

L'impatto delle recenti riforme regolamentari europee (REMIT, MiFID II, EMIR, MAR, CSMAD) sui mercati energetici

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Overview of the EU financial and wholesale energy markets reforms

24 November 2011

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- Background
 - International dimension to reform
 - European dimension
- Some acronyms
- New energy market regulatory architecture after REMIT...
- ...and impact on the energy (and commodities) industry

International dimension to commodity market reform

- Post- crisis programme of financial reform
 - G20 and Financial Stability Board driving agenda
 - ◆ Institutional change
 - ◆ Substantive reform
 - Macro-prudential regulation, Stability/systemic risk issues, Micro-prudential regulation
 - IOSCO role in commodity markets analysis and reforms
- Increased pressure in EU and G20
- IOSCO Task Force on Commodity Futures Markets (formed 2008)
 - March 2009 Report
 - ◆ Price levels and volatility consistent with fundamentals: insufficient evidence to blame speculation
 - ◆ Recommendations on coordinating monitoring, analysis, investigation, etc
 - 2009: more politicised: “improved functioning & transparency” agenda

Key EU reform themes 1 – substantive rules

- Implementing and going beyond global agreements
- Safety first
- Regulate more business: products, participants, platforms
 - Remove/restrict MiFID commodity exemptions
 - Regulate physical markets: under MiFID or separate legislation
- Less choice for market participants and users
 - e.g. limit trading and clearing alternatives
- One size fits all
 - e.g. extend inadequately adapted equity model; “lite” regimes doomed
- Transparency
 - Trade derivatives on organised platforms, and report and clear them
 - Increase transparency (pre- & post-trade), publication, trade reporting

Drivers of change in Europe

- Financial crisis and subsequent commitments by G20 leaders
 - **But much in MiFID Review & other EU reform initiatives is additional to G20 commitments**
- “Market” as a mechanism is being called into question
 - Shooting the messenger: short selling, accounting standards ...and now, ...commodity traders
 - ◆ Increased political rhetoric in recent months following price increases/volatility in energy as well as foodstuffs and metals
 - ◆ *Dirigiste* price regulation vs framework for price discovery & efficiency
- MiFID Review
 - market evolution: venues, technologies, participants, etc
 - single market and rulebook objectives
 - Reality: “Never waste a good crisis”?

Why the commodities markets?

- High prices have social and economic (and so political) impact
 - Political populism
 - Volatility largely unexplained?
 - Perennial pariah treatment of “speculators” and “derivatives”?
- Commodity sector (and mainly energy) fought hard for key exemptions from MAD, MiFID and CRD
 - And all three Directives are now under review
 - CESR/CEBS pre-crisis review of commodities is unfinished business
- G20 commitments on derivatives clearing & trading are widely cast
 - Commodities not excluded so issues for the different markets must be considered
- European drive for single market
 - e.g. 3rd Energy Liberalisation Package

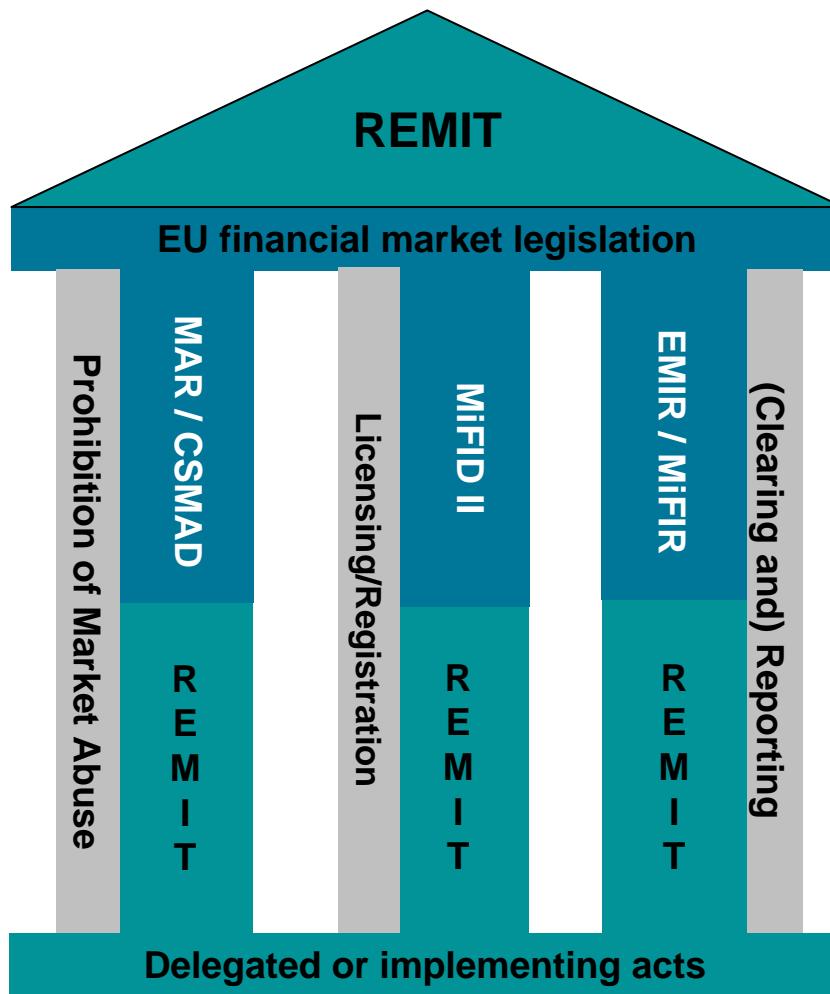
Key reform themes 2 – institutional arrangements

- More supervisory intrusion & control, e.g. powers to
 - Impose position limits and/or intervene in specific positions
 - Ban or restrict product & service offerings
- More focus on supervision & enforcement: tougher & uniform sanctions
- Centralisation
 - More Regulations, fewer Directives ⇒ less national discretion
 - European Parliament (EP) control: more detail in Level 1 means less flexibility to adapt
 - Single market / single rule book objectives
- Changes in regulatory architecture
 - Stronger EU level supervisors, with more powers & discretions
 - ◆ European Securities and Markets Authority (ESMA) versus its predecessor, the Committee of European Securities Regulators (CESR)

