

**WHEN COMPETITION IS THE LAST CONCERN:
THE BATTLE FOR THE CONTROL OF ENDESA.**

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Abstract: Competition law and regulation had played a prominent role in the process of construction and liberalization of the internal energy market in the EU. Several transactions in the last decade have shown the difficulties of the process and how Member States may occasionally make a political use of merger review rules and of regulation to benefit domestic firms. This chapter describes in all its complexity the ENDESA takeover contest (2005-2007). This case is a unique example of the mixture of legal issues that may be involved in takeovers requiring competition and regulatory approval. Several lessons can be learnt from the case, not only for the history of Spanish and European competition law (especially regarding merger review). Other relevant industrial policy, regulation and corporate law issues were also raised by this landmark case, though the case is mainly illustrative of how politics, at the end, may affect or shape the final outcome in some business transactions.

Keywords: Merger Control, Competition Law, Regulation, Spain, ENDESA, GAS NATURAL, E.ON, ACCIONA, ENEL, Energy, EU Merger Review, National champions

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‘Who said that a Spanish customer may not be more bothered by a customer care representative speaking with a German accent than by assumedly higher price from his old, less efficient but Castilla born-and-bred supplier?’, F. M. Salerno, ‘Current Issues of EU merger control in the energy sector: a proposed framework to foster the dialogue’, *European Competition Law Review*, 28/1 (2007) 70.

INTRODUCTION

Electricity and gas are network industries with several specific features (natural monopoly, public goods) that make them prone to market failure¹. They are also services of general economic interest subject to public service obligations. In the past in the EU there has been little room for competition in these sectors: they were monopolized by publicly owned firms, often vertically integrated, which covered the whole or parts of Member States and which were largely isolated from each other.

Several regulatory measures have been adopted in the EU to liberalize gas and electricity markets. Other measures have been adopted to promote an internal energy market across the EU, but insufficient cross-border interconnections among national networks make competition between companies from different Member States limited².

On the other hand, given the public interest in securing the supply of energy, these sectors are subject to intense State regulation and control. Moreover, there is always a strong political ingredient in government’s rules and decisions in energy issues³. Demand for energy is highly

¹ Physical characteristics of energy commodities, mainly electricity (which is non-storable) heavily influence supply flows and condition market functioning (competition, contracts and pricing).

² See Communication from the Commission to the Council and the European Parliament, *Report on progress in creating the internal gas and electricity market*, 11.032009, 7-9 (disparities in electricity and gas prices for household consumers in the Member States are a sign of insufficient market integration).

³ In the Spanish case, the government also sets prices for electricity and there are several other features of the structure and organization of supply and demand that heavily distort competition conditions in this market, as discussed by C. Crampes & N. Fabra, ‘The Spanish Electricity Industry: Plus ça Change...’, (2005) *Energy Journal*, 26/1, 127-154. However, evidence shows that price regulation in the energy industry in Spain is biased in favour of the industry (consumers benefitting little from price controls), see P. Arocena, I. Contín & E. Huerta, ‘Price regulation in the Spanish energy sectors: Who benefits?’, (2002) *Energy Policy*, 30/10, 885-895 (based on 1987-1997 data). For another testimonial of how consumers have been overcharged, see also L. Blázquez-Gómez & E. Grifell-Tatjé, ‘Evaluating the regulator: Winners and losers in the regulation of Spanish electricity

inelastic and a stable and efficient energy supply is key for consumers' welfare and for the competitiveness of the industry. The energy industry shows a high level of concentration (oligopoly) and most utility companies active in these sectors are former state monopolies. Ultimately, experience shows that protectionist considerations have been very significant in the evolution of this sector⁴. The relevance of energy to the national productive system leads occasionally to its consideration as a strategic industry, especially in those countries lacking energy resources (like Spain)⁵. The protection of national industry's interests has led national governments to make a range of interventions aimed at preventing foreign companies from acquiring control of national utility companies⁶. For example, before the Swedish company VATTENFALL managed to acquire NUON on June 2009⁷ and the leading Dutch energy company, ESSENT, was bought by the second German energy company, RWE⁸, there was an attempt to create a Dutch national champion by merging both NUON and ESSENT. In the same vein, apparently, the support of merger plans by SUEZ and GAS DE FRANCE by the French government on September 2007 was aimed at preventing a takeover of SUEZ by Italy's ENEL⁹.

Regarding the evolution of the sector in Spain, the case of the change of control of ENDESA is the more telling. The process that led to the final acquisition of ENDESA by the local construction company ACCIONA together with the Italian energy firm ENEL, lasted more than two years and several players intervened in it. The contest for the control of ENDESA was triggered by the launch of a tender offer on September 2005 by GAS NATURAL, which ENDESA successfully managed to fend off using all the available means (*infra* §2). The initial bid was followed by an offer first by the German energy company EON (*infra* §3) though, finally,

distribution', (2011) *Energy Economics*, 33, 807–815 (who estimate that in the 1988-2002 period Spanish electricity distribution companies obtained a reimbursement in excess of between €2,163 and €6,510 million).

⁴ See F. Domanico, 'Concentration in the European electricity industry: The internal market as solution?', (2007) *Energy Policy*, 35/10, 5068-5070.

⁵ On the very special and strong links of electricity companies and the Government in Spain, see P. Arocena, K.-U. Kühn & P. Regibeau, 'Regulatory reform in the Spanish electricity industry: a missed opportunity for competition', (1999) *Energy Policy*, 27/7, 389-390.

⁶ Sparking a conflict between Spanish authorities and the European Commission, see. S. Beth Farmer, 'The European Experience with merger and deregulation', in P. C. Carstensen & S. B. Farmer (Eds.), *Competition Policy and Merger Analysis in Deregulated and Newly Competitive Industries*, Edward Elgar, Cheltenham-Northampton (Mass.), 2008, 196. However, it would be a mistake to consider that the only issue in the ENDESA case, see J. Galloway, 'The pursuit of national champions: the intersection of competition law and industrial policy', (2007) *European Competition Law Review*, 28/3, 173 (who stresses that the same tensions existed in the Spanish domestic context, when no foreign firms were initially involved).

⁷ See Case N° COMP/M.5496 –Vattenfall/Nuon Energy. See T. Lo Nardo, M. Godfried & K. Kovács, 'The Vattenfall/Nuon Energy case-Upholding competition on electricity retail markets in Germany', (2009) *Competition Policy Newsletter*, 3, 49-52.

⁸ See Case N° COMP/M.5467-RWE/ Essent.

⁹ See Case N° COMP/M.4180-Gaz de France/Suez.

ACCIONA and ENEL were the companies that took the reins of ENDESA on October 2007 (*infra* §4).

The 25-month period duration of the contest for control of ENDESA was plagued with litigation on several legal issues, which were raised by the rival bidders. All the competing bids activated merger review proceedings, either at EU level or at Spanish level, and they also faced strict monitoring by Spanish regulatory authorities. As we will see, the interrelation of competition and regulation was a crucial issue in this case (*infra* §5.3), though both competition and regulatory controls were clearly used as defensive tools against an initial hostile tender offer (*infra* §5.1). Moreover, probably because of the relevant public interests that pervade energy industry in any country, government intervention at different stages strongly influenced the process and the final outcome (*infra* §5.2), the whole case being a good example of the political motivations that can be found behind the pure technical assessments made by the competent authorities and regulatory agencies (*infra* §5.4).

1. BACKGROUND

In 1944, in the aftermath of the Civil War, the Spanish government created ENDESA (EMPRESA NACIONAL DE ELECTRICIDAD, S.A.) as a state-owned firm aimed at controlling the electricity sector, considered to be strategic and of national interest. Over the next decades, ENDESA grew as the largest energy utility company in Spain. As years went by, it took over several other domestic electricity firms (in 1983 ENHER, GESA, UNELCO, ENCASUR and ERZ; from 1991 onwards, ELECTRA DE VIESGO, FECSA, SEVILLANA DE ELECTRICIDAD, SALTOS DEL NANS and HECSA). Later ENDESA expanded internationally mainly into Italy, France, Portugal, Poland and some Latin American countries (Chile, Argentina, Colombia, Peru and Brazil), using for that purpose some of the proceeds it obtained from its progressive privatization in the 1980s and 1990s¹⁰.

ENDESA is active both at the wholesale and retail level in the Spanish electricity market. It is one of the main generators, distributors and sellers of electricity in Spain, with market shares well above of 30% in each of the submarkets in the electricity industry. In the last few years it has followed a business diversification strategy, including additional electricity sources in its portfolio (including renewable energy and co-generation), with a small presence also in natural gas distribution. It is the largest electricity generator in Spain. As it was indicated before, it also vertically integrates electricity supply. ENDESA has ownership interest in six of

¹⁰ In 1988, the Spanish Government (*rectius* the INSTITUTO NACIONAL DE INDUSTRIA, INI, through which most State owned industry holdings were held at that time) floated 20,4% of ENDESA's share capital in NYSE. The State's ownership holding was later reduced to 66,9% in 1994. Another 25% was sold in 1997 and all the rest of the State holdings in the company were sold in 1998. For a description of the overall privatization of Spanish SOEs in which the sale of ENDESA took place see M.A. Ortega-Almón & M. A. Sánchez Domínguez, 'The Privatization Process in Spain (1985-2001)', (2001) *Teoria Evidencia Economica, Passo Fundo*, 9/17, 9-24.

the eight nuclear power plants active in Spain, although the electricity power generated comes mainly from thermal plants powered by carbon, combined-cycle gas turbine power plants, hydroelectric power stations and renewable sources. In the last decade, combined-cycle gas turbine power plants (CCGT or CCPP) have greatly increased their importance as a crucial source of electricity, amounting to more than a third of total Spanish electricity production¹¹.

Apart from ENDESA, other traditional players in the highly concentrated Spanish electricity markets are IBERDROLA, UNION FENOSA and HIDROCANTÁBRICO. Electricity and gas industries were liberalized in the 1990s¹², but the regulatory reform did not necessarily increase competition in the market¹³. Several transactions have ignited the market since 2000, notably the battle for the control of ENDESA in 2007. Before that, there was a merger attempt between ENDESA and IBERDROLA, which was authorized by the Government in 2001 but which never was completed due to the harsh conditions the Government imposed on competition grounds (together the two companies represented 80% of the electricity generation capacity in Spain)¹⁴. Further, in 2000 and 2001, several bidders sought control of HIDROCANTÁBRICO (TXU¹⁵, UNIÓN FENOSA¹⁶, FERROATLÁNTICA¹⁷, EDP¹⁸, RWE¹⁹), which was

¹¹ Therefore, gas can be cheaply and efficiently used as a source of electricity. On this strategy (which was a very relevant issue in the GAS NATURAL bid for ENDESA) and the impact it may have on competition in the markets in Spain, see J. López Milla, 'La integración vertical de los negocios de gas y electricidad posibles efectos sobre la competencia en los mercados afectados', (2007) *Economía industrial*, 364, 125-137. Indeed, in the last few years the vast majority of M&A in the EU energy industry involve both gas and electricity companies, see S. Verde, 'Everybody merges with somebody—The wave of M&As in the energy industry and the EU merger policy', *Energy Policy*, 36/3 (March 2008) 1125-1127 and G. De Federico, N. Fabra & X. Vives, *Competition and Regulation in the Spanish Gas and Electricity Markets*, IESE/U. Deusto- Reports of the Public-Private Sector Research Center, n° 5, Nov. 2010, 11-12.

¹² See J. I. Unda Urdaiz, 'Liberalization of the Spanish Electricity Sector: An Advanced Model', (1998) *The Electricity Journal*, 11/5, 29-37; L. A. Rasines García, 'The liberalisation of the Spanish Gas Market', (2006) *Energy Policy*, 34, 1630-1644 and R. Serrallés, 'Electric energy restructuring in the European Union: Integration, subsidiarity and the challenge of harmonization', *Energy Policy* 34(2006), 2549 ("The state's protective behaviour of "Spanish" economic enterprises permeates the carácter of the liberalization legislation and has influenced some of the outcomes in terms of corporate ownership and control").

¹³ An explanation of regulatory pitfalls and state provoked distortions (e.g., national coal policy) derailing regulatory reforms, see Arocena, Kühn & Regibeau, (1999) *Energy Policy*, 27/7, 387-399. See also Garrués-Irurzun, J., 'Market power versus regulatory power in the Spanish electricity system, 1973-1996', (2010) *Renewable and Sustainable Energy Reviews*, 14/2, 655-666 and J. Gual, 'Regulatory Change in Network Industries: The Spanish Experience', (2003) *Journal of Network Industries*, 4/1, 76.

¹⁴ See Competition Defence Court Report of 10.01.2001, ENDESA/IBERDROLA (C-60/00), the agreement of the Council of Ministers of 02.02.2001, authorized the transaction subject to conditions, published by Order of 9 February 2001 (Official Gazette 51, 28.02.2001, 7657-7659). The transaction had received a positive opinion by the NEC on 28th November 2000 (ref. 84/2000), but subjecting it to several conditions.

¹⁵ See Case N° COMP/M.1914, TXU/Hidroeléctrica del Cantabrico (aborted/withdrawn).

