

PRESS RELEASE

## **Energy - Contractual changes possible only under specific condition**

**AGCM Chairman Roberto Rustichelli and ARERA President Stefano Besseghini discuss the increases in bills and the concerns over contractual relationships consumers have complained about.**

**Scope of application of Article 3 of Aid bis Decree-Law.**

Rome, 13 October 2022

The Chairman of the Italian Competition Authority (AGCM), Roberto Rustichelli, and the President of the Italian Regulatory Authority for Energy, Networks and Environment (ARERA), Stefano Besseghini, met in Rome to discuss the energy market situation.

Following the meeting, as reported in a joint note, they expressed their intention of contributing to clarifying the nature and constraints of "*Unilateral changes in electricity and gas contracts*" also in light of the provisions of the *Aid bis* decree (Article 3, of Decree-Law No. 115 of 2022) in order to ensure protection of customers and balance in the national energy system.

The uncontrolled increase in energy prices and the general state of uncertainty caused by international tensions are affecting both consumers and operators in the energy sector, sometimes resulting in initiatives that may constitute unfair commercial practices or violations of sector regulation.

This is evidenced by several complaints that consumers submitted to both Authorities for *violations of the aforementioned Article 3, of the Aid bis Decree-Law*, which is the main new development in the context of unilateral contract variations as well as for improper exercise of *seller withdrawal and termination for excessive onerousness* remedies.

*"The Italian Competition Authority - says AGCM Chairman **Roberto Rustichelli** - emphasises how its action is, yet again, centred on consumers, especially in the current economic situation, which is gradually worsening the prospects of citizens' quality of life. The Authority is confident that companies in the sector will maintain corporate legal compliance, but is ready to intervene if conduct that is detrimental to consumer rights and market structures is adopted"*.

According to ARERA President **Stefano Besseghini**, "*at such a complex time, which holds the entire energy system in a delicate balance and in the marked need to reconcile the sometimes conflicting interests of the various players involved, it is absolutely necessary that the framework of rules within which to act be clear, shared and correctly applied. The energy system has always been characterised by various information asymmetries and vulnerabilities. In strongly urging compliance with the rules, the Authority calls for an additional sense of responsibility, each for their own part, urging operators not to exploit such asymmetries and consumers to make proper use of facilitation tools. There will be*

*a precise enforcement action by ARERA that will be all the more effective the more these basic principles will be respected".*

It should be briefly noted that the Aid bis Decree-Law defines some urgent measures in the fields of energy, water emergency, social and industrial policies. Especially in the case of ongoing contracts signed on the electricity and gas liberalised market, Article 3 provides for the *suspension of the contractual clauses that allow unilateral changes in contracts for the supply of electricity and natural gas* in relation to the definition of price, *until 30 April 2023*.

Still until 30 April 2023, according to paragraph 2, notices that are given for these purposes before the date of entry into force of the decree shall be "ineffective", unless the contractual changes have already been made.

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In light of the reflexion jointly carried out and the complaints received by the offices of the two Authorities, ARERA and AGCM consider it useful to summarise the overall framework of the rules and remedies available to allow consumers and companies to correctly construe each other's conduct, including within the scope of application of Article 3, of Decree-Law 115/22

a. **unilateral changes** in contractual terms (Article 13, of the Code of Commercial Conduct).

i. These are the cases in which, during the performance and validity of a supply contract, the seller decides to enforce, with cause, a contractual clause in which the right to unilaterally varying specific contractual terms is explicitly provided for.

ii. As these clauses explicitly give the seller the right to unilaterally vary the contractual terms that define the price, they fall fully within the scope of application of Article 3, of Decree-Law 115/22.

b. **automatic changes** in economic terms (Article 13 of the Code of Commercial Conduct).

i. These are changes/updates of the economic terms already provided for by the contractual provisions at the time of conclusion. They usually entail an increase in the flat rates determined by the seller, the expiry of or reduction in discounts, a change from a fixed price to a variable price or from a variable price to a fixed price.

ii. Since they are already provided for in the contractual provisions, on which both parties have agreed, they do not have a unilateral nature.

iii. They do not fall within the scope of Article 3, of Decree-Law 115/22, since they are, indeed, automatic evolutions of the economic terms that have already been defined and agreed between the parties.

c. **PLACET offers: renewals of the economic terms**.

i. Renewal is a case that, in principle, does not constitute a unilateral variation, since it is aimed at entering into a new contract on the same terms and conditions as the expiring one. Renewal, however, may be variously regulated in a contract entered into by the parties.

ii. In the case of PLACET offers - which consist in contractual offers whose terms are entirely established by the Authority, with the exception of the price, of which the Authority only establishes the frame, while the amount is defined by the seller - the regulation provides for a specific procedure for the renewal of the economic terms and conditions (which must take place every 12 months).

iii. Therefore, this renewal does not fall within the scope of Article 3, of Decree-Law 115/22.

d. **Proposal for renegotiation due to supervening unbalanced performance as a result of price increases** (operators invoke force majeure).

- i. There have been complaints about operators putting forward offers at higher prices, informing customers that in case of non-acceptance they would resort to termination due to supervening excessive onerousness of the existing contract.
- ii. The problematic aspect of this case relates to the fact that the seller suggests termination of the contract, instead of a new contract.
- iii. It should be noted that the increase in prices could constitute not a case of "supervening impossibility", but, at most, of "excessive onerousness" which, under the terms provided for by Article 1467 of the Italian Civil Code, entitles the seller to seek termination of the contract in a court of law.
- iv. The seller may not consider the contract terminated without a court decision and request activation of last-resort services for contractual termination: the latter conduct violates the ARERA regulation on the activation of last-resort services.

**e. Exercise of the right of withdrawal from the supply contract with its customers**

- i. The exercise of the right of withdrawal may raise issues if it violates the Authority's regulation on the matter (for example, cases of withdrawal with almost immediate effect have been complained about) and ensuing activation of last-resort services.
- ii. In this respect, it should be noted that with regard to small retail customers (households, low voltage, and other electrical and gas usage within the limits of 200,000 Sm<sup>3</sup>), the Authority's regulation recognises the right of withdrawal of the seller, in the context of liberalised market contracts, and if this right is set out in the contract document, providing for a notice period of at least six months.