Legal and Regulatory Aspects of Marketing and Promoting Private Equity Funds Across Europe

An EVCA Tax & Legal Committee Paper
Edited by SJ Berwin
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About EVCA

The European Private Equity and Venture Capital Association (EVCA) exists to represent the European private equity sector. With over 925 members throughout Europe, EVCA’s many roles include working to promote the asset class both within Europe and throughout the world, representing the industry in public affairs and developing professional standards. EVCA’s services and information products’ range includes research and information papers, renowned large-scale conferences and networking opportunities, small-scale but industry-specific workshops and private equity management training courses through the EVCA Institute. EVCA’s activities cover the whole range of private equity, from seed and start-up to development capital, buyouts and buyins, and the flotation of private equity-backed companies.

Please note

This publication does not purport to contain a complete explanation of the private equity asset class and any related securities. No statement in this publication is to be construed as a recommendation to purchase or sell a security or to provide investment advice. Private equity involves risk and is not suitable for all investors. Prospective private equity investors considering purchase of securities should reach an investment decision only after carefully considering the suitability of these securities in light of their own personal financial condition and objectives.

This memorandum is a general guide to the relevant legislation in each country and does not go into detail; it is intended for guidance only and specific legal advice should be taken in every case.

The information contained in this memorandum is continually changing. The current regime in each jurisdiction is stated as at 1 April 2004.
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Contributing Members
There has been much talk over the past year scrutinising the issues of valuation, transparency and disclosure for the private equity industry. In March 2004, at the EVCA International Investors Conference in Geneva there was a whole panel discussing these topics. Actually, it seems that wherever private equity professionals meet they are debating these issues.

These concerns are closely linked with a number of aspects one can regularly read in the press, to name but a few, the argument of the maturation of the private equity asset class and the subsequent growing professionalism of fund managers, sophisticated investors and intermediaries. These developments have been supported by a number of studies looking at ways how to analyse subjects such as risk management and asset allocation.

Today however, at the brink of a more than welcome upswing for the private equity industry, which promises rising deal and fundraising activity, the modernisation of our industry will have an impact on many more aspects of the daily fund management. Therefore, in this paper we have concentrated on an aspect which is for every fundraiser of utmost importance, and will be so even more in the years to come: the legal and regulatory aspects of marketing and promoting private equity funds across Europe!

While we must assume that consolidation of private equity funds and placement agents will continue, given current trends, there will nevertheless be numerous new players pursuing institutional investors for financial commitments. EVCA believes that this pan-European guideline on legal and regulatory aspects of the marketing and promoting of private equity funds will support professionalism within our industry.

EVCA is, as always, most grateful to all members of its Tax & Legal Committee for the determination and hard work put into this paper.

Javier Echarri
Secretary General
EVCA
Marketing private equity funds to international investors can be complicated and expensive. Even within Europe, each country has its own marketing rules, although some are broadly based on the principles set out in the EU UCITS Directive. This Paper provides an overview of the rules on the marketing and promoting of private equity funds in the UK, Ireland, Germany, Italy, Spain, Belgium, the Netherlands, Finland, Sweden, Denmark, Portugal, France, Switzerland and Luxembourg. It also includes a description of the marketing rules in the United States, allowing comparison of their rules with those in the various European jurisdictions.

The Paper does not describe the position in Central Europe. Until recently, local pension funds and insurance companies had comparatively little funds. Further, they were precluded from investing in unlisted securities such as private equity funds. As a result, the vast bulk of private equity funds investing in the region were based offshore and did not target local money. Since the late 1990s, a wall of money has been flowing into local pension fund and insurance company coffers. Private equity fund managers are now looking at ways of attracting that money. As part of the final legislative changes required by EU accession, the accession countries have been amending their laws so as to make them compliant with those EU directives concerned with the free movement of capital. These changes will allow insurance companies to invest a proportion of their capital in investment funds making private equity investments. This should prove a great boost to local private equity fund managers.

The Paper deals with the marketing requirements in each jurisdiction in two ways. It considers:

(a) the marketing requirements for the common local structure in each jurisdiction, which would normally be used for a domestic fund; and

(b) the marketing requirements for other, foreign, private equity fund structures (limited partnership and corporate) which may be commonly marketed in each country.

The discussion about the marketing requirements primarily focuses on the rules for marketing to institutions and sophisticated investors, not retail investors. This is because, in most jurisdictions, the restrictions on marketing to retail investors are sufficiently high to severely limit private equity houses’ ability to present their proposals to them without becoming subject to restrictive public offer requirements. If retail investors are to be admitted to a private equity fund, therefore, they often have to be admitted into an appropriate vehicle, which itself receives the marketing, rather than the retail investors being marketed to directly. This Paper studies various aspects of the requirements for marketing and promoting private equity funds, and the questions, together with some general conclusions, are set out below.

Part 1 – Typical fund vehicles

Part 1 outlines the common vehicles used for private equity fundraising in the relevant jurisdiction, and contrasts their treatment with that of foreign vehicles. The remaining questions in this Paper address the marketing requirements for all of these vehicles.

1 What is the local structure commonly used for private equity funds? How does the law of your jurisdiction classify a private equity fund structured in that way? Please consider and describe any requirement to register the fund with local regulatory authorities.

Question 1 contains a discussion of the manner in which the usual local structure is treated in each jurisdiction.
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Around half of the countries have a limited partnership structure as the main, or one of the main, local structures used for private equity funds: the United Kingdom, Ireland, Germany, The Netherlands, Sweden, Finland, Denmark and the United States of America. Out of these countries, Germany, The Netherlands and Denmark also have alternative corporate structures, although in Germany they are not used for tax and marketing reasons. France, Portugal and Italy have fairly similar vehicles, which are neither limited partnerships nor corporate vehicles. The common vehicles for Belgium are corporate.

Even within the broad classification of “limited partnership”, however, there is no standard. For example, an English or Irish limited partnership is not, whilst a Swedish or Finnish limited partnership is, a legal entity.

This, unfortunately, means that a fund-raiser in one jurisdiction cannot assume that a vehicle from his local jurisdiction will be treated in the same way across Europe, as some jurisdictions make a difference in the treatment of limited partnerships with legal personality and others do not.

In addition, no assumptions can be made about the requirements to register a local vehicle with regulatory authorities. The requirements vary between:

• no requirement for registration with regulatory authorities (such as in Germany, United Kingdom, Ireland, Sweden, The Netherlands or Finland), either at all or as long as any offer of the vehicle’s securities will not be public;
• a requirement to file information (such as in France, where this requirement exists even in the case of an offer to professional investors, although in a simplified form); or
• a requirement to obtain prior authorisation from the regulatory authorities, whether or not the offer is to be a public offer (such as in Portugal or Italy).

2 Are foreign limited partnerships treated differently to the local structure described in the response to question 1? If so, what are the differences and does it depend on the jurisdiction of origin of the limited partnership?

Although knowledge of the local structure is useful, it is also important to know how foreign limited partnership and corporate structures will be treated.

Once again, there is no standard approach to this issue. For example, in the United Kingdom, the terminology used is that of “collective investment schemes” (CIS). This can include a variety of vehicles, including undertakings for collective investment in transferable securities (UCITS), which are subject to the special regime of the UCITS Directive: hence, in the United Kingdom a UCITS can be a CIS, but a CIS does not have to be a UCITS. However, other European jurisdictions do not have this classification, and rely on whether a foreign or local vehicle falls within their definition of a UCITS – which draws on the UCITS Directive directly. This may explain some of the differences between the treatment of funds in various jurisdictions.

Germany simply makes a distinction as to whether a foreign limited partnership fund qualifies as a “foreign investment fund” and therefore is subject to German investment law. If it does, it can only be marketed on a private placement basis and German investors may be subject to a penalty tax for investing.
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Many of the remaining countries, such as France, Portugal and Italy, will recognise only UCITS comparable to their own local structure. Others, such as The Netherlands, will accept any UCITS, but make a distinction for non-UCITS vehicles depending on whether they think that the local jurisdiction appropriately regulates such vehicles.

3 Are foreign corporate structures treated differently to the local structure described in the response to question 1? If so, what are the differences and does it depend on the jurisdiction of origin of the corporate structure?

The distinctions which jurisdictions make as to foreign corporate structures tend to run in line with those applied to foreign limited partnership structures.

Part 2 – Promotional and marketing issues

Part 2 considers the general marketing and promotional issues that arise when marketing the fund vehicles described in Part 1. First, there is a general outline of the restrictions on marketing, followed by a description of possible exemptions that can relax the strict marketing rules. Following on from this are a couple of more specific questions: first, a discussion of the impact of electronic communication, which means a quicker and wider dissemination of information to a wider audience, and the restrictions (if any) placed on such communications by the local authorities. Finally, and importantly, is the question whether marketing activities carried out by a foreign private equity fundraiser in the relevant jurisdiction will result in the establishment of a place of business in that jurisdiction and the consequential tax issues.

4 What restrictions (if any) are imposed by the laws of your jurisdiction on promoting and marketing the funds described above? Are there any restrictions on who can promote or any registration or authorisations required for the person promoting?