¹⁶ See Competition Defence Court Report of 17.05.2000, UNIÓN FENOSA/HIDROCANTÁBRICO (C-54/00) which informed about the increased risks of coordination in power generation and about the elimination of an aggressive competitor on the supply side. It was prohibited by agreement of the Council of Ministers of 26.05.2000, published by Order of 15 June (Official Gazette n°.165 of 11.07.2000, 24825-24826). The Spanish

finally acquired jointly by ELECTRICIDADE DE PORTUGAL (EDP) and ENBW²⁰. In 2003 GAS NATURAL launched a takeover bid for the shares of IBERDROLA, which was blocked by the National Energy Commission (NEC) because of the negative impact it would have had in the regulated gas and electricity distribution²¹.

Timeline of the battle for the control of ENDESA

- 5 September 2005 → GAS NATURAL (GN) Tender offer (21.30€)
- 8 November 2005 → Authorization of GN bid by National Energy Commission with conditions (NEC)
- 11 November 2005 → Defense Competition Service recommends II phase on GN bid
- 15 November 2005 → European Commission Decision on jurisdiction regarding GN bid (COMP/M.3986)
- 20 December 2005 → Advisory Opinion on GN bid by NEC (33/2005)
- 5 January 2006 → Defense Competition Court Negative Opinion on GN bid
- 3 February 2006 → Authorization by Government of GN bid with conditions (Competition)
- 21 February 2006 → E.ON tender offer (27.50€)
- 23 February 2006 → Spanish Parliament approves Decree widening NEC powers (Decree-Law 4/2006)

NEC had authorized and favourably considered the transaction on April 2000 (see Resolution 5/2000, Reports 3 and 4/2000).

¹⁷ See Case N° COMP/M.2434, ENB/Villar Mir.

¹⁸ See Case N° COMP/M.2340, EDP/Cajastur/Caser/Hidroeléctrica del Cantábrico.

¹⁹ See Case N° COMP/M.2353, RWE/Hidroeléctrica del Cantábrico.

²⁰ See Case N° COMP/M.2684, ENB/EDP/Cajastur/Hidroeléctrica del Cantábrico. The European Commission cleared subject to conditions an agreement giving joint control of HC to ENBW, EDP and CAJASTUR [the transaction would lead to strengthening the dominant position on the Spanish wholesale market for electricity and for that reason an increase of capacity on the interconnection with France was required, see E. Navarro, M. García & C. Vergez, 'Anti-trust Issues in the Liberalised Electricity Market in the European Union', (2002) *Business Law International*, 345/2, 353-354; M. Piergovanni, 'EC Merger Control Regulation and the Energy Sector: An Analysis of the European Commission's Decisional Practice on Remedies', (2003) *Journal of Network Industries*, 4/3, 253-255 and Verde, (2008) *Energy Policy*, 36/3, 1130-1131]. On the 9th of September of 2004, EDP acquired ENBW's interest in HC, see Case N° COMP/M.3448, EDP/Hidroeléctrica del Cantábrico

²¹ The NEC denied its authorization by Resolution of 30.04.2003, as it considered that the financing (debt) of the transaction would carry significant risks for the investment plans of the company in the regulated activities of gas and electricity transport and distribution (2003-2006).

27 February 2006 →	Authorization of GN bid by Spanish SEC
21 March 2006 →	Commercial Court nº 8 Madrid-Interim Measures (suspension)
25 April 2006 →	European Commission clears E.ON bid (COMP/M.4110)
27 July 2006 →	E.ON offer authorized by NEC with conditions (ref. 90/2006)
25 September 2006 →	ACCIONA buys 10% of ENDESA's shares in market
26 September 2006 →	E.ON increased price to €35 per share
3 November 2006 →	Spanish Ministry of Industry authorizes Eon offer with conditions.
15 January 2007 →	Provincial Court annuls interim measures awarded by commercial Court nº 8
2 February 2007 →	E.ON increased price to €38.75 per share
12 March 2007 →	ENEL owns 25% of ENDESA's shares in marke
26 March 2007 →	E.ON increased price to €40 per share
2 April 2007 →	Agreement among E.ON, ACCIONA and ENEL
11 April 1007 →	ACCIONA/ENEL Tender Offer (41.30€)
4 July 2007 →	ACCIONA/ENEL offer authorized by NEC with conditions (49/2007)
5 July 2007 →	ACCIONA/ENEL offer authorized by European Commission (COMP/M.4685 & COMP/.5171)

2. THE BEGINNING OF THE BATTLE: GAS NATURAL BID.

On September 5th 2005, GAS NATURAL announced the launch of a tender offer for all the shares of ENDESA. It offered €1.30 per share, part in cash (€7.34 per share) and part in GAS NATURAL shares (2 shares of GAS NATURAL in exchange for one share of ENDESA)²². GAS NATURAL was valuing ENDESA at €2,551 million and it expected to close the deal by the end of April 2006. Prior to that, GAS NATURAL would have increased its share capital by issuing the shares that would be required for the exchange bid for ENDESA. The offer caught ENDESA's management by surprise, but on September 6th 2005 the bid was rejected outright

²² As ENDESA's statutes limit the votes of any single shareholder to 10% and conditions were required to join the Board of Directors, GAS NATURAL conditioned its bid on reaching 75% of the share capital and changing these rules (such an amendment requires the approval of more than 50% of shareholders).

by ENDESA's board: it was considered grossly inadequate and not in the best interest of its shareholders. The Board unanimously considered that the implied value of the offer was inferior and uncertain, when compared with ENDESA's stand alone strategic plan²³.

GAS NATURAL is a relatively small energy group of energy undertakings, operating mainly in the supply, distribution and marketing of natural gas in Spain, Italy and Latin America. It was formed in 1991 by a three-way merger of CATALANA DE GAS, MADRID GAS and the piped gas assets of REPSOL. GAS NATURAL is the leader in the market for gas in Spain (largest gas supplier in Spanish market and main gas distributor). It is also a new entrant in the electricity sector in which it is also active in the generation and supply of electricity. Although it is a newcomer in electricity, it has a big growth potential, both in generation (because of its CCGT plants) and retail supply (experience and large commercial network in the gas market). According to GAS NATURAL, the acquisition would allow the creation of a Gas/Electricity "national champion" in Spain, combining its strengths in gas markets with those of ENDESA's in the electricity market, in order to build a global energy dual-fuel operator. It would become the first energy company in Spain and Latin America (both in gas and electricity), and the third largest utility company worldwide with more than 31 million customers. The estimated cost savings were of 350 million €per year with additional potential savings from increased efficiencies of 75 million €per year²⁴.

GAS NATURAL is based in Barcelona. It has been suggested that the offer was triggered by regional political interests. Apparently, the political parties in charge of Catalonia's government at that time had signed an agreement to encourage the creation of Catalonian operators in key strategic sectors, including energy²⁵. Moreover, the Socialist government in Madrid favoured the deal considering it as a means for creating a national champion to compete in the global energy market, whilst the deal was opposed by the center-right opposition Popular Party (PP). Furthermore, the largest shareholder of ENDESA at that time was CAJA MADRID (10%), a large savings bank based in Madrid whose Board was dominated by people appointed by the regional government of Madrid, which was ruled by the PP.

GAS NATURAL is controlled by LA CAIXA, a local savings bank, strongly linked to the regional government and local interests. The political support by the Spanish socialist government was coupled with the support of Catalonia's government, as the idea of the Spanish energy national champion being based in Catalonia was cherished by the regional government. The

²³ See Presentation "Endesa: major proyecto, más valor" (trans. 'Endesa: better project, higher value') filed by ENDESA on 03.10.2005 (Relevant Facts OC19237, OC19247 and 61285) in the Spanish Securities and Exchange Commission (SSEC), available at www.cnmv.es.

²⁴ See the presentations "Creating a leading, fully integrated global energy company", filed by GAS NATURAL before the SSEC on 06.09.2005 (Relevant Fact OC19132), or "Juntos sumamos energía" (trans. Together we add up energy") filed by GAS NATURAL before the SSEC on the 07.04.2006 (Relevant Fact OC20354).

²⁵ See §VIII of the *Tinell Pact* (Acuerdo para un Gobierno catalanista y de izquierdas en la Generalitat de Catalunya) signed on 14.09.2003 by ERC, IC and the Socialist Catalonian party (available in Spanish at <http://web.lavanguardia.es/lavanguardia/docs/20051213/pactotinellcastellano.pdf>)

GAS NATURAL takeover attempt became a political battle with several parliamentary appearances dealing with the government's intervention in the process. Apart from the central government, some of the Spanish regions (mainly, but not only, Catalonia's government²⁶) and the Spanish Government took sides in the transaction at different stages and were crucial in the final outcome.

Aside from the political implications of the case, the Board of Directors of ENDESA vowed to defend the company's independence and it took various steps aimed at derailing GAS NATURAL's offer. ENDESA's board opposed the bid on several legal grounds, from competition law and regulation to corporate law²⁷.

2.1. Competition Law issues.

GAS NATURAL was required to notify the transaction to the competition authorities and to the energy regulator. In anticipation of possible competition concerns that would probably be raised by the authorities, it proposed an initial sale of some assets to IBERDROLA. IBERDROLA is ENDESA's main rival in the generation, distribution and sale of electricity in Spain (with even larger shares than ENDESA in the electricity's sale market), and it is also significantly involved in the natural gas market.

On the competition side, the initial bid by GAS NATURAL raised several interesting issues that are worth looking at. Overall, they demonstrate the success of ENDESA's strategy of delaying the potential acquisition by GAS NATURAL²⁸. First, ENDESA argued that the transaction had a community dimension and, therefore, the European Commission was competent to review the merger (*infra* §2.1.1). The Commission's jurisdiction over the case was also requested, unsuccessfully, by the Italian and Portuguese national competition authorities (*infra* §2.1.2).

²⁶ Several regional competition authorities delivered opinions on the negative impact of the transaction for competition in each of their respective markets. See Tribunal de Defensa de la Competencia de la Comunidad de Madrid, *Informe sobre los efectos de la OPA de Gas Natural sobre Endesa y el contrato vinculado de venta de activos a Iberdrola en el Mercado energético de Madrid*, Jan. 2005 (Cons. 02/2005, Exp. Gas/Endesa) and also Tribunal Galego de Defensa de la Competencia, *Análise dos Efectos da Operación de Concentración Gas Natural-Endesa en Galicia*, est. 4/2006 (more nuanced effects in the region).

²⁷ In terms of resistance, ENDESA carried out a severe defence that, at the end, effectively blocked GAS NATURAL's bid; for a description of takeover defences (some of them, mainly post-offer and principally litigation were used by ENDESA) and a review of the literature on the issue, see R. S. Ruback, 'An Overview of Takeover Defenses', in A. J. Auerbach, ed., *Mergers and Acquisitions*, U. of Chicago Press 1987, 49-67.

²⁸ In the words of the Judicial Decree of the Madrid Provincial Court n° 28 of 15.01.2007 (proc. 523/2005) "ENDESA has tried to use its entire arsenal against the operation launched by Gas Natural, also raising claims before the Commercial Courts, but not all the weapons that may be wielded must be suitable for combat" (Legal Ground 6th). GAS NATURAL'S assessment was obviously also very negative characterizing ENDESA's strategy as a systematic obstruction, "tooth and nail", independently of its rationale, its aim being only to obtain injunctions to stop the transaction, see GAS NATURAL reaction to the Judicial Decree of Commercial Court n° 8 of Madrid of 21.03.2006, filed the same day before the SSEC (Relevant Fact OC 20258).

At the same time, ENDESA managed to obtain an injunction to stop the offer from proceeding as it convinced a commercial court that the transaction was part of an anticompetitive conspiracy to eliminate ENDESA from the market (i.e., a buy and divide collusive agreement) (*infra* §2.1.3). Finally, within the domestic merger review system, the Spanish Government authorized the transaction [despite a negative opinion by the Spanish Defense Competition Tribunal (*infra* §2.1.4)], although ENDESA again managed to provisionally suspend this decision by challenging it before the Spanish Supreme Court (*infra* § 2.1.5).

2.1.1. Does the transaction fall within the scope of EU merger review?

GAS NATURAL filed a merger review notification with the Spanish competition authorities on the September 12th, 2005. A week later, ENDESA appeared before the European Commission claiming the transaction had “*Community dimension*”²⁹. If that were the case, the European Commission would be the appropriate authority to take a decision and not the Spanish Competition authorities. ENDESA thought that it would obtain a more independent opinion from the Commission, probably favouring its interests in fending off the transaction. Alternatively, it may well be that ENDESA was only trying to gain time, delaying the tender offer from being effective, and allowing for alternative (and higher priced) offers to come forward³⁰.

ENDESA based its claim on the fact that the undertakings involved in the transaction did not achieve more than two-thirds of their Community-wide turnover in Spain. In setting the thresholds for the EU merger review system, the European Merger Regulation 139/2004 (EMR thereafter) sets requirements based on the undertakings’ turnover (worldwide and Community-wide), but excluded from the Commission’s jurisdiction those transactions heavily affecting one member State. The EMR considered that to be the case if “*each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State*”³¹.