Some acronyms

- **MiFID II**
 - Proposal for a Directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and the Council (Draft 20.10.2011)
- **MiFIR**
 - Proposal for a Regulation of the European Parliament and of the Council on markets in financial instruments and amending Regulation [EMIR] on OTC derivatives, central counter parties and trade repositories (Draft 20.10.2011)
- **EMIR**
 - Proposal for a Regulation of the European Parliament and of the Council on OTC derivatives transactions, central counterparties and trade repositories (Presidency Compromise Draft 23.09.2011)
- **MAR**
 - Proposal for a Regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse) (Draft 20.10.2011)
- **CSMAD**
 - Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation (Draft 20.10.2011)
- **REMIT**
 - Regulation of the European Parliament and of the Council on wholesale energy market integrity and transparency (Final draft 23.09.2011)

New energy market regulatory architecture after REMIT



Impact on the energy (and commodities) market (1)

MiFID



- OTC physical forward contracts and EUA/CER/ERU are considered as financial instruments
- Specialization exemption (Art. 2(1)(k)) is deleted albeit own-accounting trading and ancillary exemptions will still be available (albeit the precise wording is still in progress)
 - ➡ capital requirements and full licensing regime
- Trading venues (regulated markets, MTFs and OTFs) where commodity derivatives are traded must:
 - Impose position limits (Art. 59)
 - Publish aggregated weekly breakdown of the positions held by different categories of traders and make this available to national authorities upon request (Art. 60)
 - National authorities are entitled to:
 - ◆ Demand information regarding positions
 - ◆ Limit the ability of a person to enter into a commodity, derivative or demand the reduction of the position

Impact on the energy (and commodities) market (2)

MiFIR



- Obligatory trading of sufficiently liquid standardised derivatives on organised trading venues (regulated markets, MTFs, OTFs (Artt. 24-27))
- ESMA is entitled to limit the ability of a person from entering into commodity directives (Artt. 34-35)

EMIR



- Clearing obligation with CCPs for OTC derivatives
 - (cash liquidity risk)
- Reporting obligations to trading repositories

MAR/CSMAD



- Extension of scope to cover commodities derivatives and EUA/CER/ERU
- Trader definitions of “inside information” and “market manipulation” with a specific reference to “spot commodity contract”

Impact on the energy market (3)

REMIT



- immediately applicable prohibitions of insider dealing/market manipulation and obligation to publish inside information
- at a later stage:
 - Registration of trading firms
 - Data collection and monitoring by ACER and NRAs
 - NRAs' sanctionatory powers

Offices Worldwide



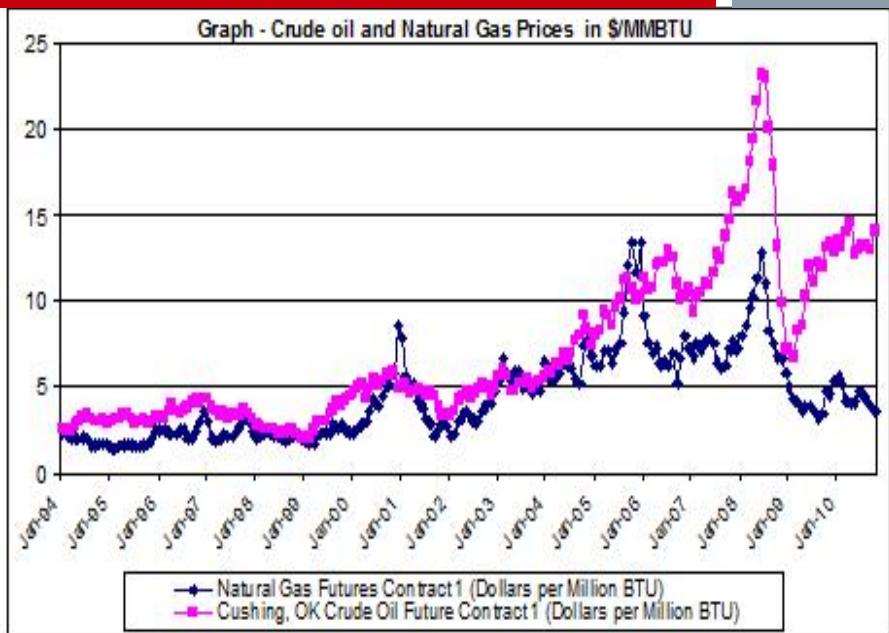
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MiFID & EMIR: impact on the energy industry



Robert Finney, Partner
24 November 2011

6 key questions for energy & emissions traders

- Do we need a licence?
- Are we restricted in the information we use for trading decisions?
- Do we have more obligations to counterparties or clients?
 - Or are we entitled to more duties from our brokers/counterparties?
- Can we choose where to trade?
- Who will see information about our orders / trades / positions?
- Must our trades be cleared or collateralised?

Specific financial measures

- MiFID II
 - MiFID & MiFIR legislative proposal, October 2011
- Market Abuse (MAD II)
 - MAD & MAR legislative proposal, October 2011
- EMIR (European Market Infrastructure Regulation)
 - ◆ Legislative proposal, September 2010
 - ◆ Now in trilogue negotiation
 - European Parliament, Council & Commission
- Capital Requirements reform
 - CRD IV, legislative proposal (directive & regulation), July 2011
 - ◆ Basel III implementation
 - Separate review proposed for CRD-exempt, MiFID-regulated commodity dealers

Overview of MiFID II proposals (1)

- 2 measures
 - Recast existing MiFID Directive
 - Many new and existing provisions now to be in a Regulation
- 4 main types of reform
 - Extensions of scope
 - ◆ More products, services, activities
 - ◆ Fewer safe harbours
 - Radical new rules on markets & trading activity
 - Increased investor protection
 - ◆ Not just for retail clients
 - Strengthening the EU regime
 - ◆ Extensive roles for Commission & ESMA, less national flexibility
 - ◆ Restricting 3rd country access

