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Subject: ENEL – Distortion of the level playing field

Dear Ditte and Cristina,

I reach out to you to inform you about a serious situation that is of high concern to Iberdrola and that, in our view, requires all the attention of the European Commission.

Iberdrola has noticed that for some time now, one of its main competitors, the Italian state owned company ENEL, is not operating according to market criteria and it is adopting decisions lacking from any kind of business or economic logic. Iberdrola and ENEL are direct competitors in several European and international markets. However, they are not competing on a level playing field because the Italian company is taking advantage of its condition of State owned company that is, in addition, the incumbent and quasi-monopolistic firm in the domestic electricity markets. With that unique status and the obvious support of the State, ENEL clearly benefits from a privileged factual and regulatory situation in Italy, which ensures it a cheaper and easier access to the capital markets, and ensures monopolistic rents, while enjoying high levels of immunity and other intangible privileges and advantages. This enables the Italian company to make investment decisions and take positions on key regulatory issues in other countries that do not follow any market and private investor rationale and are



therefore beyond the possibilities of any of its competitors under normal market conditions.

Iberdrola is, of course, not calling into question the right of the Italian State to keep a controlling stake over ENEL. However, to achieve a complete and well-functioning internal market in electricity, it is critical that the European Commission acts as the Guardian of the Treaties and prevents any Member State from passing legislation, adopting policies and taking measures that favor state controlled companies and go against the principle of fair competition and distort the level playing field. At the same time, the Commission should ensure that, in dealing with the companies, they control that all Member States comply with the obligations arising from the Treaty, in particular the competition rules and that, when they implement and apply the energy directives at national level, they refrain from unduly benefiting the companies that they own or control, often former monopolists in several markets.

Yet this is exactly what is happening in Italy with ENEL. There is clear evidence that ENEL is taking investment decisions and positions that it would not be able to maintain if it were not a company controlled and supported by the Italian State that still enjoys an incumbent and privileged status. This situation is causing a serious damage to Iberdrola in a number of the markets and situations where they compete.

One of the most obvious illustrations of that lack of any market rationale in ENEL's conduct is its instructions to its subsidiary ENDESA in recent developments in the Spanish nuclear generation business. The irrationality of its decisions became evident in the discussions concerning the closure of a nuclear power plant that Iberdrola co-owns with ENDESA, in Garoña, where ENDESA maintained a position favourable to continue the activity – with the investments required to extend the life of the plant 10 more years – despite the fact that irrefutable export and economist reports were conclusive that the plant's continuity was economically unviable. This insistence and inexplicable position led to recurrent losses for the company, which had to be covered by multiple capital increases.

Another obvious example is the way ENEL operates in the ongoing competitive process for the acquisition of the Brazilian electricity distribution company Eletropaulo, where it competes with the Brazilian company Neoenergia, where Iberdrola has an interest. Taking advantage of its status, ENEL is not respecting the rules of a normal competitive bidding process promoted by private companies. Since the beginning, ENEL is trying to influence the Board of the company and the Brazilian regulator as well as to intimidate competitors with completely unfair press statements. In these statements, ENEL emphasizes its financial ability to improve any offer from private operators, regardless of the financial and business logic of the final bid. ENEL is carrying that campaign not only in the media but also before the Brazilian regulatory authority, a campaign which is led by statements of ENEL ITALIA's President himself, despite the fact that the bidding company is a Chilean company controlled but only partially owned by ENEL. The fallacious nature of the



campaign is shown by the fact that he strongly criticizes the agreement reached between the target Eletropaulo and Neoenergia, while ENEL attempted to line up a very similar one but failed because of the poorer conditions offered. Only a company enjoying from unconditional support from the State, as its controlling shareholder, can decide to act this way.

