

THE ICA'S INTERVENTION AGAINST "INERTIA SELLING" IN THE ELECTRICITY AND NATURAL GAS RETAIL SUPPLY

Fabio Massimo Esposito^{1,2}

Keywords: Unsolicited Contracts, Unsolicited Supply, Energy, Teleselling, Aggressive Commercial Practices, CRD

1. THE PROCEEDINGS

Despite past interventions carried out by the Italian Competition Authority (ICA)³ and the energy regulator AEEGSI⁴ against inertia selling of energy supplies, during 2013 and 2014 the ICA received a steady flow of complaints against many energy retailers. In fact, consumers complained about finding out to have been switched to a new supplier through welcome letters or unexpected bills sent to them by the new supplier, without having given their consent to the switching - sometimes even without having been contacted by the supplier's agents.

In February 2014, Law Decree n. 21/2014 transposed in the Italian Consumer Code (which transposes the Unfair Commercial Practice Directive nr. 2005/29 (UCPD)) the Consumers Rights Directive nr. 2011/83 (CRD) confirming that the ICA has the power to apply both UCPD and CRD also in regulated sectors - such as energy.

¹ Italian Competition Authority.

² The opinions expressed belong only to the author and cannot be purported to represent those of Autorità Garante della Concorrenza e del Mercato. The paper benefitted from comments by Iacopo Berti, Andrea Venanzetti, Anna Astazi and Sergio Merlino.

³ See *PS91 - ENEL Energia - Richiesta cambio fornitore*, in Bollettino 33/2008; *PS376 - Sorgenia - Fornitura energia elettrica*, in Bollettino 40/2009; *PS5803 - Italcogim Energie - Attivazioni non richieste*, in Bollettino 49/2010; *PS2545 - ACEA Electrabel - Attivazione non richiesta*, in Bollettino 47/2011, *PS3764 - Edison - Attivazioni non richieste*, in Bollettino 47/2011.

⁴ In 2012, AEEGSI (the Italian Energy regulator) issued resolution 153/2012 requiring traders to take "preventive measures" so as to avoid unsolicited contracts providing for a simple *voluntary* procedure to switch consumers back to their original supplier. Under this procedure, consumers complaining for an unsolicited supply pay the electricity/gas consumed to the unrequested supplier, at the regulated price for domestic consumers minus the component covering commercial cost covering commercialization costs, until being switched back to the previous supplier.

Therefore, between November 2014 and April 2015, the ICA launched seven proceedings aimed at investigating commercial practices carried out to acquire new customers by electricity and natural gas retailers of different sizes⁵ through distance and off-premises contracts. The seven proceedings investigated two possible kinds of infringements of the Consumer Code: (a) aggressive commercial practices in the acquisition of new customers (in violation of art. 20, 24 and 25 of the Consumer Code – art. 5, 8 and 9 UCPD), including requiring a payment for unsolicited supplies, against art. 66-quinquies of the Consumer Code and art. 27 CRD and (b) violation of the formal requirements set by art. 49, 51 and 52 of the Consumer Code (art. 6, 7, 8 CRD) for off-premises (i.e. D2D) and distance (i.e. teleselling) contracts. Therefore, the proceedings intended to offer a first indication of how the CRD should be applied in Italy with reference to distance contracts concluded in the energy sector. Dawn raids were conducted at the traders' premises.

All the proceedings were closed in November 2015 with fines amounting to more than six million Euros.⁶ The ICA did not accept commitments offered by five traders, because the alleged unfair commercial practices involved conducts included in the blacklist of aggressive commercial practices⁷ and because of the ICA's interest in assessing whether the practices breached the Consumer Code.⁸ Almost all retailers decided to implement spontaneously the measures submitted as commitments; the ICA took into account their good will and reduced fines proportionately to the expected ability to mitigate the extent of unsolicited supplies.

1.1 The ICA's approach to unsolicited supply contracts

Push sale channels – such as door-to-door (“D2D”) and teleselling – bring about an inherent risk of bounded rationality exploitation, with respect to household consumers. Unsolicited calls or visits may influence consumers' behaviours through the surprise effect, leading to difficulty in quickly grasping the content of the new offer and comparing it to the offer already subscribed, as well as to a

⁵ ENEL Energia S.p.A., ENI S.p.A. (first and second largest retail sellers of electricity and natural gas in Italy), ACEA Energia S.p.A., Hera Comm s.r.l. (two medium-sized retailers, regionally very strong), Green Network S.p.A., BeeTwin S.p.A. (two small newcomers), GDF Suez Energie S.p.A. (a small player).