Overview of MiFID II proposals (2)

- Scope of directive

- Transparency
 - Major extension to non-equity
 - Pre-trade & post-trade

- Transaction reporting
 - Virtually all financial instruments
 - Harmonisation

- Commodities
 - Exemptions deleted/restricted
 - Position transparency, oversight & intervention

- Conduct of business
 - Restricting execution only, more duties to professionals & ECPs
 - Professional client classification

- Market infrastructure

- All organised trading functionalities to be regulated as such
 - ◆ New, broad venue category (OTF)
 - ◆ Regulated Market (RM) / MTF / OTF standards to be aligned
 - ◆ Extra rules for derivatives venues
 - ◆ Publication of execution quality data
- Liquid, clearing-eligible derivatives to be traded on RM/MTF/OTF
- Consolidated tape: non-equities too

- Stricter organisational requirements

- Supervisory convergence

- Powers & sanctions
- Single European Rulebook

- Third country access regimes

MiFID II: Specific commodities proposals (1)

- Capture specialist commodities/commodity derivatives traders
 - So exemptions widely used by utilities, other energy traders and commodity dealers to be narrowed/deleted
 - ◆ Some unregulated firms will now need authorisation
 - & some regulated non-MiFID firms (where these exist, as in UK)
 - ◆ Classification of currently unregulated firms may change
 - ◆ 2.1(k): commodity dealers exemption deleted
 - Implies major restructuring by many traders
 - ◆ Ancillary business exemption (Art 2(1)(i)) narrowed as follows
 - Own account dealing exemption: client order execution to be deleted
 - » Also in Art 2(1)(d)), but some helpful clarification there
 - Investment services provision: own account dealing excluded
- Scope of instruments widened
 - Emissions allowances – secondary spot trading spot
 - Expected deletion of C(7) cleared/margined criterion is not proposed

MiFID II: Specific commodities proposals (2)

- Position disclosure, limits, oversight & intervention
 - Commodity derivatives trading venues to:
 - ◆ Provide detailed position-related information to regulators
 - ◆ Publish aggregated data
 - ◆ Establish position limits or alternative arrangements “*designed to support liquidity, prevent market abuse, and ensure the orderly pricing and settlement conditions*”
 - Stronger regulatory powers
 - ◆ To require parties to explain and/or reduce positions
 - ◆ To impose hard limits (OTC and on-exchange)
 - Not universal, but adopted when specified criteria are satisfied
 - ◆ Note: regulators will also have a general (not commodity-specific) power to prohibit or restrict financial instruments, activities and practices

MiFID II: Organised trading of OTC derivatives

- G20 commitment: "*standardised OTC derivative contracts should be traded on exchanges or electronic trading platforms, where appropriate*"
- MiFID proposal: all derivatives which are eligible for clearing (under EMIR) and sufficiently liquid to be traded on a RM / MTF / OTF
 - Or equivalent 3rd country venue
 - Not systematic internalisers
 - Criteria for “sufficiently liquid” to be specified in implementing measures
 - ◆ e.g. average trade frequency & size, profile of market participation
 - ◆ Systemic risk irrelevant!
- Additional requirements to be set for derivatives trading venues
 - e.g. Non-discriminatory multi-lateral access

MiFID II: New category of “organised trading facility” (OTF)

- All organised trading outside current range of MiFID venues
 - e.g. broker crossing systems, inter-dealer brokers
 - Voice and electronic trading
 - Operator discretion in execution
 - Not pure OTC trading, bulletin boards, order-routers
- Level playing field across venue types
 - e.g. in terms of organisational, oversight & surveillance standards

MiFID II: Non-equity market transparency

- New pre- & post-trade transparency regimes for non-equities
 - Includes derivatives and emissions allowances
 - Pre-trade: will cover actionable indications of interest as well as quotes / orders
 - Tailored to asset class, but requirements will be similar across venue categories
- Extension and harmonisation of transaction reporting
 - To be discussed later

MiFID II: Supervision proposals include...

- Telephone/e-communications recording: set minimum standards
- Regulatory powers to ban or restrict specific products, practices & operations (already discussed)
 - Reintroduces national gold-plating through back door
- Derivatives oversight & intervention (already discussed)
- EU third country access regimes
 - For investment firms and market operators
 - Based on regulatory equivalence, MoUs and reciprocity
 - ◆ Equivalence determined by Commission
 - Two regimes: (1) Branch (with passport), (2) Cross-border services
 - Transitional period
- Regulators to have stronger investigative & sanctioning powers

Market Abuse Directive (MAD) Review – key points

- 2 legislative measures on insider dealing & market manipulation
 - Directive requiring criminal sanctions for intentional offences
 - Regulation covering and extending existing MAD regime
- Extensions
 - MTFs & OTFs caught as well as regulated markets (RMs)
 - ◆ So more commodity derivatives caught
 - Definition of “inside information”
 - ◆ Particularly affects commodity markets
 - ◆ Includes non-public non-price sensitive considered relevant by reasonable investor, with no materiality test
 - Manipulation of organised markets through OTC instruments
 - Attempted market manipulation
 - Extra-territoriality: trading outside EU relating to EU-traded instrument
- Stronger investigation, enforcement and sanctions framework

Market abuse and transaction reporting

- All trading relevant to MAD to be reported
 - Unless not susceptible to abuse nor capable of being used to abuse organised markets
 - Unless reported under EMIR (to a trade repository)
 - Note that MiFID / EMIR reporting exempts from REMIT reporting to ACER
- Accordingly MiFID transaction reporting requirements to extend to **all** commodity derivatives whether on RM / MTF / OTF or truly OTC
 - Extension and harmonisation of contents
 - National approved reporting mechanisms

EMIR overview (1)

- Clearing obligation:
 - Clear OTC derivatives in classes subject to clearing obligation, through an EU-authorised CCP
 - Eligibility of contracts for clearing obligation
 - Bottom up & limited top-down approaches
- Report *all* derivatives to registered TR (and changes / termination)
 - Retrospective effect
- Access to a CCP
 - Direct participation or via clearing member
 - Generally CCP cannot discriminate for/against execution venues when accepting/rejecting a transaction for clearing
- Timing: adoption spring 2012; in force from 1 January 2013?

