

## APPENDIX 3

## **EU Private Equity Requirements (only as applicable)**

### **1 Which AIFMs / AIFs are affected?**

1.1 The following requirements only apply to:

- (a) AIFMs managing one or more AIFs which either individually, or jointly on the basis of an agreement aimed at acquiring 'control' (as defined below), acquire control of a non-listed company;
- (b) AIFMs cooperating with one or more other AIFMs on the basis of an agreement, pursuant to which the AIFs managed by those AIFMs jointly acquire 'control' of a non-listed company.

'Control' is calculated as more than 50% of the voting rights of the relevant company. The percentage of voting rights is calculated on the basis of all the shares to which voting rights are attached, even if the exercise thereof is suspended. Furthermore, when calculating the percentage of voting rights held by the relevant AIF, in addition to the voting rights held directly by the relevant AIF, the voting rights of (i) any undertaking controlled by the AIF; and (ii) any natural or legal person acting in its own name but on behalf of the AIF or on behalf of an undertaking controlled by the AIF, shall be taken into account.

1.2 The following requirements will not apply to non-listed companies which are:

- (a) Small and medium-sized enterprises within the meaning of the European Commission's Recommendation 2003/361/EC; or
- (b) SPVs set up to purchase, hold or administer real estate.

1.3 Notwithstanding sections 1.1 and 1.2 above, section 2.1 below shall also apply to AIFMs managing AIFs that acquire a non-controlling participation in a non-listed company.

1.4 Notwithstanding the above, Member States will retain discretion to impose stricter rules with respect to the acquisition of holdings in issuers and non-listed companies in their territories.

### **2 Notification of the acquisition of major holdings and control of non-listed companies**

2.1 Where an AIF acquires, disposes of or holds shares of a non-listed company, the AIFM managing such AIF must notify the regulator(s) of the Member State(s) into which it markets, of the proportion of voting rights of the non-listed company held by the AIF every time that proportion reaches, exceeds or falls below the thresholds of 10%, 20%, 30%, 50% and 75%.

2.2 Where an AIF acquires, individually or jointly, control over a non-listed company, the relevant AIFM must notify that acquisition of control to:

- (a) the non-listed company;
- (b) the shareholders of which the identities and addresses are available to the AIFM or can be made available by the non-listed company or through a register to which the

AIFM has or can obtain access; and

(c) the regulator(s) of the Member State(s) into which it markets.

2.3 The notification required under 2.2 must contain the following additional information:

(a) The resulting situation in terms of voting rights;

(b) The conditions subject to which control was acquired, including information about the identity of the different shareholders involved, any natural person or legal entity entitled to exercise voting rights on their behalf and, if applicable, the chain of undertakings through which voting rights are effectively held; and

(c) The date on which control was acquired.

2.4 In its notification to the non-listed company, the AIFM must request the board of directors of the company to inform the employees' representatives or, where there are none, the employees themselves, without undue delay, of the acquisition of control by the AIF managed by the AIFM and of the information referred to in 2.3 above. The AIFM must use its best efforts to ensure that the employees' representatives or, where there are none, the employees themselves, are duly informed by the board of directors.

2.5 The notifications referred to in 2.1, 2.2 and 2.3 above shall be made as soon as possible, but no later than 10 working days after the date on which the AIF has reached, exceeded or fallen below the relevant threshold or has acquired control over the non-listed company.

### 3 Disclosure in case of acquisition of control

3.1 When an AIF acquires, individually or jointly, control of a non-listed company or an issuer, the AIFM managing that AIF shall make the information referred to in 3.2 below available to:

(a) the company concerned;

(b) the shareholders of the company of which the identities and addresses are available to the AIFM or can be made available by the company or through a register to which the AIFM has or can obtain access; and

(c) the regulator(s) of the Member State(s) into which it markets.

Member States may require that the information referred to in 3.2 below is also made available to the regulator of the non-listed company which the Member States may designate to that effect.

3.2 The AIFM must make available:

(a) the identity of the AIFMs which either individually or in agreement with other AIFMs manage the AIFs that have acquired control;

(b) the policy for preventing and managing conflicts of interest, in particular between the AIFM, the AIF and the company, including information about the specific safeguards

established to ensure that any agreement between the AIFM and/or the AIF and the company is concluded at arm's length; and

- (c) the policy for external and internal communication relating to the company in particular as regards employees.

3.3 In its notification to the company pursuant to 3.1(a) above, the AIFM must request the board of directors of the company to inform the employees' representatives or, where there are none, the employees themselves, without undue delay, of the information referred to in 3.1. The AIFM must use its best efforts to ensure that the employees' representatives or, where there are none, the employees themselves, are duly informed by the board of directors.

