JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

14 July 2006 *

In Case T-417/05,

Endesa, SA, established in Madrid (Spain), represented by J. Flynn, QC, S. Baxter, solicitor, M. Odriozola Alén, M. Muñoz de Juan, M. Merola, J. García de Enterría Lorenzo-Velázquez and J. Varcárcel Martínez, lawyers,

applicant,

v

Commission of the European Communities, represented by F. Castillo de la Torre, É. Gippini Fournier, A. Whelan and M. Schneider, acting as Agents,

defendant,

supported by

Kingdom of Spain, represented by N. Díaz Abad, abogado del Estado,

* Language of the case: Spanish.

and by

Gas Natural SDG, SA, established in Barcelona (Spain), represented by F. González Díaz, J. Jiménez de la Iglesia and A. Leis García, lawyers,

interveners,

Application for annulment of the Commission Decision of 15 November 2005 declaring that a concentration has no Community dimension (Case COMP/ M.3986 — Gas Natural/Endesa),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of M. Jaeger, President, V. Tiili and O. Czúcz, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 March 2006,

gives the following

Judgment

Legal context

Regulations concerning the control of concentrations

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

'1. Without prejudice to Article 4(5) and Article 22, this Regulation shall apply to all concentrations with a Community dimension as defined in this Article.

2. A concentration has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and

(b) 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.

...'

2 Article 5 of the Regulation, entitled 'Calculation of turnover' provides:

'1. Aggregate turnover within the meaning of this Regulation shall comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of sales rebates and of value added tax and other taxes directly related to turnover. The aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in paragraph 4.

Turnover, in the Community or in a Member State, shall comprise products sold and services provided to undertakings or consumers, in the Community or in that Member State as the case may be.

...'

3 According to Article 19 of that regulation:

'1. The Commission shall transmit to the competent authorities of the Member States copies of notifications within three working days and, as soon as possible, copies of the most important documents lodged with or issued by the Commission pursuant to this Regulation. ...

2. The Commission shall carry out the procedures set out in this Regulation in close and constant liaison with the competent authorities of the Member States, which may express their views upon those procedures. ...'

4 According to Article 21 of the Regulation:

'2. Subject to review by the Court of Justice, the Commission shall have sole jurisdiction to take the decisions provided for in this Regulation.

3. No Member State shall apply its national legislation on competition to any concentration that has a Community dimension.'

5 Article 22 of the Regulation provides:

'1. One or more Member States may request the Commission to examine any concentration as defined in Article 3 that does not have a Community dimension within the meaning of Article 1 but affects trade between Member States and

threatens to significantly affect competition within the territory of the Member States of States making the request.

Such a request shall be made at most within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned.

2. The Commission shall inform the competent authorities of the Member States and the undertakings concerned of any request received pursuant to paragraph 1 without delay.

Any other Member State shall have the right to join the initial request within a period of 15 working days of being informed by the Commission of the initial request.

All national time-limits relating to the concentration shall be suspended until, in accordance with the procedure set out in this Article, it has been decided where the concentration shall be examined. As soon as a Member State has informed the Commission and the undertakings concerned that it does not wish to join the request, the suspension of its national time-limits shall end.

3. The Commission may, at the latest 10 working days after the expiry of the period set in paragraph 2, decided to examine the concentration where it considers that it affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request. If the Commission does not take a decision within this period, it shall be deemed to have adopted a decision to examine the concentration in accordance with the request.

The Commission shall inform all Member States and the undertakings concerned of its decision. It may request the submission of a notification pursuant to Article 4.

The Member State or States having made the request shall not longer apply their national legislation on competition to the concentration.

...'

6 Article 17(3) of Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing the Regulation (OJ 2004 L 133, p. 1) provides:

'The right of access to the file shall not extend to confidential information, or to internal documents of the Commission or of the competent authorities of the Member States. The right of access to the file shall equally not extend to correspondence between the Commission and the competent authorities of the Member States or between the latter.'

7 Article 1 of Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards (OJ 2002 L 243, p. 1) provides:

'This Regulation has as its objective the adoption and use of international accounting standards in the Community with a view to harmonising the financial information presented by the companies referred to in Article 4 in order to ensure a

high degree of transparency and comparability of financial statements and hence an efficient functioning of the Community capital market and of the Internal Market.'

Rules relating to company accounts

8 Article 4 of Regulation No 1606/2002, entitled 'Consolidated accounts of publicly traded companies', provides:

'For each financial year starting on or after 1 January 2005, companies governed by the law of a Member State shall prepare their consolidated accounts in conformity with the international accounting standards adopted in accordance with the procedure laid down in Article 6(2) if, at their balance sheet date, their securities are admitted to trading on a regulated market of any Member State within the meaning of Article 1[13] of Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field.'

9 Commission Regulation (EC) No 1725/2003 of 29 September 2003 adopting certain international accounting standards in accordance with Regulation No 1606/2002 (OJ 2003 L 261, p. 1) provides:

'*Article 1*

The international accounting standards set out in the Annex are adopted.

...'

10 International Accounting Standard IAS 18, entitled 'Revenue', annexed to Regulation No 1725/2003 provides:

'Definitions

7. The following terms are used in this Standard with the meanings hereby specified:

Revenue is the gross inflow of economic benefits during the period arising in the course of the ordinary activities of an enterprise when those inflows result in increases in equity, other than increases relating to contributions from equity participants.

Fair value is the amount for which an asset could be exchanged, or a liability settled, between knowledgeable, willing parties in an arm's length transaction.

8. Revenue includes only the gross inflows of economic benefits received and receivable by the enterprise on its own account. Amounts collected on behalf of third parties such as sales taxes, goods and services taxes and value added taxes are not economic benefits which flow to the enterprise and do not result in increases in equity. Therefore, they are excluded from revenue. Similarly, in an agency relationship, the gross inflows of economic benefits include amounts collected on behalf of the principal and which do not result in increases in equity for the enterprise. The amounts collected on behalf of the principal are not revenue. Instead, revenue is the amount of commission.'

11 Commission Regulation (EC) No 707/2004 of 6 April 2004 amending Regulation No 1725/2003 (OJ 2004 L 111, p. 3) provides:

'*Article 1*

In the Annex to Regulation ... No 1725/2003, SIC-8 First-time application of IASs as the primary basis of accounting is replaced by the text set out in the Annex to this Regulation.

Article 2

This Regulation shall enter into force on the 20th day following that of its publication in the *Official Journal of the European Union.*

...'

12 The annex to Regulation No 707/2004, entitled 'IFRS 1 — First-time adoption of International Financial Reporting Standard states:

'36. To comply with IAS 1 Presentation of Financial Statements, an entity's first IFRS financial statements shall include at least one year of comparative information under IFRSs.

...

47. An entity shall apply this IFRS if its first IFRS financial statements are for a period beginning on or after 1 January 2004. Earlier application is encouraged. ...'

Commission Notice on calculation of turnover

13 According to paragraph 26 of the Commission Notice on calculation of turnover under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ 1998 C 66, p. 25) ('the Notice'):

'The Commission seeks to base itself upon the most accurate and reliable figures available. As a general rule therefore, the Commission will refer to audited or other definitive accounts. However, in cases where major differences between the Community's accounting standards and those of a non-member country are observed, the Commission may consider it necessary to restate these accounts in accordance with Community standards in respect of turnover. The Commission is, in any case, reluctant to rely on management or any other form of provisional accounts in any but exceptional circumstances (see the next paragraph). Where a concentration takes place within the first months of the year and audited accounts are not yet available for the most recent financial year, the figures to be taken into account are those relating to the previous year. Where there is a major divergence between the two sets of accounts, and in particular, when the final draft figures for the most recent years are available, the Commission may decide to take those draft figures into account.'

14 Paragraph 27 of the Notice provides:

'Notwithstanding paragraph 26, an adjustment must always be made to account for acquisitions or divestments subsequent to the date of the audited accounts. This is

necessary if the true resources being concentrated are to be identified. Thus if a company disposes of part of its business at any time before the signature of the final agreement or the announcement of the public bid or the acquisition of a controlling interest bringing about a concentration, or where such a divestment or closure is a pre-condition for the operation the part of the turnover to be attributed to that part of the business must be subtracted from the turnover of the notifying party as shown in its last audited accounts. Conversely, the turnover to be attributed to assets of which control has been acquired subsequent to the preparation of the most recent audited accounts must be added to a company's turnover for notification purposes.'

Facts

15 The appellant, Endesa, SA, is a commercial company listed in particular on the Madrid stock exchange. It heads the Endesa Group, the largest electricity group in Spain, with a presence in Italy, France, Portugal, Poland and Latin America.

16 Gas Natural SDG, SA, ('Gas Natural') is a commercial company listed on the Madrid stock exchange. It heads the Gas Natural Group, a group of undertakings providing services in the energy sector, which operates mainly in the supply, distribution and marketing of natural gas in Spain, Italy and Latin America. It is also developing activities in the electricity sector, mainly in the production and marketing of electricity, a sector in which it is a new entrant.

17 On 5 September 2005 Gas Natural announced its intention to launch a bid for Endesa's entire share capital, resulting in a concentration under Article 3 of the Regulation. The bid was declared hostile by Endesa's administrative bodies.

18 On 12 September 2005 Gas Natural notified the Spanish competition authorities of the concentration.

19 Shortly after the announcement of Gas Natural's bid, Endesa wrote to the Commission, informing it that it considered the concentration had a Community dimension within the meaning of Article 1 of the Regulation. According to Endesa, this meant that the concentration should be notified to the Commission under Article 4 of the Regulation and also that the Spanish competition authority had no power to give a ruling on that concentration.

20 On 19 September 2005 Endesa requested the Commission to give a ruling on whether it was competent to examine the concentration in view of its Community dimension.

21 In those communications Endesa stated in particular, first, that the figures to be taken into account for the 2004 turnover were those calculated on the basis of the new International Financial Reporting Standards ('IFRS') rather than those given in the audited accounts and, second, that a number of other adjustments should be made to those figures in order to comply with the provisions of the Commission Notice on calculation of turnover. On the basis of the figures thus obtained Endesa considers that it did not achieve more than two-thirds of its aggregate turnover in the Community in Spain in 2004.

22 On 20 September 2005 the Portuguese competition authority requested the Commission to agree to referral of the concentration on the basis of Article 22 of the Regulation. On 22 September 2005 the Commission informed the other Member States of that request for referral, giving them the opportunity to join it. On 28 September 2005 the Spanish competition authority informed the Commission that it did not wish to join the Portuguese request. On 7 October 2005 the Italian

authority informed the Commission that it wished to join the Portuguese request. The Commission rejected those requests for referral on 27 October 2005, on the grounds that the national authorities had not demonstrated to what extent the concentration affected intra-Community trade and free competition, and concluded that it was not the authority best placed to look into the matter.

23 On 26 September 2005 the Commission wrote to Gas Natural asking it to clarify the basis on which it had notified the concentration to the Spanish competition authority and to send it its observations on Endesa's arguments. Gas Natural replied to that letter on 3 October 2005. In its reply it said that in order to identify the competent competition authority it had used the figures published in Endesa's audited accounts for 2004. According to Gas Natural, those accounts show that in 2004 Endesa (like Gas Natural) had achieved over two-thirds of its aggregate turnover in the Community in Spain.

24 Also on 26 September 2005 the Commission wrote to Endesa asking it for some clarification regarding its communications. On 4 October 2005 it sent Endesa a copy of Gas Natural's observations on its initial communications, asking for its comments on them. Endesa replied to those requests on 5 and 7 October 2005, respectively.

25 On 6 October 2005 the Spanish competition authority informed the Commission that it did not agree with the arguments put forward by Endesa and stated that it considered it was competent to assess the concentration in question.

26 On 25 October 2005 the Commission sent Gas Natural a copy of Endesa's communications of 5 and 7 October 2005, giving it an opportunity to reply to them. On 26 October 2005 the Commission invited Gas Natural, Endesa and the Spanish competition authority to send it their opinions on the interpretation of Article 5 of

the Merger Regulation in the light of paragraph 40 of the Commission Notice mentioned above. At the same time it sent the Spanish competition authority a copy of Endesa's communications of 5 and 7 October 2005, giving it the opportunity to express its opinion on all the matters at issue.

27 On 27 October 2005 the Spanish competition authority informed the Commission that it had no further observations to make on the adjustments and sent the Commission its opinion on the interpretation of Article 5 of the Merger Regulation in the light of paragraph 40 of the relevant Commission Notice. On 2 November 2005 Gas Natural and Endesa made known their views on this. Furthermore, Gas Natural provided further comments on the adjustments proposed by Endesa, on the basis of Endesa's communications of 5 and 7 October 2005. In its comments Gas Natural proposed further adjustments which it considered had been overlooked by Endesa. On 4 November 2005 a copy of those proposed adjustments was sent to Endesa, which made known its observations on them on 9 November 2005.

28 On 15 November 2005 the Commission adopted the decision declaring the lack of Community dimension (Case COMP/M.3986 — Gas Natural/Endesa) which is the subject of this action ('the Decision').

29 With regard to the national procedure for control of concentrations, the Spanish Minister for the Economy decided on 7 November 2005 to launch the 'second phase' of that procedure, by sending the file from the Servicio de Defensa de la Competencia (Competition Service, 'the SDC') to the Tribunal de Defensa de la Competencia (Competition Court, 'the TDC').

30 On 20 December 2005 the Comisión Nacional de la Energía (National Energy Commission, 'the CNE') issued its opinion on the concentration, in which it recommended that the concentration should be authorised subject to certain conditions.

