COMMISSION DECISION

of 26 September 2001

declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement

(Case COMP/M.2434 — Grupo Villar Mir/EnBW/Hidroeléctrica del Cantábrico) [a]

(notified under document number C(2001) 2861)

(Only the Spanish version is authentic)

(Text with EEA relevance)

(2004/135/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area, and in particular Article 57(2)(a) thereof,

Having regard to Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1], as last amended by Regulation (EC) 1310/97 [2], and in particular Article 8(2) thereof,

Having regard to the Commission's Decision of 1 June 2001 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission,

Having regard to the opinion of the Advisory Committee on Concentrations [3],

Whereas:

(1) On 4 April 2001 the Commission was notified, under Article 4 of Council Regulation (EEC) No 4064/89 (the Merger Regulation), of a proposed merger in which the firms Grupo Villar Mir and Energie Baden-Württemberg (EnBW), the latter jointly controlled by Electricité de France (EDF) and Zweckverband Oberschwäbische Elektrizitätswerke (OEW), were to acquire joint control of the Spanish firm Hidroeléctrica del Cantábrico SA (Hidrocantábrico), by means of a public takeover bid by Ferroatlántica SL (Ferroatlántica). Ferroatlántica belongs to Grupo Villar Mir and, after completion of the operation, is to be jointly controlled by Grupo Villar Mir and EnBW.

(2) The notification was declared incomplete on 6 April 2001. On 10 April 2001, the notifying parties provided the additional information requested. The notification was completed, within the meaning of Article 10(1) of the Merger Regulation, on that date.

(3) After examining the notification, the Commission concluded that the operation fell within the scope of the Merger Regulation.

(4) By letter dated 14 May 2001, the Spanish authorities informed the Commission, in accordance with Article 9 of the Merger Regulation, that the proposed merger would create or strengthen a collective dominant position as a result of which effective competition would be significantly impeded in the electricity generation market in Spain. They stated that the merger would also affect the market in distributing and trading in electricity in the Autonomous Community of Asturias, which presented all the characteristics of a distinct market and was not a substantial part of the common market. The Spanish authorities therefore requested that the proposed merger be referred back to them in accordance with Article 9 of the Regulation.

(5) After a preliminary examination of the case, the Commission concluded that the proposed operation raised serious doubts as regards its compatibility with the common market, as it could create or strengthen 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. Consequently, on 1 June 2001 the Commission decided to initiate proceedings under Article 6(1)(c) of the Merger Regulation.

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[a] See the final report of the Hearing Officer in OJ C 42, 18.2.2004.
[1] OJ L 395, 30.12.1989, p. 1; corrected version OJ L 257, 21.9.1990, p. 13.
[2] OJ L 180, 9.7.1997, p. 1.
[3] OJ C 42, 18.2.2004.

(6) The Advisory Committee discussed the draft Decision on 13 September 2001.

I. THE PARTIES AND THE OPERATION

(7) Grupo Villar Mir, whose parent company is Inmobiliaria Espacio SA, is a business group with various interests in the following areas: real estate, fertilisers, construction, operation of infrastructure and service concessions and management of financial investments.

(8) EnBW, which is jointly controlled by EDF and OEW, is a vertically integrated electricity company whose main activity is the generation, transmission, distribution, trading and supply of electricity, principally in south-west Germany.

(9) EDF is a State-owned company whose main activities are the generation, transmission, distribution and trading of electricity in France. Through EDF/RTE, a division of EDF, it operates the national electricity grid and interconnectors with neighbouring countries. Through its subsidiary EDF International (EDFI), a holding company, EDF owns shares in electricity companies in various European countries, including Austria, Italy, Sweden and the United Kingdom. It is also involved in the construction sector, the maintenance of electricity generating plants and transmission grids, recycling and city lighting.

(10) Ferroatlántica produces, distributes and markets various types of metal and electric furnace-produced ferrous alloys, both for the home and export markets, and also produces hydroelectric power. It is owned outright by Grupo Villar Mir and will, on completion of the proposed operation, be jointly controlled by Grupo Villar Mir and EnBW, which will acquire 50 % of its capital.

(11) Hidrocantábrico is involved in the generation, distribution and marketing of electricity and is currently the fourth biggest Spanish electricity company. Outside the electricity sector, its main activities are essentially the distribution and marketing of gas and its involvement in the telecommunications sector in the Autonomous Community of Asturias.

(12) The proposed operation is the acquisition of joint control of Hidrocantábrico by Grupo Villar Mir and EnBW, by means of EnBW's purchase of 50 % of Ferroatlántica's shares. To this end, the Parties concluded a number of agreements. On 28 September 2000, Ferroatlántica, with the support of EnBW, made an initial public takeover bid for 25 % of Hidrocantábrico's stock, authorised by the National Stock Market Commission (CNMV) on 17 January 2001. Subsequently, two other public bids were made for the whole of Hidrocantábrico's stock, one by the group formed by the savings bank Caja de Ahorros de Asturias (Cajastur), the Portuguese electricity company Electricidade de Portugal SA (EDP) and Caja de Seguros Reunidos, Compañía de Seguros y Reaseguros SA (Caser), and the other by the German group RWE. RWE's offer was later withdrawn. Ferroatlántica, as the first company to make a public bid, amended its initial offer, raising its bid to 100 % of the company's shares and offering improved terms. After the bidding process was completed, the group formed by Cajastur, EDP and Caser owned 35 % and Ferroatlántica 59,66 % of Hidrocantábrico's shares.

II. CONCENTRATION

(13) According to the agreements concluded by Grupo Villar Mir and EnBW, each of the companies will own a 50 % share of Ferroatlántica (the vehicle for the acquisition of control of Hidrocantábrico). As a result, Grupo Villar Mir and EnBW will jointly control Hidrocantábrico.

(14) Following the bidding process, Ferroatlántica acquired 59,66 % of Hidrocantábrico. According to the notifying parties, under the articles of association of Hidrocantábrico as amended at the shareholders' general meeting of 22 May 2000, the acquisition of a clear majority shareholding in Hidrocantábrico after a public bid for 100 % of the shares at a price of at least EUR 24 grants the notifying parties sole control of Hidrocantábrico. Ferroatlántica would have an absolute majority of voting rights and the right to appoint the majority of the members of the Board of Directors.

(15) As far as the assessment of joint control is concerned, this Decision is adopted on the basis of the information provided by the Parties and does not affect any rights and obligations that the various shareholders' groups may have under Spanish law.

(16) In the light of the above, the notified operation constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

III. COMMUNITY DIMENSION

(17) The companies involved in the proposed operation (Grupo Villar Mir, EnBW and Hidrocantábrico) have a combined aggregate worldwide turnover in excess of EUR 5 billion (Grupo Villar Mir: EUR 918 million; EnBW: EUR 38 billion [4]; Hidrocantábrico: EUR 890 million). Each of them has a turnover in the Community of more than EUR 250 million (Grupo Villar Mir: EUR 843 million; EnBW: EUR 36 billion; Hidrocantábrico: EUR 890 million) and they do not achieve more than two thirds of their Community-wide turnover in one and the same Member State. The proposed operation therefore has a Community dimension.

IV. RELEVANT MARKETS

A. *RELEVANT PRODUCT MARKETS*

(18) As the Commission indicated in its Decision in Case COMP/M.1853 — EDF/EnBW, the relevant product markets in the electricity sector must be defined according to the existing degree of liberalisation. The supply of electricity to tariff customers is a legal monopoly in which there is no competition. The relevant product market must therefore be viewed in the context of the liberalised segment of the market.

(19) According to the definition formulated by the Tribunal de defensa de la competencia (Spanish Competition Court) 'the relevant product market must be defined as the generation of electricity that is bought and sold through the pool or wholesale market. On the supply side in this market, electricity from the generators [5] is in competition with that from the special "over 50 MW" scheme and imported electricity. On the demand side, there are the distributors [who sell electricity to tariff customers]* (*), traders [who sell electricity to eligible customers]*, and eligible customers. It also includes the electricity sold via bilateral contracts [between generators and eligible customers]*, in so far as these contracts are agreed upon in a system of free competition' [6]. Until 2003, Spanish generators are not allowed to conclude direct contracts with traders (they can only sell electricity in the pool or to eligible customers) [7]. External agents can conclude contracts with Spanish traders.

(20) Eligible customers in the Spanish market are those consumers, regardless of their level of consumption, who are supplied at a nominal voltage of more than 1 000 volts [8]. From 1 January 2003, all consumers of electricity, without distinction, will have the status of eligible customers, even though electricity will continue to be offered in the tariff market up to 1 January 2007 [9]. Eligible customers in Spain who wish to buy electricity under the liberalised system have three options: (a) through the pool, (b) by means of 'bilateral contracts' with generators or foreign operators or (c) through contracts with traders. The market for eligible customers potentially represents 54 % of consumption in Spain, but those who have chosen to buy electricity in the liberalised market (directly through the pool or via bilateral contracts or contracts with traders) represent 35 to 38 % of total consumption. In other words, 62 to 65 % of the electricity bought in the wholesale market is purchased by distributors, for subsequent supply to tariff customers.

(*) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

(4) These figures include the turnover of OEW and EDF for the purpose of calculating the relevant turnover in accordance with the provisions of the Merger Regulation.

(5) Endesa, Iberdrola, Unión Fenosa, Hidrocantábrico and other small generators.

(6) Report C-60/00 on the Endesa/Iberdrola merger.

(7) Article 21 of Royal Decree-Law No 6/2000 of 23 June 2000 on urgent measures to step up competition in goods and services markets (Spanish Official Gazette No 151, 24.6.2000, p. 22440). However, this in no way entails the disappearance of the pool. Article 21 of Royal-Decree Law No 6/2000 itself states that (as of 2003) traders will be able to conclude contracts for the acquisition of electricity from national producers in the normal way and concludes that '*this energy may be sold to eligible customers or be incorporated into the existing daily or intradaily markets*' (i.e. the pool).

(8) Article 6 of Royal Decree-Law No 6/1999 of 16 April 1999 on urgent measures to liberalise markets and strengthen competition (Spanish Official Gazette No 92, 17.4.1999, p. 14350).

(9) Article 19 of Royal Decree-Law No 6/2000.

(21) The pool functions as follows: (i) the daily market, which represents more than 90 % of the total electricity sold in the wholesale market: there is a single price for each hourly period, the hourly marginal price; (ii) the intradaily market (around 6 % of total electricity sold in the wholesale market): energy which is not sold in the daily market can be sold subsequently in the 'intradaily market'. Bilateral contracts represent less than 3 % of total sales in the wholesale market.

