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Art. 2 – para 1 – point c	(c) persons providing an investment service where that service is provided in an incidental manner in the course of a professional activity and that activity is regulated by legal or regulatory provisions or a code of ethics governing the profession which do not exclude the provision of that service;	(c) persons providing an investment service where that service is provided in an incidental manner in the course of a professional activity and that activity is regulated by legal or regulatory provisions or a code of ethics governing the profession which do not exclude the provision of that service;	(c) persons providing an investment service where that service is provided in an incidental manner in the course of a professional activity and that activity is regulated by legal or regulatory provisions ▌;	
Art. 2 – para 1 – point d	(d) persons who do not provide any investment services or activities other than dealing on own account unless they:	(d) persons <u>who deal on own account in financial instruments other than commodity derivatives, emission allowances or derivatives thereof, and</u> who do not provide any <u>other</u> investment services <u>and/or perform any other investment activities in financial instruments other than commodity derivatives, emission allowances or derivatives thereof. This exemption does not apply to persons who</u>:	(d) persons who do not provide any investment services or activities other than dealing on own account unless they:	**VKU supports the Council's version**. Although the EP and the COM version exempt both financial and commoditiy derivatives under this exemption "on own account", there is still the limitation under Art. 2 para 1 point d subpoint ii. This limitation prohibits energy companies, which are members of energy exchanges, to make use of this exemption. 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 the exemptions continue to facilitate these activities. If energy supply companies shall have a chance to make use of the excemptions under Art. 2, par 1, two applications must generally be possible: one for commodity trading transactions and one

	COM	Council	EP	Compromise
				for treasury transactions. The preferred Council's version enables under exemption d) dealing on own account with financial insturments other than commodity derivatives. This means, that this facilitates trading activities with financial instruments for energy companies indicated by treasury needs. At this point VKU would like to underline that it is in general essential that this exemption can be combined with the exemption i) (in the Council's version this combination is now given through Recital 14ba, in the COM and EP version the combination ist given through Art 2. – para 1 – point d – subpara 2). If this is not the case energy companies will only be able to cover the treasury needs but not the needs of their energy business (see also comment under Art. 2 – para 1 – point i – intent 1)
Art. 2 – para 1 – point d – subpoint i	(i) are market makers	(i) are market makers; or	(i) are market makers;	
Art. 2 – para 1 – point d – subpoint ii	(ii) are a member of or a participant in a regulated market or MTF; or	(ii) apply a high frequency algorithmic trading technique; or	(ii) are a member of or a participant in a regulated market or *multilateral trading facility* (MTF) ***or have direct market access to a trading venue***;	**VKU supports the Council's version.** In order to meet their physical needs and to cover price risks deriving from their commercial activities, energy companies are usually members and/or participants of regulated markets. This is especially the case for energy

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				exchanges. The EP and COM version excludes members of or participants in a regulated market or a MTF. As a consequence most energy companies would not be able to make use of this exemption at all. This would be the case for their treasury indicated needs as well as for their energy business.
Art. 2 – para 1 – point d – subpoint ii a (new)			***(iia) engage in algorithmic trading;***	
Art. 2 – para 1 – point d – subpoint ii b (new)			***(iib) given the scale*** of ***their trading activities are deemed to have a significant market presence by the competent authority; or***	
Art. 2 – para 1 – point d – subpoint iii	(iii) deal on own account by executing client orders ;	(iii) deal on own account by executing client orders;	(iii) deal on own account ***when*** executing client orders.	
Art. 2 – para 1 – point d - subpara	This exemption does not apply to persons exempt under Article 2(1)(i) who deal on own account in financial instruments as members or participants	[…]	***Persons who are*** exempt under ***point (i) do not also need to meet the conditions laid down in this point in***	VKU wants to underline that the combination of the exemptions d) and i) is necessary for the daily business of energy supply companies. This is