31 On 5 January 2006 the TDC issued its opinion, in which it recommended that the concentration should be prohibited.

32 On 3 February 2006 the Spanish Council of Ministers authorised the concentration subject to certain conditions.

33 On 21 March 2006 Commercial Court No 3, Madrid suspended the concentration.

Procedure

34 Endesa brought the present action by application lodged at the Registry of the Court of First Instance on 29 November 2005. By means of a separate application lodged on the same day, the applicant requested that its action be dealt with under an expedited procedure in accordance with Article 76a of the Rules of Procedure of the Court of First Instance.

35 By a separate document lodged at the Registry of the Court of First Instance on 29 November 2005 the applicant submitted an application both for suspension of operation of the Decision and for a ruling that the Commission should call on the Spanish competition authorities to suspend all national procedures.

36 By letters lodged at the Registry of the Court of First Instance on 2 and 9 December 2005, Gas Natural and the Kingdom of Spain applied for leave to intervene in support of the defendant under Article 115(1) and (2) of the Rules of Procedure.

37 Both applications for leave to intervene were served on the parties, in accordance with Article 116(1) of the Rules of Procedure.

38 By letter lodged at the Registry of the Court of First Instance on 15 December 2005, the applicant requested that certain information in the documents in the case should not be disclosed to any intervening parties under the second sentence of Article 116(2) of the Rules of Procedure.

39 On 15 December 2005, the Third Chamber of the Court of First Instance, to which the case was assigned, decided to grant the application for an expedited procedure.

40 By orders of 16 December 2005 the President of the Third Chamber of the Court of First Instance granted Gas Natural and the Kingdom of Spain leave to intervene and reserved the decision on the merits of the request for confidentiality.

41 By letters lodged at the Registry of the Court of First Instance on 3 and 4 January 2006, respectively, Gas Natural and the Kingdom of Spain raised objections to the confidential treatment of certain information in the documents in the case which had been sent to them.

42 By letter lodged at the Registry of the Court of First Instance on 11 January 2006 the applicant withdrew the request for confidentiality in respect of Gas Natural as regards the report prepared by Deloitte, SL, annexed to the application.

43 Gas Natural and the Kingdom of Spain lodged their statements in intervention on 12 and 13 January 2006 respectively.

44 On 19 January 2006 the Commission lodged its defence.

45 By order of 24 January 2006 the President of the Third Chamber of the Court of First Instance partially granted the request for confidentiality lodged by the applicant, ordered that the interveners should be sent a non-confidential version of all the documents in the case and requested them to submit further observations relating to those documents at the hearing. It also reserved the costs.

46 By order of 1 February 2006 (T-417/05 R *Endesa* v *Commission*, not published in the ECR), the President of the Court of First Instance, considering that the applicant had not established that it was at risk of suffering serious and irreparable harm in the absence of interim measures, dismissed the application for such measures and reserved the costs.

47 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure, requested the parties to answer a number of written questions. The parties complied with those requests within the prescribed time-limits.

48 The oral arguments of the parties and their answers to the oral questions were heard at the hearing on 9 March 2006.

Forms of order sought

49 Endesa claims that the Court should:

— declare its application admissible;

— annul the decision;

— order the Commission to pay the costs.

50 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs, including those relating to the interlocutory proceedings.

51 The Kingdom of Spain contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

52 Gas Natural contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Law

53 In support of its action, the applicant puts forward five pleas: (i) procedural irregularities, (ii) reversal of the burden of proof and failure to state reasons, (iii) failure to use the accounts drawn up in accordance with the IAS/IFRS, (iv) rejection of proposed adjustments, and (v) infringement of the criteria set out in the Notice, lack of analysis and failure to state reasons, and misuse of powers.

First plea: procedural irregularities

First part: adoption of decisions on the requests for referral prior to adoption of the Decision

— Arguments of the parties

54 Endesa maintains that it is clear from the Regulation that any decision based on Article 22 of that regulation must relate to a concentration which complies with the thresholds laid down in one or more national rules and has no Community dimension. Thus the Article 22 mechanism allows the Commission to have competence with regard to concentrations which should not, in principle, fall within its competence.

55 It follows that, under Article 22 of the Regulation, the absence of a Community dimension is an essential pre-condition for a referral decision. Therefore, according to Endesa, since it had formally requested the Commission to adopt a position on the Community dimension of the concentration, the Commission had a choice between rejecting the request without initiating a procedure because it considered it to be manifestly unfounded, or to initiate a procedure and give a formal ruling on which authority was the competent authority before deciding on the requests for referral. It adds that the fact that the time-limit for ruling on requests for referral is laid down in the Regulation (10 working days after the expiry of the period set for the national authorities to join one or more requests) does not justify reversing the logical order for examination by the Commission. Since the Regulation does not set out any procedural steps for determining the authority, only steps concerning actual competence (through the Article 22 rules on referral), the time-limit laid down for the latter steps should apply by analogy to the former. If the Commission did not have all the information necessary in order to take a decision and it needed to ask for more information, its request for information should have automatically suspended

the time-limit by which it had to take its decision and, necessarily, the time-limits for adopting all the measures resulting from that time-limit, including the decision based on Article 22.

56 Endesa maintains that in the present case 38 days elapsed between the first request for referral and the Commission decision to reject the requests of the Italian Republic and the Portuguese Republic. By adopting the decisions on referral before determining the national or Community dimension of the concentration the Commission prejudged the result of the Decision, although it did include a purely formal reservation on this point in the Decision. That is clear from the grounds of the Decision on the requests for referral, which states in particular that the Commission is not the authority best placed to give a ruling on the concentration in question. Regardless of the basis for that statement, it is clear that it provides a premature judgment on at least one of the assessments which the Commission is required to make as part of the examination of a concentration with a Community dimension, namely the assessment of any requests for referral based on Article 9 of the Regulation.

57 The Commission, supported by the interveners, argues that this plea is simply irrelevant, that there is no similarity between the situation of a Member State which submits a request under Article 22 and a situation in which an undertaking requests the Commission to adopt a position on its own competence, and that the decisions taken on the requests submitted under Article 22 did not prejudge the questions concerning Community competence since the Commission made an express ruling on those requests without prejudice to that aspect.

— Findings of the Court

58 Endesa maintains that the Decision should have been adopted before the decision on the requests for referral under Article 22 of the Regulation and that the absence of a Community dimension constituted an essential pre-condition for a referral decision.

59 Article 22(1) of the Regulation provides that '[o]ne or more Member States may request the Commission to examine any concentration ... that does not have a Community dimension within the meaning of Article 1 but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request. ...'

60 It should be remembered that on 19 September 2005 Endesa requested the Commission to give a ruling on whether it was competent to examine the concentration. On 20 September 2005 the Portuguese competition authority requested the Commission to agree to examine the concentration on the basis of Article 22 of the Regulation. After the Commission sent that request for referral to the other Member States the Italian competition authority informed the Commission on 7 October 2005 that it wished to join the request of the Portuguese competition authority. The Commission rejected those requests for referral on 27 October 2005, on the grounds that it had not been demonstrated that the concentration threatened to affect competition in Portugal and Italy and that the Commission was in a better position to assess such effects.

61 In that regard it should be noted, on the one hand, that the irregularity claimed by the applicant does not concern the Decision but merely the decisions of 27 October 2005 on the requests for referral, which are not the subject of this action. The claim therefore in any event has no bearing on the issue.

62 It should be observed, moreover, that, as the Commission maintains, the legal consequence of the applicant's arguments is unclear. If those arguments were accepted, any decision, including a decision declaring that the concentration had a Community dimension, adopted after the decisions of 27 October 2005 on the requests for referral would be affected by the alleged irregularity and could therefore in turn be annulled on the same grounds as those relied on by the applicant. Thus, any decision taken by the Commission on Endesa's request after that date, even if it were favourable as regards that request, would have to be annulled.

63 On the other hand, the applicant has not demonstrated how the decisions of 27 October 2005 on the requests for referral prejudged the question of Community competence, since the decisions on the requests for referral on the contrary expressly state that they were adopted without prejudice to an assessment of the Community dimension of the proposed concentration.

64 Moreover, the Commission cannot be criticised for deciding on the requests for referral before deciding on the Community dimension. Article 22(3) of the Regulation requires the Commission to take a decision on a request for referral within a period of 10 days and provides that if no decision is taken an implicit decision agreeing to referral will exist. The Commission is therefore required to give a ruling on the referral decision without delay. In those circumstances, if it was required to give a ruling beforehand on the Community dimension it would have had to do so within a period of less than 10 days, so it would not have been in a position to examine the question of the Community dimension of the proposed concentration with all due care.

65 Far from damaging Endesa's interests, on the contrary, the fact that the Commission carried out an examination of the Community dimension and did not adopt the Decision until after it adopted the decisions of 27 October 2005 on the requests for referral, therefore meant in this case that the decision on the Community dimension was based on a careful examination of all the relevant information.

66 Moreover, the applicant's argument that the time-limit laid down for a ruling on the requests submitted under Article 22 of the Regulation was suspended, by analogy, until the issue of the Community dimension of the concentration had been decided must be rejected. There is nothing in the Regulation to indicate that the time-limit for a ruling on a request submitted under Article 22 is suspended in those circumstances. In the case of time-limits which produce legal effects, any ground for suspension should be expressly provided for. In that regard, it is appropriate to note

the importance of ensuring control of mergers within deadlines compatible with both the requirements of sound administration and the requirements of the business world (Case C-170/02 P *Schlüsselverlag J.S. Moser and Others* v *Commission* [2003] ECR I-9889, paragraph 34).

67 For those reasons the first part of the first plea must be rejected.

Second part: lack of transparency and infringement of the rights of the defence

— Argument of the parties

68 Endesa observes that the Regulation does not lay down any specific procedure for establishing the Community dimension of a concentration. Therefore, in reply to Endesa's formal request for a ruling determining the authority competent to deal with the concentration, the Commission should have given a clear indication of what procedure it was going to follow, which would have provided a minimum of legal certainty. Endesa expressly requested the Commission at the start of the procedure to inform the parties of the rules governing that procedure, but no account was taken of that request.

69 The procedure followed by the Commission also lacked transparency, since the Commission did not make clear to Endesa precisely which documents had been disclosed to Gas Natural, nor were the arguments which Gas Natural submitted to the Commission communicated in full. Above all, although the SDC intervened as a party to the procedure, Endesa was not informed or even given notice of the observations which the SDC submitted, despite the express and repeated requests it made in its letters of 23 September and 10 and 12 October 2005.

70 The confusion and lack of transparency in the rules of procedure applied constituted a flagrant infringement of the rights of the defence. The same applied with regard to the fact that Endesa's documents were sent to the SDC without its permission being sought, apart from the initial statement, which was sent directly to the SDC by the applicant at the Commission's request.

71 The Commission, supported by the interveners, maintains that Endesa's participation in the procedure was quite sufficient to protect its interests.

— Findings of the Court

72 With regard, first, to the complaint that the Commission did not inform the applicant about the relevant procedure, it should be noted that the Regulation does not lay down any specific procedure for establishing the Community dimension of a concentration. Also, the applicant has not shown how that failure to inform could affect the legality of the Decision.

73 In any event, the fact that the Commission did not inform the applicant about the procedure whereby it intended to examine whether or not the concentration had a Community dimension would only affect the legality of the decision adopted at the end of that procedure if it led to infringement of the rights of the defence. However, as can be seen from the following considerations that was not so in this case.

74 With regard, secondly, to the applicant's complaint that the Commission did not make clear to Endesa precisely which documents had been disclosed to Gas Natural, it should be stated that the applicant does not explain how that fact could have

adversely affected its rights or influenced the content of the Decision. Moreover, neither the applicant's rights of defence nor its right of access to the case file require that it should also be informed that other persons have had access to certain information on that file. In those circumstances the complaint must be rejected.

75 With regard, thirdly, to the complaint that the Commission did not inform the applicant fully of the arguments submitted by Gas Natural, it should be noted first that the Commission acknowledges that certain confidential information was omitted. It should also be observed that, as the Commission points out, the applicant does not provide any evidence that it requested access to information considered to be confidential. Lastly, and more particularly, the applicant does not give any indication that such information would have been useful for its participation in the procedure, either because it was information referred to in the Decision or because it was information that would establish the Community dimension of the concentration. Moreover, since the difference between Endesa and the Commission related in particular to the calculation of Endesa's turnover and not that of Gas Natural, Gas Natural's confidential information seems to have no relevance in that regard. The complaint must therefore be rejected.

76 As regards, fourthly, the complaint that the Commission did not inform the applicant fully of the arguments submitted by the SDC, it is clear from case-law (see, by analogy, Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389, paragraph 33), that correspondence with the Member States constitutes in principle internal documents which must not be disclosed to persons taking part in the procedure. Also, according to Article 17(3) of Regulation No 802/2004, the right of access to the file does not extend to correspondence between the Commission and the competent authorities of the Member States. In any event, the fact remains that the applicant does not state what information sent by the SDC was used by the Commission or might have affected its rights or influenced the Decision. The complaint is therefore unfounded.

77 Lastly as regards, fifthly, the applicant's complaint that the Commission disclosed Endesa's documents to the SDC without asking its permission, suffice it to note that Article 19(2) of the Regulation provides that the Commission is required to carry out the procedures set out in the Regulation in close and constant liaison with the competent authorities of the Member States, and that Article 19(1) provides that the Commission is required to transmit to the competent authorities of the Member States copies of notifications within three working days and, as soon as possible, copies of the most important documents lodged with or issued by the Commission pursuant to the Regulation. In any event, it should be noted that the applicant has not shown how the disclosure of documents to the SDC affected the legality of the Decision. In those circumstances, the complaint cannot be accepted.