(22) The daily market is a balanced market: energy sold is equal to energy bought. The remuneration of each seller is calculated as the product of the energy sold and the hourly marginal price and, similarly, the payment obligations of each buyer are calculated as the product of energy bought and the hourly marginal price. The daily market is used to make transactions for the next day by means of the submission of offers for sale or purchase. These offers are submitted to OMEL, the market operator, and are included in a matching procedure for the purposes of the next day's trading, which will cover 24 consecutive hourly periods. The market operator will match the offers for sale and purchase of electricity using a simple matching method, which obtains, in an independent manner, the marginal price and the volume of energy needed from each generating unit, for purchase in each hourly period. In this way, the marginal price is obtained for each hourly period according to the offer made for the sale of electricity by the holder of the last generating unit which is needed to feed into the system in order to meet the demand.

(23) It is therefore necessary to make a distinction, as far as the liberalised electricity markets in Spain are concerned, between the electricity offered through the wholesale market (the pool and bilateral contracts between eligible customers and generators) and the electricity offered subsequently by traders to eligible customers (retail market). However, only the first, the wholesale market, and in particular the pool ([10]), and more specifically the daily market, which accounts for something over 90 % of electricity sold on the wholesale market, will be analysed in the present Decision.

([10]) Bilateral contracts represent less than 5 % of the total energy sold in the wholesale market.

B. *RELEVANT GEOGRAPHIC MARKET*

(24) The relevant geographic market for the supply of energy on the liberalised market has been traditionally considered by the Commission to be no wider than national borders ([11]). This has been confirmed, in Spain's case, by two recent Commission Decisions ([12]) and is in line with the studies carried out by the Spanish competition authorities ([13]).

(25) In particular, imports to the Spanish market are (and will for some time continue to be) constrained by the limited interconnection capacity currently available. According to available information, the commercial interconnection capacity between Spain and neighbouring countries amounts in theory to approximately 1 900 to 2 000 MW (1 000 to 1 100 with France, 600 to 650 with Portugal and 300 to 350 with Morocco). This represents approximately 6,6 % of the capacity needed at peak demand times ([14]). In addition, overlap of import and export flows when electricity circulates in both directions simultaneously only takes place with Portugal. Exports from Morocco to Spain are very rare and exports from Spain to France only take place in rainy seasons (such as in winter 2001); however, the market study has shown that even when exports between France and Spain are possible, they do not take place because the spare capacity related to such flows is not allocated.

(26) Consequently, the relevant geographic market for wholesale electricity is mainland Spain.

([11]) Cases IV/M.1659 — Preussen Elektra/EZH, IV/M.1557 — EDF/Louis Dreyfus, COMP/M.1673 — VEBA/VIAG, COMP/M.1803 — Electrabel/Eon and COMP/M.1853 — EDF/EnBW.

([12]) Cases COMP/M.2353 — RWE/Hidroeléctrica del Cantábrico and COMP/M.2340 — EDP/Cajastur/Caser/Hidroeléctrica del Cantábrico.

([13]) The Spanish authorities consider that, as regards the energy offered to the pool (wholesale market) under freely competitive conditions and the demand for that energy, the geographic limits are the borders of mainland Spain. However, in the case of the retail market (supplies to final consumers) the Spanish authorities feel that, although the market could be said to be a national one, in geographic terms, the relevant geographic market is regional or even local. Nevertheless, according to the investigations carried out by the Commission, the retail market in electricity also appears to be of national dimensions. For the purposes of this Decision, however, a precise definition of the retail market for eligible customers is not necessary, since the analysis relates solely to the wholesale market or pool.

([14]) Source: Comisión Nacional de la Energía (National Energy Commission).

V. COMPATIBILITY WITH THE COMMON MARKET

INTRODUCTION

(27) The Commission takes the view that the operation can, for the reasons set out below, strengthen the collective dominant position currently existing in the wholesale electricity market in Spain.

(28) Activity by the notifying parties in the liberalised part of the Spanish electricity sector is relatively limited. Hidrocantábrico's share of sales in the daily market in the pool was [5 to 10]* % in 2000 and [5 to 7]* % during the first five months in 2001 ([15]). In 2000, EnBW offered only [800 to 1 000]*MW to the pool and Grupo Villar Mir offered no electricity to the Spanish wholesale market. Electricity exported by EDF, which jointly controls EnBW, accounted for around [< 5]* % of sales in the daily market (including the long-term contract with REE (Red Eléctrica de España), the operator of the Spanish grid). In conclusion, the proposed operation results in relatively limited horizontal overlaps in the Spanish wholesale market.

(29) However, the proposed operation must be viewed in the light of the particularly high degree of concentration on the Spanish electricity market and Spain's isolation due to a shortage of interconnections with other systems. It is also necessary to take into account the special position of EDF, which as the largest exporter of power to the Spanish market is, for reasons which will be discussed below, the main potential competitor of the Spanish generating companies, while EDF/RTE controls the interconnectors and the transmission network through which all exports of electricity to the Iberian peninsula from other European countries must be channelled.

(30) In its reply to the statement of objections, EnBW argues that it assumes that the operator involved in the proposed merger is EnBW, not EDF. According to EnBW, the approach taken by the Commission 'fails to take into account the fact that EnBW is a full functioning autonomous company pursuing its own commercial policy goals ... This is undoubtedly relevant in that Community rules on the control of mergers explicitly allow for a company in EnBW's position to be both a notifying party and a company affected by the merger ... The Commission is confining itself to assessing the merger as though it had been instigated and were to be executed by EDF ... Consequently, the statement of objections fails to take account of EnBW's present situation and confuses the respective roles of EDF and EnBW in the merger.'

(31) In the face of these arguments, the Commission must point out that it did not fail to take account of EnBW's role in the operation at any time, notably as regards its position as a notifying party; nor did it fail to take into account the nature of EnBW as a full functioning company. It should be borne in mind, however, that, when assessing the impact of a merger on competition, the Commission has always taken into account the activities of all the companies belonging to the same group ([16]) (in this case, EDF and its subsidiaries and divisions, and other companies controlled directly or indirectly by EDF; and Grupo Villar Mir, its parent company and subsidiaries), as all the companies of a group make up a single economic entity. Furthermore, in the present case it can be argued that EnBW's business strategy is set by EDF, as the Commission has noted in a previous Decision ([17]).

A THE WHOLESALE MARKET FOR ELECTRICITY IN SPAIN

1. *There is a duopolistic dominant position on the Spanish market*

(a) The two largest Spanish utilities set prices and collectively dominate the wholesale market

(32) According to the Spanish Competition Court, which recently looked at the Endesa/Iberdrola ([18]) and Unión Eléctrica Fenosa/Hidrocantábrico mergers ([19]), Spanish operators enjoy a duopolistic dominant position on the

([15]) The reason for the fall in Hidrocantábrico's market share in 2001 is that it corresponds to an especially rainy period in which huge quantities of electricity derived from hydroelectric power were put on the market. Only 18 % of Hidrocantábrico's generating capacity comes from hydroelectric power plants.

([16]) The Merger Regulation does not define the concept of a group in the abstract, but sets out to establish whether the companies are entitled to run the activities of the undertaking (as in the case of EDF vis-à-vis EnBW).

([17]) In its Decision on Case COMP/M.1853 — EDF/EnBW, the Commission stated that *'pursuant to the Shareholder Agreement* [between EDF and OEW]* *EDF is the sole industrial partner whereas OEW will be the regional partner.* [confidential]* *As long as OEW's regional interests and its profit interest are sufficiently respected, it appears very unlikely that OEW has an incentive to actively oppose the business strategy EDF chooses within EnBW.*'

([18]) Report C-60/00 on the Endesa/Iberdrola merger.

([19]) Report C-54/00 on the Unión Eléctrica Fenosa/Hidroeléctrica del Cantábrico merger.

Spanish electricity market. There are two dominant companies in particular, Endesa and Iberdrola, which had market shares of 47 and 27 % respectively in 2000 in the daily market. For a large number of hourly periods, their production is essential to meet demand and, consequently, they are in a position to set the price.

(33) The findings of the Spanish authorities have been confirmed by the results of the Commission's investigation, which established that the situation described above has remained essentially unchanged. There have been no structural changes over the last few months to substantially modify the duopolistic dominant position on the Spanish electricity market identified by the Spanish authorities.

(34) In particular, the two main Spanish electricity companies Endesa and Iberdrola still hold considerable market power reflected in: 1. their shares of total installed electricity generating capacity; 2. their shares of sales to the wholesale market or pool; and 3. their ability to set prices in the wholesale electricity market.

(35) As regards, firstly, the total installed electricity generating capacity of generating companies based in Spain, table 1 shows how Endesa and Iberdrola control around 83 %, far ahead of the other operators, with 12 % (Unión Fenosa) and 5 % (Hidrocantábrico).

Table 1

Total installed electricity generating capacity ([20])

	December 1999		December 2000		May 2001	
Endesa	[ ]* MW	[40-50]* %	[ ]* MW	[40-50]* %	[ ]* MW	[40-50]* %
Iberdrola	[ ]* MW	[35-40]* %	[ ]* MW	[35-40]* %	[ ]* MW	[35-40]* %
Unión Fenosa	[ ]* MW	[10-15]* %	[ ]* MW	[10-15]* %	[ ]* MW	[10-15]* %
Hidrocantábrico	[ ]* MW	[< 10]* %	[ ]* MW	[< 10]* %	[ ]* MW	[< 10]* %
Others	[ ]* MW	[< 5]* %	[ ]* MW	[< 5]* %	[ ]* MW	[< 5]* %

Source: Spanish Ministry of Economic Affairs.

(36) Table 2 shows the market shares in respect of sales on the daily market during the years following those studied in the abovementioned reports by the Spanish Competition Court. Again, the combined share of Endesa and Iberdrola is between 74 % and 78 % of the total.

([20]) The table does not include installed capacity under the special scheme, which amounted to 8 695 MW at 31 December 2000.