According to ENDESA, the application of this controversial rule to the GAS NATURAL takeover would have supported the “*Community dimension*” of the transaction³². Of course, the other

²⁹ See article 1 of Council Regulation (EC) N° 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L24, 29.01.2004, 1-22).

³⁰ Several indications point in that direction, for example, ENDESA’s request for a suspension exceeding the 10 day period provided by article 22(3) of Regulation 139/2004 concerning the referral requests by the Portuguese and Italian national competition authorities (see *infra* §2.1.2). This was an issue considered by the General Court in ¶66 of Judgment of July 14th 2006, Endesa/Commission, T-417/05, ECR (2006) II-2533.

³¹ Article 5 of Regulation 139/2004 details how turnover is calculated.

³² After this transaction there were proposals for the two-thirds rule to be reconsidered, as its application in transactions in the energy market precludes EU oversight, leaving National Competition Authorities and Member States to decide, and thereby allowing them to promote national champions at expense of a consistent and coherent EU-wide competition oversight, especially in large member States (in some cases with public interest

specific quantitative thresholds used by the EMR were undoubtedly met by the GAS NATURAL/ENDESA concentration.

ENDESA argued that less than two-thirds of its aggregate Community-wide turnover were located within Spain. ENDESA attempted to engage the European Commission in a complex *ex post facto* recalculation and reassessment of its turnover, which was mainly rejected by the Commission. In particular, ENDESA argued that the 2004 turnover figures that should be taken into account were those elaborated on the basis of the new International Financial Reporting Standards (IFRS) rather than those prepared and audited according to Spanish Generally Accepted Accounting Standards. Moreover, ENDESA claimed that a significant number of adjustments should be made to those reconciled IFRS accounts for 2004 in order to comply with the requirements of the Commission Notice on calculation of turnover³³. Apparently, the outcome of the whole endeavour would have made a major difference to ENDESA's revenue with a significant reduction of its turnover in Spain (€4,500 million) and an increase of its turnover in other EU countries (€700 million), that would have given the transaction a "*Community dimension*". Nevertheless, the European Commission considered it was not justified to recalculate ENDESA's accounts and rejected almost all of ENDESA's arguments and adjustments. According to the Commission's calculations two thirds of the firm's turnover was achieved in Spain.

The European Commission decided on November 15th, 2005, that the transaction did not have community dimension and, therefore, it was subject to Spanish merger control³⁴. Two weeks later ENDESA challenged the Commission's decision before the EU's General Court and requested interim measures³⁵. The request for interim measures was denied in early February 2006³⁶, and on July, 14th 2006 the General Court adopted a final decision on the case, confirming the Commission's decision³⁷.

considerations other than competition policy and the mergers raising substantial competition concerns). See ¶16 of Report on the functioning of Regulation 139/2004, of 18.6.2009, COM (2009) 281 Final and accompanying Staff Working Paper of 30.06.2009, SEC (2009) 809 final/2 (¶¶65 and 70). See also A. Scott, 'Last rites for the two-thirds rule in EC merger control?', (2006) *Journal of business law*, 6, 619-630 and A. Nourry & N. Jung, 'EU State Measures Against Foreign Takeovers: "Economic Patriotism" in all but name', (2012) *Competition Policy International*, 8/1, 38.

³³ ¶¶26 and 27 of the Notice on calculation of turnover under Council Regulation (EEC) N° 4064/89 on the control of concentrations between undertakings (OJ 1998 C 66, 02.03.1998, 25-35) set the rules concerning turnover restatement and adjustment.

³⁴ Decision of 15.11.2005, Case N° COMP/M.3986–Gas Natural/Endesa (available at http://ec.europa.eu/competition/mergers/cases/additional_data/m3986_en.pdf)

³⁵ OJ 2006 C22, 28.01.2006, 20-21.

³⁶ Order of 01.02.2006, Endesa/ Commission T-417/05 R.

³⁷ Judgment of 14.07.2006, Endesa/Commission T-417/05. The General Court also condemned ENDESA to pay GAS NATURAL's legal expenses in the case. The amount GAS NATURAL claimed (392,154.75€+9,383.11€) was

Several years later, it was also the two-thirds rule which prevented the European Commission from analysing the acquisition of UNIÓN FENOSA by GAS NATURAL³⁸. Both companies were vertically integrated groups active in gas/electricity markets in Spain and elsewhere, and the transaction was cleared by the Spanish National Competition Commission (NCC), subject to commitments, on February 11th 2009 (because of the risks the transaction posed for the maintenance of effective competition in some of the markets affected, especially in the supply of gas to Spain, the wholesale electricity market and retail supply of gas and electricity)³⁹.

2.1.2. Upward Referral to the European Commission from Portuguese and Italian Competition Authorities?

On the other hand, even if the transaction was not subject to the EMR, it was to be notified in several EU jurisdictions where the concerned undertakings conducted business. That was the case in relation to Portugal and Italy, where GAS NATURAL filed notifications before the respective national competition authorities.

Both the Portuguese *Autoridade da Concorrência* and the Italian *Autorità Garante della Concorrenza* requested the European Commission to take the case in accordance with article

contested by ENDESA, the General Court finally deciding the issue by order of 12.12.2008 (T-417/05 DEP), which set the amount to be paid at 66,887.70€

³⁸ This very same rule prevented the European Commission from deciding on other cases with huge implications throughout the EU and specially in the process of consolidation of the internal energy market, for example the case E.ON/RUHRGAS (concerning the main electricity operator and the main gas operator and importer in Germany). In that case, in accordance with §42 GWB, the German Minister for Economic Affairs authorized a concentration that was disapproved by the *Bundeskartellamt* (4000-U-109/01, of 21 January 2002, E.ON/RuhrGas) based on an overriding public interest (a national champion would be created that would improve national supply security and increase competitiveness in international energy markets), although the transaction was not supported by the *Monopolkommission*. See OECD, *Germany- Regulatory Reform in Electricity, Gas, and Pharmacies*, 2004, 70-71.

³⁹ C-0098/08 (GAS NATURAL/UNIÓN FENOSA). The remedies imposed were mainly divestitures to favour entry of new operators in the gas market or strengthen existing ones, counteracting the disappearance of UNIÓN FENOSA as a competitor and lowering the entry barriers to the acquirer of the divested assets. See G. Federico, 'The Economic Analysis of Energy Mergers in Europe and Spain', (2011) *Journal of Competition Law and Economics*, 7/3, 619-627 and G. De Federico, *The Spanish Gas and Electricity Sector: Regulation, Markets and Environmental Policies*, IESE- Reports of the Public-Private Sector Research Center, n° 5, Nov. 2010, 19-20.

The authorization by the Spanish NCC was challenged in court by ENI, SPA on several grounds, including that the transaction should have been analyzed by the European Commission because it constituted an indirect acquisition of the joint-venture UNION FENOSA GAS that ENI had with UNION FENOSA and if ENI turnover was taken into account, the two-thirds exemption would not apply. The Spanish National Court rejected this argument on the basis that there had occurred only a mere change in the controlling shareholder of one of the companies exercising joint control (Legal Ground 4th), confirming the NCC decision by judgment of 20.09.2010 (appeal number 175/2009).

22(3) of the EMR, but the Commission refused to accept the referral requests⁴⁰. It did so on the basis of the wide discretion provided by the rules governing referrals and because it was not shown neither that the transaction would have had a major impact on trade among Member States (with the risk of appreciably affecting competition in those jurisdictions) nor that the Commission was better suited than the Portuguese or the Italian Competition authorities to assess the impact of the transaction in those jurisdictions⁴¹.

Ultimately, although the Commission probably thought that it should be the competent authority to review the transaction⁴², the fact that the Spanish Competition authorities were not keen to hand over the transaction, supported the Commission rejection of the Portuguese and Italian upward referral requests⁴³.

2.1.3. The Pre-merger disposal agreement: Up-front buyer proposal as an anticompetitive agreement?

Business acquisitions that may lead to excessive market concentration are frequently backed up with divestment deals that seek to alleviate potential competition concerns that could be raised by the authorities. Anticipatory remedies proposals try to preserve competition, by maintaining the number of competitors in markets affected and avoiding increases in market shares in overlapping markets. In this case there was a pre-sale agreement between GAS NATURAL and IBERDROLA. According to that agreement IBERDROLA agreed to buy assets in electricity generation in Spain and Latin America, and electricity and gas distribution for an estimated value of €7,000-8,000 million⁴⁴.

⁴⁰ See ¶¶7 and 9 of Commission Notice on Case Referral in respect of concentrations (OJ 2005 C56, 5.3.2005, 2-23).

⁴¹ See IP/05/1356: *Commission declines Portuguese and Italian requests to consider effects of proposed Gas Natural/Endesa merger on their markets*, 27.10.2005.

⁴² The power of the European Commission to intervene in merger cases being assessed by national competition authorities if there is a significant effect on trade could be recognized, analogous to the one provided by article 11(6) of Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 04.01.2003, 1-25), see J. W. Van de Gronden & S. A. De Vries, 'Independent competition authorities in the EU', (2006) *Utrecht Law Review*, 2/1, 65.

⁴³ ¶19 Letter 27.10.2005 to Portuguese Authority on COMP/M.3986 and ¶15 of Letter 27.10.2005 to Italian Competition Authority on COMP/M.3986. See G. De Stefano, R. Motta & S. Zuehlke, 'Merger Referrals in practice- Analysis of the Cases under Article 22 of the Merger Regulation', (2011) *Journal of European Competition Law & Practice*, 2/6, 542.

⁴⁴ See presentation "Acuerdo Gas Natural-Iberdrola" (trans. "Agreement Gas Natural-Iberdrola") filed by GAS NATURAL before the SSEC on 16.09.2005 (Relevant Fact OC19169). According to GAS NATURAL, the choice of IBERDROLA was justified by its strong technical and economic capabilities to exploit the divested assets in a more efficient and competitive way. The acquisition of the divested assets by IBERDROLA would be deemed as an independent transaction that might itself have triggered merger review proceedings. Indeed, the fact that the acquirer was the second largest electricity company in Spain was another fact likely to jeopardize a smooth

In this case, the pre-sale agreement led to an unforeseen development when on November 25th, 2005, ENDESA filed a claim against GAS NATURAL and IBERDROLA in a Madrid commercial court alleging their agreement amounted to an anti-competitive conspiracy to eliminate a rival⁴⁵. According to ENDESA, two of its competitors (GAS NATURAL and IBERDROLA) were part of a concerted practice to buy and fragment a rival, in violation of Article 101 of the Treaty on the Functioning of the EU (TFEU)⁴⁶.

ENDESA requested the court to issue interim measures, to suspend the takeover bid and the subsequent agreement with IBERDROLA. Surprisingly, the commercial court found some basis for ENDESA's claim, and it suspended GAS NATURAL bid for some months, requesting a €1,000 million bond⁴⁷. Only ten months later the Madrid Provincial Court of Appeals found ENDESA's claim unfounded and discharged its claim⁴⁸. According to the Provincial Court it made no sense at all to consider that the sale agreement related to the takeover was an anticompetitive agreement in breach of article 101 of TFEU, mainly because it was conditioned the success of the takeover bid by GAS NATURAL and could not be understood unless tied to it, and also because it was made public to the authorities (something that normally does not happen with violations of article 101 of TFEU) and, thus, they would be able to correct any possible anticompetitive concerns it may inflict.

2.1.4. Decision under the Spanish domestic merger review system.

After the request of the Spanish Competition Defense Service⁴⁹, the analysis of the GAS NATURAL bid entered into the second phase of the merger review proceedings on November 7th, 2005. This gave the national competition authorities extra-time (2 months) to examine the transaction, which it is only done in those cases in which the transaction raises concerns that it will potentially reduce effective competition in the market (article 15bis of 1989 Spanish

transaction. See Federico, (2011) *Journal of Competition Law and Economics*, 7/3, 617.

⁴⁵ This provoked a conflict between ENDESA and IBERDROLA, which had a very negative impact in the functioning and works of the association of Spanish electricity operators (UNESA) to which both companies belonged. For several months UNESA experienced a deadlock in its operations due to this conflict between its two main members.

⁴⁶ OJ 2000 C 83, 30.3.2010, 47-200.

⁴⁷ Judicial Decree of the Commercial Judge n° 8 of 21.03.2006. See L. Agosti, 'The Madrid Commercial Court suspends Gas Natural's public acquisition offer on Endesa on the basis of a potential infringement of Art. 81 EC (Gas Natural-Iberdrola/Endesa)', *e-Competitions*, n° 683, March 2006 and S. Santos & F. Cantos, 'A Spanish commercial court suspends Gas Natural's bid for Endesa', *e-Competitions*, n° 1380, March 2006.

⁴⁸ Judicial Decree of the Madrid Provincial Court n° 28 of January 15th 2007 (proc. 523/2005). See M. Fernández, 'The Madrid Commercial Court of appeal lifts interim measures having blocked a key merger on the basis of alleged anticompetitive agreement (Gas Natural/Endesa)', *e-Competitions*, n° 13220, Jan. 2007 and A. Montesa & A. Givaja, 'A Spanish Appeal Court removes the bid's suspension on the basis that the agreement does not potentially infringe Art. 81.1 EC (Gas Natural/Iberdrola/Endesa)', *e-Competitions*, n° 13287, Jan. 2007.