EMIR overview (2)

- Non-financial counterparties (NFCs)
 - Clearing threshold (excluding hedges)
 - Reporting & clearing obligations
- Intra-group exemptions: different for FCs and NFCs
- Risk mitigation for non-cleared contracts
 - Arrangements to measure, monitor & mitigate operational & credit risk
 - ◆ Electronic confirmation, mark-to-market (MTM) valuation,
 - ◆ Exchange of collateral (or, for FCs, hold additional capital)
 - ◆ House/client segregation required, but full segregation to be offered
 - ◆ Generally applies to financial counterparties *and* NFCs
 - ◆ Limited exemption from MTM & collateral for NFCs below threshold
- CCP and TR authorisation/registration
 - Process & supervision arrangements
 - Standards

Key issues for energy/commodities under EMIR (1)

- Uncertain scope of clearing obligation
 - Which derivatives & underlyings will be designated? (e.g. commodities)?
 - What will be captured under MiFID II?
 - Physically-settled contracts (e.g. power & gas under EFET, EUAs) or longer-dated forwards: generally not power/gas under current proposals
 - Criteria & processes to initiate clearing obligation & decide derivatives class
 - Non-financial end-users: definition of hedging
- Intra-group exemptions subject to numerous conditions
- Timing
 - including frontloading (if this obligation survives) & phase-in/transitional
- International
 - Differences in scope / designated classes
 - Other potential for conflicting / inconsistent clearing obligations
 - Duplicate reporting, arbitrage, etc
 - Recognition of non-EU CCPs / TRs
 - Derivatives with third-country counterparties

Key issues for energy/commodities under EMIR (2)

- Interaction of EMIR regime with MiFID & MAD regimes, especially after the MiFID/MAD reviews
 - Pressure for standardisation
 - Impact on scope of MiFID exemptions
 - Relationship to definitions of own account dealing/execution of client orders
 - Possibly broader scope of financial instruments under MiFID II
 - changes in Level 2 implementing measures
 - Clearing may impose contractual structures triggering other obligations
 - Accelerates extension of MAD II to underlying markets
- Impact on trading terms and patterns
 - e.g. seeking/avoiding clearing, move to/from electronic trading
- Impact on finances
 - Collateral, capital

Impact & conclusions (1)

- EMIR, MiFID II and MAD II, added to REMIT, will have a major impact on energy markets and their participants due to:
 - Combined impact
 - ◆ Changes in market structure + Restrictions on venue and product choice
 - ◆ Extension of MiFID scope:
 - Deletion/restriction of MiFID exemptions + possible extension of MiFID “financial instruments” through changes in Level 2 implementing measures
 - ◆ Trading limitations under MAD and REMIT
 - ◆ Costs of clearing / collateralisation
 - Timing and impact of EU’s 3rd country regimes
 - ◆ And extra-territorial US Dodd-Frank Act provisions (& equivalent regimes elsewhere) will also impact many EU traders

Impact & conclusions (2)

- Some potential impacts
 - Restructuring of trading and customer risk management operations
 - ◆ To avoid or minimise MiFID regulatory capture and EMIR/MAD/REMIT
 - Some will curtail their activities / customer offering: an opportunity for others!
 - Changing internal procedures for commodities compliance
 - ◆ To reflect new market structures & realities, and operations
 - More centralised and less bilateral trading; more collateral
 - Trend from physical to financial mechanisms
 - Possible polarisation of structured versus standardised products
 - Reduced order flow and liquidity in some markets
 - Higher costs likely for market participants and counterparties/clients
 - ◆ Major process and technology implications
 - ◆ Ongoing financing costs or users may withdraw or assume basis risk to avoid margin, reporting & operational costs
- Early analysis and planning are crucial to your business

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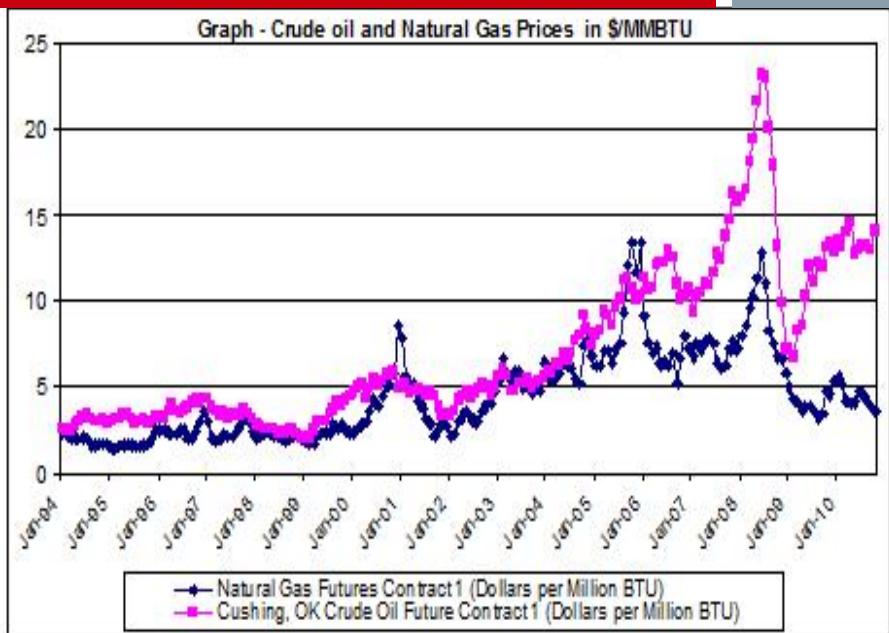
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MiFID & EMIR: impact on the energy industry



Robert Finney, Partner
24 November 2011



Defining market manipulation in a Post-REMIT World

*Regolamento REMIT (Regulation on Energy Market Integrity and Transparency)
e l'impatto delle recenti riforme sui mercati energetici*

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November 24 2011

Outline

- ◆ How does REMIT define market manipulation?
- ◆ Could some current market practices be liable to claims of market manipulation?
- ◆ Can economics help define what market manipulation is?
- ◆ A proposed definition;
- ◆ Conclusions.

