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

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Response to the ESMA Consultation Paper on Draft Guidelines on the Market Abuse Regulation

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Opening Remarks

The Public Affairs Executive of the European private equity and venture capital industry endorses the importance of ensuring that markets operate effectively and are free from market abuse. We welcome measures which appropriately and proportionately seek to achieve that objective.

We recognise that the Market Abuse Regulation (MAR) mandates ESMA to produce guidelines for market sounding recipients (MSRs), albeit being bound/constrained by the Level 1 text.

As already acknowledged in the MAR, market soundings are important for the proper functioning of financial markets and care should therefore be taken not to impose overly cumbersome administrative and reporting requirements on the MSR.

Given that an MSR 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[1], 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.

The draft Guidelines appear designed for those investors who are likely to invest predominantly in public traded securities and so be more frequent recipients of market soundings. Consequently, some of the draft Guidelines may be unnecessarily prescriptive and onerous for firms who are infrequent MSRs and there should be appropriate flexibility in the Guidelines to address this. An explicit recognition in the Guidelines that they may be applied flexibly depending on the nature and frequency of the market soundings the MSR is likely to receive would be helpful. In particular, this concerns the Guidelines' proposals on internal procedures.

In addition, the Guidelines are not limited in their territorial scope, and so would apply to MSRs whether based in the EEA or anywhere else in the world. While we recognise that the territorial scope of MAR is global (in the sense that market abuse can be committed by a person located anywhere in relation to

[1] As used in this submission, "publicly traded securities or investments" means securities or investments that are admitted to trading or traded on a regulated market or multilateral trading facility.

financial instruments admitted to trading on an EEA trading venue), we think there is a risk that applying the Guidelines without territorial limit means that many, particularly, infrequent MSRs will not be aware of, and therefore not in full compliance with, the Guidelines.

Consultation response

Question 1) Do you agree with this proposal regarding MSR's assessment as to whether they are in possession of inside information as a result of the market sounding and as to when they cease to be in possession of inside information?

We think the requirement for the MSR separately to assess whether it is in possession of inside information for *each* market sounding is potentially burdensome, and may in practice be a difficult exercise for the MSR to undertake compared with the issuer and its advisers.

Although there is a requirement in Article 11(7) of MAR for an MSR to undertake an assessment, we consider that the ESMA Guidelines could provide that an MSR should not have to undertake an assessment where it is told by the disclosing market participant (DMP) that the information is inside information, but may choose to if the MSR considers it has grounds to disagree with the DMP's assessment.

However, where the DMP states that the market sounding does not involve inside information the MSR should assess itself whether it has any grounds to disagree with that assessment. We consider that this would be consistent with the purpose of the provision in MAR, since the MSR would still be making an assessment of whether it had inside information.

We agree with the principle that the MSR's assessment should be based on other information it has as well as the information disclosed to it by the DMP. However, the word "available" is potentially unclear, since there may be information that is *potentially* available to the MSR (e.g. other information that is somewhere in the public domain) but which is not in fact in the MSR's possession. The Guidelines should therefore be amended to state:

> *"(1)…MSRs should independently assess whether they are in possession of inside information as a result of the market sounding taking into consideration as a relevant factor all the information in their possession, including information obtained from sources other than the DMP.*
>
> *(2)…MSRs should independently assess whether they are still in possession of inside information taking into consideration all the information in their possession, including the information obtained from other sources than the DMP."*

Question 2) Do you agree with this proposal regarding discrepancies of opinion between DMP and MSR?

Where the MSR undertakes its own assessment and, as a result, disagrees with the assessment of the DMP we do not see any significant purpose being served by requiring the MSR to communicate that assessment to the DMP. The MSR may still choose to do so in order to make its point, but we do not think the Guidelines need to impose this as a requirement.

Question 3) Do you agree with this proposal regarding internal procedures and staff training? Should the Guidelines be more detailed and specific about the internal procedures to prevent the circulation of inside information?