⁴⁹ Report N-05082 (GAS NATURAL/ENDESA).

Competition Act, in force at that time⁵⁰). Moreover, the domestic merger review system gives the government powers to intervene in transactions on the basis of public interest values different to competition⁵¹.

On January 5th 2006 the Spanish Competition Defense Tribunal (hereinafter CDT) delivered its opinion on the transaction, proposing that the government should deny authorization given its anticompetitive impact on the energy markets⁵². The decision was adopted following a vote in which the CDT was split according to party lines (the six appointed by PP voting against the authorization, the three appointed by Socialist Party voting in favor of the authorization, and providing a dissenting opinion).

According to the final decision of the CDT, the takeover would give birth to the market leader in several segments of the gas and electricity markets in Spain. Given the substantial entry barriers in these markets and the vertical integration of the firms involved (which would have been considerably strengthened by the transaction), the takeover raised significant and severe anti-competitive concerns in the market for technical restrictions and in the markets for the supply of gas and electricity in some parts of the country (Catalonia and Andalucía). Above all, the transaction would reduce the existing asymmetry in gas and electricity between GAS NATURAL and ENDESA, creating a conglomerate operator integrating both gas and electricity with substantial market power, that might lead to an increase in prices paid for gas and electricity. Apart from these unilateral effects, there would be an increased risk of

⁵⁰ Defence Competition Act 16/1989, of 17.07.1989 (an unofficial translation is available at <http://www.cncompetencia.es>). The current competition act is Defence Competition Act 15/2007, of 03.07.2007 (a unofficial consolidated translation is available at the same website).

⁵¹ The scope for government's decisions on these grounds still exist in the current Defence Competition Act 15/2007 (articles 10.4 and 60), though it has considerably been narrowed from what was possible before (article 17 of Defence Competition Act 16/1989). See F. Marcos & A. Sánchez-Graells, 'Lights and Shadows in the Modernization of Spanish Merger Review', (2008) *The Threshold-Newsletter of M&A Committee-ABA Antitrust Section*, 8/3, 29.

⁵² CDC Report C-94/05, GAS NATURAL/ENDESA (<http://estaticos.elmundo.es/documentos/2006/01/05/tdc.pdf>). For a supportive comment on the position of the Spanish Competition Court, see J. Barquin, L. Bergman, C. Crampes, J.-M. Glachant, R. Green, C. Von Hirschhausen, F. Lévêque & S. Stoft, 'The Acquisition of Endesa by Gas Natural: Why the Antitrust Authorities Are Right to Be Cautious', (2006) *The Electricity Journal*, 19/2, 62-68, considering the transaction "would render the Spanish industry structure more vertically compact and subsequently more closed to foreign initiative" (id. 64). A similar analysis by the same authors in 'The Acquisition of Endesa by Gas Natural: An Antitrust Perspective', (2005) *Journal of Network Industries*, 6/4, 213-224. These papers were related to a report on the transaction (*Brief academic opinion of economic professors and scholars on the project of acquisition of Endesa by Gas Natural*, Oct. 28, 2005) commissioned by ENDESA.

In exchange GAS NATURAL asked other academics to write a report in response (*The Proposed Acquisition of Endesa by Gas Natural: Is There an Academic Consensus Against Electricity and Gas Mergers*, Nov. 5, 2005), which was also published, see A. J. Padilla, M. Polo, M. Schnitzer, D. Spector, R. Schmalensee & X. Vives, 'The Proposed Acquisition of Endesa by Gas Natural: Is There an Academic Consensus Against Electricity and Gas Mergers', (2004) *Utilities Law Review*, 14/6, 268-274.

coordination with the other main players in the concentrated Spanish energy markets. The CDT also considered that GAS NATURAL alleged efficiencies of €430 million were not enough to compensate for the negative competitive effects of the transaction. Moreover, it considered that the divestments proposed by GAS NATURAL would not solve the horizontal, vertical and conglomerate negative effects of the transaction on competition.

Nonetheless, despite the negative opinion of the CDT, and given the Government was empowered to take a different decision⁵³, it gave its authorization for the transaction to proceed on February 3rd, 2006, although it imposed substantial remedies affecting electricity generation, gas transport and gas and electricity supply⁵⁴. In electricity generation, the remedies imposed were the mandatory sale of 4,300 megawatts of capacity and a prohibition on the purchase of any CCGP plants for 2 years. Moreover, existing power customers (CCGP) were granted the right to cancel contracts without penalty. In relation to gas supply, an obligation was introduced to ensure a stable supply source of gas to GAS NATURAL's competitors through auctions. Remedies also required the release of 1,8 bcm per year of gas for three years from 2007 by releasing excess gas from Sagane 1 contract with Algeria (to be done through public tenders from December 2006) and the mandatory sale of ENDESA's stakes in Saggas and Reganosa regasification plants and the reduction of its stake in ENAGAS from 15% to 1%. Finally, in the area of gas distribution, another remedy required the sale of distribution facilities and tariff supply agreements with at least 1,500,000 supply outlets to create no less than two new competitors of a minimum size of 250,000 supply outlets.

On the other hand, ENDESA was very active in trying to use competition law not only to defend itself against the hostile takeover bid but also to attack the hostile bidder. ENDESA's attack also reached LA CAIXA, GAS NATURAL's principal shareholder. ENDESA filed a claim before the competition authorities on December 1st 2005 accusing LA CAIXA of breaching Spanish merger review rules. The argument was that LA CAIXA had in the past joint control of GAS NATURAL with REPSOL (together they held more than 60% of its share capital), but some changes in the participation of LA CAIXA in REPSOL (which according to ENDESA had become solely controlled by LA CAIXA), gave LA CAIXA sole control of GAS NATURAL without those

⁵³See M. Motta & M. Ruta, *Mergers and National Champions*, in O. Falck, C. Gollier & L. Woessmann (eds.), *Industrial Policy for National Champions*, MIT Press-CESifo, Cambridge (Mass.) 2011, 104 (“*even when both the government and the authority belong to the same country, they may have opposing views about a particular (domestic) merger. This is because the government's position is affected by political contributions, which distort its objective function away from total welfare considerations. As a result, politicians may be ready to accept mergers that are not very efficient, but which are profitable enough for firms to lobby the government*”).

⁵⁴ Economy and Treasury Ministry Order EHA/193/2006 of 03.02.2006, authorized the GAS NATURAL offer, subject to the fulfilment of 21 separate remedies (going beyond those initially anticipated by GAS NATURAL). See also D. Domínguez Muñoz, ‘The Spanish Council of Ministries cleared with remedies a merger in the natural gas sector, in spite of the NCA's opinion to block the transaction (Gas Natural/Endesa)’, *e-Competitions* N° 22231, Jan. 2006 and A. Montesa Lloreda and A. Givaja Sanz, ‘The Spanish competition authorities clears with remedies a major merger in the energy sector raising substantial EC and national procedural issues (ENDESA/Gas Natural)’, *e-Competitions*, N° 494, feb. 2006.

changes having been notified to the competition authorities. However, it is not reported that the Spanish competition authorities adopted any decision on this claim⁵⁵.

2.1.5. Injunction against the Government's decision.

Once the authorization of the transaction by the Government was effective, at the beginning of February 2006, the SSEC would allow the offer to proceed in the stock markets (although the injunction referred *supra* §2.1.3 was still in place) and the conditions would have to be fulfilled. However, various conditions required major sales and divestments by GAS NATURAL, so ENDESA, one consumers' association (Euroconsumo) and an association of minority shareholders challenged the Government's authorization before the Supreme Court and requested interim measures for the acquisition to be blocked. They argued that if the government authorization was effective and the offer was allowed to proceed and was successful, not only would competition in the affected markets be lessened but the execution of the divestment remedies by the acquirer would also be difficult to reverse in the event that the challenge to the government authorization was successful.

In a highly discussed decision (vote split 18-14, two separate dissenting opinions were issued), the Supreme Court agreed to grant the precautionary measures at the end of April 2006, but required ENDESA to post a €1,000 million bond⁵⁶. The majority opinion of the Supreme Court was based on various reports which confirmed the anticipated negative and pernicious competitive effects of the transaction in both gas and electricity markets⁵⁷.

The injunction against the government authorization of GAS NATURAL's offer was lifted by the Supreme Court on January 2007, after ENDESA and the rest of the applicants asked for it to be revoked given that the circumstances had substantially changed⁵⁸. At that time, keeping the injunction in place prevented competitive takeover bids made being effective. It was true that the new circumstances made the continuation of the precautionary injunction unnecessary as, for instance, there was a competing offer by EON (already authorized by the government) and other transactions were taking place in the stock market that made the acquisition by GAS NATURAL unlikely to succeed (see *infra* §3).

⁵⁵ The claim is available at www.elconfidencial.com/fotos/denuncialacaixa.pdf.

⁵⁶ Judicial Decree of Supreme Court of 28.04.2006, granting an injunction of the Government's authorization of the concentration GAS NATURAL/ENDESA (appeal number 47/2006). The bond posted by ENDESA in the case referred *supra* §2.1.3 was considered sufficient for this purpose. The Supreme Court confirmed its decision by Judicial Decree of 26.06.2006, responding to an appeal filed by the Government, IBERDROLA and GAS NATURAL.

⁵⁷ Mainly those by the DCT and the NEC, widely and extensively reproduced in the Supreme Court opinion.

⁵⁸ Judicial Decree of Supreme Court of 15.01.2007, lifting the injunction. By Judicial Decrees of the Supreme Court of 28.05.2007; 29.05.2007; 12.07.2007, 24.10.2007 and 27.10.2007, the case was closed as it was devoid of purpose or interest once GAS NATURAL withdrew its bid on February 1st 2007.

2.2. Energy Regulation issues.

On the energy regulation front, because ENDESA's activities are subject to specific energy regulation and to control by the National Energy Commission (NEC), GAS NATURAL requested authorization. The NEC authorized the bid, subject to the fulfillment of several conditions aimed at preserving the solvency of regulated firms affected by the transaction, among them the sale of assets valued at €8,200 million and the maintenance of a net financial debt/EBIDTA ratio of less than 5.25% during three years, limitations on dividend distributions, and maintaining pre-existing investment plans of both GAS NATURAL and ENDESA⁵⁹.

ENDESA unsuccessfully challenged NCE's authorization before the Ministry of Industry, Energy and Commerce. Besides, the National Court rejected ENDESA's claim for suspension of NEC's authorization on July 20th 2006.

2.3. Corporate Law and Securities Regulation issues.

ENDESA was also very active in fighting the GAS NATURAL bid in the corporate and securities regulation fronts. On November 30th 2005, ENDESA claimed before the Spanish SSEC that GAS NATURAL main shareholder -LA CAIXA- was effectively controlling GAS NATURAL and that it was required by Spanish takeover laws to launch a takeover bid for all the shares of GAS NATURAL.

The most controversial issue here was the *passivity duty* that Spanish takeover laws impose on the board of directors of the companies target in tender offers, according to the rules in force at that time⁶⁰. ENDESA's board of directors adopted several decisions after the hostile bid was

⁵⁹ NEC Resolution of 8.11.2005, concerning the authorization requested by Gas Natural SDG, S.A. both to segregate affiliates and contribute with branches of secondary transport and distribution and to take a stake in the share capital of Endesa resulting from the tender offer presented before the SEC, ref. 29/05 (available http://www.cne.es/cne/doc/publicaciones/cne29_05.pdf together with explanatory and dissenting opinions of 4 members of the NEC's Board).

Six weeks later, the NEC also provided its consultative opinion to the Government on the impact that the transaction might have on competition in the affected markets. NEC report of 20.12.2005, on the project of a concentration consisting of Gas Natural SDG, S.A. acquiring the control of Endesa, S.A. through a tender offer of its shares, ref. 33/2005 (available at http://www.cne.es/cne/doc/publicaciones/cne33_05.pdf, together with four dissenting opinions). The NEC's opinion was less negative than the one delivered by the CDT, as it held that the transaction could be allowed to proceed if the authorization was subject to some remedies being adopted (similar –though more strict- to those finally imposed by the Government).

⁶⁰ Article 14 of Royal Decree 1197/1991, of July 26, on regulation of Securities Tender Offers (*Limitation of action of the board of directors of the target company and of its group*) reads: “1. From the publication of the suspension of trading of target company's shares and until the results of the offer are released, the board of directors of the target company shall refrain from conducting or arranging any transactions other than the ordinary activities of the company or which are mainly intended to disturb the development of the offer, and at all times shareholders' interest must prevail over their own. In particular, it may not: a) Issue shares, bonds of

announced that were considered by GAS NATURAL to violate that duty. First, ENDESA's board not only made several public statements against the tender offer but also started several legal actions that were aimed at delaying or defeating it. Second, following the initial reaction against the hostile takeover bid, ENDESA promised to return to its shareholders the cash resulting from the sale of non-strategic assets: during that period ENDESA decided to pay an interim dividend and then the largest dividend in the history of the company (€2.9 per share in 2005, as it included the payoff from the sale of the communications company AUNA). Third, it also launched a major advertising campaign to enhance and promote ENDESA's brand in the retail energy markets⁶¹. Finally, it allegedly searched for an alternative company that would outbid GAS NATURAL's offer. On September 12th 2005, the President of the SSEC sent a formal letter to ENDESA's board of directors to remind ENDESA's directors of their passivity duty. ENDESA challenged the letter in court and managed to suspend its effects, arguing that the SSEC had exceeded its role⁶².