How does REMIT define market manipulation?

- ◆ REMIT would make it illegal to secure an “abnormal” and “artificial” price.
- ◆ However, no definition offered for these terms.

“I know it when I see it” standard

- ◆ Subjective interpretations of “abnormal” and “artificial” expose participants to uncertainty.
- ◆ Industry’s concern is abuse by someone who might seek career advancement by punishing the big energy companies.

A case of market manipulation? LNG Diversions

- ◆ An LNG vessel approaches Rovigo.
- ◆ Five days before arrival, it gets diverted to Zeebrugge.
- ◆ The diversion decision is made by someone who:
 - Trades gas actively in Italy;
 - Is net long on gas;
- ◆ After the diversion, Italian market prices rise due to fewer supplies.

Two possible “violations” of REMIT:

1. *Insider trading* between date that company made decision and others found out.
2. *Market manipulation* because the diverter’s long position became more profitable as a result.

Can economics help define manipulation?

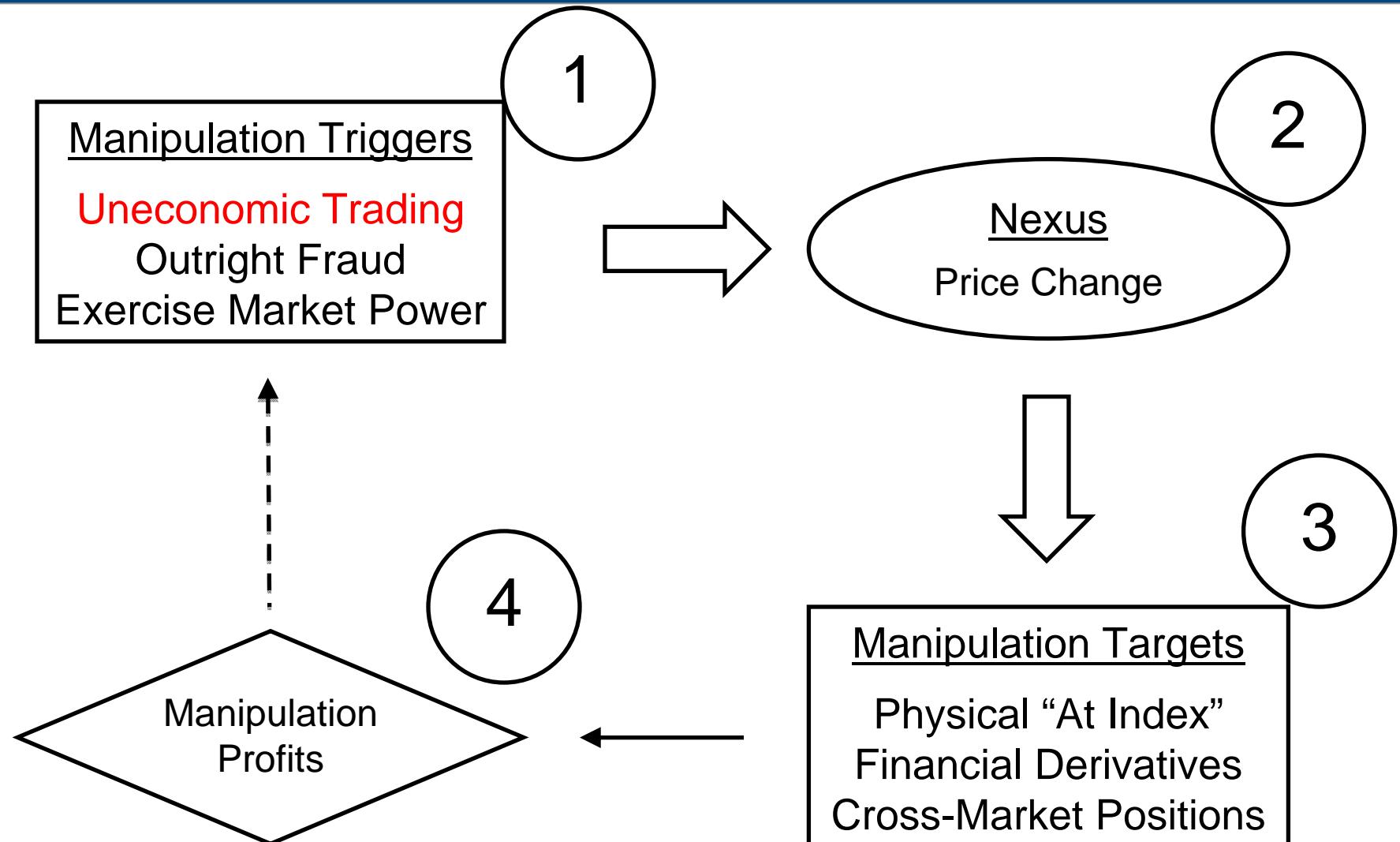
A substantial body of economics is focused on market power. Suggestions:

1. Use accumulated antitrust expertise to define abnormal and artificial.
 2. Distinguish between “scarcity rents” and “market power.”
-
- ◆ Some people equate scarcity rents to market power, but...
 - ◆ ...key distinction is how the *company arrived at scarcity rents*:
 - Prudent planning for a gas shortage?
 - *Inducing* a shortage deliberately?

One proposed definition of manipulation

- ◆ We consider a type of manipulation that is common in energy markets: a “*loss-based*” manipulation:
 - Intentionally losing money on transactions that set a price to benefit the value of one or more positions that tie to that price
 - This constitutes a fraudulent scheme/device/contrivance
- ◆ The choice to manipulate is a cost/benefit analysis.

A Framework For Defining Market Manipulation



An Example of Loss-Based Manipulation: Amaranth

1
2

Figure V: NYMEX Trading on March 2006 Contract Termination, February 24, 2006



3
4
5

Source: NYMEX_00003 (NYMEX NG Futures Contract trade data) (contained in Exhibit S1-5).