While we in principle do not object to requirements to maintain internal procedures, we do not feel that the proposal regarding internal procedures is fully appropriate for all MSRs. In particular, we consider that the proposals are already too prescriptive to the extent they purport to apply to MSRs who only receive infrequent market soundings.

The draft Guidelines state that information received in the course of a market sounding should only be communicated through "pre-determined" reporting lines. Such a procedure may be possible where an investor is a frequent recipient of market soundings. However, for an infrequent recipient, such as a private equity investor, it will be very difficult to have meaningful formalised "pre-determined" reporting lines.

The market sounding may come into any one of a number of people within the firm. Consideration of the matter that is the subject of the market sounding is also likely to require the involvement of a number of different individuals – for example, members of the deal team potentially responsible for the investment or members of the investment committee, as well as control functions such as legal and compliance. These individuals will vary depending on the investment (because different deal teams are responsible for different investments and/or markets), and given the infrequency of the market soundings a private equity firm is likely to receive the individuals involved may change over time. As a result it is likely to be very difficult to establish pre-determined reporting lines in anything other than the most generic terms.

The same difficulty will apply in relation to the requirement to identify the "function or body" responsible for assessing whether information received is inside information. Again, with the possible exception of the internal legal and compliance function, it is likely to be difficult to identify upfront a function or body that could sensibly be made responsible for this assessment, as the assessment is likely to require the involvement of different individuals for each market sounding: for example, members of the deal team likely to have to be involved because they are the individuals potentially most familiar with the investment and therefore most likely to be able to assess whether the information is inside information. The deal teams could well be different for different market soundings.

As currently drafted the Guidelines are too prescriptive, in particular, for private equity firms, that are infrequent MSRs, and greater flexibility should be permitted.

Question 4) Do you agree with this proposal regarding a list of MSR's staff that are in possession of the information communicated in the course of the market sounding?

We do not consider that MSRs should be required to keep a list in circumstances where no inside information was communicated. However, we welcome the fact that ESMA has not been prescriptive about the information required to be recorded on such list.

Question 5) Do you agree with the revised approach regarding the recording of the telephone calls?

Yes. We welcome the approach, which will not require MSRs to record telephone calls.

Question 6) Do you agree with the proposal regarding MSR's obligation to draw up their own version of the written minutes or notes in case of disagreement with the content of those drafted by the DMP?

Provided the Guidelines may be satisfied by the MSR providing to the DMP a marked-up version of the DMP's minutes or notes showing where the MSR disagrees with the DMP's version, then we agree with the proposal.

Question 8) Do you agree with the proposal regarding legitimate interests of the issuer for delaying disclosure of inside information?

Regarding the proposed guidelines on legitimate interests of the issuer for delaying disclosure of inside information, (1.c, iii), we feel that the obligation for the decision of the ultimately responsible body to be made within the same day is too restrictive. In the case of prolonged negotiations (for example a bid or merger), a number of small decisions may need to be taken during the course of the negotiations and it may not be possible to ensure that the ultimately responsible body is instantly informed by the lower body. The guidelines should be amended to provide information "as soon as legally and practically possible" as this would make more sense in this context.

Other

We should also like to comment on the appropriateness of Guideline 7 on assessment of related financial instruments. We do not consider that this assessment is likely to be necessary for private equity firms. Private equity firms are unlikely to hold large numbers of positions in publicly traded issuers or in financial instruments that are related to such issuers. As a result, when a firm is a recipient of a market sounding it is very unlikely to hold, buy or sell related financial instruments. In this case, an assessment of all the issuers and financial instruments to which the information disclosed as part of a market sounding relates seems unnecessary. If the firm subsequently considers the acquisition of a publicly-traded investment (for example, as part of a take-private) then it should assess at that point whether it is in possession of any inside information in relation to that investment.

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 about Invest Europe, please visit www.investeurope.eu.

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.