



*On behalf of the Public Affairs Executive (PAE) of the EUROPEAN PRIVATE EQUITY AND VENTURE CAPITAL INDUSTRY*

## Response to ESMA Consultation on the review of the Market Abuse Regulation

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### Introduction

The Public Affairs Executive of the European private equity and venture capital industry agrees with the importance of ensuring that markets operate effectively and are free from market abuse.

We welcome measures which seek to achieve that objective in an appropriate and proportionate manner but we are concerned that several of the proposed changes suggested in the Consultation Paper could have the direct result of imposing overly cumbersome administrative and reporting requirements on infrequent recipients of market soundings such as private equity firms.

We would therefore urge ESMA to take into account the different nature of market players impacted by the Regulation and to prepare the revision of the framework in a way that would not disproportionately impact financial market participants who are only holding positions in listed securities for a short amount of time.

### Section 3 - FX contracts

**Q2: Do you agree with ESMA's preliminary view about the structural changes that would be necessary to apply MAR to spot FX contracts? Please elaborate and indicate if you would consider necessary introducing additional regulatory changes.**

We agree with ESMA's comments that, if the decision is made to extend MAR to the spot FX market, it will not be a simple matter of adding to the list of in-scope instruments. We believe that the way the market works would not lend itself to this - and that any new regime should therefore be the subject of careful thought and proper consultation. Any changes and new obligations would in any case need to be proportionate to the risks and the activities of the various different market participants.

### Section 7 - Market soundings

**Q33: Do you agree with the proposed amendments to Article 11 of MAR?**

No. We disagree strongly with ESMA's assertion that the whole of Article 11 is or should be mandatory for disclosing market participants (DMPs). In particular, we do not agree that the procedure in Article 11(4) & (5) is or should be mandatory, although DMPs may choose to follow that procedure if they wish to benefit from the automatic safe harbour.

Many private equity and venture capital firms have limited exposure to instruments within the scope of MAR and, of those, the number who disclose market soundings will be yet more limited. To implement detailed procedures of the type required to comply with Art 11 (4) & (5) would be costly, onerous and

entirely disproportionate to their activities.

If the safe harbour does not apply, these firms are still subject to the overarching requirement that any disclosure of inside information must be lawful (within the meaning of MAR). We find this to be a sufficiently high bar, while enabling firms to develop processes more appropriate to their businesses.

**Q36: Do you think that the reference to “prior to the announcement of a transaction” in the definition of market sounding is appropriate or whether it should be amended to cover also those communications of information not followed by any specific announcement?**

We agree that the market soundings regime should apply to soundings in respect of which (for whatever reason) a later announcement is not made. However, it should not apply where the relevant transaction has already been announced.

We would therefore suggest introducing changes to the existing text to remove references to the “prior to the announcement of a transaction” and to replace it by a reference to the fact the transaction “has not been announced”.

**Q37: Can you provide information on situations where the market soundings regime has proven to be of difficult application by DMPs or persons receiving the market sounding? Could you please elaborate?**

Given that a market sounding recipient is defined as any person who is the recipient of a market sounding, this will encompass a very wide variety of different investors ranging from large buy-side firms, who may be frequent recipients of market soundings, to investors who have only a very limited number of publicly traded investments and therefore who will be very infrequent recipients of market soundings.

Private equity investors only hold positions in publicly traded securities infrequently, and rarely tend to hold publicly traded securities issued by multiple issuers. In addition, it is even rarer for private equity investors to receive market soundings as a potential purchaser of other listed securities.

Indeed, the circumstances in which private equity firms will hold public securities are very limited: some may retain a minority investment in a portfolio company following its IPO; some may occasionally invest in publicly traded companies (so-called “PIPE” investments) or hold publicly traded bonds; and some may on occasion receive shares as consideration from a listed purchaser of a portfolio company. However, this is not something that private equity does predominantly and in general these investments are only likely to represent a very small number of investments held by a private equity fund. If and when private equity funds hold listed securities, this would generally only happen on a temporary basis (and for a short time) as part of the initial investment process or during the exit process.

