Enel Group comments on the draft Vertical Block Exemption Regulation (VBER)

The Enel Group acknowledges the European Commission (EC) proposed changes to readjust the safe harbour provided by the VBER taking into consideration new market developments, i.e. the growth of e-commerce and online platforms.

The changes made to the draft rules mainly concern areas discussed during the public consultation, namely:

1. Dual distribution
2. Active sales restrictions
3. Indirect restrictions of online sales
4. Parity obligations
5. Retail price maintenance and
6. Non-compete obligation
7. Qualification of online platforms pursuant to VBER

Please find below Enel Group's input on each of these areas:

1. Dual distribution

As regards dual distribution – i.e. the supplier's commercial practice of selling goods and/or providing services at several levels of trade, while competing with the buyer at the retail level in order to reach to consumers – the draft rules restrict the safe harbour with the introduction of an aggregate market share of the supplier and the buyer in the retail market which must not exceed a proposed percentage of 10% (Article 2(4) VBER).

However, if this joint market share is more than 10% but less than 30%, the exemption would still apply, provided that any exchange of information between the parties is compatible with the horizontal guidelines' provisions: this would indeed be assessed under the new horizontal rules (Article 2(5)).

Finally, the exemption does not apply to vertical agreements which, directly or indirectly, have as their object the restriction of competition between the competing supplier and the buyer (distributor/retailer) (Article 2(6)).

While it is understandable that the purpose of the combined market share threshold is to avoid horizontal concerns, which might have been automatically waived under the umbrella of vertical exemptions, its value – in order not to pose a heavy burden on undertakings and still guarantee a level playing field – could have been set around a higher value (e.g., 20-25%). In addition, an alternative assessment criterion of introducing a threshold relating only to the size of supplier's retail sales would have been useful (at least in cases in which these are marginal and therefore the aggregate market share/thresholds might not have the alleged relevance for which it was introduced in the first place).

Furthermore, the envisaged policy change of introducing the assessment under horizontal rules seems a little controversial, it does not enhance the legal certainty that companies seek (on the contrary, additional analysis is added to the self-assessment process) and it creates a new hierarchy whereby in certain dual distribution relationships instances more importance is given to information exchange, leaving the topic of how this would work out in practice open. In this regard, Enel would like to seek the Commission to provide more detailed clarifications regarding at least which types of information may be exchanged by the parties since they are objectively necessary for the execution of the dual distribution agreement(s).

Additionally, self-assessing potential situations which might interfere with the area of horizontal restrictions of competition by object, but at the same time being subject to eligibility for individual exemption under art

101 (3) TFEU (e.g., public announcements of individualized prices) can be quite burdensome for undertakings wanting to make sure that they benefit of the block exemption under the VBER and it would create considerable additional legal uncertainty.Nonetheless, the extension of the exception to include, in addition to manufacturers, also wholesalers and importers that engage in dual distribution is a positive change.

2. Active sales restrictions

Enel acknowledges and welcomes the redraft of Article 4 VBER which sets out more clearly the permitted territorial and customer restrictions for each type of distribution agreement (exclusive, selective and free) allowing suppliers a little more flexibility to design their distribution systems according to their business needs.

The draft rules introduce the possibility of shared exclusivity, allowing a supplier to appoint more than one distributor in a particular territory or for a particular customer group (Article 4(b) and 4.6.1.1. (102)) and clarify that suppliers in exclusive distribution systems may oblige their buyers to pass on active sales restrictions to their customers. This change should enhance the protection of the investment incentives of exclusive distributors.

Additionally, the revised rules allow for the coexistence of selective distribution and exclusive or regular distribution systems. It follows from Article 4(b) and (d) of the draft VBER that exclusive and regular distributors may be prohibited from selling the contract products to unauthorised distributors in territories where those products are subject to a selective distribution system. In this way, suppliers could protect their selective distribution system in certain territories against sales to unauthorised distributors by outside distributors.

More clarification is also provided on the *Metro* criteria (from the CJUE case C-230/16) under which purely qualitative distribution systems are exempted from Article 101 TFEU and it is stated that a selective distribution system can be used for products of high-quality or of a high-tech nature (4.6.2.2. (134) Vertical Guidelines).

3. Indirect restrictions of online sales

Enel greatly welcomes the removal of dual pricing – i.e. whereby the same distributor charges a higher wholesale price for products sold online than for products sold offline – from hardcore restrictions, as long as the price difference incentivizes an appropriate level of investment and relates to the difference in costs related to the online and offline channels. Such new changed policy will allow businesses to differentiate wholesale prices based on the costs of each channel and to incentivise investments in physical stores.

