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The MiFID Review – European Commission Consultation

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MiFID under review

The Markets in Financial Instruments Directive ("**MiFID**") came into force on 1 November 2007[1]. It is part of the European Single Market Programme removing barriers to cross border financial services within Europe, and is designed to foster competition and a level playing field between the EEA's trading venues for financial instruments, and to ensure appropriate levels of protections for investors and consumers of investment services across the EEA.

MiFID is under review because of the legislative requirement on the European Commission (the "**Commission**") to report to the European Parliament and Council on certain topics[2], including the scope of the pre and post-trade transparency regime and the application of the systematic internaliser ("**SI**") regime. There have been structural changes in the equities market since the introduction of MiFID, including greater competition between multi-lateral trading facilities ("**MTFs**") and traditional exchanges, consolidation between exchanges and technological innovation. The financial crisis has inevitably influenced the topics under review and the nature of the proposals being made, for example, the focus on enhancing pre and post-trade transparency.

Following a number of consultations, the Committee of European Securities Regulators ("**CESR**") provided two sets of technical advice to the Commission recommending possible revisions to MiFID[3] (the "**Technical Advice**"), following which the Commission has now published a paper consulting on amendments to MiFID (the "**Consultation**"), a high level summary of the key elements of which is set out below. The Consultation is accompanied by a press release and FAQs.

The Consultation covers a wide range of subjects, and there are a number of surprises in it where the Commission has taken a contrary approach to CESR's recommendations, or has made an entirely new proposal not covered by CESR's work. An example is the proposal to regulate automated

1 It comprises 3 main pieces of legislation: the Level 1 Directive 2004/39/EC, the Level 2 Directive 2006/73/EC and Regulation 1287/2006.

2 Article 65 of Directive 2004/39/EC.

3 In July 2010, see http://www.cesr.eu/popup2.php?id=7003 and October 2010, see http://www.cesr.eu/popup2.php?id=7279.

trading, including high frequency trading ("**HFT**"), which goes further than CESR's recommendations in this area, and which the Commission states is in response to concerns raised with regards to the potential impact of automated trading and HFT on European markets.

At a glance, the key proposals are:

> New regime to regulate organised trading facilities, intended to capture broker crossing systems and inter dealer broker systems bringing together third party interests.

> New broad definition of automated trading, where HFT will be a sub-category and persons involved in HFT will need to be authorised.

> Pre and post-trade transparency requirements to be extended to non-equity instruments trading (including OTC derivative contracts) on regulated markets ("**RMs**"), MTFs and organised trading facilities and equity like instruments .

> Establishment of a mandatory consolidated tape – the Commission proposes different options for consultation.

> Mandatory requirement for all clearing eligible derivatives contracts, as determined by ESMA, to be traded on a RM, a MTF or an organised trading facility.

> A position reporting obligation imposed on commodity derivative exchanges and narrowing of the exemptions from MiFID available to commodity derivatives firms.

> Extension of the transaction reporting regime to all instruments admitted on a RM, a MTF or an organised trading facility and whose value correlates with the value of a financial instrument traded on a RM, a MTF or an organised trading facility.

> MiFID rules to apply to firms selling financial instruments they issue, even when on a non-advised basis.

> Abolition of possibility of disclosing inducements in a summary form and an ex-post reporting requirement where the ex-ante disclosure referred to methods of calculating inducements, and the European Securities and Markets Authority ("**ESMA**") to prepare technical standards.

> Modifying MiFID to limit the availability of eligible counterparty ("**ECP**") status in certain circumstances, including in relation to transactions in complex instruments, and the abolition of the presumption that professional clients have the necessary level of knowledge or experience.

> Granting to the Commission the power to ban certain products, practices or operations that threaten the stability of the financial system.

> National regulators to have the power to temporarily ban or restrict the trading of a product where there is a threat to financial stability, to ban trading of OTC derivative products held to be eligible for clearing where there is no central counterparty (“**CCP**”) offering such clearing and to have position management powers in respect of derivative contracts.

> ESMA to prepare technical standards setting out proposed position limits for on exchange and OTC derivatives.

The consultation closes on 2 February 2011, which does not give firms much time to respond. The Commission proposes to publish legislative proposals for adoption in spring 2011.

