

The decarbonization of Europe through the development of interoperable offshore electricity grids and in compliance with EU competition law

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Key Points

- The InterOPERA Project—a horizontal cooperation arrangement—aims to facilitate carbon neutrality through the development of multi-vendor interoperable offshore electricity grids, whilst maintaining compliance with competition law.
- This project is used as a case study to illustrate the principles underlying such sustainable energy projects vis-à-vis European Union competition law.
- It is concluded that European Union competition law is consistent with commercial efforts of the offshore wind industry to develop offshore meshed electricity grids to power Europe with renewable energy in the coming decades.

1. Introduction

The purpose of the present article is to analyze current efforts to reach carbon neutrality through the development of multi-terminal multi-vendor interoperable offshore electricity grids and to examine whether such efforts are compliant with European Union (EU) competition law.

The purpose of the EU-funded InterOPERA project (InterOPERA or Project), which is used herein as a case study, is to bring together a diverse set of public and private stakeholders from the renewable energy industry to develop interoperable multi-vendor multi-terminal (MVMT) high-voltage direct current (HVDC) offshore electricity grids to transition Europe to sustainable energy at large scale.¹ The Project² is intended to set future legal and technical interoperability standards for these grids, which will enhance offshore wind development and integration and assist Europe in reaching its 2050 carbon

neutrality targets under the Paris Agreement³ and associated EU legislation.⁴

The Project is a joint endeavour of public and private stakeholders belonging to multiple jurisdictions, both inside and outside of Europe, and is therefore subject to not only applicable domestic law, but also regional and international law. The present article will focus on the applicable EU competition law that governs joint, cooperative efforts such as this. InterOPERA is but one example of such horizontal cooperation between private actors, and more cooperation of this sort will be necessary for Europe to meet its carbon neutrality goals.

³ In 2015, states—including those of the EU—adopted, by consensus, the Paris Agreement. In this Agreement, which entered into force in 2016, states agreed to strengthen the global response to climate change by holding the increase in the global average temperature to well below 2°C above pre-industrial levels and by pursuing efforts to limit the temperature increase to 1.5°C. They also agreed to increase the ability of countries to adapt to the adverse impacts of climate change and to make financial flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development. Paris Agreement, adopted 12 December 2015, opened for signature 22 April 2016, entered into force 4 November 2016, 3156 UNTS 79, article 2.

⁴ Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 79; see, eg, European Climate Law: Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), PE/27/2021/REV/1, OJ L 243, 9.7.2021, pp. 1–17 (BG, ES, CS, DA, DE, ET, EL, EN, FR, GA, HR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV).

¹ Although it is possible and commonplace for offshore wind farms to employ alternating current (AC) technology, the use of HVDC transmission technology increases the efficiency of the electronic transmission network, especially when a large amount of electricity is at play between asynchronous zones via multi-terminal systems or a meshed grid.

² The Project is funded by the European Union (EU) programme for research and innovation.

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The article will first conduct a review of Europe's past efforts to encourage the development of interoperable electricity grids to transport offshore renewable energy to onshore grids (Section 2). The article then examines some basic background of the InterOPERA project (Section 3) before discussing the competition law compatibility of this cooperation (Section 4)—in order to provide the information necessary for the subsequent analysis of the following question: whether horizontal cooperation in renewable energy projects, such as InterOPERA, is consistent with EU competition law. This overarching question can be broken down, for purposes of the analysis, into whether the Project qualifies as:

- a research and development agreement under EU competition law and, if so, whether it fulfils the requirements set out in Regulation 2023/1066 (one of the European Commission's New Horizontal Block Exemption Regulations)⁵ (Section 4.B);
- a specialization agreement under EU competition law and, if so, whether it fulfils the requirements set out in Regulation 2023/1067 (Section 4.C);
- a standardization agreement and, if so, whether it is permissible under Articles 101 and 103 of the Treaty (Section 4.D);
- a sustainability agreement under the new Chapter 9 of the 2023 revised European Commission's Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the EU to Horizontal Co-operation Agreements (Horizontal Guidelines or Guidelines) (Section 4.E); and,
- if it does not qualify as one of such agreements, whether it meets the general criteria of Article 101(3) of the TFEU.

Some concluding remarks are offered in Section 5.

2. Europe's efforts to encourage the development of interoperable electricity grids

Most of the existing electricity grids in the world have been built using high voltage alternating current (HVAC), but there are fundamental technical impediments to expanding HVAC electricity grids to an offshore environment. For several years, there have been efforts related to the concept of HVDC grids in order to increase the capacity to transmit offshore wind and other renewable energy to onshore grids and to connect onshore grids of different synchronous zones, such as the continental European system with Scandinavia or the United Kingdom. As observed by Olivia Woolley, although states have made declarations about the need for such grids, they have not, thus far, entered into an international legal arrangement to require and/or regulate the multi-terminal multi-vendor interoperability of these grids so that they can achieve the capacity that is needed for Europe's carbon net-zero goals.⁶ This has been left to public-private partnerships and funded by entities such as the European Commission. Since Woolley's observation on this point in 2013, this has not changed. Cécil Nieuwenhout has called for the development of a new treaty on this matter.⁷

⁵ Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the EU to categories of technology transfer agreements, Official Journal of the EU, L 93/17, dated 28 March 2014, is not discussed herein due to the fact that this regulation states, at recital 7, that it does not apply if the research and development and specialization regulations apply.

⁶ Olivia Woolley, 'Governing a North Sea Grid Development: The Need for a Regional Framework Treaty' (2013) 14.1 Competition and Regulation in Network Industries 73.

⁷ See generally Cécil Nieuwenhout, 'Regulating Offshore Electricity Infrastructure in the North Sea: Towards a New Legal Framework' (2020) PhD Thesis, University of Groningen.

The states of Europe, in their constituent legal instrument—the Treaty on the Functioning of the EU (TFEU or Treaty)—have clearly acknowledged the relationship between the preservation and improvement of environment and energy policy. In that Treaty, it is stated that, in order to preserve and improve the environment, the EU's energy policy is required to inter alia 'promote energy efficiency and energy saving and the development of new and renewable forms of energy' and 'promote the interconnection of energy networks.'⁸

In the 1990s and 2000s, the EU began to liberalize energy markets by gradually removing restrictions on the movement of goods, services, and capital in its member states so that consumers could freely choose their suppliers and suppliers could freely deliver to their customers.⁹ At the beginning of the 2010s, several European states entered into a memorandum of understanding, in which they agreed to contribute to the move to a sustainable low-carbon economy through the maximization of the potential of offshore renewable energy resources. The development of the necessary offshore electricity grids was seen as key to this future endeavour, and states acknowledged that they needed to facilitate the strategic, coordinated, and cost-effective development of offshore and onshore grids.¹⁰

In 2016, several states of the EU agreed upon the Political Declaration on Energy Cooperation Between the North Seas Countries. The objectives of this declaration are to facilitate the further cost-effective deployment of offshore renewable energy, in particular wind, through voluntary cooperation.¹¹ Moreover, Belgium, Denmark, Germany, and the Netherlands—in their 2022 Esbjerg Declaration on the North Sea as a Green Power Plant of Europe—stated that, in order to reach EU climate neutrality according to the European Commission's Strategy on Offshore Renewable Energy, they would increasingly replace fossil fuels with European renewable energy from the North Sea, including offshore wind, and that this was intended to be accomplished through the joint development of an offshore renewable energy system consisting of multiple interconnected offshore energy projects and hubs, offshore wind production at massive scale, and electricity inter-connectors to the shore.¹²

⁸ Consolidated Version of the Treaty on the Functioning of the EU, Official Journal of the EU, C 326/47, dated 26 October 2012, Article 194(1). See also TFEU, Article 171; Regulation (EU) 2022/869 of the European Parliament and of the Council of 30 May 2022 on guidelines for trans-European energy infrastructure, amending Regulations (EC) No 715/2009, (EU) 2019/942 and (EU) 2019/943 and Directives 2009/73/EC and (EU) 2019/944, and repealing Regulation (EU) No 347/2013.

⁹ See Directive of the European Parliament and of the Council (EU) 96/92/EC of 19 December 1996 concerning common rules for the internal market in electricity, Official Journal of the EU L 027, dated 30 January 1997; Directive of the European Parliament and of the Council (EU) 2003/54/EC of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, Official Journal of the EU L 176, dated 26 June 2003.

¹⁰ North Sea Countries' Offshore Grid Initiative, Memorandum of Understanding, 3 December 2010; see also North Sea Countries' Offshore Grid Initiative, Declaration, 7 December 2009, paragraphs 10–15 (stating that multilateral cooperation is essential for the effective development of offshore wind and infrastructure development in the North Sea and that efficient and optimal solutions for the North Sea countries should be identified collectively, rather than on a national basis).

¹¹ Commission Delegated Regulation (EU) 2018/540 of 23 November 2017 amending Regulation (EU) No 347/2013 of the European Parliament and of the Council as regards the Union list of projects of common interest, Official Journal of the EU L 90, 6 April 2018.

¹² <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/repowereu-affordable-secure-and-sustainable-energy-europe_nl> accessed 30 January 2024. Also in 2022, Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Poland, and Sweden—in their Marienberg Declaration—expressed the political will to replace fossil fuels with RES, develop stronger grids and interconnections, pursue faster permitting processes, and strive for a balanced coexistence of economic and ecological needs. Baltic Sea Energy Security Summit, Marienberg Declaration, 30 August 2022.