Moreover, ENDESA accused GAS NATURAL, IBERDROLA and the banking guarantors (UBS, SOCIÉTÉ GENERALE and LA CAIXA) of violating the prohibition on financial assistance. According to ENDESA, the offer was to be financed by the proceeds from a sale of assets to IBERDROLA valued €7,000-8,000 million and that contravened the prohibition of any kind of loan, guarantee or financial assistance by a company to acquire its own shares⁶³. Both the commercial court and the provincial court rejected ENDESA's claims on this issue, arguing that the sale of assets was not aimed at providing financial assistance for the acquisition but to offer a solution to the harmful competition effects that the transaction may have and that ENDESA's assets were neither used to finance the share acquisition⁶⁴.

Finally, as ENDESA is also listed in the NYSE, a takeover bid had to be launched for ENDESA's American Depositary Shares (ADS), and the transaction had to be approved also by the U.S.

any kind or instruments and other securities giving right to subscribe or acquire them, other than when executing previous issuance agreements, authorized by the shareholder's meeting. b) Transact directly or indirectly with securities affected by the offer with the purpose of disturbing its purpose. c) Proceed to the disposition, lease, mortgage or encumbrance of property or other corporate assets when it may disturb or defeat the tender offer. 2. Those limitations also apply to the companies of the group to which the target company belongs and any others that may act together in agreement with the target company".

⁶¹ By Order of 13.02.2006, the Commercial Court of Barcelona n° 1 rejected to suspend both the dividend distribution proposal and the advertising campaign initiated by ENDESA.

⁶² Decree of the National Court of 10.11.2005 (administrative appeal n° 461/2005). Likewise, on March 30th 2006 the SSEC rejected a claim filed by GAS NATURAL against ENDESA for breach of its passivity duty.

⁶³ Article 81.1 of Consolidated Text of Spanish Companies Act 19/1989, approved by Legislative Decree 1564/1989, of 22 December (Official Gazette 10, 27.12.1989, 40012-40034): "A company may not advance funds, grant loans, loan guarantees or provide any financial assistance for the purchase by a third party of its shares or of shares of its parent company" (the same rule is in force nowadays, article 150.1 Consolidated Text of Spanish Companies Act, approved by Legislative Decree 1/2010, of 2 July (Official Gazette 161, 03.07.2010, 58472-58594).

⁶⁴ See Provincial Court of Madrid, section n° 28, of 09.01.2007 and Commercial Court n° 3 of Madrid, Decree 21.03.2006.

Securities and Exchange Commission⁶⁵.

3. A WHITE KNIGHT COMES ON STAGE: EON ENTERS THE BATTLE.

On February 27th, 2006, the Spanish SEC approved GAS NATURAL's tender bid. It was formally rejected by ENDESA's board on March 6th. On that date the 45-day acceptance period by ENDESA's shareholders was opened, but it lapsed on March 21st when a Commercial Court granted interim measures and the tender was suspended (see *supra* § 2.1.3).

Although only some of ENDESA's individual legal challenges against GAS NATURAL's bid were successful, overall it managed to delay the effectiveness of the original bid long enough for competing bidders to enter the market. Undoubtedly, the best way to thwart GAS NATURAL's hostile bid was to drive up ENDESA's price by igniting a contest for its control. For that reason, there were insistent rumors that ENDESA's executives were seeking an alternative bidder to fight GAS NATURAL offer.

Seemingly, ENDESA's executives asked E.ON for help in fighting against GAS NATURAL's bid by offering it to take a shareholding of 24.9% on ENDESA's capital⁶⁶. E.ON confirmed its interest in the investment, on February 21st, 2006, when it launched a rival all-cash bid for all the shares of ENDESA (€7.50)⁶⁷. The offer amounted to €9,100 million, which would be financed through a combination of debt and existing resources.

E.ON was a major player in the global energy market, being the world's largest fully-private energy firm (with annual revenues exceeding €5,000 million) and the second electricity provider in the world. E.ON was the largest German energy group resulting from the merger in 2000 of VEBA and VIAG⁶⁸. The offer for ENDESA made sense to E.ON for several reasons: enlarging its scale of operations (especially in South America, but also in France and Italy), diversifying them and preparing for the opening of the European power market, and it would

⁶⁵ ENDESA ADSs were created by JPMORGAN CHASE BANK NE, each ENDESA ADS represented three ENDESA shares. GAS NATURAL filed several forms in compliance with the 1934 U.S. Securities and Exchange Act. It also started litigation against E.ON before the U.S. Federal Courts.

⁶⁶ GAS NATURAL filed a claim before the SSEC against ENDESA for providing privileged information to E.ON's executives on March 4th 2012. It also challenged the relationship between E.ON, ENDESA and DEUTSCHE BANK (which acquired a substantial amount of shares of ENDESA at that time) as an act of unfair competition consisting of providing privileged access to a rival in the context of a tender offer in violation of securities market regulation, leading to relevant discovery proceedings by the Commercial Court of Barcelona n° 1, of 25.10.2006.

⁶⁷ The final price to be paid would be reduced by €0.095 per share (to €5,405) in case ENDESA paid the announced €2.40 dividend.

⁶⁸ The transaction was authorized by the European Commission subject to conditions (both divestitures and market opening commitments), see Decision of 13.06.2000, Case n° COMP/M.1673-VEBA/VIAG (OJ L188, 10.07.2001, 1-52).

also improve its overcapitalized balance sheet through the debt financing of the merger⁶⁹. Nevertheless, it was also rejected by ENDESA's Board, though it viewed it as "not hostile" and valued positively the increase in the price and the respect for the company's project as a whole (compared with GAS NATURAL's offer).

Initially, E.ON though its offer would not face regulatory or competition related obstacles: there was no relevant overlap between each firm's services in their respective markets, and no concern could be posed against the transaction for leading to an anticompetitive position.

Outwardly, E.ON's offer was not well received by the Spanish Government, as it ran against the whole idea of building of a Spanish energy "national champion"⁷⁰. Indeed, only three days after the bid was launched, the Spanish Government adopted some new regulations that gave additional powers to the NEC in case of the acquisition of control or a significant participation in a company operating regulated activities in Spain (for example, ENDESA)⁷¹. Earlier regulation had provided for control of investments made by regulated companies, but said nothing about non-regulated companies' investments in regulated firms that may affect their operations. The new regulation was soon named the "anti-E.ON Decree" as it had the immediate consequence of introducing preliminary control by the NEC of the E.ON bid that did not exist shortly before, on wider grounds to those that were considered in authorizing the GAS NATURAL bid. Of course, the European Commission was concerned and sought an explanation from the Spanish Government. On May 3rd 2006, the Commission opened infringement proceedings against Spain, as it considered the Spanish government action illegal and in breach of EU Law⁷². At the same time, in accordance with the EMR, E.ON's bid

⁶⁹ See W. Bernotat, 'Mergers & Acquisitions from a Strategic Perspective', in A. Bausch & B. Schwenker (eds.), *Handbook Utility Management*, Springer-Verlag, Berlin-Heidelberg 2009, 229-230.

⁷⁰ See A. Goucha Soares, ' "National Champions" Rhetoric in European Law: Or the many faces of protectionism', (2008) *World Competition*, 31/3, 361-364 (providing also an explanation of the type of industrial policy in which such decision is grounded) and Galloway, (2007) *European Competition Law Review*, 28/3, 176-177.

⁷¹ Royal Decree-Law 4/2006, of 24.02.2006, which modifies the functions of the NEC (Official Gazette 50, 28.2.2006, 8016-8018). The PP filed a constitutional challenge against this norm, which was admitted by Constitutional Court Order of 09.05.2006 (Official Gazette 125, 26.5.2006, 19708).

⁷² In the proceedings before the NEC, E.ON argued that the Decree-Law 4/2006 was null and void for the same reasons that the controversial "Golden share" powers that the Spanish Government was conferred by the Third Transitory Disposition of Act 5/1995, of 23.03.1995 on the legal regime of State Holdings on certain firms (*Ley de régimen jurídico de enajenación de participaciones públicas en determinadas empresas*, Official Gazette 72, 25.03.1995, 9366-9369), in force until May 27th, 2006 (Act 13/2996, of 26.05.2006) to veto mergers and acquisitions of former State-owned companies on grounds of general interest. In particular, see Royal Decree 1113/1999, of 25.06.99, for the application of the system of prior administrative approval to ENDESA, S.A., and to certain companies in its group (restating Royal Decree 929/1998, of May 14, Official Gazette 162, 08.07. 99, 25905). The EU Court of Justice had already declared that these powers were in breach EU Law, see Judgment of 13.05.2003, *Commission of the European Communities v. Kingdom of Spain*, Case C-463/00 [ECR 2003 I-4581] (with an express reference to ENDESA at ¶¶71-73) and M. Harker, 'Cross-Border Mergers in the EU: The

triggered EU merger review proceedings, and the European Commission delivered its authorization on April 25th 2006⁷³.

ENDESA sided with E.ON in the proceedings before the NEC. They both argued that competition and industrial policy considerations had to be left out of NEC's decisions which should be based only on energy regulatory concerns.

In a controversial decision⁷⁴, in late July 2006, the NEC approved E.ON's bid for ENDESA subject to several conditions⁷⁵. Apart from the usual financial requirements and E.ON's obligation to respect prior ENDESA's investment commitments, among the 19 conditions imposed was the requirement for E.ON to keep the ENDESA group unchanged for a period of time, and some operation and financial requirements (service debt ratio and limitations on dividends distribution). Besides, the NEC required E.ON, irrespective of the lack of any activity in Spain at that time, to dispose of 32% of ENDESA's assets (one nuclear production facility, several coal-operated generating factories and all Spanish assets of the company located out of the Iberian Peninsula). Theoretically, these conditions were justified on public security grounds concerning national energy strategy and energy policy, mainly security of supply (related to energy generation, transport and distribution).

The NEC decision was appealed to the Ministry of Tourism, Industry and Commerce, which on November 3th 2006 mostly confirmed the NEC's holding, authorizing E.ON's bid, but changing some of the conditions initially imposed by the NEC (brand use requirement, reduction of duration of some requirements, no divestment or sale of assets required, but additional obligation imposed to use domestic coal in power plants). After the usual steps in these cases, the European Commission concluded that the decision of the Spanish

Commission v. the Member States', (2007) *European Competition Journal*, 3/2, 527-529. The EU Court of Justice also declared the provision limiting the voting rights of shareholders in undertakings in the energy sector (supplementary Provision 27 to Act 55/1999 of 29.12.99 on fiscal, administrative and social measures, in the version of that provision laid down in Article 94 of Law 62/2003 of 30.12.2003) contrary to EU law, see Judgment of the Court (Third Chamber) of 14.02.2008, *Commission of the European Communities v. Kingdom of Spain*, Case C-274/06 [ECR 2008 I- 00026].

⁷³ Decision of 25.04.2006 case N° COMP/M. 4110 E.ON/Endesa (available at http://ec.europa.eu/competition/mergers/cases/decisions/m4110_20060425_20310_en.pdf). The decision was appealed to the General Court of the EU by IBERDROLA on July 26th 2006 (T-200/06) but later IBERDROLA relinquished the action, and the case was closed by Order of the Court of 04.05.2007.

⁷⁴ Adopted with a vote of four-to-three and two abstentions. Moreover, the decision should have been taken in one month but that it took four months to adopt it due to several NEC's requests of information to other firms recognized as interested parties (including ENDESA and GAS NATURAL) and E.ON (which in that period filed before the NEC more than 32,000 pages of documentation concerning the company and the regulatory conditions it was required to follow elsewhere and the implications of the planned merger).

⁷⁵ NEC Resolution of 27.07.2006, concerning the request by E.on Zwölfte Verwaltungs GmbH. to take a stake in the share capital of Endesa resulting from the liquidation of tender offer presented before the SEC, ref. 90/06 (http://www.cne.es/cne/doc/publicaciones/CNE_Resolucion_28072006.pdf, together with explanatory and dissenting opinions of 5 members of the NEC's Board)

Government created unjustified restrictions on a merger of Community dimension in breach of article 21 of the EMR⁷⁶ and also unjustifiably restrained freedom of establishment and free movement of capital rules under the TFEU⁷⁷. The Commission deemed almost all the conditions to be discriminatory and restrained free movement of capital and freedom of establishment.

The European Commission declared that those measures were incompatible with EU Law and should be withdrawn. Given that the Spanish Government did not comply with the Commission request, it started infringement proceedings against the Spanish Government before the EU Court of Justice (in accordance with art. 258 of TFEU). In March 2008, the Court decided that the adoption by the Spanish Government of legal rules introducing *ex ante* control for transactions that led to the acquisition of a meaningful stake in the share capital of a Spanish company conducting regulated activities in the energy industry violated EU Law. It considered this to be both an unjustified restriction to freedom of movement of capital and an unjustified obstacle to freedom of establishment, without the security of supply argument providing a sound justification for the *ex ante* review of the transaction, which was considered disproportionate⁷⁸.

