

	<b>COM</b>	<b>Council position</b>	<b>EP</b>	<b>Comment and proposal</b>
Annex I – heading	ANNEX I	ANNEX I	ANNEX I	
Annex I – title	LISTS OF SERVICES AND ACTIVITIES AND FINANCIAL INSTRUMENTS	LIST OF SERVICES AND ACTIVITIES AND FINANCIAL INSTRUMENTS	LISTS OF SERVICES AND ACTIVITIES AND FINANCIAL INSTRUMENTS	
Annex I – Section A – heading	Section A	Section A	Section A	
Annex I – Section A – title	Investment services and activities	Investment services and activities	Investment services and activities	
Annex I – Section A – point 1	(1) Reception and transmission of orders in relation to one or more financial instruments;	(1) Reception and transmission of orders in relation to one or more financial instruments;	(1) Reception and transmission of orders in relation to one or more financial instruments;	
Annex I – Section A – point 2	(2) Execution of orders on behalf of clients;	(2) Execution of orders on behalf of clients;	(2) Execution of orders on behalf of clients;	
Annex I – Section A – point 3	(3) Dealing on own account;	(3) Dealing on own account;	(3) Dealing on own account;	
Annex I – Section A – point 4	(4) Portfolio management;	(4) Portfolio management;	(4) Portfolio management;	
Annex I – Section A – point 5	(5) Investment advice;	(5) Investment advice;	(5) Investment advice;	
Annex I – Section A – point 6	(6) Underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis;	(6) Underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis;	(6) Underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis;	
Annex I – Section A –	(7) Placing of financial instruments without a firm commitment basis;	(7) Placing of financial instruments without a firm commitment basis;	(7) Placing of financial instruments without a firm commitment basis;	

	COM	Council position	EP	Comment and proposal
point 7				
Annex I – Section A – point 8	(8) Operation of Multilateral Trading Facilities;	(8) Operation of Multilateral Trading Facilities;	(8) Operation of Multilateral Trading Facilities;	
Annex I – Section A – point 9	(9) Safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as cash/collateral management;	[...];		
Annex I – Section A – point 10	(10) Operation of Organised Trading Facilities.	(10) Operation of Organised Trading Facilities.	(10) Operation of Organised Trading Facilities.	
Annex I – Section B – heading	Section B	Section B	Section B	
Annex I – Section B – title	Ancillary services	Ancillary services	Ancillary services	
Annex I – Section B – point -1a (new)			<i>(-1a) Safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as cash/collateral management;</i>	
Annex I – Section B – point 1	(1) Granting credits or loans to an investor to allow him to carry out a transaction in one or more financial instruments, where the firm granting the credit or loan is involved in the transaction;	(1) Granting credits or loans to an investor to allow him to carry out a transaction in one or more financial instruments, where the firm granting the credit or loan is involved in the transaction;	(1) Granting credits or loans to an investor to allow him to carry out a transaction in one or more financial instruments, where the firm granting the credit or loan is involved in the transaction;	
Annex I – Section B – point 2	(2) Advice to undertakings on capital structure, industrial strategy and related matters and advice and	(2) Advice to undertakings on capital structure, industrial strategy and related matters and advice and services relating	(2) Advice to undertakings on capital structure, industrial strategy and related matters and advice and services relating	

	COM	Council position	EP	Comment and proposal
	services relating to mergers and the purchase of undertakings;	to mergers and the purchase of undertakings;	to mergers and the purchase of undertakings;	
Annex I – Section B – point 3	(3) Foreign exchange services where these are connected to the provision of investment services;	(3) Foreign exchange services where these are connected to the provision of investment services;	(3) Foreign exchange services where these are connected to the provision of investment services;	
Annex I – Section B – point 4	(4) Investment research and financial analysis or other forms of general recommendation relating to transactions in financial instruments;	(4) Investment research and financial analysis or other forms of general recommendation relating to transactions in financial instruments;	(4) Investment research and financial analysis or other forms of general recommendation relating to transactions in financial instruments;	
Annex I – Section B – point 5	(5) Services related to underwriting.	(5) Services related to underwriting.	(5) Services related to underwriting.	
Annex I – Section B – point 6	(6) Investment services and activities as well as ancillary services of the type included under Section A or B of Annex 1 related to the underlying of the derivatives included under points (5), (6), (7) and (10) of Section C where these are connected to the provision of investment or ancillary services.	(6) Investment services and activities as well as ancillary services of the type included under Section A or B of Annex 1 related to the underlying of the derivatives included under points (5), (6), (7) and (10) of Section C where these are connected to the provision of investment or ancillary services.	(6) Investment services and activities as well as ancillary services of the type included under Section A or B of Annex 1 related to the underlying of the derivatives included under points (5), (6), (7) and (10) of Section C where these are connected to the provision of investment or ancillary services.	
Annex I – Section B – point 7		<u>(7) Safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as cash/collateral management and excluding maintaining securities accounts at the top tier level ('central maintenance service') referred to in point (2) of Section A of the Annex of the [CSD Regulation];</u>		
Annex I – Section C – heading	Section C	Section C	Section C	