The European Commission has stated, in its 2023 Green Deal, that it is committed to accelerating the move away from fossil fuels and to achieving its climate targets towards net-zero carbon emissions by 2050.¹³ The European Commission, in the same year, acknowledged that cooperation between companies on research and development ‘can contribute to achieving the objectives of the European Green Deal’.¹⁴ Furthermore, Belgium, Denmark, France, Germany, Ireland, Luxembourg, the Netherlands, Norway, and the United Kingdom, also in 2023, stated that energy security and climate change mitigation are crucial to the future of Europe and that the role of efficient and effective offshore electricity market arrangements was instrumental for a swift realization of joint and hybrid offshore renewable energy projects.¹⁵

From an analysis of the foregoing legal instruments and political declarations, it can be seen that the law and policy of the EU/Commission are intended to foster the development of renewable offshore sources of electricity and its transmission to end-users on land in a secure, efficient, and affordable manner. However, European authorities have not yet required original equipment manufacturer (OEM) companies to develop offshore HVDC grids that are multi-terminal multi-vendor interoperable and have instead left this integration to market forces and cooperation between private commercial entities. In the next section, the goals of the InterOPERA Project will be examined in order to provide the factual context necessary to then analyze whether the Project is in-line with European competition law.

3. Objective of InterOPERA

The InterOPERA project is the latest iteration of attempts by the on- and offshore renewable energy production industry and electricity transmission owners to work together to develop the electricity grids that are necessary for Europe to meet its net-zero goals with respect to carbon emissions.

The Best Paths Transmission for Sustainability project (Best Paths), which spanned 2014–2018, was intended to transform Europe’s electricity transmission grid to ensure its readiness to cover market actors’ requirements in the new energy paradigm at an affordable cost.¹⁶ The project entitled Progress on Meshed HVDC Offshore Transmission Networks (PROMOTiON) partially overlapped with the Best Paths project and was conducted from 2016 to 2020. The objective of PROMOTiON was to unlock the potential of Europe’s offshore resources by addressing technical, legal, regulatory, economic, and financial barriers to the implementation of an offshore HVDC transmission network.¹⁷ The objectives of the Ready4DC project, from 2022 to 2023, were to create and engage a community of experts to assess and give

recommendations on the major technical and legal aspects of designing and building an interoperable multi-vendor HVDC grid and to prepare the ground for the development of the first multi-vendor multi-terminal (MVMT) HVDC project in Europe.¹⁸

Building on these previous projects, InterOPERA (2023–2027) aims to bring together a diverse set of stakeholders from the renewable energy and electricity transmission industry to develop MVMT HVDC electricity grids in order to transition Europe to sustainable energy at large scale and to set future legal and technical interoperability standards for these grids, which will enhance offshore wind development and integration.¹⁹ It is important to mention here that ‘[t]he future European offshore transmission system will not be fully “meshed” but will consist of a combination of radial offshore connections to offshore renewable energy sources (RES), classical point-to-point interconnections between countries, offshore hybrid projects combining both functions and even multi-purpose solutions integrating energy sectors by including e.g. hydrogen solutions.’²⁰ The cooperation of multiple stakeholders to construct the planned offshore grids requires a legal basis, which is being developed in the form of an agreement between commercial entities, referred to as a ‘Multi-Party Cooperation Framework’ (Cooperation Framework). In December 2023, the Project published a preliminary draft of this Cooperation Framework. A second draft was published in December 2024. Its purpose is to establish cooperative guidelines to assist in the development and/or operation of MVMT HVDC grids; unlock these grids and foster the transition of the European energy sector at large scale through a coordinated approach between a diverse, high-level group of renewable energy and grid management actors; make these electricity systems mutually compatible and interoperable by design; improve the grid forming capabilities of offshore and onshore converters and planning for future system expansion; de-risk interoperability of control and protection systems through the use of physical demonstrators; and create operational and strategic tools for the development of offshore grids that will enhance offshore wind development and integration.²¹

With respect to competition law, the Cooperation Framework devotes an entire article to compliance with competition law and information exchange.²² The Cooperation Framework sets forth, in an annex, additional guidelines for the exchange of information in accordance with applicable competition law in a detailed code of conduct.²³

The European Commission has stated that ‘[h]orizontal cooperation agreements are those agreements between competitors with a view to cooperating in certain areas, such as research and

¹³ European Commission, COM(2023) 62 final, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, A Green Deal Industrial Plan for the Net-Zero Age, dated 1 February 2023, page 1.

¹⁴ Commission Regulation (EU) 2023/1066 of 1 June 2023 on the application of Article 101(3) of the Treaty on the Functioning of the EU to certain categories of research and development agreements, Official Journal of the EU, L 143/9, dated 2 June 2023 (hereinafter referred to as ‘Regulation 2023/1066’), recital 2.

¹⁵ Ostend Declaration of Energy Ministers on the North Seas as Europe’s Green Power Plant Delivering Cross-Border Projects and Anchoring the Renewable Offshore Industry in Europe (2023).

¹⁶ This was to be achieved by speeding up HVDC grid development and addressing interoperability issues to enable the systems of different companies to work together (multi-vendor systems). < <http://www.bestpaths-project.eu/> > accessed 30 January 2024.

¹⁷ The project sought to connect key stakeholders from the relevant industries, such as HVDC vendors and transmission system owners/operators (TSOs), in order to provide a platform for interdisciplinary development of meshed offshore HVDC grids. < <https://www.promotion-offshore.net/> > accessed 30 January 2024.

¹⁸ < <https://www.ready4dc.eu/> > accessed 30 January 2024.

¹⁹ InterOPERA, D4.3, Multi-Party Cooperation Framework (draft version) December 2024 < [20251002-Multi-party-cooperation-framework-draft.pdf](https://www.ready4dc.eu/20251002-Multi-party-cooperation-framework-draft.pdf) > accessed 21 August 2025 (hereinafter referred to as ‘InterOPERA MPCF’), pages 7, 12.

²⁰ European Network of Transmission System Operators for Electricity (ENTSO-E), Ten-Year Network Development Plan (TYNDP) 2024, Offshore Network Development Plans: European Offshore Network Transmission Infrastructure Needs, Pan-European Summary, January 2024 < [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://eepublicdownloads.blob.core.windows.net/public-cdn-container/tyndp-documents/ONDP2024/web_entso-e_ONDP_PanEU_240226.pdf](https://eepublicdownloads.blob.core.windows.net/public-cdn-container/tyndp-documents/ONDP2024/web_entso-e_ONDP_PanEU_240226.pdf) > accessed 3 July 2024, page 9.

²¹ InterOPERA MPCF, page 7.

²² InterOPERA MPCF, page 22.

²³ InterOPERA MPCF, Annex D, pages 56–59. Under the ‘References’ section of the InterOPERA Cooperation Framework, there are several documents listed under the ‘InterOPERA’ heading. These documents include a ‘Consortium Agreement’ dated 2023. See InterOPERA MPCF, Annex F, page 62. As this agreement is not publicly available, and as this article focuses on the Cooperation Framework and not on the consortium itself, the consortium agreement will not be analyzed herein.

development, production, purchasing, commercialization, standardization, or exchange of information.²⁴ The design and building of offshore meshed HVDC grids necessitates a certain amount of horizontal cooperation between a wide variety of private and semi-private actors. It now will be examined whether such cooperation amongst these actors is permissible under the applicable EU competition law.

4. Competition law in the context of the offshore renewable energy industry

A. Purpose of competition law

This section briefly sets forth the general purpose of EU competition law in order to provide helpful context, before diving into the specific rules on different forms of agreements relevant to the Project's objectives.

Pursuant to Article 101 of the TFEU,²⁵ the European Commission has issued guidelines in order to foster legal certainty with respect to EU competition law. These guidelines are intended to assist companies in self-assessing their compliance with competition law when they are entering into cooperation agreements with each other and also when they are pursuing concerted practices under Article 101 of the Treaty. The guidelines are aimed at facilitating cooperation in a manner that is economically desirable by, for example, encouraging the green and digital transitions in Europe and advancing the resilience of the market. Of specific relevance to the cooperation pursued in the context of interoperable electricity grids is the set of guidelines governing horizontal cooperation, commonly referred to as the 'Horizontal Guidelines'.²⁶

The European Commission has made additional statements about the benefits and need for an offshore meshed HVDC grid. In this regard, the European Commission has adopted a network code laying down the requirements for HVDC systems and wind farms ('power park modules') that are connected to them. The goal is 'to ensure fair conditions of competition in the internal electricity market, to ensure system security and the integration of renewable electricity sources, and to facilitate Union-wide trade in electricity.'²⁷ In making these statements, the Commission directly took into consideration that new DC-connected offshore windfarms could, in the future, 'form part of a meshed off-shore grid connecting to more than one synchronous area' and that, if this were to come to pass, 'certain technical requirements should be set in order to maintain system security and ensure that future meshed networks can be developed cost-effectively'.²⁸

²⁴ European Commission, Questions and Answers on adoption of the new Horizontal Block Exemption Regulations and Horizontal Guidelines, 1 June 2023 < https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_3014 > accessed 3 August 2024.

²⁵ Consolidated Version of the Treaty on the Functioning of the EU, Official Journal of the EU, C 326/47, dated 26 October 2012.

²⁶ Annex to the Communication from the [European] Commission, Approval of the content of a draft for a Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the EU to horizontal co-operation agreements (2023) (hereinafter referred to as 'Horizontal Guidelines'), paragraphs 1–2.

²⁷ Commission Regulation (EU) 2016/1447 of 26 August 2016 establishing a network code on requirements for grid connection of high voltage direct current systems and direct current-connected power park modules, Official Journal of the EU 241/1, dated 8 September 2016 (hereinafter referred to as 'Regulation 2016/1447'), article 1.

