

Brussels, 20<sup>th</sup> December 2006

## **Mergers: Commission decides that Spanish measures in proposed E.ON/Endesa takeover violate EC law**

*The European Commission has decided that Spain has violated Article 21 of the EU Merger Regulation, which gives the Commission exclusive competence over mergers of a European dimension, in that certain conditions imposed on E.ON for its proposed acquisition of control over Endesa are incompatible with EC law and are therefore illegal. The Commission decision refers in particular to new conditions imposed in a decision of 3 November 2006, adopted in the framework of an administrative appeal against a previous decision of the Spanish Energy Regulator, CNE, on the proposed transaction. The Commission decision requires Spain to withdraw the illegal conditions by 19 January 2007.*

Competition Commissioner Neelie Kroes declared: "I regret that the Commission has once again been obliged to intervene to avoid that a Member State places unjustified conditions on a major European takeover. No one should doubt the Commission's commitment to ensuring Europe's businesses can operate on a level playing field to the benefit of Europe's consumers, businesses and the economy as a whole".

The Commission has declared incompatible with EC law the modified conditions imposed by the Spanish Minister of Industry, Tourism and Trade requiring that:

- Endesa maintains its brand for a five years period;
- the companies owning electricity assets outside mainland Spain are kept within the Endesa Group for a period of 5 years;
- Endesa's power plants using domestic coal continue to use such an energy source as foreseen in the national mining plans;
- E.ON does not adopt strategic decisions, regarding Endesa and affecting security of supply, contrary to the Spanish legal order.

The Commission considers that these modified conditions are incompatible the EC Treaty's rules on free movement of capital (Article 56) and on freedom of establishment (Article 43). The condition on the use of domestic coal is also incompatible with the EC Treaty's rules on free movement of goods (Articles 28).

The Commission has exercised its discretion not to adopt, at this stage, a negative decision on the modified conditions requiring that any acquisition of stakes in Endesa's share capital should be subject to the applicable rules of the Spanish legal system and that Endesa fulfils all existing obligations concerning the management of nuclear power plants. The modified conditions at issue do not impose any additional obligation which is not already foreseen by the general Spanish legislation and the Spanish authorities have given explicit assurances that the conditional authorisation granted to E.ON could not be revoked in case of violation thereof.

Finally, the Commission has taken note that the Spanish Minister has not modified, but merely clarified, the condition imposed by CNE with regard to gas supply requirements.

### **Previous Commission decision**

On 26 September 2006, the Commission adopted a decision by which it declared that the decision of CNE of 27<sup>th</sup> July 2006, subjecting E.ON's bid for Endesa to a number of conditions breached Article 21 of the EC Merger Regulation (see [IP/06/1265](#))

The Commission's assessment of the conditions imposed by CNE remains valid in so far as the decision by the Spanish Minister has not modified – or has only slightly modified – the CNE's decision. In the framework of an on-going infringement procedure pursuant to Article 226 EC (see [IP/06/1426](#)), the Commission is evaluating whether the Spanish authorities complied with its decision of 26 September 2006.

Today's decision concerns only the compatibility with Article 21 of the Merger Regulation of the substantially modified conditions imposed by the Minister's 3<sup>rd</sup> November decision.

### **Next steps**

The Spanish authorities have until 19 January 2007 to withdraw the modified conditions declared incompatible with EC law by today's decision. If they failed to do so, the Commission could open infringement proceedings under Article 226 of the EC Treaty.

### **Background**

Under Article 21 of the EU 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. Moreover, Member States cannot adopt measures which could prohibit or prejudice (*de jure* or *de facto*) such concentrations unless the measures in question:

- protect interests other than competition and
- are necessary and proportionate to protect interests which are compatible with all aspects of Community law.

Public security, plurality of media and prudential rules are interests that are recognised by the Merger Regulation as being legitimate, but specific measures must still be proportionate and fully compatible with all aspects of Community law.

The European Commission approved on 25<sup>th</sup> April 2006 under the EU Merger Regulation the acquisition by E.ON of sole control of Endesa (see [IP/06/528](#)). After examining the operation, the Commission concluded that the proposed transaction would not significantly impede effective competition in the European Economic Area (EEA) or any substantial part of it.