⁶ See *PS9406 – BeeTwin – Attivazioni non richieste*, *PS 9769 – ENEL Energia – Attivazioni non richieste*, *PS 9815 – Acea Energia – Attivazioni non richieste*, *PS9999 – Hera – Attivazioni non richieste*, *PS10000 – ENI – Attivazioni non richieste*, decided on November 4, 2015, in Bollettino 44/2015; *PS9578 – Gdf Suez Attivazioni non richieste*, *PS9834 – Green Network – Attivazioni non richieste*, resolved on 11 November 2015, in Bollettino 44/2015.

⁷ All traders demanded immediate or deferred payment for the electricity and/or gas supplied, although not solicited by the consumer, violating art. 26, par. 1, lett. f of the Consumer Code, reproducing point 29 of Annex I of UCPD.

⁸ It must be reminded that if the ICA accepts the commitments submitted by parties and makes them mandatory, no assessment of the alleged infringements is made. Therefore, sometimes commitments are rejected not only because the case concerns very serious infringements or because commitments are unsatisfactory, but also because the ICA deems that the case deserves a legal assessment of the allegedly illicit conduct, so as to make jurisprudence.

psychological pressure to conclude the contract. In this context, consumers may accept a supply contract without a clear understanding of its convenience and of its terms.⁹

To address such critical issue, the ICA complemented its previous approach based on control and incentive mechanisms for agents with a particular focus on acquisition *procedures*. Therefore, the ICA assessed to what extent the consent acquisition procedures had been designed with the aim: (i) to mitigate the effect of undue influence of push sales, ensuring consumers' understanding of the economic conditions and contractual terms, as well as consumers' awareness of the steps leading to being bound by the contract, and the exact moment when this occurs; (ii) to minimize the risk of unsolicited supplies due to the absence of consent – forged signatures or voices, acquisition (claiming discounts or mandatory controls) of personal and technical information that were used to upload a contract request without consumers' consent; (iii) to stimulate agents to look for a genuine consent. Moreover, the ICA scrutinized how traders managed consumers' complaints for the unsolicited supply, to ascertain whether they had asked for a payment for the unsolicited supply. Finally, the ICA scrutinized how traders implemented the CRD in their acquisition procedures.

2. THE FINDINGS

The investigation confirmed that procedures were not designed to ensure ex-ante a truly informed and aware consent, being rather directed to acquire consent to enter into a supply contract, leaving consumers only the ex-post safeguard of the right of withdrawal. The ICA identified two different conducts in the unsolicited supply: one related to unsolicited requests of supply due to the absence of consent and to trader's demand to be paid for the electricity/gas supplied; the other focused on unsolicited contracts due to a flawed consent.

2.1 Check-call systems

The ICA found that the only procedural measure taken to avoid unsolicited contracts due to the absence of consent was a system for checking calls so as to ascertain whether consumers had actually been contacted by an agent and had given their consent to enter into a contract. However, the system could be manipulated, and it had been applied by several undertakings only to a subset of contract proposals. In D2D sales, no system had been put in place to avoid the uploading in the CRM systems

⁹ This was clearly reflected in many complaints, e.g. when consumers were sure that they had given consent only to receive a copy of the contract - in order to read contract terms, ponder the choice and, if the case, sign it – or when they found that the contract terms were different from what they had understood on the basis of the agent's explanations.

of contracts with forged or absent signatures or signed by unauthorized proxies. Withdrawal terms were often inconsistently explained.

2.2 Teleselling procedures

The ICA found that consent acquisition was always based on only one phone call (vocal order), divided in two sections. In the first one, consumers were informed about the contract conditions and convinced to enter into the contract. Often this took place by exploiting misunderstandings on the actual contractual value of the call by providing misleading information on the convenience of the offer. In the second section (recorded), the agent read a script at high speed reporting pre-contractual information asking consumers to give their consent to switch supplier. Sometimes consumers were then called back to verify the previous call and the consent given. No recording of the first call was given to consumers before the second one, nor were they provided with further information on the contract agreed upon and contract terms.

2.3 Insufficient information

From a UCPD perspective, this setup did not give consumers the possibility to ponder the offer before being bound by the contract. Only by allowing consumers to read contract terms before confirming their intention to enter into the contract, unsolicited contracts due to flawed consent could have been eliminated.