Equity markets – regulation of and structural issues

The Commission is proposing to amend MiFID to take into account the new types of trading facilities, technological advances and methods of execution that exist in the post-MiFID world, but which are not currently regulated under MiFID. The proposals follow a considerable body of CESR work on these issues[4].

Organised trading facilities

In keeping with CESR’s Technical Advice, the Consultation proposes introducing a general definition and authorisation requirement for organised trading facilities such as broker crossing systems and inter-dealer broker systems that bring together third-party interests and orders. This proposal is intended to capture operators of “dark pools” (e.g. trading systems where there is no pre-trade transparency of orders in the system), and which have attracted much regulatory interest. The definition would exclude systems already regulated as RMs, MTFs or SIs, and pure OTC trading. The proposed requirements are very similar to those currently imposed on MTFs. After reaching an asset-specific threshold to be defined in implementing measures, an organised trading facility would convert to a MTF.

Automated trading

The Commission takes a more interventionist approach than CESR in relation to automated trading, in response to perceived risks to the EU markets posed by automated and HFT. CESR recommended the development of technical standards in relation to sponsored access, co-location and tick sizes, and that further work be carried out in the area of HFT, a specific type of automated trading where computer programmes enter trading orders.

However, the Commission is proposing that MiFID be amended to provide a broad definition of automated trading. HFT would be treated as a sub-category of this definition, and all persons involved in HFT over certain thresholds would be required to be authorised under MiFID. The Commission is also proposing further requirements on firms involved in automated trading to put in place robust risk controls to mitigate potential trading errors. Venue

[4] Two consultations in April 2010: http://www.cesr.eu/popup2.php?id=6548 and http://www.cesr.eu/popup2.php?id=6535 and a report in June 2010: http://www.cesr.eu/popup2.php?id=5771

operators will also be subject to a range of requirements to ensure that automated trading errors cannot undermine their market. Automated algorithmic trading is also likely to be considered in the context of the review of the Market Abuse Directive ("**MAD**").

Regulation of MTFs and RMs

In keeping with CESR's Technical Advice, and in response to concerns that MTFs are in some cases subject to a lighter regime than RMs leading to an unlevel playing field, the Commission is proposing to align the organisational requirements for RMs and MTFs. This will mean that RMs and MTFs operating similar businesses will be subject to equivalent organisational standards and regulatory oversight.

Systematic Internalisers

CESR carried out work in 2008 and 2009 assessing the impact of MiFID on the secondary markets functioning[5] that identified the small number of firms registered as SIs – only 10 firms as of April 2010 were registered as SIs.

The Commission considers that this may be attributable to factors such as a lack of clarity in the definition of systematic internaliser, and the inflexibility of the public quote system.

The Commission is therefore proposing to amend MiFID to provide more objective criteria for determining when a firm is a systematic internaliser. The Commission is also proposing amendments to require SIs to maintain quotes to both buy and sell, as well as amendments to the minimum quote size that SIs are required to maintain. SIs which make use of the exemption from identifying themselves in post-trade reports will also be required to publish trading data monthly instead as a condition of using the exemption.

OTC derivatives trading – trading and transparency

The Consultation and proposed amendments to MiFID form part of the wider package of reform of EU financial services and in relation to OTC derivatives should be read alongside the Commission's proposals for a regulation on OTC derivatives, central counterparties and trade repositories ("**EMIR**") and for a regulation on short selling and certain credit default swaps ("**Short Selling and CDS Regulation**").

Mandatory trading on organised trading venues

In September 2009, the G20 called for all "standardised" OTC derivative contracts to be traded on exchanges or electronic trading platforms, where appropriate. In response, the US Dodd-Frank Act includes a requirement for all OTC derivatives which are subject to the US clearing obligation to be executed on a swap execution facility. Against this background and in light of recent informal briefings from the Commission on the need for convergence with the US reforms to avoid the creation of regulatory arbitrage opportunities,

[5] See in particular CESR's Call for Evidence in November 2008 and its subsequent report in June 2009 on the impact of MiFID on secondary market trading in equities and CESR Consultation May 2010 on non-equity markets transparency.

the consultation paper, as expected, proposed a mandatory requirement for all clearing eligible and sufficiently liquid derivatives contracts, as determined by ESMA, to be traded on a RM, a MTF or an organised trading facility. Note that in this context the Commission states that the facility must provide "multilateral access", which appears to exclude pure bilateral trading. If correct, that would result in a fundamental change to the method of execution of mandatory cleared derivatives. ESMA would consider as part of its determination whether the exchange or electronic trading of such derivatives would further the G20 commitment as may be the case where there is an over-concentration of dealers in a specific class of derivatives.