78 For those reasons, the second part of the first plea must be rejected.

Third part: failure to suspend the national procedure

— Arguments of the parties

79 Endesa contends that during the course of the procedure to determine the competent authority the Commission should have asked for suspension of the national procedure that was going on in parallel before the Spanish competition authorities and before the regulatory authorities in Spain. It considers that the fact that such suspension was not asked for constitutes a serious procedural irregularity.

80 Endesa maintains that suspension was required by virtue of Article 21(3) of the Regulation, which provides that no Member State is to apply its national legislation on competition to any concentration that has a Community dimension, and by reason of the general duty of cooperation contained in Article 10 EC. Moreover, it is necessary to take account of the fact that if, in order to prevent parallel procedures, Article 22 of the Regulation requires all national time-limits to be suspended until the Commission has decided on its competence, the same logic should have been applied, after it was found that there was a lacuna in the Regulation, as regards the decision on whether or not the concentration had a Community dimension. The Commission should therefore have asked for the national procedures to be suspended.

81 Endesa observes that suspension of examination of the requests for referral until a decision was given concerning the competent authority should have been automatic under Article 22 of the Regulation. The fact that the Decision was adopted in breach of one of the general principles of the system for control of concentrations, namely the 'one stop shop' principle, allowing the avoidance of parallel Community and national procedures, renders the Decision void. Moreover, the fact of obliging Endesa to take action simultaneously before the Community authorities and before the national authorities constituted an infringement of the rights of the defence. Infringement of those rights constitutes a ground for annulment according to settled case-law (Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1988] ECR 5193 and Case T-310/01 *Schneider Electric* v *Commission* [2002] ECR II-4071).

82 The Commission, supported by the interveners, maintains that, irrespective of whether it actually has the powers which the applicant ascribes to it, it was at no point clearly requested by the applicant to use them. Moreover, there can be no obligation to suspend by mere analogy. Also, the right to take part in an administrative procedure does not mean the right to take part in only one administrative procedure.

— Findings of the Court

83 As regards the complaint that the Commission did not ask the Spanish competent authorities to suspend the national procedure, suffice it to say it lacks any relevance in the context of the present action. The applicant has not moreover shown how failure to suspend the national procedure, assuming it was due to unlawful conduct on the part of the Commission, would have affected the legality of the Decision.

84 First, since the applicant bases its complaint regarding failure to suspend national procedures on Article 21(3) of the Regulation and on the general duty of cooperation contained in Article 10 EC, suffice it to say, as does the defendant, that, if appropriate, it is a case of unlawful conduct on the part of the Kingdom of Spain and not on the part of the Commission. The unlawful conduct was not therefore the result of a Commission decision and, in any event, it does not affect the legality of the Decision.

85 Secondly, since the complaint is based on the third subparagraph of Article 22(2) of the Regulation, which requires all national time-limits to be suspended until the Commission has decided on its competence, it should be pointed out that there is no similarity between the situation of a Member State which submits a request for referral under Article 22 and a situation in which an undertaking requests the Commission to adopt a position on its competence, and there can be no obligation to suspend by mere analogy.

86 Thirdly, as regards the applicant's argument that the Decision was adopted without due compliance with the 'one stop shop' principle and the argument that the fact of obliging Endesa to take action simultaneously before the Community authorities and before the national authorities constituted an infringement of the rights of the defence, suffice it to say that the applicant, which itself requested the Commission's

intervention, has not shown to what extent or why it had difficulty in defending its position simultaneously before more than one court nor how that fact could have affected the Decision. It should be noted, moreover, that where there is no Community dimension undertakings must often give notice of concentrations to more than one national authority.

87 For those reasons the third part of the first plea must be rejected.

88 It follows that the applicant's first plea in law is unfounded.

Second plea: reversal of the burden of proof and failure to state reasons

Arguments of the parties

89 Endesa contends that the Commission failed to state reasons, failing to comply with Articles 1, 5 and 21 of the Regulation. Even if the Regulation contains no express provision to that effect, the Commission is required to determine the competent authority because it has exclusive competence to deal with concentrations with a Community dimension (*Schlüsselverlag J.S. Moser and Others* v *Commission*, paragraph 66 above). This exclusive jurisdiction of the Commission requires the latter to determine whether Article 1 of the Regulation applies. In order to do this it must determine and establish the turnover achieved by the undertakings concerned during the most recent accounting year, in accordance with the rules laid down in Article 5 of the Regulation.

90 Endesa contends that the Commission cannot reverse the burden of proof as regards determining the competent authority. Since the Commission has exclusive competence to determine which authority is competent to deal with a concentration it has sole responsibility to verify and, above all, prove the turnover of the undertakings concerned.

91 Contrary to this, the Commission bases the Decision on the fact that Endesa did not provide sufficient evidence to establish the need to use the IAS/IFRS standards and to make a number of adjustments according to the Notice. This ground is unacceptable due to the very nature of the relevant rules governing determination of the competent authority, which are public policy rules. This is a reasoning which runs counter to all logic and the elementary principles of the Community legal system, especially since the Commission would have counted on Endesa's total cooperation and it could have asked it for any additional information it considered relevant. In reality, the Commission spent almost the entire two months of the procedure examining aspects which in the end were not covered in the Decision.

92 By considering that it is for individuals to convince the Commission that it has exclusive competence, the Decision is initiated by a serious failure to state reasons since it is the Commission which is required to establish beyond doubt, either following a complaint or on its own initiative, the matters falling within its competence, within the context of the responsibilities which the Treaty imposes on it as guardian of the Treaty.

93 In that regard, Endesa refers to Case T-87/05 *EDP* v *Commission* [2005] ECR II-3745, in which the Court of First Instance noted, in connection with the application of another notice on concentrations, concerning commitments, that the Commission could not reverse the burden of proof by imposing on the parties an obligation based solely on the Notice and having no legal basis in the Regulation. It

is incumbent on the party concerned to send to the Commission all the information needed for assessing the concentration and incumbent on the Commission to carry out that assessment without reversing the burden of proof.

94 In order to carry out that assessment the Commission has significant procedural instruments, such as the power to request information. The Commission could therefore have called upon independent experts to audit Endesa's accounts if it had considered it was necessary, and it had two months within which to carry out a detailed and exhaustive analysis of the best way to calculate Endesa's 2004 turnover.

95 Moreover, there is nothing in the file lodged with the Commission to show that the information given by Endesa was inadequate. At the end of a procedure during which Endesa cooperated as closely as possible with the Commission it could not be claimed that the information provided was inadequate.

96 The Commission, supported by the interveners, maintains that the discussions which took place during the procedure before it were essentially of a legal nature and that in the Decision it replied to the applicant's arguments not because it considered the applicant bore the burden of proof but because the duty to state the reasons for its decisions includes the obligation to reply to arguments submitted by the parties where they have been rejected.

Findings of the Court

97 Endesa contends that the Commission reversed the burden of proof with regard to determining the authority competent to examine the concentration by basing its

decision on the fact that Endesa did not provide sufficient evidence to establish the need to use the IAS/IFRS accounts and to make a number of adjustments.

98 It should be noted that a concentration is deemed to have a Community dimension where the aggregate turnover of the undertakings concerned exceeds the thresholds laid down in the Regulation. Recital 17 in the preamble to the Regulation states that the Commission is given exclusive competence to apply the Regulation, subject to review by the Court of Justice. Article 1(1) of the Regulation provides that the latter applies to all concentrations with a Community dimension. Therefore, where a concentration has a Community dimension the Commission has exclusive competence to examine it. However, it does not follow automatically that the Commission has exclusive competence to determine whether a concentration has a Community dimension.

99 It should be noted in that regard that the Regulation provides that it is incumbent first of all on the undertakings concerned to make the initial assessment of a concentration's dimension and to determine as a result which authorities should be notified of the planned concentration. Then when, as in the present case, a concentration is notified not to the Commission but to the authorities of one or more Member States, it is for those authorities, in particular in the light of the obligation of loyal cooperation contained in Article 10 EC, and in the light of Article 21 of the Regulation, which provides that the Commission has exclusive competence to examine whether concentrations having a Community dimension are compatible with the corresponding prohibition on Member States applying their national competition law to such concentrations, to check that the concentration referred to them does not have a Community dimension. It is true that in such situations it is always possible for the Commission to decide that, contrary to the opinion of the authorities of the Member States, the concentration does have a Community dimension and falls within its exclusive competence.

100 Moreover, the Merger Regulation makes no specific provision expressly requiring the Commission to ensure on its own initiative that any concentration which is not

notified to it does not actually have a Community dimension. However, it is clear from case-law that, when a complaint is referred to it by an undertaking which considers that a concentration that has not been notified to the Commission has a Community dimension, the Commission is required to decide on the principle of its competence as supervising authority (*Schlüsselverlag* v *Commission*, paragraph 66 above, paragraphs 27 and 28). In that context, in principle, it is for the complainant to prove the merits of its complaint, on the understanding that it is for the Commission, in the interest of sound administration, to conduct a thorough and impartial examination of the complaints made to it and to provide reasoned answers to the complainant's arguments with a view to establishing that the concentration falls within the Commissions exclusive competence.

101 It follows from the above that, contrary to what the applicant contends, the Commission is not in principle required to prove that it is not competent to decide on a concentration which is not notified to it and to show that that concentration does not have a Community dimension, even if a complaint is made to it.

102 In any event, contrary to what the applicant contends, the Commission did not merely find that Endesa had not proved that the concentration had a Community dimension, it actually examined in detail the information concerning the concentration's dimension and concluded that it did not have a Community dimension, refuting the applicant's arguments.

103 It is clear from a reading of the Decision that the Commission clearly explained the reasons why it did not consider it appropriate either to use the IAS/IFRS accounts or to make the proposed adjustments.

104 First of all, regarding the alleged need to use the IAS/IFRS accounts, the Commission stated, first, in paragraph 20 of the Decision that it is clear from Article 1 of the Regulation and from the Notice that the general principle is that turnover must be calculated on the basis of the audited accounts, and that only in exceptional circumstances can the Commission depart from this principle. The Commission then concluded that since it was established, on the basis of the turnover figures given in the audited accounts for 2004, that the company achieved more than two-thirds of its Community-wide turnover in Spain, it was up to Endesa to provide sufficient elements to show the existence of exceptional circumstances which justified the reference to turnover figures different from those indicated in its audited accounts (paragraph 21 of the Decision).

105 The Commission went on to say that Endesa had not provided sufficient such elements (paragraph 23 of the Decision). However, the Commission explained why there are no such exceptional circumstances in the present case and set out the reasons why it was necessary to give preference to the accounts prepared according to generally accepted accounting principles ('GAAP'), refuting the arguments put forward by the applicant.

106 Thus, first, the Commission stated in the Decision, on the one hand, that Endesa was required by law to prepare its official consolidated accounts for 2004 on the basis of GAAP and, on the other hand, that that requirement was in accordance with the Community accounting rules applying at that time. It also states that Endesa was not required to prepare audited consolidated IAS/IFRS accounts until the year beginning 1 January 2005. It adds that Endesa was obliged to prepare IAS/IFRS accounts for 2004 only to allow for a comparison of the new 2005 IAS/IFRS accounts with those of the preceding year, which also explains why Endesa was not required by law to have the IAS/IFRS accounts for 2004 audited. The Commission points out that those accounts are not definitive and may be subject to amendments because the IAS/IFRS according to which the 2005 accounts had to be prepared had not yet been finalised in all respects.

107 Secondly, the Commission explained in the Decision that the objective of measuring the economic strength of undertakings neither requires nor permits the Commission, in an individual case of application of Articles 1 and 5 of the Regulation, to enter into a general assessment of the merits of the different approaches to accounting provided for in Community law or in the laws of the Member States, in particular when audited accounts exist to only one such standard and that standard was the one required by both national and Community law at the material time. The Commission stated that this would be at variance with the equally valid objective of applying simple and objective conditions for determining Commission competence in merger cases, as well as with the general principle of legal certainty. The Commission added that its role is confined to examining specific adjustments which are required by the terms of Article 5 of the Regulation (paragraph 25 of the Decision).

108 The Decision also states that the fact that the Community legislator envisaged that the IAS/IFRS adopted under Regulation No 1606/2002 would result in a true and fair view of the financial position of an undertaking, does not imply, *ipso facto*, the technical superiority of such standards, since that requirement to give a true and fair view is also a criterion contained in the Community legislation governing the previous national accounting standards (paragraph 26 of the Decision).

109 Finally, the Commission stated in the Decision that it does not agree that in the present case use of the IAS/IFRS figures would be preferable in order to ensure a uniform application of the rules on the control of concentrations. It maintains that the use of the unaudited IAS/IFRS figures in this case would create a disparity of treatment with regard to all the other cases in which the Commission referred to the 2004 audited accounts drawn up on the basis of the national standards.

110 In the light of the foregoing, it must be held that the Commission did not impose on the applicant the burden of proving the Community or national dimension of the concentration but, on the one hand, it examined the dimension of that

concentration and stated the reasons why it was appropriate in this case to take as the basis the accounts prepared according to GAAP (see, by analogy, *EDP* v *Commission*, paragraph 93 above, paragraph 73) and, on the other hand, it established that the applicant had not put forward any arguments to challenge that analysis.