2.4 Formal requirements

Moreover, this procedure did not satisfy formal requirements regarding contracts concluded by phone pursuant to the Italian legislation transposing the CRD (art. 51.6 and 51.7 of Consumer Code).¹⁰ In fact, it did not clearly inform consumers that by continuing the call they would have renounced to the possibility to conclude the contract in written form. Moreover, it did not give consumers automatic access to a durable medium containing the vocal order, the offer confirmed by the trader and consumers' confirmation of offer acceptance.

However, the ICA claimed that CRD requirements are satisfied by any procedure in which: (i) consumers are clearly informed, at the beginning of the process, that the vocal order procedure is alternative to accepting the contract and confirming the consent in written form, (ii) consumers have access to a durable medium containing the vocal order, the offer confirmed by the trader and consumers' confirmation of offer acceptance – as without that access no distance contract can be validly concluded, (iii) the trader sends a confirmation letter. The ICA made these minimal

¹⁰ According to the Italian Consumer Code, consent confirmations to enter into contracts can be made on a durable medium, instead of in written form.

requirements clear in its decisions, in order to provide a first interpretation of the CRD in the retail energy sector.

2.5 Unsolicited supply

The ICA found that all traders always invoiced consumers for the gas and electricity supplied, and sometimes sent default notices threatening actions against consumers who refused to pay because the supply was unsolicited. When consumers complained for the unsolicited supply, all traders (except one, who applied an equivalent internal procedure) applied the AEEGSI del. 153/12 procedure,¹¹ often without verifying whether the complaint was sound.¹²

With regard to both, the ICA recognized that traders did not abide to art. 66-quinquies of the Consumer Code (which transposes article 27 of the CRD and according to which consumers are not to pay unsolicited supplies of electricity and gas) and considered the payment request as a violation of art.26.1(f) of the Consumer Code (a blacklisted aggressive practice).

2.6 Incentive mechanism

The ICA found that the incentive mechanisms adopted for agents were unable to deter unsolicited contracts. In fact, the incentive system was not clearly designed to reward a genuine consent and punishment procedures were too discretionary.¹³

2.7 Right to withdrawal

Traders opposed obstacles to consumers' exercise of contractual rights, ranging from limiting the form in which withdrawal could be exercised (sometimes without providing a model form) to denying withdrawal for formal reasons, to bad management of complaints concerning unsolicited contracts or supplies.

¹¹ Under this procedure, a consumer claiming to be a victim of an unsolicited supply is switched back to the former supplier; for the period between the unwanted switching and the completion of the re-switching (which can even require several months), it is stipulated that the consumer will pay the unsolicited supplier a price equal to the regulated price of gas or electricity for domestic consumers, net of the component covering commercial costs. Therefore, traders applying this procedure to all complaints, without ascertaining whether the complaint was sound or not, were able to receive a payment for the unsolicited supply even from the consumers who actually did not want the switch, contrary to art. 66 of the Consumer Code.

¹² Traders claimed that a complaint proved consumers' dissatisfaction and therefore they preferred to let them return to their former supplier.

¹³ Actually, although agents were not paid for contracts voided before activation, no difference was made whether the contract was voided because of consumers' genuine afterthought or due to absent or flawed consent. In implementing punishment procedures, the trader's commercial ability always weighted against harsh punishments: traders' interest to push sales always prevailed over the claimed attention to consumers' rights.

In the end, the ICA resolved that the commercial practices adopted by traders in the acquisition of new contracts were contrary to the requirements of professional diligence and were likely to lead to unsolicited contracts due to absent or flawed consent. In fact, the specific features of the procedures used and the circumstances in which the contacts occurred - taking into account consumers' limited rationality and the complexity of commercial offers in the energy sector - can exert an undue influence capable of significantly impairing the average consumer's freedom to choose or act with regard to the product. This can therefore lead or is likely to lead consumers to make a transactional decision that would not have been made otherwise. Therefore, they were considered unfair commercial practices infringing art. 20, 24 and 25 of the Consumer Code (that is, artt. 5, 8 and 9 of UCPD). Payment requests for the unsolicited supply infringed art. 26.1, let. F), of the Consumer Code.

Several undertakings began to modify their acquisition procedures before the end of the proceedings (and such willingness granted a reduction of the fines). The new procedures mainly consisted in focusing on the need for consumers to have a full and effective access to the contract before being bound: only after receiving a contract kit containing all relevant information (including durable medium or access credentials to a server containing the audio files) the contract could be considered "confirmed" (and the withdrawal period started).

During the first semester of 2016, the ICA will examine the definitive versions of the selling procedures adopted by the seven traders, including the procedures for redressing consumers from the unsolicited provision of services and incentive schemes for agents, in order to assess their compliance with the ICA's decisions.