After E.ON entered the contest for the control of ENDESA, additional players showed an interest in the transaction. In February 2006, the Italian energy company ENEL approached

⁷⁶ Article 21 of EUMR establishes that Member States shall not apply their national competition law to concentrations of community dimension which shall be subject to EU control. However it permits Member States to adopt measures which could prohibit, submit to conditions or in any way prejudice such operations only if (i) the measures in question protect interests other than those taken into account by the EU Merger Regulation (public security, plurality of the media and prudential rules shall be regarded as legitimate interests, others can be recognized by the Commission after they are communicated by Member States) and (ii) these measures are necessary and proportionate for the protection of interests compatible with EU law and do not constitute a means of arbitrary discrimination or a disguised restriction to the freedom of establishment or of the free movement of capital or, in any other respect, a breach of general principles or other provisions of Community law.

⁷⁷ See Commission Decisions of 26.09.2006 [Case n° COMP/M.4197–E.ON/Endesa–C(2006) 4279 final] and of 20.12.2006 concerning a proceeding in accordance to article 21 of Council Regulation (EC) n° 139/2004 on the control of concentrations between undertakings [Case n° COMP/M.4197 E.ON/Endesa, C(2006) 7039 final]. See L. Busa & E. Zaera Cuadrado, ‘Application of Article 21 of the Merger Regulation in the E.ON/Endesa case’, *Competition Policy Newsletter*, 2008-2, 1-2 and Harker, (2007) *European Competition Journal*, 3/2, 514-517 and Nourry & Jung, (2012) *Competition Policy International*, 8/1, 11 and 25-27.

⁷⁸ According to the EU Court of Justice, it would be impossible for the Government to assess the impact of the transaction on the security of supply when the authorization was to be given and, furthermore, it was always empowered to impose public service obligations on firms operating in the industry to guarantee the security of supply, see Judgments of the Court (Third Chamber) of 06.03.2008, *Commission of the EC v. Kingdom of Spain*, Case C-196/07 [ECR 2008 I-00041] and of 17.07.2008, *Commission of the EC v. Kingdom of Spain*, Case C-207/07 [ECR 2008 I-00111]. See also D. Gerard, ‘Protectionist threats against cross-border mergers: Unexplored avenues to strengthen the effectiveness of Article 21 ECMR’, (2008) *Common Market Law Review*, 45/4, 990-991 and 1024 and C. Padrós & E. E. Cocciolo, ‘Security of Energy Supply: When could National Policy take precedence over European Law?’, (2010) *Energy Law Journal*, 31, 41-49.

GAS NATURAL offering to provide assistance in raising the value of its original offer. GAS NATURAL refused to accept ENEL's help. Likewise the French energy company EDF and the Spanish construction and services company FCC also declared that they would consider contributing to GAS NATURAL's bid.

More telling was the decision of the local building and service company ACCIONA to buy 10% of ENDESA's shares for €3,388 million on September 2006⁷⁹. This infrastructure and building company is controlled by the Entrecanales family, and it is heavily involved in large-scale civil works projects in Spain (lately it had also been increasingly interested in electricity generation from renewable energies, mainly wind-farms), but its annual sales turnover was less than one-tenth of E.ON. ACCIONA's acquisition was authorized by the NEC on November 3rd 2006⁸⁰. Reacting to this any other potential challenges, E.ON simultaneously raised its bid by 38% to €35 per share, a 9% premium over the market price following E.ON entry.

Theoretically, the acquisition in the market of a relevant stake in the share capital of ENDESA was a diversification investment of ACCIONA, which did not aim at taking the control of ENDESA, but only to become a representative shareholder of the company, which considered it to be more valuable as an independent venture than in the hands of E.ON⁸¹. ACCIONA entered in the battle for the control of ENDESA acting as a "white squirrel", fighting against the behemoth of E.ON. ACCIONA's action was politically motivated by the Spanish government⁸², that was not only putting legal obstacles to confront E.ON's bid but also sought to introduce pressure in the market for a 'Spanish option' to succeed.

Nonetheless, E.ON's way was cleared once the interim measures against GAS NATURAL bid (referred supra §§2.1.3 and 2.15) were lifted in January 2007. At that point the SSEC initiated the process of "closed envelope auction" of ENDESA, a procedure that applied in Spain at that time when more than one entity has disclosed an intention to make a tender offer for a Spanish issuer. However, two weeks later, on February 1st 2007, GAS NATURAL's Board announced its unanimous decision to drop the bid for ENDESA⁸³. The next day E.ON set the final price of its bid at €38.75 per share (€4.25 more than its initial bid). ENDESA's board meeting, held on February 6th, 2007, considered E.ON's bid adequate. Nevertheless, by that

⁷⁹ See Relevant Facts 71032, 71036, 71037, 71040 and 71074, filed by ACCIONA before the SSEC on 25.09.2006 and 26.09.2006.

⁸⁰ NEC Resolution of 3.04.2007, concerning the request by Finanzas Dos, S.A. (Acciona), to take a stake in the share capital of Endesa, S.A. below 25%, Ref. 114/06 (because it did not have any relevant incidence over ENDESA's strategic assets or regulated activities as long as control rights over the company was not acquired and not decisive influence could be carried over its management policy and decisions).

⁸¹ See the presentation "Endesa independent: an alternative with greater value", filed as a relevant fact before the SSEC by ACCIONA (on 25.01.2007, OC 22577), which clearly declared ENDESA to be worth more than the price offered by E.ON and described the conflicts and disadvantages if ENDESA became a subsidiary of E.ON.

⁸² The Spanish government would have supported ACCIONA's bid against the one launched by E.ON with the holdings the State still had in ENDESA (2.95%) coupled with the holdings held by LA CAIXA (an additional 2%).

⁸³ See Relevant Fact 76189, filed before the SSEC by GAS NATURAL on 01.02.2007.

time, ACCIONA was ENDESA's largest shareholder, controlling 21% of its share capital, just below the threshold that would have triggered the duty to launch a rival tender offer (mainly because it lacked the means for an all-out rival bid). Paradoxically, being subject to Spanish takeover rules, therewith E.ON did not own a single share of ENDESA neither was it allowed to purchase any⁸⁴.

4. THE END OF THE BATTLE: ENEL AND ACCIONA.

At the end of February the contest for the control of ENDESA took an unexpected turn. After several political contacts between the Spanish Government and the Italian Government⁸⁵, the Italian State Owned Enterprise (hereinafter SOE) ENEL acquired 9,99% of the share capital of ENDESA in the market at €39 per share (on Feb. 27th, 2007). ENEL presented this purchase as a way of benefitting from ENDESA's assets and operations in Italy, thereby strengthening its market position.

In the following weeks ENEL continued to purchase ENDESA's shares until it reached almost 25% of its share capital in mid-march 2007⁸⁶. Thereafter, rumors that the Italian multinational

⁸⁴ On October 16th 2006, E.ON commenced a lawsuit against ACCIONA in the New York Federal District Court alleging that its actions were intended to derail E.ON's takeover, deceiving and misleading ENDESA's shareholders and manipulating its stock price [grounded on sections 13(d) and 14(d) and (e) of the 1934 U.S. Securities Exchange Act and Rules adopted by the U.S. SEC thereafter]. The lawsuit is available at <http://www.elconfidencial.com/fotos/demandaeon181006.pdf>. ACCIONA rejected these accusations [see Relevant Fact filed by ACCIONA before the SSEC on 16.10.2006 (OC21642)] and asked the court to dismiss the lawsuit. On 20.11.2006 and 09.01.2007 the District Court rejected ACCIONA's motions to dismiss (both available at <http://www.eleconomista.es/imag/documentos/acciona3.pdf> and <http://www.eleconomista.es/imag/documentos/Accionaeuu.pdf>). At the end, most of E.ON's preliminary injunctions were rejected, though ACCIONA was prohibited to make any further material misstatements or omissions under the U.S. securities laws, see Opinion-Order of 05.02.2007 (filed as Relevant Fact OC22651 on 06.02.2012). E.ON filed also a similar claim before SSEC, in which it accused ACCIONA of acting in concert with GAS NATURAL to defeat E.ON's bid and of acting fraudulently in avoidance of Spanish takeover regulation.

⁸⁵ Seemingly the discussion of this transaction was over the table in the Spain-Italy February 20th 2007 Ibiza's summit, as it was also Spanish ABERTIS INFRAESTRUCTURAS bid for AUTOSTRADA, Italian's largest toll road operator, see case N° COMP M.4249 Abertis/Autostrade. Apparently, the acquisition of an important stake in the capital of TELECOM ITALIA SPA by the Spanish Company TELEFÓNICA was another result of this meeting, see Goucha Soares, *World Competition*, 31/3 (Sept. 2008) 361-362.

⁸⁶ NEC Resolution of 26.04.2007, concerning the request by Enel Energy Europe, S.R.L., to take a stake in the share capital of Endesa, S.A. which does not trigger a takeover bid according to applicable legislation, Ref. 37/2007, authorizing the acquisition given that there were no control rights over ENDESA but imposed several conditions as ENEL was able to exert a decisive influence over the regulated activities and strategic assets of ENDESA and because of the role and intervention of the Italian government in ENEL (with a dissenting opinion signed by three members of NEC's Board considering the transaction should have received the same treatment than the GAS NATURAL or the E.ON takeover bids, especially after the agreement between ACCIONA and ENEL of 26.03.2007 to launch a joint bid for ENDESA).

would team up with ACCIONA in launching a joint takeover bid for ENDESA if E.ON's offer fell through were confirmed. Following E.ON's formal complaint, the Spanish SEC banned them from launching any bid for at least 6 months⁸⁷. At the same time E.ON was allowed to improve its offer, which it did, raising the price to €40 on March 26th, 2007. However, despite having a strong legal position against its rivals, they held together 46% of the share capital of ENDESA, condemning E.ON's bid to failure.

For that reason, on April 2nd 2007, E.ON reached an agreement with ENEL and ACCIONA to withdraw the bid for ENDESA in exchange for some of the company's assets in Turkey, Poland, France, Italy and Spain for a good price⁸⁸. A few days later, ENEL and ACCIONA launched an offer at €41.30 per share⁸⁹.

The NEC authorized the ACCIONA/ENEL bid, subject to twelve conditions, similar to those imposed to E.ON some months ago, among them the obligation to maintain the Spanish company as an independent entity⁹⁰. On the next day, the European Commission approved the bid in accordance with the EMR without imposing any conditions⁹¹.

Moreover, ENEL stated its intention to appoint three members of the board, despite Spanish legislation prevented foreign SOEs from sitting on boards and limiting voting rights to 3%. That rule was known as the anti-EDF-rule and it was introduced in 1999 through fear of European SOEs acquiring Spanish energy companies and it was applied in the HIDROELÉCTRICA DEL CANTÁBRICO contest (2000-2001). See *supra* note 81.

⁸⁷ See resolution of the Board of Directors of the SSEC of 23.03.2007, regarding the Public Tender Offer for Endesa, (declaring "*incompatible*" with Spanish Law a tender offer by ACCIONA and ENEL and asserting that it "*would not authorize any public tender offer for Endesa that was launched by Enel or Acciona, either individually or jointly, in the next 6 months as from the settlement of E.ON's current offer*" unless E.ON desisted from its bid).

⁸⁸ The agreement was filed as a relevant fact by ACCIONA on the 02.04.2007 (numbers 78774 and 78776). By virtue of this agreement, E.ON acquired ELECTRICA DEL VIESGO and all the additional generation capacity of ENDESA in Spain, in Italy ENDESA ITALIA and in France ENDESA FRANCE/SNET. These were deemed other concentrations of a European community dimension for the purposes of the EMR, see case N° COMP/M.4672-E.ON/Endesa Europa/Viesgo and case N° COMP/M.5170-E.ON/Endesa Europa/Viesgo.

⁸⁹ See ACCIONA's relevant facts numbers 78976 and 7897 (filed on 11.04.2007). The price was later reduced to €40.16 per share (on the 2nd July 2007) deducting the dividend distributed by ENDESA.

⁹⁰ NEC Resolution of 4.07.2007, concerning the request by Acciona S.A. and Enel Energy Europe, S.r.l., for the acquisition of shares of Endesa, S. A, resulting from the tender offer liquidation, ref. 48/2097 (available at http://www.cne.es/cne/doc/publicaciones/cne49_07.pdf, there were four dissenting opinions in this case), Moreover, as happened before with E.ON's bid, The Ministry of Tourism, Industry and Commerce later modified some of the conditions, but the core conditions were kept intact (see relevant fact 85097, filed by ACCIONA before the SSEC on the 22.10.2007).

⁹¹ Case n° COMP/M.4685- Enel/Acciona/Endesa and Case n° COMP/M.5171-Enel/Acciona/Endesa.

As had happened in the past with E.ON's bid, the European Commission also considered that the requirements imposed by the Government in relation to ACCIONA/ENEL for the transaction to be authorized violated article 21 of the EMR⁹².