In addition, the revised Vertical Guidelines no longer requires the criteria in relation to online sales imposed by suppliers in a selective distribution system to be identical to those imposed on physical shops. It will therefore be possible for undertakings to reflect the fact that these channels are inherently different in nature.

4. Parity obligations

Enel acknowledges that the rules on parity clauses, also known as most-favoured nation clauses, have been toughened at least as far as wide parity clauses are concerned – i.e. whereby a platform prohibits a contracting party from offering goods or services to end users through other online platforms at a lower price or better conditions (Article 5(1d) VBER). Conversely, narrow parity clauses – i.e. whereby a platform prohibits a contracting party to offer goods or services via its own website at a lower price or better conditions – would still fall within the scope of the draft VBER.

5. Resale price maintenance

Enel acknowledges that resale price maintenance (RPM) – i.e. restrictions that set a fixed or minimum resale price to be observed by the buyer – remain a hardcore restriction (Article 4(a)) without any major change. In essence, the safe harbour for recommending a resale price to a reseller or requiring the reseller to respect a maximum resale price is not altered. However, more detailed paragraphs were introduced at 6.1.1. of the Vertical Guidelines which are useful for the stakeholders to identify specific RPM instances and to have clearer guidance on the conditions under which efficiencies can be argued and the evidence needed to meet the threshold for an individual exemption under Article 101(3) of the Treaty.

6. Non-compete obligation

Enel highly welcomes the proposal to cover by the block exemption the non-compete obligations that are tacitly renewable beyond a period of 5 years provided that the buyer can renegotiate or terminate the agreement with a reasonable notice period and at a reasonable cost (6.2.1. (234) of the Vertical Guidelines).

Indeed, such proposed change finally recognizes the unnecessary administrative burden and additional transaction costs for undertakings that are forced to periodically renegotiate and explicitly renew their contracts despite there being a willingness on both sides to continue the contractual relationship beyond 5 years.

However, it is not completely clear what may be considered a "reasonable cost" for the block exemption to apply. In this regard, Enel would welcome more clarifications by the EC in relation to the meaning of such notion, also taking into account the significant investments that the supplier shall make under certain long-terms agreements, such as the RES Power Purchase Agreements. Such agreements require a relationship-specific investment made by the supplier, in relation to which the proposed Guidelines on Vertical Restraints state that "a non-compete or quantity forcing agreement for the period of depreciation of the investment will in general fulfil the conditions of Article 101(3). In the case of high relationship-specific investments, a non-compete obligation exceeding five years may be justified" (para. 298). With respect to similar agreements, a "reasonable cost" may include also a reimbursement (e.g. in the form of penalty) that the client shall pay for the significant long-term investment made by the supplier. Enel would respectfully ask the Commission to expressly address such topic in the revised Guidelines.

In addition, and in order to provide greater legal certainty, Enel would like to request the EC to include the provision covering by the block exemption the non-compete obligations that are tacitly renewable beyond a period of 5 years also in the VBER.

7. Qualification of online platforms pursuant to VBER

The proposed Vertical Guidelines exclude that an undertaking which provides online intermediation services may be qualified as an agent pursuant to VBER. Enel acknowledges the reasons explained by the Commission in order to justify such legal option, but would like to request the Commission to reconsider the possibility to qualify, in certain circumstances, an online platform as an agent, at least in cases where it may be demonstrated that the financial and commercial risk associated with the contracts concluded, negotiated or promoted by the platform on behalf of the "principal" are borne exclusively by the latter.

Finally, considering the primary importance of boosting the Green Deal objectives at European level, it would have been desirable, as previously addressed by the EC and discussed during the public consultation, to dedicate a new section of the draft guidelines to soften the rules or, at least, to include specific guidance exclusively for vertical agreements focused on sustainability.

Such a policy change would be beneficial to companies committed to fulfilling the EU climate and energy policies by guaranteeing a strengthened regulatory framework able to promote sustainable and green

business choices. Yet, neither in the VBER nor in the Vertical Guidelines is the issue of sustainability addressed nor are concrete proposals to ensure that the rules do not constitute obstacles to sustainable agreements mentioned, especially in the context in which such initiatives have been also considered useful by some of the NCAs which replied to the targeted consultation.