Table 2

Sales on the daily market

(%)

	1999	2000	2001 (Jan-May)
Endesa	[45-50]*	[45-50]*	[40-45]*
Iberdrola	[25-30]*	[25-30]*	[30-35]*
Unión Fenosa	[10-15]*	[10-15]*	[10-15]*
Hidrocantábrico	[5-10]*	[5-10]*	[5-10]*
Others	[< 5]*	[< 5]*	[< 5]*
Imports / EDF-REE (Red Eléctrica de España) contract	[5-10]*	[< 5]*	[< 5]*

Source: OMEL, the Spanish company operating the Spanish electricity market.

(37) The market power of the two main operators in the Spanish electricity market is particularly highlighted by their ability to set prices in the wholesale market. The table below illustrates this.

Table 3

Price-setting capabilities of market operators in relation to the quantities of energy sold [21]

(%)

Year	Endesa	Iberdrola	Endesa/ Iberdrola	Endesa/ others	Iberdrola/ others	Endesa/ Iberdrola/ others	Others
1998	55-60	20-25	0-2	0-2	0-2	0-2	15-20
1999	45-50	25-30	0-2	0-2	0-2	0-2	20-25
2000	40-45	25-30	0-2	0-2	0-2	0-2	25-30
2001	40-45	20-25	0-2	0-2	0-2	0-2	35-40

Source: OMEL.

(38) The marginal price-setting capabilities of Endesa and Iberdrola in the wholesale market are not due solely to the size of their installed generating capacity in comparison with total installed capacity in Spain. Account must also be taken of the technological composition of their installed capacity, or generation mix. As the Spanish Competition Court has emphasised: 'the setting of offer prices in the pool for the various hourly periods is in large measure determined by the different generation technologies used by the generating plants which make up the system. In general, and as a result of

[21] The table shows what percentage of electricity, in relation to the total amount of electricity placed on the market, has been sold at the marginal price corresponding to that offered by each operator or simultaneously by two or more operators.

the characteristics of the different production technologies, coal plants tend to set prices mainly during troughs in demand, while hydroelectric plants tend to dominate during peak periods. Consequently, given that Endesa generates about 57 % of its energy using coal, and Iberdrola is clearly the leading company in flexible hydroelectric generation, both groups are accustomed to leading marginal price setting in the market' ([22]).

(39) Endesa and Iberdrola play a pivotal role in the Spanish wholesale market. Their capacity is at least equal to the excess supply on the market, especially at times of peak demand. This means that the combined supply of the rest of the generators is insufficient to satisfy demand and the pivotal firms can increase their prices in response to demand, generally without fear of losing business.

(40) Moreover, there are various links between the companies operating in the electricity market. These are both legal (jointly owned plants such as Trillo, stakes held in market operators and in the system) and structural. In particular, various structural characteristics of the market allow strategic coordination between operators, such as the fact that the market is in one homogeneous and relatively transparent product in which price fluctuations are detected almost immediately.

(41) Finally, besides the considerations set out above regarding the market power of the two main Spanish operators, account has to be taken of the fact that the Spanish generating market may be viewed as a market with little accessibility, given the existence of a number of barriers to entry, such as: 1. access to potential production sites and hydroelectric and fuel resources; 2. installation costs; 3. the necessary diversification of the generation mix; and especially 4. the shortage of interconnection capacity with France, on which exports to the Spanish market from other European countries outside the Iberian peninsula have to rely.

([22]) Report C-54/00 on the Unión Eléctrica Fenosa/Hidroeléctrica del Cantábrico merger.

(b) **Smaller Spanish generators and foreign operators, considered as a group, have not been in a position to set prices for most hourly periods**

(42) The other Spanish generators, Unión Fenosa and Hidrocantábrico, have, for most hourly periods, taken the prices set by the dominant firms. As indicated above (see table 3), one of the two main Spanish operators, either Endesa or Iberdrola, has been able to set prices in some 60 to 80 % of cases. Given that quantities offered above the marginal price are not sold in the daily market, the other operators, knowing that Endesa's and Iberdrola's offers are necessary to meet demand in almost every hourly period, tend to submit zero price offers, safe in the knowledge that all the electricity they offer will be sold in the daily market at the marginal price set in the pool (and not the price at which it was offered). Accordingly, the two largest players are able to use their broad generation mix in such a way as to enable them to submit flexible offers according to expected supply and demand. Smaller players, like Unión Fenosa and Hidrocantábrico, which have a narrow generation mix, are less able to submit competitive offers which are sufficiently flexible. For them, the option of offering at zero price, knowing that Endesa and Iberdrola will ask for high prices, is the easiest way to make as many sales as possible.

Moreover, on account of its long-term contract with EDF, REE offers electricity to the pool at prices which are public knowledge. This means that during the trough hours in which Endesa and Iberdrola's supplies may not be needed to cover all the demand, if the REE offer is needed the rest of the Spanish operators are sure that they will receive the price offered by REE. This price (around EUR [< 0,05]* per kW/h) is currently between 30 % and 40 % higher than the average prices offered by EDF to eligible customers in the French market.

(c) **Despite the existing collective dominance, the price level on the Spanish market has been affected by increases in the amount of cheap energy supplied in the pool**

(43) Between November 2000 and March 2001, exceptionally heavy precipitation significantly boosted the amount of power generated by hydroelectric plants. Average prices in Spain plummeted (falling 30 to 40 % by comparison with average prices over the same period in 2000). However, prices quickly returned to their earlier level after this period of heavy rain.

(44) This drop in prices might have indicated that the joint dominant position is being weakened. However, the results of the market study conducted by the Commission show that this situation is purely short term and will not significantly change the duopolistic structure of the relevant market, the degree of market power wielded by its two main operators or the comfortable situation of the small operators as price takers.

(45) It should be borne in mind that one of the major operators, Iberdrola, produced the lion's share of the electricity generated during this period, supplying electricity generated at low cost in its hydroelectric plants ([23]). The second operator with a high hydroelectric output is Endesa ([24]). It is worth pointing out here that, according to the Spanish authorities and a number of third-party competitors, many of these hydroelectric power stations had to be used to generate electricity in order to take pressure off the reservoirs and thus make room to take up flood water. As prices are generally set with a narrow margin, at the point of intersection of supply and demand, the two main operators, which were forced to take the decision to offer large quantities of energy at zero price in order to be sure of selling it, were less successful in fine-tuning their offers in order to maintain a high price level. However, once they were relieved of the obligation to dispose of large quantities of hydroelectric power, they were once again in a better position to mix electricity of this type with that generated at a higher cost. Prices have therefore risen back to their former level.

(46) However, as noted above, the situation described is entirely short term, as it is the result of a period of exceptionally high precipitation. Hydroelectric output between May 2000 and June 2001 reached an all-time high, as it was 64 % up on output over the 12 previous months. According to the calculations of the Spanish authorities, the probability of matching or exceeding this hydroelectric output is no more than 7 %. There can be no doubt that this is an atypical, one-off situation which cannot be interpreted as the outcome of a structural change in the Spanish electricity market substantially affecting the position of joint dominance exercised by the two main generators.

(47) At all events, the impact which low-cost electricity had on pool prices during the period in question indicates that, as a general rule, supplying a relatively large amount of cheap electricity brings down average prices. Since imported energy competes in the pool on the same basis as energy generated by the system, as explained below, it may be concluded that a rise in imports of low-cost electricity on the Spanish market would go hand-in-hand with a comparable drop in price levels, in that it would displace higher offers in the formation of the marginal price. This would apply particularly at times of low and medium demand, if the increase in imports were to result in a situation in which the supply from Endesa and Iberdrola were not essential to satisfy demand. The same goes, moreover, for the additional power offered to the Spanish market through bilateral contracts. This would certainly boost competition on the Spanish market and weaken the existing position of joint dominance.

(48) The surplus capacity and technology mix of some operators (especially EDF, with its surplus nuclear energy production), together with the price differential between Spain and other European countries, favours competition from low-price suppliers. However, the limitations resulting from the existing interconnection capacity form a significant entry barrier to the Spanish market, thus tending to maintain and consolidate the status quo, as explained below.

2. *The (extremely) limited import capacity freely available via the French-Spanish interconnector has boosted the Spanish generators' collective dominant position*

(a) The current state of play as regards interconnection between France and Spain

(49) The Iberian peninsula's electricity grid is linked through interconnectors to the French national grid, at the border between the two countries. The installed capacity which can, in theory, be used for commercial purposes, totals a maximum of 1 100 MW for flows from France to Spain and 1 000 MW in the opposite direction ([25]).

([23]) Hydroelectric power accounts for approximately 50 % of Iberdrola's generating capacity.

([24]) Hydroelectric power accounts for about 36 % of Endesa's generating capacity.

([25]) For reasons to do with the safety of the electrical system in particular, the 'commercial capacity' is the only part of the total physical capacity which is really useful for exchanges. The commercial capacity between systems is not the sum of the transmission capacities associated with the different components of the grid (lines) which make up the interconnection: it is significantly lower, as the operation of the interconnected electrical systems requires operating conditions and safety margins to be taken into account. The system operator establishes the available commercial capacity for different periods of time, ranging from a year, through a fortnight to a day, determining with great precision what resources can be used, depending on the availability and operating schedules of the system's components.

Table 4

Interconnection capacity between France and Spain

Interconnection with the European grid	Total physical capacity	Commercial capacity
One 400 kW line from Hernani to Cantegrit		
One 400 kW line from Vic to Baixas	3 826 MW (winter)	1 100 MW (winter)
One 220 kW line from Arkale to Monguerre	3 194 MW (summer)	1 000 MW (summer)
One 220 kW line from Biescas to Pragnere		

Source: Spanish Ministry of Economic Affairs.

(50) This interconnection capacity represents about 3,5 % of the capacity needed to satisfy peak demand in Spain. It should, however, be borne in mind that the figures cited refer not to 'real' commercial capacity (i.e. that which is actually usable) but to 'anticipated' commercial capacity: for example, in July and August 2000, the 'real' commercial interconnection capacity between France and Spain was approximately 800 to 900 MW, and only 400 to 700 MW in the opposite direction ([26]). Moreover, the guaranteed maximum interconnection capacity is only 550 MW in both directions ([27]). Finally, it should be noted that available commercial capacity is calculated independently by the operators of the two systems and that the lowest value of the two is used.

Table 5

Commercial interconnection capacity between France and Spain: ranges most frequently published in 2000 and 2001 ([28])

Direction	Peak	Trough
France >>>>>>Spain	750-1 100 MW	800-1 100 MW
Spain >>>>>>> France	400-700 MW	700-1 000 MW

Source: Spanish Ministry of Economic Affairs.

([26]) Source: Red Eléctrica de España, the operator of the Spanish grid.