Transparency

Building on the Commission's work to improve transparency of the OTC derivatives markets in the proposed EMIR and the Short Selling and CDS Regulation, the Consultation includes proposals for the extension of the MiFID pre and a transaction based post-trade transparency regime (as amended by the Consultation proposals) to all derivatives contracts when traded on an organised trading venue and also when traded OTC. New pre and post-trade information reporting would be imposed on investment firms and organised trading venues by reference to the underlying asset class and type of financial instrument. Investment firms would be required via implementing measures to make pre-trade quotes for OTC derivatives transactions public and firm quotes for certain trade sizes. In addition, the Commission is consulting on whether there should be a requirement for OTC derivatives transactions to be identified and flagged in post-trade transparency reports.

Transparency

CESR carried out work in 2008 and 2009 assessing pre and post-trade transparency in equity and non-equity markets[6], which looked at a number of issues, including the lack of clarity regarding pre-trade transparency waivers applicable to the equities market, the difficulties in establishing a consolidated price for shares and the extension of pre and post-trade transparency requirements to non-equity and equity-like instruments.

Following on from this work, the Commission is proposing:

> Providing ESMA with specific powers to monitor and review the pre-trade transparency waivers.

> Extending the transparency requirements to non-equity instruments whether traded on RMs, MTFs, organised trading facilities or OTC. This would apply to all bonds and structured products with a prospectus or admitted to trading on a RM or a MTF and all derivatives eligible for central clearing. This goes further than CESR's Technical Advice, which did not cover derivatives eligible for central clearing.

[6] See in particular CESR's Call for Evidence in November 2008 and its subsequent report in June 2009 on the impact of MiFID on secondary market trading in equities and CESR Consultation May 2010 on non-equity markets transparency.

> Extending the pre and post-trade transparency requirements to equity-like instruments, such as depositary receipts, exchange traded funds and certificates issued by companies.

> Measures for post-trade transparency in equity markets to improve the quality of data, including a requirement that firms publish their trades through approved publication arrangements.

> Providing that post-trade information be published as close to instantaneously as possible and reducing the real time reporting deadline from three to one minute and prohibiting publication of data on a batch basis. For large transactions the Commission is proposing to require the majority of transactions to be reported by the end of the trading day, reducing the intra-day reporting deadline from three to two hours and raising the intra-day transaction size threshold.

> Amending MiFID to establish a mandatory consolidated tape to improve consolidation of post-trade data – three options are consulted on – one operated by a statutory, single no-profit making entity, another by a commercial undertaking appointed by the Commission following a public tender and the third by competing commercial providers meeting certain conditions.

Commodity derivatives

MiFID applies to commodity derivatives which meet the definition of financial instrument, irrespective of the underlying.

Responding to concerns raised internationally regarding speculative trading and increased presence of financial investors in certain commodity derivatives markets (e.g. oil and agricultural markets) leading to excessive price increases and volatility, the Commission is proposing revisions to MiFID that are devoted to the functioning of the commodity derivatives markets. This work is to be considered as part of the commodities review that the Commission has been undertaking[7].

Requirements for commodity derivative exchanges and position limits

> A position reporting obligation on organised trading venues by category of trader which admits commodity derivatives to make available to regulators (in detail) and the public (in aggregate) harmonised position information by type of regulated entity.

> To pre-empt problems of convergence between futures and spot prices in US agricultural derivatives (due to deficiencies in contract specifications), a provision requiring RMs, MTFs and organised trading facilities to design contracts which they admit to trading and which can be physically settled in a way that ensures convergence between futures and spot prices.

[7] The Commission is to issue a separate communication outlining policy action on commodities in mid-2011.

> The Commission is also seeking views on the provision of limits on the price differential in a given period of futures and spot prices.

> Technical standards are to be proposed by ESMA on ex-ante position limits for OTC and exchange traded commodity derivatives contracts.

MiFID exemptions for commodity firms

Currently, MiFID provides exemptions[8] for commercial users when they deal on own account in financial instruments or provide investment services in commodity derivatives on an ancillary basis as part of their main business, and where they are not subsidiaries of financial groups. The exemptions exist since it is not considered that commercial firms pose systemic risks.

