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Access, pricing and public service obligations: some EU experience with dispute resolution

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Issues of this presentation

- Dispute resolution is an almost general responsibility of EU regulators
- Yet, their practical experience is limited mostly to the mass market
- In general, regulators are seen more as advocates of competition and consumer rights than neutral arbitrators
- Will deal with some experience about:
 - consumer complaints: Italian experience
 - EU policy on out-of-court dispute resolution
 - international pricing controversies
 - access issues at EU and National level

Issues excluded from the presentation

- Disputes between market players, regulators and governments are a different, often big issue
- High litigation in countries where regulatory decisions are subject to appeal before general or special (administrative) Courts
- In some countries market players may win favorable Court sentences even against government acts
 - e.g. French Conseil d'Etat on regulated gas prices, 2011
- In other countries, limited appeals rights against regulator
 - in UK, appeals with Competition Commission
 - in Czech Republic, appeals with Regulator's Chairman

Part 1

Mass market disputes and customers' complaints

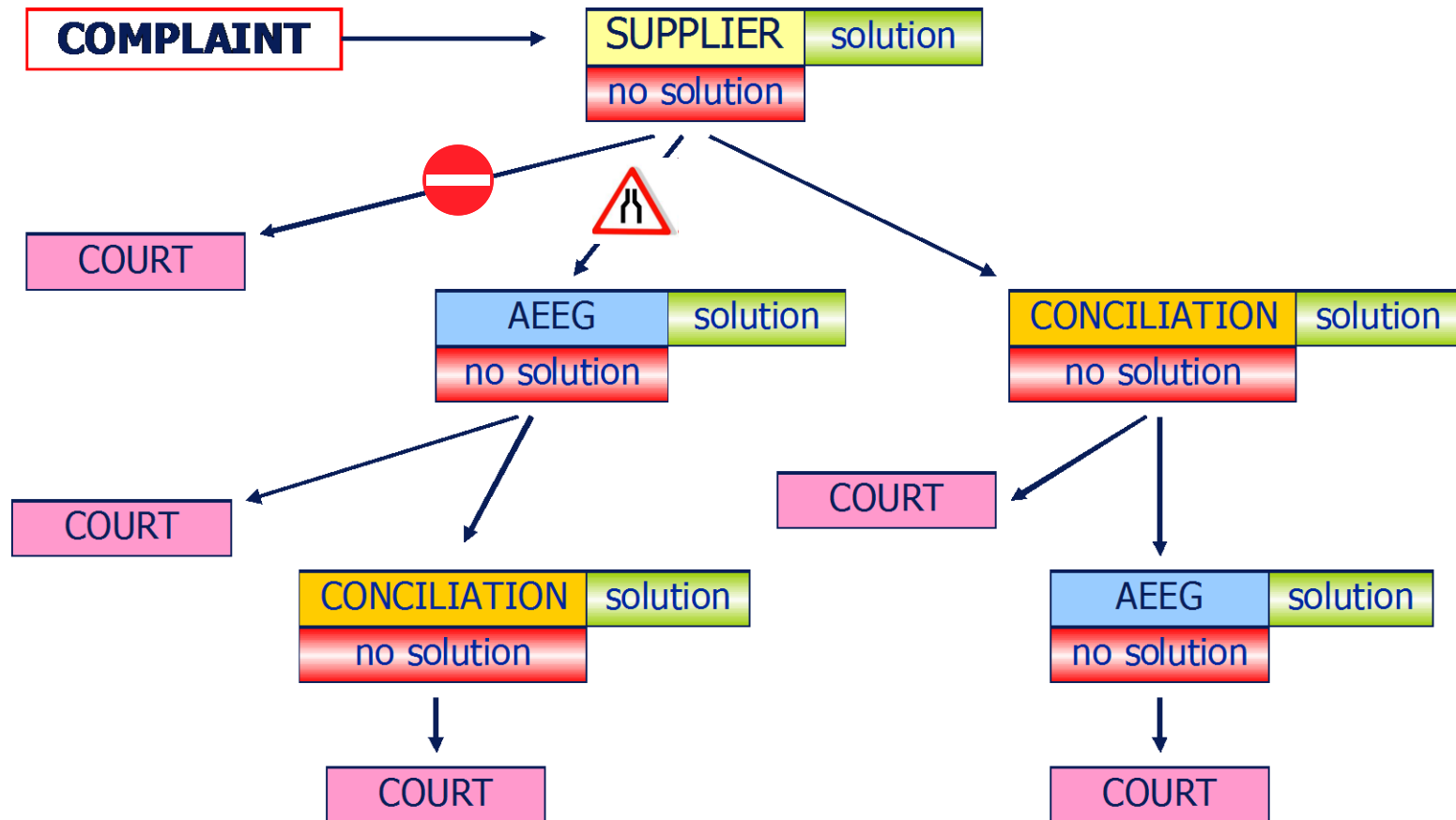
Mass market disputes

- EU regulators are normally concerned with public services supplying large numbers of customers:
 - Universal service: Electricity
 - Service subject to Public Service Obligations: Gas
- By far the largest number of disputes is related to small consumer complaints and PSOs
- Problem: too many complaints may overwhelm available staff
- Regulators not equipped for huge dispute streams, alternatives to be sought

Mass market disputes: Italian experience

- Judicial procedure (Court)
 - expensive, difficult, slow: “it isn’t worth it”
 - decisions based on law and regulation
- Extra-judicial procedure (Conciliation)
 - suppliers may refuse to activate the procedure
 - the payment of a charge is requested
 - solution based on a mutually accepted agreement
- Regulator (AEEG)'s complaints management procedure
 - no fees or charges
 - easy to submit
 - solution based on regulation

Complaint processing: logical frame



Italian regulator's handling of customer claims

- The AEEG evaluates a complaint only after the customer has tried to resolve the problem with the supplier
- AEEG normally handles cases in which the utility and the customer could not find a mutually satisfactory solution
- The AEEG evaluates the complaint on the basis of service supply regulation
 - focus strictly on the regulatory aspect of the complaint
 - punish utilities only if the regulations are violated
- Disputes not addressing service supply, or liability issues are not addressed

Complaints handling: preliminary steps

- Claims may be submitted by the customer directly, or through a consumer NGO, a lawyer, etc.
- The investigation is based on written documents submitted by the customer: description of the problem, copy of the claim previously submitted to the supplier, copy of any relevant available document (supplier's written answer, bills, contracts..)