([27]) This means that whatever happens to the system, the commercial interconnection capacity will never fall below 550 MW.

([28]) The limits to commercial capacity derive from structural limitations on the transmission grid in the border area, while the variation in commercial capacity values is mainly the result of changes in the seasonal thermal capacity of the electricity lines (summer to winter). Another factor which affects both aspects is the structure of electricity generation in different periods and the demand values in areas near the border which can, in some cases, saturate domestic grids.

(51) The inadequacy of the interconnection with France, which isolates the Spanish electricity market, is clearly demonstrated by the capacity ratios ([29]) and the interconnection capacity in relation to demand at peak times, which are less than 5 % and 6,6 % respectively for Spain. It may thus be concluded that imports are extremely limited as a result of this restricted commercial interconnection capacity. A comparison between the installed interconnection capacities of other European countries reveals that Spain has the lowest value as a percentage of the capacity needed at peak demand times.

Table 6

Interconnection capacities in relation to peak demand

(%)

Country	Interconnection capacity/ peak demand
Switzerland	129,6
Austria	75,3
Belgium	30,8
Netherlands	28,7
Greece	17,6
France	16,6
Germany	15,1
Portugal	13,7
Italy	11
Spain	6,6

Source: Spanish National Energy Commission.

([29]) Capacity ratio = theoretical international interconnection capacity/installed capacity (excluding special scheme).

(52) On the basis of the figures supplied, the EU average clearly lies between 15 and 20 %.

(53) Returning to the Spanish case, between 80 and 90 % of imports come from the French-Spanish interconnectors (which account for approximately 60 % of Spain's total anticipated commercial interconnection capacity). Moreover, [40 to 60]* % of the anticipated commercial interconnection capacity between France and Spain is reserved for the contract between EDF and REE. This contract, which was enshrined in the ninth transitional provision of Spanish Law No 54/1997 of 27 November 1997 on the electricity sector ([30]), provides for the supply of electricity over a 20-year period, approximately 10 years of which have passed. The aim of this contract was to guarantee REE's electricity supplies in Spain. Taking account of this contract, the interconnector has a permanent capacity reserve of [500 to 600]* MW, which is equivalent to [80 to 100]* % of the total guaranteed commercial capacity. In addition, electricity is supplied to the pool at prices which are known to the other competitors.

(54) Finally, it is important to note that the degree of saturation of this interconnector has recently exceeded 90 %, which means that the interconnector was used almost exclusively for electricity imported into Spain.

Table 7

Degree of use of the commercial exchange capacity

(in MW)

Imports	Half-year			Exports		
	Mean capacity	Mean use	Utilisation rate (%)	Mean capacity	Mean use	Utilisation rate (%)
1999 — January-June	731,6	619,2	84,64	532,1	0,0	0,00
1999 — July-December	927,6	874,4	94,27	654,5	0,0	0,00
2000 — January-June	949,4	922,2	97,14	708,0	7,9	1,11
2000 — July-December	965,9	888,4	91,97	702,6	12,9	1,84
2001 — January-May	1 051,9	625,6	59,47	737,6	269,2	36,49

Source: OMEL.

(55) According to data supplied by the Spanish competition authorities, EDF has habitually used [200 to 300]* MW of interconnector capacity over and above its long-term contract with REE. EDF thus uses approximately [70 to 80]* % of the total anticipated commercial interconnection capacity.

(b) **Prospects for increased interconnection capacity in the near future**

(56) In early 1990, EDF, which owns the French grid and interconnectors and is responsible for ensuring that they work properly, decided to boost interconnection capacity between France and Spain significantly. Significant progress had been made with the planning of these projects by 1996, so that all the permits necessary to start carrying them out were obtained.

(57) The projected Aragon-Cazaril line, which is a result of these contacts, would provide a guaranteed commercial capacity of approximately 1 100 MW, and implementation of the plan would have brought the total anticipated commercial capacity to some 2 300 MW. However, in 1996 the French Government decided to call a halt to all progress on these projects on social (local opposition) and environmental (protected areas) grounds and EDF had to compensate the operator of the Spanish grid, REE.

([30]) Spanish Official Gazette No 285, 28.11.1997, p. 35097.

(58) In 1997 a new agreement was signed. The Parties concerned committed themselves to increasing commercial interconnection capacity across the Pyrenees by 2006, preferably using the Aragon-Cazaril line, which was to come into operation by 2006. Under the terms of the contract, the Parties were liable and were required to pay compensation if the increase in interconnections was delayed until after 1 January 1997 (for reasons for which they bore some responsibility, of course). If the necessary permits could not be obtained (that is, for reasons outside their responsibility), the Parties would not be liable. However, provision was to be made for alternative lines to reinforce and upgrade existing capacity. It should be noted that failure to make provision for liability (in the event that the relevant legal permits are not obtained) does not in any way imply a lack of economic incentives on EDF's part. The agreement was signed by the French generator (as proven by documents in the Commission's possession), so it is a reliable commitment.

(59) As both RTE and REE recognise the need to increase interconnection between France and Spain, they have agreed to improve the Hernani-Cantegrit line. REE is improving the Vic interconnector on the Vic-Baixas line. It is hoped that as a result of these operations, according to information provided by the Spanish grid operator, the anticipated commercial interconnection capacity between Spain and France will have increased by around 500 MW by mid-2002, thus bringing total anticipated capacity up to 1 600 MW. Consequently, according to the commitments entered into by EDF/RTE in the 1997 agreement (creation of the Aragon-Cazaril line or another 1 200 MW alternative), interconnection capacity should reach at least 2 800 MW by 2006.

(60) Recently REE and EDF-RTE submitted to their respective governments a joint study on possible routes, in which they examined the relevant environmental and economic issues. The final decision awaits approval by the two authorities. In principle, EDF appears to be reluctant to accept the line crossing the central Pyrenees (Aragon-Cazaril): it would prefer a route through the eastern Pyrenees (the route taken by the high-speed train). This option is different from the solution initially negotiated, Aragon-Cazaril.

(61) The exploration of alternative routes by both grid operators merely serves to confirm a fact to which we will refer below: EDF has economic reasons for increasing the interconnection capacity between France and Spain substantially. The aim in searching for new routes is precisely to avoid a repetition of what happened in 1996. The players involved have merely anticipated possible difficulties (social or environmental), trying to find solutions which will ensure that the projected increase in interconnection capacity is genuinely viable.

(c) **There is too little freely available existing capacity to have a significant influence on the Spanish wholesale market**

(62) Given the long-term contract between EDF and REE, which takes up most of the French-Spanish interconnection capacity, the remaining capacity theoretically available to importers amounts to some [500 to 600]* MW, that is, approximately [1,5 to 2,5]* % of the capacity necessary to satisfy Spanish demand during peak hours.

(63) The foreign competitors which export electricity into Spain face significant barriers to entry. A very small amount of electricity is imported by companies other than EDF (approximately 25 %, most of which is accounted for by Electrabel). Moreover, [5 to 10]* % of total French exports went to the traditional Spanish operators, rather than the pool or independent foreign operators. This means that not all sales of electricity in Spain competed with supplies from the major operators.

(64) The isolation resulting from the limited interconnection capacity is a key factor in the joint dominant position held by the two main market operators, as the Spanish authorities stressed during the inquiry.

(d) **The current electricity deficit in the south and east of Spain is not such that the grid would collapse if there were an increase in interconnection capacity between France and Spain over the next few years**

(65) Moreover, EnBW claims that, in view of the current electricity deficit in the south and east of Spain, which obliges REE to have recourse to less efficient power stations to prevent the grid from collapsing, a substantial additional supply in the north, through an increase in transport capacity from France, could aggravate the present situation in view of the current state of the grid and REE's difficulties in reaching areas with unsatisfied demand.

(66) However, it must be borne in mind that many of the projects to establish new generating capacity, to which EnBW itself refers in its comments, will be sited in the south and east of Spain ([31]); consequently, it is rather doubtful whether an increase in interconnection capacity could lead to a collapse in the grid. It should also be borne in mind that some of the main centres of electricity consumption in Spain are situated in the north of the country.

B. STRENGTHENING OF THE EXISTING DOMINANT POSITION ON THE SPANISH MARKET

(67) As detailed below, the Commission takes the view that the notified operation will result in the existing duopolistic dominant position on the wholesale electricity market in Spain being strengthened. In particular, as a result of the merger there will no longer be the incentives that existed beforehand for EDF to increase substantially its exports of electricity to the Spanish market following expansion of the interconnection capacity between France and Spain. This will both eliminate the existing Spanish generating companies' main potential independent competitor and maintain the isolation of the Spanish electricity market from other European electrical systems outside the Iberian peninsula. In both cases, it will have the effect of consolidating the existing joint dominant position on the Spanish electricity market, which will be protected from potential competition from operators based in other European countries outside the Iberian peninsula by an entry barrier: limited international interconnection capacity, without any real prospects for significant further development.

(68) In their responses to the statement of objections, EnBW and Grupo Villar Mir claim that under the Merger Regulation a merger cannot be declared incompatible with the common market if it strengthens a collective dominant position held by third parties other than those affected by the merger, an argument in support of which they adduce a number of judgments issued by the Community courts and decisions taken by the Commission itself ([32]).

([31]) The new plants in San Roque, Castellón, Escombreras, etc.

([32]) Grupo Villar Mir, for example, argues that in all the cases in which the Commission or the Community courts have accepted the creation of a collective dominant position as a valid criterion for banning a merger, the notifying parties were part of the oligopoly or duopoly in a dominant position (Gencor/Lonrho, Nestlé/Perrier, Kali & Salz) and that although the Commission has decided in previous cases that a merger creates competition problems in that it reduces the number of operators competing on the market (Nestlé/Perrier), the position of third parties in the market is never the criterion which leads to the banning of a notified operation. EnBW argues that Articles 8(3) and 2(3) of the Merger Regulation imply that the ban must not be applied to mergers which allegedly reinforce the collective dominant position of third parties other than the Parties affected by the merger.

(69) However, as the Parties note in their claims, there is a precedent in the Commission's Decision in the Exxon/Mobil case ([33]), which relates to the strengthening of a dominant position held by undertakings other than the Parties involved in the merger analysed. However, the Parties allege that in this case there were various structural links between the company affected by the merger and the company in a dominant position, whilst, according to EnBW, Hidrocantábrico has no structural or other links with members of the duopoly in the notified merger.