²⁸ Regulation 2016/1447, recital 15 (emphasis added); see also Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity, Official Journal of the EU L 158/63, dated 14 June 2019, recital 66 ('Offshore electricity infrastructure with dual functionality (so-called 'offshore hybrid assets') combining transport of offshore wind energy to shore and interconnectors, should also be eligible for exemption such as

From the foregoing, it can be discerned that proper cooperation between companies in the on- and offshore grid industry can be considered to enhance competition, thus leading to innovation, energy security, and cost efficiency—provided that such cooperation complies with various criteria, which will be discussed below.

In June 2023, the European Commission issued new competition rules that apply to cooperation between companies. Although the updated rules, regulations, and guidelines with respect to research and development agreements, specialization agreements, standardization agreements, and the new category of sustainability agreements (all examined below) 'do not represent a revolutionary departure from the competition rules previously in force', they do 'describe the types of collaboration between competitors that can be considered competition law compliant, as they generate efficiencies and advantages for consumers.'²⁹ A horizontal cooperation agreement can involve aspects of more than one type. In other words, an agreement can be both a research and development agreement and also a specialization agreement, as is discussed in more detail below.

B. Research and development agreements

This section will analyze whether InterOPERA's Cooperation Framework qualifies as a research and development agreement under EU competition law. If it is indeed such an agreement, it will then be considered whether it fulfils the requirements set out in Regulation 2023/1066 and/or falls under the exemption in Article 101(3) of the TFEU.

Regulation 2023/1066 is a new regulation that entered into force on 1 July 2023. It will be in force for 12 years from that date.³⁰ The purposes of the new Regulation are (1) to facilitate research and development, whilst simultaneously protecting competition, and (2) to provide adequate legal security for companies.³¹ The European Commission is of the view that research and development 'cooperation agreements often have pro-competitive effects, in particular where they bring together undertakings with complementary skills and assets and allow them to develop and market new and improved products and technologies more quickly than would otherwise be the case.'³² Even Tukun and Ignacio Anchustegui have observed that horizontal cooperation by companies 'operating at different supply chain levels is generally covered by block exemptions since they often have pro-competitive effects'.³³ Moreover, the European Commission acknowledges that cooperation between companies on research and development

under the rules applicable to new direct current interconnectors. Where necessary, the regulatory framework should duly consider the specific situation of those assets to overcome barriers to the realization of societally cost-efficient offshore hybrid assets.').

²⁹ Alberto Puente and Michael Tuit, 'Adoption of New European Competition Rules on Efficient Cooperation Amongst Competitors' June 2023 < <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://periscopiofiscalllegal.pwc.es/wp-content/uploads/2023/06/Adoption-of-new-European-competition-rules-on-efficient-cooperation-among-competitors-1.pdf> > accessed 14 February 2024.

³⁰ Regulation 2023/1066, recital 23, article 13. Article 12 of Regulation 2023/1067 outlines a transition period during which the exemption will not apply to certain research and development agreements: '[t]he prohibition laid down in Article 101(1) of the Treaty shall not apply during the period from 1 July 2023 to 30 June 2025 in respect of agreements already in force on 30 June 2023 which do not satisfy the conditions for exemption established by this Regulation but which satisfy the conditions for exemption established by Regulation (EU) No 1217/2010.' The applicability of this provision to the Cooperation Framework is doubtful, as the Cooperation Framework (MPCF) was not in force by 30 June 2023.

³¹ Regulation 2023/1066, recital 4.

³² Horizontal Guidelines, paragraph 54.

³³ Even Tukun and Ignacio Herrera Anchustegui, 'Collaborating in Offshore Renewable Energy Projects and Competition Law: Consortium Bids in Deep Waters' 19 February 2024, page 10 < SSRN: <https://lnkd.in/dnJuV8jt> > accessed 23 May 2024.

'can contribute to achieving the objectives of the European Green Deal'.³⁴

The European Commission's general attitude towards research and development agreements can be ascertained from the preamble of Regulation 2023/1066, wherein the Commission states that (1) it can generally be assumed that the positive effects of research and development agreements outweigh negative effects on competition, *provided that the agreements are below a certain level of market power*,³⁵ and (2) consumers are generally expected to benefit from research and development through the introduction of new and improved products, technologies, and processes.³⁶

It is important to note that, as stated by the Commission, '[t]here is no presumption that [research and development] agreements are either caught by Article 101(1) of the Treaty or that they fail to satisfy the conditions of Article 101(3) of the Treaty where the market share threshold set out in this Regulation is exceeded or other conditions of this Regulation are not met.' The Commission states that, '[i]n such cases, it is necessary to conduct an individual assessment of the research and development agreement under Article 101 of the Treaty'.³⁷ This individual assessment is contained herein. One commentator has remarked: 'Overall, the changes in the revised [research and development] block exemption regulation (BER)³⁸ and in Chapter 2 of the new Horizontal Guidelines are less extensive than expected' and that '[i]t remains to be seen in how far the revised [research and development block exemption regulation] will lead to more legal certainty in the future'.³⁹

For the present analysis, the European Commission's definition of a research and development agreement can be articulated as an agreement between two or more parties to pursue joint research and development and the joint exploitation of the results.⁴⁰ The term 'research and development' is defined as:

activities aimed at acquiring know-how relating to products, technologies or processes, the carrying out of theoretical analysis, systematic study or experimentation, including experimental and demonstrator production, technical testing of products or processes, the establishment of the necessary facilities up to demonstrator scale and the obtaining of intellectual property rights for the results.⁴¹

³⁴ Regulation 2023/1066, recital 2.

³⁵ Regulation 2023/1066, recital 5; see also Horizontal Guidelines, paragraph 86.

³⁶ Regulation 2023/1066, recital 8.

³⁷ Regulation 2023/1067, recital 14; see also Horizontal Guidelines, paragraph 127. The present analysis focuses on Article 101 of the Treaty, rather than Article 102. For a discussion of abuse of dominant position, see Adrien de Hauteclocque, 'Article 102 TFEU Abuse of a Dominant Position' in Christopher Jones (ed.), *EU Energy Law, Volume II, EU Competition Law and Energy Markets* (Claeys and Casteels 2019), page 283 et seq.

³⁸ 'The Horizontal Block Exemption Regulations are two Commission regulations that define certain research and development and specialization agreements that can be considered more beneficial than harmful. Agreements that meet the conditions of these regulations are therefore exempted from Article 101(1) of the Treaty.' European Commission, Block Exemptions - Horizontal Agreements < https://competition-policy.ec.europa.eu/antitrust-and-cartels/legislation/horizontal-block-exemptions_en > accessed 3 August 2024.

³⁹ Lara Skotki, 'New Block Exemption Regulation for Research and Development Agreements' 1 August 2023 < <https://www.taylorwessing.com/en/insights-and-events/insights/2023/08/new-block-exemption-regulation-for-research-and-development-agreements> > accessed 13 February 2024. See also Fernand de Visscher and Marie-Ysaline Lannoye, 'Research and Development (R&D) Agreements – New Rules and Transitional Period' 20 September 2023 < <https://simontbraun.eu/research-and-development-rd-agreements-new-rules-and-transitional-period/2023/09/20/> > accessed 13 February 2023 (explaining the new regulation).

⁴⁰ Regulation 2023/1066, article 1(1)(a)–(b).

⁴¹ Regulation 2023/1066, article 3; see also Horizontal Guidelines, paragraph 52.

Based on the European Commission's definitions pertaining to research and development agreements, InterOPERA's Cooperation Framework could be considered such an agreement, as it contemplates an arrangement between two or more parties to jointly research, develop, and exploit new technologies and processes, such as an offshore and interoperable HVDC electricity grid.

Article 2 of Regulation 2023/1066 exempts research and development agreements from Article 101(1) of the TFEU, pursuant to Article 101(3).⁴² However, Article 6 provides that this exemption only applies if, at the time the agreement is entered into, the combined market share of the parties to the agreement does not exceed 25 per cent of the relevant product and technology markets.⁴³ The determination of what exactly constitutes the 'relevant market' is relevant to the question of whether the exemption applies. With respect to geographical scope of the market share, the Cooperation Framework is not necessarily restricted to offshore areas in Europe. Moreover, the general functional requirements for interoperability that are being developed by InterOPERA may have application to other regions, especially if they are published and become a new industry standard in the HVDC field, as part of national, regional, and global efforts towards carbon neutrality by 2050 under the Paris Agreement. Finally, it seems that non-European companies will be free to become parties to the Cooperation Framework. For all of these reasons, the 'relevant market' may not be restricted to Europe and could encompass other regions or could even be considered global—rather than being limited only to Europe.⁴⁴

With respect to the identification of the relevant market, it may also be considered that the goal of InterOPERA is to create something that does not exist yet, namely, an offshore and interoperable MVMT HVDC electricity grid. With respect to the market share threshold that applies to research and development agreements, the European Commission has stated that there can arise situations wherein horizontal cooperation between companies 'will not improve, substitute or replace existing products or technologies, but will instead create a new relevant market satisfying a new demand'. The Commission then gives the example of a vaccine that is intended to inoculate people against a pathogen for which no vaccine previously existed. In such cases, the Commission does not consider that such research and development agreements are subject to any market share threshold.⁴⁵ As such, the Project may, in fact, be considered to be creating a new market, much like pharmaceutical companies are doing when they create a new vaccine—with both endeavours having a potentially positive impact on society. Since offshore meshed grids currently do not exist, but rather are only being developed, the relevant companies are creating a 'new relevant market satisfying a new demand' and thus may not be subject to the 25 per cent market share threshold.

The European Commission has also recognized the possibility that a replacement product or technology can satisfy the same demand as an existing product or technology, *but not belong to the same market*. The Commission gives the example of compact discs replacing vinyl records.⁴⁶ It is thus possible that the Project

⁴² Regulation 2023/1066, article 2.

⁴³ Regulation 2023/1066, article 6(1); see also Horizontal Guidelines, paragraphs 86–104.