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2	of a regulated market or MTF, including as market makers in relation to commodity derivatives, emission allowances, or derivatives thereof;		***order to be exempt.*** ***This exemption shall apply to persons who, when dealing emission allowances, do not provide any investment services or activities other than dealing on own account and do not execute client orders, and which own or directly operate installations subject to Directive 2003/87/EC;***	important as i) is covering the comoditiy derivatives and d) the rest of the financial instruments. This combination is given in all three versions. While EP and COM clarify this combination within the scope of this article, the Council realizes this intention with recital 14ba.
Art. 2 – para 1 – point e	(e) persons which provide investment services consisting exclusively in the administration of employee-participation schemes;	(e) persons which provide investment services consisting exclusively in the administration of employee-participation schemes;	(e) persons which provide investment services consisting exclusively in the administration of employee-participation schemes;	
Art. 2 – para 1 – point f	(f) persons which provide investment services which only involve both administration of employee-participation schemes and the provision of investment services exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings;	(f) persons which provide investment services which only involve both the administration of employee-participation schemes and the provision of investment services exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings;	(f) persons which provide investment services which only involve both administration of employee-participation schemes and the provision of investment services exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings;	
Art. 2 – para 1 – point g	(g) the members of the European System of Central Banks and other national bodies performing similar functions in the Union, other public bodies charged with or intervening in the management of the public debt in the Union and international bodies of which one or more Member States are members;	(g) the members of the European System of Central Banks and other national bodies performing similar functions in the Union, other public bodies charged with or intervening in the management of the public debt in the Union and international bodies of which one or more Member States are members;	(g) the members of the *ESCB* and other national bodies performing similar functions in the ***European*** Union, other public bodies charged with or intervening in the management of the public debt in the ***European*** Union and international bodies of which ***three*** or more Member States are members ***and which are charged with or intervening in the management of the public debt***;	

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Art. 2 – para 1 – point h	(h) collective investment undertakings and pension funds whether coordinated at Union level or not and the depositaries and managers of such undertakings;	(h) collective investment undertakings and pension funds whether coordinated at Union level or not and the depositaries and managers of such undertakings;	(h) collective investment undertakings and pension funds whether coordinated at ***European*** Union level or not and the depositaries and managers of such undertakings;	
Art. 2 – para 1 – point i	(i) persons who:	(i) persons […]:	(i) persons who:	
Art. 2 – para 1 – point i – indent 1	- deal on own account in financial instruments, excluding persons who deal on own account by executing client orders, or	(i) who deal on own account, including market makers, in commodity derivatives, emission allowances or derivatives thereof, excluding persons who deal on own account by executing client orders; or	***(i)*** deal on own account in financial instruments, excluding persons who deal on own account ***when*** executing client orders ▌,	As already stated under Art 2 para 1 point d it is esstential for energy companies to be able to cover the treasury needs and the needs of their energy business. This ist given in the COM and the EP version as dealing on own account both in financial and in commodity derivatives is part of the ancillary exemption. In the Council's version this ist also given through the Recital 14ba which allows a combination of the exemptions d) and i). This combination is very essential and has to be maintained.
Art. 2 – para 1 – point i – indent 2	- provide investment services, other than dealing on own account, exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings, or	[…]	***(ii)*** provide investment services, other than dealing on own account, exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings, or	**VKU supports the Council's Version.** Under MiFID I groups of municipal energy companies can use a common trading company for their ancillary derivative business and use the ancillary exemption. This is right now possible under MiFID I for companies consisting of several members, whereby this exemption is not only limited to parent undertakings and their subsidiaries.

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				This should also be the case for MiFID II. It should be made sure that trading joint ventures of energy companies can make use of the ancillary exemption. This usage will be threatened if e.g. intragroup transactions between parent undertakings and their subsidiaries would be added in the frame of the ancillary exemption. It is therefore important to avoid missunderstandings of the used term "on a groups basis" under Art. 2 – para 1 – point i – indent 4.
Art. 2 – para 1 – point i – indent 3	- provide investment services, other than dealing on own account, in commodity derivatives or derivative contracts included in Annex I, Section C 10 or emission allowances or derivatives thereof to the clients of their main business,	*(ii) providing* investment services, other than dealing on own account, in commodity derivatives or […] emission allowances or derivatives thereof to the customers or suppliers of their main business;	***(iii)*** provide investment services, other than dealing on own account, in commodity derivatives or derivative contracts included in *point (10) of Section C of* Annex I or emission allowances or derivatives thereof to the clients of their main business,	**VKU supports the Council's version.** This business case descibes the traditional business schemes of the energy business. The Council's version facilitates the provision of investment services both for customers and suppliers of the main business of energy companies.
Art. 2 – para 1 – point i – indent 4	- provided that in all cases this is an ancillary activity to their main business, when considered on a group basis, and that main business is not the provision of investment services within the meaning of this Directive or banking services under Directive 2006/48/EC;	provided that for each of the above cases individually and on an aggregate basis this is an ancillary activity to their main business, when considered on a group basis, and that main business is not the provision of investment services within the meaning of this Directive or banking services under Directive 2006/48/EC**,** and the persons do not apply a high frequency algorithmic trading technique;	provided that in all cases***:*** **–** this is an ancillary activity to their main business, when considered on a ***consolidated or non-consolidated*** group basis, and that main business is not the provision of investment services within the meaning of this Directive or banking services under Directive 2006/48/EC ***or acting as a market-maker in relation to commodity derivatives***,	**VKU supports the amandment "consolidated or non consolidated" in the EP version.** In general it is important to make sure that ancillary activity has to be counted "on a group basis" with a wide interpretation of the group definition. The suggested amandment in the EP ensures this wide interpretation and is in line with the idea of MiFID I where a wide interpretation was a valid understanding of both the Germna legislative and of the German authority Bafin. It should be made sure that this

