JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

21 September 2005 *

In Case T-87/05,

EDP — Energias de Portugal SA, established in Lisbon (Portugal), represented by C. Botelho Moniz, R. García-Gallardo, A. Weitbrecht and J. Ruiz Calzado, lawyers,

applicant,

v

Commission of the European Communities, represented by A. Bouquet and M. Schneider, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by

Gas Natural SDG SA, established in Barcelona (Spain), represented by J. Perez-Bustamante Köster and P. Suárez Fernández, lawyers,

intervener,

* Language of the case: English.

APPLICATION for annulment of Commission Decision C(2004) 4715 final of 9 December 2004 declaring incompatible with the common market the concentration by which EDP — Energias de Portugal SA and Eni Portugal Investment SpA proposed to acquire joint control of Gás de Portugal SGPS SA (Case COMP/M.3440 — EDP/ENI/GDP),

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

composed of J. Pirrung, President, N.J. Forwood and S. Papasavvas, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 5 July 2005,

gives the following

Judgment

Legal context

1 Article 2(3) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1, corrected

version, OJ 1990 L 257, p. 13, as amended by Council Regulation (EC) No 1310/97 of 30 June 1997, (OJ 1997 L 180, p. 1) ('the Merger Regulation'), provides:

'A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market.'

2 Article 18(2) of Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time-limits and hearings provided for in [the Merger Regulation] (OJ 1998 L 61, p. 1), provides:

'Commitments proposed to the Commission by the undertakings concerned pursuant to Article 8(2) of [the Merger Regulation] which are intended by the parties to form the basis for a decision pursuant to that Article shall be submitted to the Commission within not more than three months from the date on which proceedings were initiated. The Commission may in exceptional circumstances extend this period.'

3 Point 43 of the Commission notice on remedies acceptable under the Merger Regulation (OJ 2001 C 68, p. 3: 'the Notice on Remedies'), states:

'... Where the parties subsequently modify the proposed commitments, the Commission may only accept these modified commitments where it can clearly determine — on the basis of its assessment of information already received in the

course of the investigation, including the results of prior market testing, and without the need for any other market test — that such commitments, once implemented, resolve the competition concerns identified and allow sufficient time for proper consultation of Member States.'

4 Article 3(1) of 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 Second Gas Directive') states:

'Member States shall ensure, on the basis of their institutional organisation and with due regard to the principle of subsidiarity, that, without prejudice to paragraph 2, natural gas undertakings are operated in accordance with the principles of this Directive with a view to achieving a competitive, secure and environmentally sustainable market in natural gas, and shall not discriminate between these undertakings as regards either rights or obligations.'

5 Article 1(31) of the Second Gas Directive defines 'emergent market' as 'a Member State in which the first commercial supply of its first long-term natural gas supply contract was made not more than 10 years earlier'.

6 Article 28(2) and (3) of the Second Gas Directive provides:

'2. A Member State, qualifying as an emergent market, which because of the implementation of this Directive would experience substantial problems may derogate from Articles 4, 7, 8(1) and (2), 9, 11, 12(5), 13, 17, 18, 23(1) and/or 24 of

this Directive This derogation shall automatically expire from the moment when the Member State no longer qualifies as an emergent market. Any such derogation shall be notified to the Commission.

3. On the date at which the derogation referred to in paragraph 2 expires, the definition of eligible customers shall result in an opening of the market equal to at least 33% of the total annual gas consumption of the national gas market. Two years thereafter, Article 23(1)(b) shall apply, and three years thereafter, Article 23(1)(c). Until Article 23(1)(b) applies the Member State referred to in paragraph 2 may decide not to apply Article 18 as far as ancillary services and temporary storage for the re-gasification process and its subsequent delivery to the transmission system are concerned.'

Background to the dispute

7 The applicant, EDP — Energias de Portugal SA ('EDP' or 'the applicant') is the incumbent electricity company in Portugal. Its main activities consist of the generation, distribution and supply of electricity in Portugal. EDP is quoted on the Euronext Lisbon (Portugal). The Portuguese State is the largest shareholder, holding, directly or indirectly, a 30% share, while the remaining shares are widely held. EDP controls Hydrocantábrico, which is active in the electricity and gas sectors in Spain. EDP holds a 20% share in Turbogás and a 10% share in Tejo Energia, companies active in the generation of electricity in Portugal. EDP also holds a 30% share in Rede Eléctrica Nacional SA, which manages the Portuguese electricity network.

8 Eni SpA is an Italian company active at all levels in the energy supply and distribution chain.

9 Gás de Portugal SGPS SA ('GDP') is the incumbent Portuguese gas company. GDP is a wholly-owned subsidiary of the Portuguese company Galp Energia SGPS SA ('GALP'). GALP is currently jointly controlled by the Portuguese State and Eni, with interests in both the oil and the gas sectors. GDP and its subsidiaries cover all levels of the gas supply chain in Portugal. GDP, through its subsidiary Transgás, imports natural gas into Portugal, through pipelines and through the Sinès LNG (Liquefied Natural Gas) terminal, and is responsible for transportation, storage, transport and supply through the high-pressure gas pipeline network ('the gas network'). GDP is also active in the natural gas supply to large industrial customers and in the development and future operation of the first underground natural gas storage caverns in Portugal. Through its subsidiary GDP Distribuição Energia SA, GDP also controls five of the six local gas distribution companies.

10 Rede Eléctrica Nacional SA ('REN') is a Portuguese company resulting from the 1994 spin-off from EDP of the Portuguese electricity grid. REN currently manages the Portuguese electricity grid and acts as a single buyer for the purposes of the Community directives, buying electricity from producers and reselling it to the distributor/supplier for the supply of non-eligible customers, that is, customers who cannot choose their suppliers. The Portuguese State controls directly or indirectly 70% of REN.

11 In 2003, the Portuguese Government set its policy for the restructuring of the energy sector in Portugal in the light of the forthcoming full liberalisation of that sector required by the relevant Community directives. As originally planned by the Portuguese Government, that restructuring would consist of the following phases:

— the separation of the gas and oil business of GALP into three separate parts (a) gas transmission (Transgás); (b) gas distribution and supply (GDP); and (c) oil refining and oil products distribution (Petrogal);

— the promotion of the gas and electricity businesses' integration within the same economic group;

— the acquisition of the gas transmission activities (in particular the gas network and, potentially, other regulated assets) by REN.

12 Pursuant to a share purchase agreement of 31 March 2004, EDP, Eni (through its wholly-owned subsidiary Eni Portugal Investment SpA) and REN were to jointly acquire the whole of GDP's share capital from GALP. A further agreement was concluded on the same date concerning the temporary participation of REN in GDP and the future sale of the gas network to REN in exchange for the latter's shares in GDP. The completion of the whole transaction was conditional on the clearance of the entire transaction by the competent competition authorities.

13 On 9 July 2004, the Commission received notification of the entire transaction pursuant to Article 4 of the Merger Regulation. Taking the view that the entire transaction would lead to two distinct operations, first, sole control of the gas network by REN and, second, acquisition of joint control of GDP by EDP and Eni ('the parties') by way of purchase of shares, the Commission considered that the second operation had a Community dimension (OJ 2004 C 185, p. 3).

14 On the same day, the acquisition by REN of sole control of the gas network was notified to the Portuguese competition authority.

15 After a preliminary examination, the Commission concluded that the concentration raised serious doubts as to its compatibility with the common market. Accordingly, on 12 August 2004, the Commission initiated proceedings in respect of the concentration, in accordance with Article 6(1)(c) of the Merger Regulation.

16 On 12 October 2004, the Commission sent the parties a statement of objections in which it concluded, on a provisional basis, that the concentration was incompatible with the common market.

17 On 27 October 2004, the parties replied to the statement of objections.

18 On 28 October 2004, the parties offered commitments designed to meet the competition concerns identified by the Commission in the statement of objections.

19 On 29 October and 4 November 2004, the Commission sent a questionnaire, pursuant to Article 11 of the Merger Regulation, to potential competitors of the merged entity, to the Spanish and Portuguese regulators and to the operator of the Spanish gas network ('the market test').

20 On 17 November 2004, the parties submitted modified commitments.

21 On 26 November 2004, the parties submitted further modifications to their commitments in respect of the electricity sector and announced new modifications of their commitments in respect of the gas sector. On the evening of 3 December 2004, they communicated to the Commission the final version of the modifications concerning the gas sector.

22 By decision of 9 December 2004 (Case No COMP/M.3440 — EDP/ENI/GDP C(2004) 4715 final ('the contested decision'), the Commission declared the concentration incompatible with the common market.

23 For the purposes of the present case, the contested decision may be summarised as follows.

24 First, the Commission identified the following eight relevant markets which would be affected by the concentration:

— in the electricity sector:

— wholesale supply of electricity in Portugal;

— retail supply of electricity to large industrial customers (LICs) in Portugal;

— retail supply of electricity to smaller industrial, commercial and domestic customers in Portugal;

— 'balancing power' and ancillary services in Portugal;

— in the gas sector:

— supply of gas to power producers operating Combined Cycle Gas Turbine power stations (CCGTs) in Portugal;

— supply of gas to Local Distribution Companies (LDCs) in Portugal;

— supply of gas to LICs in Portugal;

— supply of gas to small industrial, commercial and household customers in Portugal or on a local scale.

25 Second, the Commission stated, in its competitive assessment, that the concentration would have:

— in the electricity markets:

— eliminated the significant potential competition from GDP on the wholesale electricity market (a horizontal effect);

— eliminated GDP's significant potential competition on each retail electricity market (a horizontal effect);

— eliminated GDP's significant potential competition on the balancing power and ancillary services markets (a horizontal effect);

— given EDP knowledge of its current competitors' input costs and daily nomination gas needs and further deterred or delayed the entry of potential competitors wishing to operate new CCGTs (a non-horizontal effect);

— given EDP privileged and preferential access to natural gas resources available in Portugal (a non-horizontal effect);

— given EDP the ability and the incentive to significantly foreclose its competitors by raising the level of gas prices and/or lowering the quality of supply (a non-horizontal effect);

— foreclosed gas demand on the market for gas supply to power producers (a non-horizontal effect);

— on the gas markets:

— foreclosed gas demand on the market for gas supply to LDCs (a non-horizontal effect);

— eliminated EDP's significant potential competition on the market for the supply of natural gas to LICs (a horizontal effect);

— eliminated EDP's significant potential competition on the market for the supply of natural gas to small customers (a horizontal effect).

26 As indicated above, the parties proposed several commitments to the Commission on 28 October 2004 (A — P), on 17 November 2004 (EDP.1 — EDP.5; ENI.I — ENI. XIV), on 26 November and on 3 December 2004. These commitments covered the following matters:

— sale to REN of the Sinès re-gasification terminal (A/ENL.II);

— sale to REN of the Carriço underground storage facility (B/ENI.III);

— early sale of the Gas Network to REN (ENI.IV);

— guarantees of access to the Gas Network pending publication of the relevant third party access rules or the sale of the Gas Network to REN (C/ENI.V);

— release of the gas capacity at the Campo Maior, entry point of the gas pipeline into Portugal, currently booked for and unused by Transgás (D/ENI.VI);

— commitment not to book further capacity at Campo Maior (E/ENI.VII);

— commitment not to book further capacity on the Extremadura pipeline (F/ENI. VIII);

— commitment to make capacity available on the Extremadura pipeline and/or at the Campo Maior entry point under certain conditions (ENI.IX);

— amendment of the purchase agreement dated 31 March 2004 concerning those rights of GDP known as the 'matching the best offer mechanism' concerning EDP's offers of short term gas supply on the market (G/ENI.X);

— measures aimed at eliminating concerns relating to possible privileged access to price information (H/ENI.XI);

— measures aimed at ensuring the effective liberalisation of the demand represented by LICs (I/ENI.XII);

— commitment to sell one or more LDCs controlled by one of the parties (J/ENI. XIV);

— commitment not to engage in dual offers of natural gas and electricity to LICs and small customers in Portugal until these markets are liberalised (K/ENI. XIII);

— reduction of EDP's shareholding in REN from 30% to around 5% (L/EDP.1);

— moratorium on the construction of new CCGTs (M/EDP.3);

— commitment to lease temporarily the capacity of one of EDP's three gas fired power plants situated at Ribatejo (TER) (N/EDP.4);

— commitment to sell EDP's shareholding in Tejo Energia (O/EDP.2);

— commitment to suspend temporarily certain of EDP's voting rights in Turbogás and to appoint independent members to the Turbogás board (P/EDP.5).

27 Thirdly, the Commission proceeded to assess the effects of the set of commitments of 28 October 2004, then the effects of the modified set of commitments of 17 November 2004 and concluded that none of them resolved the competition concerns it had identified. The Commission found that the modified set of commitments proposed on 26 November 2004 did not fully and unambiguously remove the competition concerns, except on the market for gas supply to LDCs and that those commitments were, in part, mere expressions of intention. It also rejected the modified set of commitments of 3 December 2004 for two reasons, on one hand

because it was presented too late and, on the other hand, because it merely implemented the set of commitments submitted on 26 November 2004.

28 In conclusion, for the reasons mentioned above, whether considered individually or together, the Commission came to the conclusion that, despite the commitments proposed by the parties, the Concentration would strengthen EDP's dominant positions on the markets for the wholesale supply of electricity, balancing power and ancillary services and retail supply of electricity in Portugal as well as GDP's dominant positions in the supply of gas to CCGTs, to LICs and to small customers, as a result of which effective competition would be significantly impeded in a substantial part of the common market. The Concentration was therefore declared incompatible with the common market pursuant to Article 2(3) of the Merger Regulation.

Procedure and forms of order sought by the parties

29 By application registered at the Registry of the Court of First Instance on 25 February 2005, the applicant brought the present action against the contested decision.

30 By a separate document lodged on the same day, the applicant also applied for an expedited procedure, pursuant to Article 76a of the Rules of Procedure of the Court of First Instance.

31 By way of measures of organisation of procedure in accordance with Article 64 of the Rules of Procedure of the Court of First Instance, the applicant and the Commission attended an informal meeting on 6 April 2005 with the Judge-

Rapporteur in order to examine the possibility of the application for an expedited procedure being granted. As a result of the informal meeting, the applicant undertook to lodge its application in an abbreviated form in conformity with the requirements of the Court of First Instance's Practice Directions, and the Commission requested further time to prepare its defence. A provisional timetable for the procedure was produced by the Judge-Rapporteur. On 22 April 2005, the applicant lodged an abbreviated application, which differs from the initial one primarily in that the first and the second pleas are withdrawn. The Commission lodged its defence on 14 May 2005.

32 On 25 May 2005, the Second Chamber of the Court of First Instance, to which the case was assigned, decided to grant the application for an expedited procedure.