⁴⁴ With respect to the product market scope of the market share, vendors of HVDC equipment are highly concentrated, and there are few players due to the high economic and technological barriers to entry into the market.

⁴⁵ Horizontal Guidelines, paragraph 90.

⁴⁶ Horizontal Guidelines, paragraphs 88–89.

could be viewed as the improvement or substitution of a product or technology that is interchangeable with the current system of offshore turn-key systems. As such, the Project, again, may not belong to the current relevant market.

In Regulation 2023/1066, the European Commission expresses a positive view of research and development agreements; and many of the Commission's statements are consistent with the aims of the InterOPERA project. *First*, the Commission expresses the view that cooperation in joint and paid-for research and development—and even in the exploitation of the results—is 'most likely to promote technical and economic progress if the parties contribute complementary skills, assets or activities to the cooperation'.⁴⁷ As InterOPERA is funded by the EU's programme for research and innovation, it is, by its very design, intended to promote technological and economic progress and is in-line with the stated objectives of the Commission in respect of the Regulation. *Second*, the Commission has stated: 'In order to justify the exemption established by this Regulation, the joint exploitation should relate to products (including goods and services), technologies or processes for which the use of the results of the research and development is indispensable'.⁴⁸ Since the increase in offshore electricity production and transportation cannot be reasonably achieved without the interoperability of a meshed offshore grid, nor without HVDC technology compared to existing interoperable AC technology, the new technology to link the present and future HVDC grids—the results of the research and development agreement—is therefore indispensable. *Third*, the Commission expresses the view that the results of research and development should be available to all the parties for future research and development projects.⁴⁹ The very purpose of the Project is to make the technology of all parties developing and building offshore HVDC grids interoperable⁵⁰ via the creation of general functional requirements, which will be published in the Cooperation Framework, and thus not only available to the parties, but to all companies.⁵¹ *Fourth*, the Commission points out that '[w]here the research and development agreement does not provide for joint exploitation of the results, the parties should agree in the research and development agreement to grant each other access to their respective pre-existing know-how if such know-how is indispensable for the purpose of the exploitation of the results by the other parties' and that any licencing fees 'should not be so high as to effectively impede access to the know-how by the other parties'.⁵² The Cooperation Framework clearly

provides that parties are to share proprietary information with each other for the purpose of creating offshore meshed HVDC grids.⁵³ Where such information is protected by intellectual property rights, access is to be granted on fair, reasonable, and non-discriminatory terms.⁵⁴ From the foregoing, it can be seen that InterOPERA is consistent with the legal and policy objectives of Regulation 2023/1066 relating to horizontal cooperation involving research and development.

In order to assess whether InterOPERA and its Cooperation Framework can be considered permissible as a research and development agreement under EU competition law, the European Commission's new 2023 Horizontal Guidelines, which replace the 2011 ones, are useful analytical tools.⁵⁵ The Guidelines 'are intended to provide legal certainty by assisting [companies] to assess the compatibility of their horizontal cooperation agreements with [European] Union competition rules while ensuring effective protection of competition.' The Guidelines 'also aim to make it easier for [companies] to cooperate in ways which are economically desirable, thereby contributing, for example, to the green and digital transitions and to promoting the resilience of the internal market'.⁵⁶ The Horizontal Guidelines offer a method of analyzing research and development agreements, in the event that they restrict competition.⁵⁷ In the context of InterOPERA, there is no evidence of a restriction of competition, and the following analysis is solely offered *arguendo* and in order to comprehensively investigate the matter.

The Horizontal Guidelines state that a research and development agreement that restricts competition within the meaning of

⁵³ InterOPERA MPCF, Article 4.3.

⁵⁴ InterOPERA MPCF, Article 7.1 ('During the activities undertaken in connection with the development and/or operation of MVMT HVDC grids, the Parties will need to cooperate and work together in order to develop and operate their systems in a manner that render them interoperable. This cooperation may entail the sharing of intellectual property between Parties.'). Article 7.5 ('In a spirit of cooperation and good faith and subject to articles 7.6–7.9, a Party (Party A) shall engage with another Party (Party B) in order to facilitate the access of Party B to the intellectual property of Party A when such access is necessary for Party B to engage in a project to develop and/or operate MVMT HVDC grids. The intellectual property referenced in the present article refers exclusively to intellectual property relevant to the standardization, maintenance, evolution, and/or continuous improvements of the functional requirements for interoperability.'). Article 7.6 ('As agreed between Parties in separate, written agreements, access rights to the intellectual property referenced in the previous paragraph: (a) may be granted, in the sole discretion of the intellectual property holder, on a non-exclusive and non-transferable basis; (b) may be granted, in the sole discretion of the intellectual property holder, via royalty-free licences; (c) shall be used only for the purposes for which such rights have been granted; and (d) shall, in any case, always be negotiated on fair, reasonable, and non-discriminatory terms.'). Article 7.7 ('A Party (Party A) that holds a standard essential patent that is necessary for the development and/or operation of MVMT HVDC grids shall engage with another Party (Party B) in order to facilitate the licencing of such a patent to Party B that is involved in a project to develop and/or operate MVMT HVDC grids. When such a licence agreement is concluded, it shall always be on fair, reasonable, and non-discriminatory terms. The intellectual property referenced in the present article refers exclusively to intellectual property relevant to the standardization, maintenance, evolution, and/or continuous improvements of the functional requirements for interoperability.').

⁵⁵ The Horizontal Guidelines set forth the 'centre of gravity test', which applies to the relationship between the different chapters of the Guidelines. Horizontal Guidelines, paragraph 8. The Commission observes that 'it is not possible to provide a precise and definite rule that is valid for all cases and all possible combinations.' Horizontal Guidelines, paragraph 7. However, based on the general examples provided by the Commission (Horizontal Guidelines, paragraph 7), it is reasonable to conclude that the 'centre of gravity' of the Cooperation Framework is the research and development component of the horizontal cooperation between the different parties.

⁵⁶ Annex to the Communication from the [European] Commission, Approval of the content of a draft for a Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the EU to horizontal co-operation agreements (2023) (hereinafter referred to as 'Horizontal Guidelines'), paragraph 1.

⁵⁷ Horizontal Guidelines, paragraph 35.

⁴⁷ Regulation 2023/1066, recital 7.

⁴⁸ Regulation 2023/1066, recital 10; see also Horizontal Guidelines, paragraphs 80–82.

⁴⁹ Regulation 2023/1066, recital 11; see also Horizontal Guidelines, paragraph 74.

⁵⁰ InterOPERA MPCF, Article 1.1 ('The purpose of the Cooperation Framework is to facilitate the cooperation of the Parties and other stakeholders in connection with the development and/or operation of MVMT HVDC grids in all areas of the world.'). Article 1.2 ('Specifically, the purpose of the Cooperation Framework is to assist the Parties in such negotiations with respect to the following: (a) Unlocking MVMT HVDC grids and fostering the transition of the European energy sector at large scale through a coordinated approach between a diverse, high-level group of industries at the forefront of RES development and grid management; (b) Making HVDC systems mutually compatible and interoperable by design; (c) Improving the grid forming capabilities of offshore and onshore converters and coordinating offshore network planning and future system expansion; (d) De-risking interoperability of control and protection systems through the execution of all necessary activities relevant to the implementation of physical demonstrators; and (e) Creating operational and strategic tools for the development of MVMT HVDC grids that will enhance offshore wind development and integration.').

⁵¹ InterOPERA MPCF, Article 4.4 (creating a placeholder for inclusion of the general functional requirements when they are finalized by InterOPERA).

⁵² Regulation 2023/1066, recital 13. These obligations are also included in Article 3 of the Regulation. Regulation 2023/1066, article 3(2)–(3); see also Horizontal Guidelines, paragraphs 80–82.

Article 101(1) will still comply with Article 101 if it fulfils the four cumulative conditions of Article 101(3).⁵⁸

With respect to the *first criterion*—whether the agreement leads to *efficiency gains*, that is to say, it must contribute to improving the production or distribution of products or contribute to promoting technical or economic progress—InterOPERA is combining the complementary skills and assets of the parties in order to rapidly develop and market a new technology. As such, InterOPERA is pivotal to technological progress in the European—and global—energy market and is likely to lead to further research and innovation in this field. The efforts of InterOPERA to make the offshore HVDC transmission grid possible will contribute to a resilient energy market, thus increasing efficiency.

With respect to the *second criterion*—whether the restrictions are *indispensable* to the attainment of the efficiency gains—InterOPERA, rather than restricting competition, will ultimately create a pro-competitive effect. With respect to indispensability, it has been observed that.

[t]oday, offshore grids only consists [sic] of export cables for offshore wind farms and point-to-point interconnectors. These are suited to today's demands. However, Europe's green transformation will increasingly involve exchanging electricity across borders, and require a significantly larger share of generation to come from offshore wind farms. This calls for new solutions to offshore grids.⁵⁹

Even if there were a restriction on competition (which is not the case), the development of the necessary technologies is indispensable to making offshore electricity grids interoperable—a vital goal of the EU, as articulated in the documents discussed in Section 2.

With respect to the *third criterion*—whether consumers will receive a fair share of the resulting benefits—the European Commission has stated: 'The swift completion of a fully functioning and interconnected internal energy market is crucial to maintaining security of energy supply, increasing competitiveness and ensuring that all consumers can purchase energy at affordable prices.'⁶⁰ The European Commission's statement seems to create a presumption—at least as a matter of policy—that the alacritous integration of the energy market within the EU will lead to lower energy prices for consumers. The recent energy crisis in Europe, which resulted in the dramatic increase of energy prices for end-users, would seem to support such a presumption.

