Essays

Financial and Energy Contracts: New Demands for the Regulation and Categorization of Contracts

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Abstract

According to recent European regulations, certain kinds of contracts, mostly derivatives with an *underlying* energy product, risk being included, by virtue of the predominance afforded to the financial aspects, within the realm of financial contracts and consequently subject to the full extent of the legislation governing the latter. In other words, the systematic conclusion of those kinds of contracts in the course of business becomes a *regulated activity*. It therefore becomes a pressing matter to establish a criterion to distinguish between financial and genuinely energy (only) contracts.

In this respect, the dividing line between the financial contracts group and the energy contracts group may be their *cause*. Indeed, European Parliament and Council Directive 2014/65/EU of 15 May 2014 on markets in financial instruments (MiFID 2) identifies energy financial instruments as such on the basis of elements within their governing contracts that reasonably allow one to rule out that the transaction serves a commercial purpose. In light of the current or forthcoming regulatory framework, it is, or will be, possible to be exempted only as regards cases of real commercial purpose from the rigor of the applicable rules on the professional provision of investment services to the public. The energy *subject matter* of the contract, in and of itself, does not justify any such exemption.

I. Financial and Energy Contracts: The Pressure for a Categorization

The increase in regulatory initiatives addressing financial and energy contracts,[1] both at national and mostly European level, together with the related potential concerns regarding categorization and consequently how to regulate these contracts

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[1] The regulatory framework dedicated to financial contracts will be affected by a sort of revolution following the entry into force, scheduled for 3 January 2018, of European Parliament and Council Directive 2014/65/EU of 15 May 2014 on markets in financial instruments [2014] OJ L173/349 (MiFID 2), replacing European Parliament and Council Directive 2004/39/EC of 21 April 2004 on markets in financial instruments [2004] OJ L145/1 (MiFID). In addition to MiFID 2 (and its implementing European Parliament and Council Regulation (EU) 2014/600 of 15 May 2014 on markets in financial instruments [2014] OJ L173/84, known as MiFIR), one must also consider the recent European Parliament and Council Regulation (EU) 2014/196 of 16 April 2014 on market abuse [2014] OJ L173/1 (so-called MAD 2) under European Parliament and Council Regulation (EU) 2014/596 [2014] OJ L173/1 (MAR, as amended) and under European Parliament and Council Directive 2014/57/ EU of 16 April 2014 on criminal sanctions in the case of market abuse [2014] OJ L173/179 (CSMAD).

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do not appear to be a major source of concern but rather a settled matter judging by the vast amount of definitions and notions included in the relevant legislation.

However, such an impression is soon contradicted because there are still several grey borderline areas in which a solution entailing one or the other, ie considering the contracts to be energy or financial ones, is still very unclear and may – setting aside for a moment the pressure for categorization – have destabilizing effects on the day-to-day operations of the counterparties.

The best example of such a scenario, also deserving of further analysis (see below), involves certain kinds of contracts – mostly derivatives – with an *underlying* energy product, which risk being included, by virtue of the predominance afforded to the financial aspects, within the realm of financial contracts and thus being made subject to the full extent of the legislation applicable thereto. In other words, the conclusion in a systematic and professional way of such kinds of *borderline* contracts may become a *regulated activity* (or investment service) and thus entail an obligation for professionals involved in the energy field to obtain the related authorization for the purposes of Arts 18 et seq of decreto legislativo 24 February 1998 no 58.

It, therefore, becomes a pressing matter to establish a distinguishing criterion between financial and genuinely energy (only) contracts. They constitute areas that formally – and legislatively – diverge although there are overlapping and mixed features.

In this respect, the distinction between financial and energy contracts has, so far, been connected in a rather hasty manner to the kind of market in which they are traded. Depending on whether the reference market was either financial or energy related, the contract would be deemed to be of the corresponding kind.

As a result, however, the distinguishing criterion seems pointless. Rather, the criterion merely represents a statement of principles. Since classifying a contract within a certain sector is crucial for the purposes of applying the corresponding legislation to that contract, it appears that identifying the reference market as the defining mark of a contract entails – on the contrary – starting from the legislation in order to establish how the contract is to be correctly classified. A procedure that, at most, may have the virtue of descriptive and stylistic benefits.

The normal and useful path, which moves from the practical to the abstract, in turn constituting the assumption for the identification of the relevant applicable legislation, demands further analysis. For instance, within the binomial *market* and *contracts*, be they energy or financial ones, one must preliminarily distinguish between the *freedom of contract* sphere and the *heteronomous* sphere, so to speak.

The contracts negotiated and entered into on the markets, that is, exchange contracts, will be included within the sphere of freedom of contract, to be mostly traced back to typical *sale and purchase* and *exchange* contracts, with little or

no financial or energy elements.[2] Likewise, the rules governing regulated exchange markets will be included within the sphere of freedom of contract.[3] Scholarly opinion now, definitively, agrees as to the private nature of the relationship between the regulated market entity and each market participant, each on its own account.[4]

The rules outside the scope of the parties' freedom, ie at a national or supranational level and mostly laid down by the European Union, will be connected to the contractual aspect, be it energy or financial, rather than to the kind of market: a consideration, the latter, which is *at a later* rather than *earlier* stage compared to the kind of contracts entered into.

It helps, at this point, to retrieve the meaning and purpose of the categorization work typically undertaken by the scholar – who moves from a single, specific contract to identify the category envisaged by the legislator and, therefore, the applicable legislation – in order to re-establish the importance of his or her work and to keep it up to date to cover new sectoral and industry related rules and newly emerging contractual cases. For such purposes, a preliminary digression on the underlying reasoning and the available techniques will follow.

II. Contractual Types, Categories and Groups

1. Types

The typical task of the scholar has been the categorization of contracts. Namely, to verify that a practical single case, adequately interpreted,[5] had the

[2] The scope of such exchange contracts may be represented, in turn, by other contracts, such as derivatives.

[3] Here we only consider regulated financial exchange markets in order to establish a connection with the energy exchange markets, which in fact today belong to the sole category of regulated markets.

[4] According to unanimous opinion see E. Gabrielli and R. Lener, 'I contratti del mercato finanziario', in P. Rescigno and E. Gabrielli eds, *Trattato dei contratti* (Torino: UTET, 2011), I, 6, the regulation governing financial markets is undoubtedly an act of private autonomy, designed, under the guise of general conditions, to govern relations between management companies, intermediaries and issuers admitted to trading. As incontrovertible evidence thereof, see the application form pursuant to the regulation of the markets managed and organized by the Italian Stock Exchange, which requires that certain clauses of that regulation must be approved 'specifically, under Arts 1341 and 1342 of the (Italian) Civil Code'.

