorised must be transferred within a period of six months, for which transfers the necessary authorisations must be obtained. During that period and until the transfer of ENDESA's shares has been concluded, voting rights over any shares of the company not yet transferred will be suspended. In any event, ENDESA's governing body will limit its activities to normal management of the company and will abstain from carrying out or agreeing on any transaction other than the normal activity of the company.

ELEVEN.- Conditions EIGHT and NINE will be reviewed or, where appropriate, cease to have effect if it is found that the limits on acquisitions of shareholdings of ENEL, and the Italian government's current special powers of control over it, have ceased to exist, and if the Italian government has no other means of exercising effective control over its management.

TWELVE.- CNE may request the Government, in accordance with Article 10 of Law 54/1997 of 27 November 1997 and Article 101 of Law 34/1998 of 7 October, in order to guarantee energy supply in emergencies arising from scarcity of or certain risk in the provision of the supply, and in cases of

scarcity of any source(s) of primary energy, to adopt the measures described in the aforementioned Articles."

(36) As already indicated, on 19 October 2007 the Minister adopted the Minister's decision on Enel's and Acciona's administrative appeal against CNE's decision of 4 July. In such decision the Minister partially modified CNE's decision.

(37) Firstly, the Minister's decision has completely removed five conditions, namely conditions seven, eight, nine, ten and eleven.

(38) Secondly, the Minister has modified conditions two, three, four and five. The text of the modified conditions is similar to that of the conditions which were imposed last year by the same Minister on E.on and which the Commission, in its decision of 20 December 2006, considered as incompatible with Community law. The modified conditions read as follows:

> **"TWO -** The applicants must maintain ENDESA duly capitalised. ENDESA must comply with a debt service ratio (net financial debt/EBITDA) of less than 5.25 for a minimum of three years from the takeover of ENDESA. The applicants must inform CNE of the evolution of this ratio each quarter from the date of the takeover of ENDESA.
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> **THREE**.- ACCIONA and ENEL will assume and carry out, through their control over ENDESA, all the investments in regulated gas and electricity activities (both transmission and distribution) in both sectors (as defined in Function 14 of Additional Provision No 11(3)(1) of Law 34/98) included in: (1) the latest investment plans announced by ENDESA for 2006-2011 described in this Decision, (2) the document *Planning of the gas and electricity sectors. Development of the transmission networks 2002-2012* approved by the Council of Ministers and submitted to the Parliament, and (3) the CNE's *Framework report on the demand for electricity and natural gas and its coverage*.
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> This obligation is understood not to affect any duly substantiated adaptation of ENDESA's investment plans to exceptional circumstances arising in the sector, such as alterations in energy demand or in the regulatory conditions.
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> During the period 2007-2012, the ENDESA companies which carry out regulated activities or have strategic assets in Spain will be able to distribute dividends only when the funds generated by them (defined as cash flow or net profit for the year plus depreciation) are sufficient to meet both their investment commitments and servicing of the financial debt and related financial expenses.
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> **FOUR**.- In view of the special nature of nuclear assets with respect to public security, ACCIONA and ENEL in the exercise of their control over Endesa must comply with the obligations and regulations concerning nuclear energy, specifically compliance with all the codes and agreements with the other partners concerning management of nuclear plants as regards security and supply of uranium;
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> To this effect Enel and Acciona must keep yearly informed the CNE of every incident that may have had an impact on the production.
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> **FIVE**- ACCIONA and ENEL will, for a period of five years from acquisition of ENDESA, ensure that the aggregate annual consumption of each plant owned by ENDESA currently consuming national coal is not less that the aggregate annual amounts specified for consumption by these plants in the

2006-2012 National Coal Mining Plan, in so far as the current conditions and circumstances are maintained".

(39) Conditions one and six imposed by CNE's decision of 4 July 2007 were not appealed by Enel and Acciona and were not consequently modified by the Minister's decision.

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

INTRODUCTION AND GENERAL CONSIDERATIONS

(40) As indicated above, the Minister's decision partially modified CNE's decision (i) by withdrawing some of the conditions imposed by CNE, (ii) by reducing the duration or the scope of some other conditions and (iii) by clarifying the requirements of certain conditions.

(41) In the present decision, the Commission will only assess the compatibility with Article 21 of the Merger Regulation of the requirements imposed on Enel and Acciona by the CNE decision of 4 July 2007 as modified by the Minister's decision.

(42) In this respect, it should be noted that the imposition of these requirements makes a concentration with a Community dimension (the Enel/Acciona/Endesa concentration) subject to a number of conditions or obligations. Indeed, on the one hand, these requirements are imposed in the framework of the authorisation procedure established by the Royal Decree that specifically concerns certain acquisitions, including concentrations, in regulated sectors. On the other hand, the failure by Enel and Acciona to comply with the mentioned requirements would expose these companies to legal actions.