Other stakeholders have stated that the development of an offshore meshed grid will lead to direct benefits for consumers of

electricity, citing a decrease in average price differential caused by the Kriegers Flak Combined Grid Solution hybrid interconnector between Denmark and Germany.⁶¹ In the context of bidding consortia, Even Tukun and Ignacio Anchustegui have expressed the following view:

Consortium strategies usually allow a larger number of participants to partake in a bid, reduce project costs and may lead to synergies and economies of scale between the partners. For offshore wind, this is likely to result in lower electricity prices for end consumers, and lesser need for state support, if awarded. Furthermore, the development of RES in and by itself mitigates the impact of climate change.⁶²

There is an urgent need to increase offshore energy production in order to meet the carbon neutral goals of our society. It is also necessary to consider the hidden social costs to continuing to generate electricity by burning fossil fuels, such as the costs of the medical treatment of respiratory illnesses and the prevention of slow and rapid onset environmental disasters (and the concomitant human migration).⁶³ One could also argue that the fair share criterion is about making sure that the profits do not only inure to the benefit of the original parties, but also trickle down to consumers. As the (offshore and onshore) grid business is in principle a regulated business, the regulator will make sure that no excessive profits are made and that the resulting efficiencies end up with consumers. It may also be noted that, for non-regulated (merchant) interconnectors, it is required that new cables (and any exemptions therefor) should not harm competition.⁶⁴

With respect to the *fourth criterion*—whether the agreement affords the parties the possibility of *eliminating competition* in respect of a substantial part of the products in question—the central goal of the Project is to transform the offshore energy industry in order to make it interoperable, so that all stakeholders—both old and new—can work together in order to generate the huge amounts of sustainable energy that are necessary to reach our net-zero goals.⁶⁵ The Project will not create entry barriers in the

⁵⁸ Horizontal Guidelines, paragraphs 154–162; see also Horizontal Guidelines, paragraph 36 ('The application of the exception rule of Article 101(3) [of the Treaty] is subject to four cumulative conditions, two positive ones and two negative ones: (a) the agreement must lead to *efficiency gains*, that is to say, it must contribute to improving the production or distribution of products or contribute to promoting technical or economic progress; (b) the restrictions must be *indispensable* to the attainment of those objectives, that is to say, of those efficiency gains; (c) consumers must receive a fair share of the resulting benefits, that is to say, the efficiency gains, including qualitative efficiency gains, attained by the indispensable restrictions must be sufficiently passed on to consumers such that the consumers are at least compensated for the restrictive effects of the agreement. Hence, efficiencies only accruing to the parties to the agreement will not suffice. For the purposes of these Guidelines, "consumers" are the customers of the parties to the agreement and subsequent purchasers; (d) the agreement must not afford the parties the possibility of *eliminating competition* in respect of a substantial part of the products in question.') (emphasis added).

⁵⁹ Elia Group and Ørsted, 'Making Hybrids Happen, Enabling Offshore Hybrid Projects to Enhance Europe's Energy Transition' March 2024, page 12.

⁶⁰ Regulation 2016/1447, recital 1 (emphasis added).

⁶¹ Elia Group and Ørsted, 'Making Hybrids Happen, Enabling Offshore Hybrid Projects to Enhance Europe's Energy Transition' March 2024, page 12 ('Relying solely on radial and point-to-point connections will either result in too many grid cables with insufficient utilization rates and unnecessary environmental nuisance being caused—or under-deployment, with the required buildout of offshore wind and interconnectors not materializing, so delaying the energy transition and inflating costs to rate payers. There is a risk of ending up with a spaghetti-like buildout of the grid, as part of which each piece of infrastructure only serves one specific purpose.'), page 15 ('Europe needs these initial projects to deliver cost-effective renewable generation and grid capacity for a rapid, fair and just transition; their success will directly benefit European consumers.'), page 19 (discussing the Kriegers Flak Combined Grid Solution hybrid interconnector's effect on prices).

⁶² Even Tukun and Ignacio Herrera Anchustegui, 'Collaborating in Offshore Renewable Energy Projects and Competition Law: Consortium Bids in Deep Waters' 19 February 2024, pages 8, 21 < SSRN: <https://lnkd.in/dnJuV8jt> > accessed 23 May 2024.

⁶³ See Elia Group and Ørsted, 'Making Hybrids Happen, Enabling Offshore Hybrid Projects to Enhance Europe's Energy Transition' March 2024, page 28 ('SEW [socioeconomic welfare] calculations only consider the European Emissions Trading System (EU ETS) price of CO₂, as part of the fuel costs. They do not reflect the true societal cost of CO₂ emissions, which significantly exceed the EU ETS price of CO₂.').

⁶⁴ The European Commission has stated that '[n]ew direct current interconnectors may, upon request, be exempted, for a limited period, from Article 19(2) and (3) of this Regulation and from Articles 6 and 43, Article 59(7) and Article 60(1) of Directive (EU) 2019/944 provided that the following conditions are met: (a) the investment enhances competition in electricity supply.' Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity, Article 63(1)(a) (New interconnectors).

⁶⁵ Adrien de Hauteclocque, 'Article 102 TFEU Abuse of a Dominant Position' in Christopher Jones (ed.), *EU Energy Law, Volume II, EU Competition Law and Energy Markets* (Clayes and Casteels 2019), page 373 ('De iure or de facto exclusivity arrangements concluded by incumbents that tie customers, dry up wholesale markets or reserve network capacity are likely to fall foul of Article 102 TFEU.').

relevant market and instead will facilitate existing players and new entrants to work together to create sustainable energy.⁶⁶

The last prong of the analysis of whether InterOPERA's Cooperation Framework is a permissible research and development agreement under EU competition law is to examine some interestingly on-point examples that are offered in the Horizontal Guidelines.

The first example involves two engineering companies that are cooperating on the development of a component for a vehicle that will reduce carbon emissions. Even though the two companies have a combined market share of 35 per cent and therefore cannot benefit from the block exemption, the joint venture, in the view of the Commission, nevertheless fulfils the conditions of Article 101(3) because (1) there are efficiency gains, (2) the indispensability claims are plausible, (3) the efficiency gains will be passed on to consumers, and (4) there will not be an elimination of competition.⁶⁷ This example is similar to InterOPERA and gives a specific example of where cooperation between companies is permissible, *even in circumstances where the combined market share of the companies exceeds the maximum of 25 per cent.*

The second example involves three companies that are leading players in renewable energy technologies. These companies set up a research partnership to define a research and development agenda setting a common long-term vision for the development of new renewable energy technologies and the improvement of existing ones. The research partnership will be formalized in a memorandum of understanding (MoU) that will create a framework for the companies' cooperation, including cooperation, objectives, terms and conditions, governance rules, and monitoring arrangements. The parties will subsequently implement their research and development objectives through a number of separate subsequent agreements covering individual joint and paid-for research and development projects. In the above example, the Commission is of the view that the block exemption is not applicable because the MoU does not relate to specific research and development projects, but rather establishes general terms and conditions for the implementation of such projects that will be the subject of separate agreements later. The Commission also states that the MoU does not restrict competition within the meaning of Article 101(1) because it is a high-level framework agreement that does not relate to specific research and development projects; it is thus not possible, in the opinion of the Commission, to determine whether the parties are competitors for purposes of the MoU, and their competitive relationship will only be able to be determined when they enter into the implementing research and development agreements.⁶⁸

The example given by the European Commission is not identical to InterOPERA, but it is very similar. The InterOPERA Cooperation Framework is the type of arrangement dealt with in the example and even shares the same name. Moreover, the Cooperation Framework sets forth the framework for the parties' cooperation and then expressly states that they will still need to enter into subsequent agreements—both with each other and potentially non-parties—in order to exploit the new technologies that are developed to achieve interoperability for the future offshore meshed HVDC grids. As such, the example given by the Commission is highly supportive of the position that the Project does not restrict competition under EU competition law. There is even an argument, as stated by the Commission in its example, that the Project falls completely outside the strictures of EU competition law because the Cooperation Framework 'does not relate to specific research and development projects, but rather establishes general terms and conditions for the implementation of research and development projects that will be the subject of separate agreements later.'

One final note in respect of research and development agreements is to acknowledge that, in respect of information exchange, the Horizontal Guidelines state that, where a cooperation agreement 'does not fall within the Article 101(1) prohibition because it has neutral or positive effects on competition, an information exchange that is ancillary to that agreement does not fall within that prohibition either' and that '[t]his will be the case if the information exchange is objectively necessary to implement the cooperation agreement and is proportionate to the objectives thereof.'⁶⁹ It has been observed by one commentator that parties participating in a research and development agreement, especially small or medium-sized enterprises, can reap significant economic benefits 'given the difficulty [of] such parties to meet the costs of research alone, which is an increasingly important factor in remaining competitive, especially in the market for high-tech product[s].'⁷⁰ The information exchanges within InterOPERA are intended to facilitate the creation of the technologies necessary for an interoperable offshore HVDC grid, and these exchanges are both necessary and proportionate to that objective.⁷¹ Moreover, in respect of any commercially sensitive information that may be exchanged, the parties involved in the Project have developed a code of conduct to ensure that only necessary and proportionate information is exchanged, and the procedures in the InterOPERA

⁶⁹ Horizontal Guidelines, paragraph 369.

⁷⁰ Silvia Stefanelli, 'When Research and Development Agreements Between Companies Do Not Distort Competition' 22 January 2024 < <https://www.linkedin.com/pulse/when-research-development-agreements-between-do-silvia-stefanelli-la9tf/> > accessed 13 February 2024; see also Anthony Woolich, 'European Commission Adopts Updated Block Exemption Regulations and Guidelines on Agreements Between Competitors' July 2023 < <https://www.hfw.com/European-Commission-adopts-updated-Block-Exemption-Regulations-and-Guidelines-on-agreements-between-competitors-july-2023> > accessed 15 February 2024 (discussing the European Commission's new guidelines on information exchange); Alberto Puente and Michael Tuit, 'Adoption of New European Competition Rules on Efficient Cooperation Amongst Competitors' June 2023 < <chrome-extension://efaidnbmnnnibpcapjpcgclcfndmkaj/https://periscopiofiscalllegal.pwc.es/wp-content/uploads/2023/06/Adoption-of-new-European-competition-rules-on-efficient-cooperation-among-competitors-1.pdf> > accessed 14 February 2024 (same).

