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Press and Information

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Judgment of the Court of First Instance in Case T-87/05

EDP, Energias de Portugal SA v Commission of the European Communities

THE COURT OF FIRST INSTANCE UPHOLDS THE PROHIBITION OF THE ACQUISITION OF GAS DE PORTUGAL BY ENERGIAS DE PORTUGAL AND ENI

Although the Commission made a number of errors in its decision concerning the gas markets, the strengthening of the dominant positions of Energias de Portugal on the electricity markets is in itself sufficient to justify the decision.

The Second Gas Directive¹ provides for the liberalisation of the markets in gas in the Member States. Those markets must be open to competition by 1 July 2004 for non-residential customers and 1 July 2007 for other customers. However, the Member States may, in certain circumstances, derogate from certain obligations and postpone the application of the directive. Portugal benefits from that derogation until 2007. A single operator, Gás de Portugal (GDP), the incumbent Portuguese gas company, is present at all levels in the gas supply chain.

On 31 March 2004, a transaction was concluded, the main consequence of which was that Energias de Portugal (EDP), the incumbent Portuguese electricity company, and Eni SpA, an Italian energy company, were to purchase GDP jointly.

By decision of 9 December 2004, the Commission declared the concentration incompatible with the common market. It concluded that, in spite of the significant commitments proposed by the parties in order to resolve the competition concerns which had been identified, the concentration would strengthen EDP's dominant positions on all the electricity markets in Portugal (the wholesale, retail and ancillary services markets) and also GDP's dominant positions on most of the Portuguese gas markets, with the consequence that competition would be significantly impeded in a substantial part of the common market.

On 25 February 2005, EDP sought annulment of that decision before the Court of First Instance. The expedited procedure requested by the applicant was granted by the Court and

¹ Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC (OJ 2003 L 176, p. 57).

the case was disposed of in seven months, which is the shortest period ever achieved for a case of this type.

The Court finds that it follows from the derogation provided for in the Second Gas Directive that the gas markets in Portugal were not open to competition on the date of adoption of the decision, as GDP held a monopoly on virtually all the gas markets. A monopoly represents the ultimate dominant position, which, logically, cannot be strengthened. In those circumstances, there was no effective competition which could be impeded by the concentration. The Court concludes that, in basing the prohibition of the concentration on the strengthening of dominant positions giving rise to a significant impediment to competition on the gas markets which, by virtue of the derogation, were not open to competition, the Commission disregarded the effects, and thus the scope, of that derogation.

None the less, the Court observes that that error is limited solely to the gas markets and that the assessments in respect of the situation on the electricity markets are not affected by that error.

The Court then observes that there is no reason to annul a decision prohibiting a concentration if certain grounds of that decision which are not vitiated by illegalities, in particular those concerning one of the relevant markets, are sufficient to justify its operative part. In the present case, the Court finds that the Commission did not make a manifest error of assessment when it considered that the concentration would cause an important potential competitor (GDP) to disappear from all the electricity markets. That fact would entail the strengthening of EDP's dominant positions on each of those markets, with the consequence that effective competition would be significantly impeded. That conclusion is in itself sufficient to justify the Commission's decision.

Consequently, **the Court dismisses EDP's application and upholds the Commission's decision.**

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

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

Languages available: CS, DE, EN, ES, FR, PL, PT, SK

The full text of the judgment may be found on the Court's internet site

<http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en>

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

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