33 By order of the President of the Second Chamber of the Court of First Instance of 13 June 2005, the main parties having been heard, Gas Natural SDG SA was granted leave to intervene, during the hearing, in accordance with Article 76(a) of the Rules of Procedure, in support of the form of order sought by the Commission and the application by the main parties for confidentiality was also granted, subject to the observations of the intervener. The intervener confirmed that it had no objection to that request for confidentiality.

34 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure and, by way of measures of organisation of procedure, invited the intervener to provide in advance a skeleton argument of the presentation it intended to make at the hearing. Further to a request of the applicant, the Court invited the Commission and the intervener to provide the minutes of the meeting held on 27 August 2004 in Madrid between these two parties, which they did. Finally, the Court put written questions to the main parties and invited them to answer these questions at the hearing. The applicant provided written answers to these questions on the eve of the hearing (hereinafter the 'answers for the hearing'). These answers were transmitted to the other parties the same day.

35 The parties presented oral arguments and replied to the Court's questions at the hearing on 5 July 2005. The documents submitted by the applicant during the hearing were not added to the case file.

36 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

37 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

38 The intervener claims that the Court should dismiss the application.

Substance

39 It must be noted, by way of preliminary observation, that owing to the constraints of the expedited procedure granted in the present case, and, moreover, with the agreement of the main parties, in principle only the substance of the arguments of

the party which is unsuccessful on the ground under consideration will be set out in this judgment, and then only to the extent necessary. In that regard, all the arguments submitted by the parties that are capable of affecting the outcome of the dispute, including those not expressly set out in the Report for the Hearing, which was approved by the parties subject only to minor amendments, have been taken into account. Accordingly, the Court's reasoning will be limited to what is necessary to provide full and complete support for the operative part of the present ruling (see, to that effect, Case C-237/98 P *Dorsch Consult* v *Council and Commission* [2000] ECR I-4549, paragraph 51).

40 The Court records that the applicant expressly agreed, on condition that the procedure was expedited, to withdraw its first two pleas in law and also the third limb of the third plea of its initial application, in order to facilitate the rapid adoption of a decision by the Court. Its stated reason for so doing was that, should the contested decision be annulled on account of those first two procedural pleas, alleging lack of access to the file and a failure to state reasons, or on account of the third limb of the third plea, alleging breach of the principle of sound administration, the Commission would not have been bound, *a priori*, to adopt a different competitive analysis from that adopted in the contested decision, when adopting any new decision. As the expedited procedure has been granted in this case, the Court takes formal note of the withdrawal of those two pleas and of the third limb of the third plea.

41 In its abbreviated application, the applicant advances four pleas in law. First, it claims that the Commission ignored the derogation which the Portuguese Republic enjoys under Article 28(2) of the Second Gas Directive. Second, it claims that there has been a breach of Article 2(3) of the Merger Regulation, in that the Commission did not establish that the second criterion laid down in that article was satisfied. Third, the applicant claims that there have been a number of formal and/or procedural breaches of Article 8(2) and (3) of the Merger Regulation. Fourth, it claims that the Commission made errors of assessment in relation to the commitments given pursuant to Article 8(2) and (3) of the Merger Regulation.

42 The Court observes at the outset that certain pleas of a general nature, that is to say, pleas not specifically connected with one of the markets in issue, may in themselves lead to the annulment of the contested decision. Consequently, it is appropriate to examine at the outset those general pleas, namely the second and third pleas, then the first plea, which relates primarily to the gas markets, and, finally, the fourth plea.

43 At the hearing, the Commission expressed reservations about the fact that the applicant had provided in writing its answers for the hearing. It must be pointed out, in that regard, that of the 23 questions put by the Court to the main parties, only two had requested a written response. None the less, the applicant provided all of its answers in writing on the day before the hearing and at the hearing merely referred to that written document. In so far as the Commission invokes a breach of its rights of defence, it should be emphasised that that written document was delivered to it late in the afternoon of the day before the hearing, and that the Commission was given adequate opportunity to comment on that document at the hearing. Although undoubtedly brief, the period thus afforded to the Commission is within the bounds of what is acceptable in the context of the expedited procedure that characterises the present case, during which extremely tight time-limits were imposed on all the parties and also on the Court. Furthermore, the fact that the Commission was given the opportunity to acquaint itself with the essence of the applicant's answers on the day before the hearing, instead of on the day itself, enhanced the smooth running of the adversarial debate.

I — *Second plea: breach of Article 2(3) of the Merger Regulation*

44 By this plea, the applicant claims, in substance, first, that Article 2(3) of the Merger Regulation contains two distinct criteria and, second, that in the contested decision the Commission has not determined whether the second of those criteria was satisfied.

45 The Court observes that Article 2(2) and (3) of the Merger Regulation lays down two cumulative criteria, the first of which relates to the creation or strengthening of a dominant position and the second to the fact that effective competition in the common market will be significantly impeded by the creation or strengthening of such a position (see, to that effect, Case T-2/93 *Air France* v *Commission* [1994] ECR II-323, paragraph 79; Case T-290/94 *Kaysersberg* v *Commission* [1997] ECR II-2137, paragraph 156; and Case T-5/02 *Tetra Laval* v *Commission* [2002] ECR II-4381, paragraph 146).

46 In certain cases, however, the creation or strengthening of a dominant position may in itself have the consequence that competition is significantly impeded.

47 Thus, the fact that an undertaking in a dominant position, by acquiring a competitor, strengthens that position to such an extent that the degree of dominance thus attained substantially impedes competition may constitute an abuse of a dominant position (Case 6/72 *Europemballage Corporation and Continental Can* v *Commission* [1973] ECR 215, paragraph 26). The relevance of that case-law is increased by the fact that the situation examined by the Court of Justice in that judgment, at a time when the Merger Regulation did not exist, was very similar to the situation that could arise following a concentration within the meaning of that regulation.

48 Likewise, in relation to concentrations, a dominant position is characterised by a situation in which one or more undertakings wield economic power which would enable them to prevent effective competition from being maintained in the relevant market by giving them the opportunity to act to a considerable extent independently of their competitors, their customers and, ultimately, of consumers (Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraph 200).

49 It follows that proof of the creation or strengthening of a dominant position within the meaning of Article 2(3) of the Merger Regulation may in certain cases constitute proof of a significant impediment to effective competition. That observation does not in any way mean that the second criterion is the same in law as the first, but only that it may follow from one and the same factual analysis of a specific market that both criteria are satisfied.

50 It follows that, in so far as it is clear from the grounds of a decision finding that a concentration is incompatible with the common market, including those formally devoted to an analysis of the creation or strengthening of a dominant position, that that transaction will produce significant anti-competitive effects, the decision cannot be held to be vitiated by illegality solely because the Commission did not expressly and specifically relate its description of those elements to the second criterion laid down in Article 2 of the Merger Regulation, whether from the viewpoint of the obligation to state reasons laid down in Article 253 EC or from a substantive viewpoint. To adopt the contrary approach would be to place the Commission under a purely formal obligation requiring it to invoke certain identical considerations twice, first in its analysis of the creation or strengthening of a dominant position on a given market and second by reference to the significant impediment to competition in the common market.

51 In the present case, the Commission's argument that this plea is based on a failure to state reasons must be rejected at the outset. Were it to appear from the contested decision that the Commission did not in fact consider whether the second criterion in Article 2(3) of the Merger Regulation was satisfied or did not demonstrate that it was, then it would be necessary to conclude that the decision was not consistent with that provision. Indeed, in the context of this regulation, an absence of reasoning in this regard could indicate only the absence or insufficiency of any examination of whether the second criterion was satisfied, and not that such an examination was in fact carried out but omitted from the decision.

52 As regards the applicant's main complaint, the Court finds that the Commission took care to conclude in the contested decision, in the case of each of the markets concerned, that both criteria laid down in Article 2(3) of the Merger Regulation were satisfied. Thus, the Commission concluded that the concentration would strengthen EDP's and GDP's pre-existing dominant positions, with the consequence that effective competition would be significantly impeded in the wholesale electricity market (recitals 364, 379, 410, 428 and 429), the market for balancing power and ancillary services (recital 432), the retail electricity markets (recital 473), the market for the supply of gas to electricity producers (recital 528), to LDCs (recital 538), to large customers (recital 550), to small customers (recital 602) and in general (recital 609), even after it had examined all the commitments (recital 914).

53 Admittedly, it must also be noted that in the contested decision the Commission examined together, and without distinction, the elements leading it to conclude that EDP's and GDP's pre-existing dominant positions would be strengthened and the elements leading it to conclude that the concentration would also have the consequence that effective competition would be significantly impeded.

54 However, since the elements relied on in the contested decision to show that EDP's and GDP's dominant positions would be significantly strengthened and the elements showing that effective competition would be significantly impeded following the concentration are frequently identical, the mere fact that the Commission did not devote specific parts of the decision to examining the significant impediment to competition does not justify the conclusion that the Commission failed to have regard to the second criterion laid down in Article 2(3) of the Merger Regulation. Thus, in the present case, most, or indeed all, of the considerations which led the Commission to conclude that the pre-existing dominant positions would be strengthened are based on an effective restriction of the competition that could exist in the absence of the concentration and therefore also seek to demonstrate that the second criterion laid down in Article 2(3) of the Merger Regulation was satisfied. In particular, in so far as the concentration does not lead, or leads only incidentally, to an increase in the parties' market share on one of the markets concerned, the anti-

competitive effects of the concentration result primarily, or indeed essentially, in the Commission's submission, from effective restrictions of competition on each of the markets concerned. For example, proof that EDP's and GDP's dominant positions would be strengthened owing to the disappearance of an important or significant potential competitor on most of the markets considered in the contested decision relies on proof that competition, which according to the Commission would have been effective, would be significantly impeded as a result of the concentration (see, for example, as regards the disappearance of GDP as the most likely important potential competitor on the wholesale electricity market, recitals 335 to 364; on the retail electricity markets, recitals 450 to 473; or, as regards the disappearance of EDP as the most significant potential competitor on the retail gas market, recitals 559 to 599).

55 It also follows that, contrary to the applicant's contention, the Commission, in the contested decision, did not treat the question as to whether the second criterion laid down in Article 2(3) of the Merger Regulation was satisfied as an automatic consequence of the first criterion, but, on the contrary, based its reasoning on the fact that the significant impediments to competition strengthened EDP's or GDP's dominant positions.

56 Consequently, the analysis of the commitments which the Commission carried out on the basis of that reasoning is not affected either by the defect which the applicant alleges. Thus, when the Commission concluded that the commitments were insufficient to resolve the competition concerns previously identified, it considered that EDP's or GDP's dominant positions would continue to be strengthened because competition would still be significantly impeded (see, for example, as regards the disappearance of GDP as the most likely important potential competitor on the wholesale electricity market, recitals 650 to 675; on the retail electricity markets, recitals 708 to 714; or, as regards the disappearance of EDP as the most significant potential competitor on the retail gas market, recitals 735 to 738).

57 Last, it should be observed that the applicant's complaint does not go beyond general criticism. In particular, in the context of this plea, the applicant does not claim, still less prove, that on any one of the markets concerned the competition considerations put forward by the Commission would be incapable of proving as a fact the existence of a significant impediment to effective competition.

58 It follows from the foregoing that the Commission did not disregard the second criterion laid down in Article 2(3) of the Merger Regulation. Consequently, the present plea must be rejected.

II — *Third plea: breach of Article 8(2) and (3) of the Merger Regulation*

59 The applicant relies on four limbs in support of its plea in respect of the commitments, relating, first, to failure to have regard to the burden of proof; second, failure to have regard to the comprehensive nature of the commitments; third, to a misuse of powers; and, fourth, to exaggeration of the difficulties in monitoring compliance with certain behavioural commitments.

A — *First limb of the third plea, concerning the burden of proof*

60 The applicant maintains that the Commission wrongly relied on the presumption that it was for the parties to prove that their commitments eliminated the

competition concerns identified by the Commission. In doing so, the Commission misapplied a standard of control set out in paragraph 6 of the Notice on Remedies.

61 It must be borne in mind that Article 2(2) of the Merger Regulation provides that the Commission 'shall' declare compatible with the common market a concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market. It follows that it is for the Commission to demonstrate that a concentration cannot be declared compatible with the common market.

62 Furthermore, Article 8(2) of the Merger Regulation provides that the Commission is to adopt a decision declaring the concentration compatible with the common market where it finds that a notified concentration, 'following modification by the undertakings concerned if necessary', fulfils the criterion laid down in Article 2(2) of the Merger Regulation. It follows that, in so far as the burden of proof is concerned, a concentration modified by commitments is subject to the same criteria as an unmodified concentration.

63 Accordingly, first, the Commission is under an obligation to examine a concentration as modified by the commitments validly proposed by the parties to the concentration (see, to that effect, Case T-158/00 *ARD* v *Commission* [2003] ECR II-3825, paragraph 280) and, second, the Commission can declare the concentration incompatible with the common market only where those commitments are insufficient to prevent the creation or strengthening of a dominant position having the consequence that effective competition would be significantly impeded. In that regard, it must none the less be borne in mind that, in the case of complex economic

assessments, the burden of proof placed on the Commission is without prejudice to its wide discretion in that sphere (see, to that effect, Case T-342/00 *Petrolessence and SG2R* v *Commission* [2003] ECR II-1161, paragraph 101, and the case-law cited, and Case C-12/03 P *Commission* v *Tetra Laval* [2005] ECR I-987, paragraph 38).

64 Furthermore, the fact that paragraph 6 of the Notice on Remedies indicates that '[i]t is the responsibility of the parties to show that the proposed remedies ... eliminate the creation or strengthening of ... a dominant position identified by the Commission' cannot alter that legal position. Even on the assumption that the Commission thereby intended to make the parties to a notified concentration responsible for demonstrating the effectiveness of the proposed commitments, an exercise which is consistent with their interests, the Commission could not conclude that where there is doubt it must prohibit the concentration. Quite to the contrary, in the last resort, it is for the Commission to demonstrate that that concentration, as modified, where appropriate, by commitments, must be declared incompatible with the common market because it still leads to the creation or the strengthening of a dominant position that significantly impedes effective competition.

65 It follows that it is for the Commission to demonstrate that the commitments validly submitted by the parties to a concentration do not render that concentration, as modified by the commitments, compatible with the common market.

66 The Commission claims that a distinction must be drawn in that regard between the commitments submitted before the deadline laid down in Article 18(2) of the Merger Regulation for submitting commitments and those submitted after that deadline. In this case it is common ground that the parties submitted modifications to their first series of commitments both before the expiry of that deadline, on 17 November 2004, and afterwards, on 26 November 2004, and even on 3 December 2004. In fact, point 43 of the Notice on Remedies, read in the light of points 41 and 42, makes no distinction according to whether the modification of the commitments is submitted before or after the deadline. None the less, point 43 provides that the

modified commitments must, in particular, enable the Commission to establish clearly, without the need for any other test and with sufficient time for proper consultation of the Member States, that once implemented such commitments will resolve the competition concerns identified.