	COM	Council position	EP	Comment and proposal
Annex I – Section C – title	FINANCIAL INSTRUMENTS	FINANCIAL INSTRUMENTS	FINANCIAL INSTRUMENTS	
Annex I – Section C – point 1	(1) Transferable securities;	(1) Transferable securities;	(1) Transferable securities;	
Annex I – Section C – point 2	(2) Money-market instruments;	(2) Money-market instruments;	(2) Money-market instruments;	
Annex I – Section C – point 3	(3) Units in collective investment undertakings;	(3) Units in collective investment undertakings;	(3) Units in collective investment undertakings;	
Annex I – Section C – point 4	(4) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, emission allowances or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash;	(4) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, emission allowances or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash;	(4) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, <b>■</b> or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash;	
Annex I – Section C – point 5	(5) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event;	(5) Options, futures, swaps, <u>forwards</u> and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event;	(5) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event;	
Annex I – Section C – point 6	(6) Options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market, OTF, or an	(6) Options, futures, swaps, <u>forwards</u> and any other derivative <u>contracts</u> relating to commodities that can be physically settled provided that they are traded on a regulated market	(6) Options, futures, swaps, and any other derivative contract relating to commodities that <b><i>are not intended to</i></b> be physically settled provided that they are traded on a regulated market, OTF, or	<b>VKU supports the EP version.</b>  VKU understands the intention of MiFID II and supports the efforts to make the financial market less

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	MTF;	[...] or an MTF <u>or an OTF, except for such contracts traded on an OTF that can only be physically settled</u>	an MTF;	<p>vulnerable for speculative behavior and to prevent another financial crisis. Therefore VKU understands, that the definition of financial instruments plays a vital role in MiFID II.</p> <p>Nevertheless, it has to be ensured that within the scope of the definition of financial instrument other industries, as e.g. the energy industry, still have the possibility to perform its business as usual.</p> <p>To perform the energy business, energy companies or their trading platforms deal with standardised contracts with the intention to fulfill them physically. Even if there are products which can also be financially settled, the intention of a physical settlement is also given for this kind of contracts. Therefore the intention is always relevant for energy companies.</p> <p>The intention of a physical fulfillment can clearly be proved through compliance with balance sheet rules and regulations. The deciding factor should not be whether or not a standardised product can also generally be used for other purposes. The deciding factor should be for what the standardised product is used. On a regulated market, like EEX, it is standard that products can also be settled financially. This makes sense as it is difficult for an energy supply company to identify the specific amount of energy it will sell in the</p>

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				<p>future. If energy supply companies will fall under MiFID II they could not continue their usual activity, namely commodity settlement, without acquiring the licence as a financial services provider.</p> <p>In case the EP definition is not acceptable, VKU supports the Council's definition with the following amendment:</p> <p>In the wording "except for such contracts traded on an OTF that can only be physically settled" the word "can only" should be deleted and replaced by "are intended to". As already stated above, energy companies deal with standardised contracts with the intention to fulfill them physically. Therefore, the intention of a physical settlement should be enough.</p>
Annex I – Section C – point 6a (new)			<i>(6a) Insurance contracts linked to investment-related instruments;</i>	
Annex I – Section C – point 7	(7) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise referred to in C.6 and not being for commercial purposes, which have the characteristics of other derivative financial instruments, having regards to whether, inter alia, they are cleared and settled through recognised clearing houses or are subject to	(7) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in C.6 and not being for commercial purposes, which have the characteristics of other derivative financial instruments [...];	(7) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise referred to in C.6 and not being for commercial purposes, which have the characteristics of other derivative financial instruments, having regards to whether, inter alia, they are cleared and settled through recognised clearing houses or are subject to regular margin calls;	

	COM	Council position	EP	Comment and proposal
	regular margin calls;			
Annex I – Section C – point 8	(8) Derivative instruments for the transfer of credit risk;	(8) Derivative instruments for the transfer of credit risk;	(8) Derivative instruments for the transfer of credit risk;	
Annex I – Section C – point 9	(9) Financial contracts for differences;	(9) Financial contracts for differences;	(9) Financial contracts for differences;	
Annex I – Section C – point 10	(10) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event, as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market, OTF, or an MTF, are cleared and settled through recognised clearing houses or are subject to regular margin calls.	(10) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event, as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market, OTF, or an MTF, are cleared and settled through [...]CCPs or are subject to regular margin calls.	(10) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates, <b>emission allowances</b> or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event, as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise referred to in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market, OTF, or an MTF, are cleared and settled through recognised clearing houses or are subject to regular margin calls;	
Annex I – Section C – point 11	(11) Emission allowances consisting of any units recognised for compliance with the requirements of Directive 2003/87/EC (Emissions Trading Scheme);	(11) Emission allowances consisting of any units recognised for compliance with the requirements of Directive 2003/87/EC (Emissions Trading Scheme);	(11) Emission allowances consisting of any units recognised for compliance with the requirements of Directive 2003/87/EC (Emissions Trading Scheme);	