Conclusions

- ◆ REMIT introduces significant uncertainty as to what behaviour is allowed and what might be regarded as market manipulation.
- ◆ Economics can help set standards of what is acceptable behaviour in the market and what is not.
 - Would be useful to both enforcement authorities and market participants ('safe harbours')
- ◆ Firms should engage with the future REMIT consultation processes to ensure that any proposed detailed rules do not rule out legitimate trading strategies.
- ◆ For further reading please download our paper:
 - www.brattle.com/_documents/UploadLibrary/Upload960.pdf



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The Regulation on Wholesale Energy Market Integrity and Transparency - REMIT

Avv. Carmine Oncia



Sommario

- *Background* e ambito applicativo
- Abusi di mercato vietati
- Trasparenza, Monitoraggio dei mercati, Indagini e Sanzioni
- Tempistiche ed entrata in vigore
- Aree di criticità

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Background e ambito applicativo

Background

- I mercati dell'energia all'ingrosso dell'Unione europea sono sempre più interconnessi
 - Gli abusi di mercato in uno Stato membro si ripercuotono sui prezzi all'ingrosso dell'elettricità e del gas naturale oltre i confini nazionali e sui prezzi al dettaglio per i consumatori
- Le pratiche di monitoraggio e supervisione dei mercati dell'energia all'ingrosso sono specifiche per Stato membro e per settore
 - Frammentazione, risultato dei vari regimi nazionali in vigore
 - Non adeguatezza: la regolamentazione finanziaria in vigore (MiFID, MAD) non tratta in misura adeguata l'integrità nei mercati dell'energia e del gas
- Obiettivo: promuovere una concorrenza aperta e leale sui mercati dell'energia all'ingrosso a beneficio dei consumatori finali per garantire che i prezzi fissati sui mercati dell'energia all'ingrosso riflettano un'interazione equa e concorrenziale tra domanda e offerta e che non sia possibile trarre profitto dagli abusi di mercato

Ambito applicativo

- Il REMIT si applica ai prodotti energetici all'ingrosso
- “*Prodotti energetici all'ingrosso*”: contratti - inclusi i relativi derivati - per la fornitura o il trasporto di energia elettrica o gas naturale qualora la consegna avvenga nell’Unione europea
- Esclusioni:
 - Strumenti finanziari già regolati dalla Market Abuse Directive
 - ◆ Connessione con la MAD: divieti di *insider trading* e *market manipulation* non si applicano ai prodotti energetici all'ingrosso che siano classificati come strumenti finanziari ai sensi della MiFID, ai quali si applica la MAD
 - ◆ Atti delegati della Commissione al fine di aggiornare e coordinare le relative definizioni, anche in vista della MiFID II/MiFIR e MAD/MAR
 - Contratti per la fornitura e la distribuzione di energia elettrica o gas naturale destinati all’impiego da parte dei clienti finali

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Abusi di mercato vietati

Abusi di mercato vietati

- *Insider trading*
- Manipolazione di mercato (*market manipulation*)

Divieto di *insider trading*

- Condotte vietate:
 - *Trading* sulla base delle informazioni privilegiate
 - Comunicazione delle informazioni privilegiate al di fuori del normale esercizio del lavoro, professione o funzione (“*tipping*”)
 - Raccomandazione o induzione di altri, sulla base delle informazioni privilegiate, al compimento di una operazione di trading (“*tayautage*”)
- Esclusioni
- Definizione di informazione privilegiata: informazione di carattere preciso, che non è stata resa pubblica, *price sensitive* e che concerne uno o più prodotti energetici all'ingrosso
 - La definizione include “*informazioni riguardanti la capacità e l'uso degli impianti di produzione, stoccaggio, consumo o trasporto di energia elettrica o gas naturale [...] inclusa l'indisponibilità pianificata o non pianificata degli impianti...*

Divieto di manipolazione di mercato (*market manipulation*)

- Divieto di manipolazione di mercato (*market manipulation*) e tentata manipolazione di mercato:
 - Aggiotaggio operativo: conclusione di qualsiasi operazione sui prodotti energetici all'ingrosso che fornisca indicazioni false o tendenziose sull'offerta, domanda o sul prezzo di prodotti energetici all'ingrosso
 - Aggiotaggio informativo: diffusione di notizie false tramite i media o qualsiasi altro mezzo che siano o rischino di dare indicazioni false o tendenziose sull'offerta, domanda o sul prezzo di prodotti energetici all'ingrosso

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Trasparenza

Obbligo di *disclosure* delle informazioni privilegiate

- Obbligo per i *market participants* di comunicare al pubblico in modo efficace e in tempo utile le informazioni privilegiate di cui dispongono
- Obbligo delle persone che compiono operazioni a titolo professionale su prodotti energetici all'ingrosso di avvertire immediatamente l'autorità nazionale di regolamentazione qualora abbiano ragionevoli motivi per sospettare un potenziale abuso di mercato

Stato dell'arte in Italia

- In Italia, il *trading fisico* di energia è già soggetto ad alcuni adempimenti regolamentari:
 - Autorizzazioni gas (import)
 - *Reporting requirements* (vs MSE, AEEG, GSE) sia nel settore elettrico che nel gas (ad es., dati su import, comunicazione quote di mercato, contratti PSV - “*Punto di Scambio Virtuale*” - anagrafica operatori, contratti a termine, certificati verdi)
 - *Unbundling* e separazione quantomeno contabile (AEEG, Delibera n. 11/07)
 - Registrazione per gli operatori del settore elettrico e del gas (Elenco degli Esercenti) – AEEG, Deliberazione GOP n. 35/08
 - Monitoraggio del mercato elettrico – AEEG, Delibera n. 115/08
 - Monitoraggio delle operazioni al PSV (“*Punto di Scambio Virtuale*”)

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Monitoraggio dei Mercati, Indagini e Sanzioni