(70) However, the inquiry, and in particular the information provided by the Spanish ministerial authorities, has revealed that, in the present case, there are also various structural links between the notifying parties (and EDF, as a company which exercises joint control over one of them) and the members of the duopoly in question. These links are as follows:

— joint ownership of power stations, such as Trillo,

— ownership of Elcogas SA, [3 to 5]* % of whose equity is held by Hidrocantábrico, 37,93 % by Endesa and 11,10 % by Iberdrola. EDF has a [25 to 30]* % stake,

— the four major Spanish generators are OMEL shareholders, each of them accounting for 5,71 % of its equity,

— the four major Spanish generators are REE shareholders, each of them accounting for 10 % of its equity.

(71) Finally, independently of the above remarks and contrary to what the Parties claim, if the merger involves strengthening the dominant position of third parties which are not party to the merger, it is not essential for those third parties to have significant structural links with the notifying companies. The Parties infer that there is such a requirement from the Exxon/Mobil Decision referred to above. However, what the principle referred to in that Decision actually says is that the strengthening of a dominant position in which the Parties to the concentration are not involved does fall within the scope of the Merger Regulation without any further qualification ([34]).

([33]) Case IV/M.1383 — Exxon/Mobil.

([34]) Recital 225 of the Decision and recital 228, which reads as follows: '*The Commission considers that the creation or reinforcement of a dominant position by a third party is not excluded from the scope of application of Article 2(3) of the Merger Regulation. In addition, it should be borne in mind that Gasunie* [the third party occupying a dominant position]* *is a JV in which one of the Parties to the concentration has a substantial interest*' (emphasis added).

Article 2(3) of the Merger Regulation reads as follows: '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'. This provision lays down a causal link between the merger in question and the (creation or) strengthening of a dominant position. Nothing in the wording of this provision entails the conclusion that the notifying parties necessarily need to form part of the dominant position themselves or to have substantial or significant links with the third parties that do. The Commission therefore concludes that the wording of the provision means that mergers which are capable of strengthening a dominant position and constitute an obstacle to effective competition are incompatible with the single market, regardless of whether the dominant position is held by the companies involved in the merger, by companies structurally linked to them or by third companies.

(72) Finally, EnBW claims that in Spanish and European competition law there are alternatives to Community monitoring of merger operations for counteracting potential abuses by members of a duopoly. However, as the Commission has had occasion to point out in the past ([35]), the Merger Regulation lays down a system of structural supervision intended to prevent the creation or strengthening of dominant positions rather than a system for keeping tabs on potential abuses.

1. ***There are incentives for companies based in other Member States to enter the Spanish wholesale market***

(73) As noted above, the wholesale electricity market in Spain offers attractive prices to operators based in other countries. The price level applied to eligible customers is generally over 30 % higher than in other European countries such as France and Germany.

(74) It should also be noted that Spain has traditionally been a net importer of electricity. There are various reasons for this: firstly, the installed production capacity and the particular mix of electricity production sources in Spain (the generation mix). Secondly, the demand for electricity has grown considerably over the last few years, the average rate of increase being between 5 and 7 %. The creation of new generating capacity has not kept pace with this rise in demand. Moreover, the investigation has shown that demand will continue to increase at over 3 % for the next few years ([36]).

(75) The law currently in force in Spain allows foreign suppliers to sell electricity directly to the pool or, alternatively, to eligible customers or power generation or distribution companies. In particular, the pool system in its existing form allows interested operators to develop sales in Spain without first having to acquire generating capacity in the country.

(76) The market study conducted by the Commission's departments clearly demonstrates that operators based on the other side of the Pyrenees have incentives to enter the Spanish market. The study also shows that, despite the existence of such incentives, operators face difficulties due to the paucity of interconnection capacity between Spain and its neighbours, particularly France, an aspect which is analysed below. At all events, suffice it to say here, as an indicator of operators' incentives and the difficulties arising from the shortage of interconnection capacity, that the daily demand by European electricity companies based outside the Iberian peninsula for the allocation of interconnection capacity with Spain is seven times greater than the physical interconnection capacity currently available.

2. ***EDF is the Spanish electricity generating companies' main potential competitor***

(77) EDF, in its present role as a foreign operator, is the Spanish electricity generating companies' main potential competitor. Firstly, it has extensive generating capacity with low variable costs in France, largely owing to its capacity to generate nuclear power. EDF is in a position to supply power to the Spanish wholesale market during periods of average and low demand. This type of generating capacity is particularly appropriate when a continuous long-term supply is required. Moreover, EDF has very extensive financial resources at its disposal, enabling it to compete on electricity markets beyond its domestic market without needing to establish a presence there.

([35]) See the Exxon/Mobil Decision referred to above.

([36]) The Spanish National Energy Commission forecasts that energy consumption in Spain will grow by over 12 % between 2001 and 2005.

(78) Over the last few years EDF has developed a policy of exporting electricity to other European countries. In this context it should also be borne in mind that France holds a strategic position on the liberalised European market, owing to its interconnections with the United Kingdom, Belgium, Germany, Switzerland and Italy. Any other generating company established in one of the countries mentioned or beyond their borders and wishing to export electricity to Spain has to do so through the French transmission grid and interconnectors, which puts them at a disadvantage in strategic terms.

(79) EDF's current sales of electricity account for approximately [< 5]* % of total sales in the Spanish pool (including the long-term contract between EDF and REE), whilst the total number of imports and international transactions represent around 5 % of total sales on the wholesale market. As stressed above, the fact that EDF has traditionally played a key role in interconnection capacity at the French/Spanish border has contributed decisively to this level of sales. This has helped to ensure a constant flow of electricity at a constant price.

(80) Finally, it should be noted that that EDF enjoys the considerable advantage that its domestic market is close to Spain. EDF has a near-monopoly of generating capacity in France. It is almost impossible for foreign competitors to buy electricity from EDF on the French market. They are thus obliged to purchase electricity in other countries and effect the necessary transactions to ensure its transmission via the French national grid to the French/Spanish border. According to the replies given by competitors in the context of the investigation conducted by the Commission's departments, there seem to be regular connection problems in the south of France, which is why RTE often requires grid users to pay congestion fees or surcharges. Foreign suppliers therefore have to take these costs into account when making offers, which is particularly complex when supply contracts are concluded several months in advance. This diminishes the economic viability of such operators' electricity exports. EDF, on the other hand, is in a more favourable position, as it has a comparative advantage in terms of access to information and having its own production system, enabling it to avoid or minimise congestion surcharges and thus to make cheaper offers which can be anticipated further in advance.

3. ***Prior to the proposed merger, there were clear incentives for EDF to increase its exports to Spain and to favour increased interconnection capacity to this end***

(81) EDF's past behaviour is indicative of its desire to increase its presence on the Spanish market. The investigation has shown that the French undertaking has given unmistakable signs of its wish to increase the capacity of the interconnection between France and Spain with a view to enabling it more easily to step up its exports to the Iberian peninsula. It should not be overlooked that the signing of the initial Aragon-Cazaril agreement shows that EDF had included among its strategic objectives the plan to build a third interconnector at the French/Spanish border which could increase interconnection capacity by 1 200 MW. EDF has also contributed considerable human and financial resources to the project at each stage of its development (planning, engineering, licensing procedures) for nearly a decade. The blocking of the project in 1996 does not mean that EDF had no economic interest in substantially increasing interconnection capacity with Spain. The features of the Spanish market and of EDF itself, as well as its position on the French market, were favourable to that interest. The reasons for the blocking, which have already been stated, had nothing to do with the French producer's incentives, but with certain factors unconnected with it which led the French government to stop the project. Last but not least, the signing of a new agreement in 1997 confirmed EDF's desire to bring about a large increase in interconnection between France and Spain and, in so doing, to boost its position on the Spanish market by significantly increasing its exports. Furthermore, EDF-RTE has undertaken to upgrade the Hernani-Cantegrit line by 300 MW and, in conjunction with REE, is looking into the feasibility of a further increase of 1 200 MW. All this, together with the upgrading of the Vic interconnector in Spain, which is being undertaken by REE (involving a further 200 MW), could (with the appropriate political and economic stimulus) lead to total interconnection capacity of somewhere between 3 800 and 4 000 MW by 2007. The market study carried out by the Commission has also shown that REE is highly interested in increasing the commercial capacity of French-Spanish interconnection to at least 6 000 MW.

(82) Previous recitals have underlined the incentives for operators not established in Spain to export electricity to the Spanish market. It has also been seen how EDF is in a particularly privileged position which makes it, as a foreign operator exporting to Spain, the main potential competitor of the Spanish electricity generators.

(83) As explained below, not only does EDF have the necessary potential for increasing its exports to Spain, even without the proposed merger it also has powerful incentives for effectively increasing its exports and thereby strengthening its position on the Spanish market.

(84) First, electricity prices are higher in Spain than in France, and EDF has surplus generating capacity. A comparison of price levels in Spain and France in recent years shows that prices charged to eligible consumers in Spain are usually over 30 % higher, on average, than those applied in France. Only during exceptionally rainy periods, such as in the early months of 2001, do prices in Spain fall to levels close to those prevailing on the French market. Taking EDF's surplus generating capacity also into account, it would clearly be in its interest substantially to increase its electricity exports to the Spanish market.

(85) Second, EDF's pan-European strategy requires it to be able to supply international customers established in Spain. In its Decision in EDF/EnBW ([37]), the Commission already referred to the strategy developed by EDF in recent years, which places it in a unique position to offer genuinely pan-European supplies to industrial and commercial consumers. That strategy relies, among other things, on building up EDF's position on the Spanish market.

(86) Given the limited amount of interconnection capacity currently available between France and Spain, that capacity clearly has to expand before EDF can significantly increase its exports to the Spanish market. Even under the existing capacity allocation system, which allows EDF to use most of the available commercial capacity (around [70 to 80]* %), EDF cannot achieve a significant presence on the Spanish market as a foreign exporting operator without a large increase in interconnection capacity between France and Spain.

(87) As noted earlier, EDF has in the past given signs of its desire to increase interconnection capacity between the two countries, not only by supporting the upgrading of existing interconnectors but also by including the Aragon-Cazaril project among its strategic priorities. Furthermore, although initial work on that project was carried out before the electricity market liberalisation process began, the incentives justifying EDF's strategy of expanding its activities in Spain as an electricity exporter have not only not diminished but have increased, as stressed in the foregoing.

