News Bulletin

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# Higher, Wider, Deeper: EU Commission Publishes MiFID II and MiFIR Proposals

## Background

On 20 October 2011, the EU Commission (the "Commission") published its long awaited legislative proposals[1] for the recasting of the Markets and Financial Instruments Directive ("MiFID").[2] The Commission had previously published a consultation paper in relation to its proposals on 8 December 2010.[3] Although many respondents raised a number of fundamental concerns on various aspects of the Commission's proposals during the consultation, most of the major changes proposed in the consultation paper have been retained in a similar form in the draft legislation.

MiFID came into force less than four years ago in November 2007 and made significant changes to the regulatory framework of financial services within the EU, introducing a harmonised regime for the regulation of investment services. Although the EU Commission had indicated it would undertake an early review of MiFID and its effect on the financial markets, the onset of the financial crisis has resulted in a much more far-reaching overhaul of the Directive than was originally contemplated. As highlighted below, the new proposals will significantly expand the scope of MiFID in a number of important respects and will facilitate a more interventionist approach on the part of national regulators and the new European Securities and Markets Authority ("ESMA"). The proposals are intended to tie in with other recent international developments in the regulation of financial markets including the Dodd-Frank legislation in the U.S., the EU Commission's proposals to recast the Market Abuse Directive ("MAD"), which were also published on 20 October 2011, the draft European Markets Infrastructure Regulation ("EMIR"), and the EU Commission's proposals in relation to packaged retail investment products ("PRIPs").

As had been widely expected, the draft legislation is split into two separate documents. Provisions dealing with pre- and post-trade transparency, exchange trading of derivatives, product intervention by national authorities and provision of certain services without a branch by non-EU firms are contained in a regulation ("MiFIR") that will have direct effect in member states without the ability for member states to put their own interpretation on the provisions in implementing legislation. The remaining provisions dealing with matters such as authorisation and operating conditions for investment firms, passporting of activities across the EU, conduct of business rules, including investor protection, and powers of national authorities and ESMA are contained in a directive ("MiFID II") that will need to be implemented by member states through national legislation.

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[1] Draft regulation, http://ec.europa.eu/internal_market/securities/docs/isd/mifid/COM_2011_652_en.pdf; draft directive, http://ec.europa.eu/internal_market/securities/docs/isd/mifid/COM_2011_656_en.pdf.
[2] Directive 2004/39/EC of 21 April 2004 on markets in financial instruments, http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/l_145/l_14520040430en00010044.pdf, Directive 2006/73/EC of 10 August 2006.
[3] EU Commission public consultation: Review of the Markets in Financial Instruments Directive (MiFID), http://ec.europa.eu/internal_market/consultations/docs/2010/mifid/consultation_paper_en.pdf. See also our client alert: "European Commission Consultation on the Review of MiFID," http://www.mofo.com/files/Uploads/Images/101221-European-Commission-Consultation-on-the-Review-of-MiFID.pdf.



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In putting together the draft legislation and previous consultation paper, the EU Commission received technical advice on a number of issues by the Committee of European Securities Regulators ("CESR"), which has now been superseded by ESMA. The legislative proposals do, however, go further than CESR's advice in a number of areas, including the proposals for pre- and post-trade transparency.

We have set out below, the principal features of the draft legislation together with some thoughts as to their potential impact on the operation of financial markets.

## Introduction of Concept of Organised Trading Facility

A number of the existing MiFID provisions, particularly in relation to transaction reporting and pre- and post-trade transparency requirements, currently apply only to financial instruments admitted to trading on regulated markets, multilateral trading facilities ("MTFs") and systematic internalisers ("SIs," being investment firms which on an organised, frequent and systematic basis deal on own account outside a regulated market or trading platform).