⁷¹ Horizontal Guidelines, paragraph 369; see also paragraph 386 (defining information that is generally not considered commercially sensitive), paragraph 388 ('Information that has been put in the public domain for legitimate reasons—and therefore has become readily accessible (in terms of access costs) to all competitors and customers—is usually not commercially sensitive.'). See also Even Tukun and Ignacio Herrera Anchustegui, 'Collaborating in Offshore Renewable Energy Projects and Competition Law: Consortium Bids in Deep Waters' 19 February 2024, page 23 < SSRN: <https://lnkd.in/dnjuV8jt> > accessed 23 May 2024 (stating that 'if more information than necessary is shared, this could constitute an illicit exchange violating Article 101 TFEU').

⁶⁶ See Even Tukun and Ignacio Herrera Anchustegui, 'Collaborating in Offshore Renewable Energy Projects and Competition Law: Consortium Bids in Deep Waters' 19 February 2024, page 22 < SSRN: <https://lnkd.in/dnjuV8jt> > accessed 23 May 2024 ('Recent national practice shows that sustainability considerations were pivotal in determining the legality of cooperation between potential competitors for a large infrastructure project. In 2022, Shell and TotalEnergies collaborated on a carbon capture and storage project in the Netherlands. The proposal for collaboration was evaluated by the Dutch National Competition Authority, which deemed the collaboration lawful as societal benefits outweighed competitive restrictions in context under an efficiency analysis in the national equivalent to Article 101(3) TFEU.'), citing Authority for Consumers and Markets of the Netherlands, 'No Action letter for the Agreement between Shell and TotalEnergies Regarding a Joint Marketing Initiative for CCS Services (Project Aramis)' 27 June 2022.

⁶⁷ Horizontal Guidelines, paragraph 170. In respect of the cost efficiency, Hannah Kruimer has remarked: 'The concept of fair competition between energy suppliers is to achieve lower prices, greater supplier choice for consumers, enhanced efficiency and raise innovation.' Hannah Kruimer, 'Non-Discriminatory Energy System Operation: What Does It Mean?' (2001) 12.3 Competition and Regulation in Network Industries 260, 262.

⁶⁸ Horizontal Guidelines, paragraph 171.

code of conduct closely track those recommended in the Horizontal Guidelines.⁷²

In conclusion, horizontal cooperation between actors to develop and build offshore meshed HVDC grids, such as the cooperation envisaged in InterOPERA, can be considered research and development agreements that do not restrict competition under the European Commission's Regulation 2023/1066. Even if they did (which is not the case), such commercial endeavours would most likely fall into the exception set forth in Article 101(3) of the Treaty.

C. Specialization agreements

This section will analyze whether InterOPERA's Cooperation Framework qualifies as a specialization agreement under EU competition law and, if so, whether it fulfils the requirements set out in Regulation 2023/1067⁷³ and/or whether it falls under the exemption in Article 101(3) of the TFEU.

Regulation 2023/1067 entered into force on 1 July 2023. It will be in force for 12 years from that date.⁷⁴ The purpose of the new Regulation is to ensure effective protection of competition and to provide adequate legal security for companies seeking to enter into specialization agreements.⁷⁵

With respect to whether the Cooperation Framework is a specialization agreement under Regulation 2023/1067, it may be kept in mind that there are three different species of specialization agreements: (1) a 'unilateral specialisation agreement' is an agreement between two or more parties that are active on the same product market and under which one or more parties agree to fully or partly cease production of certain products or to refrain from producing those products and to purchase them from another party or parties, which agree to produce and supply them; (2) a 'reciprocal specialisation agreement' is an agreement between two or more parties that are active on the same product market and under which two or more parties, on a reciprocal basis, agree to fully or partly cease or refrain from producing certain but different products and to purchase those products from one or more of the other parties, which agree to produce and supply them; and (3) a 'joint production agreement' is an agreement under which two or more parties agree to produce certain products jointly.⁷⁶

The European Commission has explained that specialization agreements 'contribute to improving the manufacture of goods or the preparation of services and their distribution if the parties have complementary skills, assets or activities, because, in that case, the agreement allows them to focus on the manufacture of certain goods or the preparation of certain services and thus

operate more efficiently and supply the products more cheaply.' The Commission has also observed that, '[g]iven effective competition, it is likely that consumers will receive a fair share of the resulting benefits.'⁷⁷ Ivana Ružičić and Sara Ostojić have pointed out that '[t]he scope of application of the regulation on the block exemption of specialization agreements is expanded so that the revised regulation covers more types of production agreements between more market participants'.⁷⁸

The Commission also presumes that, when companies are engaging with each other via a specialization agreement and their combined market share does not 'exceed a certain level, the agreement will, as a general rule, give rise to economic benefits in the form of economies of scale or scope or better production technologies, whilst allowing consumers a fair share of the resulting benefits'.⁷⁹

Based on the stated goals of InterOPERA, the first two types of specialization agreements are not applicable because the parties are not seeking to cease or refrain from anything. In order to determine whether the contemplated cooperation qualifies as a 'joint production agreement' (the third type of specialization agreement), it is necessary to consider what the terms 'agreement', 'produce', and 'product' mean in the context of the Regulation. The Regulation defines these terms. Under the definitions section of the Regulation, an 'agreement' is 'an agreement between undertakings, a decision by an association of undertakings or a concerted practice';⁸⁰ a 'product' is 'a good or a service, including both intermediary goods or services and final goods or services, with the exception of distribution and rental services';⁸¹ and 'production' means 'the manufacture of goods or the preparation of services, including by way of subcontracting'.⁸²

The Cooperation Framework is indeed an agreement. With respect to the other terms ('production' and 'product'), the Regulation seeks to regulate not only goods but also services, although it then expressly excepts the 'distribution' of goods and services. Moreover, the Regulation encompasses the 'preparation of services' and states that "distribution" means the sale and supply of the specialisation products to customers, including the commercialisation of those products'.⁸³ It is uncertain whether these terms are intended to encompass companies coming together to create a technological method (and accompanying standards) for creating a way for their transmission of electricity to work together across different energy transmission networks. It could be considered that the act of creating a new engineering methodology to connect offshore energy grids is a product, service, or at

⁷² InterOPERA MPCF, Article 6, Annex D; Horizontal Guidelines, paragraph 406 ('Undertakings that want (or need) to exchange commercially sensitive information are encouraged to implement measures to restrict access to the information or control how it is used. Undertakings should also consider to limit the exchange to what is necessary for the intended purpose.'), paragraphs 407–410 (discussing measures to reduce the risk that commercially sensitive information is exchanged during interactions with competitors).

⁷³ Article 8 of Regulation 2023/1067 outlines a transition period during which the exemption will not apply to certain specialization agreements: '[t]he prohibition laid down in Article 101(1) of the Treaty shall not apply during the period from 1 July 2023 to 30 June 2025 in respect of agreements already in force on 30 June 2023 which do not satisfy the conditions for exemption established by this Regulation but which satisfy the conditions for exemption established by Regulation (EU) No 1218/2010.' As the Cooperation Framework (MPCF) was not in force by 30 June 2023, the applicability of this provision to the Cooperation Framework is doubtful.

⁷⁴ Commission Regulation (EU) 2023/1067 of 1 June 2023 on the application of Article 101(3) of the Treaty on the Functioning of the EU to certain categories of specialization agreements, Official Journal of the EU, L 143/20, dated 2 June 2023 (hereinafter referred to as 'Regulation 2023/1067'), recital 18, Article 9.

⁷⁵ Regulation 2023/1067, recital 3.

⁷⁶ Regulation 2023/1067, article 1.1(1)(a)–(c).

⁷⁷ Regulation 2023/1067, recital 7; see also Ceciel Nieuwenhout, 'Regulating Offshore Electricity Infrastructure in the North Sea: Towards a New Legal Framework' (2020) PhD Thesis, University of Groningen, pages 79, 88–90, 117–120 (discussing price drivers for offshore electricity).

⁷⁸ Ivana Ružičić and Sara Ostojić, 'New Rules on the Block Exemption of Horizontal Agreements in the EU' 27 June 2023 < <https://www.prlegal.rs/new-rules-on-the-block-exemption-of-horizontal-agreements-in-the-eu/> > accessed 13 February 2024.

⁷⁹ Regulation 2023/1067, recital 12. It is important to note that, as stated by the Commission, '[t]here is no presumption that specialization agreements are either caught by Article 101(1) of the Treaty or that they fail to satisfy the conditions of Article 101(3) of the Treaty where the market share threshold set out in this Regulation is exceeded or other conditions of this Regulation are not met' and that, '[i]n such cases, it is necessary to conduct an individual assessment of the specialization agreement under Article 101 of the Treaty.' Regulation 2023/1067, recital 14.

⁸⁰ Regulation 2023/1067, article 1.1(2). The definition follows the general wording of Article 101 of the TFEU, which has been further explained by the Court of Justice of the European Union in a long line of case law.

⁸¹ Regulation 2023/1067, article 1.1(3).

⁸² Regulation 2023/1067, article 1.1(4).

⁸³ Regulation 2023/1067, article 1.1(13).

least a distribution. It therefore can be argued that the Cooperation Framework is a 'joint production agreement', although it should be kept in mind that there are arguments to the contrary.