4. ***A substantial increase in exports to Spain, once interconnection capacity has been expanded, would give rise to greater competition in the Spanish electricity market, thereby weakening the existing jointly dominant position***

(88) In view of the present difficulties involved in building new generating capacity in Spain to offer an alternative to the capacity controlled by the four main Spanish generating companies ([38]), the main route for boosting competition on Spain's oligopolistic electricity market is to increase substantially the volume of electricity exports from other European countries to the Spanish market.

(89) The above finding is in line with the outcome of the analysis carried out by the Spanish Competition Court in its assessment of the Unión Eléctrica Fenosa/Hidroeléctrica del Cantábrico merger: 'the electricity generating system relies on the possibility of offering electricity to the pool under conditions of free competition. Suppliers can make their offers with electricity from generating plant located in Spain or with electricity imported from foreign systems. Imported electricity competes in the pool on an equal footing with energy generated within the national system. To sum up, competition with operators already present in the Spanish system could come not only from new generators but also from importers. This route would also enable the introduction of competition to be speeded up, since it would not be necessary to wait for several years as in the case of new power stations' ([39]) (emphasis added). From the findings of the Spanish Competition Court it may, therefore, be concluded that exports of electricity to the Spanish market are a particularly well-suited instrument, when

([37]) Case COMP/M.1853 — EDF/EnBW.

([38]) Report C-60/00 on the Endesa/Iberdrola merger.
Report C-54/00 on the Unión Eléctrica Fenosa/Hidroeléctrica del Cantábrico merger.

([39]) Report C-54/00 on the Unión Eléctrica Fenosa/Hidroeléctrica del Cantábrico merger.

increasing levels of competition in that market. This tells against the notifying parties' assertions that the statement of objections made too much of the role to be played by exports, in particular those from EDF.

(90) At present, however, the limitations stemming from the shortage of existing interconnection capacity between Spain and other European countries outside the Iberian peninsula prevent exports to the Spanish market playing an active role in promoting competition on the Spanish electricity market. In particular, the share of total electricity demand in Spain which is met by imports across the French/Spanish border stands at somewhere between 3,5 % and 4 % (around 8 000 GWh). But this could change in future given the strategic interest of EDF and other European operators in substantially increasing exports to Spain.

(91) A relatively large increase in electricity exports to Spain would indeed have notable effects both on the level of prices charged on the Spanish wholesale market and on the existing oligopolistic status quo on that market. Foreign operators would thus gain readier entry to the organised market and easier access to direct bilateral contracts, while the supply of electricity on the Spanish market would be increased. All this would reduce the isolation of the Spanish electricity market, thereby imparting considerable impetus to competitive forces on that market and pushing electricity prices down.

(92) Such an increase in supply on the wholesale market would lead not only to a reduction in the relative market shares of the two main Spanish operators but also, and more importantly, to a weakening of their respective power to set prices in the pool. Provided that exports to the Spanish wholesale market consist of low-cost electricity (for example electricity generated by nuclear power stations in France), those exports would displace offers of more expensive electricity in the formation of the marginal price, thereby introducing competitive forces into the market. The situation described, in which sales by foreign operators contribute to a lowering of prices, either directly (setting the marginal price) or indirectly (forcing the main operators to offer electricity at lower prices), would of course take place to a greater extent the greater the volume of exports to the Spanish market.

(93) The investigation has shown that the recent evolution of the electricity market confirms the validity of the above analysis. In particular, the fall in prices that took place on the Spanish market between 2000 and 2001 as a result of the increase in hydroelectric power generation, illustrates the effects of an increase in the amount of low-priced energy offered in the pool. The sharp increase in hydroelectric power generation observed in Spain between November 2000 and March 2001 led to a significant drop in the price of electricity, by up to 42 % ([40]). Taking a longer period as a reference basis, if equivalent periods of 13 consecutive months (March 1999/March 2000 and March 2000/March 2001) are examined, an increase in the supply of hydroelectricity of 22 811 GW/h caused electricity prices to fall by a little over 30 % over the time periods observed.

(94) The abovementioned increase in the supply of electricity is quantitatively and qualitatively comparable to that which would result from a substantial increase in the interconnection capacity between France and Spain. Firstly, given that with current capacity (1 100 MW) exports from France total 8 TW/h, an extra 3 000 MW, i.e. a situation in which there would be a total of 4 000 MW of commercial interconnection capacity, would lead to an increase in supply of some 20 to 24 TW/h per year. Secondly, from a qualitative standpoint, the energy exported to Spain could be expected to be electricity generated by plants with low marginal costs, which could therefore be supplied to the Spanish wholesale market at lower prices than those traditionally prevailing on that market.

(95) Recent developments observed on the Spanish market, and in particular the parallel with the increase in hydroelectric power production, make it possible to conclude, therefore, that an increase in interconnection capacity, with the attendant growth in electricity exports to Spain, would significantly promote correct price formation on the organised market (particularly at times of low or average demand, when supply from Endesa and Iberdrola would not be necessary to meet demand) and under bilateral contracts and would in particular bring about a substantial reduction in prices on the Spanish wholesale market, thereby rendering it more accessible, boosting competition and weakening the existing duopolistic dominance. Increasing interconnection capacity would, finally, create a large capacity reserve, in other words an excess of supply in relation to demand, in an electrical system in which a good is traded that cannot be stored.

(96) In their responses to the statement of objections, the Parties argue that this analysis is an oversimplification. However, they fail to provide any reliable data establishing that increased interconnection would not be accompanied by a drop in prices on the Spanish market, as happened in the situation previously analysed, other

([40]) The average price of electricity on the generating market fell from ESP 7,46 (EUR 0,04) in March 2000 to ESP 4,31 (EUR 0,03) in March 2001.

than EnBW's assertion that there is no link whatsoever between the capacity ratio and electricity prices. In any case, this assertion is not even borne out by EnBW's own figures as regards price forecasts for 2002; disregarding Belgium and the Netherlands, in the countries where the interconnection capacity levels in relation to demand at peak times are less than 15 % (Italy, Portugal and Spain) the prices are higher than in the other countries where the levels are over 15 % (Germany, Switzerland, France and Austria) ([41]).

5. ***The operation cannot be conducive to competition unless French-Spanish interconnection capacity is increased***

(97) In the reply to the statement of objections, the notifying parties state that the operation under consideration is conducive to competition vis-à-vis Endesa and Iberdrola. Specifically, EnBW argues that following the merger 'the dominant position of the members of the duopoly will be weakened and price competition will increase', principally owing to EnBW's ability to support Hidrocantábrico with its technical know-how and to the fact that, as a member of the EDF group, Hidrocantábrico would be eligible for financial support and better credit rates, enabling it to make successful acquisitions or build new power plants.

(98) In this regard, the Commission would again point out that, as previously shown, the price level on the Spanish market is affected by increases in the amount of cheap energy supplied in the pool. An anticipated change in the ownership of a plant such as Viesgo, owned by Endesa, accounting for 5 % of existing generating capacity in Spain (+ 2 500 MW) entails neither an increase in cheap energy supplied to the pool nor a substantial decrease in Endesa's market share. Furthermore, it should not be forgotten that (unless there is an increase in interconnection capacity) the creation of a structural link of control between EDF and Hidrocantábrico entails the disappearance of the main source of outside competition on the Spanish market. These points are considered in more detail below.

6. ***The planned increase in generating capacity in Spain will not bring about the disappearance of the Endesa-Iberdrola duopoly***

(99) While it may well be the case, as stated above, that Hidrocantábrico's generating capacity could be boosted in the coming years (improving its position on the Spanish market), it should be borne in mind that, despite the legal ban, cited by EnBW, preventing the members of the duopoly from investing in new capacity for the time being ([42]), the two companies are also set to open new generating plants in the near future. For example, there is San Roque (Endesa) with installed capacity of 400 MW, Besós (Endesa and Gas Natural) with installed capacity of 800 MW, Castellón (Iberdrola, Repsol and BP) with installed capacity of 800 MW, Castejón (Iberdrola) with installed capacity of 400 MW, all scheduled to go into operation in 2002. This means that the likely generation shares for Endesa and Iberdrola over the coming years will probably not differ substantially from the current shares, at least not to the point of thereby putting the existing duopoly at risk.

(100) Finally, although according to figures at the Commission's disposal ([43]), the new plants planned are set to increase generating capacity by about 10 to 15 % by 2005, given the likely increase in demand and the cost of the energy generated (much higher than energy produced in France and other European countries), the increase in energy supplied to the pool from the new plants is not expected to have any effect on prices ([44]) or on the ability of Endesa and Iberdrola to set prices. It should not be forgotten that energy from combined cycle plants (which is basically where the additional energy to be supplied to the pool in the coming years will come from) is much more expensive to produce than the nuclear energy produced by EDF and that, as stated above, a large number of the new combined cycle plants expected to go into operation between now and 2005 will be entirely or partly in the hands of Endesa and Iberdrola.

([41]) Between 37,5 % (Switzerland and Austria compared to Spain and Portugal) and 90 % (France compared to Italy).

([42]) Article 16 of Royal Decree-Law No 6/2000 of 23 June 2000 provides that 'electricity producers whose installed generating capacity under the ordinary scheme throughout mainland Spain, on the date of entry into force of this Decree-Law, exceeds 40 % of the total [Endesa]* may not increase their installed capacity for a period of five years. For producers whose share of such installed capacity is less than 40 % but more than 20 % [Iberdrola]*, the period shall be three years'. Hidrocantábrico could take advantage of the above restrictions in order to gain extra market share, in particular in view of the fact that, according to data compiled by the Spanish National Energy Commission, electricity consumption is expected to grow by a total of around 12 % between 2001 and 2005.

([43]) Source: Spanish Ministry of Economic Affairs.

([44]) In its reply to the statement of objections, EnBW states that an extra 7 500 MW of generating capacity should be operational by 2003. According to the Commission's information, the additional installed capacity to be operational by 2003 would be less than 5 000 MW.

(101) Therefore, although the planned increase in generating capacity, in particular as a result of new operators entering the Spanish wholesale electricity market, may improve competition in a clearly limited way, it is unlikely to bring about the disappearance of the Endesa/Iberdrola duopoly. The entry of EDF through Hidrocantábrico together with a blocking of the increase in French-Spanish interconnection capacity would, therefore, reinforce the duopoly state of affairs (as it stands and as it is forecast for the future).