We believe that many of the proposed market sounding rules would not be appropriate for market players with infrequent access to publicly traded securities. Indeed, many private equity firms adopted a proportionate approach to implementation of MAR: in many cases, consistent with their limited exposure to the public markets, they did not roll out procedures which would enable them to benefit from the safe harbour. To do so would have been costly, onerous and have provided few additional safeguards.

**Q38: Can you provide your views on how to simplify or improve the market sounding procedure and requirements while ensuring an adequate level of audit trail of the conveyed information (in relation to both the DMPs and the persons receiving the market sounding)?**

We do not consider that market sounding recipients should be required to keep a list of circumstances where no inside information was communicated.

### **Section 8 - Insiders lists**

**Q42: What are your views about expanding the scope of Article 18(1) of MAR (i.e. drawing up and maintain the insider list) to include any person performing tasks through which they have access to inside information, irrespective of the fact that they act on behalf or on account of the issuer? Please identify any other cases that you consider appropriate.**

We oppose the extension of the "issuer" insider list requirements to all firms. These requirements are very onerous. We therefore believe that ESMA's proposal should be narrowed to persons who have some nexus with the issuer, such as auditors and notaries.

We also do not consider it is practical for insider lists to include only those persons who actually accessed information. This would require a constant screening of those personnel to whom (for good reason) access is available but may not be utilised, such as appropriate IT or compliance personnel. We believe it should be sufficient if firms' facilities enable them, on request, to identify which of such personnel actually accessed information. The current UK practice of categorising insiders as super insiders, core insiders and peripheral insiders could also be a way to address this issue.

### **Section 10 - CIUs**

**Q61: What persons should PDMR obligations apply to depending on the different structures of CIUs and why? In particular, please indicate whether the definition of "relevant persons" would be adequate for CIUs other than UCITs and AIFs.**

We find that the proposed use of the concept of a "relevant person" of the management company is too broad. The current definition includes personnel who are "involved" in collective portfolio management or who provide services to a third party delegate of the management company "for the purpose of" the provision of collective portfolio management. The concept of collective portfolio management (CPM) is broadly defined and includes many purely administrative functions, as well as more substantive investment activity. Moreover, to be "involved in" CPM and/or to provide services "for the purpose of" CPM are broad and ill-defined concepts. This creates a situation where the potential constituents of "relevant persons" are very broad and out of line with the concept of PDMR in the context of non-CIU issuers.

An alternative approach would be to look to the personnel who take part in the investment decisions of the CIU.

### **Contact**

For further information, please contact Christophe Verboomen ([christophe.verboomen@investeurope.eu](mailto:christophe.verboomen@investeurope.eu)) at Invest Europe.



## About the PAE

The Public Affairs Executive (PAE) consists of representatives from the venture capital, mid-market and large buyout parts of the private equity industry, as well as institutional investors and representatives of national private equity associations (NVCAs). The PAE represents the views of this industry in EU-level public affairs and aims to improve the understanding of its activities and its importance for the European economy.

## About Invest Europe

Invest Europe is the association representing Europe's private equity, venture capital and infrastructure sectors, as well as their investors.

Our members take a long-term approach to investing in privately held companies, from start-ups to established firms. They inject not only capital but dynamism, innovation and expertise. This commitment helps deliver strong and sustainable growth, resulting in healthy returns for Europe's leading pension funds and insurers, to the benefit of the millions of European citizens who depend on them.

Invest Europe aims to make a constructive contribution to policy affecting private capital investment in Europe. We provide information to the public on our members' role in the economy. Our research provides the most authoritative source of data on trends and developments in our industry.

Invest Europe is the guardian of the industry's professional standards, demanding accountability, good governance and transparency from our members.

Invest Europe is a non-profit organisation with 25 employees in Brussels, Belgium.

For more information please visit [www.investeurope.eu](http://www.investeurope.eu).