However, the Commission is now proposing to narrow the relevant exemptions in MiFID[9] in response to concerns that unsophisticated clients are not adequately protected, since firms benefiting from the exemptions are not subject to any MiFID provisions, including conduct of business rules. In addition, the exemption in Article 2(1)(k) would be deleted on the basis that a specific exemption for commodity trading houses is no longer valid.

Definition of "other derivative financial instrument"

The Commission is proposing to amend the conditions[10] that an OTC derivative contract in commodities that can be physically settled must meet in order to fall within the definition of "other derivative financial instrument".

In light of ESMA's proposed powers to determine clearing eligibility under EMIR, the Commission is proposing to remove the requirement that the contract must be cleared by a CCP or is subject to the payment of margin. This may increase the number of commodity derivatives contracts that will constitute financial instruments within the scope of the MiFID regime.

Emission allowances

Emission allowances ("**EUAs**") are a new instrument created by the Emissions Trading Scheme Directive. There has been some debate regarding whether these instruments should be classified as financial instruments under MiFID, however, the Commission takes the view that EUAs should not be

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[8] Article 2(1)(i) and (k) of MiFID Level 1 Directive. Article 2(1) (i) provides: "persons dealing on own account in financial instruments, or providing investment services in commodity derivatives or derivative contracts included in Annex I, Section C 10 to the clients of their main business, provided 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 2000/12/EC"; Article 2(1)(k) provides: "persons whose main business consists of dealing on own account in commodities and/or commodity derivatives. This exception shall not apply where the persons that deal on own account in commodities and/or commodity derivatives are part of a group the main business of which is the provision of other investment services within the meaning of this Directive or banking services under Directive 2000/12/EC".

[9] Specifically by making revisions to Article 2(1)(i) to ensure that the exemption only applies to hedging activities and to ensure that the ancillary activity is applied in a narrow way with regard to quantative and qualitative thresholds.

[10] See Articles 38 and 39 of the MiFID Regulation. The conditions are:

> it is traded on or is equivalent to a contract traded on a RM, a MTF or similar third country facility;

> it is cleared by a central counterparty or is subject to the payment of margin; and

> it is a standardised contract in terms of price, lot, date of delivery, etc.

classified as a financial instrument under MiFID. Derivative contracts on EUAs are however financial instruments under MiFID. The supervision of secondary trading of spot EUAs is to be explored by the Commission in a further report required by the Emissions Trading Scheme Directive.

Transaction reporting

The Commission identifies in its Consultation specific issues with the current transaction reporting regime ("**TR regime**") that need to be addressed – in particular the fact that reporting requirements between Member States diverge (CESR in its work has highlighted difficulties with convergence) and the need for the transaction reporting regime to mirror the scope of MAD – since market supervision is the main purpose of the TR regime.

The Commission therefore proposes:

> Extending the TR regime to all instruments admitted to a RM, a MTF or an organised trading facility and whose value correlates with the value of a financial instrument traded on a RM, a MTF or an organised trading facility.

> Extending the TR regime to commodity derivatives that are not admitted to trading or traded on a RM, a MTF or an organised trading facility.

> Introducing a reporting obligation on venue operators that offer access to unauthorised persons.

> Obliging RMs, MTFs and organised trading facilities to store order data in a manner accessible to supervisors for at least 5 years.

> Amending MiFID to specify that a transaction reporting obligation only arises upon a concluded agreement with a counterparty to buy or sell financial instruments.

> Amending MiFID to provide that firms that receive or transmit orders pass the required information to the receiving investment firm.

> Empowering ESMA to prepare technical standards on a common European transaction reporting format and content.

> Amending MiFID to enable direct reporting by firms to ESMA, and amend MiFID to waive the TR obligation on a firm that has already reported an OTC contract under the proposed EMIR.

Investor protection and intermediaries

In light of the financial crisis and alleged mis-selling cases, the Commission believes that a revision of provisions relating to the scope of MiFID, the conduct of business rules and the authorisation and organisational provisions is necessary.

The key proposals are summarised below.