- If the claim is not complete, the claimer may be asked to produce lacking relevant documents
- Further information or documents may be asked to the supplier

Complaints handling: outcome

- Once the investigation of a customers' complaint is completed, there are three possible complaint outcome:
 - Justified: if it is found that the utility did not comply with AEEG orders or regulations
 - Not justified: when the utility demonstrates that correct procedures were followed
 - Inconclusive: if incomplete records, equivocal findings or uncertain regulatory interpretations make it difficult to determine whether or not the customer was right
- The customer is in any case informed and given reasons about the outcome of his complaint

Complaints and the regulator: procedures

- Responsible Department may ask the Commission to declare the claim not justified
- Otherwise, the Commission designates an Officer in charge
- Parties may send written statements and related technical documentation, also with legal and technical assistance
- The Officer in charge may hear the parties, promote technical consultancy or inspections
- The Officer in charge proposes a decision to the Commission
- Parties may request temporary measures or confidentiality

Complaints handling: outcome implementation

- If the claim is not justified or if the problem is not AEEG competence (e.g. taxation, property, liability..) the customer is informed and the case is shelved
- If the claim is justified, the regulator:
 - attempts to persuade the utility to comply (moral suasion, informal procedure)
 - issue an order to comply (formal procedure)
- The informal approach (a letter addressed to the supplier) usually leads to the solution of the case
- If the utility does not comply, the AEEG issues a fine (between 25K & 300M€)

Complaints and the regulator: evolution

- In the gas service most complaints are related to contracts, billing, connection issues
- However, liberalization of retail supply leads to growth of price related complaints
- Commercial quality regulation requires written answers to customers' complaints within scheduled time
- Dealing with complaints helps the regulator to understand the problems and act to prevent them, e.g. by revising controversial rules and filling regulatory gaps
- Increasing consumer confidence in their rights is a success, but it may stress regulator's capabilities to cope with complaints

EU harmonisation of Alternative Dispute Resolution

- Increasing need and relevance of conciliation and other out-of-court procedures is rather common in the EU
- Need to resort to “faster, easier and cheaper solutions to disputes with traders” (European Commission, Nov. 2011)
- New EU Legislative Package under discussion:
 - Directive on Out-of-Court (Alternative) Dispute Resolution (ADR)
 - Regulation on mandatory tools of online complaint submission
 - Covering all sectors, but only business to consumer (B2C) disputes
 - Outcome not binding on supplier, unless decided by Member State