111 The same applies as regards secondly, the alleged need to make a number of adjustments. It is true, both as regards the 'pass through' adjustment and the gas swaps adjustment, that the Commission again stated in the Decision (paragraphs 32 and 38) that Endesa had not provided sufficient elements to convince the Commission that such an adjustment to its audited accounts was justified under the terms of Article 5 of the Regulation and the Notice. However, the Commission, whilst refuting the applicant's arguments, set out the reasons why it did not consider it appropriate to make the proposed adjustments without reversing the burden of proof.

112 Thus, first, as regards the 'pass through' adjustment, the Commission noted in the Decision (paragraphs 30 to 36) that the Notice does not refer to a concept of 'passing through' (parts) of amounts derived from the sale of products and the provision of services. It added that the Spanish electricity distribution companies cannot be treated in the same way as undertakings acting merely as intermediaries, whose turnover consists solely of the amount of commission they receive. The Commission also observed that the risk of non-payment by the final customers of the regulated price for the supplied electricity is borne by the distribution companies and not by the transmission system operator, the electricity generators, or the pool.

113 Secondly, as regards the gas swaps adjustment, the Commission considered in the Decision (paragraphs 37 to 40) that those swaps should be regarded as operations whereby Endesa sells and purchases the corresponding amount of gas, as is shown by the fact that there are separate invoices for these transactions. It added that the

fact that the sale price and purchase price is the same does not have any relevance in this regard, but only means that Endesa does not realise any margin from those operations considered together.

114 It follows that the Commission did not impose on the applicant the burden of proof concerning those adjustments either. On the contrary, it examined the proposed adjustments and stated the reasons why it considered it should not make them.

115 It should also be noted that the Commission cannot be required to ensure on its own initiative in every case that the audited accounts submitted to it give a true and fair view of the position and to carry out an examination of all the adjustments that may be envisaged. It is only when its attention is drawn to specific problems that the Commission must examine them, as it has done in this case.

116 Finally, the applicant contends, thirdly, that there is nothing in the file lodged with the Commission to show that the information it provided was inadequate. It also maintains that at the end of a procedure which lasted almost two months, during which it cooperated as closely as possible with the Commission and during which the Commission could have asked it for any additional information it considered relevant, it could not be claimed that the information provided was inadequate.

117 In that regard, it should simply be noted that the Commission by no means merely stated in the Decision that the information provided by Endesa was inadequate. Also, as the Commission observes, the discussions which took place during the procedure before it were essentially of a legal nature and concerned interpretation of the relevant provisions. It is clear from the reasons given in the Decision for

rejecting consideration of the IAS/IFRS accounts and the proposed adjustments that the Commission did not criticise the applicant for not providing it with the necessary factual information, but found that the applicant's arguments were unconvincing.

118 In any event, since Endesa contended that it was appropriate not to use its audited accounts or to make adjustments which did not correspond to usual practice and were not provided for in any relevant instrument, it was in the situation of a complainant within the meaning of *Schlüsselverlag J.S. Moser and Others* v *Commission*, paragraph 66 above. In those circumstances, it was up to Endesa to clarify its arguments and demonstrate their merits, taking into account in particular the need for speed, which is a feature of procedures for the control of concentrations. There is much less reason for the applicant to criticise an alleged reversal of the burden of proof since it was attempting to challenge its own accounting and should therefore have had an accurate knowledge of all the relevant elements.

119 It follows from the above considerations that the second plea is unfounded.

Third plea: failure to use the accounts prepared in accordance with the IAS/IFRS

120 The applicant divides its plea into three parts: failure to use the IAS/IFRS as the only accounting standards in force, precedence of the IAS/IFRS and, finally, errors of law and manifest errors of assessment regarding the rejection of the accounts prepared in accordance with the IAS/IFRS.

First part: failure to use the IAS/IFRS as the only accounting standards in force

— Arguments of the parties

121 Endesa maintains that the Commission did not give a ruling on the fact that on the day the bid was announced, 5 September 2005, the only accounting standards in force were the IAS/IFRS. Following the replacement of all the national accounting systems by the IAS/IFRS the only consolidated accounts that could be taken into consideration in order to determine the Community dimension of a concentration were those prepared in accordance with the accounting standards in force.

122 Endesa observes that the Community dimension of a concentration must be determined on the date on which the obligation to provide notification arises. In the present case, the obligation to provide notification arose on the date the bid was announced. According to Article 5 of the Regulation, turnover comprises the amounts derived in the preceding financial year from the sale of products and the provision of services falling within ordinary activities. The reference to activities in the preceding financial year is only a formal convention which the legislature used since it is impossible to take into account the turnover in the financial year that is current at the time the concentration is notified. The fact that it is necessary to refer for practical reasons to the preceding financial year does not mean that repealed legal norms or former accounting standards must or can be applied.

123 In order to determine turnover for the purposes of establishing the Community dimension of the concentration it is therefore necessary to consider that the only valid accounting standards were those in force at the date on which Gas Natural's bid was announced. Since the reconciled accounts existed on that date and had also

been published and were definitive, the Commission had to make exclusive use of those accounts when it assessed the Community dimension of the concentration.

124 The Decision did not take account of the fact that calculation of turnover at European level follows very different principles from those existing in other legal systems, such as that of the United States. In that country competence in the area of concentrations is also determined on the basis of the results obtained during the preceding financial year, but no account is taken of what has happened since the end of that financial year. The Community legislature, on the contrary, preferred to use the criterion of the actual economic strength of the undertakings at the time of notification.

125 The Commission, supported by the interveners, maintains that reliance on the fact that the new accounting rules were in force in September 2005 is merely intended to conceal the fact that the 2004 accounts were required to be prepared according to GAAP.

— Findings of the Court

126 Endesa contends that the Commission did not take into account the fact that on the day the bid was announced the only accounting standards in force were the IAS/IFRS, which renders the Decision void.

127 It should be noted that according to Article 5 of the Regulation '[a]ggregate turnover ... comprise[s] the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings' ordinary activities ...'.

128 As the applicant accepts, the Regulation refers necessarily, for practical reasons, to the turnover in the preceding financial year. The reason for this is that there are normally audited accounts only for the last complete financial year, the accounts for more recent periods lack the safeguards provided by audited accounts.

129 In this case, it is agreed that the accounts for the preceding financial year, within the meaning of Article 5 of the Regulation, are those for 2004. It should also be noted that an undertaking having an obligation to prepare annual accounts that are to be audited only has one sort of official accounts, namely those which have been prepared and audited in accordance with the relevant law. It cannot be denied that the applicant's annual accounts for 2004, which were required to be audited, had to be prepared according to Spanish GAAP. If the applicant had submitted the accounts for 2004 prepared according to IFRS it would also not have complied with its legal obligations in Spain. Under Article 4 of Regulation No 1606/2002, the IFRS were not applicable and obligatory until 2005. 'Reconciliation' of the accounts for 2004 with IFRS principles is provided for under Regulation No 707/2004 in order to facilitate the transition between the old and the new standards by providing shareholders and investors with a reference point with which to compare the 2005 accounts, the first accounts prepared according to the new standards. Moreover, the 'reconciled' accounts for 2004, prepared for comparative purposes only, do not provide the same safeguards as the official accounts prepared according to GAAP and subject to audit. The applicant's argument that the new IFRS accounting rules were in force on the date the bid was announced, 5 September 2005, is therefore irrelevant.

130 It should also be observed that the applicant's arguments would mean that whenever changes took place in the accounting rules the official audited accounts would be set aside and fresh accounts would need to be prepared according to the principles that were applicable at the time the obligation to provide notification arose, which is neither reasonable nor prudent since such non-audited fresh accounts do not provide the same safeguards as official accounts subject to audit.

131 The applicant is also wrong to contend that the Commission applied legal rules that had been repealed. In fact, the Commission does not apply any accounting rule but refers, as the Regulation requires it to do, to the accounts of undertakings for the preceding financial year which constitute evidence situated in the past and must be assessed according to the standards that applied to them. In the present case, as the applicant's accounts for 2004 had, as was stated above, to be prepared according to GAAP, the applicant cannot claim that the Commission ignored the temporal scope of the standards in question. As Regulation No 1606/2002 made application of the IFRS compulsory only for accounts from 2005 onwards it is, on the contrary, the applicant's contention that would make that regulation retroactive by applying it to the 2004 accounts. Neither Regulation No 1606/2002 nor Regulation No 707/2004 give any reason to suppose that the Community legislature intended to set aside official accounts prepared according to the national accounting standards in force and to replace them, generally or for the purposes of the Merger Regulation, by reconciled IFRS accounts for 2004, which were prepared for comparative purposes only.

132 As regards, finally, the argument that the Decision did not take account of the fact that turnover is calculated in Europe according to different principles from those existing in other legal systems, it should be noted first of all that the United States system only confirms the need to be able to determine in a rapid and predictable manner whether a concentration should be notified and, if so, to which authority. It should also be observed that if, unlike the system in the United States, the Community system allows account to be taken of events that have taken place in the life of the undertaking since the end of the last accounting year, such as transfers or acquisitions of undertakings during the current financial year, that premise is designed, in principle, as is clear from the Notice, to take into account changes that have taken place in the financial position of the undertaking and not to conduct a full review of the accounting treatment of a financial position which has remained stable. It would run counter to the requirements of legal certainty and speed pursued by the Community legislature to make applicability of the Community Merger Regulation dependent in every case on a complete review by the Commission of the accounting systems of the undertakings concerned.

133 Consequently, the first part of the third plea must be rejected.

Second part: precedence of the IAS/IFRS

— Arguments of the parties

134 Endesa contends that the Commission should at least have established which accounting standards, the IAS/IFRS or GAAP, made it possible to calculate as accurately as possible the actual turnover for the 2004 accounting year. It adds that in order to do so the Commission should simply have analysed the characteristics of the various accounting standards and of the two accounting statements at its disposal, both of which were valid, lawful and definitive.

135 According to Endesa, if that analysis had been made it would necessarily have led to preference being given to the IAS/IFRS accounts, since those accounts give precedence to substance over form, unlike the standards adopted according to GAAP, which do precisely the opposite: some transactions, although devoid of actual economic content, are recorded in the accounts on the basis of purely formal elements.

136 Endesa notes that the statement of reasons in the Decision (paragraph 20) start with an explanation that the general principle is that the turnover must be calculated on the basis of the undertaking's audited accounts and that only in exceptional circumstances can the Commission depart from this principle. This reasoning is manifestly incorrect. Not only does it appear to suggest that the Commission's obligation to determine the Community dimension correctly is restricted to merely examining the audited accounts of the undertakings concerned, it is also based on a deliberately incomplete interpretation of the Commission's own practices and of the Notice by attaching the same importance to audited accounts as to other definitive accounts. In the Decision the Commission refers to paragraph 26 of the Notice but

overlooks in the statement of reasons the fact that the Notice refers to audited accounts but also refers to 'other definitive accounts', on the understanding that it is only in exceptional circumstances that accounts may be used that are not definitive.

137 Endesa contends that the Decision represents an unacceptable refusal on the part of the Commission to accept its obligations under Community law, which requires it to exercise its exclusive competences without sheltering behind presumptions as to the supposed conformity of audited accounts. This presumption, which is an ad hoc creation of the Commission, is not supported by any of the provisions of the Regulation, which not only avoids any reference to whether or not the accounts are audited, but also contains a specific and unconditional obligation on the Commission to determine the actual turnover of the undertakings concerned in every case. The reference to audited accounts appears only in the Commission Notice, which cannot in any event alter the content or scope of the Regulation. The slightest conflict between the two is subject to the hierarchy of norms (Case C-266/90 *Soba* [1992] ECR I-287; Case C-322/93 P *Peugeot* v *Commission* [1994] ECR I-2727; and Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169). In the present case, however, the Notice places audited accounts and other definitive accounts, that is to say, accounts relating to a full tax year which has ended, on the same level.

138 Endesa also observes that the Commission's position on this subject conflicts with its own practice. Thus, in a previous case (M.705 Deutsche Telekom/SAP) the Commission agreed to use the most recent unaudited accounts because they differed significantly from the audited accounts and were the only accounts which established the Community dimension of the concentration. The Commission also agreed to the use of unaudited accounts in Case M.2340 EDP/Cajastur/Caser/Hidroelectrica del Cantabrico.

139 Endesa maintains that the Commission committed a further error in considering that Endesa's consolidated accounts prepared according to IAS/IFRS, notified to the market five months before the bid was announced, did not constitute definitive accounts. The Commission did not take into consideration the fact that the IAS/

IFRS accounts were a reconciliation of the 2004 audited accounts with the new accounting standards, nor the fact that all listed undertakings submitted to the Comisión Nacional del Mercado de Valores (National Securities Market Commission (CNMV)) their 2004 consolidated accounts that had been reconciled with the IAS/IFRS ('reconciled accounts') and all the interim reports for 2004, nor the fact that it is the latter accounts that the market takes for reference purposes.

140 Thus, according to Endesa, the Commission not only infringed the rules on competence by introducing into the Regulation a non-existent presumption in favour of audited accounts, it also committed a manifest error of assessment in considering that the IAS/IFRS accounts were not definitive. Moreover, the statement of reasons contains contradictions in this regard since, on the one hand, the Commission suggests that the IAS/IFRS accounts should not be taken into account because they are not audited (overlooking the reference in paragraph 26 of the Notice to 'other definitive accounts') and, on the other hand, it states that the reason they are rejected is that they are not definitive. The Decision should therefore be annulled as a result of those defects and since it does not determine which 2004 consolidated accounts are closest to the requirements of Article 5 of the Regulation.