Article 2 of the Regulation exempts specialization agreements from Article 101(1) of the TFEU, pursuant to Article 101(3) of the TFEU.⁸⁴ However, the exemption only applies when the combined market share of the parties does not exceed 20 per cent of the relevant market(s) to which the specialization market belongs.⁸⁵ How to determine the 'relevant market' in the context of the development of an offshore meshed HVDC grid was discussed in the previous section.

For the same reasons as discussed in the previous section on research and development agreements, it is unlikely that efforts to horizontally cooperate via specialization agreements in respect of offshore meshed HVDC grids—such as the efforts undertaken in InterOPERA—restrict competition. Even if they did (which is not the case), these efforts would still satisfy the four cumulative conditions set forth in Article 101(3) of the TFEU and elaborated further in the Horizontal Guidelines (efficiency gains, indispensability, pass-on to consumers, no elimination to competition) and thus qualify for the application of the exception in Article 101(3) of the Treaty.

D. Standardization agreements

This section will analyze whether InterOPERA's Cooperation Framework qualifies as a standardization agreement and, if so, whether it is permissible under Articles 101 and 103 of the Treaty.

The European Commission states that standardization agreements 'have as their primary objective the definition of technical or quality requirements with which current or future products, production processes, value chain due diligence processes, services or methods may comply.' The Commission explains that such agreements 'can cover various issues, such as standardization of different grades or sizes of a particular product, or technical specifications in product or services markets where compatibility and interoperability with other products or services is essential.'⁸⁶

The Commission appropriately notes that '[p]articipants in standardisation are not necessarily competitors', but that, where competitors are involved, restrictive effects on competition can occur in three ways: (1) restriction of price competition; (2) foreclosure of innovative technologies; and (3) exclusion of, or discrimination against, certain companies by preventing effective access to the standard.⁸⁷ In the event that the Cooperation Framework were considered to be a standardization agreement, it would most likely not be considered to lead to restrictive effects on competition for the following three reasons. *First*, there is no elimination of price competition. *Second*, the development of technologies to achieve a meshed offshore HVDC electricity grid does not foreclose innovative technologies, such as direct current (DC) technologies with a much lower voltage that are capable of being used for large-scale power transmission. *Third*, the Framework does not prevent others from obtaining access to the results of the standardization, as InterOPERA will publish the results (the general functional requirements for interoperability) so that they are available to others who wish to build interoperable grids both inside and outside of Europe; thus, no one project partner will acquire control over the use of the standard.⁸⁸

With respect to market share, the Commission has stated that '[i]t may not always be possible to assess with any certainty at an early stage whether the standard will in practice be adopted by a large, or only by an insignificant, share of the relevant industry'.⁸⁹ This certainly holds true for the result of the Project, as it is indeed the intention for the general functional requirements to become an industry standard, but it is not certain that this will indeed come to pass. Moreover, the Commission has observed:

as the effectiveness of standardization agreements is often proportional to the share of the industry involved in developing and/or applying the standard, high market shares held by the parties in the market or markets affected by the standard will not necessarily lead to the conclusion that the standard is likely to give rise to restrictive effects on competition.⁹⁰

In other words, one of the primary objectives of the development of a standard is for it to gain traction and ultimately become an industry-wide practice. A large combined market share of the parties involved in InterOPERA, if it exists, is therefore not necessarily indicative of a restriction on competition. Furthermore, the fact that the general functional requirements of the Project will be published and available for use by all demonstrates the pro-competitive nature of the Project.⁹¹

Even if the Project were found to restrict competition (which is not the case), it would nonetheless satisfy the four cumulative conditions set forth in the Horizontal Guidelines—and thus qualify for the application of the exception in Article 101(3) of the Treaty for reasons similar to those discussed in the previous sections devoted to research and development and specialization agreements.⁹² In addition, the European Commission has stated that the rules of a standard development organization (SDO) should provide that all competitors in the market affected by the standard can participate in the process leading to the selection of the standard in order to ensure unrestricted participation⁹³ and that third parties must not be foreclosed from effective access to the standard.⁹⁴ These conditions are met in the Project.

Based on the above analysis, efforts to develop and build offshore meshed HVDC grids can be considered standardization agreements that do not restrict competition. InterOPERA is a good

⁸⁹ Horizontal Guidelines, paragraph 472.

⁹⁰ Horizontal Guidelines, paragraph 472.

⁹¹ Horizontal Guidelines, paragraphs 451–459.

⁹² These reasons are as follows: (1) the creation via horizontal cooperation of standards for interoperable technologies for offshore HVDC grids is likely to yield efficiency gains; (2) InterOPERA's Cooperation Framework does not impose restrictions that go beyond what is necessary to achieve the efficiency gains, especially as all companies will be free to make use of the new standards; (3) the establishment of interoperability standards are presumed (by the European Commission) to benefit consumers; and (4) the results of the Project will be available to all, both inside and outside of Europe, and thus third parties are not foreclosed from accessing the standard (no elimination of competition). Horizontal Guidelines, paragraphs 475–486; see also Regulation 2016/1447, recital 5 ('Secure system operation is only possible if there is close cooperation between owners of HVDC systems and DC-connected power park modules and system operators. In particular, the functioning of the system under abnormal operating conditions depends on the response of the HVDC systems and DC-connected power park modules to deviations from the reference 1 per unit (pu) values of voltage and nominal frequency. In the context of system security, the networks and the HVDC systems and DC-connected power park modules should be considered as one entity from a system engineering point of view, given that those parts are interdependent. Therefore, as a prerequisite for grid connection, relevant technical requirements should be set for HVDC systems and DC-connected power park modules.') (emphasis added), recital 13 ('The regulatory authorities, Member States and system operators should ensure that, in the process of developing and approving the requirements for network connection, they are harmonized to the extent possible, in order to ensure full market integration. Established technical standards should be taken into particular consideration in the development of connection requirements.') (emphasis added).

⁹³ Horizontal Guidelines, paragraph 452.

⁹⁴ Horizontal Guidelines, paragraph 486.

⁸⁴ Regulation 2023/1067, article 2(1).

⁸⁵ Regulation 2023/1067, article 3(1).

⁸⁶ Horizontal Guidelines, paragraph 436 (emphasis added).

⁸⁷ Horizontal Guidelines, paragraph 441.

⁸⁸ Horizontal Guidelines, paragraphs 441–444.

example of such an endeavour. Even if there were restriction (which is not the case), such an agreement would most likely satisfy the four cumulative conditions set forth in the Horizontal Guidelines and thus qualify for the application of the exception in Article 101(3) of the Treaty.

E. Sustainability agreements

In this section, it will be investigated whether and, if so, how the new Chapter 9 (on sustainability agreements) of the revised Horizontal Guidelines affects efforts of private actors to cooperate in respect of offshore meshed grids in order to assist Europe in meeting its carbon neutrality goals. InterOPERA will be used as a case study in the analysis.

In the 2023 revised Guidelines, the European Commission added a new Chapter 9 devoted to sustainability agreements, which constitutes 'the main novelty of the Guidelines.'⁹⁵ According to the Commission, the concept of sustainable development 'refers to the ability of society to consume and use the resources available today without compromising the ability of future generations to meet their own needs' and 'encompasses activities that support economic, environmental and social (including labour and human rights) development'.⁹⁶ In setting forth this iteration of the concept, the Commission drew upon United Nations General Assembly resolution 66/288, entitled 'The Future We Want', which was adopted on 27 July 2012. The Commission also expressed the view that the concept of sustainable development includes 'addressing climate change (for instance, through the reduction of greenhouse gas emissions), reducing pollution, limiting the use of natural resources, ... ensuring a living income, [and] fostering resilient infrastructure and innovation'.⁹⁷

It has been observed that this is the first time that the European Commission has included in the Horizontal Guidelines guidance on sustainability agreements, providing 'a framework for companies to self-assess the compatibility of their joint sustainability initiatives with EU competition rules' and that '[s]ustainability standardization agreements that comply with certain conditions may now benefit from a specific safe harbour'.⁹⁸ It has also been observed that the criteria of Article 101(3) of the TFEU are normally oriented towards economic, rather than other, benefits, whereas sustainability agreements are more focused on non-economic benefits, as well as benefits that are not direct to consumers (indirect benefits).⁹⁹

According to Even Tukum and Ignacio Anchustegui, '[i]f it becomes clear that the main objective of the agreement is the pursuit of sustainability, this creates a presumption that the agreement will not be a restriction of competition by object, and the agreement's effects on competition will have to be assessed'.¹⁰⁰ Article 101(1) of the TFEU provides

that agreements that may affect trade between member states and that have as their object or effect the prevention, restriction, or distortion of competition within the internal market are 'prohibited as incompatible with the internal market'. Moreover, the Court of Justice of the European Union has held that 'the essential legal criterion for ascertaining whether coordination between undertakings involves such a restriction of competition "by object" is the finding that such coordination reveals in itself a sufficient degree of harm to competition'.¹⁰¹

Robert Hardy and Chazz Sutherland state that '[c]ompanies often point out that there is a tension between sustainability and antitrust/competition' and that 'competition rules hamper competitor cooperation and innovation regarding sustainability because such rules prohibit arrangements that companies believe are necessary'.¹⁰² Alberto Escudero and Michael Tuit have similarly commented that 'competition law could, rightly or wrongly, be perceived as a barrier to reach [sustainability] agreements, ultimately disincentivizing collective business efforts towards sustainable development'.¹⁰³ Nevertheless, the Commission maintains that '[c]ompetition law enforcement contributes to sustainable development by ensuring effective competition, which spurs innovation, increases the quality and choice of products, ensures an efficient allocation of resources, reduces the costs of production, and thereby contributes to consumer welfare'.¹⁰⁴

After providing these background principles and after stating that the term 'sustainability agreement' refers to 'any horizontal cooperation agreement that pursues a sustainability objective, irrespective of the form of cooperation', the European Commission clearly states that sustainability agreements are not a distinct category of horizontal cooperation agreement for the purpose of applying Article 101 of the Treaty.¹⁰⁵ The Commission clarifies that 'where a horizontal cooperation agreement corresponds to one of the types of horizontal agreements covered by the preceding Chapters of these Guidelines and that agreement also pursues a sustainability objective, it should be assessed on the basis of the guidance contained in the relevant preceding Chapter(s), together with the guidance provided in this Chapter.' According to the Commission, '[t]his means, in practice, that [a research and development] or specialisation agreement that pursues a sustainability objective ... can benefit from the block exemption regulations applicable to [research and development] agreements or specialisation agreements, provided that the conditions of those regulations are met.' Moreover, the Commission states that, '[i]f the conditions of the relevant block exemption regulation are not met, it is necessary to carry out a

Deep Waters' 19 February 2024, page 19 < SSRN: <https://lnkd.in/dnjuV8jt> > accessed 23 May 2024.