[5] A classic debate among scholars concerns the distinction between interpretation and categorization of contracts. The traditional opinion (see E. Betti, *Interpretazione della legge e degli atti giuridici* (Milano: Giuffrè, 2nd ed, 1971), 145) proposes a clear distinction between the two activities: first, interpretation is directed to understanding the provisions of the parties, while categorization, which takes place at a later stage, is aimed at legally assessing the contract. The artificial nature and futility of that distinction have been pointed out by C. Grassetti, *L'interpretazione del negozio giuridico, con particolare riguardo ai contratti* (Padova: CEDAM, ed reprinted, 1983-1939), 100, and G. Scalfi, *La qualificazione dei contratti nell'interpretazione* (Milano-Varese: Istituto Editoriale Cisalpino, 1962), passim. The principle of definitive indivisibility

same features as a theoretical case envisaged by the legislator or, at least, those features deemed as the minimum requirement to consider whether the application of the theoretical case to the practical one was appropriate.

Therefore, categorization assumes the existence of laws able to encapsulate, on the basis of certain defining elements, the practical cases which from time to time may be scrutinized by the scholar. The intensity of such pull grows stronger the more such theoretical defining elements closely resemble reality in terms of customary rules, negotiating techniques or economic models.

Scholars have made a considerable effort in trying to identify the defining elements of those contracts. The ambition to come up with a uniform solution has resulted first and foremost in an approach that identifies the so-called *cause* of a contract as its universally defining element amongst the several type of existing contracts.[6] However, such a solution has proven not to be an efficient and sound yardstick.[7]

Another attempt has involved a consideration of mandatory rules, such as those rules that identify the essential features of a certain kind of contract, thus setting it apart from other types. However, given the vicious circle this approach often results in, it has not been regarded as substantially effective. Indeed, not all mandatory rules descriptive of a specific type of contract include its defining elements. As a result, in order to identify such defining elements, one must already have full knowledge of those elements.[8]

Eventually, attention was drawn to the nature of the obligation. 'However, existing laws do not support but contradict such identification'.[9] In addition, at a certain point, the *subject matter* of a contract became its identifying element. Indeed, the *subject matter* was, in turn, considered the basis of a particular definition of *cause* itself, up to the point whereby it presented a blurred resemblance to the so-called main obligation (*prestazione tipica o caratteristica*).[10]

Criticism of that theory has led to an 'acknowledgement that the many criteria

of interpretation and categorization has now also been settled in case law: see, among others, Corte di Cassazione-Sezione lavoro 16 May 2013 no 11921, available at *www.dejure.it*.

[6] See E. Betti, *Teoria generale del negozio giuridico* (Napoli: Edizioni Scientifiche Italiane, 2nd ed (reprinted), 1994), 185, and, in view of a critical review, G. B. Ferri, *Causa e tipo nella teoria del negozio giuridico* (Milano: Giuffrè, 1966), 249. See also, for a summary of the guidelines, G. Alpa, 'Causa e tipo' *Vita notarile*, I, 3 (1997), and, for the opinion stressing the relevance of the *cause* to identify the type, the complete survey conducted by E. Gabrielli, 'Il contratto e le sue classificazioni' *Rivista di diritto civile*, I, 705 (1997), in particular fn 24.

[7] See G. De Nova, *Il tipo contrattuale* (Padova: CEDAM, 1974), 59.

[8] See A. Cataudella, *Sul contenuto del contratto* (Milano: Giuffrè, 1966), 193; Id, '*Intuitus personae* e tipo negoziale', in Id et al, *Studi in onore di F. Santoro Passarelli* (Milano: Giuffrè, 1972), I, 627. The internal contradiction, in this view, has been remarked on by G. De Nova, *Il tipo contrattuale* n 7 above, 65.

[9] See G. De Nova, *Tipicità e atipicità dei contratti* (Milano: Giuffrè, 1983), 31; M. Allara, *La vendita* (Torino, 1946-47), 34 and L. Barassi, *Il contratto di lavoro nel diritto positivo italiano* (Milano: Società Editrice Libraria, 2nd ed, 1915), I, 539.

[10] See G. De Nova, *Il tipo contrattuale* n 7 above, 61-62.

used by the legislator to identify the several types of contracts are heterogeneous'.[11] This heterogeneity may be manifest in the subjective elements of the parties, the nature of the *subject matter* of the contract, the content, the kind of obligations, timing considerations and the way the contract is to be performed.

2. Categories

With the advent of European legislation, the contract type and the problem of determining its identifying elements, ie the connection between the practical and the abstract case, have been overcome and subsumed under contract categorization.

Briefly, developments in private law legislation, especially as regards commercial aspects, do not entirely appear to be in line with the list of so-called *typical* contracts set out in Title III of the Italian Civil Code. Specifically, these developments do not concern sale, lease, sub-contract, mandate, etc, entered into between natural persons for purposes other than their professional activity and neither do they envisage new models to add to existing domestic law. Instead, the developments endorse the ways in which contracts are negotiated including those with multi-layered contents such as, for instance, contracts negotiated outside business premises, distance contracts, internet contracts, contracts related to cases of shared ownership, and long term contracts related to holidays products. Otherwise, the developments opt for a specific 'category of contract'.[12] Art 128 para 1 of the Italian Consumer Protection Code, which begins by making reference to European law to the sale of goods, quickly clarifies its scope of application as being not just the *sale* type of contract but also 'contracts for the supply of consumer goods to be manufactured or produced'.[13]

The bottom line of the rules, related to the provisions corresponding to the mentioned cases, is based on issues defined both by the subjective features of the parties and by the peculiarities of their subject matter or content, and, as previously said, by the circumstances in which the negotiations have taken place. These features are all identified, by the legislator, across several and potentially relevant contractual types.

The categorization work undertaken by scholars, in this case, in connection

[11] ibid 84; R. Sacco, 'Autonomia contrattuale e tipi' *Rivista trimestrale di diritto e procedura civile*, 802 (1966).