Given the importance of the issue and its negative effects in different markets (e.g the Eletropaulo bidding competitive process), Iberdrola is determined to react against this situation. It is convinced that it is necessary to open a debate at European level on the risks derived from these kind of privileges enjoyed by certain state owned companies, in particular incumbents in non-fully liberalized markets such as electricity, and on the need to put an end to this situation of inequality. Iberdrola considers these discussions to be necessary and urgent. It is critical to make sure that States are fully in compliance with the obligations imposed by the Treaty regarding their state owned companies operating in the EU electricity markets.

Preserving the level playing field is not only necessary in the electricity sector. It is also key in the markets for corporate acquisitions through competitive processes, where there are clear indicia of a serious and growing problem: every time a State owned company (or company benefitting from obvious State support) participates in a bidding process, it ends up submitting the winning economic offer. In Europe, the most obvious recent examples have been the numerous acquisitions (even in strategic sectors) led by Chinese state-owned companies, which have been in a position to overbid their private competitors and have ended up winning in virtually all the open processes they have attended. This shows that private companies cannot compete under equal conditions, a serious problem that needs to be addressed. There is an urgent need for the Commission to consider this matter also from a European perspective and to find a solution to the problem. The solution stands in finding the right balance between the principle of the Treaty that ensures neutrality concerning property ownership and other equally important principles in the Treaty like market openness, the right to a non-distorted competition and to a level playing field in fully liberalized markets as pursued in the sectoral directives.

Iberdrola is assessing carefully the legal actions that it could bring to make sure that the European Commission thoroughly scrutinizes whether ENEL and the Italian State are complying with the competition rules applicable to State owned or controlled companies and if they are acting in ways compatible with the goals and obligations of the Directives, whose implementation is so important to achieve the internal market in the energy sector. It does not seem to be the case given the variety and importance of advantages and privileges that daily benefit ENEL in Italy, some of which we enlist and briefly describe further down in this letter.



I would be grateful if we could have the opportunity to meet with you so that we can discuss more in detail about this important question and about possible avenues to address it.

Yours sincerely,

Eva Chamizo Llatas
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ENEL's numerous privileges and advantages in Italy that distort the level playing field

ENEL enjoys numerous advantages and privileges in Italy that are not available to any of its competitors.

a. Advantages in access to capital markets

ENEL clearly benefits, albeit in an intangible manner, from its status as a state-owned company. In addition of being its controlling shareholder the Italian State gives ENEL very valuable (implicit) support by slowly legislating and adopting the required decisions towards the delayed liberalization of the electricity market.

The result, in practice, is that rating agencies assimilate these privileges and support in their analyses and ENEL benefits greatly from that, both in terms of rating and cost of



access to capital markets, with the advantage of having access to capital under privileged conditions that are impossible to obtain for its competitors.

b. Incumbent rents in Italy

The Italian Government has carried out a lengthy and slow process of liberalisation of the retail electricity markets. This has allowed ENEL to continue to enjoy its privileged position as the incumbent, former monopolist, and to still have a very high market share (and much higher in comparison to its competitors) in the three retail electricity markets that still exist in Italy, as well as a super-dominant position in the tariff market. This exceptional position ensures that ENEL sells more than 70% of the electricity supplied in Italy to household customers, which is sold at among the highest prices in the EU. This unique situation has guaranteed revenues that no other operator can replicate.

c. Regulatory advantages in Italy

As the incumbent, ENEL has also benefited from a number of regulatory advantages resulting from the design, slowness and delay in the adoption and implementation of the main regulatory initiatives that are required to ensure effective competition in view of the much needed end of the regulated tariff and the complete liberalisation of retail markets.

i. Improvement of quality and information in the market

The information on the Supply Points in Italy is not public and there is no data on switchings among customers' suppliers. As ENEL's competitors and new entrants, such as Iberdrola, are unable to analyse market movements, model offers or carry out commercial campaigns according to the areas of action of the different operators, as the historical operator, ENEL clearly benefits from the fact that it already has the best and most up-to-date information on supply points and consumers in its database.