A full explanation of local marketing requirements might be overwhelming if the question was not tailored to an extent. Therefore three assumptions should be borne in mind:

(a) the fund will be promoted to institutional investors and, to the extent permitted in the relevant jurisdiction, to a limited number of high net worth and/or sophisticated individuals;

(b) neither the fund nor any promoter wishes to appoint a local placing agent unless this is indicated as a requirement of the relevant jurisdiction; however, they may wish to make face-to-face presentations to potential investors (though seeking to avoid establishing a place of business in the relevant jurisdiction); and

(c) a distinction, to the extent possible, is drawn between the marketing (or pre-marketing) of a fund and the subsequent process of actually getting investors to subscribe for fund interests.

A significant proportion of jurisdictions requires that marketing and promotional activities, even for a private placement, are carried out by an authorised person; for example, the United Kingdom, France, Sweden, Denmark, The Netherlands, Portugal and Italy. However, if the activity falls within one of the local available exemptions (see paragraph 5 below), this requirement may fall away, as long as certain rules are followed.
A few countries, such as Germany, do not require an authorised person, nor do they impose any requirements on the marketing of their local vehicle. Germany will, however, require any brokerage activities in the context of marketing of a “foreign investment fund” to be carried out by an authorised person.

5 Are there any exemptions from the restrictions identified above? Please advise how to ensure that any marketing will fall within applicable exemptions and avoid formalities to the maximum extent possible.

The restrictions on promoting and marketing can be extreme, but there are often limited exemptions that can be utilised.

The most common exemption is the restricted circle exemption, but this is not applied uniformly across all countries. The most limited example of this exemption is to be found in Denmark, which only allows marketing to a maximum of 10-15 investors within the exemption; whereas in Italy, fundraisers can approach up to 200 investors within the exemption’s limits. Spain and Belgium each allow up to 50 investors to be approached. In both Sweden and Finland no more than 100 investors can be approached.

Another well-used exemption, in the context of private equity investment, is the professionals’ only exemption. There is no overall agreement on the definition of professionals, and indeed the terminology across countries differs, but in summary, it will usually include institutions (banks, pension funds, insurance companies etc) with sufficient assets or experience to invest in private equity, and will exclude retail investors. It is relatively much less common to encounter exemptions for high net worth individual investors.

Other exemptions include those where the aggregate offering is less than a certain amount or where each investor is required to commit a minimum amount (in each case, Denmark, Spain, and in relation to the second exemption only, Portugal). Various other exemptions are found only in (or in relation to) specific domestic regulations (for example, in France or the United Kingdom).

6 If the fund or promoter has a branch office or associate in your jurisdiction that is appropriately regulated for promotion of vehicles such as the fund how would this affect the answers provided to questions 4 and 5 above?

As outlined in question 4, the assumption was made that there was no permanent presence in the relevant jurisdiction through which marketing or promoting the fund could be made. However, in some instances organisations will have a presence, although it may not be the driving force in the establishment of the new fund. This may make the marketing and promotion of funds easier in the relevant jurisdiction.

The general conclusion was that the presence of a branch office or associate would not affect the answers provided to questions 4 and 5. The clear exception was the United Kingdom, where such branch or associate would in many cases be subject to domestic financial services regulation.
7 Will the use of the Internet or a website to promote a fund in your jurisdiction be possible and, if so, would it have any impact on the answers provided above? Please consider any special rules concerning the use of email and any conditions or constraints that apply to the use of the Internet or a website generally. Please also consider whether it would be possible to operate a website with secure access granted only to specified institutional investors and individuals, and whether it makes any difference where the website is located.

With the increasing use of the Internet in the dissemination of marketing and promotional materials (whether by website or by email), it is important to be sure of the limitations of these electronic tools. Authorities are generally now quite aware of the important issues. For example, the Electronic Commerce Directive means that promotion into a jurisdiction by an email originating from another Member State will in principle be governed by the rules of the originating Member State and not the rules of the Member State where the promotion or marketing is received.

The general view appears to be that website use is possible, as long as the general marketing rules discussed above are adhered to. For private equity funds, use will of course normally be made of an exemption to the normal public offering rules, such as the restricted circle or professionals only exemptions discussed above. It would be usual, therefore, for the website to have secure access, available only to those investors within the relevant exemptions. Some countries go further: Germany, for example, would advise limiting access to established contacts. On dissemination by email, the same rules as for general marketing apply. France is one particular country that has specific guidelines for marketing by email.

8 Will marketing in accordance with the answers above lead to the establishment of a place of business in your jurisdiction? If so, what would the consequences be for the fund or promoter?

With the prevalence of pan-European funds, managers certainly do not want to be deemed to have places of business across Europe due to the marketing of their funds to a wide cross-section of European investors and therefore opening up the possibility of being taxed in more than one jurisdiction. It is important to know the effect that marketing efforts may have on the overall structure of the fund, and the consequences of falling foul of local law.

The general view is that, on the facts outlined in these questions, no place of business should generally be established. However, as the facts for each particular fundraising are different, advice should always be sought on a case-by-case basis before undertaking any marketing activities.
Part 3 – Offer documentation

Part 3 deals with specific issues on the offer documentation that can be circulated in the relevant jurisdiction. First, the issue of whether specific wording should, or must, be used in offer documentation is explored. Any requirements to localise the offer documentation are then outlined.

9 In order to demonstrate knowledge and compliance with the restrictions outlined above would you recommend the use of any particular wording in any offer documentation? Please provide an example of any such wording and indicate whether its use is mandatory or advisory.

It is common in promotional or marketing material to have a series of caveats regarding marketing. For example, such caveats may state that the material is only for the benefit of certain categories of investor, or only to be circulated to a limited number of people, and so on. In some instances this is required by the laws of the relevant jurisdiction; in others, it has become common practice to present these caveats partly as protection for the offeror.

With a few exceptions, use of wording in a private placement memorandum is advisory, but not mandatory. The exceptions are: the United Kingdom, where any communication must include mandatory wording; France, where the normal advisory wording becomes mandatory on any website; and the United States, where the inclusion of certain wording may be mandatory, with the presentation of such wording being also subject to certain mandatory requirements (such as the requirement for capitalisation of the legend).

10 Is there any requirement that the offer documentation or any part of it should (a) be in your local language or (b) deal with any other local considerations (e.g. tax)?

One of the problems that fundraisers of pan-European funds can come across is the requirement to translate an offer document, fully complying with the rules of one Member State, into another language or the requirement to add local tax information. These requirements can add substantially to the cost and time taken to market a fund across jurisdictions. While some countries, such as Germany and Portugal, have relaxed the requirement for translation, other jurisdictions persist.

A few countries require local language for documents given to investors whether a public offer is made or not, for example France and The Netherlands. Some require the local language only for public offer documents: Finland, Spain and Italy. Some others, such as Germany, Finland, Denmark, Portugal and Belgium, allow English in addition to the local language.

It appears that considerations of local tax and other issues are not mandatory for private placements, but the market standard is to include such information.
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Part 4 – Penalties for non-compliance with marketing restrictions

There will, of course, be penalties for breach of the marketing restrictions in each jurisdiction. This part of the Paper outlines the consequences.

11 In the event of a breach of any of the restrictions outlined above what are the possible consequences by way of criminal or regulatory sanctions and civil claims by investors against the fund or promoter?

It is always important to know the downside of not complying with marketing restrictions. In all countries there are regulatory sanctions, and in many countries there are criminal as well as civil, sanctions. The regulatory and criminal penalties available to local authorities cover a wide range of fines and terms of imprisonment.

Civil claims by investors alleging loss for misrepresentation in the marketing documents are possible in most countries, although the situation is slightly uncertain in the Nordic countries. It is clear that in some countries (the United Kingdom and Spain) the local regulator will liaise with the promoter’s home jurisdiction, which may result in additional sanctions.

Part 5 – Additional factors

The final part of the Paper contains important information which, although perhaps strictly outside the limited marketing and promotional aspects of fund raising, still impact upon closing a fund. Without this additional information, readers would not have an accurate picture of the ease of marketing a fund in a particular jurisdiction.

12 Are there any additional legal, licensing or other requirements or restrictions in your jurisdiction which may impact on any marketing undertaken in accordance with the answers above?

Occasionally, there may be legislation not directly connected with the marketing and promotional aspects of fund raising and this question is designed to highlight these points. For example, in the UK it is possible, within limits, to market a fund to persons without the need for any form of authorisation. As fund-raisers gather themselves to rush to the UK to market and promote their funds, they should know that when they are ready to collect money from investors, an appropriately authorised person will be required to collect that money.

In this way, a description of only the marketing and promotional aspects would fall short of giving readers a clear picture of the requirements to bring the fund to a closing. It is also pertinent that in some jurisdictions there are rules that generally regulate the conduct of advertising across that area. Germany and Italy are subject to general financial product rules. Some additional factors that need to be considered are:

- in The Netherlands, there may be a requirement to provide clients with a financial information leaflet;
- there are additional consumer protection laws that may need to be observed in Finland; and
- in Spain, a local paying agent must be appointed when the offer is directed to the public.
13 Are there any other matters you ought to bring to our attention (i.e. exchange controls, money laundering, public offer regulations)?