The scope of these provisions will be widened by the introduction of a new concept of an organised trading facility ("OTF") defined as any system or facility (not being a regulated market or MTF) operated by an investment firm or market operator in which multiple third-party buying and selling interests in financial instruments are brought together to form a binding financial contract within the scope of MiFID. This definition is therefore designed to catch a wide range of organised trading platform including broker crossing systems. OTFs will also now become subject to MiFID authorisation and conduct of business rules including best execution obligations. Client orders in an OTF will not be permitted to be executed against the proprietary capital of the firm operating the OTF.

## Pre- and Post-Trade Transparency

The pre-trade transparency requirements are aimed at providing investors with public information about current trading opportunities including bid and offer prices. Post-trade transparency requires the provision of public information for concluded trades helping market participants facilitate price formation and comply with their execution duties. The Commission's stated aim is that all organised trading should be conducted on regulated markets, MTFs or OTFs and identical pre- and post-trade transparency requirements should apply to each of these venues. The requirements will, however, be calibrated for different types of instruments and different types of trading.

*Equity and Equity-like Instruments*

Shares admitted to trading on a regulated market (including where traded on an MTF or over-the-counter) are already subject to transparency requirements under MiFID. The new transparency requirements are set out in MiFIR and are extended to all shares traded on an MTF or OTF. The draft legislation also extends the rules to equity-like instruments including depository receipts, exchange-traded funds and similar financial instruments.

The Commission states in the Explanatory Memorandum to MiFIR that existing waivers for the application of the pre-trade transparency regime will be made more consistent and coherent. It notes the primary purpose of waivers is generally to prevent information in relation to large-scale transactions giving distorted picture of the market. The area is, however, a sensitive one due to concerns over the increasing use of "dark pools" in professional markets where pre-trade transparency information is not published. Competent authorities will be permitted to grant pre-transparency obligation waivers based on the market model or the type and size of orders and are required to inform ESMA about their use of waivers. It is intended that ESMA will publish an opinion as to the compatibility of such waivers with MiFIR. The Commission is required to specify the scope of waivers in delegated acts.

In relation to post-trade transparency, it is proposed that details should be made public as close to real-time as is technically possible. In this regard, the previous Commission consultation paper indicated the time in which such information would generally be required would be reduced from 3 minutes to 1 minute and this is likely to be included in amendments to the MiFID implementing directive. Competent authorities will be able to allow deferred publication of certain transactions based on their type or size. ESMA is required to monitor the application of such delayed publication permissions and submit an annual report to the Commission on how they are applied in practice.

*Non-equity Markets*

The draft MiFIR also extends the pre- and post-trade transparency rules to bonds, structured finance instruments, emission allowances and certain derivatives. This is one of the more controversial proposals and will have a huge impact on the operation of markets in these instruments and a number of market participants have raised concerns as to the effect on liquidity of certain products.

All bonds and structured products that are (i) admitted to trading on a regulated market or (ii) admitted to trading or traded on an MTF or OTF in respect of which a prospectus has been published will be subject to the transparency rules as will derivatives and emission allowances admitted to trading or traded on MTFs and OTFs.

In relation to the pre-trade transparency requirements, to address some of the concerns raised during the consultation process as to the impact on liquidity, the scope of waivers is wider than in respect of equity instruments. In addition to waivers based on type and size of orders, competent authorities will be permitted to grant waivers either to exempt certain transactions from the requirements or to grant a waiver for certain instruments based on specific characteristics of trading activity and liquidity. Competent authorities will be required to notify ESMA of the intended use of such waivers and it will issue an opinion on whether such waiver is appropriate. In relation to post-trade transparency, publication should again be as near to real time as practicable, with the possibility of deferred publication by reference to the size (in particular those that are large in size for the type of product) or type of transaction.

Controversially (and contrary to CESR's previous technical advice), the regulation also provides that pre- and post-trade transparency should apply to OTC derivatives entered into by a systematic internaliser which are clearing eligible under EMIR as well as those traded on a regulated market, MTF or OTF. Post-trade transparency rules will also apply to all OTC derivatives entered into by a systematic internaliser which are clearing eligible or reported to a trade repository (which, under the current EMIR proposals, is likely to cover the vast majority of OTC derivatives).