[12] See G. De Nova, 'I singoli contratti: dal titolo terzo del libro quarto del codice civile alla disciplina attuale', in P. Rescigno et al, *I cinquant'anni del codice civile. Atti del convegno di Milano, 4-6 giugno 1992* (Milano: Giuffrè, 1993), 230.

[13] See Art 1.4 of European Parliament and Council Directive 99/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12. In this respect, G. De Nova, 'La recezione della Direttiva sulle garanzie nella vendita dei beni di consumo: vincoli, ambito di applicazione, difetto di conformità' *Rivista di diritto privato*, 759 (2001), underlines that 'for the purpose of the directive, also "*appalto*" and "*contratto d'opera*" are contracts of "sale" '. See also L. Follieri, '«Contratti di vendita» e garanzia legale', in F. Addis ed, *Aspetti della vendita dei beni di consumo* (Milano: Giuffrè, 2003), 151.

with contractual types of a European nature, faces the task of temporarily *downgrading* the importance of (contractual) type due to the fact that type becomes useful only where the rules dedicated to a so-called *transtypical* category do not regulate the specific aspect associated with the subject of the agreement between the parties. Therefore, one must refer instead to the rules governing that type of contract.[14] This, indeed, does occur rather frequently.[15]

3. Groups

In addition to the traditional types and categories, contracts entered into and within the scope of regulated markets have, for the purposes of the identification and application of special rules, become increasingly relevant. The

> 'transformation of the legislative role of the State and the processes of privatization and liberalization thereof have contributed to the creation of an important body of contract law outlined in relation to each regulated market'.[16]

The energy, telecommunications, credit and finance sectors, to name a few of those areas that have undergone deep regulatory intervention, do identify a further group of contracts that are defined by the parties and obligations' context of reference. Similarly, a market and sector led regulation is normally applied to these groups:

> 'that is, the laws of bank contracts regulated by the credit market, the laws of energy contracts by the corresponding market and so on and so forth'.[17]

On the other hand, the work of categorization described herein, ie matching an abstract and a practical case, runs the risk of appearing as a *non-issue*. On the one hand, it is argued that primary and secondary legislation describing the contracts within the mentioned group is so detailed and thorough and, in addition, mandatory that it serves no purpose to consider the specific regulation of each

[14] See L. Mengoni, 'L'Europa dei codici o un codice per l'Europa' *Saggi, conferenze e seminari del Centro di studi e ricerche di diritto comparato e straniero*, 4 (1993), which defines the approach of the European legislation as 'jagged'.

[15] According to A. Luminoso, 'Vendita. Contratto estimatorio', in V. Buonocore ed, *Trattato di diritto commerciale* (Torino: Giappichelli, 2005), II, 266, with reference to profiles neglected by the rules governing the sale of consumer goods, 'the guiding principle can only be (...) the application (...) of the provisions of national law that are not in contrast with' European legislation, as, for examples, the rules under Arts from 1470 to 1489 of the Italian Civil Code and those contained in Arts from 1498 to 1536, as such rules do not involve the warranty for defects and lack of quality.

[16] See F. Cafaggi, 'Il diritto dei contratti nei mercati regolati: ripensare il rapporto tra parte generale e parte speciale' *Rivista trimestrale di diritto e procedura civile*, 95 (2008).

[17] Once again, see ibid 98.

traditional type of contract included within each group. On the other hand, even in the case where a special legal remedy might be needed, the great majority of contracts entered into within such sectors would immediately be traced back to either a *sale* or *supply* category or, at most, a *service contract*. It becomes, thus, unnecessary to consider possible departures from the well-known models provided for by the Italian Civil Code.

The aim of completeness of the contractual group with respect to the contractual type presupposes a clear-cut distinction amongst the different sectors, for the purposes of a clear application of the corresponding laws. Such an assumption, however, appears not to be always true. Further, it can happen that the connection of certain cases to a specific group may not be an automatic and intuitive mechanism but rather result from the analysis of certain legislation as normally appropriate for the said group and also often of the other cases within said group.

In that respect, the best fitting example concerns the dividing line between the financial contracts group and the energy contracts group.

III. The Dividing Line Between the Financial Contracts Group and the Energy Contracts Group, Between Subject Matter and Cause of the Contract

The limit, the dividing line, between the financial contracts group and the energy contracts group, as is evident from their name, may be identified with the *subject matter* of the contracts negotiated and entered into (*rectius* executed) on the said markets; shortly, a matter of contractual freedom.

By reasoning in black and white terms, if the *subject matter* of the sale and purchase or, broadly, of an exchange, exhibits financial elements, this will lead to the application of a number of specific rules, tailored for peculiar demands and aims, such as to

> ‘increase transparency, protect the investors, strengthen trust, (…) ensure that the supervisory authorities are equipped with the necessary powers to carry out their tasks’.[18]

A similar criterion does not appear to be included in the legislative framework, both at the national and European level, whereby contracts, and the related issues and remedies normally applied to the said financial group often overlap with those related to the energy group. As a matter of fact, Directive 2014/65/EU of 15 May 2014 (so called MiFID 2, shortly to come into force), as well as previously MiFID[19] include within financial instruments – in accordance

[18] See recital 4 of European Parliament and Council Directive 2014/65/EU, known as MiFID 2.

[19] European Parliament and Council Directive 2004/39/EC of 21 April 2014, also known

with the list in Section C of Annex 1 – cases featuring elements potentially energy related and specifically derivative instruments on goods as per nos 5, 6 and 7 as well as (MiFID 2) the emission allowances as per no 11:[20] derivatives, therefore, with an underlying energy commodity.[21] Considered, however, in light of their predominant financial structure.

Alternatively from the standpoint of *subject matter*, another criterion appearing to be more in line with the applicable legislation, and also useful to distinguish contracts belonging to the financial group from those in the energy group and vice versa, could well be the *cause* of the contract, already identified as a possible universal defining element amongst the several types.

European law identifies energy financial instruments, which the entire legislation on financial instruments will therefore be applied to (including first and foremost the principle of *regulated activities*)[22] based on the existence with the contracts governing them of elements that reasonably allow one to exclude the commercial scope of the transaction.

Indeed, those derivative contracts which:[23]

1. (no 5) may (or shall, at the option of one of the parties) be executed in cash; the cash settlement, by netting the positive and negative balance, in lieu of the physical settlement of the commodity, is regarded as an undisputable financial features of the case;[24]

as MiFID (where MiFID stands for 'Markets in Financial Instruments Directive'), soon will stall MiFID 2, whose entry into force, originally planned for 2017, has been postponed to 3 January 2018. The list of financial instruments (intended as exhaustive) contained in Section C of Annex 1 to the first MiFID is reflected in Art 1 para 2 of decreto legislativo 24 February 1998 no 58.