As mentioned above, a description of marketing and promotional rules in each jurisdiction may not give the full picture of the requirements for finally closing a fund with investors from the relevant jurisdiction. This question allows a brief summary of any other relevant issues that are noteworthy in the context of this Paper.

Anti-money laundering rules generally apply in all jurisdictions, and it is always advisable to seek advice on this issue before beginning marketing. Although, in some countries, such as the United Kingdom, the requirement is to ensure that verification of investors’ identities is undertaken prior to funds being committed, in some other jurisdictions, such as Denmark, the requirement may mean that action needs to be taken somewhat earlier in the fund-raising process. Sweden requires its residents to disclose holdings in foreign securities to the tax authorities. In addition, anyone who carries out payment by a private individual to or from Sweden of more than SEK 100,000 must report the transaction to the tax authorities. Exchange control requirements operate in Denmark when transferring funds in excess of DKK 250,000 into or out of Denmark. The United States of America has “open record” laws, which apply to certain public entity investors (whether they invest in domestic or European funds); these laws may require disclosure of fund results and other information and the fund, if these laws are applicable to any of its investors, will need to consider their impact and any ways of mitigating their effect.

14 Are the laws and regulations outlined above expected to be amended to any material extent in the foreseeable future? If so please describe a timescale and the possible impact of the proposed changes.

While this Paper deals with the current law in each jurisdiction, there may be forthcoming changes which impact on the relevance of the information provided here. This question allows a brief summary of any forthcoming changes.

The main issue is the implementation of the Electronic Commerce Directive in France, Germany, Sweden, Spain and Italy, which requires prior customer consent before, among other things, email communications can be made.

In other countries, namely France, Denmark and Portugal, there are important clarifications to existing law that will be forthcoming in the near future.

Multiple changes throughout the EU, related to various aspects of the Financial Services Action Plan, are likely to be implemented throughout 2004-2007. These will include licensing for all investment advisers.

Jonathan Blake
Chairman EVCA Tax & Legal Committee
SJ Berwin
Typical fund vehicles

1. What is the local structure commonly used for private equity funds? How does the law of your jurisdiction classify a private equity fund structured in that way? Please consider and describe any requirement to register the fund with local regulatory authorities.

1.1 Local Structure
The local structure most commonly used for domestic private equity funds is an English limited partnership.

1.2 Classification
A private equity fund structured as an English limited partnership will be classified as a Collective Investment Scheme (CIS) as defined in section 235 of the UK Financial Services and Markets Act 2000 (FISMA).

1.3 Regulatory registration requirements
Such a fund will be “unregulated” in the UK, in the sense that it does not fit into one of the categories of fund, which the Financial Services Authority (FSA) regulates as products. Accordingly there will be no need to register the fund with the FSA (in fact it is not even possible to do so), though as a consequence of the fund’s “unregulated” status there will be various restrictions upon the way interests in it can be marketed in the UK.

2. Are foreign limited partnerships treated differently to the local structure described in the response to question 1? If so, what are the differences and does it depend on the jurisdiction of origin of the limited partnership?

2.1 Treatment of foreign limited partnerships
The treatment of foreign limited partnerships will depend on whether they are deemed to be the equivalent of English limited partnerships (unincorporated vehicles) or corporate vehicles. The majority are not considered to be corporate bodies.

2.2 Unincorporated overseas limited partnerships
Most overseas limited partnerships would be treated in the same way as an English limited partnership, with an important caveat in the case of any overseas limited partnership that is a corporate vehicle. The differences for such partnerships are outlined in paragraph 2.3 below.

2.3 Overseas limited partnerships that are corporate vehicles
A limited partnership constituted subject to the laws of the US State of Delaware is another fund vehicle typically marketed in the UK, which differs from English, and many overseas, limited partnerships in being a corporate vehicle. It is understood that in June 2003 Malta adopted legislation for the constitution of limited partnerships that are intended to share these corporate characteristics.

A corporate-type limited partnership will almost certainly not be a CIS, provided that section 236 of FISMA does not apply to it. This provides that a body corporate will qualify as a CIS where, among other things, a reasonable investor would expect at the time he invests that he would be able to realise his investment at, or closely correlated to, net asset value within a period that appears to him to be reasonable.
Whether this will be the case in relation to a private equity fund will depend on the terms of the fund documentation (as well as any private arrangements with the operator or promoter of the fund outside the documentation). A full analysis is beyond the scope of this note. The UK Financial Services Authority (FSA) has issued some not particularly helpful guidance on the subject. On the whole, however, if appropriate steps are taken in the fund’s documentation to clarify that no investor has any expectation of a net asset value realisation on demand before the fund is wound up, this suffices to disapply FISMA section 236, and in the case of the majority of private equity funds this is likely to be the case.

If section 236 of FISMA does not apply, then the promotion of interests in a corporate private equity fund (including a Delaware LP) in the UK may be subject to UK public offer regulations (see further paragraph 4.2 below).

3 Are foreign corporate structures treated differently to the local structure described in the response to question 1? If so, what are the differences and does it depend on the jurisdiction of origin of the corporate structure?

As mentioned in paragraph 2.3 above, a corporate fund would have to be classified as a CIS in order to be treated as similar to an English limited partnership. If it does not fall within that definition, any promotion of interests in that corporate fund may be subject to UK public offer regulations (see further paragraph 4.2 below).

Promotion and marketing issues

4 What restrictions (if any) are imposed by the laws of your jurisdiction on promoting and marketing the funds described above? Are there any restrictions on who can promote the funds in question or are there any registration or authorisations required for the person promoting?

4.1 General restrictions

Section 21 of FISMA defines any communication made by way of business that contains an invitation or inducement to engage in investment activity as a “financial promotion”. All offering or other information relating to a private equity fund will constitute a financial promotion, subject to the exemptions set out in paragraph 5 below, and will therefore need to be communicated or approved by an FSA authorised person.

4.2 Additional restrictions for non-CIS vehicles

A private equity fund structured as a Delaware limited partnership or as any other form of body corporate, and which does not constitute a CIS because of its particular circumstances, may be subject to the additional requirements set out in the Public Offers of Securities Regulations 1995 (the Prospectus Regulations). This may require the issue of a prospectus which complies with the detailed contents requirements set out in the Prospectus Regulations, subject to the exemptions set out in paragraph 5 below.
5 Are there any exemptions from the restrictions identified above? Please advise how to ensure that any marketing will fall within applicable exemptions and avoid formalities to the maximum extent possible.

5.1 General exemptions

The prohibition on an unauthorised person issuing a financial promotion, or causing one to be issued, is subject to various exceptions. These are set out in the UK Financial Services and Markets Act 2000 (Financial Promotion) Order 2001 (the Financial Promotion Order). It should be remembered that a firm from outside the UK wishing to promote a fund in or into the UK would be such an unauthorised person for these purposes. The main categories of recipient to whom a financial promotion may be issued by an unauthorised person are:

(a) firms authorised under FISMA or passported branches of firms authorised in other EEA Member States (authorisation and passported status can be checked on the FSA’s website www.fsa.gov.uk/register);

(b) persons whose ordinary activities¹ do, in fact, or can reasonably be expected to, involve them in acquiring and holding interests in funds of this type for the purposes of a business carried on by them;

(c) governments, local authorities and certain types of international organisation;

(d) any body corporate which itself has or is in a group² with another that has:

- called up share capital or net assets of at least £5 million (or foreign currency equivalent); or
- called up share capital or net assets of at least £500,000 (or foreign currency equivalent) and at least 20 members;

(e) unincorporated associations or partnerships with net assets of not less than £5 million (or foreign currency equivalent);

(f) the trustees of a trust which has aggregate gross cash and financial investments of at least £10 million (or foreign currency equivalent) at the date of intended promotion or at any time in the preceding 12 months;

(g) any director, officer or employee of any of the above whilst acting in that capacity, provided that his responsibilities in that capacity involve him, in the relevant company or other organisation in (a) – (f) above, engaging in investment activity;

(h) persons in the business of disseminating information (other than by way of advertising) in relation to funds of this nature (basically, financial journalists, investment publications, web sites covering finance matters etc., though the safe view is to assume that such promotions are for informative purposes only, and not so as to lead such journalists etc. themselves to invest)³;

1 To constitute “ordinary activities”, such a person’s business would need to include buying such investments in an ordinary or everyday way. It would not be sufficient if that person bought or sold such investments personally rather than as part of his business, or if he did so once or twice but not so as to amount to an ordinary activity.

2 It is worth pointing out that the definition of “group” for FISMA purposes (set out in section 418) includes natural persons; thus, for example, a company worth £100 that is at least 20% owned or controlled by an individual worth £5 million may have fund interests promoted to it (even though strictly speaking that individual is not entitled to receive the promotion).

