BVCA

17 June 2015

MiFID 2 Consultation
Securities and Markets
Financial Services Group
HM Treasury
1 Horse Guards Road
London, SW1A 2HQ

By email: mifid2consultation@hmtreasury.gsi.gov.uk

Dear Sirs,

Re: Transposition of the Markets in Financial Instruments Directive II (March 2015)

Introduction

This response to HM Treasury's paper entitled '*Transposition of the Markets in Financial Instruments Directive II*' (March 2015) (the "**Transposition Paper**") is made by the Regulatory Committee of the British Private Equity and Venture Capital Association (the "**BVCA**"). The BVCA welcomes HM Treasury's engagement with stakeholders on these important issues.

About the BVCA

The BVCA is the industry body for the UK private equity and venture capital ("**PE/VC**") industry. With a membership of over 500 firms, the BVCA represents the vast majority of all UK-based PE/VC firms and their advisers. Its members have invested around £30 billion into nearly 4,000 companies based in the UK over the last five years. In 2013, around £4.1 billion was invested into around 710 UK companies. Of the total number of companies invested in during 2013, around 64% were small companies, while 22% were medium-sized companies.

Our response

We set out below answers only to those of the Transposition Paper's questions which we consider to be of particular relevance to the PE/VC industry. We would be happy to expand upon any of the points raised in our response if that would be helpful. If so, we would ask that HM Treasury contacts Gurpreet Manku (Director of Technical and Regulatory Affairs, BVCA (gmanku@bvca.co.uk)) in the first instance.

Yours faithfully,

Sheenagh Egan
Chair - BVCA Regulatory Committee

BVCA

HM Treasury: Transposition of the Markets in Financial Instruments Directive II (March 2015)

General comments

1. We welcome the Government's stated approach to implementation of MiFID II as set out in Chapter 1 (*Introduction*) of the Transposition Paper. In particular, we welcome the Government's intention that transposition should mirror as closely as possible the original wording of MiFID II and go no further than its requirements, except where there is a clear justification and authority to do otherwise. We also fully support the Government's efforts to minimise the burden of the MiFID II implementation process on firms and stand ready to provide such assistance to the Government as may be helpful in order for this to be achieved.

Chapter 2: Third countries

Q1. Do you agree the UK should maintain its current third country regime and not implement Article 39 MiFID II? Please explain your reasons why and supply any evidence you have to support your answer. If you do not agree, please provide your views on: (a) what would be the likely or expected economic and non-economic consequences of implementing the MiFID II third country regime; and (b) what impact would the implementation of Article 39 MiFID II have in relation to retail cross-border business currently conducted under applicable exclusions. Please supply any evidence you have to support your answers.

2. While most PE/VC firms do not routinely deal with retail clients, many do engage with sophisticated and/or ultra-high net worth individuals who would be categorised as retail or elective professional clients under MiFID II.

3. We agree that the UK should maintain its current third country regime and should not implement Article 39 of MiFID II. In particular, we agree that the current regime, "… *has the virtue of being sufficiently tailored to client types and to the risks in question and balances the need to maintain investor protection, market integrity and financial stability, while remaining open to business internationally*". As far as we are aware, there are no investor protection issues to justify narrowing the existing UK overseas persons exclusions by adopting the 'Article 39 regime'.

4. As the MiFID II "own exclusive initiative" (reverse solicitation) test is very narrowly drafted, if the UK opted in to the Article 39 regime, it is likely that third country firms would have to establish a branch before dealing with UK retail or elective professional clients. If those firms either: (i) could not establish a branch, because their home jurisdiction did not satisfy the pre-conditions set out at Article 39(2) of MiFID II; or (ii) did not want to do so, because of the relatively onerous authorisation conditions, ongoing conduct of business obligations and inherent costs, they would effectively be 'locked out' of the UK retail and elective professional market. For many PE/VC firms, the number of affected investors and the aggregate amount likely to be invested would not justify the costs of establishing a branch, and it is likely that firms would simply cease to offer services to those investors.

5. This would not only adversely impact UK investors' choice and ability to spread investment risks but could also give rise to the risk of regulatory retaliation by third countries. This could have a damaging effect on the UK financial markets, and in particular on the City of London. We

therefore think there are good economic reasons for the UK to maintain its current third country regime.

6. Finally, we appreciate that the third country regime set out in MiFID II applies only to third country firms which provide investment services to, or perform investment activities for, EU retail or elective professional clients and that it is MiFIR which sets out the regime for third country firms which deal with *per se* professional clients or eligible counterparties.

7. We assume that, irrespective of the final outcome in relation to the Article 39 regime, the existing UK regime for third country firms dealing with UK *per se* professional clients or eligible counterparties will be maintained until a positive Equivalence Decision is adopted by the Commission in respect of the relevant third country jurisdiction and the three year transitional period provided for in Article 54 of MiFIR has expired.