

***Case No COMP/M.5171 -
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: 13/06/2008

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EUROPEAN COMMISSION

Brussels, 13/06/2008
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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 Where possible the information omitted has been replaced by ranges of figures or a general description.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.5171 - Enel/ Acciona/ Endesa
Notification of 13.05.2008 pursuant to Article 4 of Council Regulation
No 139/2004¹**

1. On 13/05/2008, the Commission received a notification of a 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 agreements entered into between Enel and Acciona.
2. According to said agreements, Enel and Acciona shall 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"). This transaction represents a separate concentration and is dealt with under the reference number of COMP M.5170 – E.ON/Endesa Europa/Viesgo.

I. THE PARTIES

3. Enel is an Italian energy company, active mainly in the generation, distribution and supply of electricity in Italy. It is also active in Spain through its wholly owned subsidiary Viesgo, and in other European countries, Russia, and North and South America.

¹ OJ L 24, 29.1.2004 p. 1.

4. Acciona is a corporate group primarily based in Spain whose main lines of businesses are development and management of infrastructures and real estate projects, provision of transport, urban and environmental services, as well as 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 in 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

6. The notified concentration consists of the acquisition of joint control over Endesa by Enel and Acciona, as a result of 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 did not already own or control.
8. On 02/04/2007 Enel, Acciona and E.ON agreed that Enel and Endesa would transfer to E.ON a number of rights and assets, including Enel's existing electricity generation, distribution and supply business in Spain (i.e. its Spanish subsidiary Viesgo, except for its stake in EUFER², a special regime operator representing less than 1% of Spanish electricity production or capacity), certain additional Endesa's assets and rights on 450 MW of nuclear generation capacity located in Spain, and Endesa's current businesses in Italy, France, Poland and Turkey. These businesses are not included in the scope of the notified concentration since Enel and Acciona will not acquire any lasting control over them.
9. This transaction has been already notified to and authorized by the Commission's decision COMP/M.4685 - Enel/Acciona/Endesa of 5 July 2007. However, Enel, E.ON and Acciona on 18 March 2008 have concluded another agreement whereby they modified their agreement of last year in relation to the assets to be transferred to E.ON. In particular, the new agreement excludes one of the power plants from the portfolio of Endesa assets to be divested to E.ON (the Foix power plant) and substitutes one power plant (Besos 3) for another one (Tarragona 1)³.
10. Given that the perimeter of the concentration has been changed, the Commission's decision of 5 July 2007 would not cover the actually implemented concentration. The now submitted notification deals with the final agreement between the parties.

III. COMMUNITY DIMENSION

11. 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...million]; Endesa [EUR...million]). Moreover, Enel, Acciona and Endesa do not achieve more than two thirds

² EUFER is a joint venture between Enel and the Spanish electricity and gas operator Unión Fenosa.

³ The change in the agreement will not require Enel or Acciona to apply for any new administrative authorizations in Spain from the Comisión Nacional de la Energía.

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

12. 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. However, as stated in the Commission's decision of 5 July 2007, given that 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 Commission⁴, 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. However, as concluded in the previous Commission's decision of 5 July, the only market affected by the transaction is the market for the generation and wholesale of electricity. Therefore, since the change of the scope of the notification does not affect markets other than the generation/wholesale supply, only the impact on this market will be assessed.

B. Relevant geographic markets

14. In line with the previous Commission decision of 5 July, the generation and wholesale supply of electricity is at most national in scope⁵, but it can be left open whether this market should be split into three different markets (i.e. mainland Spain, the Canary Islands and the Balearic Islands) given that neither Enel nor Acciona have any activities in the Canary Islands and the Balearic Islands and the assessment at the level of mainland Spain does not give rise to competition concerns.

C. Competitive assessment

15. Taking into account the scope of the notification, which exclude the activities that will be sold to E.ON, the only markets which are affected by the transaction, as stated in recital 12, are the electricity markets in Spain and more specifically the generation and wholesale of electricity.
16. As mentioned above, the main amendments to the initial perimeter of the transaction that was approved by the Commission's decision of 5 July will consist of (i) the exclusion of the Foix power plant from the portfolio of Endesa assets to be divested to E.ON and (ii) the substitution in the same portfolio of Besos 3 power plant for the Tarragona 1 plant. Moreover, the negotiations on the initial rights to be transferred from Endesa's nuclear plants to E.ON (initially 450 MW) are not closed yet and it may be that the final rights transferred to E.ON are in the range from 0 MW to the maximum 450 MW.

⁴ COMP M. 3440 ENI/EDP/GDP, COMP M.4110 E.ON/Endesa

⁵ TDC Report in case C94/05 Gas Natural/Endesa

17. In any case, these changes will not lead to any change of the assessment of the present transaction as carried out by the Commission in its previous decision on this case of 5 July 2007 as the impact on the affected market is negligible.
18. In particular, due to these changes, Endesa's share of installed generation capacity in mainland Spain, will increase, even if the 450 MW drawing rights are finally not transferred to E.ON, by only [$<5\%$]: Endesa's market share pre-transaction is around [20-30%] whereas the parties combined market share post-transaction will be around [20-30%] (Endesa [20-30%]; Acciona [$<5\%$]; Enel (through its stake in EUFER) [$<5\%$]). This is only marginally different from the result of the transaction as previously notified to the Commission⁶.
19. In terms of production, also the change is minimal. While the combined market share in the Commission's decision of 5 July was [20-30%], the current combined market share is [20-30%].
20. For these reasons and also considering that the conditions of competition in the Spanish market for the wholesale supply of electricity, which is the only horizontally affected market, did not materially change in the last year and that a number of other companies such as Iberdrola, Unión Fenosa and EDP/Hidrocantábrico are also present in this market there is no reason for the Commission to depart from its previous decision of 5 July 2007.

V. CONCLUSION

21. In the light of the foregoing, 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.
22. 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

⁶ The combined market shares before the modification of the scope of the transaction was about [20-30%] (see COMP/M.4685 Enel/Acciona/Endesa).