3 Indeed, whereas with most classes of intended recipient it is good – and sometimes essential – practice to specify these in legends on placing memoranda, the “journalists exemption” does not necessitate this.
United Kingdom

(i) certified high net worth individuals (CHNWIs):

- (i) a CHNWI must have a certificate from his employer or accountant to the effect that in the last financial year he had gross income of not less than £100,000 and/or net assets (after certain disqualifications) of not less than £250,000;
- (ii) certain other conditions are required to be met, and the exemption only applies where the fund being sold invests directly in venture capital situations (thus a fund of funds could not be offered to a CHNWI);

(j) certified sophisticated investors (CSIs):

- (i) a CSI must have a certificate not more than 3 years old issued by a UK authorised investment firm which certifies he has sophistication in relation to investment in unregulated collective investment schemes;4
- (ii) as with CHNWIs, certain further conditions must also be met, but broadly any sort of scheme can be sold to a CSI;

(k) associations of persons who are entirely or predominantly composed of persons falling within (d), (e), (f), (g), (i) and/or (j) above.

The “one-off exemption”

One further, and rather tricky, exemption should be mentioned, called the “one-off exemption”, which applies in cases where:

- the promotion is made to a single person or to a group of persons in the expectation they will invest jointly;
- the subject matter of the promotion is clear (i.e. the recipients are aware from what they receive that there is a fund being offered); and
- the promotion is not part of an “organised marketing campaign”; this expression is not defined, but needs to be understood as restricting this exemption to limited and discrete private promotions.

Thus, in circumstances where it is proposed to offer a fund to three or four pre-identified people, all of whom is already expected to invest, and the solicitation goes no further, this promotion is exempt and need not be carried out by an authorised person.

Private individuals

As can be seen, private individuals barely feature on the list of exemptions, however wealthy or experienced they may be. It is important to note, in relation to 5.1(i) and (j) in particular, that the UK has no self-certification scheme.5 This is why investment memoranda are usually sent only to FISMA authorised firms, leaving it to them to advise their clients.

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4 Or, if the fund in question is not a collective investment scheme, then a certificate attesting to experience in direct investment in unquoted equity would presumably suffice.
5 It is worth mentioning that, in January 2004, the Treasury issued a consultation document proposing a revision to the CHNWI and CSI structure in the Financial Promotion Order. This may in time lead to a regime under which investors of high net worth and/or sophistication will be able to self-certify (thus creating a system closer in spirit to the “accredited investor” regime in the United States). The CHNWI/CSI regime in the UK at present is acknowledged – for several reasons – not to have achieved the broad purpose of liberating investment capital from wealthy and sophisticated individuals, and many in the private equity industry have argued that unless self-certification becomes possible this may never be capable of achievement. However, the Treasury’s proposals may still take some time yet to be implemented in a fashion which significantly expands the marketability of private equity funds and investment opportunities.
5.3 Prospectus exemptions for corporate funds

For a corporate fund (including a Delaware limited partnership), there are a number of exemptions from the requirement to produce a prospectus under the Prospectus Regulations. The main exemptions likely to be of use in marketing a private equity fund are as follows:

(a) where the interests are offered only to persons whose ordinary activities involve them in acquiring, holding, managing or disposing of investments for the purpose of their business;
(b) where the interests are offered to no more than fifty persons in the United Kingdom; and
(c) where the minimum consideration per investor which may be paid for the interests is at least €40,000 or foreign currency equivalent.

These (and other) exemptions apply cumulatively. Thus if most participants come into the fund at €40,000 or more, but one investor is permitted to enter the fund for less, the latter would be covered by the “50 or fewer” exemption.

The €40,000 figure will rise to €50,000 on the coming into force (expected mid-2005) of the EU Second Prospectus Directive. This provision will also create a further useful exemption for small fund-raisings: any vehicle raising a maximum of €2.3m will also be exempted from the Prospectus Regulations, regardless of the amounts solicited from individual investors.6

6. If the fund or promoter has a branch office or associate in your jurisdiction that is appropriately regulated for promotion of vehicles such as the fund how would this affect the answers provided to questions 4 and 5 above?

6.1 Wider marketing regime

If the fund or promoter is represented in the UK by an FSA-authorised firm or the branch of a firm authorised in another EEA Member State7, a somewhat wider marketing regime applies in relation to funds that are CISs. A much wider regime applies in relation to funds that are not CISs.

6.2 Funds which are CISs

Any fund that is a CIS can be promoted by a UK authorised firm, or a branch in the UK of an EEA firm, to:

- the categories of investor described in paragraphs 5.1 above (by virtue of the provisions of the Financial Services & Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001; and
- certain other categories of investor, specified in the FSA’s Conduct of Business Sourcebook, Chapter 3 Annex 5R - of principal interest is the capacity to promote to persons who fall within the FSA’s definition of an “intermediate customer” and, among others, this category can include any person bona fide classified as an expert in relation to unregulated CISs by a UK-authorised firm or a branch in the UK of an EEA firm.

6 This could in due course be of use where marketing a “friends and family” side-fund constituted as a Delaware limited partnership, for example.
7 It is assumed for these purposes that the scope of the firm’s or EEA firm’s authorisation covers marketing and deal-arranging activities. A pure investment advisory firm would not be able to assist in this process, for example.
6.3 Funds which are not CISs

Any fund which is not a CIS can broadly be promoted by a UK authorised firm, or a branch in the UK of an EEA firm, to any person subject to:

- the requirement for a prospectus, unless an exemption contained in the Prospectus Regulations applies; and
- compliance with obligations as to the form and content of promotional materials contained in Chapter 3 of the FSA Conduct of Business Sourcebook.

7 Will the use of the Internet or a website to promote a fund in your jurisdiction be possible and, if so, would it have any impact on the answers provided above? Please consider any special rules concerning the use of email and any conditions or constraints that apply to the use of the Internet or a website generally. Please also consider whether it would be possible to operate a website with secure access granted only to specified institutional investors and individuals.

Subject to compliance with the marketing restrictions set out in paragraphs 4 to 6 above, there are no special rules that would prohibit the use of the Internet, a website or email to communicate with potential investors. However:

(a) the restrictions on marketing a CIS mean that a website may only be used if it has secure access granted only to specified institutional investors or investors who otherwise fall into one of the exemptions set out in paragraph 5 above (in the case of a multi-purpose web site, such access controls need only apply to the page or pages used for the fund marketing exercise); and

(b) in relation to a corporate fund that falls within the scope of the Prospectus Regulations, care would need to be taken to ensure that access is not afforded to more than 50 persons, unless another exemption from the scope of the Prospectus Regulations applies.

Please also refer, however, to the response to question 14 below.

8 Will marketing in accordance with the answers above lead to the establishment of a place of business in your jurisdiction? If so, what would the consequences be for the fund or promoter?

On the basis that marketing is conducted from outside the UK, or through personal visits to the UK by representatives of the fund for meetings with investors, the answer should be no. However, it is never possible to give a full answer to this question without knowing in more detail what the fund promoter proposes to do and with what other business activities it may be concerned. Specific advice should always be taken in advance of carrying out any marketing activities in the UK.
9 In order to demonstrate knowledge and compliance with the restrictions outlined above would you recommend the use of any particular wording in any offer documentation? Please provide an example of any such wording and indicate whether its use is mandatory or advisory.

9.1 Unapproved offer documentation

If we assume that the fund or promoter does not have an FSA authorised branch office or associate and intends to rely on the exemptions set out in paragraph 5.1 above, the appropriate restrictive wording, use of which is mandatory in order to comply with the terms of the exemptions, would be as follows:

“This Memorandum has not been issued, nor have its contents been approved, by a person authorised under the UK Financial Services & Markets Act 2000 (FISMA). Accordingly, it may only be communicated in the United Kingdom in reliance upon applicable exemptions from the FISMA financial promotion restrictions set out in the Financial Services & Markets Act 2000 (Financial Promotion) Order 2001 (Financial Promotion Order) to the following types of person in the UK:

(i) investment professionals, as defined in article 19 of the Financial Promotion Order, including persons authorised under FISMA, persons exempt from the requirement to be so authorised, governments, local authorities and international organisations and persons having professional experience of participating in unregulated collective investment schemes;

(ii) high value entities, as defined in article 49 of the Financial Promotion Order; this category includes:

• any body corporate which has, or is in a group with another that has, paid up share capital or net assets exceeding:
  • £5 million (or foreign currency equivalent); or
  • £500,000 (or foreign currency equivalent), where a body corporate in its group has at least 20 members;

• any unincorporated association with net assets exceeding £5 million (or foreign currency equivalent); and

• the trustees of a trust with an aggregate gross value of cash and investments at any time in the two years preceding the date of this Memorandum of at least £10 million (or foreign currency equivalent) in value;

(iii) certified high net worth individuals (CHNWIs) pursuant to article 48 of the Financial Promotion Order: a CHNWI is a person who holds a certificate from his employer or his accountant issued not more than 12 months prior to the date of this Memorandum which confirms that in the financial year preceding the date of the certificate he had gross earnings of at least £100,000 per annum and/or net assets (after discounting his house, pension schemes and certain other assets) of at least £250,000; in addition the CHNWI must have signed a statement, within the 12 months preceding the date of this Memorandum, confirming his status and understanding of the protections lost in the terms provided for in Article 48(2)(b);

Note – the text here lists all the exemptions that could be relied upon in the circumstances; the default minimum is likely to include reference to articles 19 (investment professionals) and 49 (high value entities) only, so as to protect the promoter in the case of an institutional promotion only.
(iv) certified sophisticated investors (CSIs) pursuant to article 50 of the Financial Promotion Order: a CSI is a person who holds a certificate from an authorised person under FISMA issued not more than 3 years prior to the date of this Memorandum which confirms that he is sufficiently knowledgeable to understand the risks involved in participating in unregulated collective investment schemes; in addition the CSI must have signed a statement, within the 12 months preceding the date of this Memorandum, confirming his status and understanding of the protections lost in the terms provided for in Article 50(1)(b).