	COM	Council	EP	Compromise
				interpretation will not be touched and changed in the future. In several member states, municipal energy companies organize their trading jointly in separate companies. Whereby all stakeholders of this company are public utility companies. Sometimes also with own generation. Often one or more of these stakeholders are not able to run economically reasonable a trading department on their own. When buying and selling financial instruments these joint trading-houses provide derivative transactions as ancillary activities to the business of the stakeholder companies who are their clients. So these companies are doing the same business as a company's trading department, which can make use of the ancillary exemption, by pursuing the same goals. It therefore makes sense that joint venture trading companies can benefit from the same exemption. Otherwise there is no level playing field anymore and will lead to a distortion of competition. Especially medium sized companies, which are often stakeholder of joint venture trading companies, would be affected and as a consequence cannot take part in trading activities anymore.
			– they report annually to the relevant competent authority the basis on which they consider that their activity under points (i), (ii) and (iii) is	

	COM	Council	EP	Compromise
			ancillary to their main business;	
Art. 2 – para 1 – point j	(j) persons providing investment advice in the course of providing another professional activity not covered by this Directive provided that the provision of such advice is not specifically remunerated;	(j) persons providing investment advice in the course of providing another professional activity not covered by this Directive provided that the provision of such advice is not specifically remunerated;	(j) persons providing investment advice in the course of providing another professional activity not covered by this Directive provided that the provision of such advice is not specifically remunerated;	
Art. 2 – para 1 – point k	(k) firms which provide investment services and/or perform investment activities consisting exclusively in dealing on own account on markets in financial futures or options or other derivatives and on cash markets for the sole purpose of hedging positions on derivatives markets or which deal for the accounts of other members of those markets or make prices for them and which are guaranteed by clearing members of the same markets, where responsibility for ensuring the performance of contracts entered into by such firms is assumed by clearing members of the same markets;	[…]	▌	
Art. 2 – para 1 – point l	(l) associations set up by Danish and Finnish pension funds with the sole aim of managing the assets of pension funds that are members of those associations;	(l) associations set up by Danish and Finnish pension funds with the sole aim of managing the assets of pension funds that are members of those associations;	(l) associations set up by Danish and Finnish pension funds with the sole aim of managing the assets of pension funds that are members of those associations;	
Art. 2 – para 1 – point m	(m)'agenti di cambio' whose activities and functions are governed by Article 201 of Italian Legislative Decree No 58 of 24 February 1998.	(m) 'agenti di cambio' whose activities and functions are governed by Article 201 of Italian Legislative Decree No 58 of 24 February 1998.	(m) 'agenti di cambio' whose activities and functions are governed by Article 201 of Italian Legislative Decree No 58 of 24 February 1998;	
Art. 2 – para 1 –	(n) transmission system operators as defined in Article 2(4) of Directive	(n) transmission system operators as defined in Article 2(4) of Directive	(n) transmission system operators as defined in Article 2(4) of Directive	