(43) In particular, the Commission notes that the fact that the Minister's decision has eliminated the possibility of the revocation of the conditional authorisation as a sanction in case of Enel's and Acciona's failure to comply with the mentioned conditions does not deprive these conditions of their restrictive character. The imposition of additional obligations, which are not foreseen by the general Spanish legislation, even if not apt to cause the revocation of the conditional authorisation granted to Enel and Acciona, purport in any event to legally bind Enel and Acciona and could expose them, in case of non compliance with such conditions, to the risk of penalties or injunctions by the competent administrative authorities and, in the context of civil or administrative enforcement actions, by the national courts. Indeed, the Commission considers that it is possible (and, in any event, it cannot be excluded) that, under Spanish law, CNE or any other competent authority could order Enel and Acciona to comply with the conditions and take any appropriate measure in order to ensure their respect. Moreover, it is possible (and, in any event, cannot be excluded) that, in certain circumstances, interested third parties or public authorities may bring actions before a national court to request an injunction ordering Enel and Acciona to comply with the conditions.

(44) Moreover, such obligations may be restrictive of freedoms protected by Community law because they create a state of legal uncertainty and because it cannot be presumed that natural or legal persons will not comply with binding legal obligations imposed by the public authorities, even if no system of sanctions is expressly foreseen.[6]

(45) The CNE's and Minister's decisions therefore constitute measures taken by a Member State within the meaning of Article 21(4) of the Merger Regulation which, as explained in the assessment of such measures below, specifically hinder a concentration with a Community dimension.

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

(47) In their reply, the Spanish authorities submit that they did not violate the communication and standstill obligation provided for by Article 21(4) of the Merger Regulation since their measures are aimed at protecting security of supply, which is one of the recognised legitimate interest under the terms of Article 21(4), and therefore did not need to be notified to and approved by the Commission prior to their entering into force.

(48) However, at the time of the adoption of the CNE decision , the Commission's decisions of 26 September and 20 December 2006, that were not challenged by Spain, and had, therefore, become final strongly suggested that the requirements imposed on Enel and Acciona by the CNE did not genuinely aim at protecting a "recognised interest" (public security, plurality of the media and prudential rules) and did not comply with the principles of proportionality and non-discrimination and the provisions of Community law (see below the assessment of the compatibility of such requirements)Under these circumstances, Spain's failure to notify the CNE decision implies a violation of the communication and stand-still obligation provided for in Article 21(4) of the Merger Regulation (see above recitals21-25).

(49) In this respect, the Commission reiterates 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. Moreover, Member States are indeed liable for violations of EC law irrespective of the national authority which determined the breach[7]. It is

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6 The case-law of the Court clearly states that, even when a Member State has waived the application of national provisions that are contrary to Community law, the maintenance of such provisions gives rise to an ambiguous state of affairs by maintaining, as regards those subject to the law who are concerned, a state of uncertainty as to the possibilities available to them of relying on Community law. Such uncertainty constitutes an obstacle that is contrary to the fundamental freedoms established by the Treaty (see Case 167-73 Commission v France [1974] ECR 359, paragraphs 41 to 47).

7 See by analogy Case C-173/03 Traghetti del Mediterraneo, 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 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.

moreover worth recalling that, according to a well-established case law, the obligation to apply Community law, even if it may conflict with national law, binds administrative authorities as well as courts[8].

(50) Such measures therefore must be communicated to the Commission and approved by it, in accordance with Article 21(4) third subparagraph of the Merger Regulation. By failing to do so in respect of the CNE's decision, the Spanish authorities thus failed to comply with the communication and stand-still obligation provided for in Article 21(4) of the Merger Regulation.

(51) This violation of the communication and standstill obligation does not however deprive the Commission of its power to assess, pursuant to Article 21(4) of the Merger Regulation, the requirements imposed on Enel, Acciona and Endesa in order to establish whether they are necessary and proportionate for the protection of an interest compatible with EC law and do not constitute a breach of general principles and other provisions of Community law[9]. The Commission is entitled to assess the requirements imposed on Enel, Acciona and Endesa as modified by the Minister's decision, given that the latter does not introduce new elements that were not assessed in the Commission's Preliminary Assessment of 21 September 2007, but, insofar as it modifies certain conditions, it only reduces their scope.

(52) In this context, it should first of all be pointed out that, in the Commission’s view, the legal basis on which both CNE’s decision and the Minister’s decision have been adopted - i.e. Royal Decree - is contrary to Articles 43 and 56 EC (see above recitals 18-20).

