Verband kommunaler Unternehmen e.V.

POSITION PAPER

On the European Commission Draft of MiFID II (20th of October 2011), the version of the European Parliament (26th of October 2012) and the version of the Council of the European Union (18th of June 2013)

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General Remarks

In their daily business, energy companies deal with financial instruments both because of their treasury indicated needs (i.e. cash flow management, financing of asset invemstments, etc.) and because of their energy business (power and/or gas production, power and/or gas supply etc.). Therefore, it is necessary that also under MiFID II these activities can be continued.

As the three versions differ substantially VKU sees the thread that in the frame of the trilogue the three institutions negotiate a compromise where the energy industry loses any chance to make use of an exemption to carry out its daily business.

Therefore VKU wants to underline that within the scope of the negotiations of Art. 2 – para 1 (Exemptions) it is important not to mix several text elements of the different drafts. VKU sees the danger that this results in a disadvantageous combination which makes either the usage of the exemption for treasury purposes or for energy trading impossible.

Finally VKU wants to point out that, if energy companies will fall under MiFID II, this will definitely lead to higher energy prices caused by the additional requirements which have to be fulfilled by energy companies on the one hand and to a banishment of companies out of the energy sector and a reduction of competition as consequence on the other hand.

Main points of concern

From VKU point of view the below mentioned points are the most relevant ones for the energy industry:

1. Definition of derivatives under Annex 1 Section C Point 6:
   To perform the energy business, energy companies or their trading platforms deal with standardized 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.

   That's why VKU supports the EP definition.

2. "Own account" exemption under Article 2 - para 1 - point d:
   VKU supports the Council's version as a membership or participation in a regulated market should not hinder the usage of this exemption.

3. "Ancillary activity" exemption under Article 2 - para 1 - point i & para 3a / 4:
   VKU strongly supports the synchronization between EMIR and MiFID II which is given in Art. 2 – para 4 (new) in the Council's version. This is especially the case for the exclusion of elements (a) to (c) ("The abovementioned elements shall exclude: …") proposed in the Council's version. For the calculation of the relation between the main business of a company and the ancillary activity neither the intra-group transactions of EMIR nor hedging activities should be relevant.

4. Necessity to make cumulative use of the exemptions Article 2 - para 1 - point d and point i:
   As already stated in the general remarks above, energy companies need to cover both their treasury needs and the needs of their energy business. To enable this, it is important under MiFID II that these exemptions can be combined. Although this combination is given in all three versions (COM and EP: clarification under Article 2 – para 1 – point d – subpara 2; Council: recital 14ab), VKU supports the Council's version. In the EP and the COM version there still is a limitation under Art. 2 para 1 point d subpoint ii. This limitation prohibits energy companies, which are members of energy exchanges, to make full use of this exemption (see also Point 2 of this paper).

5. Joint venture energy trading companies:
   Especially in Germany and Austria, but also in several other member states, municipal energy companies organize their trading jointly in separate companies (not necessarily parent undertakings and their subsidiaries). All stakeholders of this company are public utility companies. The usage of a common trading company for their ancillary derivative business was until now well understood under MiFID I.

   MiFID II should not discriminate joint venture trading companies, which mainly consist of a lot of small- and medium-sized municipal energy companies. If this would be the case those companies would not be able to execute any trading activities anymore as they neither are able to afford an own trading department nor can make use of a common trading company for their ancillary derivative business.

   Therefore VKU supports the Council's version as the exemptions under Article 2 – para 1 point o and p allow the acting of joint venture energy trading companies under MiFID II (in the EP and COM version this is not given because of Article 2 – para 1 – point i – indent 2).