

Case T-87/05

EDP — Energias de Portugal, SA

v

Commission of the European Communities

(Competition — Concentration — Regulation (EEC) No 4064/89 — Decision declaring a concentration incompatible with the common market — Portuguese electricity and gas markets — Acquisition of GDP by EDP and Eni — Directive 2003/55/EC — Liberalisation of gas markets — Commitments)

Judgment of the Court of First Instance (Second Chamber), 21 September
2005 II - 3753

Summary of the Judgment

1. *Competition — Concentrations — Assessment of compatibility with the common market — Criteria — Creation or strengthening of a dominant position significantly impeding effective competition in the common market — Cumulative nature — Interaction*
(Art. 82 EC; Council Regulation No 4064/89, Art. 2(2) and (3))

2. *Competition — Concentrations — Assessment of compatibility with the common market — Creation or strengthening of a dominant position significantly impeding effective competition in the common market — Burden of proof on the Commission — Commitments validly given by the undertakings concerned — No effect*
(Council Regulation No 4064/89, Arts 2(2) and 8(2); Commission Notice on remedies acceptable under Regulations Nos 4064/89 and 447/98, para. 43)

3. *Competition — Concentrations — Examination by the Commission — Commitments given by the undertakings concerned of such a kind as to render the notified transaction compatible with the common market — Examination in turn of the competition concerns followed by an examination in turn of each of the relevant commitments relating thereto — Whether permissible — Conditions*
(Council Regulation No 4064/89, Arts 2(2) and (3) and 8(2))

4. *Actions for annulment — Pleas in law — Misuse of powers — Concept*
(Art. 230 EC)

5. *Competition — Concentrations — Examination by the Commission — Commitments given by the undertakings concerned of such a kind as to render the notified transaction compatible with the common market — Acceptability of commitments that are both behavioural and structural*
(Council Regulation No 4064/89, Arts 2(2) and (3) and 8(2))

6. *Competition — Concentrations — Assessment of compatibility with the common market — Concentration on markets on which there is a monopoly situation permitted by Community law — Inapplicability of the criteria of compatibility with the common market laid down in Article 2(3) of Regulation No 4064/89*
(Council Regulation No 4064/89, Art. 2(3); European Parliament and Council Directive 2003/55, Art. 28(2))

7. *Competition — Concentrations — Assessment of compatibility with the common market — Need to analyse the immediate effects of the transaction — Possibility to take future effects into account*
(Council Regulation No 4064/89, Art. 2(3))

8. *Competition — Concentrations — Errors affecting the decision that the proposed concentration is incompatible with the common market — No effect where decision justified on other grounds — Criteria of incompatibility satisfied in respect of at least one of the markets in question*
(Council Regulation No 4064/89, Art. 2(3))
9. *Competition — Concentrations — Examination by the Commission — Economic assessments — Judicial review — Limits*
(Council Regulation No 4064/89, Art. 2)
10. *Procedure — Application initiating proceedings — Formal requirements — Brief summary of the pleas in law on which the application is based — Pleas in law not set out in the application — Reference to elements in an annex — Expedited procedure — Inadmissibility*
(Rules of Procedure of the Court of First Instance, Article 44(1)(c))
11. *Competition — Concentrations — Examination by the Commission — Commitments given by the undertakings concerned of such a kind as to render the notified transaction compatible with the common market — Taking into account of commitments given after the deadline — Conditions*
(Council Regulation No 4064/89, Art. 8; Commission Regulation No 447/98, Art. 18; Commission Notice on remedies acceptable under Regulations Nos 4064/89 and 447/98, para. 43)
12. *Competition — Concentrations — Assessment of compatibility with the common market — Existence of distinct but linked markets — Impact*
(Council Regulation No 4064/89, Art. 2(3))

1. Article 2(2) and (3) of Regulation No 4064/89 on the control of concentrations between undertakings lays down, for the purpose of assessing the compatibility of a concentration between undertakings with the common market, two cumulative criteria, the first of which relates to the creation or strengthening of a dominant position and the second to the fact that effective competition in the common market will be significantly impeded by the creation or strengthening of such a position. In certain cases, however, the creation or strengthening of a dominant position

may in itself have the consequence that competition is significantly impeded.