141 The Commission, supported by the interveners, maintains that the applicant starts from the incorrect premise that the GAAP and IAS/IFRS accounts for 2004 have the same status, and adds that the IAS/IFRS accounts for 2004 submitted by the applicant cannot be regarded as definitive.

— Findings of the Court

142 As regards, first, the allegedly more appropriate nature of the applicant's reconciled accounts, it should be noted first of all that the Commission set out in paragraphs 19 to 27 of the Decision the reasons why the applicant's turnover should be calculated

on the basis of the official accounts prepared according to GAAP rather than on the basis of the reconciled accounts. As stated above, the Commission was correct to point out in that regard that Endesa was required by law to prepare its official consolidated accounts for 2004 according to GAAP, that that requirement was in accordance with the Community accounting rules applying at that time and that the reconciled accounts were to be prepared for comparative purposes only.

143 In addition, as is stated in paragraphs 25 and 26 of the Decision, the applicant's argument that the IFRS accounting principles give a more accurate view of the economic strength of undertakings cannot be accepted.

144 On one hand, the objective of measuring the economic strength of undertakings does not oblige the Commission, in an individual case in which Articles 1 and 5 of the Regulation apply, to make an overall assessment of the merits of the various accounting approaches provided for by Community law, in particular where accounts exist which have been audited according to just one of those standards where the standard concerned was precisely the one required by both national and Community law applying at the relevant time.

145 On the other hand, the applicant's contention that the IFRS provide a more accurate picture of the financial position since they give precedence to substance over form, which is the opposite of GAAP standards, is by no means established. As stated in paragraph 26 of the Decision, the fact that the Community legislature envisaged that the international accounting standards adopted under Regulation No 1606/2002 should result in a true and fair view of the financial position of an undertaking does not imply *ipso facto* the technical superiority of such standards for the purpose of Article 5 of the Merger Regulation in comparison with the accounting standards applicable under the laws of the Member States up to 1 January 2005. Regulation No 1606/2002, adopted on the basis of Article 95(1) EC, constitutes a harmonisation measure and does not contain any value judgments with regard to the various national standards. Moreover, as Gas Natural stated, a number of Spanish

accounting standards applying GAAP provide that substance must always take precedence over form and the general accounting plan focuses on the idea of a 'true and fair view', as a corollary to a 'mechanism for expressing the economic reality of transactions conducted'.

146 As regards, secondly, the applicant's argument that its reconciled accounts should be regarded as 'other definitive accounts' within the meaning of paragraph 26 of the Notice, it should be noted that, as is clear from that Notice, the turnover of the undertakings concerned must be calculated on the basis of reliable, objective and easily identifiable figures. Although paragraph 26 of the Notice states that 'as a general rule therefore the Commission will refer to audited or other definitive accounts ...' and 'is, in any case, reluctant to rely on management or any other form of provisional accounts in any but exceptional circumstances', that does not mean that the Notice places audited accounts on an equal footing with 'other definitive accounts'. Paragraph 26 of the Notice cannot be interpreted as offering a number of options from which it is possible to choose freely, but as being designed to cover particular situations in which there are no audited accounts for the preceding year. Paragraph 27 of the Notice moreover only refers to the most recent audited accounts and not to 'other definitive accounts'. In the present case, it is settled that there are audited accounts for financial year 2004 and that there is therefore no need to refer to other definitive accounts.

147 In any event, the applicant has not managed to show that the reconciled accounts it submitted to the Commission are definitive accounts.

148 In that regard, it is sufficient to note the content of Endesa's comments which accompanied its reconciled accounts when they were sent to the CNMV on 5 April 2005. In the part headed 'General considerations' Endesa states that '[t]he consolidated balance sheets and profit and loss accounts for 2004, prepared according to the IAS/IFRS assessment and classification criteria are pro forma

statements which are used only for purposes of comparison with those of 2005, the first financial year for which accounts will be prepared according to IFRS' (p. 3, paragraph 1). Endesa also mentions that there are several exceptions during the initial application of IAS/IFRS standards (p. 13). Finally, in Legal Notice II (p. 34), Endesa explains that the International Accounting Standards Board (IASB) may publish new standards applicable from 1 January 2005, that there is not yet a competent authority which will ensure correct application of the standards and which can therefore be consulted in that connection, that changes likely to result from the foregoing and from developments in practices in that sector may also influence the way in which it interprets the standards and that therefore amendments may be made to the information supplied before their publication (in 2006) by way of comparison in the annual accounts for 2005.

149 In those circumstances, there is reason to consider that the reconciled accounts produced by Endesa cannot be regarded as 'definitive' accounts within the meaning of the Notice.

150 As regards the two cases relied on by the applicant in which the Commission agreed to use the most recent unaudited accounts, suffice it to say that in both those cases the concentration had been notified at the beginning of the year (the first in February 1996 and the second in February 2001) and that the undertakings concerned did not yet have audited accounts for the preceding year. Consequently, a decision had to be taken to use either the audited accounts for an earlier year (1994 and 1999, respectively) or the accounts for the preceding year that were already closed, even though they had not yet been audited. In both cases, moreover, the earlier accounts would not have reflected significant changes in the economic activity of the undertakings that had taken place during the preceding financial year and their use would have infringed Article 5 of the Regulation. Hence, the particular facts in those two cases differ considerably from the circumstances of the present case.

151 It is clear from the foregoing that the accounts prepared in accordance with IAS/IFRS submitted by Endesa cannot be regarded as definitive, so the argument that the Commission should have given them preference cannot in any event be accepted.

152 It follows from the foregoing considerations that the second part of the third plea must be rejected.

Third part: errors of law and manifest errors of assessment affecting rejection of the reconciled accounts

— Arguments of the parties

153 Endesa relies, first, on the manifestly erroneous nature of the grounds on which the Commission rejected its arguments concerning the appropriateness of using the reconciled accounts, second, the existence of exceptional circumstances in the present case which justify in any event use of the reconciled accounts and, third, the manifestly erroneous nature of the grounds of the Decision according to which the use of reconciled accounts is allegedly incompatible with the objective of simplicity, the general principle of legal certainty and the requirement of uniform application of the Regulation.

154 Endesa contends first of all that the reasoning adopted in paragraph 24 of the Decision is incomplete because it fails to take account of the fact that, according to IFRS 1 adopted by Regulation No 707/2004, the date for the transition to IAS/IFRS is 1 January 2004. More specifically, the Community legislature laid down an obligation for listed undertakings to prepare consolidated and reconciled accounts by 2004 at the latest. In Spain, the CNMV set 31 August 2005 as the final date for

submitting reconciled accounts for 2004. Endesa complied with this on 5 April 2005. Consequently, a coherent and complete interpretation of the intention of the Community legislature, in contrast with the partial reading effected by the Commission, gives reason to conclude that the 2004 accounting year was a transitional period during which two accounting standards co-existed as a result of a statutory requirement.

155 Endesa then notes that the Commission states, also in paragraph 24 of the Decision, that the IAS/IFRS accounts for 2004 could be subject to amendments and were for comparative purposes only, and the absence of a statutory obligation to audit those accounts is evidence of this. However, the Commission seems to overlook the fact that all an undertaking's accounts are for comparative purposes and the IAS/IFRS accounts for 2004 were prepared under an obligation laid down by Community law. The absence of an obligation to audit those accounts stems from the specific features of a transitional period. It would be absurd if the Community or national legislature were to add to the costs of the transition of accounts the costs of conducting two audits for the same financial year, since the 2004 IAS/IFRS accounts constitute a reconciliation with the audited accounts for the same accounting year, with the same accounting and legal value.

156 As for the assertion that the IAS/IFRS could undergo amendments until the end of the 2005 financial year, which, according to the Decision, would prevent them from being regarded as definitive, this shows a misunderstanding of the accounting standards laid down by the Community legislature and of the implementing regulations which the Commission itself adopted during the last few months. On one hand, the new accounting system was applicable from 1 January 2005. The fact that some of the accounting rules of the new system were adopted by the Commission after the bid was made has no effect on whether the accounts are definitive, since Endesa's reconciled accounts were prepared on the basis of reliable and definitive data, applying the accounting rules used until then to implement the IAS/IFRS. To regard those accounts as not being definitive because other rules were

added later within the new legal framework is as absurd as saying that there are never any definitive accounts because the adaption and development of an accounting system is an ongoing process.

157 On the other hand, the rules recently adopted, with retrospective effect, do not affect Endesa's accounts in any way since those rules only concern the financial sector and the insurance sector, and not the electricity sector. Furthermore, the amendments concerning IAS 39 have no effect on the calculation of turnover since those amendments relate only to the accounting treatment of financial instruments. Moreover, after the date on which Gas Natural announced its bid for Endesa no amendment of the IAS/IFRS that might affect revenue accounting for the 2004 or 2005 financial years took place and none can take place now.

158 Consequently, none of the Commission's arguments provides grounds for considering that the accounts for 2004, consolidated according to IAS/IFRS, are definitive accounts. To defer the use of the IAS/IFRS accounts for 2004 until the end of the 2005 financial year would be manifestly contrary to the intention of the Community legislature, which required the Community accounting standards to be applied from 1 January 2005 and not from 1 January 2006. Hence all the accounting information which listed undertakings were required to disclose to the market during 2005, whether it related to the financial years 2005 or 2004, had to be communicated exclusively according to the IAS/IFRS.

159 Endesa concludes that even if amendments are adopted, since perfecting an accounting system is an ongoing process, the fact remains, as the Commission has acknowledged on several occasions, that '[p]ursuant to Regulation ... No 1606/2002, it is the objective of the Commission to have a stable platform of international accounting standards in place as from 1 January 2005' [recital 4 in the preamble to Commission Regulation (EC) No 2086/2004 of 19 November 2004 amending Regulation No 1725/2003 (OJ 2004 L 363, p. 1), and recital 2 in the preamble to Commission Regulation No 2238/2004 of 29 December 2004 amending Regulation No 1725/2003 (OJ 2004 L 394, p. 1)].

160 As regards paragraph 25 of the Decision, Endesa observes that the Decision does not explain why the Commission could not assess the different accounting methods available. The Commission's position is clearly at variance with paragraph 60 of the Notice, in which the Commission itself states that it is possible to 'adopt different accounting rules, in particular those related to the preparation of consolidated accounts, which are to some extent harmonised but not identical within the Community' and that 'this consideration applies to any type of undertaking concerned by the ... Regulation'. This paragraph of the Notice, although it refers mainly to holding companies, states none the less that the possibility of adopting different accounting standards applies to any undertaking irrespective of the sector to which it belongs.

161 Endesa objects to the assertion, which also appears in paragraph 25 of the Decision, that '[t]he Commission's role, as further described in the Notice on the calculation of turnover, is confined to examining specific adjustments which are required by the terms of Article 5 of the ... Regulation' and considers, on the contrary, that the obligation laid down in Article 5 of the Regulation includes examination of the suitability of the accounts of the undertakings concerned for determining their actual turnover.

162 That assertion made in the Decision is again in manifest contradiction to the Notice, paragraph 26 of which states that 'the Commission seeks to base itself upon the most accurate and reliable figures available'. In the present case, following the harmonisation work carried out by the Community institutions, there were two sets of consolidated accounts for accounting year 2004 and it was necessary to determine which of the two was the most accurate and reliable. In the light of the reports by the undertaking's external auditors, which the Commission made no reference to in the Decision, it is clear that the consolidated accounts prepared according to the Spanish accounting standards distorted to a significant extent the operating revenue of an undertaking in the electricity sector.

163 As regards the technical superiority of Community accounting standards as compared with national standards, about which the Commission expresses doubts in paragraph 26 of the Decision, Endesa observes that in the preparatory documents for Regulation No 1606/2002 the Commission expressly refers to the need to improve, harmonise and render financial information more reliable by going beyond the provisions of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11) and that if that directive had guaranteed information that was as clear and reliable as that required by the new accounting system there would have been no need to introduce that system. In that regard, the Commission did not take into account the opinions of Endesa's external auditors, who explained clearly the differences existing between the results shown in the accounts prepared according to the different accounting standards.

164 Endesa adds that the grounds of the Decision, which state that both the current and the previous Community accounting standards are intended to provide a true and fair view of the financial position of undertakings, disregard the specific differences between partial and complete harmonisation of standards, the basic principles of Community law and most elementary logic. The Commission itself moreover stated that the previous accounting directives 'do not meet the needs of companies that wish to raise capital on pan-European or international securities markets [see paragraph 9 of the Communication from the Commission to the Council and the European Parliament of 13 June 2000, COM(2000) 359 final] and also acknowledged that 'IAS provides a comprehensive and conceptually robust set of standards for financial reporting that should serve the needs of the international business community'.

165 Endesa contends that the Commission is also wrong to consider that the use of unaudited accounts is possible only in exceptional circumstances. That interpretation is neither expressly nor implicitly apparent from the Regulation, which constitutes the only rules that are binding, nor does it accord with the content of

paragraph 26 of the Notice, which states that it is necessary to prove the existence of exceptional circumstances only if management or any other form of provisional accounts are to be used.

166 Even if the Commission's view is accepted, it is appropriate to consider that exceptional circumstances do exist in the present case. On the one hand, the question of the use of one accounting standard rather than another is in itself exceptional. On the other hand, the use of different accounting systems leads to a difference of EUR 4 400 million in Endesa's revenue, which is a rare event concerning few markets, so that the change in accounting system itself should be regarded as an exceptional and highly significant factor for the Spanish electricity market, in which the existence of an obligatory pool artificially doubles transactions from the financial point of view, if items are not offset as required under the new accounting system.