*Availability of Data and Consolidated European Tape*

With a view to improving the quality of data available to market participants, regulated markets, MTFs or OTFs will be required to make post-trade information available free of charge 15 minutes after the execution of the transaction and to offer pre- and post-trade data separately to the public on a reasonable commercial basis. The Commission has the ability, by delegated act, to set out criteria specifying what will be regarded as a reasonable commercial basis.

One aim of the EU Commission is to seek to facilitate the provision of a consolidated European tape. The draft MIFID II sets out conditions for the emergence of consolidated tape providers including detailing the organisational requirements that such providers will need to meet in order to be able to operate such a scheme. Each member state must require a consolidated tape provider to have adequate policies and arrangements in place to collect post-trade information made available under MiFIR, to consolidate it into a continuous electronic data stream, and to make the information available to the public as close to real time as is technically possible, on a reasonable commercial basis. MiFID II sets out minimum information that must be provided.

## Transaction Reporting

Under MiFID, transaction reporting refers to the provision of transaction information to regulatory authorities. It is proposed that the existing MiFID requirements will be expanded and also reflect the provisions of the draft recast MAD. All transactions in financial instruments will be required to be reported to competent authorities except instruments which (i) are not admitted to trading on a regulated market or traded on an MTF or OTF, (ii) the value does not depend on a financial instrument admitted to trading on a regulated market or traded on an MTF or OTF and (iii) the trading of cannot have an effect on such a financial instrument.

MiFIR sets out details of the information that is required to be reported including the name and volume of instruments, dates and time and execution and transaction prices. Transactions must be reported as quickly as possible, and not later than the close of the following working day. Reporting can be made either directly by the firm or an Approved Reporting Mechanism ("ARM") on its behalf or by the regulated market, MTF or OTF through whose systems the transaction was completed.

Regulated markets, MTFs and OTFs will be required to store order data in a manner accessible to supervisors for at least 5 years. To avoid double reporting of trades under MiFID and EMIR, trade repositories will be required to transmit reports to competent authorities.

The Commission also has the ability after a two-year review to introduce a requirement that transaction reporting be made directly to a system appointed by ESMA.

## Exchange Trading of Derivatives

MiFIR contains provisions designed to comply with the agreement made by the G20 at its September 2009 summit to move trading in standardised OTC derivatives to exchanges or electronic platforms by the end of 2012. It requires financial counterparties under EMIR and non-financial counterparties that are subject to a clearing obligation under EMIR to conclude transactions in derivatives that are specified to be subject to a trading obligation either on a regulated market, MTF, OTF or third country trading venue that the Commission has determined is subject to equivalent requirements in non-EU jurisdictions and meets certain other conditions. The operator of a regulated market is required to ensure that all transactions in derivatives that are subject to the clearing obligation under EMIR and are concluded on the regulated market are cleared by a central counterparty ("CCP").

In determining which derivates should be subject to a trading obligation and the date from which such obligation commences, ESMA is required to develop implementing technical standards. The obligation can only apply to a class of derivatives (or subset) that is admitted to trading on at least one regulated market, MTF or OTF and is considered sufficiently liquid to trade only on such venues. In developing its standards, ESMA is required to consider the class of derivates or a relevant subset as sufficiently liquid by reference to the average frequency of trades, their average size and the number and type of active market participants. ESMA is required to undertake a public consultation before publishing its technical standards. ESMA will also be required to publish and maintain on its website a register of derivatives that are subject to the exchange trading obligation.

Although this requirement was fully expected due to the G20 agreement and the previous consultation paper, concerns remain that these requirements could have a significant impact on the liquidity of certain products, notwithstanding the requirement that only sufficiently liquid instruments be subject to the exchange trading obligation. The ESMA consultation and subsequent rule making are therefore likely to generate significant market interest.