67 In that regard, first, the wording of point 43 of the Notice on Remedies does not provide that the parties to a concentration are responsible for proving that their modified commitments will clearly resolve the competition concerns identified. Second, since the Commission is required to accept modified commitments, on certain conditions, it does not have the power to alter the burden of proof established by the Merger Regulation for the purpose of issuing a final decision under Article 8(2) or (3) of that regulation, on the ground that the concentration fulfils the criteria laid down in Article 2(2) or (3) of that regulation. Thus, according to the special conditions set out at point 43 of the Notice on Remedies, it is also for the Commission to demonstrate that the modified commitments are not sufficient to establish clearly, without the need for further investigation or in the absence of sufficient time for consultation of the Member States, that they will resolve the competition concerns identified.

68 Last, it should be emphasised that, according to the logic of the administrative procedure in relation to concentrations, the Commission provisionally identifies the competition concerns which in its view are raised by the concentration, first explaining why it considers it necessary to initiate proceedings under Article 6(1) of the Merger Regulation and then, second, issuing a statement of objections to the parties to the transaction. At that stage, the parties to the transaction may dispute the very existence of those competition concerns and/or offer commitments capable of resolving them, whether at the time of responding to the statement of objections or at a later stage in the discussions. It is thus clear that by proposing commitments the parties to the transaction intend to convince the Commission that those commitments wholly resolve the competition concerns previously identified. On the other hand, when it regards those commitments as insufficient, the Commission

necessarily considers that the parties to the transaction have failed to convince it of the value of their commitments for the purpose of resolving the anti-competitive problem or problems caused by the transaction concerned.

69 It follows that the fact that the Commission regards commitments which have been validly submitted, i.e. either with the first proposal or, in accordance with point 43 of the Notice on Remedies, in the form of a modification of the initial commitments, as insufficient constitutes an improper reversal of the burden of proof only where the Commission bases that finding of their insufficiency, not upon an assessment of the commitments based on objective and verifiable criteria, but rather upon the assertion that the parties have failed to provide sufficient evidence to carry out a substantive assessment. In the latter case, doubt does not operate in favour of the parties to the transaction and it would have to be concluded that the burden of proving that such a transaction was compatible with the common market has been reversed.

70 In the present case, the applicant puts forward a single example based on recital 833 to the contested decision, relating to the commitments of 17 November 2004, which were given before the deadline, and which provide that 'considerable doubts and uncertainties remain whether the combined effect of [the proposed measures] will sufficiently compensate for the loss of EDP as a major potential competitor' on the wholesale gas supply market. In the contested decision, the Commission expressly bases that assessment on the Notice on Remedies.

71 It should be noted that the Commission concluded the recital in question in a very affirmative manner, maintaining that the measures proposed by the parties would not prevent the strengthening of GDP's dominant position in the market concerned as a result of the merger. Thus, the Commission found that the commitments in question were insufficient to allow the merger to be authorised.

72 Furthermore, the doubts and uncertainties to which the Commission refers relate to whether the commitments were, inter alia, unconditional and certain. At recital 832 to the contested decision it sets out five reasons for its view that the commitments in question were insufficient to ensure that additional gas capacities would actually be made available for third parties (exclusion of the parties' Spanish subsidiaries from the commitment not to reserve additional capacity; absence of mandatory approval by the Spanish regulator of the access code for third parties; the parties' right to reserve so-called strategic capacities; reduced effectiveness of the commitment to release capacity at Campo Maior owing to the limited current pipeline capacity and the negative consequences for the capacities available at the Sinès LNG terminal; the parties' special rights vis-à-vis the operator of that terminal and the option to build a storage tank for natural gas). Accordingly, the doubts expressed refer not to the possibility of adverse effects with competition resulting from the merger but rather to the fact that it was impossible to be satisfied that the commitments in question would be fully operational. The Commission is entitled to reject non-binding commitments or, which amounts to the same thing, commitments the effect of which may be reduced, or even eliminated, by the parties. In doing so, the Commission did not transfer the burden of proof to the parties but denied the certain and measurable character which the commitments had to display. Last, it should be noted that, in the context of this plea, the applicant did not dispute before the Court of First Instance the uncertain nature of the commitments in question.

73 In the light of the foregoing, it must be held that in the contested decision the Commission did not reverse the burden of proof which it bore in relation to its obligation to establish that the merger was incompatible with the common market. On the contrary, it sought to demonstrate why the merger should be prohibited in spite of the proposed commitments.

74 The first limb of the third plea in law must therefore be rejected.

B — *Second limb of the third plea in law, relating to the overall assessment of the merger as modified*

75 The applicant claims, in substance, that the Commission did not assess the situation as it would exist after the merger, taking account of the commitments, by reference to the situation which would exist if the merger did not take place. In its written reply for the hearing, the applicant explained its argument as meaning that it criticises the Commission for having assessed the weaknesses that could be identified in the commitments rather than assessing the likely effects of the merger as modified on a particular market, which would lead to a different outcome. The applicant further alleges that the Commission assessed each commitment in isolation from the others. In its written reply, it gave the example of the separate examination of the commitments designed to resolve the horizontal problem on the wholesale electricity market and of the commitments relating to the non-horizontal problems on that market.

76 It should be observed that the contested decision is formally structured in such a way as to present, in turn, the identification of the competition concerns caused by the merger, as notified, on each of the markets (recitals 280 to 609), then the competitive assessment of the commitments of 28 October 2004 (recitals 650 to 738), then those of 17 November 2004 (recitals 741 to 841) and, finally, those of 26 November 2004 (recitals 860 to 912). In carrying out its assessment, the Commission examined in turn each of the commitments deemed relevant for each of the markets concerned. Where a number of competition concerns were identified on one market, the Commission examined the commitments in turn within the framework of each of those concerns. It concluded, in each case, with the exception of the market for the supply of gas to LDCs, that the commitments were insufficient to resolve the competition concern identified and/or prevent the strengthening of the dominant position in question (see, in relation to the wholesale electricity market taken as an example by the applicant, as regards the horizontal problem, recitals 675, 767 and 868, or, as regards the non-horizontal problems, recitals 700, 702, 703, 801, 874 and 875).

77 It must be borne in mind that the Commission has a duty to examine a concentration as modified by the commitments validly proposed by the parties (see paragraph 63 above). However, as the applicant acknowledged at the hearing, such a premiss does not preclude the examination, in turn, of the competition concerns caused by that transaction, then the commitments offered by the parties to the transaction with a view to resolving those concerns, nor does it preclude the examination, in turn, of each of the relevant commitments by reference to those concerns, provided that the Commission ultimately arrives at a global assessment of the merger as modified, that is of the effects of that transaction on each of the markets identified taking account of all the commitments relevant to that market.

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

79 In the present case, the applicant's complaint is based on an unrealistic premiss and a misreading of the contested decision.

80 First, it should be borne in mind that the commitments offered by the parties to a merger are specifically intended to resolve the competition concerns previously identified. It is therefore inevitable that the Commission, when faced with a commitment, will seek first of all to determine the scope of that commitment and, in particular, any intrinsic weaknesses which it may have, and then ascertain whether that commitment constitutes a suitable means of resolving the identified concern, in whole or in part. The analysis of the likely effects of the modified merger presupposes an initial assessment of the scope of that modification. In that regard, it is important to note that, both in the application and in the annexes thereto, the

applicant also adopted that step-by-step approach, leading the Court, moreover, to do likewise. It is unrealistic to imagine, moreover, that the Commission could, within the time constraints imposed by the Merger Regulation, recommence entirely its analysis of a merger, in the light of the submission of commitments, as though that transaction had been notified anew in the form modified by the commitments. Such an approach would conflict with the requirement of speed that characterises the general structure of the Merger Regulation (Case T-221/95 *Endemol* v *Commission* [1999] ECR II-1299, paragraph 68). The unrealistic nature of the approach impliedly suggested by the applicant is reinforced, in this case, by the fact that three, or indeed four, series of commitments were proposed in turn, the last one, or last ones, out of time, and when the procedure was in its final states. In that regard, the applicant's argument that those successive series are merely modifications of the earlier commitments and not new commitments does not alter that analysis. In that situation, the Commission is required, each time, to deal with those new elements in its analysis, in order to consider whether those commitments are capable of invalidating its previous findings.

81 Second, in the contested decision, the Commission was careful to explain in what way the weaknesses of each of the commitments meant that it could not, on its own, enable the Commission to resolve the competition concern at issue. However, it systematically followed that specific analysis by concluding that the whole body of commitments relevant to that concern was also insufficient to resolve it. For the commitments of 18 October and 17 November 2004, it stated that the dominant position concerned would still be strengthened (see, for example, in relation to the wholesale electricity market to which the applicant refers, as regards the horizontal problem, recitals 675 and 767, or, as regard the non-horizontal problems, recitals 700, 702, 703 and 801). When considered necessary, it also examined commitments other than those specifically proposed by the parties with a view to resolving the particular competition concern (recitals 809 to 812). In that way, the Commission's analysis was equivalent to an analysis of the concentration as modified by the commitments. Although in the case of the commitments of 26 November 2004, the Commission merely concluded that those commitments were insufficient to resolve the competition concerns in question, it none the less carried out an overall assessment of those commitments by reference to those concerns (see, as regards

the horizontal concern on the wholesale electricity market, recital 868, or, as regards the non-horizontal concerns on that market, recitals 874 and 875). Furthermore, as the examination of the belated commitments satisfies special conditions set out in the Notice on Remedies, it cannot be inferred from the fact that the Commission did not expressly find that they strengthened the dominant positions examined that it did not carry out an overall examination of the merger as modified.

82 It follows that the Commission did carry out an overall analysis of the merger as modified by the commitments proposed by the parties.

83 As regards the instance of the separate examination of the commitments relating to the horizontal concern and the non-horizontal concerns on the wholesale electricity market, to which the applicant refers, it must be held that that argument is wholly coterminous with the argument, set out in the context of the fourth plea in law, that the commitments relating to non-horizontal problems would allow a number of competitors to enter the market, whereas GDP was merely a potential competitor. Even on the assumption that the Commission did wrongly consider that it could decide not to examine the indirect scope of certain commitments by reference to a competition concern or a market to which they were not directly relevant, that would not constitute an error of law but an error of assessment. Although the Commission is required to examine all the relevant commitments by reference to competitive concerns identified on any of the markets concerned, including those not specifically designated as such by the parties to a merger, the question whether or not a particular commitment is relevant to a specific concern raised by a merger is a matter for the economic assessment of the transaction in question and must be examined in that context.

84 As the applicant has also put forward this argument in the context of its fourth plea in law, relating to the existence of errors of assessment by the Commission with regard to the merger as modified, it is appropriate to deal with it when examining that plea.

85 In the light of the foregoing, the second limb of the third plea must be rejected.

C — *Third limb of the third plea in law, relating to misuse of powers*

86 The applicant claims, essentially, that the Commission misunderstood the powers conferred on it by the Merger Regulation by requiring that the commitments should be aimed at the liberalisation of the electricity and gas markets.

87 According to consistent case-law, the concept of misuse of powers refers to cases where an administrative authority has used its powers for a purpose other than that for which they were conferred on it. A decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken for such a purpose (Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 24, and Case C-400/99 *Italy* v *Commission* [2005] ECR I-3675, paragraph 38). Where more than one aim is pursued, even if the grounds of a decision include, in addition to proper grounds, an improper one, that would not make the decision invalid for misuse of powers, since it does not nullify the main aim (Case 2/54 *Italy* v *High Authority* [1954] ECR 37, 54, and, to that effect, Case T-266/97 *Vlaamse Televisie Maatschappij* v *Commission* [1999] ECR II-2329, paragraph 131).

88 It should be observed at the outset that it is common ground that the merger falls within the scope of the Merger Regulation (recitals 12 and 13 to the contested decision). It must also be observed that the applicant does not claim that the merger could not form the subject-matter of a decision to initiate the investigation proceedings under Article 6 of the Merger Regulation and, therefore, of a final decision under Article 8 of the Merger Regulation. In that regard, the applicant acknowledges, notably in its written answer for the hearing, that the merger as

notified strengthened EDP's dominant positions on the electricity markets. Accordingly, it was inevitable that the parties would give commitments with a view to obtaining a decision declaring the merger compatible with the common market.

89 It is therefore quite plain that, in taking account of the commitments proposed for the purposes of the adoption of the contested decision, the Commission acted wholly within the framework of the Merger Regulation. The Commission thus pursued the objective of that regulation, which seeks to prohibit the creation or strengthening of a dominant position which would have the consequence of significantly impeding effective competition.

90 The applicant claims, however, that the Commission demanded more such commitments, going beyond what was necessary to ensure that EDP's and GDP's dominant positions would not be strengthened. In particular, it claims that the Commission required that the market be opened to a greater extent than was necessary to resolve the competition concern caused by the merger.

91 The numerous examples provided by the applicant — to the effect, in substance, that the Commission deemed the commitments insufficient to ensure that new competitors would enter the relevant markets (see, in particular, recitals 659, 665, 707, 714, 725, 749, 805, 812, 862, 879 and 888 to the contested decision) — demonstrate simply that the objective of the Merger Regulation, namely to prevent the creation or strengthening of dominant positions having the effect that effective competition would be significantly impeded by a concentration, was pursued by the Commission. Indeed, the entry of new competitors on markets where it is not disputed that EDP and GDP hold very strong dominant positions constitutes one essential aim of competition in the context of the application of Article 2(3) of the Merger Regulation. Accordingly, the essential objective pursued by the Commission in its refusal to modify its position in the light of the commitments falls squarely within the framework of the Merger Regulation.

92 In that regard, it must be noted that, in the context of its plea relating to the competitive assessment of the concentration as modified, the applicant relies on the fact that the concentration would constitute a significant advance towards the opening of the gas and electricity markets to competition. Unless it is to contradict itself, therefore, the applicant accepts that the resolution by the commitments of the competition concerns raised by the concentration and the pursuit of the opening of the markets to competition may co-exist.

93 Even on the assumption, and this question will be examined below, that the finding that one of the proposed commitments is insufficient or that the Commission's requirement of a particular commitment should be considered excessive by reference to the resolution of the competition concerns identified by the Commission in the contested decision, such an error would constitute a breach of Article 2(3) of the Merger Regulation and not a misuse of powers.