[20] For a more detailed analysis of the new list of financial instruments, see L. Parola and M. Miccoli, 'Direttiva MIFID II: i nuovi confini tra prodotti energetici all'ingrosso, derivati su merci e strumenti finanziari e impatto sugli operatori' *Diritto del commercio internazionale*, 565 (2015).

[21] According to European Commission Regulation (EC) 2006/1287 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards recordkeeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive [2006] OJ L241/1, implementing MiFID, the term 'commodity' is defined as 'any goods of a fungible nature that are capable of being delivered, including (...) energy such as electricity'.

[22] Briefly, the principle of *regulated activities* encompasses the carrying out, vis-à-vis the public and on a professional basis, of 'investment services and activities', as now defined in Art 1 para 5 of decreto legislativo 24 February 1998 no 58, 'where they concern financial instruments'.

[23] The list of financial instruments provided by the MiFID directives includes either goods, which, in turn, will be the subject of the exchange contracts entered into on the relevant financial market (such as transferable securities, money market instruments, shares mutual funds) or, directly, contracts themselves, such as derivatives. Exchanging derivatives means negotiating one of the positions that form the structure of the contract, short or long.

[24] In this respect, the Italian Derivatives Energy Exchange (IDEX) – which is the segment of the Italian Derivatives Market (IDEM) dedicated to derivatives having an energy underlying commodity, provides that such instruments can be settled only in cash (cash settlement) and excludes any form of physical delivery. This, 'in order to facilitate the participation of pure financial players and thus create the conditions so that the market has sufficient liquidity' (see the presentation paper of such market, available on the Italian Stock Exchange website).

2. (no 6), although, provide for the physical settlement of the commodity, feature certain other strong financial elements such as the negotiation on a regulated market, a multilateral trading facility (MTF)[25] or an organized trading facility (OTF);[26] with the exception of – as discussed in more detail below – those energy products which are negotiated in an organized trading facility and which can be settled only by way of physical settlement;

3. (no 7, derivatives over the counter) through a closing provision, may be executed by way of physical settlement; and such financial element is provided for those derivatives which 'have no commercial purpose but for the other features of derivatives financial instruments';

are, in accordance with Section C of Annex 1 to MiFID 2, by way of a *praesumptio iuris et de iure*, included within the area of financial instruments regarded as lacking a commercial purpose, that is, supply and procurement of energy.

Regarding commercial purpose, to be considered as opposed to and excluding the financial purpose, the Final Report published by the European Securities and Markets Authority (ESMA) on 19 December 2014,[27] rather than provide for an investigation into the motives of the transaction, takes into account (by exclusion) the existence of specific features in the contract. Said features have to jointly appear in order to exclude the commercial purpose. Namely, the derivative must not be a spot contract; it must be traded on a regulated market, an MTF or an OTF; a clearing mechanism through a clearing house or by margin call must be applied; and the derivative itself must be standardized.[28]

Briefly, the distinction between the energy contracts group and the financial contracts group, aiming to identify the scope of application of the rules applicable to each one, conveys the idea – almost a new version of the theory of *cause* as a distinguishing element amongst the different types – that only those contracts that display an authentic, exclusive or largely predominant commercial purpose

[25] According to Art 77-*bis* of decreto legislativo 24 February 1998 no 58, the Multilateral Trading Facilities (MTFs) are trading circuits, managed by private entities, that allow the purchase and sale of financial instruments already listed in other venues. Similar to regulated markets, MTFs carry out trade organization functions but, unlike them, they cannot decree the admission to trading of securities and are subject to rules and procedures different from those required for regulated markets.

[26] The Organized Trading Facility (OTF) is a new trading venue, in addition to regulated markets and MTFs provided for by MiFID. Such venue includes, for example, the platforms established by brokers for exchanging non-equity financial instruments, which, under MiFID, were excluded from the rules on professional provision to the public of investment services and activities.

[27] ESMA Final Report 2014, aiming to provide technical advice to the European Commission for the implementation of MiFID 2, employs a defining formula similar to Art 38 of the European Commission Regulation (EC) 2006/1287, implementing MiFID.

[28] According to ESMA Final Report 2014, transport contracts entered into with, or by, an operator or an administrator of an energy transmission network, a balancing system or a network of pipelines do not fall within the perimeter of the point C7, providing that such contracts are deemed necessary in order to balance demand and supply of energy at any given time.

may be excluded. The provisions of MiFID 2, in the European legislator's own words, will automatically apply to energy derivatives contracts so long as (recital 8)

> 'it is appropriate to include in the list of financial instruments commodity derivatives and others which are constituted and traded in such a manner as to give rise to regulatory issues comparable to traditional financial instruments'.

More in detail, (recital 9), 'the scope of financial instruments will include physically settled energy contracts traded on an organized trading facility (OTF)', except for those already regulated under the European Parliament and Council Regulation (EU) 2011/1227 of 25 October 2011 on wholesale energy market integrity and transparency, known as REMIT.[29]

On the other hand, REMIT, in as much as it is thorough enough to cover the demands for integrity and transparency in the wholesale energy market, includes wholesale energy products, partially excluded from MiFID 2 regulation because of their genuine commercial purpose and, in any case, depending on whether the abuses and other distortions are taken into account by parallel special legislation. By 'wholesale energy products' it is meant, for the purposes of Art 2.4 of REMIT, 'irrespective of where and how they are traded': (i) contracts for the supply of electricity or natural gas where (physical) delivery is in the European Union; (ii) derivatives relating to electricity or natural gas produced, 'traded or delivered in the European Union', save for the future provisions of MiFID 2 in respect of energy derivatives; (iii) contracts relating to the transportation of electricity or natural gas in the European Union; (iv) the derivatives relating to the transportation of said electricity or natural gas, save again for the future provisions of MiFID 2, once entered into force.