167 Endesa also challenges the reasoning contained in paragraph 25 of the Decision that the use of the IAS/IFRS accounts was at variance with another 'equally valid objective of applying simple and objective conditions for determining Commission competence in merger cases, as well as with the general principle of legal certainty'.

168 As regards objectivity, Endesa contends that the Commission does not explain why the IAS/IFRS accounts are less objective than any other accounts and overlooks the fact that Endesa's external auditor certified that they were based on correct, audited data and that the method of reconciliation was also correct.

169 As regards simplicity, all Community listed undertakings had been informed years in advance that the new criteria were going to be introduced and knew that 2004 would be a transition year. Endesa adds that it is difficult to reconcile the consideration that simplicity of the rules of interpretation is an objective having the same legal value as the obligation to establish the competence of the Commission correctly with the Notice, which, in paragraphs 60 and 61, draws attention to the need to carry out a strict, detailed and even onerous analysis of the accounts where the turnover is close to the Regulation thresholds (Case IV/M.213 — Hong Kong and Shanghai Bank/Midland).

170 With regard to the principle of legal certainty, the Court has consistently held that this principle guarantees that rules are 'clear and precise, so that individuals may be able to ascertain unequivocally what their rights and obligations are and may take steps accordingly' (Case 169/80 *Gondrand Frères and Garancini* [1981] ECR 1931; Case C-143/93 *van Es Douane Agenten* [1996] ECR I-431, paragraph 27; and Case C-110/03 *Belgium* v *Commission* [2005] ECR I-2801). This does not mean that calculation of the turnover should be 'easy' in every case and does not justify failure to take into consideration all the available information. Endesa notes that reconciliation of accounts is an obligation under Community rules which a prudent trader is deemed to have been aware of for several years and that the protection of traders is not justified 'if a prudent and circumspect trader could have foreseen that the adoption of a Community measure is likely' (Joined Cases C-37/02 and C-38/02 *Di Lenardo and Dilexport* [2004] ECR I-6911, paragraph 70). In this case, the IAS/IFRS were clear and unambiguous, and prudent and circumspect traders were aware of them at the time the bid was made, so there was no infringement of the principle of legal certainty.

171 As regards the last ground, set out in paragraph 27 of the Decision, that 'the use of the unaudited IAS/IFRS figures in this case would create a disparity of treatment with regard to all the other cases in which the Commission referred to figures elaborated on the basis of the national standards in the 2004 audited accounts', Endesa states that the Commission did not take into account the case-law according to which inequality of treatment exists not only where two comparable situations are

treated differently but also where two different situations are treated in the same way. It provided a number of reports during the administrative procedure explaining the special accounting treatment applicable to Spanish undertakings in the electricity sector, which did not apply to other Spanish undertakings or to undertakings in the same or in other sectors established in other Member States.

172 The obligatory nature of the pool in Spain, combined with the nature of the previous accounting standards, which did not allow items to be offset, has the effect in particular that transactions which are carried out between undertakings in the same group or even which relate to a single economic transaction are accounted for twice. It is therefore in reality the Decision which creates discrimination because, where the same transaction takes place between undertakings of a similar size to Gas Natural and Endesa but in other economic sectors or in other Community countries, the turnovers of the undertakings concerned are calculated without any duplication of items.

173 Endesa concludes that for all these reasons the Commission committed an error in its analysis of the information it had supplied, which took the form of a serious defect in the reasoning of the Decision and a manifest error resulting from failure to apply the principles laid down in Article 5 of the Regulation and the Notice.

174 The Commission, supported by the interveners, maintains that none of the arguments relied on by the applicant is well-founded.

— Findings of the Court

175 With regard first of all to the applicant's arguments that the Commission committed an error by removing the possibility of using reconciled accounts, it is sufficient to

refer to the assessment of the first two parts of the plea. It has already been observed that Endesa's only valid accounts for an assessment of whether the concentration has a Community or a national dimension are those for 2004 prepared according to the Spanish law in force at the time of the bid, verified by the auditors and approved by the shareholders, and that in any event the reconciled accounts, prepared for comparative purposes only, which the applicant submitted to the Commission could not be regarded as definitive. Confirmation that the applicant's reconciled accounts are not definitive is, moreover, provided by the fact that on 19 September 2005 it amended those accounts in order to include adjustments reducing the turnover in Spain by EUR 111 million as compared with the accounts adjusted to comply with the IFRS submitted to the CNMV on 5 April 2005. Lastly, the fact that the changes subsequently made to the IAS/IFRS did not concern the electricity sector does not alter the fact that the IAS/IFRS which should have applied in respect of the 2005 financial year were not yet stable and definitive in September 2005, nor especially the fact that there was still no authority to interpret those new standards. Endesa's auditors themselves stated that they could not vouch for the validity of the reconciliation methods used.

176 As regards, secondly, exceptional circumstances which dictate the use of reconciled accounts, it should be noted that none of the circumstances relied upon can be regarded as exceptional. With regard first of all to the specific features of the electricity sector in Spain, the pool has existed in Spain since 1998 and neither Endesa nor any other undertaking in the sector has mentioned the need to make any adjustment to its GAAP accounts in any of the national or Community procedures for control of concentrations to which they were party. It should also be observed that the special features and serious distortions in the accounts of undertakings in the electricity sector in Spain alleged by the applicant do not constitute exceptional circumstances either, since the appropriateness of making any adjustments in order to take them into account can be examined regardless of the accounting system. In the present case, the Commission has moreover examined the main adjustments proposed by the applicant in that regard.

177 Secondly, the fact that the IAS/IFRS were designed to replace GAAP from 2005 onwards cannot be regarded as exceptional, nor can the need to prepare reconciled accounts for 2004 for comparative purposes. It is true that a change in the accounting rules constitutes a significant and rare event in the life of an undertaking, but the applicant does not rely on any factor based on the letter and objectives of the Regulation that would make that change an exceptional circumstance. Moreover, the obligatory application of new accounting standards does not necessarily mean that the accounting rules that had applied previously were unreliable or ambiguous.

178 Thirdly, the fact that the use of different accounting systems leads to a difference of EUR 4 400 million in Endesa's revenue cannot be regarded as exceptional either. That difference arises from adjustments, the appropriateness of which can be examined irrespective of the accounting system.

179 In any event, except as regards differences with regard to the accounting standards of States that are not members of the European Union, the exceptional circumstances mentioned in paragraphs 26 and 27 of the Notice refer solely to significant, permanent changes affecting the financial position of the undertakings concerned (acquisitions or divestments subsequent to the date of the audited accounts, factory closures). In the present case the applicant has not relied on any such changes.

180 As regards, thirdly, the complaint alleging infringement of the principle of legal certainty, suffice it to say that audited accounts offer increased objective safeguards since they render both the undertaking and the auditor liable. The use of accounts that have neither been approved by the shareholders nor confirmed by an external audit would on the other hand be contrary to the objective of applying simple and objective criteria in order to determine the dimension of a concentration. It should be noted that the very foundation of the system of thresholds established by

Article 1 of the Regulation is to provide a simple and effective method for determining the competent authority. As the Commission rightly maintained, the use of official, audited accounts and, in principle, restriction of any adjustments to those accounts to what is strictly essential in the light of Article 5 of the Regulation are essential aspects of this simple, predictable and effective method.

181 Moreover, acceptance of Endesa's contention would be equivalent to accepting that every concentration must be subject to prior examination by the Commission in order to ensure that the accounts of the undertakings concerned comply with the principles set out in Article 5 of the Regulation.

182 As regards Endesa's argument that the use of reconciled accounts by no means affected the principle of legal certainty, since any circumspect trader was in a position to foresee the entry into force of a new accounting system, it should be pointed out that a circumspect and reasonable trader could not have foreseen that the Commission would not use the only official accounts that had been audited. It should also be noted that the IAS/IFRS, not to mention their interpretation, were not yet finally established in September 2005.

183 In any event, it should again be noted that the reconciled accounts which the applicant submitted to the Commission cannot be regarded as definitive.

184 Lastly, the complaint alleging discrimination in relation to concentrations in other sectors or other Member States must be rejected as manifestly unfounded. On one hand it is based on mere assertions and on the unproven premise that Endesa's official audited accounts for the financial year 2004 do not reflect the true financial position. On the other hand, as the Commission's practice is to work on the basis of

official audited accounts, it is, however, a departure from that practice in the absence of exceptional circumstances, which could be perceived to be discrimination. Moreover, the audited accounts used to assess a concentration's dimension may, in order to take account of specific features of the sector or country in question, be the subject of possible adjustments. In that regard, it should be noted that the Commission examined the adjustments proposed by the applicant.

185 It follows from the foregoing that the third part of the third plea cannot be accepted.

186 The third plea must therefore be rejected.

Fourth plea: rejection of the 'pass through' adjustment and the gas swaps adjustment

187 In the context of this plea, Endesa challenges the Commission's rejection of two adjustments it had sought, one relates to distribution operations (the 'pass through' adjustment) and the other concerns gas swaps. It should be observed as a preliminary point that the applicant's annual accounts prepared according to GAAP for 2004 show that its turnover in Spain represented 80.07% of its Community-wide turnover. If it was accepted that the two adjustments in question, requested by Endesa, were justified, the percentage of its turnover in Spain would be reduced to 73.94% of its Community-wide turnover. It follows from this that even if that plea were accepted this would not mean *ipso facto* that the concentration concerned had a Community dimension but rather that the Commission should examine the other adjustments proposed by the applicant, and those proposed by Gas Natural, on which it made no ruling in the Decision, since only a combination of a number of adjustments would make it possible to drop below the two-thirds threshold.

188 As the 'pass through' adjustment was in any event necessary in order for the Community dimension of the concentration to be reached, it is necessary to examine first of all the first part of the plea, which relates to it.

— Arguments of the parties

189 Endesa notes that Article 5(1) of the Regulation is copied straight from the German Competition Law (GWB), paragraph 29 of which states that 'revenue from activities that are not usual activities shall be taken into account only in exceptional cases'. It is therefore only that part of the revenue that is linked to the activity of distribution which should be taken into account when establishing the turnover of a distribution company, that is to say, only the commission corresponding to that activity.

190 Endesa criticises in that regard the Commission's erroneous assessment of the legal value of the Notice and the fact that the Commission failed to examine the adjustments proposed in accordance with the Regulation. It notes that in paragraph 33 of the Decision the Commission states that '[i]n this respect, it should be borne in mind that the Notice ... does not refer to a concept of "passing through" (parts) of amounts derived by undertakings from the sale of products and the provision of services'. The only legal basis for calculating turnover is the Regulation, the only value of the Notice is as an interpretative act of the Commission. Any other interpretation would infringe the principle of the hierarchy of norms. In the present case, since the activity of the distribution company involves costs that correspond merely to amounts that are 'passed through', only the commission on those activities should be regarded as being covered by the concept of 'ordinary activity' contained in Article 5 of the Regulation.

191 Endesa adds that taking the erroneous approach of basing its reasoning on the Notice, the Commission refers to the content of paragraphs 7, 11 and 13 of the

Notice, stating that 'in view of the particular circumstances of this case, the Spanish electricity distribution companies cannot be assimilated to undertakings acting merely as intermediaries, whose turnover may consist solely of the amount of commissions which they receive'. Thus the Commission describes how the activity of the distribution companies and of the pool in Spain operates, without giving the reasons why in the present case the distribution companies are not merely intermediaries. The Commission does not consider whether the distribution companies actually derive profits from that activity in excess of the mere remuneration for their services determined by regulated prices. The Commission does not take into account the fact that the royal decree which sets the prices for electricity each year lays down the payment which the distribution companies receive for carrying out their functions during that period, payment which is independent of the sales of energy which the distribution companies make and, hence, of the quantity of energy supplied to them.

192 The operations carried out by distribution companies do not add any value to the transaction, since payment for the activity of distribution is determined ex ante, in advance and independently of the operations of buying and selling energy, which are neutral operations for the purposes of calculating turnover. The intermediary role of distribution companies follows expressly from Article 4 of Royal Decree No 2017/1997 of 26 December 1997, which organises and regulates the procedure for paying the costs involved in transport, distribution and marketing according to a tariff, the overhead costs of the system, and the costs of diversification and security of supply, so that, contrary to what takes place in the liberalised sector, a distributor who has received the regulated price only keeps the remuneration for his service and transfers the remainder paid by the user to the rest of the operators. Where there is a shortfall in the amount recovered, it is the generator who bears it.

193 With regard to the ground of the Decision in which it is stated that distribution companies assume the financial risk of non-payment so they are not intermediaries, Endesa observes that the Commission misinterprets the information it provided on this point and the concept of 'intermediary' contained in paragraph 13 of the Notice.

194 It notes, on the one hand, that distribution companies do not assume any financial risk for non-payment which is not offset by an element incorporated in the tariffs, since the regulated system (and not the trader on his own), provides a permanent safeguard mechanism enabling such risks to be avoided. On the other hand, it states that the existence or not of financial risk makes it possible to differentiate between the situation of an agent and that of an independent commission agent. The Commission interprets, without any legal basis, the concept of 'intermediary' as referring solely to agents, although it should be applied to the nature of an agent's activities.

