Application of Article 21 of the Merger Regulation in the E.ON/Endesa case

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On 21 February 2006, the German company E.ON publicly announced its intention to launch a bid for the entire share capital of the Spanish energy company Endesa. This bid was competing with a hostile bid made by Gas Natural, launched some months earlier (2). The acquisition of Endesa by E.ON was notified to the Commission on 16 March and cleared on 25 April 2006 (3).

On 24 February 2006, the Spanish Council of Ministers adopted a new legislative measure increasing the supervisory powers of the CNE (Comisión Nacional de Energía), the Spanish energy regulator. Under the new Royal Decree, E.ON’s bid was subject to the CNE’s prior approval. Previously, this authorisation was not required as E.ON did not carry out regulated activities in Spain (4). The Commission considers this Royal Decree as contrary to Community law and has brought an action against Spain before the Court of Justice under Article 226 EC. The case is still pending before the Court (5).

Pursuant to the new Royal Decree, on 23 March 2006 E.ON requested the CNE to authorise (unconditionally) the proposed acquisition of Endesa. On 27 July 2006, the CNE adopted a decision making this operation subject to nineteen conditions (‘the CNE’s decision’).

Article 21 of the Merger Regulation

Under Article 21 of the Merger Regulation, the Commission has exclusive competence to assess the competitive impact of concentrations with a Community dimension. Member States cannot apply their national competition law to such operations, and they cannot adopt measures which could prohibit, make subject to conditions or in any way prejudice (de jure or de facto) such concentrations, unless the measures in question (i) protect interests other than competition and (ii) are necessary and proportionate to protect interests which are compatible with all aspects of Community law.

Public security, plurality of the media and prudential rules are interests recognised as being legitimate (‘recognised interests’). Measures genuinely aimed at protecting one of the recognised interests can be adopted without prior communication to (and approval by) the Commission, even if they are liable to hinder or prohibit a merger with a Community dimension, on condition that they are proportionate and non-discriminatory.

Any other interest pursued by way of national measures liable to prohibit, make subject to conditions or prejudice a merger with a Community dimension must be communicated to the Commission before being implemented. The same requirement to obtain the Commission’s prior approval applies whenever there are serious doubts that national measures are genuinely aimed at protecting a ‘recognised interest’ and/or comply with the principles of proportionality and non-discrimination. The Commission must then decide, within 25 working days, whether the national measures are justified for the protection of an interest compatible with EC law.

The Commission’s action against conditions imposed on E.ON’s bid

The CNE’s decision makes the proposed concentration between E.ON and Endesa subject to a number of conditions including: (i) the obligation to maintain Endesa’s headquarters in Spain, (ii) the obligation to keep Endesa duly capitalised and to not exceed a certain debt ratio, and (iii) the obligation to divest Endesa’s non-mainland assets. E.ON introduced an administrative appeal against the CNE’s decision before the Spanish Minister of Industry, Tourism and Trade.

After examining these conditions and having invited the Spanish authorities to submit observations, on 26 September 2006 the Commission adopted a decision declaring that the Spanish authorities had breached Article 21 of the Merger Regulation through the adoption, without prior

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(2) The Gas Natural/Endesa merger was subject to national merger control.

(3) Case COMP M. 4197 E.ON/Endesa.

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

(5) OJ C 140, 23.6.2007, p. 15.
communication to and approval by the Commission, of the CNE’s decision making E.ON’s acquisition of control over Endesa subject to a number of conditions contrary to Community law (inter alia, Articles 43 and 56 EC). Article 2 of the decision also required Spain to withdraw without delay the conditions declared incompatible with Community law (‘the first Article 21 decision’). The Spanish authorities did not take any action in this respect and therefore, on 18 October 2006, the Commission sent Spain a first letter of formal notice pursuant to Article 226 EC for failure to comply with Article 2 of the first Article 21 decision.

As part of their reply to the letter of formal notice, the Spanish authorities referred to the decision of 3 November 2006 of the Spanish Minister of Industry, Tourism and Trade deciding on E.ON’s administrative appeal against the CNE’s decision. The Ministerial decision modified the CNE’s decision by (i) withdrawing some of the conditions imposed by the CNE, (ii) reducing the duration or scope of some other conditions, (iii) clarifying the requirements of certain conditions, and (iv) modifying or replacing some other conditions through the imposition of ‘new requirements’ for E.ON’s acquisition of control over Endesa.

