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EFET response to ARERA consultation on tariffs review 2014-2019

The following document contains EFET comments to ARERA consultation 424/2023/R/gas which contains the Authority's preliminary guidance on compliance with the judgments of the Council of State no. 8523 of 5 October 2022, and no. 7386 of 27 July 2023.

Key messages

1. We appreciate ARERA obligation to swiftly comply with a definitive Court ruling. EFET wishes that the identified mechanism is such as to prevent the recurrence of new complaints or legitimate claims by third parties
2. ARERA should avoid triggering a vicious circle of appeals, rulings, counter-appeals that could occur both in case of non-compliance with the judgment and in case of retro-active compensation mechanisms, which would produce many negative effects on market participants (e.g. regulatory risks) and on the whole system (e.g. reputation and attractiveness of the Italian gas market)
3. Regulatory uncertainty discourages market participation to the detriment of competition and liquidity and ultimately costs for end-users
4. Retroactively revising entry or exit tariffs poses substantial **implementation, operational and legal challenges** as the Italian market configuration (shippers, end customers) has changed over the last 10 years. The use of retroactive elements such as re-invoicing undermines the guarantee and protection of all shippers, and the regulatory stability and certainty; moreover, it undermines legal certainty and compliance with sentences
5. The proposed adjustment mechanism may be rendered partially impossible from the considerable time elapsed, which entails that the recovery of some of the amounts is not feasible
6. **We encourage ARERA to adopt appropriate, proportionate and forward-looking measures** that - in compliance with judicial rulings - safeguard the legitimate expectations generated by shippers and end customers who- relied on the application of the previous Resolutions 514/2013 and 575/2017
7. EFET suggests implementing an **ad-hoc reimbursement mechanism** to be applied only to transport users penalised in the period 2014-2019, to be covered through the enforcement of a new system component to be applied in the upcoming years only to "*punti di riconsegna*" – hence excluding foreign exit points and storage

Detailed messages

With reference to the preliminary guidelines for compliance set out by the Authority in the context of the consultation document and in particular with reference to ARERA's intention to retroactively recalculate the entry fees for the period 2014-2019, it should be noted that:

- i. Any retroactive intervention would expose market participants to losses that could not be recovered other than by passing the burden on to the end customers. Most of the relevant supply contracts for the period 2014-2019 have already expired and some of the affected customers may even have ceased to exist;
- ii. The choices that market participants would have made in the period considered with different costs and rules would inevitably have been different (because they were differently profitable) from those actually made under the rules in force. As a result, some of the contracts would have not been finalized and the gas would have circulated differently on the available routes. A forward-looking charging tariff is the best option to adopt, in this case there would be no effects for the participants' choices;
- iii. Some of the shippers active in the 2014-2019 regulatory period have left the Italian market. Retroactive intervention would therefore not be able to recover the total amount envisaged. This would force ARERA to intervene further to recover the missing delta;
- iv. According to the ARERA indications, the retroactive modification of the entry fees proposed would also entail a modification of the entry fee of Passo Gries. Considering the methodology for calculating the QT_{PSV} component applied to users under the *"Tutela gas"*, this would implicitly entail a retroactive revision of the tariffs applied to all customers under *"Tutela gas"* with an evident *"excessive administrative complexity"* as highlighted by ARERA in point 4.2 of the consultation;
- v. The judgments of the Council of State do not oblige ARERA to modify retroactively and/or with erga omnes obligations the tariffs applied in the 2014-2019 period, leaving it to ARERA to assess whether and how to intervene, given that the annulled tariff regulation did not adequately take into account the need not to penalize the areas of the *"Mezzogiorno"*;
- vi. When re-exercising its powers, ARERA has a broad discretion at least equal to what it uses in the exercise of its ordinary powers, being limited only to the extent that it cannot reproduce the same defects as those recognised by the judgments (e.g. penalization of the south entry points in the period 2014-2019). In particular, looking at the 2014 entry tariff calculation, it seems that the methodology proposed might not to be consistent with the target of the consultation document. Considered the complexity of the topic, ARERA should experiment the use of

different tariff methodologies, showing the results, also in order to offer a counterfactual scenario to compare with the proposed tariffs.

In light of these considerations, it is clear that any intervention involving retroactive revisions of entry or exit tariffs would be highly distorting for almost all market participants as well as excessively burdensome from an implementation point of view.

Therefore, it is hoped that ARERA, in satisfying the requests of the Council of State, will use its powers in a manner that takes due account of the acquired rights of market participants, who in good faith have trusted in the application of Resolutions 514/2013, (4PRT, RTTG 2014-2017) and 575/2017 (extension of the 4PRT to 2018-2019, so-called "*Transitional period*"), and at the same time guarantees an adequate economic relief to transport users penalised in the period 2014-2019.

Given these premises, as a solution for the implementation of the provisions of the Council of State and in order to minimise the negative impacts on the system, EFET suggests implementing an ad hoc reimbursement mechanism to be applied only to transport users penalised in the period 2014-2019, to be covered through the enforcement of a new system component to be applied in the upcoming years.

In the past, with reference to similar cases, ARERA adopted this kind of solution (e.g. Resolution 32/2019/R/gas and Resolution 333/2016/R/eel). This fee should be defined well in advance to allow for its predictability and a timely adjustment of commercial offers. Also, the new system component should only be applied to "*punti di riconsegna*", hence excluding foreign exit points and storage, being a response to a domestic problem triggered by a domestic energy policy.

Finally, EFET considers that, in view of the significant impact of the proposed amendments, as well as the extension of the deadline for the conclusion of the procedure to 31 March 2024, it is appropriate to publish an additional consultation document in which ARERA can present its final guidelines.