It follows that proof of the creation or strengthening of a dominant position within the meaning of Article 2(3) of Regulation No 4064/89 may in certain cases constitute proof of a significant impediment to effective competition. That observation does not in any way

mean that the second criterion is the same in law as the first, but only that it may follow from one and the same factual analysis of a specific market that both criteria are satisfied.

competition would be significantly impeded. In that regard, as complex economic assessments are involved, the burden of proof placed on the Commission is without prejudice to its wide discretion in that sphere.

(see paras 45-46, 49)

2. It follows from Article 2(2) of Regulation No 4064/89 on the control of concentrations between undertakings that it is for the Commission to demonstrate that a concentration cannot be declared compatible with the common market and from Article 8(2) of that regulation that, in so far as the burden of proof is concerned, a concentration modified by commitments is subject to the same criteria as an unmodified concentration.

Accordingly, first, the Commission is under an obligation to examine a concentration as modified by the commitments validly proposed by the parties to the concentration and, second, the Commission can declare the concentration incompatible with the common market only where those commitments are insufficient to prevent the creation or strengthening of a dominant position having the consequence that effective

The fact that the Commission regards commitments which have been validly submitted, that is to say presented either with the first proposal or, in accordance with paragraph 43 of the Notice on remedies acceptable under Regulations Nos 4064/89 and 447/98, in the form of a modification of the initial commitments, as insufficient constitutes an improper reversal of the burden of proof only where the Commission bases that finding of insufficiency not upon objective and verifiable criteria but upon its right to presume incompatibility owing to the fact that the parties to a concentration have not provided it with sufficient information to enable it to determine the matter. In the latter case, doubt would not operate in favour of the parties to the transaction and it would have to be concluded that the burden of proving that such a transaction was compatible with the common market has been reversed.

(see paras 61-63, 69)

3. The Commission has a duty to examine a concentration as modified by the commitments validly submitted by the parties. However, such a premiss does not preclude the examination, in turn, of the competition concerns caused by that transaction, then the commitments offered by the parties to the transaction with a view to resolving those concerns, nor does it preclude the examination, in turn, of each of the relevant commitments by reference to those concerns, provided that the Commission ultimately arrives at a global assessment of the merger as modified, that is to say, of the effects of that transaction on each of the markets identified taking account of all the commitments relevant to that market.
4. The concept of misuse of powers refers to cases where an administrative authority has used its powers for a purpose other than that for which they were conferred on it. A decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken for such a purpose. Where more than one aim is pursued, even if the grounds of a decision include, in addition to proper grounds, an improper one, that would not make the decision invalid for misuse of powers, since it does not nullify the main aim.

(see para. 87)

Furthermore, it is for the Commission to examine all the relevant commitments by reference to a competition concern identified on any of the markets concerned, including those not expressly designated as such by the parties to a merger. However, the Commission does not err in law by assessing only the commitments specific to a single market or to a single competition concern by reference to that market or that concern, if the other commitments are irrelevant and have no real economic significance in that context.

5. The behavioural commitments proposed to the Commission by the parties to a concentration are not by their nature insufficient to prevent the creation or strengthening of a dominant position, and they must be assessed on a case-by-case basis in the same way as structural commitments.

(see para. 100)

- (see paras 77-78)
6. Where a Member State, making use of the derogation granted to it by Article 28

(2) of the Second Gas Directive 2003/55, has established a national gas industry operating as a monopoly and where, for that reason, the gas markets in that State are not open to competition in accordance with national law and with Community law, that constitutes a circumstance which directly and inevitably affects the application to those markets of Article 2(3) of Regulation No 4064/89 on the control of concentrations between undertakings. First, in the face of such a monopoly, the criterion of the creation or strengthening of a dominant position cannot be applied and, second, in the case of a market on which there is no competition, the criterion of a significant impediment to effective competition cannot be applied either.

Although the directive and the regulation have different legal bases and are addressed to different persons, they cannot be analysed separately.