(53) The Commission considers that submitting a cross-border operation, such as the Enel/Acciona/Endesa concentration, to a number of requirements which may limit the economic freedom of the undertakings concerned after the concentration, restricts of the free movement of capital and freedom of establishment.

(54) In this regard, it should be recalled that, to restrict the freedoms provided for by 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. Indeed, 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”[10].

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8 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.

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

10 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).

(55) It should also be underlined from the outset that the fact that Enel and Acciona did not appeal condition number one and six imposed by CNE's decision, and even if these companies would have tacitly or explicitly accepted such conditions, does not in itself deprive the Commission of its power to assess the compatibility of these requirements with EC law. Indeed, the Commission cannot be limited by Enel's and Acciona's declarations or strategies, which may be influenced by a large number of subjective elements and commercial considerations which are not relevant from an EC law perspective.

(56) Considering that, according to the Spanish authorities, most of the requirements are based on public security grounds (among which considerations related to the security of energy supply are included), before specifically assessing such requirements it is useful to briefly examine the notion of public security in the light of the EC case-law.

THE NOTION OF PUBLIC SECURITY

(57) 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 security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society[11].

(58) 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.[12] 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, provided that such measures are proportionate and non-discriminatory, be less restrictive than the establishment of prior conditions as to ownership of relevant undertakings[13]. 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[14] and in Article 3(2) of Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in

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11 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.

12 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.

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

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

natural gas and repealing Directive 98/30/EC[15], which set out under which conditions Member States can make use of public service obligations in order to safeguard public security in the energy sector.[16] Furthermore, Community legislation has established a common framework within which Member States shall define general, transparent and non-discriminatory security of supply policies compatible with the requirements of a competitive internal gas market (Council Directive 2004/67/EC of 26 April 2004 concerning measures to safeguard security of natural gas supply[17]) as well as a framework within which Member States are to define transparent, stable and non-discriminatory policies on security of electricity supply compatible with the requirements of a competitive internal market for electricity (Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment[18]).

(59) As already clarified by the Commission in its previous decisions of 26 September and 20 December 2006, the requirements imposed on Enel and Acciona should be examined in the light of this strict interpretation of the notion of public security and of the relevant Community legislation.

ASSESSMENT OF THE MEASURES IMPOSED BY CNE

Corporate governance and Brand requirement (first condition)

(60) By the first condition, CNE required Enel and Acciona

(a) to maintain Endesa as an autonomous company, fully responsible of its business plan;

(b) to maintain Endesa as the parent company of its group;

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

(d) to maintain the Endesa brand.

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15 OJ L 176, 15.7.2003, p. 57. Directive amended by Council Directive 2004/85/EC (OJ L 236, 7.7.2004, p. 10).

16 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".

17 OJ L 127, 29.4.2004, p. 92.

18 OJ L 33, 4.2.2006, p. 22.

(61) In its previous decision of 26 September 2006 the Commission considered that similar requirements concerning corporate governance contained in the first CNE decision significantly limited E.on's freedom to determine the structure of its group after the acquisition of control over Endesa and, therefore, represented a restriction of the freedom of establishment and the free movement of capital. The same reasoning applies to the requirements imposed upon Enel and Acciona.

(62) 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"[19].

(63) Moreover, 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"[20].

(64) By limiting Enel's and Acciona's freedom to reorganise Endesa after the acquisition of joint control over Endesa, the requirements in question clearly restrict Enel's and Acciona's freedom of establishment and the free movement of capital.

(65) In the reply of 22 October 2007, the Spanish authorities provided however a different interpretation of the wording of condition one. In particular, the Spanish authorities submit that the aim of the first condition is not to prohibit the re-organisation of the Endesa group, but merely to recall that any reorganisation (being it carried out in the form of a disposal of Endesa's assets or of a proper merger) should fall under the scope of application of the Decree law 4/2006 and, therefore, be authorised by the CNE.

(66) In this respect, it should first be noted that this interpretation cannot be reconciled with the actual wording of the condition. Second, even under the interpretation suggested by the Spanish authorities, , this condition would still appear to be

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

20 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).

incompatible with Community law, since it imposes on Enel and Acciona an obligation (the obligation to ask for CNE's authorisation) based, according to the Spanish authorities, on a law (the Decree Law 4/2006), which has already been challenged by the Commission for its incompatibility with Article 43 and 56 EC. Moreover, if the interpretation of the Spanish Authorities is correct, there would be no need for such a condition to exist, because in any event the parties would be submitted to the terms of Decree Law 4/2006.