3.4 When an AIF acquires, individually or jointly, control of a non-listed company, the AIFM managing such AIF must ensure that the AIF, or the AIFM acting on behalf of the AIF, discloses its intentions with regard to the future business of the non-listed company and the likely repercussions on employment, including any material change in the conditions of employment, to:

- (a) the non-listed company; and
- (b) the shareholders of the non-listed company of which the identities and addresses are available to the AIFM or can be made available by the non-listed company or through a register to which the AIFM has or can obtain access.

In addition, the AIFM managing the relevant AIF must request and use its best efforts to ensure that the board of directors of the non-listed company makes available the information set out in the first sub-section above to the employees' representatives or, where there are none, the employees themselves, of the non-listed company.

3.5 When an AIF acquires control of a non-listed company, the AIFM managing such an AIF must provide the regulator(s) of the Member State(s) into which it markets and the AIF's investors with information on the financing of the acquisition.

#### **4 Specific provisions regarding the annual report of AIFs exercising control of non-listed companies**

4.1 When an AIF acquires, individually or jointly, control of a non-listed company, the AIFM managing such an AIF must either:

- (a) request and use its best efforts to ensure that the annual report of the non-listed company drawn up in accordance with 4.2 below is made available by the board of directors of the company to the employees' representatives or, where there are none, to the employees themselves, within the period such annual report has to be drawn up in accordance with the national applicable law; or
- (b) for each such AIF, include in its annual report the information referred to in 4.2 below relating to the relevant non-listed company.

4.2 The additional information to be included in the annual report of the company or the AIF, in accordance with section 4.1 above, must include at least a fair review of the development of

the company's business representing the situation at the end of the period covered by the annual report. The report must also give an indication of:

- (a) any important events that have occurred since the end of the financial year;
- (b) the company's likely future development; and
- (c) the information concerning acquisitions of own shares.

4.3 The AIFM managing the relevant AIF must either:

- (a) request and use its best efforts to ensure that the board of directors of the non-listed company makes available the information referred to in 4.1(b) above relating to the company concerned to the employees' representatives of the company concerned or, where there are none, to the employees themselves; or
- (b) make available the information referred to in 4.1(a) to the investors of the AIF, in so far as already available, no later than the date on which the annual report of the non-listed company is drawn up in accordance with the national applicable law.

## 5 **Asset-stripping**

5.1 When an AIF, individually or jointly, acquires control of a non-listed company or an issuer, the AIFM managing such an AIF must, for a period of 24 months following the acquisition of control of the company by the AIF:

- (a) not be allowed to facilitate, support or instruct any distribution, capital reduction, share redemption and/or acquisition of own shares by the company as described in 5.2 below;
- (b) insofar as the AIFM is authorised to vote on behalf of the AIF at the meetings of the governing bodies of the company, not vote in favour of a distribution, capital reduction, share redemption and/or acquisition of own shares by the company as described in 5.2 below; and
- (c) in any event use its best efforts to prevent distributions, capital reductions, share redemptions and/or the acquisition of own shares by the company as described in 5.2.

5.2 The obligations imposed on AIFMs pursuant to 5.1 above shall relate to the following:

- (a) Any distribution to shareholders made when, on the closing date of the last financial year, the net assets as set out in the company's annual accounts are, or following such a distribution would become, lower than the amount of the subscribed capital plus those reserves which may be not distributed under the law or the statutes, on the understanding that where the uncalled part of the subscribed capital is not included in the assets shown in the balance sheet, this amount shall be deducted from the amount of subscribed capital;
- (b) Any distribution to shareholders, the amount of which would exceed the amount of the profits at the end of the last financial year plus any profits brought forward and sums

drawn from reserves available for this purpose, less any losses brought forward and sums placed to reserve in accordance with the law or the statutes;

- (c) To the extent that acquisitions of own shares are permitted, the acquisitions by the company, including shares previously acquired by the company and held by it, and shares acquired by a person acting in his own name but on the company's behalf, that would have the effect of reducing the net assets below the amount mentioned in 5.2(a).

5.3 For the purposes of 5.2:

- (a) The term 'distribution' referred to in 5.2(a) and 5.2(b) shall include, in particular, the payment of dividends and of interest relating to shares; and
- (b) The provisions on capital reductions shall not apply on a reduction in the subscribed capital, the purpose of which is to offset losses incurred or to include sums of money in a non-distributable reserve provided that, following that operation, the amount of such reserve is not more than 10% of the reduced subscribed capital.