94 The applicant maintains, moreover, that the Commission seems to have been attracted by the argument set out in a report entitled 'Report on Electricity and Gas Markets in Portugal', prepared by Cambridge Economic Policy Associates at the request of the Portuguese competition authority, according to which, in the applicant's submission, the Commission should actively use the concentration to improve competitive conditions. However, it must be noted that in the passages in the contested decision in which that report is cited (see, in particular, recitals 137, 172, 333 and 573), the Commission did not in any way embrace the objective put forward as a possibility by the report, but merely drew from it certain objective economic assessments. The references to that report cannot therefore constitute an indication of a misuse of powers.

95 As regards the remaining elements adduced by the applicant, in particular the declarations of Mr Monti, the then Member of the Commission responsible for competition, and other Commission decisions on concentrations in the energy sector (Commission Decision of 7 February 2001 in Case COMP/M.1853 — EDF/EnBW; Commission Decision of 19 March 2002 in Case COMP/M.2684.1853 — EnBW/EDP/Gastajur/Hidrocantábrico), these cannot constitute relevant indicia for

the purpose of establishing the existence of a misuse of powers in the present case, since they do not form the basis of the contested decision. Furthermore, even if those two concentration decisions were defective in the manner alleged by the applicant, namely that they required that the markets be opened to an extent that was unnecessary by reference to the competition concerns identified in those decisions, that would not mean that the contested decision, which is based on a competitive situation specific to its own case, is defective in the same way.

96 The fact, alleged by the applicant, that the Commission was in reality seeking to attain the objectives of the Second Gas Directive, whereas that directive is based on Article 47(2) EC (right of establishment), Article 55 EC (freedom to provide services) and Article 95 EC (harmonisation of legislation), does not show that the Commission wrongly intended to pursue those objectives. First, the legal basis of that directive tends rather to show that the Commission could only very indirectly pursue the aims of that directive by favouring the entry of new competitors, notably national competitors, on the relevant markets. Second, it must be held that Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas (OJ 1998 L 204, p. 1; 'the First Gas Directive') and the Second Gas Directive have the effect, if not the object, of introducing competition into a sector which had hitherto not been subject to competition (see recitals 2, 6, 21, 22, 26 and, particularly, 31 to Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ 2003 L 176, p. 37; 'the Second Electricity Directive'), and recitals 2, 7, 19, 21, 25, 27 and, in particular, 30 to the Second Gas Directive; see also, in regard to Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ 1996 L 27, p. 20), the judgment of the Court of Justice in Case C-17/03 *VEMW and Others* [2005] ECR I-4983, paragraph 62). It follows that one of the aims of the Second Gas Directive is clearly competitive. It is no surprise, therefore, that the competitive objective of the Merger Regulation should also be assumed by one of the objectives of the second electricity and gas directives. Consequently, the fact that the Commission pursued the practical realisation of the Second Gas Directive cannot indicate a misuse of powers when that objective is also the objective for which that regulation conferred its powers on the Commission.

97 The applicant claims, last, that the liberalisation of the energy sectors ought to have been implemented by the application of Article 86 EC. Without there being any need to resolve the question of whether the Commission could still use the powers conferred on it by that article, notwithstanding the existence of the second electricity and gas directives, the applicant's argument is irrelevant in the context of the present limb. Even on the assumption that Article 86 did permit the liberalisation of the markets in question to be achieved, such an assumption could only lead to a finding that that competition provision and the Merger Regulation, the objectives of which have been seen to have been properly pursued by the Commission, can be applied together.

98 In the light of the foregoing, the third limb of the third plea must be rejected.

D — *Fourth limb of the third plea, relating to the difficulties in monitoring certain behavioural commitments*

99 The applicant claims that the Commission rejected certain commitments because of their behavioural nature and of the need to carry out ex-post monitoring. It submits that in doing so the Commission acted inconsistently with the case-law and with its recent administrative practice, and failed to take into account the possibility that that ex-post monitoring could be carried out by the competent Portuguese authorities.

100 It must be borne in mind at the outset that behavioural commitments are not by their nature insufficient to prevent the creation or strengthening of a dominant position, and that they must be assessed on a case-by-case basis in the same way as structural commitments (*Gencor* v *Commission*, paragraph 48 above, paragraph 319, and *Tetra Laval* v *Commission*, paragraph 45 above, paragraph 161, upheld in that regard by the Court of Justice in *Commission* v *Tetra Laval*, paragraph 63 above, paragraph 85).

101 However, the applicant's complaint is based on a misreading of the contested decision, since in the three examples which it puts forward the Commission did not reject the commitments in question solely because of their behavioural nature or because of the difficulties in monitoring those commitments, but because of their overall insufficiency by reference to the competition concerns identified.

102 Thus, at recital 663, the Commission did indeed conclude that the commitment in respect of the leasing of production capacity equivalent to one CCGT of TER was far from securing the same advantages as a structural commitment, and that it required extensive subsequent verification on the Commission's part. However, the Commission intended thereby only to emphasise that the parties had made provision for the early termination of that commitment when certain complex conditions were satisfied, and that they had asked that the Commission verify one of those conditions was satisfied. In fact, the Commission considered principally that those conditions gave rise to serious uncertainties affecting that commitment. First, it was not therefore the behavioural nature of the commitment that led to its being rejected by the Commission. Second, the difficulty of monitoring those conditions resulted from the complexity and inappropriateness of the conditions, and not from a refusal on the Commission's part to carry out ex-post monitoring. Third, and last, recitals 662 and 664 describe several other factors, such as, in particular, the fact that the lessee would not be in a position to manage the CCGT autonomously, that it would become dependent on EDP and that the conditions of the early termination of the commitment were based on transnational considerations although the market will remain a national market, which in the Commission's view also justified the rejection of that commitment.

103 At recital 678, the Commission puts forward merely as a supplementary and marginal reason the fact that the commitment relating to the sale of the Sinès LNG terminal required extensive subsequent monitoring by the Commission. It did not in any way rely on the behavioural nature of that commitment, and virtually the entire recital is devoted to other reasons, such as, in particular, the date of the divestment, the weaknesses relating to third-party access to gas capacities, and the retention by GDP of a minority shareholding in the operator managing the terminal, leading the Commission to conclude in the following recital that the positive effects of that commitment were likely to be seriously reduced.

104 At recital 719, the Commission did indeed consider that the commitment relating to the suspension of EDP's voting rights in the Board of Directors of Turbogás with regard to the supply of gas and investments and the appointment of independent members to the board of Turbogás, were purely behavioural and would be difficult to monitor. However, that aspect was emphasised only incidentally and is preceded by three principal reasons why the Commission considered that commitment insufficient, namely the fact that the independence of the appointed member was not guaranteed, the fact that EDP would retain voting rights on important questions and could indirectly influence the choice of gas supplier, and the fact that the suspension of the voting rights would be limited to three years.

105 Last, as regards the criticism that the Commission failed to take into account the possibility that the competent Portuguese authorities might carry out the monitoring necessary to ascertain whether the conditions for the early termination of the commitments in question were satisfied, it must be held, first, that, as regards the leasing of the TER, it was the parties themselves that expressly envisaged requesting the Commission to verify that those conditions were satisfied. The Commission was therefore not in a position, without itself modifying the proposed commitment, which it is not empowered to do, to entrust that monitoring to the national authorities. Likewise, as regards the other two commitments to which the applicant refers, the Commission had no obligation, even if had been able to do so in the discussions with the parties, to establish a particular method of monitoring, notably one delegated to the competent national authorities. It was for the parties, on the contrary, to propose commitments that were full and effective from all aspects, especially if those behavioural commitments had intrinsic weaknesses as regards their binding nature that justified ex-post monitoring.

106 In the light of the foregoing, the fourth limb of the third plea must be rejected.

107 Consequently, the third plea must be rejected in its entirety.

III — *First plea, relating to the derogation which Portugal enjoys under the Second Gas Directive*

108 The applicant maintains, in substance, that in assessing the competitive situation on markets not open to competition the Commission disregarded (i) the temporary derogation from the liberalisation calendar enjoyed by the Portuguese Republic under the Second Gas Directive and (ii) Article 2(3) of the Merger Regulation by projecting its competitive analysis more than five years after the concentration.

A — *Preliminary observations*

109 It must be borne in mind, as a preliminary point, that the electricity and gas markets in the Community were, de facto, markets that were not necessarily open to competition before the adoption of the first and Second Gas Directives, owing to the national monopolies in certain Member States. However, the Court of Justice has had occasion to observe that the provisions on competition in the EC Treaty were applicable to decisions by undertakings active in those sectors (Case C-393/92 *Almelo and Others* [1994] ECR I-1477, paragraphs 34 to 51). None the less, the First Gas Directive, then the Second Gas Directive, which speeds up the calendar provided for in the First Gas Directive, are based on the premiss that Member States were not immediately required, from the date of implementation of those directives, to open the gas markets to competition. It must therefore be accepted that the various gas markets are not required to be open to competition before the deadlines set in the Second Gas Directive.

110 The Second Gas Directive seeks to establish an internal gas market in which fair competition prevails (recital 30 to the Second Gas Directive), that is, to give consumers the opportunity freely to choose their suppliers and to give suppliers the opportunity to deliver to their customers — without hindrance (recital 4 to the Second Gas Directive). One of the main axes of that liberalisation of the gas markets consists in setting a calendar for the progressive opening of those markets, based on

the progressive increase in the number of eligible customers, that is of customers free to purchase gas from the supplier of their choice. Under the Second Gas Directive, all non-domestic customers were to be eligible on 1 July 2004 and all customers will have to be eligible on 1 July 2007.

111 Under Article 28(2) of the Second Gas Directive, however, a Member State which qualifies as an emergent market is subject to an exceptional calendar. Until the dates provided for in that calendar, such a Member State may derogate from the following obligations: non-discriminatory authorisation for the construction or operation of gas facilities, designation of system operators, definition of the tasks of such operators, unbundling of system operators, designation of distribution system operators, definition of the balancing tasks of distribution system operators, unbundling of distribution system operators, unbundling of accounts, introduction of third-party access to the natural gas system and to LNG installations, introduction of a calendar for liberalisation and introduction of a system for direct pipelines (see paragraph 6 above).

112 It clearly follows that that derogation exempts the Member State concerned from the obligation to apply the main provisions of the Second Gas Directive which ensure that the various markets will be open to competition and which guarantee effective competition. It must therefore be concluded that, by virtue of that derogation, the gas markets concerned are not open to competition so long as the Member State concerned has not opened those markets.

B — *First limb of the first plea, relating to failure to have regard to the derogation granted to the Portuguese Republic*

113 By the first limb of its plea, the applicant claims that in assessing the effects of the concentration on markets not open to competition, the Commission infringed the

Portuguese Republic's right to restructure the gas sector during the period allowed under the derogation granted by Article 28 of the Second Gas Directive. The Commission on the other hand, contends first, that the concentration results solely from decisions taken by undertakings and that it must be examined primarily under the Merger Regulation. Second, it maintains that it ensured the necessary coherence between that regulation and the Second Gas Directive by not assessing the effects of the concentration during the period covered by the derogation. Third, it contends that that derogation does not give a Member State the right to favour a concentration which will significantly affect competition after the expiry of that derogation.

114 It is common ground that the Portuguese Republic benefits from the derogation provided for in Article 28(2) of the Second Gas Directive and that that derogation will come to an end in 2007, which means that the calendar for the gradual opening of the gas markets to competition will then become operative.

115 The Portuguese Republic has taken advantage of that derogation to establish a national gas industry operating as a monopoly in all sectors of the gas industry (transmission, storage, distribution, supply). It must be observed that the setting-up of those monopolies has not been challenged on competition grounds by the Commission. Similarly, in the present case, the Portuguese Government has not yet officially opened any of the markets concerned to competition. The Commission claims, in particular, that the opening of the market in the supply of gas to electricity producers had been envisaged for 2004 and was postponed to 2005 (recital 211 to the contested decision). However, no documentary evidence of the actual opening of that market has been adduced. Also, as the Commission itself acknowledges, that market was not open to competition on the date of adoption of the contested decision. The Commission relies, furthermore, on the fact that the Portuguese Republic is very seriously contemplating bringing forward the liberalisation of all the gas markets. However, even on the assumption that the liberalisation calendar in Portugal may be speeded up, before any actual liberalisation the gas markets concerned all continue to be covered by the derogation. Moreover, there is no indication that the Portuguese Republic would agree to bring forward the liberalisation calendar without the concentration being implemented.

116 It follows that the gas markets in Portugal were not open to competition on the date of adoption of the contested decision. That fact directly and inevitably affects the application of Article 2(3) of the Merger Regulation to those markets.

117 First, as regards the first criterion in Article 2(3) of the Merger Regulation, namely the creation or strengthening of a dominant position, that criterion cannot apply, since GDP currently has a monopoly on the markets for the supply of gas to electricity producers, LDCs and large customers (recital 475 to the contested decision). Indeed, on any market, a monopoly represents the ultimate dominant position, which for that reason cannot be strengthened on that market. The only market on which GDP's dominant position could be strengthened is the market for the supply of gas by LDCs to small customers, since GDP owns only five of the six existing LDCs. None the less, it should be noted that each of those LDCs has a geographical monopoly which currently precludes any competition between them.

118 Second, as regards the second criterion in Article 2(3) of the Merger Regulation, namely a significant impediment to effective competition, which, as has been seen above, constitutes an autonomous criterion, it too cannot be satisfied in a non-competitive market. Indeed, in the total absence of competition, there was no competition that could be significantly impeded by the concentration on the date of adoption of the contested decision.

119 That analysis is fully corroborated by the general competition case-law. Thus, in respect of agreements and abuse of a dominant position, it has been held that, if national legislation creates a legal framework eliminating any possibility of competitive conduct on the part of undertakings, Articles 81 EC and 82 EC do not apply (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 71 and 72; Joined Cases C-359/95 P and C-379/95 P *Commission and France* v *Ladbroke Racing* [1997] ECR I-6265, paragraph 33; and Joined Cases T-191/98 and T-212/98

to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraph 1130). Likewise, the Court of First Instance has held that 'a system of aid established in a market that was initially closed to competition must, when that market is liberalised, be regarded as an existing aid system, since at the time of its establishment it did not come within the scope of Article 92(1) of the Treaty, which, having regard to the requirements set out in that provision regarding effect on trade between Member States and repercussions on competition, applies only to sectors open to competition' (Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta and Others* v *Commission* [2000] ECR II-2319, paragraph 143, indirectly upheld on appeal by judgment of the Court of Justice in Case C-298/00 P *Italy* v *Commission* [2004] ECR I-4087, paragraphs 66 to 68).

120 It must be pointed out that this consideration affects only the issue of whether the conditions laid down in Article 2(3) of the Merger Regulation are satisfied, and not the application of that article or the applicability of the entire regulation to the concentration. Where a concentration falls within the scope of that regulation, in accordance with Article 1 thereof, the transaction is subject to that regulation, but cannot be prohibited because of its effects on markets where there is no competition.

