The Enel Group contribution to revised Horizontal Block Exemption Regulations (HBERs) and Horizontal Cooperation Guidelines (Horizontal Guidelines)

The Enel Group (Enel) welcomes the European Commission (EC) proposed changes to the current Horizontal Block Exemption Regulations (HBERs) on research & development (R&D) and specialisation agreements and the draft revised Horizontal Cooperation Guidelines (Horizontal Guidelines).

More specifically, the introduction of an entire chapter dealing with sustainability agreements meant to both (i) identify some relevant safe harbours and (ii) provide the market players with indication on specific tools useful to self-assess in general the sustainability agreements represents a very good start in supporting the undertakings committed to achieve the policy objectives of the European Green Deal.

Therefore, even if there is no specific focus yet on certain primordial topics within the current market contexts (*e.g.*, energy efficiency, RES development, low carbon technologies, clean and smart mobility, circular economy), companies have a better understanding now on what would be important for the Commission to see when glancing at the core of their potential cooperation.

Enel continues to believe that to allow greater flexibility by simplifying cooperation among companies in areas such as R&D and sustainability initiatives may be crucial to reach the ambitious green targets whose benefits are most welcomed by all stakeholders involved.

Furthermore, companies can today still be deterred from cooperating and introducing sustainability activities due to the current lack of legal certainty. Maintaining open and interpretable areas (*e.g.*, proper assessment of individual non-use value benefits, potentially based on customer surveys whose representativity or accepted error margin might always be debatable, or proper measurement and quantification of the collective benefits) might not help in deciding to cooperate based on a sound self-assessment. Accordingly, an update and further development of the horizontal rules that consider all the aspects above may lead to important benefits not only for companies, but also for the planet and the society.

As a multi-utility company with a long-standing commitment to the energy transition and to the decarbonization process, Enel is engaged in the development of renewables and in related innovative and sustainable technologies. In order to bring many of these pioneering projects to fruition, energy companies which should be at the forefront in the fight against climate change (both in general and in the context of energy crisis we are crossing these times) could occasionally cooperate to pursue initiatives that, individually, would not be able to carry out or, at least, would be carried out with less ambitious expectations. Indeed, in some instances, collaboration between competitors may be fundamental for such initiatives to succeed.

A company which decides to invest and take an economic risk for the development of an environmentally friendly project needs, in turn, a reasonable legal guarantee beyond the boundaries of a rational self-assessment that such a project cannot be subsequently revoked as a result of a possible contrary and equally reasonable assessment by the competition authority. Given the high costs of developing innovative and sustainable products and technologies and the resulting investment risk that companies are willing to take, a proposal to reintroduce comfort letters to give a legal guarantee for those agreements is therefore advanced.

Comfort letters may constitute a solution to dispel the doubts and legal uncertainty that many undertakings might still have and which can hold back many investment decisions in projects pursuing environmental objectives. While it is true that the establishment of a full-function joint venture could help to remove such uncertainty, as it would be an economic concentration possibly subject to authorisation by the competition authority, in practice, this is not always economically viable and may create additional obstacles. Therefore, at least in case of sustainability agreements, finding a practical solution based on comfort letters might be desirable.

Last but not least, Enel would like to suggest a greater convergence between the Commission's Horizontal Guidelines regarding sustainability agreements and the ongoing initiatives made by other national antitrust authorities of Member States. Reference is especially made to the Guidelines issued by the Dutch antitrust authority regarding sustainability agreements ("Dutch Guidelines"). In particular, also considering that the application of competition rules to cooperation involving sustainability is a relatively new topic, Enel would like to welcome the application also by the European Commission of the so-called "good faith" principle[1], in line with what has been stated by the Dutch authority. This principle would in fact help the undertakings to gradually adapt their conducts to the new guidelines and, on the other hand, would ensure more legal certainty in the enforcement activities carried out by different antitrust authorities both at EU and national level.

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[1] According to the Dutch Guidelines: "W*ith regard to sustainability agreements that have been published, and where these Guidelines have been followed in good faith, but which later turn out not to be compatible with the Dutch Competition Act, adjustments to such agreements may be agreed on in consultation with ACM, or following an ACM intervention. In those cases, ACM will not impose any fines. This also applies to agreements that have been discussed with ACM well in advance, and where ACM, at that point, did not identify any major risks*".