7. ***Following the proposed merger, there will no longer be incentives for EDF to push for a substantial increase in interconnection capacity between France and Spain***

(102) Following implementation of the proposed merger, it is likely that EDF's strategic position with regard to the Spanish market will alter fundamentally and its medium- and long-term commercial goals will undergo significant change.

(a) **EDF will acquire a large amount of generating capacity in Spain and, as a result, a major presence on the Spanish electricity market**

(103) Through the operation, EDF will acquire joint control of Hidrocantábrico, which has approximately a 5 % share of total installed generating capacity in Spain. Hidrocantábrico has furthermore traditionally acted as a net seller of electricity on the wholesale market. In particular, its share of sales in the daily pool market exceeded [5 to 10]* % in 2000. To this should be added EDF's activities as a foreign operator, i.e. its exports to the Spanish market, which represented some [< 5]* % of sales on the daily market during the same period.

(104) EDF will, following the merger, control, either directly or jointly and indirectly, a volume of electricity on the Spanish market corresponding to around [9 to 12]* % of sales on the daily wholesale market. This will give it a major presence on the Spanish electricity market, close to that of the third operator (Unión Fenosa) but still far behind the two dominant operators (Endesa and Iberdrola).

(105) EDF's position on the Spanish market could also be strengthened in future, albeit to a limited extent, in so far as Hidrocantábrico acquires a higher profile on the generating market, either by building new power stations ([45]) (taking advantage of the legal restrictions on the construction of new capacity by Endesa and Iberdrola) or through a policy of acquiring generating capacity. In any event, the expansion margin in question will not foreseeably place EDF in a position to put an end to the duopoly formed by the two main existing operators. On the other hand, and as spelled out in greater detail below, it is unlikely that there will be economic and commercial incentives for EDF to adopt behaviour that would cause a large fall in the existing level of prices on the Spanish wholesale market.

EDF's financial stake in Hidrocantábrico

(106) During the investigation, the Parties argued that, although there can be no doubt that EDF will acquire joint control of Hidrocantábrico as a result of the operation, its financial stake in that company will remain limited in so far as EDF owns 34,5 % of EnBW, which in turn has a 50 % stake in Ferroatlántica, which in turn owns around 60 % of Hidrocantábrico. On this basis they claim that EDF will not be greatly involved in the running of Hidrocantábrico, something that will be reflected in adoption of the strategic decisions referred to in this Decision.

(107) It has firstly to be stressed that EDF will acquire, albeit joint and indirect, control over Hidrocantábrico. This suggests that, apart from the concrete financial incentives, by acquiring a stake in a firm operating in the same sector in a market which is extremely attractive to it EDF is pursuing a number of strategic and industrial goals (acquisition of a stake in REE's equity ([46]), resulting in additional information about the management of the Spanish transmission system; positioning itself as a pan-European supplier; opportunities for exporting to Morocco and Portugal without any need to increase interconnections between Spain and France).

(108) In addition to this initial finding and making a dynamic analysis, the investigation has revealed that EDF's financial stake in Hidrocantábrico can and will in all likelihood be stepped up in the near future. This increase may take several forms, involving, for example, Ferroatlántica holding a larger financial stake in Hidrocantábrico, or EnBW or EDF directly acquiring shares in Hidrocantábrico, or EnBW holding a larger financial stake in Ferroatlántica, or EDF holding a larger financial stake

([45]) In particular, Hidrocantábrico has a permit to build a plant in Navarre with an installed capacity of 400 MW.

([46]) Endesa, Iberdrola, Unión Fenosa and Hidrocantábrico each hold 10 % of REE's equity.

in EnBW. As regards the Hidrocantábrico shares not acquired by Ferroatlántica in the notified operation, it should be pointed out that the operation took place at a time when there were as many as three takeover bids to gain control of the electricity company (although one of them was subsequently withdrawn). The interests of the remaining Hidrocantábrico shareholders could, therefore, change after consolidation of the control situation following the notified operation, which could put EDF in a position to increase its stake in Hidrocantábrico (directly or indirectly). Furthermore, the inquiry has revealed that EDF also has clear strategic economic and financial incentives for increasing its stake in Hidrocantábrico. If EDF were to take a larger financial stake in Hidrocantábrico, it would increase its share in the profits from the running of the company, and, as explained below, this increase would be greater than the profits which it would obtain through stepping up interconnection capacity.

(109) At all events, the inquiry has shown, as explained below, that even if EDF and Hidrocantábrico exercise joint control with an indirect financial stake of around 10 %, EDF will have fewer incentives to step up interconnection capacity than prior to the merger, when EDF had no generating capacity in Spain.

(b) **The substantial strengthening of EDF's position on the Spanish market will be achieved without any increase in the supply of electricity in Spain**

(110) As stated earlier, EDF will as a result of the operation acquire joint control of Hidrocantábrico, whose electricity generating capacity stands at around 2 175 MW. As already mentioned, that capacity may also be increased in future.

(111) In order to succeed in placing on the Spanish market an equivalent amount of additional electricity as a foreign exporter, in other words through exports from France, EDF would first have to secure a significant increase in interconnection capacity between France and Spain. Even if there were no change in the present situation, in which EDF generally has the use of some [70 to 80]* % of existing commercial interconnection capacity, the present interconnection would have to be increased by at least around 3 000 MW, bringing total commercial interconnection capacity to over 4 000 MW. This figure is a conservative estimate, since if a lower interconnector utilisation rate and some expansion in Hidrocantábrico's capacity are assumed the interconnection capacity required would be substantially higher.

(112) Such an increase in interconnection capacity and consequently in exports to Spain could be expected to have a definite impact on prices on the Spanish wholesale market, as explained earlier. Increased interconnection capacity would furthermore benefit not only EDF but also other European operators interested in exporting to the Spanish market.

(113) By means of the proposed operation, on the other hand, EDF will acquire a substantial presence on the Spanish market without this resulting in an increase in the volume of electricity offered in the pool and without threatening the situation of joint dominance and high prices currently prevailing in Spain.

(c) **EDF will probably be interested in maintaining the relative isolation of the Spanish electricity market in order to prevent new competitors challenging the current price level**

(114) EDF will cease being a mere foreign operator exporting to Spain and will gain joint control of one of the operators on the Spanish market. The combination of (joint) control over a sizeable amount of domestic generating capacity on the Spanish market, as a result of the proposed operation, with use of most of the existing interconnection capacity can be expected to bring about a qualitative shift in EDF's strategic interests.

(115) EDF will in this way be joining forces with an operator which is already well established on the Spanish market and has its own production capacity. The specific features of the Spanish company's generation mix (electricity produced essentially by thermal power stations) also appear to dovetail neatly with those of EDF (essentially nuclear power).

(116) The investigation shows that, following the merger, EDF will logically be more interested in exploiting its comfortable situation on the oligopolistic Spanish market, taking advantage of the excessive prices prevailing in the pool, than in boosting exports to Spain by increasing interconnection capacity. This is because a substantial increase in interconnection capacity and the resultant increase in imports into the pool would lead to a substantial drop in pool prices, as explained above. This would have an impact on Hidrocantábrico's profits (and, indirectly, on those of EDF). In view of Hidrocantábrico's generation mix, the abovementioned reduction in the prices at which it sells electricity would probably also be accompanied by a relative reduction in the amount sold, particularly as regards electricity produced at higher marginal costs. Such reductions in the amounts

sold by Hidrocantábrico and in the pool prices would certainly lower the profits which EDF derived from Hidrocantábrico's activities, and, as the investigation has shown, they would not be compensated for by an increase in EDF's exports to the Spanish market, which, in their turn, would be paid for at the lower marginal price resulting from the opening up of the market as a consequence of the substantial increase in interconnection capacity.

(117) It will certainly be advantageous for EDF to maintain the existing status quo with high prices enabling it to maximise profits and recoup its investment. On account of its joint control of EnBW, EDF will have a clear interest in ensuring that the assets acquired in the operation generate profits offsetting the costs incurred in making the investment, and this can be achieved by maintaining the high level of prices in the pool. In view of the above, EDF will be able to maximise its profits not by substantially increasing interconnection capacity, but by raising by a relatively limited amount Hidrocantábrico's generating capacity and its sales on the Spanish market, which would not jeopardise current pool prices.

(118) By expanding Hidrocantábrico's generating capacity in Spain, EDF will maintain total control over the repercussions of its decision on the capacity structure of the Spanish market, whilst, as noted above, the increased interconnection capacity would benefit not only EDF, but also other operators based outside the Iberian peninsula, with which EDF would have to compete in order to obtain substantial benefits from the new interconnection capacity (particularly if there were a system of bids for access to that capacity). Once EDF has established a significant presence in Spain, it will have an interest in maintaining a barrier to entry in the form of a manifestly inadequate interconnection capacity, thereby ensuring that other operators based in Member States outside the Iberian peninsula do not enjoy increased opportunities to step up their exports to the Spanish market, with the impact which that would have on market prices. It should be stressed that the decision to oppose an increase in interconnections does not rule out alternative strategies for EDF's growth on the Spanish market involving an increase in Hidrocantábrico's generating capacity, as noted above. In other words, failure to increase interconnection capacity is a means of maintaining entry barriers to exports to Spain for operators not based there, without significantly affecting EDF's alternative strategies.

(119) In the light of the factors outlined above, it can therefore be concluded that the most advantageous strategy for EDF, following implementation of the merger, will be to align its commercial strategy on that of the other Spanish electricity companies, within the framework of the existing duopoly. EDF, like the other generators, will earn large profits as long as prices remain high in the pool. EDF, as an exporter to Spain, will also continue to benefit from the higher level of prices in Spain than in France.

(120) Under the existing system of capacity allocation, EDF will continue to take advantage of the possibility of using the bulk of interconnection capacity for its own exports to the Spanish market. Even if the agreed change in the allocation system (which, in principle, will not affect the quantities laid down in the contract between EDF and REE) were to be implemented in the near future, it is safe to assume that EDF will continue to have access to a large share of the interconnection capacity, which it could use in order to make large profits on electricity exported to Spain. The existing interconnection capacity will in fact prevent effective competition developing on the wholesale electricity market in Spain with operators established in other countries. As things currently stand, the role played on the Spanish market by such operators, with the exception of EDF, is minimal. If interconnection capacity is not increased substantially in the years ahead, the role played by operators established outside Spain will continue to be marginal, with the result that Spanish operators, and now also EDF, would be able to continue fairly safely selling electricity on the Spanish market without being exposed to effective competition from foreign operators.