121 In that regard, the Commission claims to have respected the derogation by projecting its competitive analysis, in the contested decision, to a date when the gas markets should be open to competition, whether under the calendar envisaged by the Portuguese authorities or under the later but binding calendar of the derogation. By doing so, the Commission confirms, in part, the analysis made above of the impossibility of satisfying the criteria of Article 2(3) of the Merger Regulation in the case of markets not open to competition.

122 The Commission's argument must be rejected. The fact of putting back the subject of the competitive analysis to a date after the date on which the derogation comes to

an end does not mean that that derogation has been taken into account. By prohibiting the monopoly operator on the gas market from immediately conducting economic transactions leading to the modification of its competitive position, when the derogation recognised to the Portuguese Republic exempts it from the general rules on competition, the Commission disregarded the possibility that that State could freely structure its gas market while the derogation was in existence. In other words, the Commission prohibited the parties from benefiting from the effects of the concentration on the gas markets in the period during which the concentration could not be prohibited under the Merger Regulation and the Second Gas Directive.

123 Furthermore, by assessing only the future effects of the concentration on the gas markets as from the date on which they will be subject to the conditions of Article 2 (3) of the Merger Regulation, namely when the markets will be open to competition, the Commission deliberately refrained from taking into account the immediate effects of the concentration on those markets.

124 Where, for the purposes of applying Article 2(3) of the Merger Regulation, the Commission examines a concentration, it must ascertain whether the concentration would have the direct and immediate effect of creating or strengthening a dominant position. In the absence of such an alteration to competition as it stands, the merger must be approved (Case T-342/99 *Airtours* v *Commission* [2002] ECR II-2585, paragraph 58). It is true that the Commission may, where appropriate, take into account the effects of a concentration in the near future (Case T-5/02 *Tetra Laval* v *Commission* [2002] ECR II-4381, paragraph 153), or indeed base its prohibition of a concentration on such future effects. However, that does not allow it to refrain from analysing the immediate effects of such a transaction if they exist and from taking them into account in its overall assessment of the transaction.

125 In the present case, the Commission did not examine the period between the date of the concentration and the date of the opening of the gas markets to competition, that is a period extending, depending on the markets, from three to six, or eight, years after the concentration. However, the concentration as modified by the commitments would have immediate significant effects on the gas markets, principally constituted by bringing forward the opening of those markets by approximately two to three years by reference to the calendar envisaged by the derogation. In fact, even if the legal opening of those markets to competition was to be brought about by the Portuguese Government in accordance with the assurances which it had given to that effect, the actual effectiveness of that opening would be ensured by the numerous commitments, particularly with regard to third-party access to gas capacity. That failure on the Commission's part is by no means neutral from the point of view of competition, inasmuch as the anticipated transition from a monopoly situation to a situation in which the existence of competitors is made possible, in particular through non-discriminatory or less discriminatory third-party access to gas resources and the possibility for those third parties to operate in markets that were previously closed, cannot be completely overlooked.

126 In this respect, it is necessary to reject the Commission's argument that the undertakings concerned are subject to the Merger Regulation alone, and cannot benefit from the derogation granted to the Member State concerned by the Second Gas Directive. It is the case that that regulation and that directive have different legal bases and are addressed to different persons. It must also be accepted that the concentration is the result of decisions by undertakings, even though it is clear from the file that the Portuguese State is a participant in that concentration in that it visibly anticipated, if not arranged, it (see paragraph 11 above). Contrary to the Commission's premiss, however, the Merger Regulation and the Second Gas Directive cannot be analysed separately. As stated above, the absence of competition on the gas markets under the derogation granted in accordance with the Second Gas Directive precludes the application of Article 2(3) of the Merger Regulation. Undertakings cannot be criticised for significantly impeding effective competition where that competition does not exist as a result of national and Community legislation.

127 Certainly, as the Commission emphasises in the contested decision (recitals 210 to 214), if it is unable to assess the future competitive effects of the concentration on

markets which at present are not yet open to competition, that wholly prevents it from assessing the effects of the concentration on the gas markets. In particular, when the markets in question must be open to competition according to a strict and binding calendar in accordance with the Second Gas Directive, the Commission is not able to assess whether the concentration prevents the introduction of effective competition within the timeframe of that calendar.

128 If the consequence of this analysis, as the Commission stresses, is indeed that undertakings are not wholly subject to the normal competition rules, including those promoted by the Second Gas Directive, immediately before the latter rules are applicable to them, that outcome is, in the present case, the consequence of the intention of the legislature as expressed in the derogation created by Article 28(2) of that directive.

129 Nor can the Commission rely on the fact that the parties notified the concentration to support the conclusion that they thus recognised that the Merger Regulation was applicable. On the one hand, it is not the applicability of the regulation in its entirety, but the application of its main prohibitory provision to a part of the concentration that is at issue here. Furthermore, that notification was still mandatory under Article 1 of that regulation. Besides, the applicability of the Merger Regulation cannot depend on the intention of the parties to a concentration.

130 It must therefore be held that, by basing the prohibition of the concentration on the strengthening of dominant positions having as their consequence a significant impediment to competition on gas markets not open to competition by virtue of the derogation granted by Article 28(2) of the Second Gas Directive, the Commission has disregarded the effects, and thus the scope, of that derogation.

131 None the less, the Commission's error lies solely in the fact that it has considered that the conditions of the application of Article 2(3) of the Merger Regulation were satisfied in respect of markets not open to competition. On the other hand, its competitive assessments based on the Merger Regulation relating to the situation of the gas markets before the concentration, those relating to the situation of the gas markets at the foreseeable date of the opening of those markets and those relating to the electricity markets before and after the concentration are not affected by that error. The competitive situation existing on the date of adoption of the contested decision or on the date of the opening of the markets in question to competition is an objective fact which is not affected by the non-fulfilment of a legal criterion.

132 Furthermore, the impossibility of satisfying the conditions laid down by Article 2(3) of the Merger Regulation is limited solely to the sector in which competition is absent, and that article remains fully applicable to any other sectors concerned by the notified transaction. In that regard, it must be remembered that the Merger Regulation is directed to the analysis of one or more dominant positions on the market or markets affected by a concentration. It is quite possible, indeed frequent, that a concentration produces anti-competitive effects on only one, or some, of the markets concerned without having such effects on the other markets. Where that is so, the transaction must none the less be prohibited, in accordance with Article 2(3) of the Merger Regulation. Accordingly, the application of Article 2(3) of the Merger Regulation to the electricity markets is not affected by the error concerning the gas markets.

133 In the light of the foregoing, it must be held that the contested decision is vitiated by an error of law in so far as it concludes that there would be a strengthening of GDP's pre-existing dominant positions on the markets for the supply of gas to electricity producers, to large customers and to small customers, with the consequence that effective competition would be significantly impeded.

C — *Second limb of the first plea, relating to an excessive projection into the future*

134 The applicant maintains that the Commission infringed Article 2(3) of the Merger Regulation by projecting its competitive analysis of the gas markets beyond five years after the concentration.

135 It must first of all be borne in mind that it has been held that the contested decision was vitiated by an error of law as regards the application of Article 2(3) of the Merger Regulation to the gas markets. Accordingly, there is no further need to adjudicate on the present limb of the present plea as regards the strengthening of GDP's dominant positions on those markets.

136 However, the Commission relied, in its analysis of the electricity markets, on its competitive analysis of the gas markets, and that approach was not affected by the error of law found above. When asked to identify the interactions between the gas and electricity markets which had been set out in the contested decision, the applicant cited a number of recitals which all relate to the supply of gas to the CCGTs, either directly (recitals 336, 340, 365 and 506) or indirectly in the context of the non-horizontal effects of the concentration, namely the possibility that the merged entity will use its new position of strength in gas to harm competing electricity producers (recitals 367 to 429).

137 For this reason, there is no need to adjudicate on the present limb of the first plea as regards the Commission's competitive analyses in respect of markets other than that in the supply of gas to the CCGTs, namely the markets for the supply of gas to LDCs, to large customers and to small customers.

138 According to Decisions No 63/2003 and No 68/2003 of the Portuguese Council of Ministers, the market for the supply of gas to CCGTs was to be opened to competition in 2004, but that opening was postponed until 2005 (recitals 203 and 505). That date was not disputed by the applicant. In any event, owing to the size and nature of that market, which currently represents almost half of total consumption in Portugal and is an industrial market, it would be one of the first markets subject to the requirement of being opened to competition in 2007 under the derogation, that is by no later than three years after the concentration.

139 However, the applicant's criticism of the Commission is solely that it exceeded the maximum normal period of examination of between three and five years after the concentration.

140 Consequently, there is no need either to adjudicate on the present limb of the first plea as regards the market for the supply of gas to CCGTs.

141 In the light of the foregoing, there is no need to adjudicate on the present limb of the first plea.

IV — *Fourth plea, relating to the existence of errors of assessment in regard to the commitments*

A — *Preliminary observations*

142 At the outset, it must be borne in mind that the conditions laid down in Article 2(3) of the Merger Regulation could not be satisfied in respect of the gas markets.

Accordingly, there is no further need to adjudicate on the second limb of the fourth plea, relating to possible errors of assessment in respect of the insufficiency of the commitments concerning the competition concerns identified in the gas sector.

143 The Commission claims that if only one of the competition concerns identified in the contested decision remains unresolved by one of the commitments of 26 November 2004, that is sufficient for the contested decision to be upheld.

144 According to settled case-law, in so far as certain grounds of a decision in themselves provide a sufficient legal basis for that decision, any errors in other grounds of the decision have no effect in any event on its operative part (see, by analogy, Joined Cases C-302/99 P and C-308/99 P *Commission and France* v *TF1* [2001] ECR I-5603, paragraphs 26 to 29, and Case T-50/00 *Dalmine* v *Commission* [2004] ECR II-2395, paragraphs 134 and 146, under appeal).

145 In the case of a concentration, the Commission must prohibit a transaction provided that the criteria of Article 2(3) of the Merger Regulation are satisfied, even in respect of only one of the relevant markets.

146 Thus, according to settled case-law, it must be held that a decision in respect of a concentration finding the concentration incompatible with the common market can only be annulled if it is established that any grounds which are not vitiated by illegality, in particular those concerning any one of the relevant markets, are insufficient to justify its operative part (Case T-310/01 *Schneider Electric* v *Commission* [2002] ECR II-4071, paragraph 412).

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

148 In the present case, in the contested decision the Commission concluded its analysis of each of the relevant markets with the consideration that the concentration would lead to the strengthening of the dominant position in question on that market, without referring to the other markets. However, as the Commission relied on the competitive situation on various electricity markets and on the competitive situation on various gas markets and then found competition concerns on one or other of the electricity markets, it is necessary to examine, to the extent necessary, the merits of all of those competitive assessments on the relevant markets. It must be borne in mind in that regard that, in accordance with paragraph 131 above, the assessment of the competitive situation on the gas markets is not in itself affected by the fact that the criteria of Article 2(3) of the Merger Regulation cannot be satisfied with regard to those markets.

149 In particular, the Commission's claim, that the present plea should be rejected solely on the ground that the applicant did not seriously dispute that EDP's dominant positions on the electricity markets in respect of balancing power or ancillary services and the retail markets would be strengthened, must itself be rejected on the grounds that, as the applicant submits, the reasoning in the contested decision in respect of those markets effectively relies, at least in part, on the competitive assessments relating to the wholesale electricity market, and that the invalidation of the assessment made in respect of that market could have the consequence that the assessment in respect of the markets in question must also be declared invalid.

150 The Commission's argument that the applicant acknowledged that the commitments of 28 October and 17 November 2004 were not sufficient to resolve the competition concerns identified by the Commission must also be rejected. Although the applicant accepted in the application, for the purposes of the present plea, that

the concentration as notified would strengthen GDP's dominant positions and, in its reply for the hearing, that the concentration as notified would strengthen EDP's dominant positions, it did not accept that the commitments proposed on either 28 October, 17 November or 26 November 2004 were insufficient to resolve the competition concerns identified.

151 According to settled case-law, review by the Community Courts of complex economic assessments made by the Commission in the exercise of the discretion conferred on it by the Merger Regulation must be limited to ensuring compliance with the rules of procedure and the statement of reasons, as well as the substantive accuracy of the facts, the absence of manifest errors of assessment and of any misuse of powers (see *Petrolessence and SG2R* v *Commission*, paragraph 63 above, paragraph 101, and the case-law cited, and, to that effect, *Commission* v *Tetra Laval*, paragraph 63 above, paragraph 38).

152 In that regard, in underlining the fact that the applicant never expressly claimed that there had been a manifest error of assessment, the Commission claims by implication that that omission renders the present plea inoperative. That argument must be rejected. Since the applicant invokes an error of analysis and since the case-law requires that such an error be manifest, it would be unreasonable to find in such a formal imprecision a ground for rejecting a plea essential to the present action and it must therefore be held that the applicant intended to invoke manifest errors of assessment. None the less, it is still the case that the errors invoked by the applicant must be manifest if the contested decision is to be annulled.

153 Last, the applicant makes numerous references in the application to an economic report prepared by Lexecon at its request ('the Lexecon Report'), entitled 'EDP-Eni/GDP: an economic assessment of the argument in favour of the prohibition of the concentration as modified', dated February 2005.

154 In that regard, the Commission's criticism that certain general references to the Lexecon Report must be declared inadmissible must be upheld.

155 According to settled case-law, in order to ensure legal certainty and the sound administration of justice, if an action is to be admissible, the essential facts and law on which it is based must be apparent from the text of the application itself, even if only stated briefly, provided the statement is coherent and comprehensible (see, to that effect, Joined Cases 19/60, 21/60, 2/61 and 3/61 *Fives Lille Cail and Others* v *High Authority* [1961] ECR 281, 295, and Case T-157/01 *Danske Busvognmænd* v *Commission* [2004] ECR II-917, paragraph 45). In that regard, although specific points in the text of the application can be supported and completed by references to specific passages in the documents attached, a general reference to other documents cannot compensate for the lack of essential elements of legal arguments which, under the relevant provisions, must be included in the application (order of the Court of First Instance in Case T-154/98 *Asia Motor France and Others* v *Commission* [1999] ECR II-1703, paragraph 49, and, to that effect, judgment in Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraphs 94 to 101).

156 Thus, in so far as the applicant does not specifically refer to a specific point in the Lexecon Report, in particular where reference is made to the general conclusion of that report, or where the applicant refers to a passage the substance of which is not to be found in the application, the references to that report must be declared inadmissible.

157 On account of their brevity and the difficulties occasioned by the reference to the Lexecon Report, the applicant's arguments set out in the context of the fourth plea and relating to errors of economic assessment made by the Commission are reproduced virtually in full.