Raccolta dei dati e registrazione degli operatori di mercato

- Gli operatori di mercato devono fornire all'ACER un registro delle operazioni sui mercati dell'energia all'ingrosso:
 - Le informazioni comunicate comprendono l'identificazione esatta dei prodotti energetici all'ingrosso comprati e venduti, il prezzo e la quantità, date e tempi di esecuzione
 - La Commissione mediante atti delegati di esecuzione identificherà le soglie minime per la segnalazione delle operazioni
 - I soggetti tenuti agli obblighi di segnalazione ai sensi della Direttiva MiFID o EMIR non saranno soggetti a un duplice obbligo di segnalazione in relazione a tali transazioni
- I dati dovranno essere condivisi con le Autorità nazionali competenti nel rispetto di requisiti volti a garantire il rispetto della riservatezza, integrità e protezione dei dati personali (Opinion of European Data Protection Supervisor, 21 June 2011)
- ACER dovrà istituire e mantenere un registro europeo di tutti i *market participants*

Monitoraggio dei mercati

- ACER, in collaborazione con le Autorità nazionali regolamentari, monitorerà il mercato dei prodotti energetici all'ingrosso
 - Report annuale alla Commissione e Raccomandazioni

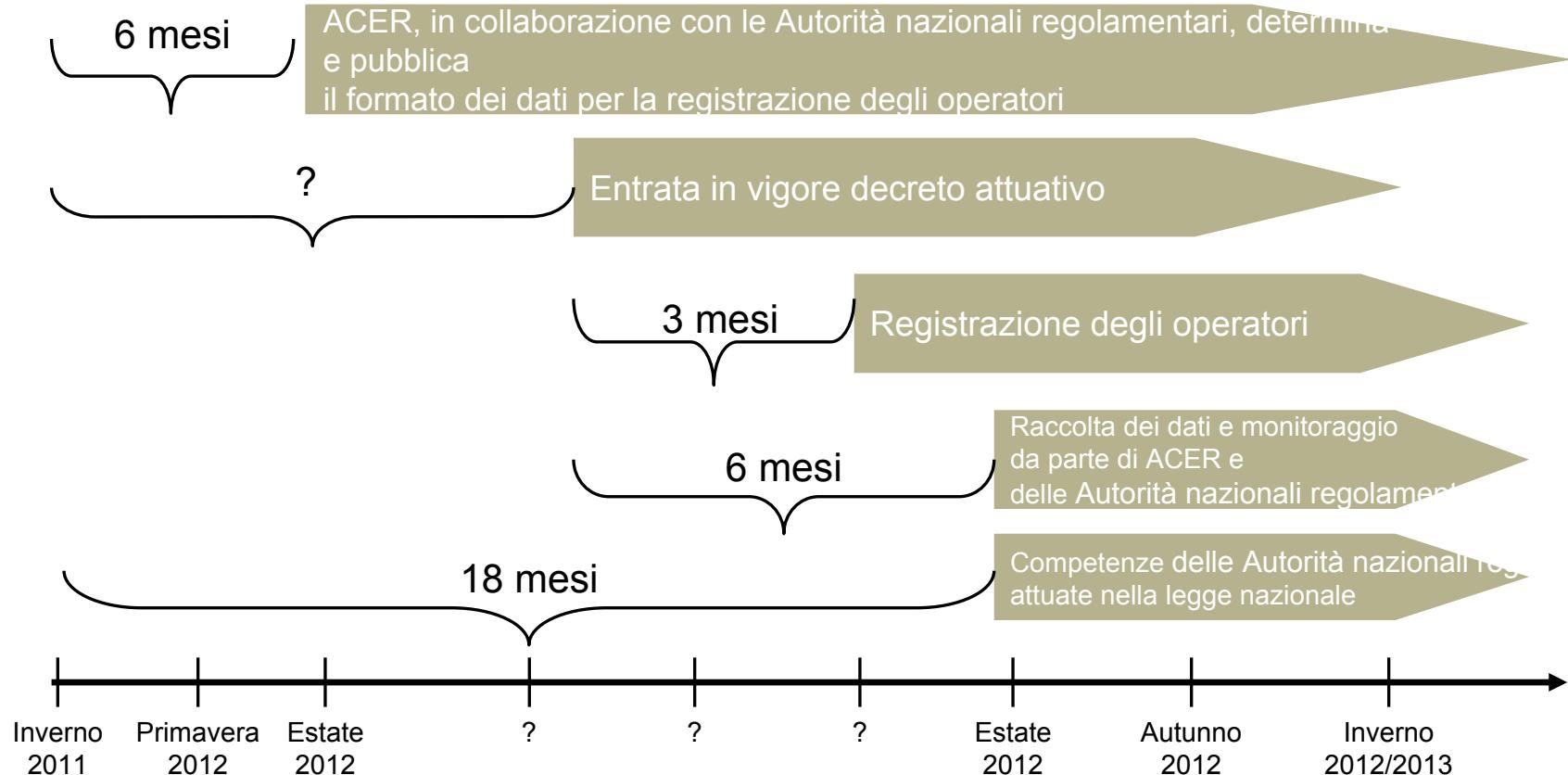
Indagini e Sanzioni

- Le Autorità nazionali regolamentari dovranno assicurare che i divieti di *insider trading* e *market manipulation* siano applicati e opportunamente sanzionati
- Nuovi poteri al fine di consentire indagini efficaci e adeguate sanzioni
- Cooperazione fra ACER, Autorità nazionali regolamentari e Autorità regolamentari del settore finanziario
- Stati membri responsabili dell'adeguamento del relativo sistema sanzionatorio

REMIT – Tempistiche dell'Entrata in Vigore

REMIT entra in vigore 20 giorni dopo la pubblicazione in G.U.

