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Press and Information

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Order of the President of the Court of First Instance in Case T-417/05 R

Endesa v. Commission of the European Communities

THE PRESIDENT OF THE COURT OF FIRST INSTANCE DISMISSES THE APPLICATION FOR INTERIM MEASURES BROUGHT BY ENDESA

The applicant has failed to show that it would suffer serious and irreparable harm in the absence of interim measures

On 5 September 2005, Gas Natural, a Spanish company active in the energy sector, announced its intention to make a public bid to acquire the total share capital of Endesa, a Spanish company primarily active in the electricity sector. That transaction was notified to the Spanish Competition Authority.

Considering that the proposed merger had a Community dimension, Endesa lodged a complaint with the Commission. In that complaint Endesa argued that, in accordance with the Merger Regulation¹, the merger had to be notified to the Commission and the Spanish authorities were not competent to carry out an assessment of it with regard to the Spanish rules on merger control. The Commission, however, rejected that complaint on 15 November 2005.

Endesa is contesting that decision before the Court of First Instance on the ground that the Commission incorrectly calculated its turnover. Endesa requested application in this case of the expedited procedure, which it has been granted²

¹ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p.1)

² On 16 December 2005, the Court of First Instance decided to adjudicate under the expedited procedure pursuant to Article 76a of its Rules of Procedure. The expedited procedure has been provided for in the Rules of Procedure of the Court of First Instance since 1 February 2001. The purpose of this procedure is to enable the Court of First Instance to deliver a rapid decision on the substance in cases which are considered to be particularly urgent.

The expedited procedure may be applied for by either the applicant or the defendant. Such an application must be lodged with the Court by a separate document at the same time as the application initiating the proceedings or the defence. The Chamber hearing the case decides, having regard to a proposal by the Judge-Rapporteur

In parallel with the lodging of its application and the request for an expedited procedure, Endesa lodged a request for interim measures seeking the suspension of operation of the Commission decision until the Court of First Instance ruled on the main proceedings.

In an Order delivered today on the application for interim measures, the President of the Court of First Instance recalls that, in order to grant interim measures, several cumulative conditions must be fulfilled, one of these being the need for such measures as a matter of urgency.

In this regard, the President recalls that whether an application for interim measures is urgent must be analysed in relation to the need to make an interim ruling so as to avoid serious and irreparable harm to the party requesting the measure. In this context, it is for the requesting party, in this instance Endesa, to prove the alleged harm to a sufficient degree of probability.

In its application, Endesa raised in particular the risk that, in the absence of interim measures, Gas Natural could take control of the company and proceed to dismantle it. This harm would, according to Endesa, also adversely affect its shareholders.

The President of the Court of First Instance recalls, however, that according to the case-law, the serious and irreparable harm alleged in relation to urgency can be taken into account only insofar as it is capable of affecting the interests of the party requesting the interim measures.

Endesa cannot therefore, as regards the requirement of urgency, usefully rely on harm which would be caused to its shareholders as these shareholders have their own distinct legal personality.

As regards the harm allegedly to be suffered by Endesa itself, the President holds that this is hypothetical, as it is dependent on the making and success of the public bid for acquisition which has not yet been successfully completed. The President also states that, in the light of the information presented during the interim proceedings, the takeover of Endesa could not take place before 15 June 2006 and, given that the Court has decided to apply the expedited procedure, it has not been shown that the alleged harm may occur before the Court rules in the main proceedings.

Finally the President considers that, even if Endesa had shown that the alleged harm to it is likely to occur before the Court of First Instance rules in the main proceedings, it has not been shown that the remedies available under Spanish law would not permit Endesa to avoid the serious and irreparable harm alleged.

Finally, having dismissed the other heads of claim put forward by Endesa - breach of its procedural rights; breach of law; and the necessity for its shareholders to be able to decide on a bid whose compliance with the merger control rules has been examined by the competent authority - **the President of the Court of First Instance has dismissed the application for interim measures.**

assigned to the case and after hearing the other party, whether there is any particular urgency justifying recourse to the expedited procedure.

Once the expedited procedure is applied the periods allowed for the procedural stages are shortened. The written procedure is limited to the submission of only one set of pleadings, unless the Court expressly authorises the parties to submit a second set. The Court then gives a ruling as quickly as possible. However, no time-limit is imposed on the Court for that purpose.

IMPORTANT: The Court of First Instance will deliver final judgment on the substance of this case at a later date. An order as to interim measures is without prejudice to the outcome of the main proceedings. An appeal, limited to points of law only, may be brought before the President of the Court of Justice of the European Communities against the decision of the President of the Court of First Instance within two months of notification of the decision.

Unofficial document for media use, not binding on the Court of First Instance.

Languages available: EN, ES, FR

The full text of the order may be found on the Court's internet site

<http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T-417/05> R

It can usually be consulted after midday CET on the day the order is made.

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