158 Finally, with regard to the Lexecon Report, the Commission cannot invoke, in a general manner, the case-law to the effect that the legality of a contested measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted (*Kayserberg* v *Commission*, paragraph 45 above, paragraph 140). The drawing up of a list of points after the date of adoption of the contested

decision with a view to securing a finding by the Court of errors of economic assessment in that decision simply entails the exercise of the rights of defence, and not an attempt to alter the legal and factual framework previously submitted to the Commission for the purposes of the adoption of the decision. However, the Commission is entitled to rely in its defence, in relation to specific points, on the fact that the report disregards the express declarations or the omissions of the parties during the administrative procedure.

B — *First limb of the fourth plea, relating to the taking into account of the commitments of 26 November 2004*

159 With a view to securing an examination of the legality of the Commission's assessment of the concentration as modified, the applicant presents the concentration, as modified by the commitments of 26 November 2004, and claims that those modifications were submitted in time to be taken into consideration for the purpose of the adoption of the final decision. The Commission denies that the commitments were submitted in good time and contends that they do not clearly resolve all the competition concerns without the need for further investigation. For those reasons, it submits, the present plea must be rejected.

160 It should be observed as a preliminary point that the commitments submitted in part on 26 November 2004, were so submitted after the deadline of 17 November 2004.

161 It is clear from reading Article 8 of the Merger Regulation in conjunction with Article 18 of Regulation No 447/98 that the regulations on concentrations impose no obligation on the Commission to accept commitments submitted after the deadline. That deadline is to be explained primarily by the requirement of speed that characterises the general structure of the Merger Regulation (*Endemol* v *Commission*, paragraph 80 above, paragraph 68).

162 None the less, by the Notice on Remedies, by which it has voluntarily undertaken to be bound, the Commission has agreed to examine modified commitments, including those submitted after the deadline provided for in Regulation No 447/98, 'where it can clearly determine — on the basis of its assessment of information already received in the course of the investigation, including the results of prior market testing, and without the need for any other market test — that such commitments, once implemented, resolve the competition concerns identified and allow sufficient time for proper consultation of the Member States' (paragraph 43).

163 It follows that the parties to a notified concentration may have their commitments which were submitted out of time taken into account subject to two cumulative conditions, namely, first, that those commitments clearly, and without the need for further investigation, resolve the competition concerns previously identified and, second, that there is sufficient time to consult the Member States on those commitments.

164 In the present case, the parties submitted the commitments in question on the actual morning of the day of the meeting of the Advisory Committee, scheduled for the afternoon of 26 November 2004. Furthermore, in the case of the commitments relating to the gas sector, the commitments of 26 November 2004 merely announced the parties' intention to modify their previous commitments (recital 859 to the contested decision). The definitive text of the commitments announced in respect of the gas sector was provided on 3 December 2004, in the evening.

165 In the case of the commitments of 26 November 2004 relating to the electricity sector, the Commission did not claim in the contested decision that they must be rejected on the ground that it did not have sufficient time to consult the Member States. On the contrary, it agreed to examine those commitments by reference to the first condition in paragraph 43 of the Notice on Remedies (recitals 855 to 881). Since the Commission willingly agreed in the contested decision to take those conditions

into consideration, it is necessary to examine the concentration as modified by those commitments, subject, however, to the particular requirements that those commitments must satisfy by reference to the first condition in paragraph 43 of the Notice on Remedies.

166 As regards the commitments of 26 November 2004 relating to the gas sector, which were intended to resolve certain competition concerns on the gas markets and also certain concerns on the electricity markets, they did not become complete and unconditional until 3 December 2004. Their effective date must therefore be taken as 3 December 2004. In the contested decision, the Commission briefly analysed the proposal of 26 November 2004 relating to those commitments, while stating that their provisional nature constituted sufficient ground for rejecting them (recital 882). It also made express reference to the fact that the definitive version of those commitments had been submitted too late to be taken into account for the purposes of the adoption of the final decision (recital 913). It must be held that the Commission was correct to reject the commitments of 3 December 2004 on the sole ground of their extreme lateness. First, those commitments were submitted seven days after the Advisory Committee had been consulted and only three working days before the final decision was adopted. Second, the Notice on Remedies does not guarantee that commitments submitted after the date of consultation of the Advisory Committee may be taken into account. In that regard, it must be borne in mind that the Commission is required, save in exceptional circumstances, which are not pleaded in the present case, to set the date of the meeting of the Advisory Committee 14 days before it is held (Article 19(5) of the Merger Regulation). Consequently, since that committee agreed that the Commission would not submit those commitments to it if it deemed them insufficient, the Commission was under no obligation and, in the light of the foregoing, did not have the actual time to convene that committee again.

167 The fact put forward by the applicant that the latter commitments were merely a modification of the earlier commitments and had been the subject of intensive discussions with the Commission cannot affect that conclusion. Even on the assumption that the commitments of 3 December 2004 consisted only of minor modifications by reference to the previous commitments, they were none the less not provided in time to be submitted to the Advisory Committee.

168 Consequently, only the commitments of 26 November 2004 relating to the electricity sector need be taken into account in the present proceedings.

169 As regards the examination of the latter commitments in the light of the first of the conditions laid down in paragraph 43 of the Notice on Remedies, the applicant underlines the distortion between the wording of that notice and its translation in the contested decision, according to which late commitments must 'address fully and unambiguously — that is, in a straightforward manner — the competition concerns identified during the investigation' (recital 859 to the contested decision). However, the applicant merely points to that difference, without drawing any consequence from it, and claims that the commitments of 26 November 2004 wholly resolved the competition concerns identified previously. Accordingly, there is no need to consider whether that change in the wording has real consequences in the present case.

170 Furthermore, it is necessary, at this stage, to reject the Commission's argument that as the commitments were submitted to it out of time and did not clearly resolve the competition concerns previously identified, the applicant's fourth plea must be rejected for that reason alone. The Commission's second premiss, namely that the latter commitments are insufficient, can be examined only in the context of the final limb of the fourth plea.

C — *Third limb of the fourth plea, relating to the existence of errors of assessment of the concentration as modified in respect of the electricity sector*

171 In the contested decision, the Commission found that EDP holds strong or very strong dominant positions on the four problematic markets for the wholesale supply of electricity, the supply of balancing power and ancillary services, and the retail supply of electricity to large customers and to small customers.

172 In the first place, according to the contested decision, EDP holds a dominant position in the wholesale electricity market, owing to its positions on the supply side (with 70% of total production capacity, the remainder being held by Turbogás (8.6%), in which EDP has a minority shareholding of 20%, Tejo Energia (5.1%), in which EDP has a minority shareholding of 10%, and other insignificant producers operating under the special regime granted in particular to renewable energies; recitals 283 to 289) and on the demand side (90 to 100% of total national consumption; recitals 299 to 301 and 433 to 443); owing to the CMEC system which was designed to compensate for the disappearance of the guaranteed purchase agreements concluded under the non-liberalised system (recitals 294 to 298); owing to the number and diversity of its electricity generation resources (recitals 292 and 293); owing to its future production capacity (three CCGT (TER) units; recitals 302 to 304); owing to the fact that the construction of new independent CCGTs planned for 2007 is doubtful and in any event will not come about until three years after the concentration (recitals 305 to 331); and, last, owing to the insufficiency of the interconnections between the Spanish and Portuguese networks for the purpose of ensuring sufficient imports of electricity (recitals 332 to 334). In the second place, EDP holds a dominant position on the emergent market or markets for balancing power and ancillary services, which can only be provided by an electricity producer in Portugal. EDP is the only producer capable of providing those services (recitals 430 to 432). In the third place, EDP has dominant positions on the retail market for large customers, which was opened to competition in 2003, with a market share of 90 to 100%, and on the retail market for small customers. Those dominant positions also result from the fact that EDP has only two minor competitors which have to suffer the hazards affecting the satisfaction of their needs by imports from Spain, from the fact that it will remain the recognised supplier in the regulated public system, owing to the fact that 70 to 80% of customers who switch from the public system to the liberalised system remain with EDP, from the fact that it holds the concession for the secondary (low voltage) electricity network and from the fact that, as a former monopoly, it holds all the information on the consumption profiles of all customers (recitals 433 to 443).

173 In the contested decision, the Commission considered that the concentration would strengthen EDP's dominant positions, with the consequence that effective competition would be significantly impeded, owing, first, to a horizontal effect on the four electricity markets, consisting in the disappearance of GDP as the most likely important potential competitor (recitals 335 to 364; see in particular recital 363; recitals 431 and 450 to 473) and, second, to the non-horizontal effects on the

wholesale electricity markets, consisting of access to confidential information of its competitors, privileged and preferential access to the gas resources available in Portugal and also the possibility of and intention to increase the production costs of its competitors (recitals 365 to 428).

174 It should be observed as a preliminary point that the applicant has not challenged the definition of the electricity markets (see paragraph 24 above). In its written reply for the hearing, it also acknowledges the existence of the competition concerns identified on those markets, although it disputes their intensity.

175 The applicant puts forward two complaints with a view to challenging the persistence both of the horizontal effect and of the non-horizontal effects on the electricity markets, in the light of the commitments. It claims, moreover, indistinctly in the context of these two complaints, that the concentration as modified will have a positive impact on the Portuguese electricity markets. In this respect, it concentrates its remarks almost exclusively on an examination of the wholesale electricity market.

176 It is appropriate, first of all, to examine those arguments by reference to the horizontal effect of the concentration on the electricity markets.

177 According to the contested decision, the only horizontal effect of the concentration on all the electricity markets lies in the disappearance of GDP as the most likely important potential competitor of EDP. As regards, first, the wholesale electricity market, the Commission has set out a number of factors which demonstrate, on a general level, that it is economically rational and profitable for a gas supplier to enter the wholesale electricity market (recitals 335 to 344). That general incentive is confirmed by the market test and by the example of other Member States in which the liberalisation of those markets has led to such a result, particularly in Spain and the United Kingdom. Furthermore, the Commission provided, during the procedure

before the Court, the grounds which for reasons of confidentiality are not disclosed in the contested decision and which demonstrate GDP's individual interest in entering the electricity generation market (recitals 345 to 361). As regards, second, the emergent market or markets for balancing power and ancillary services, the Commission considers that the disappearance of GDP as a potential entrant into the wholesale market also means the disappearance of a significant potential entrant into the markets concerned, whereas the entry of GDP into the wholesale market would weaken EDP's position on those markets (recitals 430 to 432). As regards, third, the retail electricity markets, the Commission considers that GDP was the significant potential competitor owing to its existing commercial presence, the renown of its national trade mark and its capacity to make dual supplies (electricity + gas). The Commission relied in that regard largely on the market test and on examples taken from the situation in other Member States (recitals 449 to 473).

178 The applicant accepts that the concentration as notified would strengthen EDP's dominant positions on the markets in question, with the consequence that effective competition would be seriously impeded. On the other hand, it asserts, first, that it is highly doubtful that GDP, in the absence of the concentration, would have a strong incentive to enter the wholesale electricity market. It claims, second, that the favourable consequences for the structure of competition which in all likelihood would result from the commitments offered more than compensate for any loss of potential competition from GDP.

179 It must be emphasised that, although the Commission refers at a number of points in the contested decision to the disappearance of 'GDP' as the most likely important potential competitor on the electricity markets, it is apparent from the decision, read in its entirety, and, in particular, from the section devoted to demonstrating GDP's particular interest in entering the wholesale electricity market (recitals 345 to 364), that the Commission considered that such an entry would be made 'through GALP', as a single economic entity, comprising GDP and other GALP subsidiaries, although the Commission did not deem it necessary to distinguish precisely which subsidiary of the GALP group would exercise what functions. In the following analysis, the Court will made express reference to GALP, or to the GALP group including GDP ('GALP/GDP)', only to the extent necessary.

1. The disappearance of GDP as the most likely important potential competitor

180 As regards the incentive for GDP to enter the wholesale electricity market, the applicant questions the relevance of the examples taken from other Member States, the importance of GDP's current participation in two co-generation plants (abbreviated application, paragraph 119, note 105), the failure to take into account the existing structural links between EDP and GDP and GDP's lack of interest in competing with EDP (abbreviated application, paragraph 127). As regards the incentive for GDP to enter the balancing power and retail electricity markets, the applicant merely claims that those markets would benefit from improvements in the competitive conditions on the wholesale electricity market (abbreviated application, paragraph 129).

181 In the application as abbreviated for the purposes of the expedited procedure, which on this point is identical in substance to the original application, the applicant refers, in the footnotes, to various parts of the Lexecon Report entitled 'The prospect of strong competition materialising in electricity from GDP is overstated' and 'A formal model of investment incentives in the wholesale electricity market in Portugal'. In consequence, the Commission simply refers to the report of its Chief Economist designed to rebut the assertions in the Lexecon Report.

182 It must be borne in mind that a general reference to the annexes to the parties' written submissions must be declared inadmissible in so far as it does not support arguments already present in their main submissions (see the case-law cited at paragraph 155 above). It was primarily for the applicant to provide in its application the arguments showing that the Commission made a manifest error of assessment. However, the only arguments in support of the assertion that GDP's entry was doubtful that are to be found both in the application and in the abbreviated application are those set out at paragraph 180 above. On the other hand, the Lexecon Report contains a number of further arguments intended to demonstrate

that GDP had no incentive to enter the electricity markets, no trace of which is to be found in the application. The reference to the Lexecon Report is therefore admissible only by reference to the arguments present in the application, and the other arguments must be rejected.

183 Furthermore, the fact that the present action is being dealt with under an expedited procedure increases the relevance of the case-law cited at paragraph 155 above rather than reducing it. An expedited procedure, in which there is no second round of written submissions, presupposes that the applicant's arguments are clearly and definitively established at the outset in the application, or in the abbreviated version thereof, as the case may be. Furthermore, the necessary limitation of the volume of the parties' submissions, in accordance with the Court's Practice Directions to Parties (Point VI, paragraphs 2 and 3), and therefore, by implication, the limitation of the number and complexity of the arguments put forward, may not be circumvented by systematic reference to voluminous and/or complex reports.

184 As regards, first, the relevance of the examples of liberalisation in Spain and the United Kingdom, the applicant claims that the Commission ought to have demonstrated the relevance of those examples to the Portuguese market and refers to the contrary examples in Germany and France.

185 It should be observed that those examples were intended to demonstrate the general interest for a large gas supplier to undertake vertical integration by supplying its own CCGTs. However, first, the applicant has provided no reason why those examples would not be relevant in Portugal. Likewise, it has provided no specific ground to explain why the contrary examples taken from the French or German markets would be more relevant in Portugal's case. Moreover, unlike the application, the Lexecon Report relies on national examples to demonstrate the small proportion of plants constructed by the new entrants in the wholesale electricity market (Lexecon, 3.3(b)). Furthermore, that general interest for gas suppliers is confirmed by the responses to the market test, which rely on the United Kingdom and, in particular, the Spanish examples.

