23 Article 11 only applies to discussions regarding transactions in Article 2.1 of MAR, which provides that MAR applies to financial instruments admitted to trading on either a regulated market, an MTF or an OTF or for which a request for admission to trading on such a venue has been made.

24 See 'Norme professionnelle AMAFI relative aux sondages de marché et aux tests investisseur' in France.

Question 21. Should private placement of bonds on SME Growth Markets be exempted from market sounding rules when investors are involved in the negotiations of the issuance?

- ◯ Completely disagree
- ◯ Rather disagree
- ◯ Neutral
- ◯ Rather agree
- ◉ Fully agree
- ◯ Don't know / no opinion / not relevant

21.1 Please explain and illustrate your reasoning, notably in terms of costs (one-off and ongoing costs)/time spent (number of hours)/number of people needed (in full-time equivalent):

Agreement on common market standards and best practices is essential for the development of a European corporate debt private placement market. To this end, a European Corporate Debt Private Placement Joint Committee (ECPP JC), comprising a range of stakeholders active in the private placement markets and coordinated by the International Capital Market Association, was established in 2014. This response reflects the position of a Market Abuse Regulation sub-working group of the ECPP JC. It is limited in its scope to the soundings aspect of the Market Abuse Regime and not to any requirements on dealing with inside information or insider dealing, which apply equally to private placement transactions as to public transactions.

The soundings regime under the Market Abuse Regulation itself requires the presence of a number of elements, including: "the communication of information, prior to the announcement of a transaction, in order to gauge the interest of potential investors in a possible transaction and the conditions relating to it, such as its potential size or pricing, to one or more potential investors..." As has already been articulated by the Euro Corporate Private Placement Joint Committee (ECPP JC), the soundings regime should not apply to issues of private placements for a number of reasons.

The analysis may be based on the characterisation of bilateral discussions and whether they could be deemed to be "gauging interest", or rather are for the purpose of concluding a deal. Private placement transactions can be differentiated from public transactions in a number of fundamental respects - some of which are set out in the Market Guide and include the fact that they are not announced to the market in the same way as public transactions are, and that a private placement will typically involve a bilateral negotiation with an investor (or more than one bilateral negotiation with multiple investors taking place concurrently).
The Euro Corporate Debt Private Placement Market Guide (the Market Guide) prepared by the ECPP JC, specifies that "Negotiation of contractual terms and conditions between the Borrower and the Investors is an important feature of a [private placement]....This distinguishes a [private placement] from public bond issues, where Investors subscribe to an issue without usually being involved in these negotiations". However, any

such discussions are with a view to establishing that an investor is interested in a proposed transaction, after which, any further communications are not for the purposes of gauging interest, but rather for the purpose of executing the transaction. These discussions are not entered into with a view to gauging the suitability of certain terms and conditions of a potential transaction, such as potential size or pricing.

The Market Guide specifies that the target borrowers of private placement are "primarily medium sized European and international companies who may be looking to diversify from the bank loan market, or for an introduction or alternative to the established European debt capital markets, and for whom a [private placement] could constitute a transition towards those markets". This differentiates the typical target borrowers from larger public companies. For the target borrowers, entering into these discussions may be the only available channel to access investors, as to which ICMA does not consider that the spirit of the soundings regime is intended to apply. For larger, public borrowers, the soundings regime can be used as a means to minimise leveraging investors in order to maximise the transaction itself in terms of, for instance, pricing, size and tenor.

ICMA is supportive of the findings relating to the applicability of the soundings regime under the Market Abuse Regulation to private placements as articulated by The Boston Consulting Group and Linklaters in their study "Identifying market and regulatory obstacles to the development of private placement of debt in the EU" (the PP Study). The private placement market is a fledging one, with significant potential for growth (as highlighted in the PP Study). The intended consequences of the ECPP JC and the Market Guide have been: to boost the market by reducing dependency on bank financing; to encourage a higher degree of diversification of investors; to facilitate easier access to additional debt finance; and to support jobs and growth in the EU, all in line with the goals of the Capital Markets Union (CMU). Were the soundings regime to be applicable to private placements, the consequences (intended or otherwise) could prove to be a significant detrimental factor for the development of the private placement market due to the obligations imposed on the persons receiving market soundings, which could disincentivise investors. It could also set European private placements at a disadvantage vis-à-vis US private placement or the Schuldschein market, where no such regime exists.

B5. Disclosure of inside information for SME Growth Markets Issuers of bonds only

MAR has extended the scope of the market abuse regime to MTFs, including those where debt instruments are traded. Some market participants underline that plain vanilla bonds[25] are less exposed to risks of market abuse due to the nature of the instrument. While the prices of equity financial instruments can be influenced by the publication of (negative or positive) inside information about the firm, the key variables that would impact the price of the plain vanilla bonds would be market risk, liquidity risk and credit risk. Bondholders would not be able to act on those variables while the only factor that could be influenced by the issuer is the likelihood of default. As a consequence, some stakeholders have argued that the disclosure of all inside information (either positive or negative) for debt issuers only would be burdensome and not justified.

25 A plain vanilla bond is a bond without any unusual features; it is one of the simplest forms of bond with a fixed coupon and a defined maturity and is usually issued and redeemed at the face value. It is also known as a straight bond or a bullet bond.