Scope of MiFID

The Commission is proposing that MiFID rules apply to firms when selling structured deposits, and also to financial instruments they issue, even in the issuance phase when advice is not provided. This is in response to concerns raised that greater clarity is required in the case of non-advised sales as to whether MiFID applies.

Conduct of business rules

The Commission is proposing:

> Clarification of the conditions that must be satisfied to qualify for an exemption from the appropriateness requirements when providing execution only services in relation to non-complex products – the Commission is proposing two options, one where the existing MiFID conditions[11] are modified, and the other where the exemption from the appropriateness regime is abolished altogether. As part of this work, the Commission is proposing to review the classification of UCITS that employ complex portfolio management techniques (currently UCITS are always classified as non-complex).

> Modifications to MiFID to provide that intermediaries providing investment advice should inform the client about the basis on which the advice is provided.

> As recommended by CESR, strengthening the right in MiFID for professional and retail clients to request information on OTC derivatives and other structured products that they are trading, including a pre-trade risk/gain and independent quarterly valuations of the product and quarterly reporting on the underlying assets.

> A number of modifications to the inducements regime not anticipated by CESR work in this area, including:

  > Abolishing the possibility of disclosing inducements in summary form and imposing an ex-post reporting obligation where the ex-ante disclosure referred to methods of calculating inducements.

  > Providing technical standards to supervisors to assist in practical application of the requirement that third parties' inducements must be designed to enhance the quality of the service to the client. For example, the Commission states that supervisors should take into account the long term assistance provided by the firm to the client.

  > Banning third party inducements in the case of portfolio management and investment advice provided on an independent basis.

[11] In Article 19(6) of MiFID

> Introducing a principle of civil liability within MiFID to enable clients to claim damages against firms infringing MiFID rules, and to cover the following areas: information and reporting to clients, suitability and appropriateness test, best execution and client order handling. Retail clients in the UK currently have a limited ability to claim damages from a firm for breach of FSA rules.[12]

> Requiring trading venues to produce data on execution quality – to assist firms with compliance with best execution obligations.

Authorisation and organisational requirements

The Commission is proposing:

> Modifying MiFID to strengthen the fit and proper criteria, and clarifying its application to executive and non-executive directors.

> Clarifying in MiFID that the compliance, risk management and internal audit functions should be able to report directly to the board of directors, and removal of persons in these functions should be subject to prior approval of the board and should be notified to the supervisor.

> Modifications to MiFID organisational requirements to ensure that new products and services offered are compatible with the needs of the client, risks are managed and that sufficient information is provided.

> Imposing requirements on portfolio managers to formalise and retain documents concerning their investment strategies in managing clients' portfolios.

> ESMA be empowered to propose technical standards in the area of conflicts of interest, to ensure a consistent application of the MiFID principles.

> In relation to segregation of client assets:

    > prohibiting title transfer collateral arrangements involving retail clients' assets, with a Member State option to extend the prohibition to non retail clients (as recently provided for in FSA rules);

    > putting in place provisions to ensure that a retail client's assets in the context of a securities financing transaction are protected (e.g. the borrower provides collateral, and this is monitored);

    > extending the requirement to provide information to retail clients concerning the terms of the use of their financial instruments and relevant risks to other categories of client; and

    > ESMA to be empowered to produce technical standards concerning conducting due diligence on the credit institutions with whom firms deposit client money.

[12] Under s150 of FSMA.

> Amending MiFID to provide more detailed and tailored requirements in respect of the services of underwriting and placing.

> Imposing a common regulatory framework for telephone and electronic recording. The UK has already put in place a telephone and electronic communication recording regime.

Client categorisation

Although the Commission states that it agrees with CESR's Technical Advice that the client categorisation regime has worked well since the implementation of MiFID, it is also concerned by the plethora of alleged mis-selling cases in relation to very complex products which has revealed some flaws in the current framework. The Commission is therefore reversing the position that CESR took in relation to some client categorisation issues, and is proposing:

> That the requirement to act honestly, fairly and professionally and to be fair, clear and not misleading will apply to relationships with eligible counterparties (as well as retail and professional clients).

> Modifying MiFID to limit the availability of the eligible counterparty ("**ECP**") regime in certain circumstances, in particular, to exclude transactions in complex products (such as asset backed securities and non-standard OTC derivatives) and to exclude non-financial undertakings and certain financial institutions from the ECP regime (e.g. based on size of the institution or on the nature of the business).