IV. The Regulation Layers of Both Energy and Financial Contract *Groups*

In light of the current or forthcoming regulatory framework, the process of *financialization* of energy trading[30] evolves and is completed within the dualism

[29] In that respect recitals to MiFID 2 envisaging the exemption relating to the energy contracts already subject to REMIT, find no exact match in the text of the directive (see annex 1 to MiFID II, section C, number 6, containing the list of various kinds of financial instruments). As we mentioned above, the wholesale energy products can be excluded from the scope of MiFID 2 only if they fulfill the following conditions: firstly, they have to be organized in an OTF and, secondarily, they must be settled physically. Therefore, a wholesale energy product could fall under the definition of financial instruments as it lacks one or both of such requirements. For this reason, the same product could be subject to both MiFID 2 and REMIT, with an obvious surplus of regulation affecting financial intermediaries and/or energy operators.

[30] This process of *financialization* of energy markets has been identified and historically placed well before the adoption of MiFID and MiFID 2 by M. Falcione, 'I contratti finanziari

rules/exception, in the sense that it is or will be possible to be exempted from the rigor of the applicable rules in respect of the professional provision of investment services to the public, (and in particular its *regulated activity* feature), only for the case of real commercial needs, which are regulated by other provisions taking into account the risk, abuses and distortions. The energy *subject matter* of the contract, by itself, does not justify any such exemption.

As soon as one has identified the dividing line between the cases, each governing its own matter, the different approach taken by European legislation with regard to the regulation of the financial contracts group compared to the energy contracts group appears to be clear.

With respect to the former *group*, at the core of MiFID 2, similarly to MiFID, there are 'provisions to ensure investor protection' (Section II, Arts 24-30). Within such provisions are included the general rules of conduct applicable to investment firms, with particular focus on disclosure requirements, and so called peculiar rules that are tailor made to the nature of the service or the investment activity offered.[31]

The – contractual – relationship between the authorized investment firm and the single investor or client does play an essential role in light of the principle that access to financial markets, whereby the said services and activities are offered and undertaken, is reserved solely for persons who satisfy specific requirements. It goes without saying that the protection of the investor or the client mostly depends on the way of negotiation and the contents of the mandate preliminarily granted to the intermediary. This is because the intermediary is then protected – within the wholesale market phase – by the very fact that access to financial markets is restricted and thus the intermediary works in light of specific characteristics proven and ascertained both at the time of authorization and time of admission to the single market.

With respect to the energy contracts group, their regulation is – for the purposes of REMIT – focused on the *wholesale* phase: despite its main purpose being that 'consumers (...) can have confidence in the integrity of markets' (recital 1), and, at last, 'the benefit of final consumers of energy' (recital 2) it focuses on 'rules prohibiting abusive practices affecting wholesale energy markets which are coherent with the rules applicable in financial markets'.

Indeed, the *retail* sector, ie B to C, remains expressly excluded save for a justified exception[32] because 'contracts for the supply and distribution of electricity

del *trading* nei mercati energetici', in E. Gabrielli and R. Lener eds, *I contratti del mercato finanziario* n 4 above, II, 1449.

[31] The systematic framework of rules dedicated to the behavior of financial intermediaries is based on the distinction between general rules, to which any intermediary is subject regardless of the nature of the service provided, and specific rules, that cover only some investment services and activities. In this respect, see, among others, G. Scognamiglio, 'Sulle regole di condotta degli intermediari finanziari (regole di condotta e regole di organizzazione; clausole generali e disposizioni particolari)', in G. Cottino et al, *I servizi del mercato finanziario (in ricordo di Gerardo Santini)* (Milano: Giuffrè, 2009), 95.

[32] According to REMIT (see Art 2(4)), contracts for the supply and distribution of electricity

or natural gas for the use of final customers are not wholesale energy products' (Art 2(4)). Following the logic of REMIT, indeed,

> 'retail contracts which cover the supply of electricity or natural gas to final customers are not susceptible to market manipulation in the same way as wholesale contracts which are easily purchased and sold' (recital 9).

Therefore, the regulation of energy contracts mostly takes into account the trading at wholesale level amongst market professionals whilst, with a precisely specular view, the regulation of financial contracts focuses on the agreements entered into at a 'retail' level with the consumer-client.

Also, in addition to the black letter of the law, the interest of the scholar follows the legislator's approach.

With respect to the financial contracts group, the scholarly opinion and case law are dedicated to the retail sector, that is to the – also supplementary – analysis of the conduct rules of the financial intermediaries and to the identification of the appropriate private law sanctions in case of violation of said rules.[33] With respect to the wholesale sector and therefore with the usual contract dynamics occurring upon the initiative of intermediaries within the financial markets, possibly as part of specific tasks assigned to them by the so called *end-client*, the literature goes no further than describe the internal dynamics of the markets themselves, in particular the stock market, confidently maintaining that

> 'the peculiarities of the stock market – and, through such lenses, the peculiarities of the contracts entered into within such markets – emerge from the analysis of their working rules'.[34]

The lack of a debate with regard to the regulation of the financial contracts group herein defined as 'wholesale', that is those contracts entered into within

or natural gas to final customers with a consumption capacity greater than a certain threshold shall be treated as wholesale energy products. This, for the reason that 'the consumption decisions of the largest energy users can also affect prices on wholesale energy markets, with effects across national borders' (recital 9).

[33] See M. Barcellona, *Mercato mobiliare e tutela del risparmio. L'intermediazione finanziaria e le responsabilità di Banche e Consob* (Milano: Giuffrè, 2009), 30.

[34] See R. Natoli, 'I contratti di borsa', in G. Gitti et al eds, *I contratti per l'impresa* (Bologna: il Mulino, 2012), II, 376, reflecting the opinion of A. Serra, 'Contratti di borsa. I) Diritto commerciale' *Enciclopedia giuridica* (Roma: Treccani, 1998), VIII, 2.

This approach did not change even before the proliferation of trading venues – a phenomenon already enshrined by MiFID with the codification of alternative trading venues, exacerbated by MiFID 2, following the introduction of the concept of OTF – and relevance, even for the regulator, of trading over the counter (OTC) (see European Parliament and Council Regulation (EU) 2012/648 of 4 July 2012 on OTC derivatives, central counterparties and trade repositories [2012] OJ L201/1). Moreover, today, the list of financial instruments contained in annex 1, section C, of MiFID 2 explicitly includes forward derivatives (letter C6), which by definition are traded 'over the counter'.

the financial markets, assumes that the said contracts are, notwithstanding the provisions of the Italian Civil Code, covered by special legislation which is not in light of the *subject matter* but rather the setting whereby they are entered into and traded. Therefore, following such reasoning, it may be sufficiently simple to identify the rules covering all of such settings: it being understood that there would be as many special rules and regulations as there are settings for trading.