- ai *market participant* è fatto divieto di *insider dealing* e *market manipulation*
- ai *market participant* è fatto obbligo di rendere pubbliche le *inside information*



Aree di particolare criticità e *open issue*

- Definizione di “*inside information*”
- Pubblicazione di apposite linee guida da parte dell’ACER sull’applicazione delle definizioni
- Chiarimenti sul trattamento di dati personali, investigazioni e *reporting* di sospetti abusi di mercato (Opinion of European Data Protection Supervisor, 21 Giugno 2011)
- Potere della Commissione di allineare le definizioni (inclusa quella di “*inside information*”) al fine di assicurare conformità con le altre riforme regolamentari finanziarie a livello europeo
- “*Chinese walls*”
- Rapporti con il trasportatore
- *Double reporting obligations*
- Coordinazione con la normativa vigente:
 - In materia di trading fisico di energia in Italia
 - *Disclosure requirements* per le società quotate (TUF)
- Sanzioni previste ex D. Lgs. 231/01
- Applicabilità del REMIT a gruppi Extra - UE

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Quote di emissione: le novità alla luce dei nuovi scenari regolamentari

24 novembre 2011

Avv. Lorenzo Parola

Sommario

- EU ETS: una rispolverata
- Natura giuridica delle quote di emissione: da titoli di credito a strumenti finanziari
- Cambiamenti e conseguenze per gli operatori alla luce delle proposte di MiFID II e MAR/CSMAD
- “Furto” di quote di emissioni: tutela penale e civilistica

EU ETS: una rispolverata

- Sistema di “*cap & trade*” introdotto dal 1° gennaio 2005 con l’obiettivo di creare un incentivo finanziario per la riduzione delle emissioni di gas ad effetto serra
- *EUA* corrisponde al permesso di emettere una tonnellata equivalente di CO2
- Introduzione di *CER* e *ERU* ai sensi del Protocollo di Kyoto
- Avvio del “*third trading period*” dal 1° gennaio 2013:
 - Allocazione centralizzata (Commissione)
 - Sistema di aste (*Auctioning Regulation N. 1031/2010* in via di revisione)
- Incremento esponenziale della liquidità
- Incremento dei casi di frode (“*phishing*” e “*hacking*”)

Natura giuridica delle quote di emissione: da titoli di credito a strumenti finanziari

- Ricostruzione civilistica:
 - Beni giuridici immateriali e fungibili
 - Incorporazione, assenza di vincoli alla circolazione e diffusione di massa  titoli di credito dematerializzati
 - La seconda ricostruzione non contraddice la prima!
- Proposte MiFID II e MAR/CSMAD:
 - *EUA, CER e ERU* sono considerati strumenti finanziari
 - NB Per espresso chiarimento della Commissione (Memo/11/719 del 20/10/2011) la qualifica come strumenti finanziari ha il solo fine di rendere applicabile la regolamentazione dei mercati finanziari e non quello di definire la natura legale civilistica o il trattamento contabile

MiFID II: Cambiamenti

- L'inclusione di *EUA*, *CER* e *ERU* nel novero degli strumenti finanziari ha l'effetto di proibire l'esercizio professionale di servizi e attività di investimento aventi ad oggetto *trading spot* su tali titoli a soggetti diversi da banche e imprese di investimento (in Italia, SIM)
→ contrasto con art. 12 della Direttiva 2003/87/CS che andrà sanato
- NB i derivati su CO2 già ricadono nell'ambito di applicazione di MiFID e MAD. L'attesa rimozione dell'esenzione di specializzazione avrà comunque un impatto significativo sugli operatori su derivati

MiFID II: Conseguenze

ETS Compliance Buyers



- Potranno continuare ad avvalersi dell'esenzione di accessorietà
- Potranno continuare ad accedere sia ai mercati regolamentati sui derivati di CO2 sia ai mercati regolamentati spot a condizione che posseggano i relativi requisiti di ammissione
- MA pieno assoggettamento a MAR/CSMAD

Traders professionali di CO2 su base spot



- Necessità di autorizzazione (in Italia SIM)
- Rispetto di tutti i requisiti organizzativi e operativi della MiFID
- Supervisione dei regolatori finanziari
- Possibilità di esenzione di accessorietà
- Applicabilità di *(i) Anti-Money Laundering Directive, (ii) Settlement Finality Directive, (iii) Capital Requirement Directive*
- Inapplicabilità di *(i) Prospectus Directive e (ii) Transparency Directive*

Mercati organizzati per il trading di CO2 su base spot



- Impossibilità di continuare ad operare in assenza di un'autorizzazione come mercato regolamentato, MTF, OTF o internalizzatori sistematici e conseguente assoggettamento alla relativa disciplina
- MA mancato assoggettamento all'obbligo di imporre limiti di esposizione

MAR/CSMAD: Cambiamenti e conseguenze

- In quanto strumenti finanziari, *EUA/ CER/ ERU* ricadranno nell'ambito di applicazione di MAR/CSMAD
- Divieti di *insider dealing* (abuso di informazioni privilegiate) e *market manipulation* (manipolazione di mercato)
- Obblighi di *disclosure* di informazioni privilegiate e di tenuta dell’“*insiders’ list*” (registro delle persone che hanno accesso alle informazioni privilegiate)
- MA previsioni *ad hoc*:
 - esenzione degli emittenti
 - definizione di informazione privilegiata
 - riferimento alla capacità e utilizzo impianti (disponibilità / indisponibilità)
 - franchigia per operatori minori
 - adattamenti all’obbligo di *insiders’ list*

Normativa di II livello

“Furto” di quote di emissione: tutela penale e civilistica

- Frodi a carosello
- “*phishing*” e “*hacking*” ai sensi del codice penale
 - Esclusione del furto (art. 624 c.p.)
 - Truffa (art. 640 c.p.)
 - Frode informatica (art. 640-*ter* c.p.)
 - Sostituzione di persona (art. 494 c.p.)
 - Accesso abusivo ad un sistema informatico (art. 615-*ter* c.p.)
 - Ricettazione (art. 648 c.p.)
- Acquisto in buona fede di beni mobili (art. 1153 c.c.). Rapporto con il reato di incauto acquisto (art. 712 c.p.)
- Se acquisto in buona fede da parte del terzo, il possessore originale può far valere le proprie istanze risarcitorie unicamente nei confronti dell'autore dell'illecito
- Sospensioni dei mercati e conseguenze giuridiche

MA

- La finanziarizzazione della CO2 è veramente la soluzione?

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