EUROPEAN COMMISSION
Competition DG

Director General

RE: E.ON's bid over Endesa – CNE's decision pursuant to Royal Decree 4/2006

1. On 16 March 2006 the Commission received a notification of a proposed concentration pursuant to the EC Council Regulation (EC) No 139/2004[1] (the "Merger Regulation") by which the German company E.ON AG ("E.ON") acquires control of the Spanish energy company Endesa S.A. ("Endesa") by way of public bid announced on 21 February 2006.

2. The Commission has learned that. following that the announcement by E.ON of a public bid over Endesa, the Spanish Council of Ministers adopted a new legislative measure, Royal Decree 4/2006[2], increasing the supervisory powers of the Spanish Energy Regulator (CNE).

3. Pursuant to this Royal Decree, E.ON's bid will have to be previously approved by CNE, on the basis of a new test based on the following very general grounds:

   (a) the existence of significant risks or negative (direct or indirect) effects over regulated activities or certain activities subject to administrative intervention[3];

   (b) the protection of the general interest in the energy sector and in particular the guarantee of proper maintenance of sector policy objectives, with special consideration given to assets deemed to be strategic[4];

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1 OJ L 24, 29.1.2004 p. 1

2 Royal Decree-Law 4/2006, of 24 February. modifying the functions of the Comision Nacional de Energia.

3 Eleventh Additional Provision. Section three, Point 1, Fourteenth function, point 2(a), of Law 34/1998 as amended by the Royal Decree 4/2006.

(c) the possibility that an entity undertaking regulated activities or certain activities subject to administrative intervention cannot guarantee the exercise of these activities, as a result of any other activities of the acquirer or the target entity[5];

(d) public security[6].

4. I am aware that the Kingdom of Spain has, in parallel, been approached by the services of the Directorate General Internal Market on questions concerning the compatibility of the Royal Decree with Articles 43 and 56 EC.

5. I am writing to you because I would like to remind you that, pursuant to Article 21 of the Merger Regulation, the Commission has the exclusive competence to assess the competitive impact of concentrations with a Community dimension.

6. Article 21 provides that Member States shall not apply their national competition law to such operations. Moreover, Member States can adopt measures which could prohibit or prejudice (*de jure* or *de facto*) such operations only if (i) the measures in question protect interests other than those taken into account by the Merger Regulation and (ii) these measure are necessary and proportionate for the protection of interests compatible with EC law.

7. Public security, plurality of media and prudential rules are considered to be interests compatible with EC law. Any other interest pursued by way of national measures liable to prohibit or prejudice a concentration with a Community dimension must be communicated to the Commission before the adoption of these measures.

8. In the present case, it is clear that E.ON's bid over Endesa gives rise to a concentration with a Community dimension within the meaning of Articles 1 and 3 of the Merger Regulation. Therefore, the Kingdom of Spain is obliged to notify in advance any proposed decision of the CNE prohibiting E.ON's bid or making it subject to conditions pursuant to the grounds (a), (b) and/or (c) mentioned above.

9. Moreover, in order to ensure the *effet utile* of the provision in question and in light of the loyal cooperation obligation provided for by Article 10 EC, the Kingdom of Spain should also, and in good time prior to doing so, inform the Commission of any intention to take a negative or conditional decision that would

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4 Eleventh Additional Provision. Section three. Point 1, Fourteenth function, point 2(b), of Law 34/1998 as amended by the Royal Decree 4/2006.

5 Eleventh Additional Provision, Section three. Point 1, Fourteenth function, point 2(c), of Law 34/1998 as amended by the Royal Decree 4/2006.

6 Eleventh Additional Provision. Section three. Point 1, Fourteenth function, point 2(d), of Law 34/1998 as amended by the Royal Decree 4/2006. This provision mentions in particular two grounds: (1) security and quality of supply, meaning the uninterrupted physical availably of the products or services on the market at reasonable prices in the short and long term for all users, regardless of their geographical location and (2) security in case of insufficient investment or maintenance in infrastructures that make it impossible to ensure continuously a minimum set of enforceable services for the guarantee of supply.

have the effect of withholding E.ON from acquiring shares in Endesa pursuant to the public security ground mentioned above.

10. This obligation of cooperation applies in particular where there are clear grounds for doubting that measures prohibiting the concentration or imposing conditions thereon would genuinely serve a recognised legitimate interest such as public security, would be necessary and proportionate for this purpose or, more generally, would be consistent with the general principles and other provisions of Community law.[7]

11. Indeed, prima facie, it is difficult to understand how, on the basis of community law precedents, the transfer of Endesa's shares from the current shareholders to E.ON could be considered to imply any appreciable risk for public security, as narrowly interpreted in case-law of the Court of Justice, even considering the need to ensure a minimum level of energy supplies in the event of a genuine and serious threat.[8] In these circumstances, any application of the public security ground of Royal Decree 4/2006 in order to prohibit or impose conditions on the concentration in question would require close scrutiny by the Commission by reference to the criteria in Article 21(4) of the Merger Regulation..

12. Furthermore, there are serious grounds for considering that the provisions of the Royal Decree 4/2006 can be considered to be, in themselves, contrary to Articles 43 and 56 EC in so far as the grounds of review by the CNE set out therein are imprecise and give rise to a potentially discriminatory application and because a prior authorisation regime relating to the ownership of undertakings or assets is only very exceptionally a necessary and proportionate means of pursuing recognised public interests. For this reason also, any application of those provisions to the present merger is susceptible to give rise to an infringement of Article 21(4) of the Merger Regulation.

13. In due time after receiving information of the proposed decision, the Commission would decide whether the national measures are justified for the protection of an interest compatible with EC law.

14. In the light of the foregoing, the competent Spanish authorities are invited:

- to transmit to the Commission any draft negative or conditional decision which CNE may consider to adopt regarding E.ON's proposed acquisition of Endesa, and

- not to adopt and implement such a decision before the Commission has verified that it is necessary and proportionate for the protection of an interest compatible with EC law.

15. I am sure that you can understand the importance of the above requests in order to allow the Commission to effectively exercise its functions under the Merger

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7 See Commission decision of 20 July 1999 in case *M.1616 - BSCH/Champalimaud*, paragraphs 65-67.

8 See Case C-463/00 Commission v Spain [2003] ECR I-4581.

Regulation. I would moreover be grateful if you could commit to respect these procedural requirements.

Yours sincerely,

Philip LOWE
Director General