EU proposed ADR Directive & Regulation

- Ensure that ADR entities exist for out-of -court dispute resolution
 - arbitrator, mediator, conciliator, ombudsman...
- Entities must be qualified, impartial, transparent, effective and fair
- ADR entities to be certified by government, listed by EC
- Need solve disputes within 90 days
- Regulation establishes online platform providing national point of entry for customers complaints
 - automatically sending complaint to the competent ADR entity

Part 2

Wholesale Market Disputes

International pricing disputes: content

- Related to long term contracts (see Presentation on Pricing)
- Prices normally revised every three year unless significant change in market conditions justify a revision of base price and / or escalation formulas
- Recent turmoil, emergence of spot markets triggered a wave of arbitration requests in Europe
- To succeed, applicant must demonstrate that market conditions have actually changed
- Often arbitration involves detailed analysis of gas and alternative fuel pricing and usage, as proof of change

International pricing disputes: judges and stakes

- Normally held before international Arbitration Courts (e.g. Stockholm)
- Regulators and governments hardly involved in disputes between market players!
- Each party appoints arbitrator, both appoint a Chairman
- Consultants involved for market assessment
- Outcome may be very costly for loser, with significant stock market impact
 - in Gas Natural vs. Sonatrach case, ca. € 2bn.
- In most cases arbitration is used to pressurize opponent, but solution is agreed by the parties

Access disputes: Italian arbitration procedure

- Regulatory involvement in wholesale market disputes not common → rarely used
- Each party appoints an arbitrator, AEEG's Director acts as Chairman
 - may use regulator's resources
 - no Commission involvement
- Regulator may help solution, e.g. by revising rules that triggered the dispute

Third Party Access in the EU

- Since 1998, EU Directives have granted access right (TPA) to gas transportation networks

“Member States shall ensure the implementation of a system of third party access to the transmission and distribution system, and LNG facilities based on published tariffs, applicable to all eligible customers, including supply undertakings, and applied objectively and without discrimination between system users” (Dir. 2009/73/EC, Art. 32)

Third Party Access in the EU: refusal

- May reject TPA for:
 - Lack of capacity
 - Failure to address PSOs
 - Serious take-or-pay difficulties

“Natural gas undertakings may refuse access to the system on the basis of lack of capacity or where the access to the system would prevent them from carrying out the public service obligations referred to in Article 3(2) which are assigned to them or on the basis of serious economic and financial difficulties with take-or-pay contracts having regard to the criteria and procedures set out in Article 48 and the alternative chosen by the Member State in accordance with paragraph 1 of that Article. Duly substantiated reasons shall be given for any such a refusal. (Dir. 2009/73/EC, Art. 35)

Third Party Access in the EU: refusal in practice

- Legislators feared refusal of access due to take or pay constraints,
- Foresaw detailed rules to allow such refusal
- Rules aimed at avoiding refusal abuse, granting final decision power to multinational level (European Commission)
- Frequent denial of access due to lack of capacity, but limited formal litigation at National or EU level
- No litigation on take or pay grounds

TPA in the EU: the Marathon case - 1

- Filed at the outset of market liberalization (2000)
- Processed by Directorate General for Competition (EU's antitrust authority)
- Based on general competition legislation (abuse of a dominant position) rather than special energy law
- Norwegian subsidiary of Marathon, a US based gas producer, requested TPA to 5 European TSOs (including Gasunie, GdF, Ruhrgas), filed complaint about denial
- DG Comp acted in close co-operation with National energy regulators, providing technical expertise and market knowledge

TPA in the EU: the Marathon case - 2

- Various remedies adopted by DG Comp:
 - reduce balancing zones
 - increase transparency
 - simplify balancing requirements
 - introduce entry-exit tariffs
 - release gas to competitors
 - connect or enhance pipelines
- National Regulatory Authorities in charge of monitoring implementation of remedies
- Impact of decisions far larger than single case

TPA in the EU: conclusions

- Competition Authorities more effective than energy regulators
- Long and bitter controversies, with Authorities acting as law enforcers rather than arbitrators
- Upheld by Appeals Tribunal (European Court of Justice)
- Despite efforts, improvement in actual TPA rights has been slow
- Lack of EU energy regulators, Agency for Co-ordination of European Regulators established only recently (March 2011)
 - In charge of solving cross-border disputes if not agreed by relevant National regulators
 - no experience yet

Thank you for your attention!