The Spanish SEC approved the bid on July 25th 2007, the takeover acceptance period starting on July 30th 2007 and ending on October 1st, 2007. The tender offer was accepted by 92% of the share capital. ACCIONA and ENEL had jointly won the battle for the control of ENDESA (67,05% was controlled by ENEL and 25,01% controlled by ACCIONA, with the remaining 7,94% freely trading in the stock market). Simultaneously, ACCIONA and ENEL entered into a ten-year shareholder agreement that created a holding, to be managed by ACCIONA that would control 50,01% of ENDESA. In the agreement, ACCIONA was granted a put option, expiring in March 26th, 2010, which allowed it to sell its stake in ENDESA to ENEL at 41.30€ a share or market price, whichever was higher⁹³. The relationship between ACCIONA and ENEL was not a peaceful one, they soon started to disagree on several issues, ranging from the nomination of managers at ENDESA to the valuation of its renewable assets, that were to be spun off to ACCIONA. On February 2009, ACCIONA exercised its option for selling its 25,01% stake in ENDESA for €1,107 million with a 75% premium over market price. It also acquired 2,105 MW of renewable and hydro assets free of debt for a value of €2,890 million⁹⁴. Thus, ENEL became the sole owner of ENDESA⁹⁵, taking on €8,000 million of ACCIONA's debt.

5. LESSONS FROM THE ENDESA SAGA.

The battle for the control of ENDESA provides a rich legal minefield from which several lessons can be drawn. On the one hand, ENDESA's board was successful in leveraging the price finally paid for the company and the use it made available of competition and regulation tools provided by law was crucial and instrumental for that purpose (*infra* § 5.1). On the other hand, political manoeuvring by the Spanish Government played a determinative role on the outcome of the case, and although the option initially favoured by the Government was not successful, the government played a strong hand in sponsoring an alternative (*infra* §5.2).

⁹² Decision of 5.12.2007, COMP/M.4685-Enel/Acciona/Endesa. See also Gerard, (2008) *Common Market Law Review*, 45/4, 992 and 1024. The only action on the judicial front from this case came on April 30th 2008, when the General Court of the EU rejected the Spanish authorities' request for interim measures (see Case T-65/08, *Kingdom of Spain v. Commission of the EC*).

⁹³ ACCIONA and ENEL's agreement concerning the shares of ENDESA and for the joint management of ENDESA was filed as relevant fact of the later company before the SSEC (number 85077, 22.10.2007). See also Acciona's relevant facts 78443 and 78444 (filed on the 26.03.2007), 81147 (filed on 12.06.2007); 84957 and 84965 (filed on 20.10.2007).

⁹⁴ See relevant fact 104314, filed by Acciona before the SSEC on the 21.02.2009.

⁹⁵ This acquisition of control was authorized by the European Commission on April 7th, 2009, see Case COMP/M.5494-Enel/Endesa.

Overall, we can reflect generally on the relative relevance of competition and regulation issues for the case (*infra* §5.3) and the predominant role of politics, governmental interference and influence (*infra* §5.4).

5.1. Competition and Regulation as defensive tools against hostile takeovers.

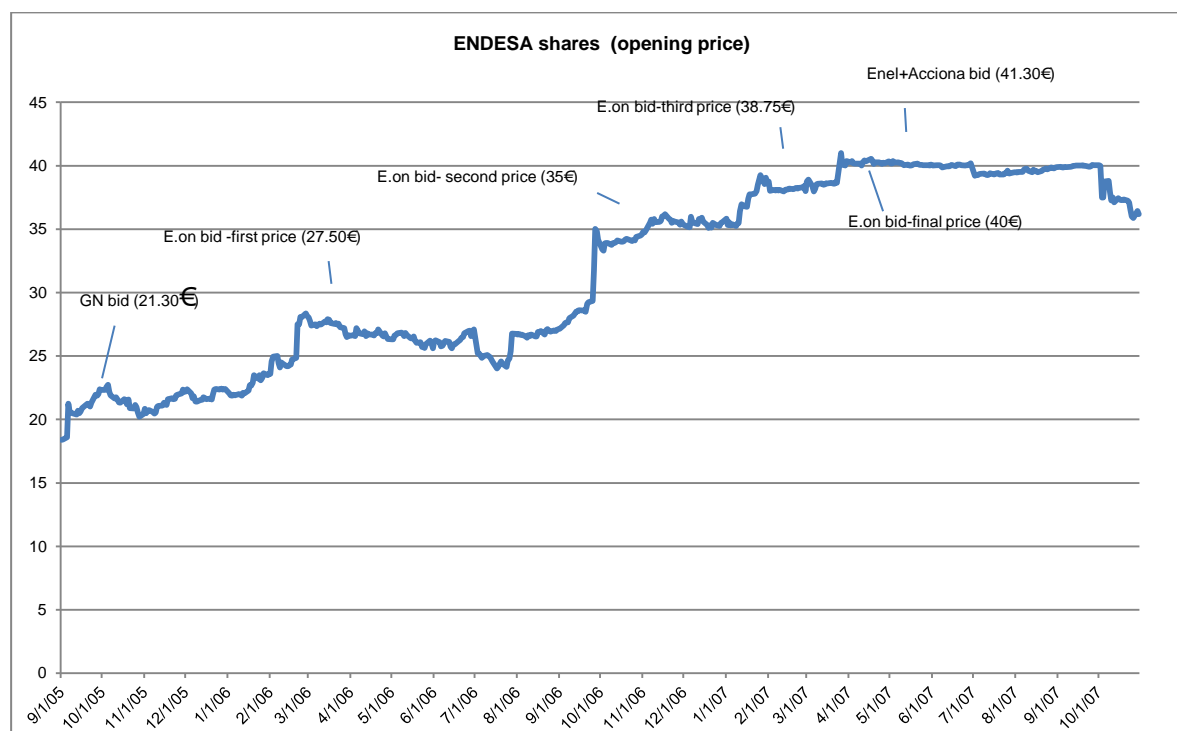
From the beginning of the battle for the control of ENDESA, its board of directors was keen to consider any dimension other than the protection of the shareholders' interest in its assessment of the alternative bids. Although the integrity of ENDESA as a firm was mentioned at several stages, at the end it was clear that the best way to defend shareholders' interest was by getting a higher price. Undoubtedly, ENDESA's board was very successful in that task: from September 2005 to October 2007 its share price in the market increased approximately 120% (from €8.24 to €9.99, see table below). Indeed, the initial GAS NATURAL bid valued ENDESA in €2,549 million, the successful offer by ACCIONA/ENEL almost doubled that valuation (€4,519 million)⁹⁶. On the other hand, ENDESA's board of directors failed in saving the integrity of ENDESA and keeping the company together as it was at the beginning of the process, given that as a result of the bid contest ENDESA was split up, part of which was given to E.ON with the remainder of the company being controlled by an Italian SOE (ENEL).

On the other hand, the battle for the control of ENDESA proves how national tender offer regulation may deter competing bids in takeover contests if supervisory authorities use their powers arbitrarily⁹⁷. Finally, it provides an excellent example of the many tools available to the board of directors of target companies in takeovers to successfully delay the acquisition and defend themselves⁹⁸.

⁹⁶ For a detailed analysis of the effects of bids on share-prices in this case see John García & F. Trillas, 'Control corporativo y riqueza de los accionistas en el sector electric europeo 2000-2007', (2011) *Revista de Economía Institucional*, 13/25, 305-309. This is consistent with evidence that correlates resistance with large shareholders' wealth, normally through litigation and competing bids ("white knights"), see R. H. Jennings & M. A. Mazzeo, 'Competing bids, management resistance, and the structure of takeover bids', (1993) *Review of Financial Studies*, 6, 905-907; J. Pearce & R. Robinson, 'Hostile takeover defenses that maximize shareholder wealth', (2004) *Business Horizons*, 47/5, 15-24 and R. Schoenberg & D. Thornton, 'The Impact of Bid Defences in Hostile Acquisitions', (2006) *European Management Journal*, 24/2&3, 142-150.

⁹⁷ See G. Kemperink & J. Stuyk, 'The Thirteenth Company Directive and Competing Bids', (2008) *Common Market Law Review*, 45, 120-121.

⁹⁸ See the interesting comparative analysis of the national institutional settings of corporate governance in the electricity industry in UK and Spain (with several references to the ENDESA battle itself) made by M. Goyer & R. Valdivieso del Real, 'Corporate Governance and the Transformation of the Electricity Sector in England and Spain: The Interaction between National Institutions and Regulatory Choices', in T. Arun & J. Turner (eds.), *Corporate Governance and Regulation*, Northampton, MA: Edward Elgar, 2009, 43-64; M. Goyer & R. Valdivieso del Real, 'Liberalization Models in the Electricity Sector: The Impact of the Market for Corporate Control in Britain and Spain (1996–2010)', (2012) *Competition and Regulation in Network Industries*, 13/1, 71-10 and R. Valdivieso del Real, 'Takeovers and the Transformation of the Electricity Sector in Britain and Spain:



5.2. Government intervention distorting the outcome of the takeover battle.

The initial GAS NATURAL bid had a business rationale, and it was clear from the start that it was politically supported. The political support for GAS NATURAL faced strong opposition on both competition and regulation grounds, and it was also beaten in the market by a higher bidder (E.ON). At that moment, government intervention in the takeover contest became protectionist and sought a Spanish ‘national champion’ as the outcome of the battle.

The Spanish Government’s support for the ‘national champion’ solution violated EU Law. Moreover, it was also trumped by the market as there was not financial leverage in a potential ‘Spanish bid’ to overcome E.ON’s bid. That made the government give up the ‘national champion idea (paradoxically, the final owner of ENDESA as a result of the contest is an Italian

The Importance of Institutions and Varieties of National Regulatory Authorities’, (2011) *Oil, Gas and Energy Law*, 9/2, 66-79. See also R. Valdivieso del Real, ‘Corporate Governance and Takeovers in the Spanish Electricity Sector’, (2009) *Networks Utilities Quarterly*, 11/1, 7-10.

SOE⁹⁹). The European Commission played an important role in the contest by limiting the Spanish Government's efforts to prevent any cross-border transaction resulting from the process¹⁰⁰.

From the government's perspective, the battle for the control of ENDESA demonstrates how relevant its role and intervention can be in the process¹⁰¹, but also its limitations in control of the final outcome. Although the Spanish government had strongly influenced some of the steps of the process, the rule of law and EU law restricted its power to impose its own solution. The Spanish Government could not make GAS NATURAL win, although it clearly made the German company E.ON lose, and it ensured that a Spanish company (ACCIONA) profited considerably by taking part in a process, though indirectly favoring Italian company ENEL finally acquiring the control of ENDESA¹⁰².

⁹⁹ It is paradoxical that the government policy decision to privatise State utility companies in Spain would somehow be reversed by the return of some of them to public ownership of a foreign government. The same point in De Federico, Fabra & Vives, *Competition and Regulation in the Spanish Gas and Electricity Markets*, Nov. 2010, 63.

¹⁰⁰ It is true however, that the impact of article 21 EUMR decisions on transactions may be considered rather limited as timing considerations make their effectiveness doubtful. For that reason Gerard concludes that "*the Commission appeared powerless in the face of Member States' inaction, which led to lasting uncertainties for companies and, in most cases, to the cancellation of merger plans*" (2008) *Common Market Law Review*, 45/4 993. A similar reflection by Harker, (2007) *European Competition Journal*, 3/2, 518 ("*while the Commission has the formal powers to order the suspension of national measures likely to frustrate a transborder merger, in reality Member States have the ability to modify and even frustrate such a merger. Time being at a premium for the merging parties, Member States do not appear phased by the prospect of infringement proceedings before the ECJ several years down the line*").

¹⁰¹ See I. Serdar Dinc & I. Erel, 'Economic Nationalism in Mergers and Acquisitions', Charles A. Dice Center Working Paper N° 2009-24/Fisher College of Business Working Paper n° 2009-03-024 (looking at transactions and government interventions in the EU between 1997 and 2006 and Spain ranking among the top countries in government interventions in merger attempts in the sample). Likewise, also in the energy industry, political support to defensive actions were crucial in making OMV (Austria) €13,800 million bid for MOL (Hungary) fail in 2008 (including the approval of a protectionist law by the Hungarian Parliament –a.k.a Lex Mol- in October 2007 that allowed companies operating public services to adopt extraordinary measures to stop takeovers). See E. Butler, 'The Geopolitics of Merger and Acquisition in the Central European Energy Market', (2011) *Geopolitics*, 16/3, 626-654.

¹⁰² In other words, "*even though there may be only one decision-maker (the European Commission) that is formally invested with the power of allowing or prohibiting the merger, member countries' governments might have several ways to affect the final outcome of the merger. For instance, they could try to increase the costs of the merger by changing the market rules, as when the Spanish authorities imposed a number of restrictive conditions (contested by the European Commission) for E-On's (failed) takeover of Endesa*", Motta & Ruta, in Falck, Gollier & Woessmann (eds.), *Industrial Policy for National Champions*, 113.

5.3. Competition and Regulation.

The battle for the control of ENDESA also provided some insights of the relationship between competition and regulation in the energy sector. According to Spanish Law, competition rules apply also in the energy industry, no matter there exists sectoral regulation.