Subscribing for interests in the Fund carries a significant risk of loss of all the property so invested. Any person who is in any doubt about investing in the Fund should seek independent advice from a person authorised under FISMA who specialises in advising on participation in unregulated collective investment schemes.

The promotion constituted by this Memorandum is not being made to categories of person other than those specified above and no one falling outside such categories should rely on any of the information in this Memorandum. The transmission of this Memorandum to any person in the UK other than the categories specified in this Memorandum is unauthorised and may contravene FISMA. Accordingly, prior to accepting an application from any applicant who claims to fall within any of the above categories, verifiable evidence of the applicant’s status may be required (including the case of a CHNWJ or CSI a copy of his certificate and statement in accordance with article 48 or 50 of the Financial Promotion Order).

If it is not intended to promote the fund to any of the above exempt classes the restrictive wording can be shortened by leaving out the relevant paragraph(s).

9.2 Prospectus wording

There is no prescribed wording for use under the exemptions to the Prospectus Regulations though it may be advisable to refer to the exemption being relied upon.

10 Is there any requirement that the offer documentation or any part of it should (a) be in your local language or (b) deal with any other local considerations (e.g. tax)?

10.1 Language requirements

While it would be unusual for an offering in the United Kingdom to be conducted other than in English, there is no rule to the effect that English is mandatory. However, an offering that is made by a UK authorised firm or the UK branch of an EEA firm will need to comply with the general requirement of Chapter 3 of the FSA Conduct of Business Sourcebook that it is “clear, fair and not misleading”, and this might be interpreted to require marketing materials used in the UK to be in English.

10.2 Local considerations

Although the offer document can contain limited representations as to taxation and a general blandishment that prospective investors should take their own advice, it is customary for the document to contain detailed yet generic representations as to how the fund and its investors in the UK are to be taxed.
Penalties for non-compliance with marketing restrictions

11 In the event of a breach of any of the restrictions outlined above what are the possible consequences by way of criminal or regulatory sanctions and civil claims by investors against the fund or promoter?

11.1 Regulatory and criminal sanctions

Breach by an unauthorised person of the restrictions on making financial promotions set out in paragraph 4 above is a criminal offence. In the event of contravention, the person responsible may be liable to an unlimited fine and/or imprisonment.

11.2 Civil claims

In the event that an investor made a commitment to the fund on the basis of unlawful marketing by the fund or promoter, the contract will be voidable at the instance of the investor, who will be entitled to recover monies paid out and to compensation for any loss sustained as a result of the investment (unless a court were to hold that in all the circumstances the promotion had been fair and not misleading, in which case the court has the discretion to allow the investment to stand).

11.3 Additional sanctions

It is also worth pointing out that if the promoter, though unregulated in the UK, is subject to regulation in its place of establishment, the FSA would be most likely to liaise with its local regulator and the promoter could therefore face local sanctions as well, and would be bound to suffer reputational damage.

Additional factors

12 Are there any additional legal, licensing or other requirements or restrictions in your jurisdiction which may impact on any marketing undertaken in accordance with the answers above?

12.1 Limitations on unauthorised promoters

Promotion of investments in the UK by an unauthorised person may be carried on in relation to the exempt categories and circumstances outlined above. However, no such unauthorised person has latitude, in the UK and by way of business, to accept an investor’s money or issue commitments in the fund to him, since this would fall within the scope of arranging investment deals and require that person to be regulated under FISMA. Contravention of this prohibition is a criminal offence. Where a promoter introduces a fund to UK investors but is not able to accept their money for investment for the reason specified, it would be permissible for the documentation to invite interested investors to subscribe by contacting the promoter in the promoter’s home jurisdiction, and assuming that all action taken from that point is outside the UK, this is not likely to violate UK financial services law. An alternative, of course, is for the overseas promoter to arrange for a UK authorised person to actually place interests in the fund.
12.2 Recklessness

Section 397 of FISMA is also noteworthy, in that it establishes a criminal offence for any person (UK or overseas, authorised or unregulated) intentionally or recklessly to make a statement, promise or forecast that is false, misleading or deceptive, or which conceals material facts, for the purpose of inducing persons in the UK to invest or being reckless as to whether they might do so. This is punishable by a maximum term of 7 years.

13 Are there any other matters you ought to bring to our attention (i.e. exchange controls, money laundering, public offer regulations)?

FISMA and other UK regulations contain detailed anti-money laundering provisions. Although the requirement to verify an investor’s identity and the provenance of his money arises at the time of accepting commitments to the fund, rather than during initial marketing, there are obligations on UK investment firms and various others who might be involved with the investment process to report suspicious transactions or persons involved with them as soon as such suspicions are aroused by the circumstances in question.

14 Are the laws and regulations outlined above expected to be amended to any material extent in the foreseeable future? If so please describe a timescale and the possible impact of the proposed changes.

The broad regime in FISMA and the FSA Conduct of Business Sourcebook is not expected to change significantly, other than in line with general regulatory developments in the European Union that it will be mandatory for the UK to implement in due course.

With this in mind, it is noteworthy that the UK has implemented the Electronic Commerce Directive, and this has the broad effect that for certain forms of communication that originate in another EEA Member States, which are electronic in nature (e.g. delivered via a web site) and where certain other conditions apply, the promotion involved ceases to be regulated by UK promotional restrictions (as discussed in paragraphs 4 and 5 above) and will instead be regulated by the relevant provisions of the law of the originating Member State.

As mentioned at various points above, the following changes are under consideration or subject to an implementation timetable:

- consideration by the Treasury of expansion of the CHNWI and CSI regimes to more closely resemble a process of self-certification; and
- broadening of the Prospectus Regulations, to implement the EC Second Prospectus Directive, which from mid-2005 will amend the exemptions to the requirement for a prospectus in the case of an offer of securities issued by a corporate fund.
Typical fund vehicles

1 What is the structure commonly used for private equity funds? How does the law of your jurisdiction classify a private equity fund structured in that way? Please consider and describe any requirement to register the fund with local regulatory authorities.

1.1 Local structure

The local structure most commonly used for domestic private equity funds is the Fonds Commun de Placement à Risques (FCPR).

1.2 Classification

Pursuant to French law, the FCPR is classified as an Organisme de placement collectif en valeurs mobilières (OPCVM), and as such it is regulated by the Autorité des marchés financiers (AMF). It is a joint ownership of financial instruments and deposits (copropriété d’investments financiers et de dépôts), as these terms are defined under French law, and as such it is not a separate legal entity.

An FCPR is created by two founders, a management company (société de gestion de portefeuille) and a custodian (dépositaire).

The management company must be a French société de gestion de portefeuille that has been approved by the AMF. It has sole responsibility for the management of the FCPR, including identifying, evaluating, selecting and implementing all investments and sales of investments on behalf of the FCPR.

The custodian, which is also a regulated entity (generally a credit institution, an investment company or an insurance company), ensures the conservation of the assets held by the FCPR and verifies the legality of the management company’s decisions.

The management company and the custodian of the FCPR must establish the by-laws of the FCPR (Règlement) that are similar to a limited partnership agreement. The by-laws must set out:

(a) the terms and conditions under which the investors will subscribe to FCPR shares;
(b) the manner in which the FCPR will operate; and
(c) the manner in which income and capital gains will be allocated and distributed.

1.3 Regulatory registration requirements

Any FCPR that is open to the public at large must receive the prior approval of the AMF.

If the FCPR is open only to “sophisticated investors”, it can be created under a simplified procedure that requires no approval and merely consists of filing the by-laws of the FCPR (together with other relevant documents) with the AMF within one month following the FCPR’s initial closing date.

9 Pursuant to French law no. 2003-06 dated 1 August 2003 on Financial Security, the Commission des Opérations de Bourse (COB) and the Conseil des Marchés Financiers (CMF) merged into a new entity named Autorité des marchés financiers (AMF).
France

The following investors are “sophisticated investors”:

(i) “qualified investors” (see the response to question 5 below);

(ii) the FCPR’s management company;

(iii) any officer or employee of the management company or any individual who acts on behalf of the management company;

(iv) any person who invests not less than €500,000; or

(vi) any person who invests not less than €30,000 provided that person meets specific criteria relating to its past private equity investing experience).

An FCPR may only invest in certain types of securities in order to qualify as an FCPR and to maintain its existence as an FCPR (i.e. at least 50% of its assets must consist of securities providing “direct or indirect access” to the equity of unlisted companies subject to certain limited exceptions for shareholder’s loans and fund-of-funds investments).

As mentioned above in paragraph 1.2, the management company must be approved by the AMF, and the custodian must be a regulated entity.

2 Are foreign limited partnerships treated differently to the local structure described in the response to question 1? If so, what are the differences and does it depend on the jurisdiction of origin of the limited partnership?