195 The classification of distribution companies as intermediaries is normal practice in the energy sector in Spain. Gas Natural also makes a 'pass through' adjustment not only in its IAS/IFRS accounts but also in its accounts prepared according to Spanish accounting standards. Thus, by refusing Endesa the 'pass through' adjustment, the Commission prevented it from standardising the turnover from its distribution activity with that of the acquiring undertaking.

196 Endesa considers that the refusal to consider the adjustment it proposed is also vitiated by a serious defect in the analysis of a factor which the Commission ultimately considered as being decisive, which takes the form of an abuse of powers and insufficient reasoning. Endesa states that the Commission suddenly expressed doubts on that subject during the final stage of the procedure, although it had never asked it for any explanations in that regard before. More specifically, the Commission did not express any doubt or ask for any explanation between 19 September and 8 November 2005, the date on which it gave Endesa a deadline of 24 hours within which to answer a number of questions which were to be decisive in the grounds of the Decision.

197 Furthermore, the analysis of that adjustment is also incomplete as regards other factors and the statement of reasons in the Decision contains manifest contradictions. According to Endesa, if one considers that distribution companies do not

act as intermediaries, it is necessary to check whether some of the distribution operations are intra-group operations, and in particular whether there exists double accounting for the same transaction where the energy distributed by Endesa Distribución is acquired by Endesa Generación through the pool.

198 Endesa states in that regard that on 10 November 2005 the Commission requested it orally for explanations on this aspect of the adjustment. In two e-mails of 11 and 12 November 2005 Endesa stressed that the logic of that adjustment went beyond mere elimination of the intra-group part whilst proposing none the less to provide data concerning intra-group operations. The Commission did not reply to those e-mails and gave no ruling on that question in the Decision.

199 The analysis made by the Commission contains contradictions in that the Commission states in the Decision that it will not give a ruling on the adjustment proposal with regard to intra-group turnover but rejects the 'pass through' adjustment, which covers a very significant part of intra-group sales. Moreover, the Decision stresses the insignificance of any intra-group transactions, whilst stating that Endesa did not provide any data on their percentage, despite the above-mentioned e-mails which the Commission did not reply to.

200 The Commission, supported by the interveners, maintains that distribution companies are not merely intermediaries or mere commission agents and that therefore the applicant's arguments must be rejected.

— Findings of the Court

201 The applicant relies on a number of arguments, concerning both the grounds and the substance, against the Commission's refusal to make an adjustment of the

revenue of the distribution companies concerned in order to discount revenue collected on behalf of others. It maintains in essence that under Spanish law electricity distribution companies are required to collect certain sums from their customers and pass them on to the electricity generators and network operators, and that those sums must therefore be deducted from the revenue shown in Endesa's accounts, since they do not result from the 'sale of products and the provision of services falling within the undertakings' ordinary activities' within the meaning of Article 5(1) of the Regulation.

202 With regard, first, to the applicant's argument that the Commission committed an error by basing its assessment merely on the fact that the Notice does not provide for any adjustment in respect of 'passing through', it should be pointed out first of all that the applicant does not challenge the validity of that Notice, but contends that the Commission attributed excessive scope to it, although it has interpretative value only, and the Commission should have examined the proposed adjustment in accordance with the provisions of the Regulation, which constitutes the only legal basis for calculating turnover.

203 It should be noted in that regard that the Commission is required to apply the Notice in so far as the latter does not conflict with the Regulation, and states that, by way of exception, certain adjustments must be made in certain circumstances. As the applicant sought during the administrative procedure to attach the proposed adjustments to the categories of adjustment mentioned in the Notice, the Commission cannot be criticised for referring in the Decision to paragraphs 7, 11 and 13 of the Notice in order to refute the arguments put forward by the applicant in connection with those paragraphs during the administrative procedure.

204 It should also be observed that although the Decision states that the Notice does not make any reference to the concept of 'passing through' amounts derived by undertakings from the sale of products and the provision of services, the fact that the Notice makes no provision for any adjustment in the case of passing through costs is not, however, the only reason why the Commission did not make such an

adjustment. The Commission also pointed out in the Decision (paragraphs 33 *in fine*, 34 and 35), in particular, that the Spanish electricity distribution companies cannot be treated in the same way as undertakings acting merely as intermediaries, whose turnover consists solely of the amount of commissions which they receive for the following reasons: the electricity distribution companies are required not only to transport the electricity on their distribution networks, but also to supply the electricity to the customers who decide to remain in the regulated system; the distribution of electricity entails the sale to end users of goods previously purchased by distributors; the expenditures connected with the purchase of electricity should therefore be regarded as costs of the distribution companies; the risk of non-payment by the final customers of the price for the supplied electricity is borne by the distribution companies and any liability related to non-performance of obligations under the contract with the end customer is borne by the distributor.

205 It follows that the applicant's complaint that the Commission committed an error by basing its assessment merely on the fact that the Notice does not provide for any 'pass through' adjustment must be rejected.

206 As regards, secondly, the complaint that the reasoning is inadequate, it is sufficient to refer to paragraphs 30 to 36 of the Decision, which sets out the reasons, summarised above, why the Commission rejected the 'pass through' adjustment, in order to hold that it cannot be accepted.

207 It is also appropriate to examine whether the Commission was right to consider in the Decision that there was no need to make the 'pass through' adjustment.

208 In that regard, it should be noted first of all that, as stated in paragraph 9 of the Notice, the concept of 'turnover' as used in Article 5 of the Regulation refers

explicitly to 'the amounts derived from the sale of products and the provision of services'. 'Sale' as a reflection of the undertaking's activity is thus the essential criterion for the calculation of turnover, whether for products or the provision of services.

209 Furthermore, the requirements of legal certainty and speed which apply in the context of control of concentrations mean that both undertakings and competition authorities can in principle rely on a foreseeable criterion and immediate access. In those circumstances, the turnover to be taken into account in order to determine the authority competent to examine a concentration must, as a rule, be calculated on the basis of the published annual accounts. It is therefore only by way of exception, where particular circumstances so justify, that certain adjustments should be made in order to best reflect the financial position of the undertakings concerned.

210 It should also be stressed that Article 5 of the Regulation refers to the aggregate turnover and not just a part of it. By way of exception, the Notice envisaged the possibility, in certain circumstances, of calculating the turnover in a different way than by reference to the aggregate of sales of products or the provision of services. Paragraph 13 of the Notice states in that regard:

'Because of the complexity of the service sector, this general principle may have to be adapted to the specific conditions of the service provided. Thus, in certain sectors of activity (such as tourism and advertising), the service may be sold through the intermediary of other suppliers. Because of the diversity of such sectors, many different situations may arise. For example, the turnover of a service undertaking which acts as an intermediary may consist solely of the amount of commissions which it receives'.

211 It should be noted first of all that this paragraph of the Notice concerns a particular category of intermediaries within the services sector only, whose sole remuneration is the amount of commission they receive. It is therefore an exception to the general rule that the relevant turnover must be calculated on the basis of the total amount of sales. The concept of intermediary must therefore be interpreted strictly.

212 It should also be observed that the applicant is not claiming that under Spanish law its activity is carried on under an agency contract or commission contract, or any other similar form of contract. The fact remains that the applicant does not sell electricity to the end customer on behalf of the electricity generators or network operators.

213 In addition, in the absence of any evidence of a legal nature put forward by Endesa to the contrary, the legal relationship existing between Endesa and the end customers must be regarded as a contract for the sale of electricity. Such a sale is a commercial act which involves the transfer of ownership.

214 The same applies as regards the legal relationship existing between Endesa and the electricity generator providing electricity, whether through the OMEL electricity pool or otherwise. Article 41(2) of Spanish Law No 54/1997 on the system for the generation and distribution of electricity provides that the electricity distributors have the right in particular to acquire the electricity needed to ensure supplies for their customers and to collect the payment in respect of performing the activity of distribution. Article 45(1)(h) of that law provides that distribution companies are required, for the purposes of delivering electricity, to acquire the energy required for the pursuit of their activities and to pay for what they acquire under the payment procedure laid down for that purpose.

215 In the light of those provisions, it is necessary to reject the argument put forward by the applicant at the hearing that a distributor is not the owner of the energy because the moment the generator puts the energy into circulation within the system that energy immediately becomes the property of the customer. Article 11(4) of Law No 54/1997 moreover also provides that, save where otherwise agreed, transfer of ownership of the electricity is deemed to take place the moment it enters the purchaser's equipment.

216 Therefore, as the activity of distributors involves, in particular, purchasing electricity or gas from their suppliers and then distributing it and selling it to the end consumers, it cannot be classified as the provision of services limited to supplying a product on behalf of generators and other operators. Endesa cannot therefore from a legal point of view be regarded as a mere intermediary within the meaning of paragraph 13 of the Notice nor can it in principle be covered by the exception envisaged in it, since the revenue derived from distribution falls within the undertakings' ordinary activities within the meaning of Article 5(1) of the Regulation. Hence, the adjustment in question cannot be justified by the allegedly exceptional nature of the selling activity of distribution companies.

217 It should also be noted that Article 20 of Law No 54/1997 did not introduce any special provision to take into an account a special feature of undertakings such as the applicant's. The third paragraph of Article 20(3) reads as follows: 'Companies whose purpose is to perform regulated activities in accordance with the provisions of Article 11(2) of this law shall keep separate accounts within their accounting system differentiating between revenue and costs strictly attributable to transport activity, distribution activity and, where appropriate, the activities of marketing and selling to customers at fixed prices'. As the Commission rightly points out, that provision does not refer to the Spanish GAAP applying merely to commission agents.

218 Endesa claims, however, that the Commission did not examine whether distribution companies did in fact derive any economic benefits from that activity beyond mere remuneration for their services as determined by the regulated tariffs.

219 In that regard, it is appropriate first of all to point out that the mere fact that the activity of distribution is, to a greater or lesser extent, regulated is not enough in itself to lead to the conclusion that the remuneration received by distributors must be classified as mere commission for the purposes of applying the Regulation.

220 Endesa contends none the less that the intermediary role of distribution companies follows expressly from Article 4 of Royal Decree No 2017/1997 of 26 December 1997, which organises and regulates the procedure for paying the costs involved in transport, distribution and marketing according to a tariff, the overhead costs of the system, and the costs of diversification and security of supply.

221 It is not apparent from that article however that the activity of distribution is that of a mere intermediary. In particular, that article does not state that a distribution company keeps only the remuneration for its service and transfers the rest to the other operators, but contains a list of payable revenue and costs for the purposes of implementing the Royal Decree.

222 As for the fact alleged by the applicant that the operations carried out by distribution companies do not add any value to the transaction, it should be pointed out, as the Commission does, that distribution comprises a number of activities which go beyond the mere supply of energy. Thus, the distributor also uses its trade mark and provides an integrated service to the customer, comprising customer service, safety

recommendations, inspection of equipment, meter reading, billing and recovery. It should also be noted that the fact that a sector is regulated by no means creates the economic fiction that distribution creates no added value or revenue flow.

223 As regards the applicant's arguments that, on the one hand, the payment for distribution companies is fixed each year irrespective of purchases and sales of energy and, on the other hand, those undertakings bear no risk of non-payment; it should be noted, first, that Article 15 of Royal Decree No 2819/1998 on the regulation of the activities of transporting and distributing electricity sets out the elements of the payment for the activity of distribution, namely: costs relating to investment, running and maintenance of equipment, costs of circulated energy, costs of a model showing the distribution areas, costs of incentives to ensure quality supply and reduction of losses, and other costs required for carrying on the activity of distribution, including the costs of business management.

224 As one of the elements of the payment for the activity of distribution is the cost of circulated energy, the applicant's assertion that the payment of distribution companies is totally independent of the energy sales they make and hence the quantity of energy supplied to them is unfounded.

225 It should also be noted that although, according to Article 20 of Royal Decree No 2819/1998, overall payment for the activity of distribution is calculated annually ex ante, distributors must none the less bear the risks entailed in their own management, in particular as regards their forecasts of demand. The distributor purchases electricity from the pool at the market price, but, as is provided in Article 4(e) of Royal Decree No 2017/1997, it is paid on the basis of the weighted average price. Thus, when the costs of acquiring the energy are paid, in accordance with Annex I.6 to Royal Decree No 2017/1997, the cost that is assigned to the distributor is not the cost it has actually paid on the market, but the weighted average price of energy purchased by the distributors over the payment period.

Hence, a distributor which has paid a price above the average will lose the difference because it will have borne a higher actual cost than that which has in fact been paid to it. On the other hand, a distributor which has paid a price below the average will obtain additional profit. It follows, as the applicant acknowledges moreover in its reply to a written question from the Court, that the system in force provides only theoretical remuneration for the activity of distribution, the actual remuneration will depend on the level of efficiency of the distributors when the energy is purchased.

226 Furthermore, with regard to sales of electricity by distributors to end customers, it should be noted that the applicant has failed to demonstrate that the statement made in paragraph 35 of the Decision, that the risk of non-payment by the final customers of the (regulated) price for the electricity supplied is borne by the distribution companies, is inaccurate. Although there does indeed exist a mechanism whereby it is possible to take into account to a certain extent the risk of non-payment in a general way, the fact remains that it is the distributor which must bear the risk of non-payment, as is clear from Article 4(a), last sentence, of Royal Decree No 2017/1997, which provides that 'during the payment procedure revenue obtained for that purpose from invoicing data shall be taken into account, irrespective of whether it has been collected'. As that provision refers to billing and not to sums actually collected, the risk of customer not paying the bill the must be regarded as being borne by the distribution company.