(121) Under such circumstances it would be highly unlikely that other competitors not established in Spain could successfully compete on the Spanish market, given the limited interconnection capacity, even if the new capacity allocation system was to grant them greater access thereto. On the basis of the figures quoted earlier, available commercial capacity on the French-Spanish interconnection amounts approximately to [500 to 600]* MW (total commercial capacity of 1 100 MW minus the [500 to 600]* MW reserved under the long-term contract between EDF and REE). Account also has to be taken of the fact that there is no guaranteed commercial interconnection capacity for third parties since the only commercial capacity guarantee is reserved for the EDF-REE contract. Even assuming that the allocation mechanism were altered so as to offer foreign suppliers greater interconnection capacity, the total amount of imported electricity offered to the Spanish wholesale market would represent a market share of less than [5]* %. Being on such a small scale, those offers would not be able to significantly influence prices in the pool.

(122) In their responses to the statement of objections the notifying parties claim that the Commission cannot prove that, in purchasing Hidrocantábrico, EDF would have no incentive to compete through imports: Grupo Villar Mir states that 'since EDF would only be purchasing a minimal stake in Hidrocantábrico, it would be surprising if its shares were sufficiently profitable to compensate EDF for the revenue it would forfeit by giving up the option of importing electricity.' In response to such claims the Commission would refer first and foremost to the previous section, which sets out the issue of EDF's indirect financial stake in Hidrocantábrico and analyses the incentives for a future increase in that stake. Moreover, the Commission has never claimed that EDF is going to stop exporting to Spain; what it has questioned is whether EDF will have any incentives after the merger to promote a substantial increase in interconnection capacity which could bring down prices on the Spanish market and which could also benefit operators other than EDF (operators without a significant generating capacity in Spain, which therefore have different business goals).

8. ***EDF/RTE will be in a position to prevent a substantial increase in interconnection capacity between France and Spain***

(123) During the investigation, EDF and EDF/RTE stated that, under French law, it was for the latter, as the operator of the French grid, to decide on any measure aimed at increasing, on the French side, interconnection capacity with Spain. Both entities stressed EDF/RTE's financial and operational independence from EDF and its regulatory obligations with regard to operation of the French grid. In short, they argued that EDF had no power over decisions on whether or not to increase interconnection capacity.

(124) EDF/RTE is indeed entrusted with the task of operating the electricity grid in France, which includes taking decisions on issues to do with allocating and increasing the interconnection capacity between France and Spain by either upgrading existing lines or planning new ones. In carrying out these tasks, EDF/RTE claims that it enjoys functional and operational independence and has resources of various kinds necessary for fulfilling them.

(125) It must be noted, however, that from a legal and organisational standpoint EDF/RTE is a division of EDF and has no separate legal personality ([47]). Second, the Director of EDF/RTE is appointed by the French Energy Minister from a shortlist of candidates submitted up by the Chairman of EDF. In any event, and even if the measures taken to ensure EDF/RTE's independence from EDF are accepted as effective, the fact remains that both form part of one and the same economic unit, an industrial group belonging to the French State, which in the final analysis controls both EDF and EDF/RTE. Under such circumstances, the taking of decisions on key issues or of other types of strategic decisions for the operation of EDF/RTE is clearly subordinated to the French authorities, and in particular the Energy Ministry, without prejudice to the powers of the electricity regulator, the Commission de régulation de l'électricité (CRE).

(126) It is the French State which is ultimately responsible for decisions on interconnections. In particular, EDF/RTE is required to submit the plan for the development of the public grid every two years to the Minister for Energy ([48]). The plan must be approved by the Minister after the CRE has given its opinion. The owner of EDF, the French State, therefore has the last word on whether or not interconnection capacity is to be increased, a decision which, as already mentioned, directly affects EDF's strategic interests.

(127) It is not unreasonable to conclude, in short, without thereby denying the autonomous operation and independent management of EDF/RTE, that interconnection capacity between France and Spain will not be substantially increased if this might be clearly detrimental to EDF's interests and, consequently, those of its owner, the French State, which holds the power to take the final decision on the issue.

VI. COMMITMENTS MADE BY EDF AND EDF/RTE

(128) EDF/RTE and EDF have offered to make commitments to resolve the problems of competition identified by the Commission. These commitments, which have the French Government's explicit support, are attached to this Decision (Annexes I and II respectively). In brief, they are as follows:

([47]) Article 12 of Law No 2000-108 of 10 February 2000 provides that 'Within Electricité de France, the department operating the public electricity transmission network shall carry out its tasks ...' (emphasis added).

([48]) Article 14 of Law No 2000-108 of 10 February 2000.

COMMITMENTS OFFERED BY EDF/RTE

(129) EDF/RTE commits itself to adopting the measures and carrying out the work necessary to increase the commercial interconnection capacity between France and Spain in the following stages:

— an additional 300 MW, through technical improvements to the existing lines by the end of 2002,

— an additional 1 200 MW through the construction of a new line [...]*. This additional capacity could be increased to [...]* after the technical and economic feasibility is checked out,

— an additional 1 200 MW through the construction of an alternative line, the doubling of an existing line or the reinforcement of the French lines in the medium term, provided that technical-economic feasibility studies to be drawn up by the end of 2002 justify such construction work.

(130) The increase in commercial capacity must result in an available capacity equivalent to 75 % of the additional increase for 85 % of the hours of the year.

(131) The above deadlines can be extended if the construction work cannot be completed for reasons not attributable to EDF/RTE. However, as regards the third stage of the interconnection capacity increase, the Commission would point out that, although the precise timetable for the work is to come out of the feasibility studies referred to, the commitments nonetheless include a reference timescale (the construction work must be carried out 'in the medium term'). The timescale will have to be finalised in accordance with the actual project to be carried out (construction of a new line, doubling or reinforcement of existing lines). According to the investigation carried out by the Commission, the reference timescale will have to be between four and eight years following conclusion of the studies referred to.

(132) One or more third parties will be appointed to check compliance with the commitments, and must be approved by the Commission. The third party will need to receive from EDF/RTE all the information and assistance necessary to carry out its task and will provide regular progress reports on compliance with the commitments, as well as being able to make proposals to the Commission for any measures deemed necessary to ensure such compliance, including the preparation of alternative and/or additional feasibility studies to those presented by EDF/RTE. The third party will also have to take account, in carrying out the task entrusted to it, of any relevant information or studies originating from interested parties, in particular the National Energy Commission or REE.

COMMITMENTS OFFERED BY EDF

(133) In order to resolve the problems of competition arising from its acquisition of control over Hidrocantábrico, EDF undertakes to support an increase in interconnection between France and Spain and, in particular, fulfilment of the abovementioned commitments by EDF/RTE in the stages described.

(134) To do this, it commits itself to taking part in the work of the users' group set up by EDF/RTE and to providing RTE with any information at its disposal which could be useful in conducting technical and economic studies on the construction of new lines or other means of boosting interconnections between France and Spain.

(135) EDF also commits itself to paying the third party or parties responsible for checking compliance with the commitments entered into by EDF/RTE, if this should be necessary.

EVALUATION

(136) The commitments described above will reduce the isolation of the Spanish electricity market in the future, significantly increasing the chances that operators based outside the Iberian peninsula can compete on the Spanish market. The increase in interconnection levels will make it possible to step up electricity exports to the Spanish market, which will have a positive effect on the level of pool prices and the capacity of the members of the existing duopoly to fix those prices.

(137) The commitments offered by EDF/RTE and EDF are therefore sufficient to avoid strengthening the dominant position of Endesa and Iberdrola, which would be based, after the merger, on the probable maintenance in the future of the present electrical interconnection capacity between France and Spain, which is clearly inadequate.

(138) Finally, the Commission wishes to make it clear that, despite the claims made by EDF/RTE in its submission (specifically in the preliminary statement), the company is an undertaking concerned within the meaning of Article 8(2) of the Merger Regulation and, as such, is capable of entering into commitments to ensure that the notified operation is compatible with the common market. The reason for this is that, despite the claim that EDF/RTE is independent of EDF, both entities belong to one and the same business group owned by the French State, as explained above.

VII. **CONCLUSION**

(139) Having regard to the above, provided that the commitments laid down in the Annexes to this Decision are observed in full, the proposed merger will neither create nor strengthen a dominant position as a result of which effective competition would be impeded in a substantial part of the common market. The operation is therefore declared compatible with the common market and with the functioning of the EEA, in accordance with Article 8(2) of the Merger Regulation, provided that the Parties abide by the following commitments:

(a) to increase interconnection capacity as laid down in section 2 of Annex I (subject to review by the Commission in accordance with section 4 of Annex I);

(b) to comply with any measures required by the Commission as recommended by the official(s) charged with monitoring the implementation of the commitments to ensure that the Parties abide by them as stated in section 3(9) of Annex I.

(140) The abovementioned aspects of the commitments constitute conditions, since only if they are fulfilled (notwithstanding any changes made further to section 4 of Annex I) can there be a structural change in the wholesale electricity market in Spain. The other aspects of the commitment are duties, since they are practical stages necessary to see through the structural change aimed at. This refers, in particular, to the provisions concerning the official(s) charged with monitoring the implementation of the commitments (section 3 of Annex I, apart from the stipulation under recital 139(b)),

HAS ADOPTED THIS DECISION:

Article 1

The notified operation, involving the acquisition of joint control of Hidroeléctrica del Cantábrico SA by the Spanish firm Grupo Villar Mir and the German company Energie Baden-Württemberg, the latter jointly controlled by the French firm Electricité de France and the German firm Zweckverband Oberschwäbische Elektrizitätswerke, is hereby declared compatible with the common market and with the functioning of the EEA Agreement, provided that the commitments set out in Annexes I and II are respected in full.

Article 2

This Decision is addressed to:

Ferroatlántica SL
Pº de la Castellana 86, 7ª
E28046 Madrid

Energie Baden-Württemberg AG (EnBW)
Durlacher Alle 93
D76131 Karlsruhe

Done at Brussels, 26 September 2001.

For the Commission

Mario MONTI

Member of the Commission

ANNEX I

COMMITMENTS

The full Spanish text of the commitments referred to in Article 1 may be consulted on the following Commission website:

http://europa.eu.int/comm/competition/index_en.html

ANNEX II

COMMITMENTS

The full Spanish text of the commitments referred to in Article 1 may be consulted on the following Commission website:

http://europa.eu.int/comm/competition/index_en.html