The rules applicable to the marketing or sale in France of shares/interests in a foreign limited partnership private equity fund depend on the following criteria:

(a) whether the fund qualifies as an OPCVM;

(b) whether its shares/interests qualify as “financial instruments” (instruments financiers) as this term is defined under French law.

2.1 Qualification as an OPCVM

According to the AMF, a foreign fund will only qualify as an OPCVM if its structure is similar to that of a French OPCVM and it can consequently be assimilated to this category. Pursuant to French law, the marketing of shares/interests in a fund that qualifies as an OPCVM requires prior registration with the AMF.

On the basis that interests in a limited partnership are not freely transferable, (i.e. no limited partner may sell, assign, pledge, mortgage, or otherwise dispose of or transfer his interest without the general partner’s written consent, which the general partner may withhold in its absolute and sole discretion), a limited partnership is, according to the AMF, unlikely to qualify as an OPCVM and its marketing in France should not therefore be subject to prior registration with the AMF (however see the marketing constraints set out in paragraph 2.2 below).

2.2 Financial instruments requirement

Pursuant to French law, only entities that do not qualify as OPCVMs are allowed to initiate a public offering or a private placement in France. In addition, only entities whose securities qualify as financial instruments, as this term is defined under French law, are allowed to do so.
France

Based on the definition of financial instruments given by French law, the AMF takes the view that interests in limited partnerships that are not legal entities (e.g. English limited partnerships) cannot be considered as financial instruments. With respect to limited partnerships that are deemed to be legal entities, (e.g. Delaware limited partnerships), the AMF takes the view that these securities do not qualify as financial instruments since they are not freely transferable. According to the AMF, therefore, limited partnerships would not be allowed to initiate either a public offering or a private placement in France.

The safe harbour created by French law for a private placement to qualified investors or a restricted circle of investors would not be available since interests in limited partnerships do not qualify as financial instruments.

3 Are foreign corporate structures treated differently to the local structure described in the response to question 1? If so, what are the differences and does it depend on the jurisdiction of origin of the corporate structure?

3.1 Treatment of foreign corporate structures

The treatment of a foreign corporate structure will depend on whether it qualifies as an OPCVM.

3.1.2 Corporate structures that qualify as OPCVMs

The marketing of shares in a corporate structure that qualifies as an OPCVM requires prior registration with the AMF.

3.1.3 Corporate structures that do not qualify as OPCVMs

The marketing in France of a corporate structure that does not qualify as an OPCVM is not subject to any prior registration with the AMF. However, if the corporate structure’s securities were to qualify as financial instruments, their marketing in France would fall within the French public offering legislation. These structures would therefore be allowed to initiate either a public offering or a private placement in France.

Promotion and marketing issues

4 What restrictions (if any) are imposed by the laws of your jurisdiction on promoting and marketing the funds described above? Are there any restrictions on who can promote the funds in question or are there any registration or authorisations required for the person promoting?

4.1 FCPR

The promotion and the marketing of an FCPR is restricted by the provisions of French law relating to financial solicitation activities (démarchage).

Further to the growing obsolescence of French legislation on financial solicitation and the financial community’s pressing demands for reform, provisions of French law relating to financial solicitation activities have recently been significantly amended by law no. 2003-06 on Financial Security dated 1 August 2003 (the Financial Security Law). There is an imminent Decree that should provide more guidance as to the conditions of application of the new rules on financial solicitation.
The Financial Security Law mentioned above introduces a new definition of *démarchage*. Article L.341-1 of the French Monetary and Financial Code, as amended, defines *démarchage* as:

- “any unsolicited contact, by whatever means, with either an individual or a body corporate, in order to obtain from such person an agreement in connection with e.g. the conclusion of transactions relating to “financial instruments”, banking operation or any ancillary operations (as defined under French law) or the provision of an investment service or any ancillary services (as defined under French law)”; the definition of direct solicitation has been modified to include new electronic means of communication;
- “the visiting of an individual’s place of work or any other place not intended to be used for the marketing of products, instruments or financial services for the same purposes by any persons.”

The authority to promote and market a FCPR is granted only to financial investment advisors, credit institutions, investment and insurance companies of sufficient standing and any equivalent institution or company approved in another member state of European Union and authorised to act in French Territory.

4.2 Limited partnerships

Since a limited partnership is not allowed to initiate a public offering, its securities cannot be marketed by way of public advertising, démarchage, or placement through a credit institution or an investment service provider in France. Furthermore, the safe harbour created by French law for a private placement is not available (see paragraph 2.2 above).

4.3 Corporate structures

The promotion and marketing in France of securities issued by corporate structures are subject to French law relating to financial solicitation activities, in the same way as an FCPR, and are described in paragraph 4.1 above.

5 Are there any exemptions from the restrictions identified above? Please advise how to ensure that any marketing will fall within applicable exemptions and avoid formalities to the maximum extent possible.

5.1 FCPR and corporate structures

In the following cases, the solicitation rules are not applicable even though all the elements constituting a soliciting activity effectively exist.

*Exception regarding the quality of the solicited person*

Solicitation rules do not apply if the person being solicited is a “qualified investor”. Article L.411-2 of the French Monetary and Financial Code defines a “qualified investor” as a legal entity having the ability and resources required to understand the risks that are inherent in the financial markets. Individuals are excluded from this definition. Decree n° 98-880 of 1 October 1998 sets out a list of all entities that are deemed to be “qualified investors”. This list includes banks, insurance companies and most other regulated financial institutions. It also includes commercial companies whose total consolidated assets are greater than €150 million. Foreign investors pertaining to an equivalent category in their country of establishment may be considered as “qualified investors.”
Exception regarding the place where solicitation takes place

Solicitation rules are not applicable in some cases because of the place where solicitation occurs; in such instances it is considered that investors may not be subject to undue pressure. The solicitation rules are not applicable if:

- the contact takes place in the offices of:
  (i) credit institutions;
  (ii) the Trésor Public (Tax Administration) or the Financial Services of La Poste;
  (iii) investment or insurance companies;
  (iv) companies in general when employee savings and investment programs are discussed; and
  (v) investment financial advisers; or
- the contact takes place in the offices of a legal entity at its own request.

Exception regarding the service or product proposed

Solicitation rules are not applicable when legal entities are contacted by the promoter who is proposing ancillary services as described in article L.321-2 paragraph 4 of the French Monetary and Financial Code (i.e. administration of financial instruments, advice activities) or when credit institutions propose lending products.

Exception regarding existing relations between the professional and the solicited person

When there are pre-existing relations between a promoter and a client, it is also considered unnecessary to protect the client by applying soliciting rules. However, the exception only applies when the operation proposed by the promoter to the client is a usual operation for such client. The criteria used to determine whether or not the operation is usual are (i) the characteristics of the operation, (ii) its risk, and (iii) the amounts linked to the operation.

5.2 Limited partnerships

As indicated above (in paragraphs 2.2 and 4.2), the marketing of interests in limited partnerships is not authorised in France. Solicitation of French investors is therefore not allowed where such products are concerned.

The possibility of applying the exemptions mentioned above to non-authorised funds, such as limited partnerships, has not yet been clarified.

However, as démarchage is now clearly defined as an “unsolicited contact” (see paragraph 4.1 above), it may be assumed that the concept of “passive marketing” that was used before the modification of the solicitation rules is still applicable. Therefore the marketing of interests in limited partnerships may fall outside the definition of démarchage if it is restricted to potential investors who are not solicited or cold-called but who, on their own initiative, request information regarding interests in the limited partnership.

There is an imminent Decree that should provide more guidance as to the conditions of application of the new rules on financial solicitation.

6 If the fund or promoter has a branch office or associate in your jurisdiction that is appropriately regulated for promotion of vehicles such as the fund how would this affect the answers provided to questions 4 and 5 above?

The answers provided to questions 4 and 5 above would not be affected.
7 Will the use of the Internet or a website to promote a fund in your jurisdiction be possible and, if so, would it have any impact on the answers provided above? Please consider any special rules concerning the use of email and any conditions or constraints that apply to the use of the Internet or a website generally. Please also consider whether it would be possible to operate a website with secure access granted only to specified institutional investors and individuals.

7.1 General rules

The AMF has issued a Recommendation n° 99-02 called *Guidelines concerning the promotion or the selling of collective investment schemes or mandated portfolio management services through the internet.*

Recommendation n° 99-02 sets out guidelines on the information that should be provided on Internet websites e.g. the identity of the product (whether mutual fund, Sicav or other), the identity of the operators (management company, custodian and so on), any chargeable fees and the investment policy. The information available on the website must be “accurate, precise and sincere”.

Moreover, as indicated in the response to question 14 below, France has implemented some of the provisions of Directive 2002/65/EC (concerning the distance marketing of consumer financial services in the Financial Security Law) as mentioned above. The provisions that have been implemented relate to the withdrawal period offered to solicited investors allowing them to reconsider their decision within 15 days.

7.2 Specific rules applicable to non-authorised foreign funds

Article 2 of Recommendation n° 99-02 provides that: “in any event, information freely available to French residents must not deal with collective investment products that are legally restricted from being offered or sold in France”.

As French investors may not be solicited as far as non-authorised funds (e.g. limited partnerships) are concerned (see paragraph 5.2 above), the use of the Internet to promote such funds should be used with particular care in order to avoid falling within the solicitation rules (see response to question 4 above).

