

Enel Group comments on proposed guidance by the European Commission about information exchange in dual distribution relationships

The Enel Group (“Enel”) welcomes the draft proposed by the European Commission (“the draft guidance”) aimed at giving guidance on what type of information can be exchanged in the dual distribution scenario.

As already argued in Enel response submitted last 17/09/2021 to the public consultation on the revised Vertical Block Exemption Regulation (“VBER”) and Vertical Guidelines (“VG”) – exchange of information may have positive effects on competition as it generates efficiencies under the vertical supply agreement that underlies the dual distribution relationship, ensuring the efficient distribution of goods and services. Understandably, it is of utmost importance for undertakings to have more legal certainty in the self-assessment of their agreements and consequently to be aware of the type of information that a supplier and a distributor competing at retail level can exchange.

In this respect, the draft guidance intended to be integrated in the VG – and, more specifically, the non-exhaustive list of examples of information that benefit from the exemption provided by Article 2(1) of the VBER and, conversely, the list of information whose exchange is generally not considered necessary to improve the production or distribution of the contract goods or services by the parties – does support companies in the evaluation of dual distribution agreements but limited to the cases where the joint market share of the supplier and the buyer in the retail market is below 10%.

Indeed, the draft guidance only informs about the information exchange in agreements that fulfil the conditions of Article 2(4), point (a) or (b) of the revised VBER, namely where the aggregated market share of the parties in the relevant market at retail level does not exceed 10% and the exemption shall apply. By contrast, where the competing supplier and buyer have an aggregate market share above 10% in the relevant market at retail level but not exceeding 30%, exchanges of information must be assessed individually under Article 101 of the TFEU, taking into account the Horizontal Guidelines.

Enel deems very useful the guidance provided by the Commission for information exchange in agreements that fulfil the conditions of Article 2(4), point (a) or (b) of the revised VBER, and especially the list provided under para. 13. The information contained in such a list does not generally amount to hardcore restrictions and its exchange in the context of distribution agreements objectively meets the *necessity to improve production or distribution* criterion.

However, it would be highly important for undertakings to be guided also in the cases pursuant to Article 2(5) of the revised VBER, where the threshold is above 10% but is still below the threshold provided for in Article 3, i.e. 30%. Indeed, more clarification on the concrete information that may be exchanged beyond the suggestion to take precautions to minimise the risk of horizontal concerns at paragraph 17 of the draft guidance is warmly suggested.

In this context, Enel believes that a clear list of examples regulating the type of information that may or may not be exchanged between the supplier and the buyer in a dual distribution relationship in cases where their aggregate market share is between 10% and 30% needs to be integrated in the VG (e.g., even applying the same list of information identified in paragraph 13 letters (a) to (g), that,

as indicated above, would normally not trigger significant concerns below the 30% market share threshold either).