However, application of competition law to the energy industry may be more difficult because of its specific features that may provide technical explanations to behavior being apparently anticompetitive. Firstly, competition authorities may face a high asymmetry of information in assessing market behavior in the energy industry. Secondly, the standard tools of merger review may be of limited use in this sector¹⁰³. And, finally, State promotion or backing of anticompetitive behavior by domestic energy firms may complicate competition law enforcement¹⁰⁴.

In the ENDESA case there was complementary application of both disciplines, ruling over different features of the transaction. Regulation is key in energy transportation and distribution, but there is room for competition in generation and supply. The competing bids for ENDESA triggered both competition and regulatory *ex ante* controls. Parallel application of regulation and competition policy in this case did not show the right policy mix: it only served to stress different political levers governments may have at hand in some industries when interfering on business transactions. At the end, the Spanish government used energy regulatory tools as a device to promote and defend values different from competition, antagonizing with the technical competitive assessment resulting from the merger review procedures¹⁰⁵.

On competition grounds, the European Commission authorized, without conditions, the bids by E.ON and ACCIONA/ENEL, whereas the Spanish Government authorized, subject to conditions, the initial bid by GAS NATURAL.

¹⁰³ See D. Bush, 'Electricity Merger Analysis: Market Screens, Market Definition, and Other Lemmings', (2008) *Review of Industrial Organization*, 32, 265-267 and 278-282 (describing the idiosyncrasies of electricity industry that may impede the use of traditional competitive analysis and the conflicts that can be raised by standard competition analysis in this sector); L. Vandezande, L. Meeus, B. Delvaux, G. Van Calster & R. Belmans, 'Evaluation of Economic Merger Control Techniques Applied to the European Electricity Sector', (2006) *The Electricity Journal*, 19/6, 49-56 and Verde, (2008) *Energy Policy*, 36/3, 1130-1132. For a description of the tools and techniques that have been used in cases in this sector, see R. Gilbert & D. Newbery, 'Analytical Screens for Electricity Mergers', (2008) *Review of Industrial Organization*, 32, 217-239.

¹⁰⁴ See OECD, Directorate for Financial and Enterprise Affairs-Competition Committee, *Energy Security And Competition Policy*, 14 Jan. 2008, DAF/COMP(2007)35, 44 ("The involvement of states in the gas and oil industries may restrict the application of competition law. States can engage in two types of behaviour that might ordinarily offend competition laws. First, states can take actions and make agreements that harm competition. Second, states can direct enterprises to take actions and make agreements that harm competition. Because the actions of many national gas and oil companies are bound up in the governance of their respective states, it can be difficult to distinguish these two types of behaviour. The important point is that state involvement of either type may trigger defences that shield the conduct in question from competition laws").

¹⁰⁵ See Salerno, (2007) *European Competition Law Review*, 28/1, 66-69.

On the other hand, regulatory measures in the energy sector have sought to create a competitive internal energy market in the EU. So far, there have been three regulatory packages. The last one has been adopted in 2009 and it is aimed at strengthening sectoral energy authorities and providing a uniform regulatory framework across the EU (in force since 2011)¹⁰⁶. EU regulation has strengthened the need for gas and electricity providers to unbundle vertically, leaving network operation under the control of a single entity in each country¹⁰⁷. The extent of liberalization has varied substantially among Member States. In some countries, like the UK and the Netherlands this has led to fully liberalized and competitive markets, while in others –like Spain and France- greater concentration and fewer entrants have led to less competitive markets. Moreover, it can be argued that privatization is not a requisite for competition, but it has shown to be an important ingredient in the UK market. At the end, for a true competitive pan-European energy market to exist the regulatory regime adopted by the EU would need to face the issue of state ownership and control of energy companies, otherwise there would never be a fair and common level playing field across the EU.

Contrary to other Member States, in Spain vertical separation of operators of activities in competitive markets and of those which are regulated (natural monopoly) is effective, and there are independent companies operating the gas and electricity Transmission System Operators-TSOs (ENAGAS and RED ELÉCTRICA DE ESPAÑA/REE)¹⁰⁸. But that has not been enough to prevent problems arising in relation to the level of concentration in the industry, barriers to entry, the absence of cross-border interconnection and the lack of transparent information on market functioning¹⁰⁹.

The European Commission has been active in enforcing the competition provisions of the TFEU in the energy industry¹¹⁰. Several decisions have had to deal with merger review of

¹⁰⁶ See R. Brandenburger & A. Iza, 'Competition policy challenges in European energy markets', (2008) *Competition Law International*, 4/2, 50-56.

¹⁰⁷ See N. Kroes, 'Improving competition in European Energy markets through effective unbundling', (2008) *Fordham Int'l Law Journal*, 31, 1393-1395 and 1416-1441.

¹⁰⁸ "Transmission" involves the connection of power plants, load centres of distributors and large industrial customers via high-voltage lines (380/220 kV), "distribution" takes place over regional and local grids via medium or low voltage lines (20-110 kV < 20 kV), through which the end-user is finally reached ("retail" or "supply" stage).

¹⁰⁹ See Communication from the Commission, *Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors-Final Report* (hereinafter *Inquiry Final Report*), SEC (2006) 1724, COM/2006/0851 final, 10.01.2007; Commission of the European Communities, *Communication from the Commission to the Council and the European Parliament, An Energy Policy for Europe*, COM (2007) 1 Final (Jan. 2007); Domanico, (2007) *Energy Policy*, 35/10, 5064-5076 and Kroes, (2008) *Fordham Int'l Law Journal*, 31, 1402-1410.

¹¹⁰ See W. Berg & J. Lohrberg, 'On the road to Pan-European Energy Markets: Some remarks on the application of EC Competition Law', (2007) *Bloomberg European Business Law Journal*, 1/2, 358-364; V. Koumpli, 'The Application of EC Competition Law to the Liberalised Energy Markets', (2005) *Revue Hellenique de Droit*

transactions in this sector, which becomes a crucial tool in solving excessive concentration in some European energy markets¹¹¹. Initially, the thresholds established in the EMR would normally make them subject to Member States' domestic merger review. However, the Commission has had to deal with the competition problems raised by some transactions by requiring divestiture and by imposing other structural conditions to eliminate or reduce entry barriers in order to authorise them¹¹². Exceptionally, when no available remedy would appear to be effective, certain transactions have even been prohibited¹¹³.

Moreover, the European Commission has also successfully challenged energy companies for violations of article 101 of TFEU for allocating national markets (E.ON RUHRGAS and GDF SUEZ¹¹⁴), and also of article 102 TFEU by dominant players that either exclude access to essential facilities to rivals or manipulate generation capacity in order to rise prices¹¹⁵. Article 102 TFEU has also been the legal basis for decisions against dominant gas firms entering into long-term supply contracts foreclosing access to downstream markets in some countries¹¹⁶.

Finally, some decisions have also controlled Member States' actions that could distort competition in the energy markets by violating the State aid regime set by articles 107-109 of the TFEU¹¹⁷.

International, 58, 41-76; Navarro, García & Vergez, (2002) *Business Law International*, 345/2, 345-366; U. Scholz & S. Purps, 'Application of EC Competition Law in the Energy Sector', (2010) *Journal of European Competition Law & Practice*, 1/1, 39-44.

¹¹¹ See ¶42 *Inquiry Final Report* and Piergovanni, (2003) *Journal of Network Industries*, 4/3, 227-269.

¹¹² See Case n° COMP M.1853-EDF/EnBW; Case n° COMP M.3696-Eon/Mol, Case n° COMP M.5224-EDF/British Energy, and also the three transactions mentioned above in footnotes 2, 3 and 4. See the analysis of remedies' design by Federico, (2011) *Journal of Competition Law and Economics*, 7/3, 614-616.

¹¹³ See Decision of 9.12.2004, Case N° COMP/M.3440 ENI-EDP-GDP (OJ L302, 19.11.2005, 69-78) confirmed by Judgment of the General Court of 21.09.2005 (T-87/05) ECR 2005 II-03745. This decision of the General Court is was adopted following the expedited procedure available since 2001, and it has been the fastest resolution of an appeal of a merger decision (7 months), see K. Fountoukakos, 'Judicial Review and the EC Merger Control: Reflections on the Effectiveness of the System with Regard to the Standard of Review and Speed', in *Cambridge Yearbook of European Legal Studies*, 133 (2007-2008) 154.

¹¹⁴ Case n° COMP/39.401, E.ON-GDF Collusion.

¹¹⁵ Case n° COMP/39.402, RWE gas foreclosure. See also Case n° COMP/39.315, ENI gas foreclosure. ENI was also fined in 2006 by the AGCM for abusing its dominant position by hindering the entry of independent operators into the Italian wholesale gas market, see Bolletino AGCM, n° 5/2006, Provision n° 15174 (imposing a fine on ENI and Trans-Tunisian Pipeline Company), available at <http://www.agcm.it> (confirmed by the Tribunale Amministrativo Regionale del Lazio, n. 3582/2006). Commitment decisions settled the Case n° COMP/39.316, GDF Foreclosure and Case n° COMP/36.072, GFU - Norwegian Gas Negotiation Committee. Finally, the European Commission also issued a commitment Decision on 26.11.2008 imposing E.ON structural remedies in Case n° COMP/30.388, German electricity wholesale market, and COMP/38.389, German electricity balancing market. See also P. Chauve, M. Godfried, K. Kovács, G. Langus, K. Nagy & S. Siebert, 'The E.ON electricity cases: an antitrust decision with structural remedies', *Competition Policy Newsletter*, 1/2009, 51-54.

¹¹⁶ See Case n° COMP/37.966, Distrigaz and Case n° COMP/39.386, EDF long term contracts.

¹¹⁷ See Decision n° 2005/145/EC of 16.12.2003 (OJ L49, 22.02.2005, 9-29) concerning an unlimited guarantee

5.4. Political interference and influence peddling in business decisions.

Aside from the legal features of the contest, the battle for the control of ENDESA will certainly be remembered for the significance of political intervention in the process. Firms taking part in the contest will clearly have learned how important it was to have not only the legal and economic arguments to support their bids, but also to have the government on their side (or, at least, not against them)¹¹⁸.

For those reasons, the battle for the control of ENDESA revealed the weaknesses of several domestic institutions, which were subject to continuous pressure and political influence. In contrast with the European Commission, the Spanish National Energy Commission, the Spanish Securities and Exchange Commission and also the Spanish Defense Competition Tribunal were used as tools of political power in the contest. As a result of the contest, the head of the Spanish Securities and Exchange Commission resigned in April 2007, claiming that the government's industrial policy was in conflict with market rules. Even the Spanish Supreme Court showed a remarkable division in deciding to award interim measures that stopped the takeover process.

Instead of working as technical and independent institutions, on several occasions during the process, administrative authorities adopted decisions based on political reasons, their members siding with the political parties which had appointed them. Of course, that did not happen with judges and courts delivering opinions on different issues raised by the bid contest, although they were probably overwhelmed by the considerable implications of their decisions.

In short, the battle for the control of ENDESA is a good example of how the political and social implications of business transactions may overcome the legal and economic arguments in affecting the final outcome. The strength and maturity of the Spanish institutional framework was tested and questioned for its inadequate role in the transaction. It is doubtful that the public interest inspired government actions and decision-making during in the contest, nor could it be said that the government was focusing on enhancing competition or the consumers' interest. Apparently, it acted only on the basis of a fairly shortsighted and parochial idea of promoting the Spanish national champion solution.

granted by France to EDF that was incompatible state aid (requiring EDF to reimburse the unpaid tax of €889 million) and EUCJ judgment of 13.03.22001- Case C-379/98 PressenElektra AG and Schleswag AG [2001] ECR I-2159 (on environmental protection aid).

¹¹⁸ See Bernotat, in Bausch & Schwenker (eds.), *Handbook Utility Management*, 232 (“the experience we gained when bidding for Endesa has given us a critical insight into the political setting for cross-national M&A activities”); N. Pettifer, ‘Current Affairs: What lawyers should learn from Endesa’, *International Financial Law Review*, may 2007, 32-33 emphasising the importance of the political side of M&A and even discussing the possibility of conducting “political due diligences”.

CONCLUDING REMARKS

The ENDESA takeover contest provides a good illustration of many different issues that can be raised in transactions in which corporate control is at play. Spanish national law and EU law were relevant at several stages of the process. The initial hostile bid by GAS NATURAL prompted a staunch defensive reaction by ENDESA's board of directors that led to litigation on many fronts and different jurisdictions, involving competition, energy regulation, corporate law and securities regulation. The effectiveness of those defensive moves in delaying the battle for control of ENDESA was unquestionable. What was a purely domestic transaction became a major European cross-border contest when E.ON and ENEL launched their bids for ENDESA. The strong preference of the Spanish Government for a Spanish national champion to develop out of the ENDESA contest affected the whole process, and was a blatant violation of EU Law. This political interference with business decisions negatively influenced and affected the strength and reputation of several Spanish institutions and considerably delayed the process. Nevertheless, as a positive result out the takeover contest, investors almost doubled the value of their investments in ENDESA. At the end of the day, shareholders may indeed be one of the few stakeholders that benefitted from the transaction.

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