(67) Furthermore, the interpretation provided by the Spanish authorities is not convincing. It is not clear for instance why the parties would be obliged under Royal Decree to ask for a new CNE authorisation in case of internal re-organisation when the CNE has already approved (even if conditionally) the acquisition of Endesa by Enel and Acciona. This would also seem to imply that Endesa would have to apply for CNE authorisation under the terms of Royal Decree 4/2006 if it had changed its seat, organisation structure and brad, even if it had remained an entirely independent group. It is not at all apparent that this is in fact foreseen by that measure.

(68) This being clarified as to the existence of a restriction of Enel's and Acciona'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.

(69) 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 company jointly controlled by an international group (Enel) may bring to the Spanish public interest in the field of security of supply. In particular, CNE refers to the risk that the policies of the new group may re-allocate resources and income initially allocated to Endesa's regulated assets to cross-subsidise other activities internal to the group.

(70) Moreover, CNE notes in its decision that the main risk is that Endesa's investments policy is guided by criteria which are not strictly business-related. According to CNE, this risk may derive from the public nature of Enel, which is controlled by the Italian State. In CNE's view, there are two factors which may strengthen Enel's influence over Endesa. First, there is a risk that Acciona might decrease its involvement in the management of Endesa once the renewable assets are transferred under the sole control of Acciona. Secondly, in CNE's view, the agreement between Enel and Acciona is characterised by a significant degree of instability as its apparent primarily purpose is to ensure that Enel and Acciona find acceptable solutions in case of disagreement rather than at effectively overcoming difficult situations related to the management of the company.

(71) In this respect the Commission considers that the Spanish authorities' position stating that the new group may not respect the obligations resulting from the laws on regulated assets or generally may not dedicate the necessary resources for the efficient management of the regulated assets is totally unsubstantiated. The Commission's view is that the mere fact that Enel is regarded by the CNE as a company of public nature is not sufficient to render it less likely to comply with

Endesa's investment obligations.[21] Similarly CNE's decision does not provide any explanation as to why the above mentioned risks would disappear (or be reduced) should Enel and Acciona fulfil the corporate requirements contained in the first condition.

(72) 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 or reorganisation of Endesa or by the possible transfer of Endesa's registered office and board of directors outside Spain. The Spanish authorities would indeed continue to exert their control under generally applicable legal provisions 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.

(73) The degree of control depends on the nature of the assets in question. Community law, and in particular Directives 2003/54/EC[22] and 2003/55/EC[23] foresee that the national energy regulator supervises 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). In addition, the Euratom treaty, Euratom Safeguards Regulation 302/2005[24] and the Nuclear Safety Action Plan lay down the framework for the supervision exercised by CSN or by the Commission's Safeguards Directorate.

(74) In addition to these tasks of national regulation and supervision authorities derived from Community and Euratom law, Member States may foresee additional powers, as long as these powers do not violate Community and Euratom law, and in particular Directives 2003/54/EC and 2003/55/EC and Euratom Safeguards Regulation 302/2005. Spain has foreseen such additional tasks for its authorities, in particular with respect to the regulated market for electricity.

(75) The first condition imposed upon Enel and Acciona by CNE goes however far beyond the supervision powers CNE enjoys in its status as an energy regulator. Such a condition appears to have a discriminatory character because CNE would not have the power to impose such a condition as an energy regulator on energy operators outside the case of its control of the acquisition of regulated assets.

(76) 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-

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21 See Case C-174/04 Commission v Italy [2005] ECR I-4933, paragraph 32: "… The Treaty provisions on the free movement of capital do not draw a distinction between private undertakings and public undertakings …".

22 OJ L 176/37, 15 July 2003.

23 OJ L 016/74, 23 January 2004.

24 OJ L 54/1 28 February 2005.

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.

(77) As regards the obligation to maintain Endesa's brand, the Spanish reply submits that once Endesa's reorganisation would be approved by the CNE, all ancillary obligation imposed on Endesa by condition one would fall apart. However, the Commission's view is that the current wording of condition one establish an obligation for Enel and Acciona to maintain Endesa's brand

(78) Moreover,, this requirement appears to significantly limit Enel's and Acciona's freedom to decide their business strategies after the acquisition of control over Endesa. Indeed, decisions concerning the use of brands may be an important part of these strategies, particularly after a concentration. Therefore, this requirement represents a restriction of the freedom of establishment and the free movement of capital.[25] At the very least, if the condition should in fact be interpreted as the Spanish authorities suggest, the CNE is responsible for creating very considerable legal uncertainty about the rights of the parties because of the way in which the condition is worded.

(79) It is also the Commission's view that such a restriction is not necessary and proportionate for the protection of a public interest. The Commission fails to understand which public interest would be protected by the maintenance of Endesa's brand for a five years time, nor there is any indication in this regard provided by CNE's decision or by the Spanish authorities' reply.