With reference to the energy contracts group, the study of which is rather recent, the appeal to apply the solution proposed in such terms is attractive, also in consideration of the previously mentioned reference – set forth in REMIT in relation to the wholesale energy market – to the 'rules applicable in financial markets'. The risk, however, as mentioned before, is to remain stuck in a tautology, diminishing the work of categorization, or better, of identification, of said type within the market.

In any case, if one were to apply that solution, the energy contracts group would drastically change its legal regime and would end up being regulated by entities other than the parties, that is by the rules of the relevant market, taken as it is.

Neglected, on the other hand, is the fact that the *group*, be it financial or energy related, for as much it may be inclusive of widely regulated contracts, cannot exist with disregard for elements of full autonomy – and precisely the freedom of the parties – such as, for instance, the decision of the person to execute an order, or elements that introduce variables within the corresponding market. In turn, such variables, depending on the actions of the parties, may give rise to as many risks with respect to the fate of the contracts themselves.

V. The Risks Associated with the Regulation of Contractual *Groups*

In light of the operational differences which distinguish truly energy related contracts from financial contracts and the almost perfect correspondence of the legislative framework adopted to regulate both the former and the latter, one can rule out the fact that the study of *groups* of energy contracts as well as of financial contracts may be limited to a reasoned presentation of the rules governing their respective markets.

It is appropriate to conduct a further level of analysis, verifying the breadth of the initiatives left to the parties with regard to these rules, the risks thereto and eventually the possibilities to restrain and perhaps neutralize the risks provided for by the market rules applicable from case to case. This is, in other words, the remedial framework at the disposal of those who operate within the markets.[35]

It is worth noting that, the risks considered above do not merely include

[35] Actually, the existence of any organized exchange system, including non-stock exchange or other regulated markets, is justified by the level of safety of the circuit, which must offer performance guarantees higher than those present in the scenario of negotiations over the counter.

counterparty risk, traditionally accounted for through the clearing house compensation mechanism.[36] A contract of exchange, having as its object financial or energy instruments, may be undermined by other criticalities or dysfunctions, which are at least as many as the possibilities of it being invalid or ineffective, *ab origine* or subsequently, provided for by contract law.

Therefore, three kinds of risks may by identified and classified:

1. the risk of not entering into the contract at all to protect the certainty of the outcomes of the negotiations and the liquidity of financial instruments or the underlying energy products;
2. the risk of anomalies *ab origine*: invalidity or voidness;
3. the risk of operational anomalies: termination.

In effect, the safety and therefore the success of an organized exchange system depends on the peculiar remedies and solutions that take into account the several potential risks provided by the specific rules of the trading setting.

VI. The Remedies and Solutions for the Energy Contracts Group

Ideally, for each of the existing organized exchange systems – whose rules as already mentioned can be considered as a form of special contractual regulation – it may be possible to conduct a strength test of the contract entered into in each of them having regard to the risk possibilities mentioned above. In other words, it may be possible to envisage a contract featuring certain failings and faults which, within the area of private law, ie over the counter, would trigger the several (private law) sanctions of invalidity and/or unenforceability. Therefore, it may be possible to verify if and how such failings and faults may be averted or treated in light of the related applicable market rules.

The exercise above is not merely possible, but fundamental, with respect to the *group* of energy wholesale contracts, that, in accordance with the foregoing assumptions, unlike, and opposite to the financial contracts group, the legislator deems to present a higher degree of risk than the contracts with an end consumer.

For the sake of brevity, we shall look at the natural gas sector; however, the strength test may be equally possible with respect to the electricity market. The following analysis, dedicated to the natural gas market, refers in the footnotes to the corresponding provisions and solutions currently adopted in the main domestic financial regulated markets, that is in the markets organized and managed by Borsa Italiana S.p.A.

A preliminary remark: the rules governing the natural gas market, although 'approved by Ministry of Economic Development Decree of 6 March 2013', exhibit

[36] According to the definition provided by the glossary available on the Italian Stock Exchange website, 'clearing house' means a 'market organ that works as an automatic and specular counterpart (ie as a seller to the original purchaser and as a buyer to the original seller) of all contracts entered into in the relevant market, in order to limit the risk of default of transactions'.

for all purposes the nature of a private law agreement. They, precisely like all rules governing financial markets, constitute a unilateral deed including the general terms and conditions of a contract with the aim of regulating the relationships between a market participant and the market entity.[37]

In line with such classification, the single market participant who intends to participate in the natural gas market must not only submit a 'market participation application' but at the same time also conclude with Gestore dei Mercati Energetici S.p.A. (GME, the company that operates the Italian Power Exchange – IPEX) a 'market participation agreement' having as its object the rights and obligations of the 'contracting party', ie the market participants *vis-à-vis* GME, and 'the terms and conditions on which GME shall provide its services in connection with transactions in the market'.

Now that the nature of the natural gas market has been clarified, the three-layered risk described above shall be taken into account.

1. The Risk of Not Entering into the Contract at All

With respect to this risk, the market rules aim to guarantee that the offer submitted by the single market participant may find a corresponding but specular offer submitted by another market participant in the form of an acceptance. By way of example, bear in mind the detailed mechanism of automatic matching of the offers for the natural gas spot market (MP-GAS), on a continuing trading basis, in accordance with Art 30 of its rules.[38] This mechanism, in light of the wording of the single offer (see Art 28.6), allows, in addition, a match and, therefore, a 'partially executed' offer (see Art 30.5), creating a sort of preliminary consent 'of the promisee' to the partial execution of the contract in lieu of the possible rejection provided for by Art 1181 of the Italian Civil Code.[39]

All those measures implemented for the purposes of guaranteeing the correctness and completeness, from a formal and substantial point of view, of the submitted offers, are aimed at preventing the risk of not being able to conclude a contract at all. The trading dynamics of the natural gas market are in line with the procedure described under Art 1326 of the Italian Civil Code, even though the offer is not addressed to a specific person (hypothetically, but this label is rather unproductive: since the market rules are a full substitute for special legislation, it may be possible to equate the offer with one to the public

[37] As explained before, market rules are undoubtedly classified in terms of private law. See, in addition, E. Gabrielli and R. Lener, 'Mercati, strumenti finanziari e contratti di investimento', in E. Gabrielli ed, *Contratto e contratti: scritti* (Torino: UTET, 2011), 274.