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point n	2009/72/EC or Article 2(4) of Directive 2009/73/EC when carrying out their tasks under those Directives or Regulation (EC) 714/2009 or Regulation (EC) 715/2009 or network codes or guidelines adopted pursuant those Regulations.	2009/72/EC or Article 2(4) of Directive 2009/73/EC when carrying out their tasks under those Directives or Regulation (EC) 714/2009 or Regulation (EC) 715/2009 or network codes or guidelines adopted pursuant to those Regulations, any persons acting as service providers on their behalf to carry out their task under the afore mentioned Directives and Regulations or network codes or guidelines adopted pursuant to those Regulations, and any operator or administrator of an energy balancing mechanism, pipeline network or system to keep in balance the supplies and uses of energy when carrying out such tasks. This exemption will only apply to persons engaged in the activities set out above where they perform investment activities or provide investment services related to commodity derivatives in order to carry out those activities. This exemption shall not apply with regard to the operation of a secondary market, including a platform for secondary trading in financial transmission rights.	2009/72/EC or Article 2(4) of Directive 2009/73/EC when carrying out their tasks under those Directives or Regulation (EC) 714/2009 or Regulation (EC) 715/2009 or network codes or guidelines adopted pursuant those Regulations.	
		(o) persons providing investment services exclusively in commodities, emission allowances and/or derivatives thereof for the sole purpose of hedging the commercial risks of their clients, where these clients are exclusively local electricity undertakings falling		**VKU supports the Council's version.** The comments on Art. 2 – para 1 – point i – indent 2 and on Art. 2 – para 1 – point i – indent 4 already show that there is an urgent necessity to provide an exemption for joint venture trading

	COM	Council	EP	Compromise
		within Article 2(35) of Directive 2009/72/EC and/or natural gas undertakings falling within Article 2(1) of Directive 2009/73/EC, and provided that these clients jointly hold 100% of the capital or of the voting rights of these persons, exercise joint control and are exempt under Article 2(1)(i) should they carry out these investment services themselves. These persons should comply with the following organisational requirements: (i) the set-up of a supervisory committee overseeing the trading activity of these persons; (ii) trading rules and a risk management handbook that govern the trading activity pursued by these persons in order to act in the best interest of the clients and to ensure the orderly functioning and integrity of financial markets; (iii) the existence of a profit and loss transfer agreement between these persons and the abovementioned clients.		companies. In several member states, municipal energy companies organize their trading jointly in separate companies. Whereby all stakeholders of this company are public utility companies. Sometimes also with own generation. Often one or more of these stakeholders are not able to run economically reasonable a trading department on their own. When buying and selling financial instruments these joint trading-houses provide derivative transactions as ancillary activities to the business of the stakeholder companies who are their clients. So these companies are doing the same business as a company's trading department, which can make use of the ancillary exemption, by pursuing the same goals. It therefore makes sense that joint venture trading companies can benefit from the same exemption. Otherwise there is no level playing field anymore and will lead to a distortion of competition. Especially medium sized companies, which are often stakeholder of joint venture trading companies, would be affected and as a consequence cannot execute any trading activities anymore.
		(p) persons providing investment services exclusively in emission allowances and/or derivatives thereof for the sole purpose of hedging the commercial risks of their clients, where these clients are exclusively		**VKU supports the additional exemption in the Council's version (also see comment on exemption o)).**

	COM	Council	EP	Compromise
		operators falling within Article 3(f) of Directive 2003/87/EC, and provided that these clients jointly hold 100% of the capital or voting rights of these persons, exercise joint control and are exempt under Article 2(1)(i) should they carry out these investment services themselves. These persons should comply with the following organisational requirements: (i) the set-up of a supervisory committee overseeing the trading activity of these persons; (ii) trading rules and a risk management handbook that govern the trading activity pursued by these persons in order to act in the best interest of the clients and to ensure the orderly functioning and integrity of financial markets; (iii) the existence of a profit and loss transfer agreement between the joint venture and the abovementioned clients.		
		(q) Central Securities Depositaries that are regulated under Union legislation.		
Art. 2 – para 2	2. The rights conferred by this Directive shall not extend to the provision of services as counterparty in transactions carried out by public bodies dealing with public debt or by members of the European System of Central Banks performing their tasks as provided for by the Treaty and the	2. The rights conferred by this Directive shall not extend to the provision of services as counterparty in transactions carried out by public bodies dealing with public debt or by members of the European System of Central Banks performing their tasks as provided for by the Treaty and the	2. The rights conferred by this Directive shall not extend to the provision of services as counterparty in transactions carried out by public bodies dealing with public debt or by members of the *ESCB* performing their tasks as provided for by the *TFEU* and the Statute of the *ESCB* and of the	