¹⁰¹ Court of Justice of the European Union, *Groupement des cartes bancaires (CB) v. European Commission*, Judgment of 11 September 2014, Case No. C-67/13 P, paragraph 57.

¹⁰² Robert Hardy and Chazz Sutherland, 'European Commission Guidance for EU Competition-compliant Possibilities for Cooperation Between Competitors in Realizing Sustainability Objectives' 8 June 2023 < <https://www.gtaw-amsterdamlawblog.com/2023/06/european-commission-guidance-for-eu-competition-compliant-possibilities-for-cooperation-between-competitors-in-realizing-sustainability-objectives/#> > accessed 13 February 2023.

¹⁰³ Alberto Escudero and Michael Tuit, 'Summary of the Main Developments Included in the Draft Guidelines on Horizontal Cooperation Agreements of the European Commission Regarding Joint Sustainability Initiatives Between Competitors' May 2022 < [chrome-extension://efaidnbmninnbpcjpcglclefindmkaj/https://periscopiofiscallylegal.pwc.es/wp-content/uploads/2022/06/1.-Sustainability-and-competition-DEFI.pdf](https://periscopiofiscallylegal.pwc.es/wp-content/uploads/2022/06/1.-Sustainability-and-competition-DEFI.pdf) > accessed 14 February 2024.

¹⁰⁴ Horizontal Guidelines, paragraph 518.

¹⁰⁵ Horizontal Guidelines, paragraphs 521–523.

⁹⁵ Alberto Puente and Michael Tuit, 'Adoption of New European Competition Rules on Efficient Cooperation Amongst Competitors' June 2023 < [chrome-extension://efaidnbmninnbpcjpcglclefindmkaj/https://periscopiofiscallylegal.pwc.es/wp-content/uploads/2023/06/Adoption-of-new-European-competition-rules-on-efficient-cooperation-among-competitors-1.pdf](https://periscopiofiscallylegal.pwc.es/wp-content/uploads/2023/06/Adoption-of-new-European-competition-rules-on-efficient-cooperation-among-competitors-1.pdf) > accessed 14 February 2024.

⁹⁶ Horizontal Guidelines, paragraph 517.

⁹⁷ Horizontal Guidelines, paragraph 517.

⁹⁸ Hans Urlus, Robert Hardy, Anna Celejewska-Rajchert, and Chazz Sutherland, 'The EU's New Horizontal Block Exemption Regulations and Guidelines' 30 June 2023 < <https://www.gtaw.com/en/insights/2023/6/the-eus-new-horizontal-block-exemption-regulations-and-guidelines> > accessed 13 February 2024.

⁹⁹ See, eg, Or Brook, 'Struggling with Article 101(3) TFEU: Diverging Approaches of the Commission, EU Courts, and Five Competition Authorities' (2019) *Common Market Law Review* 56: 121–156.

¹⁰⁰ Even Tukum and Ignacio Herrera Anchustegui, 'Collaborating in Off-shore Renewable Energy Projects and Competition Law: Consortium Bids in

full assessment under Article 101'.¹⁰⁶ As explained by Anthony Woolich, '[s]ustainability agreements will only raise competition concerns if they entail restrictions of competition by object or lead to appreciable actual or likely negative effects on competition'; '[w]here sustainability agreements restrict competition, they may still be compatible with the EU competition rules if they qualify for an exemption.'¹⁰⁷ Even Tukun and Ignacio Anchustegui agree with this assessment and state: 'Generally, there are strong legal and economic justifications for concluding that the majority of bid consortia for offshore wind projects (and renewable energy in general) are not likely to be restrictive of competition by object, even if entered into by potential competitors.'¹⁰⁸ This reasoning may also be applied to offshore grid development and the cooperation that is required for developing interoperable grids.

It may also be mentioned that '[t]he involvement of national or local public authorities in the process of conclusion of sustainability agreements, or knowledge by those authorities of the existence of such agreements, does not in itself preclude the application of Article 101 to such agreements.'¹⁰⁹ In other words, the fact that the Project is funded by the EU does not exempt it from having to comply with EU competition law and does not necessarily lead to the conclusion that it complies with that law.

In the foregoing section, the Cooperation Framework has been analyzed under the legal rubrics of research and development agreements, specialization agreements, and standardization agreements—and found to qualify as all three types of agreements. It was also concluded that the Framework was a permissible horizontal agreement under all three categories. Based on these conclusions and based on the guidance from the European Commission that horizontal agreements should first be analyzed as research and development agreements, specialization agreements, and standardization agreements before resort is made to the requirements of sustainability agreements under the new Chapter 9 of the Horizontal Guidelines, further analysis is neither necessary nor appropriate based on the guidance provided by the Commission.

¹⁰⁶ Horizontal Guidelines, paragraphs 523–524.

¹⁰⁷ Anthony Woolich, 'European Commission Adopts Updated Block Exemption Regulations and Guidelines on Agreements Between Competitors' July 2023 < <https://www.hfw.com/European-Commission-adopts-updated-Block-Exemption-Regulations-and-Guidelines-on-agreements-between-competitors-july-2023> > accessed 15 February 2024; see also Alberto Puente and Michael Tuit, 'Adoption of New European Competition Rules on Efficient Cooperation Amongst Competitors' June 2023 < chrome-extension://efaidnbmnnnibpcjpcglclefindmkaj/<https://periscopiofiscalylegal.pwc.es/wp-content/uploads/2023/06/Adoption-of-new-European-competition-rules-on-efficient-cooperation-among-competitors-1.pdf> > accessed 14 February 2024.

¹⁰⁸ Even Tukun and Ignacio Herrera Anchustegui, 'Collaborating in Offshore Renewable Energy Projects and Competition Law: Consortium Bids in Deep Waters' 19 February 2024, page 20 < SSRN: <https://lnkd.in/dnjuV8jt> > accessed 23 May 2024.

¹⁰⁹ Horizontal Guidelines, paragraph 597. See also Alberto Escudero and Michael Tuit, 'Summary of the Main Developments Included in the Draft Guidelines on Horizontal Cooperation Agreements of the European Commission Regarding Joint Sustainability Initiatives Between Competitors' May 2022 < chrome-extension://efaidnbmnnnibpcjpcglclefindmkaj/<https://periscopiofiscalylegal.pwc.es/wp-content/uploads/2022/06/1.-Sustainability-and-competition-DEFI.pdf> > accessed 14 February 2024 ('The involvement of public authorities in the process of conclusion of sustainability agreements, or the knowledge by those authorities of the existence of such agreements, does not imply that such agreements are automatically compatible with the competition rules.').

5. Conclusion

The foregoing analysis has demonstrated that the European Commission's updated regulations and guidelines in respect of competition are consistent with joint commercial efforts of the offshore wind industry to power Europe with renewable energy in the coming years and decades—so that Europe can meet its 2050 carbon neutrality targets under the Paris Agreement.

A good case study for these efforts has been analyzed herein, namely the InterOPERA Project, which can be conceived of as a horizontal cooperation arrangement and which aims to facilitate carbon neutrality through the development of interoperable offshore electricity grids, whilst maintaining compliance with applicable competition law. The Project, at its regulatory and governance core, has developed a draft Multi-Party Cooperation Framework that outlines basic principles between the parties, such as cooperation, intellectual property rights, confidentiality, liability, and compliance with competition law. This Cooperation Framework can be conceptualized as a research and development agreement under European Commission Regulation 2023/1066, a specialization agreement under Regulation 2023/1067, or a standardization agreement under the European Commission's Horizontal Guidelines. Although the Cooperation Framework will not restrict competition, even if it were considered to do so (which is not the case), the Framework would nevertheless qualify for an exemption under Articles 101 and 103 of the Treaty. The stakeholders in the Project are therefore free to characterize their cooperation as any of these three types of agreements, whilst still remaining compliant with EU competition law. Whether InterOPERA is conceptualized as a research and development, specialization, or standardization agreement, the effect would be the same vis-à-vis compliance with EU competition law.

In the context of the InterOPERA Project, it is a false dilemma to cast the analysis in terms of an either-or choice between the development of an offshore meshed HVDC grid to meet Europe's renewable energy goals, on the one hand, and compliance with EU competition law, on the other hand. There is no need to make such a choice because there is no conflict between the two and because both objectives can be achieved simultaneously. Moreover, competition law is critical to continuing efforts to drive innovation in respect of new technologies to reduce dependence on non-renewable resources; and this is a welcome state of affairs, as both carbon neutrality and continued compliance with competition law are desperately and urgently needed in the years and decades ahead, so that our society can wean itself from its self-destructive addiction to fossil fuels.

Conflict of interest

None declared.

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