[38] With reference to financial contracts, see section 4, title 4.3 ('Trading Methods') of the Rules of the Markets organized and managed by Borsa Italiana S.p.A. (hereinafter, the 'Borsa Rules').

[39] In this respect, see Art 4.3.4, point 3, of the Borsa Rules, according to witch 'The partial execution of a limit order shall give rise to the creation of an order for the unfilled quantity that shall remain on the book with the price and time priority of the original order'.

under Art 1336 of the Italian Civil Code). The offer, in order to be matched with another offer, must 'correspond' to the same and, even before, it must include the 'essential terms of the contract whose performance it is aimed at'.

Said demands are offset by the minimum requirements of form-substance of the offer – again, taking into account the spot market – provided by Art 28.1 of the rules, which requires 'at least the following information', amongst which the 'type of bid/offer (demand bid/supply offer)', the offered volume and the unit price for the offered volume.[40] However, failure to indicate a price limit, far from causing non-admission of the offer, triggers an automatic integration solution, since 'its price shall be considered to be equal to the one of the best bids/offers of opposite sign included in the order book until exhaustion of the same bid/offer' (Art 29.2).[41]

2. The Risk of Anomalies A*b Origine*

The risk that the sale and purchase agreement of natural gas, entered into on the related market through the systems and criteria of matching compatible and opposite offers, might be affected by so called *ab origine* defects, is avoided in different ways, also applied in the rules governing financial markets.

Specifically, the risk that the resulting contract may be void as a result of illegality of one of its elements or as a result of it being in violation of certain mandatory laws appears unlikely. Notably, the *subject matter* (gas); the *cause* (exchange or, supply, in light of the commercial purpose which is the distinguishing criteria for the purposes of the MiFID directives); the conduct of negotiations within rules compliant with the laws and, in any case, approved by the competent authority exclude at the outset its nullity. Also, the possible nullity of the contract due to the lack of an essential element is pre-emptively cured through the minimum requirements of form-substance of the offers, as mentioned above.

It is best, on the other hand, to examine more closely the risk of invalidity of the contract. With respect to the contract being invalid due to the lack of capacity of a party, legal or natural, it appears reasonable to categorize the main requirements for admission to the natural gas market as per Art 12.1 of the gas market rules (ie fulfillment of the requirement for 'adequate experience and competence in the use of ITC systems and related security systems')[42] within the terms of a kind

[40] Similarly, according to Art 4.3.2 of the Borsa Rules, 'Orders shall contain at least the information related to the financial instrument to be traded, the quantity, the type of transaction, the type of account, the price, and the method'.

[41] The Borsa Rules admit orders without limit price or 'market orders', 'that can be executed at any price' (Art 4.3.2, point 2). During continuous trading, 'the entry of a buy market order shall result in its match with one or more sell orders with the most advantageous prices on the book at the moment the market order is entered (...); conversely, the entry of a sell market order shall result in its match with one or more buy orders with the most advantageous prices on the book at the moment the market order is entered' (Art 4.3.4, point 1-b).

[42] As the Borsa Rules are concerned, the conditions for the admission of the intermediaries

of minimum ability to use the software and the infrastructure implemented for the purposes of the market in question.[43]

With regard to the common vitiating factors of a party's will, the manner in which the contracts are entered into, including having as their *subject matter* a tradable good such as natural gas, neutralizes the risks connected with the possible occurrence of duress or willful misconduct. The identity of the counterparty to one's transaction when submitted to the system by the market participant is always unknown since the trade occurs anonymously through the matching mechanism detailed in the corresponding market rules. The anonymity associated with negotiating and entering into a contract clearly excludes any chance to threaten or deceive the other party. Bearing in mind the absolute interchangeability of the goods, it excludes – considering the list set out in Art 1429 of the Italian Civil Code – essential mistakes as to the nature (of exchange) and as to the *subject matter* of the contract, the identity or features of the goods and the identity or features of the counterparties.[44]

The only plausible remaining risk is the one associated with volume of the purchased goods or, to be more precise, with, an irremediable error of calculation that may translate into a mistake regarding the volume considered as decisive for the consent of the market participants for the purposes of Art 1430 of the Italian Civil Code. With respect to that sort of mistake, named 'managing errors',[45] the gas market rules (in Title III) set out a procedure to 'cancel' the contracts entered into by the matching of two offers during a continuous trading session during which one of the offers exhibits an 'obvious material error'.

to the markets managed by Borsa Italiana S.p.A. similarly refer to 'the adequacy of the technological systems used for trading and associated activities carried on, the number and types of interconnections with the markets, and their compatibility with the electronic data processing and telecommunication support systems adopted by Borsa Italiana for the operation of the markets'.

This is the only *positive* requirement for admission to the natural gas market. The other requirements (lack of convictions for certain crimes; no previous episodes of exclusion from the market) are couched in *negative* terms, ie a lack thereof. Access to the so called Virtual Trading Point is not required for the purpose of admission to the market but, in accordance with Article 19 of the gas market rules, is a pre-requisite 'for the submission of offers'.

[43] However, in order to ensure the relevant presence and maintenance, since it is also the object of a specific commitment under the 'market participation agreement', GME stresses this requirement (Art 2.2.d of the model set out in Annex B to the gas market rules).

[44] According to Art 11 of the gas market rules, the risk of error affecting the operator's identity or, rather, the attribution to him of the offering statement filed into the system, can be sterilized through 'special procedures (...) aimed at ensuring the identification of the operators and the authenticity of transactions'.

[45] A similar provision, precisely dedicated to the cancellation of obvious clerical errors, is contained in Art 6.1.3 of the Borsa Rules ('Handling of input errors'). In this regard, see the decision of the Appeals Board of the Italian Stock Exchange 10 July 2004, *Banca borsa titoli di credito*, II, 702 (2005), commented by M. Ventoruzzo, according to which the intermediaries, therefore, agree to submit themselves to specific rules and accept that, in case of defects affecting the relevant contracts, an *ad hoc* procedure (...) shall apply in their own interest, as well as in the interest of the market'.

First of all, the procedure to 'cancel' a contract is only permitted when the

> 'the price of the transaction for which the procedure is to be activated is higher or lower than a maximum or minimum price limit indicated in the Technical Rules':[46]

GME has therefore established a threshold to identify a volume mistake that was decisive for giving valid consent.