Also of interest, will be a comparison of the final MiFIR rules in relation to exchange trading of derivatives with those in the U.S. Dodd-Frank requires swaps subject to a clearing requirement to be executed on a market


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exchange or "swap execution facility." The rules in relation to swap execution facilities are still in development but there are concerns amongst many U.S. swap dealers that they could be less flexible than the MiFIR concept of an OTF. Of particular concern and interest will be the development of the pre-trade transparency requirements in relation to quotes both under MiFIR and Dodd-Frank. There will be concerns both in Europe and the U.S. that if one set of rules is regarded as significantly more onerous or less flexible than the other, it could lead to regulatory arbitrage or a significant transfer of business from one market to the other.

## Product Intervention

Amongst the more controversial proposals in the previous consultation paper was the Commission indicating that it wanted to introduce the power to ban certain investment services and activities in certain financial instruments to protect investors, market stability or integrity, and to bestow competent authorities with power to intervene, in particular in relation to derivatives, including the imposition of position limits. Subsequent action by national regulators this year in the EU has, however, demonstrated that many authorities already have considerable powers, including under national legislation to intervene in financial instruments, including having the power to ban products. The FSA in the UK has published a consultation paper and feedback statement on product intervention during 2011[4] and the French, Belgian, Danish and Italian regulators have all imposed various obligations in relation to sales of certain complex or illiquid products.

The draft MiFIR provides that ESMA can take action to prohibit or restrict the marketing, distribution or sale or a type of financial activity or practice where it is addressing a threat to investor protection or to the orderly functioning and integrity of financial markets or the stability of all or part of the EU's financial system and existing regulatory obligations are not sufficient and the relevant competent authority or authorities have not taken appropriate action to deal with such threat. In taking such action, ESMA is required to take into account any detrimental effect on the efficiency of markets that such action may have or the likelihood of regulatory arbitrage. ESMA must give prior notice of any such action to relevant competent authorities and publish details of such action on its website. Any such action must be reviewed and renewed each three months or it will expire.

Competent authorities also have the power under MiFIR to prohibit or restrict in their member state, the marketing, distribution or sale of certain financial instruments or instruments with particular features or a type of financial activity or practice on the same ground as ESMA. Any such action must be proportionate, taking into account the nature of the risks identified, the level of sophistication of investors or market participants concerned and the likely effect of the action on investors and market participants. It must also consult with competent authorities in other member states that may be affected by the action and its action must not have a discriminatory effect on services or activities provided from another member state. The relevant authority must give not less than one month's notice of such action to other competent authorities and ESMA and shall publish details of the relevant action on its website.

ESMA is required to perform a coordinating role in relation to any such action taken by competent authorities and satisfy itself that such action is justified and proportionate (and provide an opinion on such question) and that, where appropriate, a consistent approach is taken by other competent authorities.

ESMA also has the power to request information from any person in relation to the size and purpose of any position or exposure entered into pursuant to a derivative and, if appropriate, require the reduction of a particular position or exposure. It can also limit the ability of a person to enter into a commodity derivative. Any such action must be on the grounds that it addresses a threat to the orderly functioning and integrity of financial markets or the stability of the whole or part of the EU financial system and relevant competent authorities have not taken measures to address the threat or such measures do not sufficiently address the threat. ESMA is

[4] See our client alerts, "FSA Product Intervention," http://www.mofo.com/files/Uploads/Images/110314-FSA-Product-Intervention.pdf and "Product Intervention in the UK and the new FCA," http://www.mofo.com/files/Uploads/Images/110705-Product-Intervention-in-the-UK-and-the-New-FCA.pdf.


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required to notify relevant competent authorities of any such proposed action and any notification shall, other than in exceptional circumstances, be made not less than 24 hours before the measure is intended to take effect or be renewed. ESMA shall also publish details of such action on its website.