Reporting capitalization and investment obligation (second and third conditions)

(80) The second condition originally imposed by CNE obliged Enel and Acciona to report each six months to the CNE about all the operations which imply significant changes to the financial situation of Endesa as well as on all the operations between Endesa and other companies controlled by either Enel or Acciona which may have an impact on the financial strength of Endesa. The policy of dividend distribution should also have to be reported to the CNE. Enel and Acciona have a further obligation to maintain Endesa duly capitalized limiting its ratio "net financial debt/EBITDA" below 5,25 for a period of five years.

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[25] In this regard, it should be recalled that, 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. Indeed, 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”. 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 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). See also Joined Cases C-282/04 and C-283/04, Commission v The Netherlands, not yet reported, paragraphs 21 and 23, stating that measures likely to deter investors of other Member States from investing in certain companies may constitute a violation of the free movement of capital provided for in Article 56(1) of the Treaty.

(81) The second condition as modified by the Minister imposes on Enel and Acciona only the obligation to maintain Endesa duly capitalized limiting its ratio "net financial debt/EBITDA" below 5,25 for a period of three years.

(82) Upon the parties' request, the Minister's decision clarified that such obligation is imposed on the entire Endesa group and not only on the regulated assets. In the Spanish authorities' view this is more favourable to Acciona and Enel, since it would be easier to comply with such obligation in relation to the entire group than in relation only to the regulated activities.

(83) In the previous Article 21 decisions the imposition of similar financial requirements was considered by the Commission to be 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.

(84) The Commission recalls that, in its decision of 26 September 2006, it noted that "*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*".

(85) In this context, it is first of all clear that the imposition of the financial requirement in question significantly limits Enel's and Acciona'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[26].

(86) Moreover, in the Commission's view, the financial requirement has a discriminatory character because it obliges Enel and Acciona to maintain in Endesa a particular debt service ratio, 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 (see recital 73).

(87) The Commission considered in its Preliminary Assessment such discriminatory treatment as unjustified.

(88) The Spanish reply explains that such measures, although giving rise to a differentiated treatment with respect to other companies in the sector, are not discriminatory (even if they provide for additional obligations on Enel and Acciona which were not imposed on Endesa before) as they are justified by Endesa's change of control, which might significantly impact Endesa's financial situation.

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[26] 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.

(89) Indeed, according to the CNE's decision, the reasons for the imposition of the financial requirements are: i) the necessity to avoid that Enel and Acciona pursue a too generous dividend distribution policy in order to compensate through Endesa's cash flow the substantial debt exposure that both of them had to incur in order to finance the joint bid for Endesa and ii) the clauses of the agreement concluded between Enel and Acciona which do not appear to ensure a stable governance of Endesa in the future.

(90) In this respect, the Commission notes that both Endesa and Acciona have declared to the CNE that Endesa's financial management will be separated from its parent companies.

(91) Moreover the Commission notes that CNE's decision does not provide any substantiated evidence that the dividends realised from Endesa constitute the main (if not the sole) fashion for both Enel and Acciona to remedy their debt exposure and that the two companies would not be able to find internally in the respective groups the necessary financial resources.

(92) Finally the Commission notes that, even if the concerns raised by the CNE resulted not to be completely unjustified, this condition, as modified by the Minister's decision, still appears to be discriminatory. Given that the reason to impose such condition is to ensure that the financial situation of a company active in the electricity sector is solid enough so as to ensure that the necessary investments in the regulated assets are carried out, it is difficult to understand why the condition is applied only to Endesa and not to all companies active in the Spanish energy sector. In fact, Spanish companies currently having a debt ratio below 5,25 may see such ratio worsened, even above the 5,25 threshold, due to reasons other than acquisitions, such as other types of investments in other countries or the dividend distribution policy, which would however not fall under the scrutiny of the CNE, and therefore should not comply with this type of condition.

(93) The third condition obliged Enel and Acciona to realise, within the deadlines already scheduled before the operation, the committed investments[27] in the electricity and gas infrastructures considered as "regulated assets" and "strategic assets" (as defined in Function 14, Additional Disposition 11, 3, Law 34/1998) and to keep CNE informed on the status of such investments as well as to limit the dividends distribution so that Endesa's income is primarily devoted to such investments.

(94) The third condition has been modified by the Minister's decisions so as to limit only to the regulated activities the obligations on Enel and Acciona, (through their control over ENDESA), to (i) realise the committed investments in the electricity and gas infrastructures and (ii) not to proceed to the dividends distribution in case that the generated cash flow is not enough to cover such investments and the payment of the financial debt.. The control and monitoring condition has been removed.