227 The fact that Article 79(7) of Royal Decree No 1955/2000 on the regulation of the activities of transport, distribution, marketing and supply, and procedures for certifying electrical equipment provides that electricity undertakings may require a deposit to be lodged does not invalidate that conclusion. On one hand, the amount of that deposit is limited to the monthly bill for 50 hours of power consumption. On the other hand, that provision also states that certain categories of consumers in specified geographical areas may be exempt from payment of this deposit. Lastly, according to the sixth transitional provision of that Royal Decree, the deposit cannot be required of consumers who were already receiving supplies at a regulated tariff at

the time the Royal Decree entered into force. However, as the Commission observed, and it was not contradicted by the applicant on this point, the great majority of consumers of electricity at the regulated tariff signed their contracts for the supply of electricity before 2000. Therefore such deposits only cover a limited part of the risk of non-payment.

228 As regards the fact that it is normal practice in the energy sector in Spain to classify distribution companies as intermediaries, it should be noted, even though this point is not decisive, that following the written question put by the Court and the observations made by the parties at the hearing, it has become clear that there was no unanimity in respect of the practice of the 'pass through' adjustment within companies in that sector.

229 Lastly, with regard to the applicant's assertion that the refusal to consider the 'pass through' adjustment is also vitiated by a serious defect in the analysis, which takes the form of misuse of powers and insufficiency of the reasoning in that the Commission suddenly expressed doubts with regard to that adjustment during the final stage of the procedure, although it had not asked for any explanations from Endesa in that regard before, suffice it to say that the fact that some information was collected at the end of the procedure cannot in itself invalidate the Decision. Also, the complexity of the case justifies the Commission seeking to obtain certain additional information, even at a late stage in the procedure and after acquiring a more detailed knowledge of the context. Moreover, in any event, the request for information sent by the Commission on 28 September 2005 already contained a number of questions with regard to the possible discounting of certain revenue collected in Spain (questions 2 and 3) and the applicant provided clarification in its reply concerning the 'pass through' adjustment (letter of 5 October 2005).

230 It follows from the foregoing that the applicant's arguments in support of the complaint based on the absence of a 'pass through' adjustment must be rejected.

231 In those circumstances, the Court finds it is not necessary to examine the merits of the applicant's alternative contention that even if it is considered that distribution companies do not act as intermediaries it is still necessary to check whether some of the distribution operations are intra-group operations. It is apparent from the applicant's reply to the written question from the Court that the corresponding adjustment is EUR 1 510 million. It is clear from the documents before the Court that, even if all the other adjustments proposed by the applicant were accepted and all the 'counter-adjustments' proposed by Gas Natural were rejected, that amount would not be sufficient for the concentration to have a Community dimension.

232 In the light of those considerations, the first part of the fourth plea should be rejected.

233 As the 'pass through' adjustments are in any event necessary in order for the concentration to reach a Community dimension, there is no need to consider the second part of the plea concerning gas swaps.

234 It follows from the foregoing that the fourth plea must be rejected.

Fifth plea: infringement of the criteria set out in the Notice, inadequate analysis and reasoning, and misuse of powers

Arguments of the parties

235 Endesa considers that, for the reasons mentioned in the second, third and fourth pleas, and because of the procedural irregularities vitiating the Decision, the Decision should be annulled, without any need to give a ruling on the manifestly

erroneous assessment the Commission made of the other proposed adjustments. It states that, given its application for the accelerated procedure to be applied in respect of this action, it merely claims in that regard that Decision was inadequately reasoned.

236 Endesa criticises the Commission's approach of relying on the absence of a specific legal basis in the Notice in order to reject a number of adjustments, and examining some adjustments and not others.

237 With regard to the first point, the Commission again fails to have regard to that fact that the legal basis for calculating the turnover of the undertakings concerned is Article 5 of the Regulation and not the Notice. The fact of considering as admissible only the adjustments provided for in the Notice or in the terms set out in it, without querying whether or not those adjustments are in accordance with the Regulation constitutes a manifest error.

238 With regard to the second point, Endesa considers that the Commission should have explained the criterion it used to select those adjustments which justified analysis and those adjustments for which no such analysis was needed. The justification provided in paragraph 70 of the Decision that '[t]he Commission considers ... that it is not necessary to conclude on this point, since the concentration at issue would not have a Community dimension even if those adjustments were accepted' is unacceptable since the same justification could have been given for many other much less significant adjustments which were none the less examined.

239 Endesa relies upon other elements which, taken together, provide clear and unequivocal evidence of misuse of powers. For example, it is odd to say the least that the Commission does not assess any of the adjustments proposed by Gas Natural apart from one concerning the 'non-consolidated companies' in the group, which is

relevant, although not particularly so, in its case. It is more significant to find that the Commission failed to mention in the Decision the case of another non-consolidated company (Ergon Energía) which Endesa referred to in its reply to the Commission's request for information of 4 November 2005. If all the non-consolidated companies were taken into account the balance would tip in favour of the concentration having a Community dimension. The reasoning for the point concerning Endesa's additional revenue in Italy (paragraphs 60 to 64) are just as surprising, since the Commission alludes to two items but gives no ruling on which one was financially more significant.

240 Endesa contends that a careful reading of the Decision reveals that the Commission's sole objective was to limit the risk of the Decision being annulled by this Court, although it was incumbent on the Commission to implement the rules with regard to competence and, in particular, to set out its reasoning in rejecting the adjustments proposed.

241 Endesa states that the Commission's relinquishment of its responsibilities with regard to determining its competence constitutes a misuse of powers which, moreover, infringes its own rights of defence in the absence of adequate reasoning, although it actively cooperated throughout the administrative procedure by providing various data requested by the Commission.

242 The time-limit of 24 hours set for Endesa to answer a request for information sent 50 days after the start of the procedure and which was to be decisive in the statement of reasons in the Decision is a further indication of misuse of powers and also constitutes infringement of the rights of the defence.

243 In the light of the abovementioned evidence, in particular the failure to justify the choice of the adjustments examined and the insufficiency of the reasoning, and taking into account its arguments regarding the two main complaints (concerning the accounting standards, on the one hand, and the 'pass through' adjustment and the gas swaps adjustment, on the other), Endesa considers that it is inappropriate to pursue its arguments challenging the assessment of the various adjustments examined in paragraphs 37 to 72 of the Decision.

244 The Commission, supported by the interveners, states that this plea is made up of various arguments which mainly do no more than express the applicant's surprise at certain aspects of the Decision, and the sole object of the plea appears to be to ensure that the assessments of the adjustments which are not expressly challenged are also deemed to be challenged. The Commission contends that that criticism is by no means substantiated and does not relate to any specific passage in the Decision. Hence it considers that it is an inadmissible plea because it does not meet the formal conditions laid down in Article 44 of the Rules of Procedure. It adds that even if the alleged errors were genuine they would not constitute proof of a misuse of powers.

Findings of the Court

245 In the context of this plea, the applicant puts forward a number of disparate arguments relating to the other adjustments rejected in the Decision, to the adjustment on which the Commission did not make a ruling in the Decision, and to the time taken to reply to a request for information. Lastly, the applicant relies on misuse of powers.

246 As regards first of all the examination of the other proposed adjustments which were analysed in the Decision, the applicant merely states that the Commission rejected them solely on the ground that they are not provided for in the Notice.

247 As the Commission points out, the Court has already had occasion to state that an expedited procedure, 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 (*EDP* v *Commission*, paragraph 93 above, paragraph 183). However, in the present case the complaint is admissible since, although it is set out very succinctly and with little substantiation, it can still be interpreted as referring to an error committed by the Commission in that the Commission considered as admissible only the adjustments provided for in the Notice, without checking whether those adjustments were or were not in accordance with the provisions of the Regulation.

248 This complaint must, however, be rejected on its merits. It is clear from examination of the Decision that, contrary to what the applicant contends, the Commission did not reject any of the adjustments in question solely on the ground that it was not expressly provided for in the Notice.

249 Thus, rejection of the adjustments referred to in paragraphs 41 to 44 of the Decision is not based on the Notice, but on the fact that they are adjustments which had not been audited or which were unsubstantiated (paragraph 44 of the Decision). No reference is made to the Notice as regards the adjustment analysed in paragraphs 45 to 50 of the Decision. Moreover, rejection of the adjustment examined in paragraphs 51 to 55 of the Decision is based on the consideration that it concerns costs which electricity companies have to bear in order to remain in the market and the conclusion refers to Article 5(1) of the Regulation. The adjustment examined in paragraphs 56 and 57 of the Decision is rejected because, from the accounting point of view, transfer of the assets in question should be regarded in itself as revenue, whether or not the assets transferred generate revenue in themselves. Also, the Commission considered that that type of practice was current or, at least, not exceptional. The conclusion also refers to Article 5(1) of the Regulation. The applicant's criticism is not justified as regards the adjustment examined in paragraphs 58 and 59, which state that Endesa has not clearly demonstrated that the revenues in question actually related to previous years, nor as regards the adjustment examined in paragraphs 60 to 64 of the Decision, which is rejected by

virtue of the principle of prudence and of the Regulation itself. Lastly, as regards the adjustment examined in paragraphs 65 to 68 of the Decision, the conclusion also refers to Article 5 of the Regulation.

250 It follows that the applicant's complaint relating to the other adjustments rejected in the Decision cannot be accepted.

251 It should also be noted that the applicant cannot reserve the option to put forward further pleas or arguments at a later date. It is therefore necessary to consider the Decision as definitive as regards the other adjustments proposed by Endesa which were analysed by the Commission in the Decision.

252 As regards, secondly, the complaint concerning the adjustments on which the Commission has not taken a position, the applicant contends that the Commission should have explained by what criterion it selected the adjustments which warranted analysis and the adjustments in respect of which no such analysis needed to be made. It considers that the choice made was totally unjustified, and results in the Decision being totally unfounded if the Court accepts one or both of the two principal pleas, concerning on one hand the accounting standards to be used and on the other hand the 'pass through' adjustment and the gas swaps adjustment.

253 This complaint cannot be accepted. It is established that even if all the adjustments on which the Commission did not give a ruling were accepted the concentration would still not have a Community dimension, since it would only have such a dimension if either the IFRS accounts prepared by the applicant or the two adjustments concerning 'passing through' and gas swaps were also accepted. Since the Commission's conclusion in the Decision was to reject both the IFRS accounts and the two adjustments, there was no point in it examining the rest of the adjustments proposed by Endesa.

254 Nor can the applicant complain of insufficient reasoning in that regard. The duty to state reasons, in particular in the context of control of concentrations, which requires the timely adoption of decisions, does not require the Commission to take a position on adjustments which, even if they were accepted, would be devoid of consequences since it is already sufficiently clear from the previous rejection of other adjustments that the concentration does not have a Community dimension.

255 On the same grounds, the arguments that the Commission did not assess any of the adjustments proposed by Gas Natural (apart from the adjustment to the detriment of Endesa) nor those relating to non-consolidated companies, in particular Ergon Energía, must be rejected. It should also be noted that although the Commission accepted one of the adjustments proposed by Gas Natural, it was on the ground that the applicant had itself accepted the justification for it. Lastly, the criticism of not examining the adjustments proposed by Gas Natural makes no sense since those 'counter-adjustments' proposed by Gas Natural would have the effect of increasing the proportion of turnover which the applicant achieves in Spain.

256 As regards thirdly the applicant's assertion that a careful reading of the Decision reveals that the Commission's sole objective was to limit the risk of the Decision being annulled by this Court, suffice it to note that the Commission cannot be criticised for ensuring the validity of its decisions so that they are not annulled by the Court.

257 As regards fourthly the complaint that it was set a deadline of only 24 hours within which to answer a request for information that was sent 50 days after the start of the procedure and which was to be decisive in the statement of reasons in the Decision, suffice it to say the applicant did not ask for any extension of the deadline and was able to answer within the time-limit set.

258 Lastly, as regards fifthly the complaint alleging misuse of powers, it should be remembered that a measure is only vitiated by misuse of powers if it appears, on the basis of objective, relevant and consistent evidence to have been taken with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case (Case 69/83 *Lux* v *Court of Auditors* [1984] ECR 2447, paragraph 30; Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 24; Case C-156/93 *European Parliament* v *Commission* [1995] ECR I-2019, paragraph 31; Case C-48/96 P *Windpark Groothusen* v *Commission* [1998] ECR I-2873, paragraph 52; and Case C-110/97 *Netherlands* v *Council* [2001] ECR I-8763, paragraph 137). Since none of the irregularities or errors alleged by the applicant, either in the context of this plea or in the other pleas of the action, in order to demonstrate the existence of an alleged misuse of powers is well-founded the complaint must be rejected. In any event, even if the alleged errors were genuine they would not constitute proof of misuse of powers.

259 Consequently, the fifth plea must be rejected.

260 It follows from all the foregoing that the action must be dismissed as unfounded.

Costs

261 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful and both the Commission and the interveners have applied for the applicant to pay the costs, the decision must be taken that the applicant must pay, in addition to its own costs, those of the Commission and Gas Natural, including those relating to the interlocutory proceedings.

262 Under Article 87(4) of the Rules of Procedure, Member States which have intervened in the proceedings are to bear their own costs. The Kingdom of Spain will therefore bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Dismisses the action;

2. Orders the applicant to bear its own costs and to pay those of the Commission and Gas Natural SDG, SA, including those relating to the interlocutory proceedings;

3. Orders the Kingdom of Spain to bear its own costs.

Jaeger Tiili Czúcz

Delivered in open court in Luxembourg on 14 July 2006.

E. Coulon M. Jaeger

Registrar President

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