ii. Switching

The existing regulation concerning switching is very slow and inefficient, which leads to strong win-back campaigns, even before the switching to the customer takes place. Further, Italian regulations do not allow switching with a simultaneous change of ownership. Therefore, it is difficult to migrate customers of historic operators to new players, such as Iberdrola, and prevents a real liberalisation of the market, to ENEL's clear benefit.

iii. Smart Meters

The delay in regulatory matters also benefits ENEL regarding smart meters since these devices are expected to provide transparency in consumption uses to the benefit of the incumbent's competitors. As the main distributor, ENEL is long overdue in its

installation and activation, which prevents its competitors from making personalized offers to customers according to their consumption curve.

iv. Brand unbundling

Companies, such as ENEL, that own distribution companies, retail supply companies on a tariff basis (“*maggior tutela*”) and operators on the free market are obliged to have different companies and brands and not to exchange information among them. However, ENEL has been reported before the Italian Competition Authority for a practice consisting of strong win-back campaigns that not complied with the prohibition on information exchange, without prejudice to the formal compliance with compulsory brand unbundling and corporate separation. In order to attract its clients to the free market and having all the necessary information, ENEL sent offers to its clients that were already adapted to consumption and pre-compiled contracts assuring a quick switching as ENEL itself was the distributor.

d. Other advantages resulting from ENEL’s status as a state owned undertaking and incumbent

ENEL enjoys of other types of advantages and privileges derived from recent decisions by the Italian State.

i. High-speed broadband

ENEL takes advantage of its status as a State owned and quasi-monopolistic operator in the electricity markets also to expand its business to other markets where it can benefit from its position and experience as network natural monopoly provider. Thus, ENEL created Open Fiber S.p.A. in 2015 to enter the high-speed broadband market. Open Fiber is now called Metroweb S.p.A. and is currently jointly controlled by ENEL and its sister company Cassa Depositi e Prestiti Equity S.p.A. (the State’s investment arm). Metroweb successfully participated in the two bidding processes organised by another state-owned company, Infratel, for the construction of an ultra-fast broadband network in 16 regions of Italy, winning contracts for an added value of EUR 2.6 billion. One of its main competitors, Telecom Italia, has alleged in a complaint that such tender was contrary to State aid and public procurement rules.

ii. The latest amendment to the regulation of the “Mercato di Salvaguardia”

ENEL has clearly benefited from the latest amendment to the competition act of 2017 that amended the Last Resort market (“*Mercato di Salvaguardia*”). As stated by the President of the Industry Commission of the Italian State, Massimo Mucchetti, the revised Competition Law of 4 August 2017 (No 124) “*is a gift to ENEL*” since it contains rules clearly in favour of “*organised interests and monopolies*”. In particular, he criticizes a last-minute legislative amendment that has the effect of automatically transferring by law, without any competitive process nor any commercial cost, all the customers who are in this last resort market (Mercato di Salvaguardia) to the operators



supplying those customers by the time of its disappearance. See article in *Business Insider Italy*: *'Il ddl Concorrenza è un regalo a Enel': Mucchetti contro il governo*. Available at: https://it.businessinsider.com/il-pd-a-pezzi-mucchetti-contro-il-governo-il-ddl-concorrenza-e-un-regalo-a-enel/?refresh_ce.

e. Anticompetitive behaviour in abuse of its dominant position

The fact that ENEL has been benefiting from its privileged position on the Italian markets is also illustrated by the numerous occasions on which the Italian Competition Authority has decided to act and investigate ENEL's conduct in the recent past, in addition to the abovementioned ongoing investigation concerning the non-observance of brand unbundling rules.

Thus, since 2017, the Italian Competition Authority is examining a possible abuse of dominance in the distribution and retail markets as a consequence of ENEL's adoption of a global strategy consisting in ensuring that its tariff customers will be preserved by its subsidiary active in the open market when the regulated tariff disappears next year. (A511(2017))

Other abuses of a dominant position have been confirmed and required remedies in the distribution market (A486 (2016)) and in the wholesale and dispatching segments (A498 (2017)).