Regarding modifications (iv) above, on 20 December 2006, after having invited the Spanish authorities to submit observations, the Commission adopted a new decision pursuant to Article 21 of the Merger Regulation (‘the second Article 21 decision’) concerning the ‘new requirements’ imposed on E.ON by the Minister’s decision. Article 1 of this decision stated that Spain had violated Article 21 of the Merger Regulation through the adoption, without prior communication to and approval by the Commission, of the Minister’s decision, which makes E.ON’s acquisition of control over Endesa subject to a number of modified conditions incompatible with Community law (inter alia, Articles 43 and 56 EC). Article 2 required Spain to withdraw by 19 January 2007 the modified conditions imposed by the Minister’s decision which had been declared incompatible with Community law. The Spanish authorities did not, however, take any action to comply with this decision.

The Commission decided to send a second letter of formal notice to Spain on 31 January 2007 in which it concluded that the reduction of the duration and scope of some conditions and the clarifications introduced by the Ministerial decision (modifications (i) to (iii) above) were not sufficient to comply fully with the first Article 21 decision. This letter of formal notice also concluded that Spain had failed to comply with the second Article 21 decision.

The Spanish authorities’ reply to the Commission’s additional letter of formal notice was not satisfactory and the Commission therefore decided on 7 March 2007 to issue a formal request to Spain to comply with its two Article 21 decisions. It took the form of a reasoned opinion, the second stage of infringement proceedings under Article 226 EC.

The Spanish authorities replied to the reasoned opinion on 16 March 2007 without informing the Commission of any steps to withdraw the illegal measures. Since the Spanish Government did not withdraw the illegal measures, despite the reasoned opinion, the Commission decided on 28 March 2007 to refer Spain to the European Court of Justice for failure to comply with the first and second Article 21 decisions. The application was lodged before the Court on 11 April 2007 (Case C-196/07 Commission v Spain). The judgment of the ECJ

On 6 March 2008, the European Court of Justice found that Spain had failed to comply with the first and second Article 21 decisions requiring it to withdraw the conditions declared incompatible with EC law. This judgment is of material significance because it confirms the Commission’s position that Member States cannot create unwarranted obstacles to mergers which fall under the Commission’s exclusive jurisdiction. The judgment therefore clearly signals to all Member States that they must not violate EC law by adopting (without prior communication to and approval by the Commission) any State measures that restrict or have a negative impact on mergers with a Community dimension and are not necessary and proportionate for the protection of a public interest. It furthermore confirms that Member States must comply with the Commission’s decisions requesting the withdrawal of illegal State measures.

See OJ C 155, 7.7.2007, p. 10.
More generally, this judgment sends a strong signal that the Commission can and should continue to vigilantly ensure that Member States do not adopt unjustified restrictions on cross-border mergers, which the Commission considers vital for the proper functioning of the single market.

Furthermore, the Court clarified that, contrary to the Spanish authorities’ arguments during the proceedings, the fact that E.ON abandoned the public offer on 10 April 2007, after the expiry of the deadline established in the reasoned opinion for the withdrawal of the illegal conditions, does not render the Commission proceedings devoid of purpose or interest. As the Court points out, the object of an action for failure to comply with Treaty obligations is established by the Commission’s reasoned opinion and, even when the default has been remedied after the time-limit prescribed by that opinion, pursuit of the action still has an object. That object may consist, in particular, in establishing the basis of the liability that a Member State could incur towards those who acquire rights as a result of its default.

Additionally, the Court concluded that Spain had not shown that it was absolutely impossible to implement the Commission’s decisions. In this respect, the Court indicated that the fact that the bid had not produced effects did not necessarily imply an absolute impossibility of fulfilment given that the formal elimination of the provisions contrary to the Commission’s decisions was still possible.

Finally, this judgment is also of relevance for another infringement proceeding which the Commission has initiated against Spain likewise for failure to comply with a Commission decision adopted pursuant to Article 21 of the Merger Regulation. On 5 December 2007, the Commission adopted a decision declaring that Spain had breached Article 21 through the adoption (again without prior communication to and approval by the Commission) by the CNE of the decision of 4 July 2007 imposing on another merger with a Community dimension, the Enel/Acciona/Endesa transaction (COMP M. 4685), a number of conditions incompatible with Community law. Given that Spain had again failed to comply with the Commission decision of 5 December 2007, the Commission initiated infringement proceedings and on 31 January 2008 addressed a letter of formal notice to Spain.

The Spanish authorities filed an action for annulment of the 5 December 2007 Commission decision pursuant to Article 230 EC and requested interim measures, namely the suspension of the Commission’s decision. On 30 April 2008, the Court of First Instance rejected the Spanish authorities’ request for interim measures (see Case T-65/08 Spain v Commission).