186 Second, and primarily, the Commission demonstrated in the contested decision, relying on the market test, the economic advantages to a gas supplier in undertaking vertical integration in electricity generation because of the fact that the new electrical plants constructed are generally powered by gas; that such a supplier could thus take advantage of the favourable economic conditions for access to gas, that the incumbent gas operator would seek to win new markets to compensate for the reduction in its market shares in the gas sector following the liberalisation of that sector; and, last, that that integration could be followed by the entry of such a supplier on the retail electricity markets. The applicant has alleged no error, and a fortiori no manifest error, in respect of those additional incentives.

187 As regards, second, GDP's interest in entering the electricity markets, the Commission stated in the contested decision that GALP, which owns GDP's entire capital, entered the electricity generation market in 2000, through its subsidiary Galp Power, by participating in two cogeneration plants, one of 44 MW and the other of 30 MW (recital 347 to the contested decision, footnote 263). As the Commission submits, that participation shows that, before the concentration, GALP had an interest in electricity generation. The consideration relied on by the applicant in its application — namely that GALP participates in those projects not in competition but in collaboration with EDP — does not call into question the fact that GALP has been shown to have an interest in electricity generation, manifested by that participation. Furthermore, the Commission referred to the statement of the Chairman of GALP reproduced in an AFX News press article to the effect that his company wished to enter the electricity markets, in particular the production markets, a statement which its shareholders, including EDP, did not criticise. That article confirms the Commission's conclusion set out in that regard in the contested decision. Finally, that consideration is no longer material, having regard to the other projects examined below.

188 It follows from the contested decision, in its confidential version, that the GALP/GDP electricity generation projects go beyond its mere participation in the two 44 MW and 30 MW cogeneration plants. Through its subsidiary Galp Power, GALP formally sought administrative authorisation, in 2002, to build two 400 MW CCGTs at Sinès. That gas-fired electricity plant is much more ambitious than the mere participation in two cogeneration plants, and demonstrates a significant interest in

penetrating the electricity generation market in force. Furthermore, according to the contested decision, a feasibility study into the construction of CCGTs within the Galp group analysed in detail the possibility that GDP might be active in the wholesale electricity market and/or manage part of the plant. The Commission also considered that, if that project had gone no further than the feasibility study, that was because the concentration had been announced by the Portuguese Government. However, the implementation of that project would make GDP one of the first entrants into the wholesale electricity market. In that regard, it should be noted that, following the hearing, it is now common ground that Galp Power has actually received administrative authorisation to build a 500 MW CCGT. Last, the confidentiality requested by Eni vis-à-vis EDP in respect of the passage in the decision describing those projects, which was lifted in the present procedure, indicates that that project is being carried out outside any collaboration with EDP. It follows that GALP/GDP has some very serious projects to enter the electricity generation market by means of the most productive type of plant at the present time, CCGTs.

189 At the hearing, the applicant emphasised that those licences had been requested by Galp Power, which, as a direct subsidiary of GALP, did not form part of the concentration. That circumstance has no real impact on the Commission's analysis. When the application for the licences was made, Galp Power and GDP were part of the same group. Accordingly, the objective of undertaking vertical integration between gas and electricity, which is explained by the Commission in the contested decision, was wholly ensured within the Galp group. In the absence of the concentration, GALP/GDP retained its licences and the possibility of competing with EDP. On the assumption that the concentration took place, the possible loss of the licences would not present a problem to the merged entity, which has already undertaken by the moratorium not to construct any CCGTs before a certain time. At the hearing, the applicant also stated that Galp Power, with its licences, was a potential competitor of the merged entity. Although the Commission did not expressly analyse in the contested decision the maintenance of GALP's capacity and interest, through Galp Power, in entering the wholesale electricity market following the concentration, that circumstance cannot constitute a manifest error of assessment since it does not have any significant consequence for the analysis of the competitive situation after the concentration. First, whether or not GALP retains an interest in entering that market in spite of losing the major incentive constituted

by vertical integration remains hypothetical. Second, even on the assumption that the hypothesis becomes reality, Galp Power would be incomparably weaker as a competitor compared to the situation when it was connected to GDP within the Galp group. Accordingly, the applicant has not demonstrated that the Commission made a manifest error of assessment in considering that the concentration would cause the disappearance of GDP, through the Galp group, as the most likely important potential competitor of EDP.

190 As regards, third, the applicant's argument that GDP is less well placed than other potential competitors of EDP owing to its structural links with EDP, through EDP's shareholding in GALP, which owns GDP's entire capital, and through the holding of the Portuguese State in EDP and GDP, it must be remembered that, according to the contested decision (recital 7, footnote 6), the Portuguese State holds directly 30% and indirectly 18.3% of GALP, Eni owns 33.34% and EDP 14%. According to those figures, EDP does not have control of GDP. In that regard, the Commission rightly observes that EDP has always claimed that the 20% which it holds in Turbogás did not give it control of that company. However, the argument works both ways in so far as the Commission, for its part, has always considered that, in spite of EDP's commitment not to use its voting rights in certain areas and its right to appoint independent members of Turbogás's Board of Directors, that would not prevent EDP from retaining a negative influence on Turbogás's conduct. According to the Commission, EDP has always claimed that the State did not control EDP. However, it must be noted that the Portuguese Government appears to be the real architect of the concentration. The fact that the concentration conforms exactly to the scenario announced by the Portuguese Government in 2003 (see paragraph 11 above), for both EDP and GDP, is probative in that regard.

191 However, even on the assumption that EDP, alone or through the Portuguese State, retains an influence over GDP, the concentration would transform that influence into pure and simple control, with, ultimately, 51% of the shares. In the absence of the concentration, as the contested decision demonstrates, GDP's economic interest may convince its shareholders, and in particular the Portuguese State and Eni, which hold the majority of its shares, to abandon a strategy of protecting EDP's interests in favour of GDP's.

192 In that regard, the Commission rightly observes that GALP/GDP has already taken the decision to construct two CCGTs and has already obtained a licence. The statement by the Chairman of GALP – that no shareholder expressed the slightest doubt that GALP should enter the electricity markets, although that would lead the company to compete with its 14%-shareholder, EDP – strongly confirms the contested decision on that point.

193 As regards, fourth, the argument that GDP had a limited incentive to enter the electricity generation market or to facilitate the entry of new entrants in order to maintain its profits by favouring EDP as its only downstream customer, it is supported by the hypothesis that by increasing competition on the electricity generation market, GDP would lose more on the gas supply market to EDP or to the independent producers than it could gain on the production market (directly Lexecon Report, 3.3(d), and, indirectly, 3.3(c)). That argument is based on the premiss that, should EDP's dominant position on that market be diluted, either because of GDP's entry or because of the entry of new competitors, EDP's 'willingness' to pay for its gas supplies a price as high as it currently pays will be reduced.

194 Apart from the fact that the premiss underlying that argument is not demonstrated, the Commission rightly refers to the argument submitted by its Chief Economist that that premiss ignores the structure of the contracts for the supply of gas, namely the 'take or pay' principle or the long-term nature of gas supply contracts. Furthermore, even on the assumption that that argument concerns EDP's short-term needs and that competition on the electricity market gives rise to tension over the prices of gas as a raw material, neither the applicant nor the Lexecon Report explains how or to what extent the difference between GDP's selling price for gas and GDP's internal cost for self-supply would be less than the potential loss on the gas supply market.

195 Consequently, the applicant has not demonstrated any manifest error on the Commission's part when the latter considered that GDP had strong incentives to enter the wholesale electricity market, and that the concentration would cause the most likely important potential competitor of EDP to disappear from that market (recitals 344 and 868).

196 Last, as regards the horizontal effect on the balancing power and retail electricity markets, the applicant merely contends that improvements in the competitive conditions within the wholesale electricity market would also be felt on these derived markets. Since, first, that premiss has not been demonstrated and, second, since the factors put forward by the Commission with a view to demonstrating the existence of the horizontal effect on those markets have not been challenged, it must be held that the applicant has not demonstrated any manifest error of assessment as regards those markets. Consequently, the existence of a horizontal effect on the balancing power and retail electricity markets must be accepted. Furthermore, as that effect is accepted on those markets, it must be held that GDP's incentive to enter them, in particular the retail markets, is likely to increase considerably its interest in entering the electricity generation market inasmuch as they offer a direct outlet for its electricity generation.

197 It must therefore be held that the applicant has not demonstrated the existence of a manifest error of assessment on the part of the Commission as regards the strong incentives for GDP to enter all the electricity markets, including the balancing power and ancillary services markets and the retail electricity markets (recitals 432, 473, 876 and 881) and as regards the disappearance of GDP as the most likely important potential competitor of EDP on those markets.

2. The competitive adjustments arising out of the commitments

198 It must be recalled that the Commission must prohibit a concentration when the criteria laid down in Article 2(3) of the Merger Regulation are satisfied by reference to at least one of the relevant markets (see paragraphs 144 to 146 above).

199 The applicant maintains that the combined effect of the various commitments relating to the electricity sector does more than compensate for the loss of the potential competition from GDP. It also claims that the commitments concerning the gas markets would, moreover, have improved competitive conditions on the wholesale electricity market.

200 It must be accepted, in that regard, that if the commitments produce, on one of the relevant markets, a competitive adjustment outweighing the significant impediment to competition caused by the concentration as notified, the overall competitive assessment of the concentration on the market in question would be positive. Consequently, the concentration could not be prohibited for that market under Article 2(3) of the Merger Regulation.

201 In its written answers, and at the hearing, the applicant emphatically asserted that, owing to the considerable interconnections between the gas and electricity markets and between the different markets in each of those sectors, a proper appraisal of the competitive situation on each of the markets required that the competitive situation on the other markets would be taken into account. The Commission contends that, in order for the decision to be upheld, it is sufficient that one of the competition concerns identified on one of the relevant markets in the contested decision is not resolved by the proposed commitments.

202 It must be stated, as a preliminary remark, that the two theories are not incompatible. Indeed, the applicant acknowledged at the hearing that the concentration, as modified, could not form the subject-matter of an overall competitive assessment in which the benefits to competition on one of the markets could compensate for the loss of competition occurring on another market. Nor did the Commission claim that the competitive situation on one of the relevant markets was wholly independent of the situation on the other markets.

203 The Court holds that, where a concentration involves a number of distinct, but linked, markets and where the competitive situation on one or more of those markets influences the situation on one or another market, it is necessary to take account of those other markets in order to be able to make a proper and comprehensive assessment of whether the transaction in question creates or strengthens a dominant position on one of the markets concerned with the consequence that competition is significantly impeded. On the other hand, there is no need to establish that the transaction in question will have that consequence on each of the markets involved in order to conclude that the transaction must be prohibited.

204 In the present case, it appears that the competitive situations on each of the electricity markets are linked, even though they do not depend exclusively on each other. Thus, as the Commission finds in the contested decision, the incentives to enter the wholesale electricity market are strengthened by entry on the retail electricity markets (recitals 338, 342 to 343 and 362) and vice versa (recitals 456 and 472). Likewise, the Commission considered that only electricity producers in Portugal were capable of participating in the balancing power and ancillary services market in electricity (recitals 430 and 431).

205 It also appears that the competitive situation on each of the electricity markets is linked to those existing on the gas markets. Thus, in particular, the entry of competitors on the wholesale electricity market depends in part on the possibility of obtaining supplies of gas independently, by reason of the barriers to entry to that market explained by the Commission when it identified the non-horizontal effects of the concentration (recitals 365 to 428). Likewise, the incentive for GDP to enter the electricity generation market is based in part on the gas prices that it obtains as a supplier (recitals 340, 341 and 343). Furthermore, the Commission considered that one of the main incentives for GDP to enter the retail electricity markets was its capacity to make dual supplies (recitals 453 to 458), which necessarily supposes an influence on the capacity of competitors to make comparable offers, and therefore on the liberalisation of the gas markets.

206 Consequently, the assessment of the competition concerns on the electricity markets must necessarily take account of the competitive situation on the other electricity or gas markets in the wake of the concentration, as modified by the commitments.

(a) The commitments relating to the electricity sector

207 As regards the combined effect of the various commitments relating to the electricity sector, the applicant cites the disinvestment of EDP in REN and in Tejo Energia; the moratorium on the construction of new CCGTs; the leasing of the TER; and the suspension of voting rights in Turbogás, referring, primarily, to the part of the Lexecon Report entitled 'The remedies likely improve incentives for third party entry into electricity'. Furthermore, in the context of its criticism concerning the non-horizontal effects on the wholesale electricity market it submits arguments relating to the moratorium; to the leasing of the TER; and to Tejo Energia. The Commission emphasises the absence of argument and of factual elements as regards the combined effect of those commitments and also refers to two parts of the report of its Chief Economist. None the less, the Commission takes care to reject in detail the arguments which the applicant sets out in the application.

208 It must be recalled that the reference to the Lexecon Report is admissible only by reference to the arguments existing in the application and that the other arguments must be rejected.

209 As regards the moratorium and the commitment to lease the TER, it must be held that, in the absence of the concentration, EDP would complete its TER project to construct three CCGT plants, the last of which would commence production in 2006, giving a total production of [1 000 to 1 500] MW, accounting for almost 20% of current consumption in Portugal (recital 302 to the contested decision). With the

concentration, the parties commit themselves not to construct further CCGTs and to lease out the generating capacity of one or two CCGTs of the TER until 30 June 2010, or earlier if certain suspensory conditions are fulfilled, the main one of which concerns the grant by the Government of licences to construct CCGTs to one or two entities not controlled by EDP.

210 In the contested decision, the Commission found, first, that only the construction of CCGTs was capable of significantly opening the wholesale electricity market because of the structural limits on imports, the delays on the Iberian market and the advantage offered by CMECs to current producers (recitals 292 to 334). Second, the Commission emphasised the limited duration of the moratorium and the lease, the fact that they could be terminated early even before the new CCGTs had actually been constructed or commenced generation, the fact that such early termination owing to the grant of licences to entities not controlled by EDP did not prevent EDP from having a link with those entities, and the fact that those commitments did not prevent EDP from requesting licences for itself. As regards the lease of the TER, the Commission further considered that the uncertainties as to its duration would weigh heavily on the lessee, that the lessee would acquire no experience in power generation and that EDP would have access to essential information relating to the lessee, since the lessee leased only capacity without managing the means of production (see, in regard to the commitments of 17 November 2004, recitals 743 to 753 and, as regards the commitments of 26 November 2004, recital 868). The Commission concluded that it was by no means certain that those commitments would lead to the actual entry of new producers.