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Annex I – Section C – point 11a (new)			<i>(11a) Additional specifications in relation to points (7) and (10).</i>	
Annex I – Section C – point 11a (new) – para 1			<p><i>1. For the purposes of point (7), a contract which is not a spot contract within the meaning of paragraph 2 and which is not covered by paragraph 4 shall be considered as having the characteristics of other derivative financial instruments and not being for commercial purposes if it satisfies the following conditions:</i></p> <p><i>(a) it meets one of the following sets of criteria:</i></p> <p><i>(i) it is traded on a third-country trading facility that performs a similar function to a regulated market, an MTF or an OTF;</i></p> <p><i>(ii) it is expressly stated to be traded on, or is subject to the rules of, a regulated market, an MTF, an OTF or such a third country trading facility;</i></p> <p><i>(iii) it is expressly stated to be equivalent to a contract traded on a regulated market, MTF, OTF or such a third country trading facility;</i></p> <p><i>(b) it is cleared by a clearing house or other entity carrying out the same functions as a central counterparty, or there are arrangements for the payment or provision of margin in relation to the contract;</i></p> <p><i>(c) it is standardised so that, in particular, the price, the lot, the</i></p>	



	COM	Council position	EP	Comment and proposal
			<i>delivery date or other terms are determined principally by reference to regularly published prices, standard lots or standard delivery dates.</i>	
Annex I – Section C – point 11a (new) – para 2			<p><i>2. A spot contract for the purposes of paragraph 1 means a contract for the sale of a commodity, asset or right, under the terms of which delivery is scheduled to be made within the longer of the following periods:</i></p> <p><i>(a) two trading days;</i></p> <p><i>(b) the period generally accepted in the market for that commodity, asset or right as the standard delivery period.</i></p> <p><i>However, a contract is not a spot contract if, irrespective of its explicit terms, there is an understanding between the parties to the contract that delivery of the underlying is to be postponed and not to be performed within the period referred to in the first subparagraph.</i></p>	
Annex I – Section C – point 11a (new) – para 3			<p><i>3. For the purposes of point (10), a derivative contract relating to an underlying referred to in this Section shall be considered to have the characteristics of other derivative financial instruments if one of the following conditions is satisfied:</i></p> <p><i>(a) that contract is settled in cash or may be settled in cash at the option of one or more of the parties, otherwise than by reason of a default or other termination event;</i></p>	

	COM	Council position	EP	Comment and proposal
			<p><i>(b) that contract is traded on a regulated market, an MTF or an OTF;</i></p> <p><i>(c) the conditions laid down in paragraph 1 are satisfied in relation to that contract.</i></p>	
Annex I – Section C – point 11a (new) – para 4			<p><i>4. A contract shall be considered to be for commercial purposes for the purposes of point (7) and as not having the characteristics of other derivative financial instruments for the purposes of points (7) and (10), if it is entered into with or by an operator or administrator of an energy transmission grid, energy balancing mechanism or pipeline network, and it is necessary to keep in balance the supplies and uses of energy at a given time.</i></p>	
Annex I – Section C – point 11a (new) – para 5			<p><i>5. In addition to derivative contracts of a kind referred to in point (10), a derivative contract relating to any of the following shall fall within point (10) if it meets the criteria set out in both point (10) and in paragraph 3:</i></p> <p><i>(a) telecommunications bandwidth;</i></p> <p><i>(b) commodity storage capacity;</i></p> <p><i>(c) transmission or transportation capacity relating to commodities, whether cable, pipeline or other means;</i></p> <p><i>(d) an allowance, credit, permit, right or similar asset which is directly linked to the supply, distribution or consumption of energy derived from</i></p>	

	COM	Council position	EP	Comment and proposal
			<i>renewable resources;</i> <i>(e) a geological, environmental or other physical variable;</i> <i>(f) any other asset or right of a fungible nature, other than a right to receive a service, that is capable of being transferred;</i> <i>(g) an index or measure related to the price or value of, or volume of transactions in any asset, right, service or obligation.</i>	
Annex I – Section D – heading	Section D	Section D	Section D	
Annex I – Section D – title	LIST OF DATA REPORTING SERVICES	LIST OF DATA REPORTING SERVICES	LIST OF DATA REPORTING SERVICES	
Annex I – Section D – point 1	(1) Operating an approved publication arrangement;	(1) Operating an approved publication arrangement;	(1) Operating an approved publication arrangement;	
Annex I – Section D – point 2	(2) Operating a consolidated tape provider;	(2) Operating a consolidated tape provider;	(2) Operating a consolidated tape provider;	
Annex I – Section D – point 3	(3) Operating an approved reporting mechanism.	(3) Operating an approved reporting mechanism.	(3) Operating an approved reporting mechanism.	