(see paras 114-118, 126)

kind as to result in a significant and lasting impediment of the effective competition existing in the market or markets concerned, would be the direct and immediate consequence of the concentration.

In the absence of such an alteration to competition as it stands, the merger must be approved. It is true that the Commission may, where appropriate, take into account the effects of a concentration in the near future, or indeed base its prohibition of a concentration on such future effects. However, that does not allow it to refrain from analysing the immediate effects of such a transaction if they exist and from taking them into account in its overall assessment of the transaction.

(see para. 124)

7. Where, for the purposes of applying Article 2(3) of Regulation No 4064/89 on the control of concentrations between undertakings, the Commission examines a concentration, it must ascertain whether the creation or strengthening of a dominant position, of such a
8. In so far as certain grounds of a decision in themselves provide a sufficient legal basis for that decision, any errors in other grounds of the decision have no effect in any event on its operative part.

Since, in the case of a concentration, the Commission must prohibit a transaction provided that the criteria of Article 2(3) of Regulation No 4064/89 on the control of concentrations between undertakings are satisfied, even in respect of only one of the relevant markets, a decision declaring the concentration incompatible with the common market can be annulled only if it is established that any grounds which are not vitiated by illegality, in particular those concerning any one of the relevant markets, are insufficient to justify its operative part.

No 4064/89 on the control of concentrations between undertakings must be limited to ensuring compliance with the rules of procedure and the statement of reasons, as well as the substantive accuracy of the facts and the absence of manifest errors of assessment and of any misuse of powers.

(see para. 151)

None the less, that observation does not preclude that it may be necessary, when examining a particular market, also to examine the competitive situation on the other markets if the decision in question relies either on a comprehensive assessment of the effects of the concentration on the various relevant markets, or on the mutual strengthening of certain competitive effects of the transaction on those various markets.

(see paras 144-147, 198)

9. Review by the Community Courts of complex economic assessments made by the Commission in the exercise of the discretion conferred on it by Regulation

10. In order to ensure legal certainty and the sound administration of justice, if an action is to be admissible, the essential facts and law on which it is based must be apparent from the text of the application itself, even if only stated briefly, provided the statement is coherent and comprehensible. In that regard, although specific points in the text of the application can be supported and completed by references to specific passages in the documents attached, a general reference to other documents cannot compensate for the lack of essential elements of legal arguments which, under Article 44(1) of the Rules of Procedure of the Court of First Instance, must be included in the application.

In that regard, the fact that an action is being dealt with under an expedited procedure increases the relevance of such a principle. An expedited proce-

ture, in which there is no second round of written submissions, presupposes that the applicant's arguments are clearly and definitively established at the outset in the application, or in the abbreviated version thereof, as the case may be.

(see paras 155, 182-183)

taken into account subject to two cumulative conditions, namely, first, that those commitments clearly, and without the need for further investigation, resolve the competition concerns previously identified and, second, that there is sufficient time to consult the Member States on those commitments.

(see paras 161-163)

11. It is clear from reading Article 8 of Regulation No 4064/89 on the control of concentrations between undertakings in conjunction with Article 18 of Regulation No 447/98 on the notifications, time-limits and hearings provided for in Regulation No 4064/89 that the regulations on concentrations impose no obligation on the Commission to accept commitments submitted after the deadline. That deadline is to be explained primarily by the requirement of speed that characterises the general structure of Regulation No 4064/89.
12. Where a concentration involves a number of distinct, but linked, markets and where the competitive situation on one or more of those markets influences the situation on one or another market, it is necessary to take account of those other markets in order to be able to make a proper and comprehensive assessment of whether the transaction in question creates or strengthens a dominant position on one of the markets concerned with the consequence that competition is significantly impeded. On the other hand, there is no need to establish that the transaction in question will have that consequence on each of the markets involved in order to conclude that the transaction must be prohibited.

It none the less follows from paragraph 43 of the Commission Notice on remedies acceptable under Regulations Nos 4064/89 and 447/98, by which the Commission has voluntarily undertaken to be bound, that the parties to a notified concentration may have their commitments which were submitted out of time

(see para. 203)