The related issue procedure, then, far from being solved through a constructive discussion between GME and the *mistaken* market participant, requires that

> 'GME shall provide the concerned (with respect to the mistaken market participant) market participants counterparties with the details of the transactions for which the activation of the error management procedure has been requested, asking them for their consent for activating that same procedure' (Art 46.6).

In the event that, those counterparties fail to give their consent, then 'GME shall not cancel the transactions, notifying the market participants concerned thereof' (Art 46.7).

Ultimately, the other counterparty, with respect to the market participant who mistakenly submitted an offer, is not affected by the cancellation even in case of an obvious mistake and thus as per the Italian Civil Code's own words, a recognizable mistake. The contract remains valid due to the counterparty's veto.

3. The Risk of Operational Anomalies

The third risk concerns the possibility of the occurrence of functional failures, giving rise to the right to terminate the contract. Excluding the case of impossibility and hardship – which may not occur in trading on natural gas market[47] – only non-performance by one of the market participants remains possible.

For the purposes of neutralizing said risk, also known as counterparty risk, the gas market rules apply two kinds of solutions. Those solutions, compensation and guarantee,[48] are, in general, rather common in the financial market. However, they appear much more difficult to apply in the natural gas market.

With regard to the compensation mechanism, it is a task traditionally

[46] The Technical Rules should be considered as 'implementing and procedural provisions' in respect of the gas market rules, whose enactment, in accordance with Art 4 of such rules, falls under the responsibility of GME, which 'abides by the principles of neutrality, transparency, objectivity and competition between operators'.

[47] For the same reasons one can exclude issues as regards title and/or defects or lack of quality normally associated with a contract of *sale*, which ultimately gas market contracts can be classed as.

[48] See Art 4.1.2 of the Borsa Rules.

performed by the clearing house, which, acting as a central counterparty and conduit for all transactions carried out on the market, acts like the offeree towards the offeror, and vice versa. Moreover, in the gas market, it is the same GME which offers such service. For the purposes of Art 23.4 of the gas market rules, 'GME shall be the counterparty of market participants in the gas purchase and sale contracts concluded in the MGAS'.

The guarantee that the clearing house – and thus ultimately the market participants – is solvent is based upon the obligation, laid down for the market participants 'for the purpose of submitting adequate bids/offers into the MGAS' (see Art 55 of the gas market rules), to post 'financial guarantees in the form of first-demand bank guarantees', in accordance with a template attached to the said rules and with a bank of a certain minimum standing. The amount of the guarantee is proportional to the volume of the offers made by said market participant (Art 56), it being understood that 'GME shall determine and update the available amount of the guarantee', also requiring 'where the available amount of the guarantee (...) is not sufficient, (...) to increase it' (Art 57).[49]

In any case, with respect to counterparty risk, it is paramount to note that the consequences of non-performance by the offeror (an unlikely event, if one considers the guarantee protection) does not amount to a termination of the sale and purchase contract of natural gas entered into, but rather a restitution of the goods and compensation for the loss suffered by the performing party (be it the purchaser or the seller).

First, non-performance is defined (Art 62.1.a) in terms of a market participant who has not made a payment to GME – rather than to its contractual counterparty – for the amounts due in respect of each net position, for the purposes of Art 59 of the gas market rules. Therefore, the procedure of 'management of default' as per Art 63 et seq is not left to the discretion (and burden) of the market participant but to GME. Its consequences are, amongst others, the suspension of the defaulting market participant and the closing of its associated net delivery positions (obtained through the calculation of the transactions entered into by the market participant itself on the MGAS), save for the contracts already entered into.

In that respect, the invulnerability of gas market contracts is further

[49] The exclusion of termination remedies in the gas market rules (which, as explained before, have a contractual nature) recalls to mind the debate on the lawfulness of a so-called clause of non-rescission (*irresolvibilità*), corresponding to a practical interest in maintaining the contract notwithstanding the legislative rules on termination for breach. See F. Delfini, *I patti sulla risoluzione per inadempimento* (Milano: Giuffrè, 1998), passim, and Id, *Autonomia privata e rischio contrattuale* (Milano: Giuffrè, 1999), 380, who maintains that such a clause is valid without prejudice to the remedies aimed at obtaining performance of the contract, damages for loss suffered subject to compliance with the limits stated in Art 1229 of the Italian Civil Code. More recently, see L. Bertino, 'Sulla validità di una clausola di irresolubilità del contratto per inadempimento' *La nuova giurisprudenza civile commentata*, II, 536 (2013) and M. D'Auria, 'Il patto di irresolubilità: profili problematici – on waiver of a buyer's right to terminate the sale agreement: problematic aspects' *Giustizia civile*, 1738 (2013).

confirmed, in general terms, under Art 25 of the gas market rules, named 'finality of transactions'. Art 25 provides notably that,

> 'without prejudice to Art 46 (…) (which refers to the managing of errors, as mentioned above), the gas transactions concluded in the MGAS shall be final and binding – also for the purposes of the guarantee, offsetting, billing and settlement of payables and receivables as well as the related obligations – as of the time at which demand bids and supply offers are verified to be valid and adequate and accepted in the bidding system (…)'.

In practical terms, the parties' contractual freedom within the *group* of energy and financial contracts, here regarded as the submission into the system of bid/offers, is irreversible and, in any case, the contract executed is safe and airtight.

The initial indication of intentions of the offeror, be it purchaser or seller, starts a highly controlled process for the purposes of the execution of the contract, which works and progresses thanks to automatic steps made possible by the technical and economic resources already contributed to the system at the time the market participant is admitted.

VII. Conclusions

The analysis of the regulation devoted to financial contracts and energy contracts implies a clear differentiation between these two contractual groups.

Such distinction is useful in identifying both the applicable legislation, either primary and secondary (that is, between MiFID directives and REMIT), and the reference market, which is governed by private sector rules. Thereafter, these market rules shall be compared and supplemented with remedies aimed to prevent and solve the risks often encountered in relation with exchange contracts.

Likewise, the legislative framework of both financial and energy contracts, as well as the reference market and the related rules, can be traced only by categorizing the contract within the appropriate group. The contractual group has become a fundamental feature and, in this respect, certain criteria are required in order to avoid overlapping and undue influence, as well as to guarantee legal certainty and efficiency of the markets involved.