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27 Comprising the last investment plans announced by Endesa for the period 2007-2011and those included in (i) the report "*Planificación de los sectores de gas y electricidad. Desarrollo de las redes de transporte 2002-2012*" approved by the Council of Ministers and (ii) the report "*Informe Marco sobre la demanda de energía eléctrica y gas natural y su cobertura*" issued by CNE.

(95) However the Commission considers , as expressed in its Preliminary Assessment (see recitals 67, 70 and 71of the Preliminary Assessment), that the limitation on the dividends distribution aimed at ensuring that Endesa's income is primarily devoted to realise certain investments, creates 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 has at the same time a discriminatory character, given that such limitation is not imposed on other energy companies holding regulated assets.

(96) Given that the Minister's decision only removes the obligation to make the planned investments in the non-regulated assets (previously defined as strategic assets), but not the limitation imposed on the dividends policy of Endesa post transaction, the Commission considers this condition, as modified by the Minister, incompatible with community law.

Nuclear power plants (fourth condition)

(97) The fourth condition, as modified by the Minister's decision, merely reiterates for Acciona and Enel the obligations already provided in other existing laws. In this regard, the Spanish authorities' reply clarified that this condition, as modified by the Minister's decision, does not impose on Enel and Acciona any additional obligation which is not foreseen by general Spanish legislation.

(98) On the basis of this clarification, given that the modified condition does not impose any further obligation on the parties and in line with its decision of 20 December 2006, the Commission no longer addresses this condition.

Use of domestic coal (fifth condition)

(99) By the fifth condition, as modified by the Minister, Enel and Acciona are obliged to ensure that Endesa's power plants using domestic coal will continue to use such an energy source as foreseen in the national mining plans for the year 2006-2012 as long as the current conditions and circumstances are maintained.

(100) In their reply the Spanish authorities submit that such condition does not impose any further obligation upon Enel, Acciona or Endesa, since it merely reiterates the obligation to consume the amounts of coal as already set out in the mining plan and following the Minister's decision the obligation only applies as long as the current conditions and circumstances are maintained and in any event such condition is justified by the national security of supply. The Commission notes first that, as recognised by the same Minister's decision[28], the mining plan does not contain any obligation on the companies to consume fixed amounts of coal,

[28] See Minister's decision of 19 October 2007 "A ello hay que añadir que , no habiendo obligaciones expresas de adquisición de carbón autóctono por parte de las empresas productoras de electricidad , en cuanto se ha optado por un sistema liberalizado, basado en incentivos, el cumplimiento del objetivo legítimo estatal de elección de las fuentes de energía autóctona , inscrita en su propia política nacional de abastecimiento energético, puede verse en peligro si los intereses de de la impresa adquirente se desvinculan de un conjunto de compromisos tácitos con la administración".

but merely provides for incentives for such companies to maintain their coal consumption at fixed levels.

(101) Therefore it appears that this condition imposes on Enel and Acciona an additional obligation and that, even if the conditional authorisation granted could not be revoked in case of violation of the present requirement, the imposition of this additional obligation which is not foreseen by the general Spanish legislation, purports to legally bind Enel and Acciona and may expose them, in case of its violation, to the risk of penalties or injunctions by the competent administrative authorities and, in the context of civil or administrative enforcement actions, by national courts (see above recitals 42, 43 and 44).

(102) The Commission considered in the previous Article 21 decisions that an identical requirement significantly limited E.on's economic freedom following the acquisition of control over Endesa. In particular, such requirement appears to be contrary to EC rules on free movement of goods. The Commission considers that this conclusion is still valid even taking account of the modification made by the Minister's decision[29], since the obligation to use domestic coal is not removed.

(103) The obligation on Endesa to buy domestic coal finds no public interest justification and may not comply with the principles of proportionality and non discrimination.

(104) The Commission noted in its previous decision of 20 December 2006 that the Minister's decision of 9 November 2006 (in the context of the E.on/Endesa case) explained that this condition is necessary in order to ensure the use of domestic coal, thereby reducing the Spanish dependency on foreign energy sources. Similar arguments are contained in the Minister's decision of 19 October 2007.

(105) However, neither the Minister's decision of 19 October 2007 (as the one of 3 November 2006) nor CNE's decision or the Spanish authorities' reply provide any element indicating that Enel's and Acciona's acquisition of control over Endesa would create a genuine and sufficiently serious threat for the security of energy supply. Moreover, the Minister's decision does not explain why Endesa, under the joint control of Enel and Acciona, would diminish its purchases of domestic coal.