The proposals therefore give considerable powers to ESMA to take product intervention action in addition to national authorities and also to seek to ensure that national measures are taken on a more coordinated basis. Although this is likely to give rise to concerns, particularly at a national political level, that such provisions are oiling the wheels to transferring significant national powers to ESMA, some market participants are likely to welcome any product intervention measures being imposed on a more consistent and coordinated basis in the EU. There have been concerns that some of the recent action by national authorities has been on a piecemeal and uncoordinated basis, giving rise to an unlevel playing field in some products across the EU. The ability of ESMA to impose position limits in relation to derivatives met with considerable resistance in the consultation process and is likely to remain an issue for debate as MiFIR and MiFID go through the legislative process.

## Non-Discriminatory Clearing Access for Financial Instruments

One issue not discussed in the previous consultation paper that has become politically charged, including in relation to negotiations on EMIR, is the question of discriminatory practices in relation to the clearing of financial instruments. Jurisdictions such as the UK have pushed for open access to clearing houses. This has met resistance in some jurisdictions, including Germany, where a vertical integration model between trading and post-trading infrastructure is common. For example, any trade currently conducted on Frankfurt's Eurex exchange is required to be cleared through its own clearing house.

The draft MiFIR provides that any trading venue under the ambit of MiFID must provide open access, including the provision of trade feeds, on a non-discriminatory basis to any CCP authorised or recognised under EMIR that wishes to clear financial transactions executed on such venue. Similarly, each CCP is required to accept financial instruments that it clears on a non-discriminatory basis, including in relation to fees and collateral arrangements. Such obligations will not, however, apply where it can be shown, in either case, that such access would threaten the smooth or orderly functioning of markets. Such determination must be made by the relevant competent authority and it must publish full reasons to the relevant parties, including the evidence on which its decision is based.

## Provision of Financial Services in the EU by Non-EU Firms

The drafts of MiFIR and MIFID II propose a harmonised framework for granting access to EU markets for firms and market operators based outside the EU. Currently, where financial services are provided by the branch of a non-EU entity, there is a fragmented approach between different member states as to the terms on which such branches can operate and no ability for services provided by such an entity in one member state to be passported into another member state.

The draft MiFID II provides that any provision of services to retail clients by a non-EU firm would require the establishment of a branch in an EU member state. This will involve the authorisation of the firm in the member state where the branch is established. The branch would be subject to certain MiFID requirements including organisational requirements, conduct of business rules and conflicts of interest. To be authorised, the branch will need to be from a jurisdiction where the Commission has determined that the legal and supervisory arrangements in such jurisdiction are equivalent to the provisions in MiFIR, MiFID and the Capital Requirements Directive, and certain other requirements are satisfied, including such jurisdiction having provisions for equivalent reciprocal recognition and cooperation arrangements with the competent authorities in the relevant member state, including in relation to the exchange of information. Once such a branch is authorised, it will be able to conduct business across other EU member states without the need for further authorisation.

In relation to firms providing services to eligible counterparties in the EU, they will be permitted to do so under MiFIR without the establishment of a branch by being registered by ESMA, which will keep a register of such entities. Registration may only be made where the EU Commission has made an equivalence determination in respect of such jurisdiction as outlined above. ESMA is required to establish cooperation arrangements with the competent authorities of such jurisdictions, including exchange of information.

The establishment of an equivalence regime in respect of services provided by entities from non-EU member states caused some concern to respondents during the consultation process. There are some fears that the provisions may result in reciprocal provisions being introduced in other jurisdictions, including the U.S., which may harm the ability of EU entities to do business in such jurisdictions or at least increase the costs and administrative burden of doing so.

## Scope of Directive and Investor Protection

A number of amendments are made to the investor protection provisions under the draft of MiFID II including:

- As recommended in the Commission's PRIPs consultation, the scope of MiFID is widened to cover firms selling or advising clients in relation to structured deposits. These are defined widely as "deposits other than those with a rate of return which is determined in relation to an interest rate."
- Firms that deal on their own account by executing clients orders are now within the scope of MiFID.
- The optional exemption for member states in respect of firms that do not hold client funds or securities and do not provide any investment service except providing investment advice or the reception and transmission or orders, is restricted to circumstances where such firms are authorised and regulated at national level under requirements that are at least analogous to MiFID II provisions relating to authorisation, supervision and conduct of business.
- Only relatively minor changes are made to the client classification definitions. Local authorities will be excluded from the definition of eligible counterparty and, in relation to eligible counterparties, a requirement is added that member states shall ensure that in their relationship with eligible counterparties, investment firms act honestly, fairly and professionally and communicate in a way which is fair, clear and not misleading in the circumstances.
- When providing investment advice, the firm will need to state whether this is provided on an independent basis and whether it is based on a broad or more restricted analysis of the market and shall indicate whether the firm will provide the client with an ongoing assessment of the suitability of financial instruments. Where a firm states that advice is provided on an independent basis, it must assess a "sufficiently large" number of financial instruments available on the market and shall not accept or receive fees or commissions paid or provided by any third party in relation to such service.
- Firms providing investment advice or portfolio management will not be permitted to receive fees or other inducements paid or provided by any third party.
- Although the Commission had in its previous consultation paper considered abolishing the "execution only" exemption where non-advised services can be provided to clients, including retail clients on an execution-only basis without an appropriateness assessment being carried out as to the knowledge and experience of the client, the exemption remains although some changes have been made to it. To fall within the exemption, bonds, other forms of securitised debt or money market instruments must (in the case of bonds and securitised debt) be admitted to trading on a regulated market (or equivalent market in a non-EU jurisdiction) or MTF and must not embed a derivative or incorporate a structure which makes it difficult for the client to understand the risk involved. ESMA is required to develop guidelines as to what will incorporate structures that make it difficult for the client to understand the risks involved in a

financial instrument. Previously all UCITS products fell within the execution-only exemption. The draft regulation now excludes structured UCITS from such treatment.

- Some amendments are made to the best execution obligations, including that information provided by firms to the clients on their order execution policy should explain clearly, in sufficient detail and in a way that can be easily understood by clients, how orders will be executed by the firm for the client. Firms will also be required to summarise and make public on an annual basis, the top five execution venues where they executed client orders for each class of financial instrument.
- Tied agents will be prohibited from handling client's money and/or financial instruments.

These amendments are largely consistent with the proposals set out in the consultation paper. Although they do not represent sweeping changes to the scope of MiFID or the investor protection provisions, they nevertheless make some important changes that are likely to have an important impact and impose additional costs in respect of certain activities. There will, however, be relief that some of the more controversial suggestions in the consultation paper including the possible abolition of the execution-only exemption and the proposal that firms could no longer assume the knowledge and experience of professional investors, have not found their way into the final proposals.

## Commodity Derivatives and Emissions Allowances

The draft regulation makes a number of significant changes in relation to the regulation of commodity derivatives. Currently MiFID contains exemptions in relation to persons who deal on their own account as an exclusive activity, as an ancillary part of another non-financial corporate activity or as part of a non-financial commodity-trading activity. The draft directive limits these exemptions so that they do not apply to firms dealing on their own account in commodity derivatives or emissions allowances as an ancillary activity to part of another non-financial corporate entity. The general exemption relating to persons whose main business consists of dealing on their own account in commodities or commodity derivatives is removed.

Member states will also be required to ensure that regulated markets, MTFs and OTFs which admit commodity derivatives impose position limits in relation to such activities. They will also be required (subject to exceeding specified thresholds) to publish a weekly report with the aggregate positions held by different categories of traders for different financial instruments and, upon request, provide the relevant competent authority with a full breakdown of position information for the members, including positions held on behalf of clients. As mentioned above, ESMA will also have the power to limit the ability of a person to enter into a commodity derivative.

Emission allowances did not previously come expressly within the ambit of MiFID. Concerns on the part of the EU Commission that certain fraudulent practices that have occurred in spot markets could undermine trust in the emissions trading scheme ("ETS") in the EU, have resulted in the draft proposal specifying emissions allowances as a financial instrument subject to regulation. This is likely to have a major impact on traders and advisors in the ETS market, many of whom are not currently subject to regulation under MiFID.