211 The applicant has not raised in its application any serious criticisms directed against the factors identified by the Commission and on which it based its conclusion that those two commitments were insufficient by reference to the competition concern identified.

212 It must therefore be concluded that the Commission did not make a manifest error of assessment when it considered that the moratorium and the lease of CCGTs of the TER were in themselves incapable of resolving the horizontal problem on the wholesale electricity market.

213 The applicant claims, moreover, that without the concentration EDP would continue to be in a position to construct new CCGTs (absence of the moratorium), leaving only extremely limited scope for third parties to enter the market.

214 It is a fact that, in the absence of the concentration, there is a real brake on the entry of new electricity producers, owing to EDP's intention and capacity to construct new plants in a market which is already largely oversupplied. However, in the absence of the concentration, that brake on entry clearly did not affect GDP or the Galp group, since the Commission demonstrated, without making a manifest error of assessment (see paragraphs 184 to 196 above), that GDP or the Galp group intended to enter the electricity generation market. With the concentration, the Commission, without making a manifest error of assessment (see paragraphs 210 to 212 above), considered that the commitments were insufficient to permit the likely entry of new competitors on the wholesale electricity market, whereas GDP would disappear as the most likely important potential competitor. Accordingly, the applicant's argument does not reveal any manifest error of assessment on the Commission's part in respect of the horizontal effect of the concentration as modified on the wholesale electricity market.

215 The applicant claims that the sale of its shares in Tejo Energia would have broken the structural link between EDP and a competing electricity producer and would certainly have had a positive structural effect on competition, whereas GDP's entry was by no means certain (Lexecon Report, 4.4(c)).

216 In the contested decision, the Commission willingly accepts that EDP's disinvestment in Tejo Energia is positive. None the less, the Commission asserted, without being contradicted, that many other factors prevent Tejo Energia from constructing a CCGT, in particular the divergence of views between shareholders in that regard, and the fact that the main shareholders, International Power and Endesa, are linked to EDP by other agreements concerning electricity generation in Portugal (recitals

669, 756 to 758 and 867 to the contested decision). As the applicant has failed to demonstrate that Tejo Energia was as important a competitor as GDP, it must be held that the commitment in respect of Tejo Energia is insufficient in itself to resolve the horizontal problem identified on the wholesale market.

217 The applicant also relies on its commitment in respect of the limitation of its voting rights in Turbogás as regards the decisions relating to the acquisition of natural gas and new investments and the replacement of EDP's representatives on the Board of Directors by independent members.

218 In the contested decision (recitals 759 to 766 and 861), the Commission considered that EDP retained influence on Turbogás owing to the fact that it retained its voting rights in areas not covered by the commitment and to the temporary nature of that commitment. The Commission also emphasises the fact that EDP reserved to itself the right to give directions to its independent representatives in order to preserve the value of its shareholding. In that regard, it mentions the interest of the other shareholders in Turbogás, in particular International Power, in maintaining good relations with EDP. Last, the Commission observes that EDP has recently acquired an option over an additional 20% share in Turbogás and the management of Turbogás's entire production capacity. In its written submissions, the Commission claimed, without being challenged, that EDP ... [1] As the applicant has not demonstrated a manifest error of assessment on the part of the Commission when it considered that Turbogás was not a significant competitor, it must be held that the commitment in respect of Turbogás is insufficient in itself to resolve the horizontal problem identified on the wholesale market.

219 The applicant also claims that the reduction of its shareholding in REN from 30% to 5% would have a clear positive effect on competition (Lexecon Report, 4.4(c)). In the contested decision, the Commission did not examine that commitment by reference

1 — Confidential data omitted.

to the horizontal effect on the electricity markets, but by reference to the non-horizontal effects on those markets, as indicated by the parties in their letter of 2 November 2004. In the absence of any elements other than the existence of that commitment, the applicant does not demonstrate any manifest error by the Commission in respect of that commitment.

220 To conclude, it must again be held that the applicant has not demonstrated that the Commission had made a manifest error of assessment when it considered that the concentration, as modified by all the commitments relating directly to the horizontal problem, taken together, must be declared incompatible with the common market owing to its horizontal effect on the electricity markets. In particular, while all of those commitments undeniably improve the possibility of entering the wholesale electricity market, the applicant has not rebutted the Commission's conclusion, based on the market test, that all of those commitments do not create a competitive environment sufficient to render such entry likely. Furthermore, even on the assumption that such entry were foreseeable on one of the electricity markets, there is no indication that that new competitor would have the strength and the advantages held by GDP in the event of the latter's entry on to all or some of the electricity markets (recitals 362 to 364, 675, 767 and 868 to the contested decision).

(b) The commitments relating to the gas sector

221 The applicant merely asserts that a number of commitments relating to the gas markets will allow a new entrant to the wholesale electricity market to obtain gas independently from the merged entity. However, it does not state what commitments would be relevant, or to what extent, but refers generally to the part of the application devoted to the examination of the gas markets. The Commission emphasises that lacuna and identifies, in the part of the applicant's pleadings devoted to the gas markets, only the single general assertion that 'these commitments [in respect of gas] [would create] a manifestly more competitive environment in the electricity sector'.

222 It is apparent from the case-file that the commitments relating to the gas sector are of two types, depending on whether they are primarily intended, on the one hand, to resolve the non-horizontal problems identified on the wholesale electricity market, essentially by improving the conditions of the supply of gas for the electricity producers competing with the merged entity (A/ENI.II to F/ENI.IX, H/ENI.XI, and L/EDP.1), or, on the other hand, to resolve the horizontal and non-horizontal problems on the gas markets (G/ENI.X, I/ENI.XII and J/ENI.XIV).

223 It must be held, at the outset, that in the contested decision the Commission identified the horizontal effect on all the electricity markets, and also the commitments directly intended to resolve this competition concern, independently of the non-horizontal effects on the wholesale electricity market and of the commitments intended to resolve these latter competition concerns (recitals 362 to 364, 675, 767 and 868 to the contested decision). It thus necessarily considered that the concentration as modified must be prohibited, if only on the sole ground that it strengthened EDP's dominant position, having as a consequence a significant impediment to competition, on the wholesale electricity market owing to the disappearance of GDP as the most likely important potential competitor. The Court must therefore examine whether, as the applicant claims in the second limb of its third plea (see paragraph 84 above) and in the present plea, the Commission ought to have examined all of the commitments in order to find that their combined effects do more than compensate for the disappearance of the potential competition from GDP.

224 In the first place, it must be held that the commitments relating to the non-horizontal effects on the wholesale electricity market (A/ENI.II to F/ENI.IX, H/ENI. XI and L/EDP.1) have only a very slight impact on the horizontal problem identified on all the electricity markets, namely the disappearance of GDP as the most likely important potential competitor, as a result of the concentration as modified.

225 First, those commitments do not affect the Commission's analysis in respect of GDP. GDP was not concerned by the non-horizontal problems to which those commitments related, since it had for itself, in the absence of the concentration, privileged access to its own gas. Accordingly, both GDP's own incentive to enter the electricity markets and the strength of that entry remain unchanged by reference to those commitments.

226 Second, those commitments have only a marginal effect on the Commission's analysis relating to the effectiveness of GDP's entry on the electricity market by comparison with the entry of other competitors of the merged entity. The Commission considered that GDP had significant competitive advantages over the other potential competitors of the merged entities on the electricity markets, namely, principally, vertical integration between the gas and electricity activities within the Galp group, privileged access to gas, the renown of its trade mark and knowledge of the customer base in Portugal. Even on the assumption that the commitments designed to resolve the non-horizontal problems were wholly effective, the competitive situation on the wholesale electricity market would still be less favourable with the concentration than without it. First of all, the commitments in question were essentially designed only to eliminate the competition concern created by the concentration itself, namely making available to the undertaking with a strong dominant position on the wholesale electricity market the dominant position of the other undertaking with a dominant position on the market for the supply of gas to electricity producers. Next, even if those commitments were apt to favour competition on the market for the generation of electricity by CCGTs, they would ultimately only guarantee to the competitors of the merged entity access to gas which was less discriminatory and more confidential. However, the Commission did not consider that access to gas, in the absence of the concentration, was a real brake on the entry on the market of competitors other than GDP but relied on its market test to demonstrate that it was unlikely that the current or potential competitors identified would actually enter or develop on that market (see recitals 305 to 331). Last, the applicant did not claim — and, moreover, it would have been difficult to do so — that those commitments gave those competitors access to gas as easy and as economically favourable as that which GDP had in the absence of the concentration. Consequently, all the competitive advantages enjoyed by GDP by comparison with the other competitors of the

merged entity remained. In other words, the net improvement in the supply of gas to competitors of the merged entity could not significantly compensate for GDP's disappearance from the point of view of competition.

227 It follows from the foregoing that the commitments intended to resolve the non-horizontal problems on the wholesale market had only a marginal impact on the Commission's analysis of the horizontal problem on all the electricity markets. Accordingly, the Commission was able, rightly and without making a manifest error of assessment, not to take those commitments into account for the purpose of concluding that the concentration as modified strengthened EDP's dominant position, having as a consequence a significant impediment to competition on the wholesale electricity market, by reason of the disappearance of GDP as the most likely important potential competitor.

228 In the second place, as regards the commitments relating wholly to the gas sector (G/ENI.X, I/ENI.XII and J/ENI.XIV), the applicant has not shown to what extent they would improve the competitive capacity of any possible competitors of EDP. It is not for the Court to ascertain for itself what effects those commitments might have on the electricity markets or, above all, to judge for itself the intensity of those effects for the purpose of finding that the Commission has made a manifest error of assessment.

(c) Conclusion on the overall competitive outcome of the concentration as modified on the electricity markets

229 It must be borne in mind that the applicant has not demonstrated that the Commission made a manifest error of assessment when it concluded that GDP was a very likely important potential competitor of EDP on the electricity markets.

230 Likewise, the applicant has not demonstrated that the Commission made a manifest error when it found that the commitments relating to the horizontal problem identified by the Commission on the electricity markets were not apt to favour the entry of an important competitor of EDP other than GDP.

231 Nor has the applicant demonstrated any manifest error of assessment on the part of the Commission in the form of its failure to take into account the effect of the commitments proposed with a view to resolving the non-horizontal competition concerns on the electricity markets or to resolving the competition concerns on the gas markets, for the purpose of assessing the horizontal effect on the wholesale electricity market following the concentration as modified.

232 In particular, the appreciable improvement in the competitive situation on the gas markets owing to the concentration as modified does not resolve the competition concerns on the electricity markets.

233 Certainly the situation on the gas markets would be distinctly improved by the concentration as modified. In the immediate aftermath of the concentration, in contrast to GDP's current monopoly situation before the concentration, competitive access to gas for third parties with real guarantees of non-discriminatory access to gas, even if those guarantees in the Commission's view remain incomplete, would be brought about by the commitments. Likewise, the proposals submitted by the Portuguese authorities, in particular as regards the speeding-up of the liberalisation of the gas markets, create a new competitive situation on the gas markets. That situation may be expected to give rise to new entrants on the gas markets, and these

new entrants, for the same reasons as GDP, are in turn likely to enter the electricity markets. That situation on the gas markets is also likely to improve the competitive situation on the derived market for the generation of electricity by CCGTs in that EDP's potential competitors may hope to obtain more competitive and non-discriminatory or less discriminatory supplies.

234 However, the Commission did not make a manifest error of assessment when it considered that the advantages secured by those commitments and those proposals would not lead to a competitive situation on the electricity markets equivalent to or better than the situation resulting from the potential entry of GDP on those markets in the absence of the concentration. First, neither a possible new entrant on to the gas markets nor a possible new entrant on to the wholesale electricity market would, at least for a certain period of time, be likely to have the strength which GDP could exercise, in the absence of the concentration, on entering the electricity markets. In particular, the Commission emphasised the numerous advantages specific to GDP, relating, in particular, to its access to gas, the renown of its trade mark, its knowledge of the customer base and its already-established electricity projects. Second, the mere potential for competition on the gas markets and, accordingly, the corresponding reduction of one of the brakes to entry on to the market for the generation of electricity, do not make it possible to rebut the Commission's finding that the entry on to that market of other competitors as significant as GDP remained unlikely.

235 Consequently, even though the Commission wrongly failed to assess the advantages which the concentration would bring to the gas markets (see paragraph 123 above), comparison between the present competitive situation, before the concentration, on the electricity markets, mainly characterised by GDP's monopoly in the supply of gas to electricity producers and EDP's strong dominant positions on all the electricity markets, and the competitive situation after the concentration, mainly characterised, first, by a significant opening of the market for the supply of gas to electricity producers and, second, by the disappearance of an important potential competitor

on all the electricity markets, namely GDP, does not show that the Commission made a manifest error of assessment in considering that the competitive outcome on each of the electricity markets was negative following the concentration.

236 It should be noted, purely for the sake of completeness, that since the general competitive improvement on the gas markets following the concentration, as modified, does not produce sufficiently significant effects on the electricity markets to resolve the competition concerns previously identified on those markets, the Commission cannot agree to declare the concentration compatible with the common market owing to the beneficial effects for competition on one of the sectors in question while ignoring the negative effects on the other sector. In that regard, it is essential to take into consideration the fact that most, or indeed all, of the expected competitive benefits in the gas sector as a result of the concentration are short-term or medium-term benefits, since all of those advantages, or most of them, will in any event be obtained two or three years after the date envisaged with the concentration, by mere adherence to the liberalisation calendar laid down by the derogation from the Second Gas Directive which the Portuguese Republic enjoys.

237 It must therefore be concluded that the applicant has not demonstrated any manifest error of assessment on the part of the Commission when it concluded that the concentration, as modified, would have the effect of strengthening EDP's dominant position on the electricity markets, having as a consequence a serious impediment to effective competition.

V — *Conclusion*

238 It must be borne in mind that the contested decision is vitiated by an error of law in so far as it concerns the gas markets in Portugal.

239 On the other hand, the contested decision is not affected by any of the errors of law alleged in the context of the second and third pleas or by any of the manifest errors of assessment alleged in the context of the second limb of the fourth plea, relating to the electricity sector.

240 By virtue of the case-law set out at paragraphs 144 to 146 above, it must be held that the grounds of the contested decision which are not annulled are sufficient to found its operative part, namely that the concentration must be declared incompatible with the common market.

241 The application must therefore be dismissed.

Costs

242 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicant has been unsuccessful and the Commission has applied for costs, the applicant must be ordered to pay the costs.

243 As the intervener did not request that the applicant be ordered to pay the costs, the parties must be ordered to bear their own costs in relation to the intervention.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs;**

3. **Orders the parties to bear their own costs in relation to the intervention.**

Pirrung Forwood Papasavvas

Delivered in open court in Luxembourg on 21 September 2005.

H. Jung — Registrar

J. Pirrung — President

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