(106) Moreover, the Commission 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 1407/2002/EC on State aid to the Coal Industry.[30]

(107) 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,*

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29 The modification specifies that the obligation is in force "*as long as the current conditions and circumstances are maintained*".

30 OJ L 205/1, 2 August 2002.

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[31]. Spain has therefore already put into place less restrictive measures allowing overcoming the alleged problems identified by the Spanish authorities.[32]

(108) Furthermore, 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 currently provides State aid to its coal industry under this Regulation[33]. In the Commission's view, this should suffice to meet the objective of increasing the security of energy supply by the means of using domestic coal, no additional obligation on the Spanish energy operators being required.

(109) In this respect, the Commission notes that, as acknowledged by the CNE and the Minister's decisions, the policy adopted by the Spanish authorities vis à vis Spanish electricity operators is not to oblige them to consume a certain amount of coal, but merely to provide them with incentives to realise such consumption. Moreover, to the Commission's knowledge, the Spanish authorities never imposed a similar obligation on any other energy operators active in Spain, but instead preferred to adopt a system of incentives.

(110) Finally, the Commission recalls that in its decision of 20 December 2006 it already clarified that the alleged interest to protect "general economic policy criteria" cannot serve as justification for obstacles to the fundamental freedoms recognised by the Treaty.

(111) On the basis of the foregoing, the Commission considers this condition to be contrary to Community law.

Assets outside mainland Spain (sixth condition)[34]

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

32 Royal Decree-Law 7/2006 might constitute State aid for the power plants receiving the subsidies. It appears that Spain has not notified Royal Decree-Law 7/2006 to the Commission under Article 88 (2) EC treaty. The Commission thus reserves the right to open an ex officio investigation under the State aid rules.

33 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.

34 See §73 to §79 of Commission's decision of 20 December 2006.

(112) This condition provides for an obligation on Enel and Acciona to keep within the Endesa Group, for a period of 5 years, Endesa's companies owning assets in generation, distribution or transport located in non-mainland Spain.

(113) The sixth condition has not been appealed by Enel and Acciona and as a result has not been modified by the Minister.

(114) In its previous decision of 20 December 2006, the Commission specified that a similar requirement imposed by the Spanish authorities significantly limited E.on's freedom to decide the structure of its group and/or sell certain companies after the acquisition of control over Endesa and therefore had a prejudicial effect on the E.on/Endesa transaction even if the conditional authorisation granted to E.on could not be revoked in case of violation of the present requirement.

(115) On this basis, the Commission concluded that the imposition of this requirement could not be considered to protect the legitimate interests within the meaning of the first subparagraph of Art 21(4) of the Merger Regulation and therefore represented an obstacle to the realisation of a cross-border operation, restricting the freedom of establishment and the free movement of capital[35]. The Commission further clarified that i) such a restriction could not be regarded as minor, having regard both to the extent to which it limited E.on's freedom regarding certain assets and to the economic significance of those assets and that, in any event, ii) a restriction on freedom of establishment is prohibited by the Treaty even if of limited scope or minor importance.

(116) In the light of the foregoing, the Commission reiterates that the requirements imposed on Enel and Acciona by the sixth condition are to be considered unjustified restrictions on the free movement of capitals and of the right of establishment.

(117) The Commission notes that the restriction of freedom of establishment and the free movement of capital resulting from the imposition of this requirement are not justified on public interest grounds and are contrary to the principles of proportionality. In principle, other measures less restrictive of the free movement of capital and the right of establishment could be used to achieve the stated objective. In particular, as regards the alleged[36] interest to protect "general economic policy criteria", the Commission recalls that such a ground cannot serve as justification for obstacles to the fundamental freedoms recognised by the Treaty.

(118) The Commission notes that the CNE justifies the requirement of the sixth condition by the necessity to ensure that adequate investments are carried out in the electricity and gas sector in those areas (outside mainland Spain) in which return of investments can be expected only in the long term[37]. In CNE's view, the

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35 This is without prejudice to the question whether a national rule of general character imposing an obligation, or providing for the possibility of imposing an obligation, to keep certain regulated assets within a given company or group of companies - without any relation with a concrete cross-border operation - may in itself represent an unjustifiable restriction of the freedom of establishment and the free movement of capital.

36 CNE's decision in the case E.on/Endesa.

37 See CNE's decision page 124.

only fashion to ensure that both Enel and Acciona carry out adequate investments in these assets is to oblige these companies to keep the assets under their property for a sufficient long term.

(119) The Commission considers that the requirement imposed on Enel and Acciona is not an adequate and proportionate means to achieve the goal of ensuring the realisation of adequate investments in these geographic areas. Indeed, the obligation to maintain certain companies within the ENDESA Group does not guarantee that the necessary investments will be made.

