Enel Group welcomes the opportunity to further contribute to the EC public consultation on the reform of merger regulation. Preliminary, as already underlined in the previous consultation, it is worthwhile to highlight that Enel believes in the absolute efficiency of the current merger regulation (Reg.139/2004) and deems inappropriate any modification implying an extension of the EC review to acquisitions of minority shareholdings (structural links).

This response will not contain comments on the reform of “Cases referral” system, because Enel Group agrees with the proposed modifications. The comments will concern only the proposals for “Acquisition of minority non-controlling shareholdings”.

1. The opportunity to extend EC merger control to verify potential anticompetitive effects of structural links.

The current merger control system applies only to acquisitions entailing a modification of “control”, while all the other minority operations are excluded by an ex-ante merger control. This choice of the EU Legislator is reasonably justified by the fact that the EC prefers to focus on the transactions more dangerous for competition and consumers, avoiding to assess the minority interest operations which usually do not create any anticompetitive problem.

In the White Paper, the EC proposes to extend the application of merger regulation also to structural links. The scope of the proposed extension is identified in the fact that the Commission does not currently have adequate tools for dealing with anticompetitive acquisitions of minority shareholdings.
Enel Group believes that the current regulation is adequate and prevent properly any anticompetitive effect of a structural link. Article 101 TFUE, which prohibits restrictive agreements, is an appropriate tool to deal with anticompetitive minority shareholdings acquisitions. In fact, if the transaction has an anticompetitive object or effect, for example entailing the acquirer access to sensitive information regarding the acquired company, it could be assessed under art.101 TFUE as anticompetitive agreement. Thus, the structural links with possible anticompetitive effects may already be submitted to a competition control.

The principles followed by the EC in the reform are as follows: 1) reduce the administrative burdens for undertakings, Commission and NCAs; 2) limit the control, providing it only for cases arising competition concerns; 3) set forth a system fitting with the merger control regimes currently in place at both EU and national level. Enel Group considers that the objectives listed above could be achieved in a better manner through other measures different from those proposed in the White Paper. Indeed, the extension of the merger control to non-controlling shareholdings could produce the opposite effect, by increasing costs and time related to the merger control procedure, not allowing to achieve the simplification target.

Apart from this, making a cost-benefit analysis, the application of merger regulation also to structural links could be considered inefficient because it would create an obligation to notify a large number of operations, only a little portion of which, could rise competition concerns. The EC past experience in mergers notification demonstrates that structural links producing anticompetitive effects are a small percentage if compared with anticompetitive effects potentially created by a control shareholding acquisition. For this, the proposed measure appears to be disproportionate to an almost non existent risk for competition.

2. The targeted transparency system as proposed solution.

The majority of private stakeholders involved in the first consultation expressed their favour for a self-assessment system with the possibility of voluntary notification and without any stand-still obligation, recognising on the Commission the power to selectively open an investigation based on own market intelligence or complaints. This was also Enel preferred option, because it was able to achieve the objectives of legal certainty and reduction of administrative burdens.

The EC proposed a targeted transparency system which foresees an obligation to submit an information notice to the EC, only for undertakings self-evaluating their transaction as creating a
"competitively significant link". Analysing the received notices, the EC could decide to open an investigation, obliging the parties to a full notification. In addition, the parties have the possibility to submit a voluntary complete notification.

As a general comment, the preferred system could be evaluated as a good compromise among the options delineated in the previous consultation. The targeted transparency system is a non-generalized form of control, being limited to certain operations, with the EC possibility to receive clear information about the transactions.

On the other hand, the proposed system seems to include some aspects that need to be precisely defined. Firstly, the EC gives two cumulative criteria to define when a non-controlling minority shareholding imply a "competitively significant link": 1) the transaction involves a competitor or a vertically related company (i.e. there needs to be a competitive relationship between acquirer and target); 2) the acquired shareholding is (a) above 20% or (b) between 5% and around 20%, but accompanied by additional factors such as rights which give the acquirer a "de-facto" blocking minority, a seat on the board of directors, or access to commercially sensitive information of the target. In relation to the first requirement, in some cases it could be very complex for the parties to determine whether they act on two vertically related markets. Such difficulty might induce the parties to take a conservative approach and always lodge an information notice in order to get clarity and approval by the Commission which would become the receiver of a significant number of cases that have no real competition risks. In this sense, Enel Group suggests to limit the first requirement of the competitively significant link only to transactions between competitors acting on the same market. In relation to the second requirement, Enel Group reiterates that to better achieve the scope of identifying only problematic operations, the second safe-harbor between 5%-20% might be increased in the minimum to 10%. Moreover, the "additional rights" eventually recognized to the acquirer, should be specifically listed so that the undertakings can assess clearly their situation.

The need of clarity involves also the information notice and its content, essential for the EC decision to further investigate the case and for the State decision to eventually request for a referral. The EC states that it might provide information related to: the companies, their market shares and turnovers, the transaction, the shareholdings before and after the acquisition, the rights related to the minority shareholding. This content is rather general and might be better specified. In any case, the
information notice should be at most as the recently modified (Reg.1269/2013) short-form for the pre-notification of mergers that are unlikely to raise competition concerns.

Enel proposes also to clarify the role of the provided stand-still clause. The White Paper envisages the opportunity to introduce a 15 days stand-still period, after the submission of the information notice, during which the Member States may request the referral and the EC could request a complete notification if the case appears prima facie problematic. The imposition of a stand-still clause represents an administrative burden for undertakings, which can’t immediately close their transaction. Thus, if it is deemed necessary to include such clause, it should be limited in time (Enel proposes 10 days) and it should be applicable only for acquisitions raising competition concerns.

As regards the proposed 4-6 months period of time following the communication of the information notice, for the exercise of the EC power to investigate the operation, Enel Group considers inappropriate such provision. In particular, regarding the communicated transactions, the EC has the opportunity to initiate an investigation during the stand-still period and it seems to be unprofitable the inclusion of another time period for the EC assessment.

Taking into account that the general aim is to eliminate the cases where an ex-post EC intervention is needed, Enel Group considers this proposal as counterproductive.

A prescription period could be introduced for non-communicated transactions to allow the EC to exercise its investigation powers. In this case, the prescribed 4-6 months period is excessively long, although the parties have the possibility to implement the acquisition. Enel Group proposes to reduce to 2-3 months the period for the EC to investigate the non-communicated cases.

Last but not least, Enel positively welcomes the EC proposals to modify and simplify the Merger Regulation related to the creation of a full-function joint venture located and operating totally outside the EEA (and which would not have any impact on markets within the EEA). Taking these operations out of the merger regulation scope, it would be eliminated an administrative burden and the EC could focus on operations harmful for consumers in the EEA.

Anyway, the EC should specify the concept of “impact on the EEA” in the way to help companies to recognize JVs which need notification. The same notification exemption is proposed for cases leading to no “reportable markets” due to the absence of any horizontal or vertical link between the undertakings involved. In these cases, it is usually adopted a simplified procedure, but the EC in the White Paper proposes to exempt the companies from this procedure, applying a targeted
transparency system as designed for non-controlling minority shareholdings. Also this measure will surely have a positive impacts on the undertakings and the Authorities, eliminating a big administrative burden as the notification obligation.