	COM	Council	EP	Compromise
	Statute of the European System of Central Banks and of the European Central Bank or performing equivalent functions under national provisions.	Statute of the European System of Central Banks and of the European Central Bank or performing equivalent functions under national provisions.	European Central Bank *(ECB)* or performing equivalent functions under national parliaments.	
Art. 2 – para 3	3. The Commission shall adopt delegated acts in accordance with Article 94 concerning measures in respect of exemptions (c) and (i), to clarifying when an activity is to be considered as ancillary to the main business on a group level as well as for determining when an activity is provided in an incidental manner.	3. The Commission shall adopt delegated acts in accordance with Article 94 concerning measures in respect of exemption (c) determining when an activity is provided in an incidental manner.	3. The Commission shall adopt delegated acts in accordance with Article 94 concerning measures in respect of *the* ***exemption laid down in paragraph 1(c) to clarify when*** an activity is provided in an incidental manner.	
Art. 2 – para 3 – subpara 2	The criteria for determining whether an activity is ancillary to the main business shall take into account at least the following elements:	[…]	▌	
Art. 2 – para 3 – subpara 2 – indent 1	- the extent to which the activity is objectively measurable as reducing risks directly related to the commercial activity or treasury financing activity,	[…]	▌	
Art. 2 – para 3 – subpara 2 – indent 2	- the capital employed for carrying out the activity.	[…]	▌	
Art. 2 – para 3a (new)		4. ESMA shall develop draft regulatory technical standards in respect of exemption 2(1)(i) to specify the criteria for establishing when an activity is to be considered as ancillary to the main business on a group level	***3a. ESMA shall develop draft regulatory technical standards to specify the criteria for determining whether an activity is ancillary to the main business, taking into account at least the following:***	**VKU supports the Council's version, especially in Art. 2 para 4 (new).** EMIR introduces the term of "activity which is objectively measurable as reducing risks directly related to the commercial activity or treasury

	COM	Council	EP	Compromise
		[…]. The criteria […] shall take into account at least the following elements: (a) the capital employed for carrying out the ancillary activity in absolute terms; (b) the capital employed for carrying out the ancillary activity relative to the capital employed for carrying out the main business; (c) the size of their trading activity in financial instruments in absolute terms; (d) the size of their trading activity compared to the overall market trading activity in that asset class. The trading activity referred to in subparagraphs (c) and (d) above shall be calculated on a group level. The abovementioned elements shall exclude: (a) intra-group transactions as referred to in Article 3 of Regulation (EU) No 648/2012 that serve group-wide liquidity and/or risk management purposes; (b) transactions in derivatives which are objectively measurable as reducing risks directly related to the commercial activity or treasury financing activity; (c) transactions in commodity	***(a) the extent to which the activity is objectively measurable as reducing risks directly related to the commercial activity or treasury financing activity;*** ***(b) the need for ancillary activities to constitute a minority of activities at group level, and at an entity level unless services provided only to other members of the same group;*** ***(c) the size of the activity relative to the main activities and the significance of the activity in the relevant markets;*** ***(d) the desirability of limiting net credit risk exposures to non-systemically significant levels;*** ***(e) the scale of market risk associated with the activity relative to the market risk arising from the main business;*** ***(f) systemic relevance of the sum of net positions and exposures of a non-financial counterparty as referred to in Article 10 of Regulation (EU) No 648/2021 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.***	financing activity". This term is integrated with identical wording in all MiFID II versions. The understanding of EMIR is that non-financial counterparts (to which most energy companies belong) can always exclude such activities from the calculation of the clearing threshold. This idea should be taken over to MiFID II regarding the definition of the ancillary activity. This would guarantee: 1. that both legislations use identical terms and definitions and 2. that the same estimation of the relevant risks and trading activities is used and 3. that the energy companies can use the same techniques and instruments to fullfill the requirements of both financial regulations (EMIR & MiFID II). That´s why it is necessary that the definition of ancillary activity exclude the elements (a) to (c) as proposed in the Council´s version *("The abovementioned elements shall exclude: …")*. Neither the intra-group transactions of EMIR nor hedging activities should be relevant to calculate the relation between the ancillary activity and the main business of a company.

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		derivatives and emission allowances entered into to fulfil obligations to provide liquidity on a trading venue.		
		ESMA shall submit those draft regulatory technical standards to the Commission by [insert date].	***ESMA shall submit those draft regulatory technical standards to the Commission by [...].***	
		Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.	***Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.***	