(120) Moreover, the Commission notes that the present condition has a discriminatory character since Endesa was not previously subject to such an obligation. The fact that before examining the E.on/Endesa concentration the Spanish authorities did not consider necessary to impose similar requirements in order to protect public security (for instance in the framework of the Gas Natural/Endesa concentration[38]) is also a clear indication that the present condition is not necessary to pursue a legitimate public interest and does not comply with the principle of proportionality.

(121) The Commission also notes that the Spanish authorities have imposed this condition on both regulated and non-regulated (generation) assets[39], when they would not, to the Commission's knowledge, have the power to impose such prohibition on energy operators outside the case of acquisition of regulated assets and, even in such cases, would have in any event, under both Community and national law, to demonstrate that the transfer of the regulated assets would have a negative effect on the security of supply[40].

(122) In the Spanish Authorities' reply this requirement is not considered as disproportionate or discriminatory because non-mainland energy assets are regarded as being regulated under the terms of law n. 54/1997 and law n. 34/98. In this respect, the Commission notes that such laws merely dispose that the energy generated in non-mainland Spain is not sold in the pool (Spanish electricity clearing mechanism) and a different retribution system for the power generation activity.

(123) Therefore the Commission considers that this is not a sufficient argument for these assets to be considered as regulated assets, given that only transmission and transport assets are considered to fall in this category under EC law (see recital 73). In any event, irrespective of whether the assets in non-mainland Spain may be considered as regulated, this condition for the reasons explained above, cannot be considered as adequate, proportionate and non-discriminatory for the protection of public security and security of energy supply .

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38 In this regard, it should be noted that under the legal regime applicable to the Gas Natural/Endesa concentration (prior to the adoption of Royal Decree-Law 4/2006 the CNE had the power to review only the acquisition made by companies with regulated assets) CNE already had to asses the impact of the transaction on security of supply.

39 According to EC law, regulated assets are transport and distribution assets. See recital 73

40 See Funcion decimocuarta of the law n. 34/1998 "Sólo podrán denegarse las autorizaciones como consecuencia de la existencia de riesgos significativos o efectos negativos, directos o indirectos, sobre las actividades reguladas en esta Ley, pudiendo por estas razones dictarse autorizaciones que expresen condiciones en las cuales puedan realizarse las mencionadas operaciones".

IX. CONCLUSION

(124) 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 the decision of the CNE of 4 July 2007, without prior communication to (and approval by) the Commission violates the specific communication and stand-still obligation provided for by such provision; and

(b) CNE submitted Enel and Acciona's acquisition of joint control over Endesa (i.e. a concentration with a Community dimension), through its decision of 4 July 2007 (as modified by the Minister's decision of 19 October 2007), to a number of conditions which are not justified by the legitimate interest specified in Art 21(4) of the Merger Regulation as they are contrary to the EC rules on the free movement of capital and the freedom of establishment and, as far as concerns condition five, the free movement of goods, and therefore unduly interfered with the Commission’s exclusive competence to decide on a concentration with Community dimension.

(125) It is therefore appropriate to require the Spanish authorities to withdraw without delay, an in any event by 10 January 2008 , the conditions imposed by the decisions of the CNE of 4 July 2007, as modified by the decision of the Spanish Minister of Industry, Tourism and Trade of 19 October 2007, which have been declared incompatible with Community law.

HAS ADOPTED THIS DECISION:

Article 1

Spain violated Article 21 of Regulation (EC) No 139/2004 due to the adoption and entry into force, without prior communication to and approval by the Commission, of the decision of the CNE of 4 July of 2007.

Article 2

Spain violated Article 21 of Regulation (EC) No 139/2004 by subjecting, by virtue of the decision of the CNE of 4 July of 2007 and of the decision of the Spanish Minister of Industry, Tourism and Trade of 19 October 2007, Enel's and Acciona's acquisition of control over Endesa to a number of conditions (conditions one and six of CNE's decision and conditions two, three and five of the CNE's decision as modified by the Minister's decision) which are incompatible with Articles 43 and 56 of the EC Treaty and, as far as modified condition five is concerned, Articles 28 of the EC Treaty, therefore unduly interfering with the Commission's exclusive competence to decide on a concentration with Community dimension.

Article 3

Spain shall withdraw by 10 January 2008 the modified conditions imposed by the decision of the CNE of 4 July 2007 and by the decision of the Spanish Minster of Industry, Tourism and Trade of 19 October 2007 which have been declared incompatible with Community law by Article 2 of the present decision.

Article 4

This decision is addressed to the Kingdom of Spain.

Done at Brussels, 5th December 2007

For the Commission
Signed
Neelie KROES
Member of the Commission