



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

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## Note on Disclosure by AIFMs & Disclosure in Relation to Portfolio Companies

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### SECTION A: DISCLOSURE BY AIFMs

The EVCA position on disclosure by AIFMs is as follows:

#### 1. Annual report (Article 19)

We agree that an AIFM should produce an audited annual report for each AIF that it manages, as specified in Article 19, and this should be available to investors and competent authorities. The report should include a balance sheet or a statement of assets and liabilities; and income and expenditure account for the financial year; and a report on the activities for the financial year.

The AIFM needs to have sufficient time to be able to prepare its report. Where information is required from third parties (including underlying funds where the fund is itself a fund of funds), up to six months would be needed in order to make it practicable for the AIFM to comply; otherwise we agree that a period of four months is appropriate. It is also important to make it clear that underlying investments would not need to have the same year end as the fund, which would be impractical.

The relevant accounting standards should be those set out in the AIF rules or instruments of incorporation.

It should also be clear that where the fund does not have access to information, for legal or other reasons, or if it is not available at the time that the accounts are prepared, it is under no obligation to include that information in its accounts. Nothing in the Directive should oblige portfolio companies to prepare accounts more quickly than is required under applicable Community or national law.

#### 2. Disclosure to investors (Article 20)

Private equity funds make full disclosure to investors before they invest, and investors typically undertake extensive due diligence. In addition, AIFM investors should receive all of the information specified in Article 20 (with EVCA's suggested additions and clarifications), but only to the extent that it is applicable to the AIF concerned. For example, it does not make sense to require disclosure of liquidity risk management for a fund where there are no redemption rights.

It should also be possible for an investor to opt out of receiving the information if it would prefer not to have it, which for legal and regulatory reasons may be preferable.

The information required by Article 20 to be disclosed to investors periodically is only relevant to funds which permit redemption, and should only be applicable to them.

### **3. Reporting obligations to competent authorities (Article 21)**

We agree that an AIFM should provide to the competent authority the annual report for each fund which it manages (within six months of the year end - see above), and a list of funds managed every quarter.

The other requirements of Article 21 are appropriate (in the case of 21.1) for funds which regularly trade on public markets and (in the case of 21.2) those which have redemption rights. It is not appropriate to apply them to funds which invest only in unquoted securities or closed ended funds.

## **SECTION B: DISCLOSURE IN RELATION TO PORTFOLIO COMPANIES**

The EVCA position in relation to the proposed requirement in the AIFM directive is as follows:

### **1. Definition of “controlling influence” (Article 26)**

The draft Directive defines “controlling influence” as being triggered when an AIF (together with other AIF managed by the same manager, or together with AIF managed by another AIFM with whom there is an agreement in place) acquires 30% of a listed or unlisted company. That threshold is too low, and does not give the AIF control rights. The disclosure and other obligations should only apply where an AIF (together with other relevant AIFs) owns over 50% of the general voting rights in the company (or the right to appoint a majority of the board of directors), because it is only at that point that the AIF is in a position to exercise control.

Where the AIF is acquiring “control” of a listed company, the obligations under the Takeover Directive (Directive 2004/25/EC) will apply and national rules may specify that various obligations are triggered at a lower threshold than 50.1%. AIFM will be required to comply with these rules. However, for unlisted companies, which will have a smaller and more active shareholder base, a threshold of less than 50.1% is inappropriate. A lower threshold is also inappropriate for listed companies in cases where the obligations concerned require control of the board.

### **2. Ongoing disclosure obligations (Article 29)**

Under European company law, disclosure obligations and any statements related to the business of the company must be made by the company, acting through its board of directors. The Directive must retain that separation between ownership and management, which is a fundamental principle of limited liability companies. It is not appropriate to require the fund to make disclosures about matters which are for the board to determine, or of information which is the property of the company.

Portfolio companies should be obliged to produce an audited annual report in accordance with applicable European and national law, which should include:

- a balance-sheet or a statement of assets and liabilities;
- an income and expenditure account for the financial year;
- a report on the activities of the financial year prepared by the Directors; and
- auditor’s report on the accounts and directors’ report.

Companies falling below size thresholds set out in applicable European and national law should be able to take advantage of exemptions from the detailed accounting and audit requirements which are stipulated by national law in order to avoid disproportionate and anti-competitive burdens being imposed upon them.

Community and national law also includes extensive obligations to consult with employees in various circumstances. All European companies, irrespective of ownership, are obliged to comply with these.

We do not believe that the more extensive disclosure requirements set out in Article 29 of the draft Directive are appropriate and we believe that it would be discriminatory to apply them only to companies controlled by an AIF.

### **3. Disclosure obligations following acquisition of a controlling influence in a company (Articles 27 and 28)**

The European Takeover Directive (Directive 2004/25/EC) specifies the information to be given to a listed target company when it is to be acquired, including in relation to the impact of the takeover on employment. This applies to AIF as well as to other acquirers. It is important that AIF do not have to provide more information than any other potential acquirer is required to do under national or European law, as that would impede investment into the European Union and would be discriminatory.

In addition, we agree that an AIF should provide the information required by Article 27 to a non-listed company when an AIF acquires a “controlling influence” in a non-listed company (namely, information about the resulting situation in terms of voting rights, the conditions under which the 50.1% threshold was reached and the identity of the shareholders, and the date on which the threshold was reached). The AIF should also be required to inform the company of the identity of the AIFM concerned (as required by Article 28(d)). However, it is not appropriate for the investor to be required to disclose the other information specified in that section. Matters related to the development plan for the company (28(e)) and the communications policy (28(g)) are for the board of the company to determine, and a requirement on a company to disclose those matters which does not apply to all companies would be discriminatory and could put the company concerned at a competitive disadvantage. Conflicts of interest (28(f)) are dealt with by company law, and it would be inappropriate and discriminatory to include a requirement to disclose a policy on those in a Directive dealing only with AIFM.

### **4. Disclosure following a delisting (Article 30)**

There is no justification for requiring a company which is owned by an AIF (but no other) to comply with the Transparency Directive for two years after delisting. This would be highly discriminatory.

## **Notes to the Editor**

### *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 EVCA*

The European Private Equity and Venture Capital Association is the voice of European private equity and venture capital, representing more than 1,300 members. In addition to promoting the industry among key stakeholders, such as institutional investors, entrepreneurs and employee representatives, EVCA develops professional standards, research reports and holds professional training and networking events.

