Enel Group contribution to the European Commission's draft revised Merger Implementing Regulation and the Notice on Simplified Procedure

Enel Group (Enel) is a multinational company and one of the main integrated operators in the electricity and gas sectors, with a particular focus in Europe and Latin America. Enel operates in the generation (RES and conventional) and distribution of electricity and in the trading and supply of gas and electricity. In the European Union, Enel is currently mainly active in Italy, Spain, Portugal, Romania, Germany, France and Luxembourg.

As pointed out during previous public consultations on this matter, Enel reiterates its support to the Commission's proposal to simplify the merger notification process through:

(i) a more straightforward (and in certain cases less thorough) collection of information requirements to be compiled with in a tick-the-box format
(ii) an extension of categories of cases unlikely to raise competition concerns that can be assessed through a simplified procedure
(iii) the confirmation of transmission of notifications in digital format

In particular, Enel welcomes the novelties in the proposed revised Notice on Simplified Procedure and the *ex novo* draft Communication formally introducing electronic notifications.

As far as the Merger Implementing Regulation is concerned – while changes to the Short Form CO are highly appreciated as effectively streamlining the information gathering – the reorganisation of the Form CO represents a step forward in identifying and structuring the key information needed for the assessment on the merits, but there might still be room for improvement, in order to secure both (i) the goal to avoid overcrowding the notification process with less relevant information and (ii) the undertakings' need for legal certainty when providing the requested data and information.

In this context, there are some revised sections of the Form CO in which the information requirements seem too vague and would need additional clarifications and explanations, in the absence of which there would be a high degree of uncertainty on how to provide the correct, complete and not-misleading answer, beyond the boundaries of the inherent good faith of undertakings involved, which are compelled to manage by themselves complex self-assessments on how to answer in order not to generate debates on their compliance with the relevant competition rules.

In light of the above, we present below some examples referring to Form CO, Section 7 paragraph 7.4 *Safeguards and exclusions*, for which more clarity would be welcome:

- Entries in the tick-the-box chart include "*The parties have a significant user base and/or <u>commercially valuable data inventories</u>*". The reference to *commercially valuable data inventories* needs further elaboration and clarification (*e.g.*, with concrete examples and/or targeted definitions on this item) since it is currently not possible for the parties involved in the concentration to understand, evaluate and correctly respond to this type of information request (*e.g.*, which is the threshold for being considered "valuable" or whether a subjective/internal approach on the valuable character is enough).

- Parties are requested to indicate whether their "*brand recognition is important in any of the overlapping markets*". Again, it is difficult for undertakings to identify and select the criteria for evaluating their brand (from the perspective of third parties) and it is therefore suggested that the Commission provides more precise indications on how this information must be considered.

- With respect to the following line: "*The parties have brought to the market an important pipeline product within the last 5 years*", the envisaged types of *important pipeline products* should be specified. In particular, it should be made explicit whether the reference is to products solely related to the concentration in question (the defined relevant/affected product/geographic markets) or to all possible products (irrespective of whether the pipeline products in question belong to the relevant markets under analysis).

- A final suggestion relates to the topic envisaging future market entries, under the following line: "*One of the parties has plans to expand into product markets and/or geographic markets in which the other party is active or which are in a vertical relation with products in which the other party is active*." Such a request for information should be limited to the markets affected by the concentration and not to all theoretical markets in which the parties involved might become active. This is especially important in cases of joint-ventures, where the parties acquiring joint control remain potential competitors on markets outside the joint-venture activity areas and the notification process should not amount to a legitimate ground to disclose future market intentions which are not related / not having a subsequent impact on the relevant markets under scrutiny identified within the Form CO.

Such clarifications would be in the favour of all parties involved (both undertakings and the case teams), since otherwise (i) the parties risk unwillingly providing misleading information or withholding information during the notification process, exposing themselves to fines by the Commission and (ii) there will be a side effect of potentially increasing the intensity of pre-notification contacts and discussions (which is the opposite of procedure targeted simplification).