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Press and Information

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Judgment of the Court of First Instance in Case T-417/05

Endesa SA v Commission of the European Communities

THE COURT OF FIRST INSTANCE CONFIRMS THE DECISION OF THE COMMISSION DECLARING THAT THE PROPOSED ACQUISITION OF ENDESA BY GAS NATURAL DID NOT FALL WITHIN ITS JURISDICTION

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 on the grounds that the merger did not present a Community dimension.

On 29 November 2005, Endesa contested 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 was granted.

Endesa argued that the Commission's examination of its turnover should have been based on the IAS/IFRS (International Financial Reporting Standards) and not on the Spanish accounting standards in force at the time.

The Court recalled that the Merger Regulation requires the Commission to refer to the accounts of the companies from the previous accounting year - in this instance 2004 - because verified accounts normally only exist for the last complete accounting period. It

¹ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p.1). According to this Regulation, a merger has a Community dimension when the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

also recalled **that a company which has an obligation to provide annual accounts for verification only have at their disposal a single type of official accounts: those which have been established and verified in accordance with the applicable legislation.** The Court points out in this regard that **the applicable rules in Spain for the 2004 accounting period were the Spanish GAAP** (generally accepted accounting principles) and that, in accordance with the Regulation on international accounting standards, the IFRS standards are only applicable and obligatory as of the 2005 accounting period.

In addition, Endesa contested the Commission's rejection of two adjustments requested by it, one relating to distribution operations "the "pass through" adjustment and the other concerning gas exchanges. In relation to the first adjustment, Endesa considered that only that part of revenue linked to distribution activity should have been taken into consideration when determining the turnover of distribution companies, to the exclusion of any sums received for the account of other operators, such as electricity producers and network operators.

In this regard, the Court recalled first that the notion of turnover contained in the Merger Regulation explicitly refers to "the amounts derived [...] from the sale of products and the provision of services". Sales, reflected in the activity of the company, is therefore an essential criteria in the calculation of turnover, which consists of products and the provision of services.

Next, the Court found that Endesa could not be considered as an intermediary acting in the name of and on behalf of producers and operators and that, therefore, the Commission had not committed an error by not carrying out the "pass through" adjustment requested by Endesa.

Given that the "pass through" adjustment was necessary for the merger to be considered to have a Community dimension, the Court did not rule on the arguments put forward by Endesa concerning gas exchanges.

Furthermore, all the procedural errors alleged by Endesa have been rejected. In particular, in response to the argument that the Commission should have adopted the contested decision before deciding on the referral requests of the Portuguese and Italian authorities, the Court underlines that these rejection decisions do not form part of the object of the present case. It adds that this event, far from damaging Endesa's interests, allowed the decision on the Community dimension of the proposed merger to be based on a thorough examination of all the pertinent elements.

Similarly, as to the fact that the Commission did not request the competent Spanish authorities to suspend their examination of the proposed merger, the Court finds that Endesa had not shown how the lack of suspension of the national procedure could have affected the legality of the Commission's decision.

Consequently the Court has rejected the action brought by Endesa.

REMINDER: An appeal, limited to points of law only, may be brought before the Court of Justice of the European Communities against a decision of the Court of First Instance, within two months of its notification.

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

Languages available: EN ES FR

*The full text of the judgment 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>*

It can usually be consulted after midday (CET) on the day judgment is delivered.

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