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Dear Ms Maria Jasper,

#### **Response to Consultation: New Competition Tool**

Iberdrola, a Spain-based international energy group and the leading producer of wind power in the world, welcomes the opportunity to participate in the consultation regarding the **New Competition Tool** ("NCT"). However, given the limited direct experience of the company in analytics involving the digital services market, Iberdrola opts to submit its response focused on key legal issues of the proposals around the NCT and its potential extension to other sectors.

This submission addresses the issues raised in the Commission's Questionnaire and should be read together with Iberdrola's 29 June 2020 submission regarding the Inception Impact Assessment.

#### **Section B of the Questionnaire – Structural competition problems**

It is hardly a novel concept that certain market features may give rise to structural competition concerns. The drafters of the treaty were no doubt aware of this issue. Nevertheless, Articles 101 and 102 were not drafted to capture such concerns, but were purposefully designed to address other, distinct types of competition issues.

Instead, structural competition concerns have traditionally been dealt with by sector regulation. In some sectors, such as telecommunications<sup>1</sup>, generally applicable statutory obligations are complemented by the possibility to impose specific and individual remedies on undertakings that control unique infrastructures or otherwise wield significant market power. Sector regulation is not exclusively focused on competition concerns but will also serve broader policy goals (e.g. in the energy sector: security of supply, consumer protection and sustainability<sup>2</sup>). The balancing of such policy goals is best left to the legislator.

Competition law is in principle agnostic to other policy goals. Its purpose is to address competition concerns to the extent they are brought about by certain unlawful conduct imputable to

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undertakings, triggering an abnormal functioning of the market and/ or price distortions prejudicing consumers.

In Iberdrola's view, there is no compelling reason to replace the time-tested division of functions between sector regulation and competition law.

Iberdrola notes that the structural competition concerns mentioned in the IIA as well as the "market features" and "scenarios" discussed in the Questionnaire mainly concern digital services markets. The EU has already adopted certain legislation relating to this sector (e.g. Regulation 2019/1150<sup>3</sup>) and the *ex ante* regulation of the future in this sector (the "Digital Services Act") is the subject of a parallel public consultation.<sup>4</sup> Supervision of this regulation is meant to be carried out at Member State level. Introducing the NCT at EU level to enable the Commission to intervene against structural competition concerns in the same sector will inevitably trigger overlaps and conflicts with national sector-specific regulation.

However, since Options 1 and 3 for the NCT have a horizontal scope, the risk for overlaps and conflicts would extend also to other regulated markets such as., for example, energy and telecommunications, which are already subject to a tested competition framework, ensuring certainty for market development. The open-textured nature of the possibility to intervene *ex post* under the NCT (in particular in Option 3) would create significant regulatory instability in these sectors and would risk undermining investment incentives. This is a major concern for a company like Iberdrola that is active in many regulated energy markets.

#### **Sections C and D of the Questionnaire - Assessment of policy options**

For the reasons set out above, Iberdrola urges the Commission to continue the work relating to the NCT within the context of the on-going review of the regulation applicable to the digital services sector. In any event, Options 1 and 3 should be rejected, to minimise the risk of overlaps and conflicts with sector regulation.

#### **Section D of the Questionnaire: Institutional set-up**

If the NCT is adopted, whether as part of a sector-specific regime or as a horizontally applicable tool, it would be important to introduce, as well as a detailed definition of its technical nature and evidence of a solid legal support, clear legal tests or thresholds: (i) for starting an investigation and adopting binding investigative measures, and (ii) for imposing remedies at the end of the investigation.

A decision to adopt binding investigative measures is not a mere intermediate decision but has direct legal effects and should be appealable. The experience from UK market investigations and EU sector inquiries show that such investigations are very onerous for the affected undertakings. It is important that the EU courts have the power to step in at an early stage and put an end to any "fishing expedition". In Iberdrola's view, it would also be disproportionate to allow for so-called "dawn-raids" under the NCT.



Any decision at the end of the investigation to impose remedies carries with it a risk of stifling investment, innovation and change. Any regulatory intervention that perpetuates inefficient market structures would restrict dynamic competition and be radically incompatible with the aims of the treaty. The substantive test must be designed to minimise these risks and ensure the same legal guarantees as with the processes currently in place. The test should also be clear and exacting enough to ensure that such decisions are only imposed when there is a robust theory of long-term harm based on competition grounds (eschewing other policy goals). The burden to prove that the constituent elements of the substantive test are met shall rest with the Commission. If the theory of harm is insufficiently established, this shall be a reason for annulling the decision. An open-ended power to regulate the market in order to address structural competition concerns would be tantamount to conferring quasi-legislative powers on the Commission and would render undertakings' right to judicial review ineffective.

For similar reasons, Iberdrola also considers that it would be very helpful to divide the investigation into phases, similar to the UK regime, where a differentiation is made between: (i) a "market study" and (ii) a "market investigation". It should only be possible to impose binding remedies after an in-depth "second phase" investigation. Any decision to proceed to an in-depth investigation should be subject to a separate legal test, similar to the "serious doubts" threshold in Article 6(1)(c) of the Merger Regulation<sup>5</sup>, and must be motivated. Establishing a milestone before proceeding to a second phase investigation would also offer a helpful opportunity for the Commission to take stock of its investigation.

Iberdrola will be available for any clarification or additional questions.

Yours sincerely,

  
Eva Chamizo Llatas.

<sup>1</sup> See Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

<sup>2</sup> See Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity; and Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU.

<sup>3</sup> Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

<sup>4</sup> See: <https://ec.europa.eu/digital-single-market/en/digital-services-act-package>.

<sup>5</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.