> Amending MiFID to abolish the presumption that professional clients have the necessary level of knowledge or experience, or limited to less complex financial instruments – to give professional clients a more rigorous assessment of suitability or appropriateness.

> Prohibiting municipalities from being classified as ECPs or per se professional clients.

The proposal to limit the availability of the ECP regime and to abolish or limit the presumption that professional clients have the necessary level of knowledge or experience in certain circumstances has the potential to impact the way that firms deal with ECPs and per se professional clients – it will add an extra compliance hurdle to be crossed at the inception of the relationship and more fundamentally has the potential to change the nature of the relationship between firms and clients when conducting very complex business.

Reinforcement of supervisory powers in key areas

In light of the alleged mis-selling cases, the Commission is proposing measures to increase regulatory scrutiny on structured products and is proposing the following controversial modifications to MiFID:

> Granting the Commission the power, and on the advice of ESMA, to ban certain products, practices or operations that raise "significant and

sustained investor protection concerns" or threaten "the orderly functioning and integrity of the financial markets or the stability of the financial system".

> Granting national regulators the power to temporarily ban or restrict the trading of a product or the provision of an activity in cases where they constitute a serious threat to financial stability or market confidence in the Member State, and granting ESMA powers to step in if the national regulator does not take action.

> Granting national regulators the power to ban the trading of derivative products that should be cleared on systemic risk grounds, but for which no CCP is offering to clear.

> Granting national regulators position management powers, including to request information from any person entering into a derivatives contract, including a full explanation of the position and all relevant documentation, as well as the power to request that the size of the position be reduced in the interests of orderly markets, investor protection or market integrity. ESMA is to be given coordination role regarding requests by national regulators, and may also initiate a request itself where there is a threat to whole or part of the stability of the financial system in the EU, and the national regulator has not taken sufficient measures to reduce the threat.

> ESMA is to be tasked with preparing technical measures setting out proposed position limits for on exchange and OTC derivatives, and when the power to impose these limits will be triggered – e.g. when market conditions warrant.

Sanctions and access of third countries to EU markets

Sanctions

MiFID currently empowers national regulators to impose administrative sanctions, but work by CESR has shown that there is a lack of convergence across the EU in terms of the administrative and criminal sanctions available for MiFID, as well as their application, which can lead to regulatory arbitrage.

The Commission is therefore proposing some amendments to MiFID to further detail the administrative sanctions that Member States can impose. For example, injunctions to put an end to an infringement, fines and penalty payments that act as a deterrent to others from committing the same measures. The Commission is also proposing that a sufficient minimum level for fines be established.

Third countries

Currently under MiFID, third country firms must be subject to a regulatory regime that is at least equivalent to that required under MiFID. However, in light of the increasing global nature of the financial markets, and the role played by persons in third countries (e.g. Lehman and Madoff), the Commission now wants to develop an EU level regime for access of third country investment firms and market operators. The Commission is proposing in this respect an equivalence regime where MiFID would be amended to provide for exemptive relief for firms and operators based in jurisdictions with equivalent regulatory regimes (e.g. in relation to MiFID, MAD, the Prospectus Directive and the Transparency Directive). ESMA is tasked with a role in assessing equivalence and to provide a single point of contact with third countries.

Next steps in the MiFID review

The Commission proposes to publish legislative proposals for adoption in spring 2011.

Linklaters

Contacts

For further information please contact:

Michael Kent
Partner

(+44) 207 456 3772

michael.kent@linklaters.com

Stephen Fletcher
Partner

(+44) 207 456 5781

stephen.fletcher@linklaters.com

Peter Bevan
Partner

(+44) 207 456 3776

peter.bevan@linklaters.com

Nadia Swann
Partner

(+44) 207 456 5232

nadia.swann@linklaters.com

Sarah Parkhouse
Partner

(+44) 207 456 2674

sarah.parkhouse@linklaters.com

Pauline Ashall
Partner

(+44) 207 456 4036

pauline.ashall@linklaters.com

Mark Middleton
Partner

(+44) 207 456 4643

mark.middleton@linklaters.com

One Silk Street

London EC2Y 8HQ

Telephone (+44) 20 7456 2000
Facsimile (+44) 20 7456 2222

Linklaters.com

Author: Kirsty Gibson

Contributor: Lala Phillips

Ref: A12803301