Therefore a secure access is recommended, as well as wording indicating that the fund is not registered with the AMF and is therefore only open to specific investors (see the response to question 9 below). Mass e-mailing, spam or push media (i.e. messages to connected web users who do not intend to contact the website) should be avoided, as the French Financial Security Law expressly provides that spamming constitutes a means of solicitation.

8 Will marketing in accordance with the answers above lead to the establishment of a place of business in your jurisdiction? If so, what would the consequences be for the fund or promoter?

Marketing in accordance with the conditions described above does not lead to the establishment of a place of business in France.
Offer documentation

9 In order to demonstrate knowledge and compliance with the restrictions outlined above would you recommend the use of any particular wording in any offer documentation? Please provide an example of any such wording and indicate whether its use is mandatory or advisory.

9.1 General wording

It is strongly recommended that specific wording, such as the following, be used:

“This offering memorandum does not constitute an offer or a solicitation by any person in any jurisdiction in which such offer or solicitation is unlawful, or in which the person making such offer or solicitation is not qualified to do so or to anyone to whom it is unlawful to make such offer or solicitation.

NOTICE TO RESIDENTS OF FRANCE: This offering memorandum has not been submitted to the Autorité des marchés financiers (AMF) for approval. Accordingly, neither this offering memorandum nor any other offering material relating to the interests in the Fund may be made available to the public or used in connection with any offer for subscription or sale of the interests in France, and the interests may not be issued, offered or otherwise sold in France.

NOTICE AUX RESIDENTS FRANÇAIS: Cette note d’information n’a pas été soumise au visa de l’Autorité des marchés financiers (AMF). Par conséquent, ni cette note d’information, ni tout autre document promotionnel se rapportant aux titres émis par le Fonds ne pourront être communiqués au public ou utilisés dans le cadre de toute offre de souscription ou de vente des titres en France et les titres ne peuvent être émis, offerts ou cédés en France.

The use of such wording is mandatory if a website is used, as article 1 of AMF Recommendation n° 99-02 provides that: “A company that decides to open a website on the Internet promoting or selling collective investment products or mandated portfolio management is obliged to ensure that its offer complies with the rules of the territories concerned. In order to avoid inadvertently misleading the residents of any country from which it is possible to consult the website, the company is requested to indicate precisely the geographical scope of its offer through a disclaimer notice.”

9.2 FCPR wording

Moreover, AMF Regulation n° 98-05 provides for specific mandatory wording regarding an FCPR which has been created under the simplified procedure (see the response to question 1 above). Such disclaimer must mention that:

(i) the fund is not registered with the AMF; and

(ii) the subscription or the acquisition, the selling or the transfer of units or shares of the OPCVM, directly or through a person, is only allowed to qualified investors as defined in Article L.411-2 of the French Monetary and Financial Code and the Decree n° 98-880 of 1 October 1998, or to other investors investing an initial amount of at least €500,000 or €30,000 subject to specific conditions, and to any officer, or employee of the management company, or any individual who acts on behalf of the management company.
10.1 Language requirements

As far as it is assumed that the fund is not authorised by the AMF and is not actively marketed to French investors, there is no obligation to translate the offer documentation into French.

If a fund is authorised by the AMF and is marketed in France to French investors, all offer documentation should be translated into French, and information provided on the website should also be available in the French language. AMF Recommendation n° 99-02 (mentioned above) provides in Article 3 that: “any information directed at French residents on the website must be in French”.

In the case of a public offering of “financial instruments” (i.e. shares issued by a foreign issuer), the offer to French investors is submitted to approval by the AMF by way of a French version of the prospectus (or offering circular), except in specific cases where a résumé written in French is considered satisfactory (i.e. the shares issued by a foreign issuer are already listed on a European market and the prospectus has been approved by the local financial authority within the last three months).

10.2 Local considerations

As mentioned above in paragraph 10.1, any information directed at French residents must be in the French language. Offering documents typically contain a discussion of French taxes applicable to an investment in the Fund.

Penalties for non-compliance with marketing restrictions

11 In the event of a breach of any of the restrictions outlined above what are the possible consequences by way of criminal or regulatory sanctions and civil claims by investors against the fund or promoter?

11.1 Criminal sanctions

The breach of solicitation rules may give rise to the following criminal sanctions, depending on the breach:

- up to six months in jail and/or a penalty of €7,500 (e.g. for the lack of proper identification papers in the form of a “solicitation card” (carte de démarchage) or if no withdrawal period was offered to the investor);
- up to five years in jail and/or a penalty of €375,000 (e.g. if solicitation activities have been carried out by a non-authorised person, or there has been solicitation of prohibited products).

The marketing of funds without a licence may also give rise to criminal sanctions of up to two years in jail and a penalty of €750,000.

11.2 Regulatory sanctions

As a general rule, the AMF may impose regulatory sanctions that can go as far as the imposition of a prohibition on undertaking its activities in France.
11.3 Civil claims

An investor may request damages if he considers that his investment in a non-authorised fund has prejudiced him.

Additional factors

12 Are there any additional legal, licensing or other requirements or restrictions in your jurisdiction which may impact on any marketing undertaken in accordance with the answers above?

There are no other requirements or restrictions concerning marketing.

13 Are there any other matters you ought to bring to our attention (i.e. exchange controls, money laundering, public offer regulations)?

There are no other matters that must be highlighted.

14 Are the laws and regulations outlined above expected to be amended to any material extent in the foreseeable future? If so please describe a timescale and the possible impact of the proposed changes.

14.1 Financial Security Law

Several Decrees should be passed in the next few months in order to clarify the application of the Financial Security Law, which substantially modifies the rules relating to financial solicitation. These Decrees will provide more details on various matters (e.g. on the use of a solicitation card (see response to question 11 above), and on the registration of persons allowed to solicit French investors in a database.

France has implemented some of the provisions of Directive 2002/65/EC (concerning the distance marketing of consumer financial services) in the Financial Security Law mentioned above. The provisions that have been implemented relate to the withdrawal period offered to solicited investors allowing them to reconsider their decision (see the response to question 7).

Some of the provisions of the Investment Services Directive have also been implemented by the Financial Security Law. However, the provisions relating to the European Passport of management companies have not yet been implemented.

14.2 The Electric Commerce Directive

The Electronic Commerce Directive is being implemented in France but the bill implementing such Directive has not yet been voted upon. The vote should occur in the next weeks (Projet de loi pour la confiance dans l’économie numérique).
Typical fund vehicles

1 What is the local structure commonly used for private equity funds? How does the law of your jurisdiction classify a private equity fund structured in that way? Please consider and describe any requirement to register the fund with local regulatory authorities.

1.1 Local structure

A German private equity fund is typically structured as a German limited partnership (Kommanditgesellschaft).

1.2 Classification

Subject to general corporate and commercial law, there is no specific regulatory framework governing the activity of such vehicles. In particular, they are not subject to the rules of the German Investment Act (Investmentgesetz).

1.3 Regulatory registration requirements

A German limited partnership (Kommanditgesellschaft) needs to be registered with the commercial register (Handelsregister) of the relevant local court (Amtsgericht) in order to comply with the requirements of the German Commercial Code (Handelsgesetzbuch). The registration of the limited partnership (Kommanditgesellschaft) with the commercial register is not a condition precedent to commencing business. It should be noted, however, that the limitation of the limited partners’ liability towards third party creditors is subject to such registration.

1.4 Other structures

A private equity fund could also be structured as a German limited liability company (Gesellschaft mit beschränkter Haftung/GmbH), as a German stock corporation (Aktiengesellschaft/AG) or as a German partnership limited by shares (Kommanditgesellschaft auf Aktien/KGaA). Apart from general corporate and commercial law rules, these corporate structures are principally also not governed by a specific regulatory framework when they engage in private equity business. In particular, they are also not subject to the rules of the German Investment Act (Investmentgesetz). Primarily for certain marketing and tax reasons, however, the use of these corporate structures is not common market practice.

2 Are foreign limited partnerships treated differently to the local structure described in the response to question 1? If so, what are the differences and does it depend on the jurisdiction of origin of the limited partnership?

2.1 Treatment of foreign limited partnerships

Unlike German limited partnerships (Kommanditgesellschaften), foreign partnerships may be subject to the provisions of the Investment Act (Investmentgesetz). This has certain implications both on their regulatory treatment (when offering investments in the fund to the German public) and on the tax treatment of German investors.
2.2 Foreign investment fund implications

Although it was the intention of the German legislator to exclude all kinds of private equity funds from the applicability of the German investment law, non-German private equity funds can nevertheless (irrespective of their legal structure) be subject to the marketing restrictions of the Investment Act (Investmentgesetz) and the specific tax rules of the Investment Tax Act (Investmentsteuergesetz) if the relevant fund is viewed as a foreign investment fund (ausländisches Investmentvermögen). Regardless of the intention of the German legislator, the current wording of the Investment Act (Investmentgesetz) and the Investment Tax Act (Investmentsteuergesetz) leaves some room to apply these acts to certain foreign private equity funds. There are, however, good arguments that foreign private equity funds which predominantly invest their assets in non-listed shares (in the target companies) are not covered by the German investment law. Apart from these arguments, the current German regulatory practice also provides an exception for funds which “actively manage” their holdings, i.e. funds which have the intention of limiting the entrepreneurial independence of their targets. Unlike “passive” investment funds, these “actively managed” funds do not simply invest in certain targets, but they also exercise a significant influence over the management and development of their targets. Evidence of such intention are, inter alia, the acquisition of a substantial stake in the target (especially a majority stake), the provision of management and supervisory board members for their targets or by otherwise actively performing advisory services for the target’s management.