## Automated Trading Including Algorithmic and High-Frequency Trading

The EU Commission has previously raised concerns about the potential threat to markets and market stability arising from algorithmic and high-frequency trading. To seek to address these concerns, a new article is proposed to be added to MiFID II providing that an investment firm that engages in algorithmic trading must have effective systems and risk controls in place to ensure that its trading systems are resilient and have sufficient capacity and are subject to appropriate trading thresholds and limits. It will also need to provide annual reports to its home competent authority of, among other things, the nature of its algorithmic trading strategies and details of the trading parameters or limits in the system and key compliance risk controls. Regulated markets will be required to have efficient systems, procedures and arrangements in place to ensure algorithmic trading systems cannot

create or contribute to disorderly trading conditions, including circuit breakers to stop trading if there are significant changes in market prices in a short period.

Firms that engage in algorithmic trading strategy will also be required to ensure that they publish firm quotes at competitive prices with the result of providing liquidity on a regular and ongoing basis to the relevant trading venues at all times, regardless of prevailing market conditions.

ESMA will be required to prepare a report within 2 years of the new arrangements coming into effect on the impact of the requirements in relation to automated and high-frequency trading.

## SME Markets

With the stated aim of making SME markets more attractive to small companies and investors, the draft regulation includes proposals for a proportionate regime for SME markets. The operator of an MTF may apply to its home competent authority to be registered as an SME growth market, provided it meets certain conditions, including that the majority of issues whose financial instruments are admitted to trading on the MTF are SMEs. It is envisaged that further details as to criteria for admission to trading and regulatory standards for such markets will be further prescribed in delegated acts or technical standards.

## Supervisory Powers

As referred to above, ESMA and competent authorities have additional powers in relation to product intervention including being able to prohibit or restrict the marketing, distribution or sale of a product to address threats to investor protection, the orderly functioning of financial markets or EU financial stability.

The draft MiFID II also includes some additional powers (which are already very wide under MiFID) for competent authorities to require data and information, including being able to demand documentation or information in relation to the size and purpose of a position or exposure entered into through a derivative. Competent authorities will also have express powers to require the freezing and/or sequestration of assets, require the suspension of trading in financial instruments or require the removal from trading of a financial instrument. It is likely, however, that most competent authorities will already have many of such powers under their national rules.

Competent authorities will also be required to comply with certain minimum rules in relation to imposing administrative sanctions in relations to breaches of MiFIR and MiFID.

## Next Steps and Impact of Draft Legislation

As can be seen from the above summaries, the new MiFID II and MIFIR proposals will have a major impact upon the regulation of financial services in the EU and the operation of regulated markets and trading platforms. Most of the proposals were contained in the Commission's previous consultation paper but a number of market participants will be disappointed that, despite concerns being raised during the consultation process as to the impact of the provisions, some of the more controversial proposals remain largely in the form proposed. These include extending the pre- and post-trade transparency regime to non-equity and to some OTC transactions, the increased powers for national regulators and ESMA to intervene in product development, marketing and selling, the equivalence regime for non-EEA firms and the effect of the proposals on the commodity derivatives and emissions trading markets. ISDA has already raised concerns that the approach taken on organised trading, particularly for derivatives, go well beyond the scope of the G-20 agreement. There is, however, relief in some quarters that some of the proposals in relation to conduct of business and investor protection have been relaxed from the position set out in the consultation paper.


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The draft legislation, however, only marks the start of the legislative process. There will no doubt be considerable discussion as the proposals are considered by the EU Parliament and Council and it is likely that some of the proposals will be subject to modification. Market participants are therefore likely to continue to raise concerns as to the impact of certain provisions. As has been seen with the discussions in relation to EMIR (which has not yet been finalised despite the draft legislation first being published over a year ago), the EU legislative process can be drawn out. The Commission will however be keen to ensure that the drafts get finalised as soon as possible and well ahead of the G-20 end-2012 deadline that applies in relation to implementing some of the provisions.

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