2.3 Marketing of foreign investment funds

Should a non-German private equity fund, for German regulatory purposes, be viewed as a foreign investment fund (ausländisches Investmentvermögen), its shares or units may be marketed in Germany on a private placement basis only, since a licence for public distribution will be difficult to obtain. Furthermore, German investors holding shares or interest in such a non-German private equity fund could be subject to a penalty taxation on their fund holdings which amounts to the higher of:

(a) the actual distributions received from such fund plus 70% of the increase of its redemption price during a calendar year; and

(b) 6% of the redemption price as of the last day of such calendar year.

Since there is typically no such redemption price available for private equity funds, it is most likely the fair market value of the shares or interests in such fund that would have to be used as the relevant taxation basis. In a worst case scenario, the above penalty taxation can lead to a tax burden even if the investor does not receive any actual distributions and even such fair market value drops throughout the calendar year. It should be noted that such penalty taxation can be mitigated if the relevant fund provides for a calculation and publication of its taxable income in accordance with the provisions of the Investment Tax Act (Investmentsteuergesetz).
3 Are foreign corporate structures treated differently to the local structure described in
the response to question 1? If so, what are the differences and does it depend on the
jurisdiction of origin of the corporate structure?

3.1 Treatment of foreign corporate structures

As with foreign limited partnerships (see paragraph 2.2), the classification of a non-
German corporate private equity fund as a foreign investment fund (ausländisches Investmentvermögen) within the meaning of the German investment law is not dependent on the legal structure of the relevant fund. As a consequence, non-German vehicles with a corporate structure are (for German regulatory and tax purposes) basically treated in the same way as non-German limited partnerships.

3.2 Marketing restrictions

It should be noted that a public offering of shares in a non-German private equity fund with a corporate structure will, even if the relevant fund is not classified as a foreign investment fund (ausländisches Investmentvermögen) within the meaning of the German investment law, be subject to the provisions of the Sales Prospectus Act (Wertpapier-Verkaufsprospektgesetz) if the fund issues participations which are viewed as transferable securities (Wertpapiere).

Promotion and marketing issues

4 What restrictions (if any) are imposed by the laws of your jurisdiction on promoting and
marketing the funds described above? Are there any restrictions on who can promote
the funds in question or are there any registration or authorisations required for the
person promoting?

4.1 German limited partnerships

Limited partners' interests (Kommanditanteile) in a German limited partnership (Kommanditgesellschaft) are not viewed as "transferable securities" (Wertpapiere) within the meaning of the Sales Prospectus Act (Wertpapier-Verkaufsprospektgesetz) and can therefore be publicly offered in Germany without the need to file a sales prospectus with the Financial Services Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht). Please note that the German government intends to improve investor protection and in this context plans to amend the Sales Prospectus Act (Wertpapier-Verkaufsprospektgesetz) in such way that, in the future, the public offering of limited partner's interests (Kommanditanteile) in a German private equity fund will also require the filing of a sales prospectus with the Financial Services Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht).

From the promoter's perspective, the promotion and marketing of limited partners' interests (Kommanditanteile) are not subject to licensing or registration requirements under the Banking Act (Kreditwesengesetz) since these interests are not viewed as financial instruments (Finanzinstrumente) within the meaning of the term as defined in the Banking Act (Kreditwesengesetz). As a consequence, the promotion or marketing activity does not qualify the promoter as a financial services institution (Finanzdienstleistungsinstitut) and therefore does not require a licence from the Financial Services Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht).
4.2 Non-German private equity funds

As set out above (see paragraph 2.3), the public distribution of non-German private equity funds requires the registration of these funds pursuant to the Investment Act (Investmentgesetz) if the relevant fund is viewed as a foreign investment fund (ausländisches Investmentvermögen). The public offering of shares in other non-German private equity funds which are (only) subject to the provisions of the Sales Prospectus Act (Wertpapier-Verkaufsprospektgesetz) requires that a sales prospectus with detailed information about the issuer and the offered shares is filed with the Financial Services Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht).

Please note that as a consequence of the envisaged amendment of the Sales Prospectus Act (Wertpapier-Verkaufsprospektgesetz) (see paragraph 4.1), the Sales Prospectus Act (Wertpapier-Verkaufsprospektgesetz) would also be applicable to participations in non-German private equity funds which are not qualified as transferable securities (Wertpapiere).

4.3 Marketing restrictions

Please note that the marketing of a non-German private equity fund will be deemed to be a performance of financial services (Finanzdienstleistungen) if the services offered include not only investment advice (Anlageberatung), but also investment broking services (Anlagevermittlung) and if further the non-German private equity fund is viewed as a foreign investment fund (auslandisches Investmentvermögen) within the meaning of the German investment law or if the shares in such fund are viewed as transferable securities. If this is the case, the marketing person requires a licence pursuant to the Banking Act (Kreditwesengesetz) if its business is carried out commercially or at least in a way which would normally require a commercially organised business undertaking.

5 Are there any exemptions from the restrictions identified above? Please advise how to ensure that any marketing will fall within applicable exemptions and avoid formalities to the maximum extent possible.

5.1 German limited partnerships

As mentioned in paragraph 4.1 above, there are currently no restrictions on the public marketing of interests in a German limited partnership, so no exemptions are required. This is also currently the case for non-German funds which are not viewed as foreign investment funds (ausländische Investmentvermögen) if the participations in these funds are not to be classified as transferable securities (Wertpapiere). A public offering of transferable securities (Wertpapiere) in a non-German private equity fund is exempt from the requirement to file a sales prospectus under the Sales Prospectus Act (Wertpapier-Verkaufsprospektgesetz) if:

(a) the securities are only offered to persons who, on a professional basis for their own account or for the account of others, deal in securities; or

(b) the minimum investment is €40,000 per investor; or

(c) the purchase price for all offered securities does not exceed €40,000.

5.2 Non-German investment funds

In the event that a non-German private equity fund qualifies as a foreign investment fund (ausländisches Investmentvermögen), a registration under the Investment Act (Investmentgesetz) can be avoided if the fund is not marketed by way of public distribution, but rather on a private placement basis.
Germany

In this context, a distribution is deemed public in the case of:

- a public offering, i.e. the offering of shares or units in a foreign investment fund by personal contact, mailing or through advertising in the media irrespective of the actual success of such offering;
- public advertising, i.e. any kind of measure which is aimed at influencing others in the context of a sales promotion; or
- a distribution in a similar manner, i.e. measures which, from an economic perspective, are comparable to a public offering or public advertising in the aforementioned sense.

Since the Financial Services Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht) applies a wide interpretation as to the scope of the term "public distribution", a marketing activity is only deemed to be non-public if it is addressed to a predefined group of persons with whom the offeror already had been in contact prior to the offering of these instruments and of whom the offeror selects certain persons as recipients for the marketing activity.

5.3 Licence exemption

With regard to promoters, it should be noted that by way of exception the performance of investment broking services (Anlagevermittlung) does not require a licence from the Financial Services Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht) if it is solely made for the account of and under the explicit assumption of liability by a bank which is domiciled in Germany or which can operate under a European Passport.

6 If the fund or promoter has a branch office or associate in your jurisdiction that is appropriately regulated for promotion of vehicles such as the fund how would this affect the answers provided to questions 4 and 5 above?

An appropriately regulated person or entity would be able to promote even non-German private equity funds in Germany which qualify as foreign investment funds (ausländisches Investmentvermögen) within the meaning of the German Investment Law, and in this context could also perform investment broking services (Anlagevermittlung).

7 Will the use of the Internet or a website to promote a fund in your jurisdiction be possible and, if so, would it have any impact on the answers provided above? Please consider any special rules concerning the use of email and any conditions or constraints that apply to the use of the Internet or a website generally. Please also consider whether it would be possible to operate a website with secure access granted only to specified institutional investors and individuals.

7.1 German limited partnerships

As mentioned in paragraph 4.1 above, there are currently no restrictions on the public marketing of interests in a German limited partnership. This also applies to any marketing activity by the use of the Internet.
7.2 Non-German private equity funds

As mentioned in paragraph 5.1 above, there are currently no restrictions on the public marketing of participations in non-German funds which are not viewed as foreign investment funds \((\text{ausländische Investmentvermögen})\) if these participations are not deemed to be transferable securities \((\text{Wertpapiere})\). This also applies to any marketing activity by the use of the Internet.

For promoting non-German private equity funds which are deemed to be foreign investment funds \((\text{ausländische Investmentvermögen})\) within the meaning of the Investment Act \((\text{Investmentgesetz in Germany})\), there are no clear and definitive guidelines as regards the use of the Internet as a “marketing tool”. According to current regulatory practice, the question whether any Internet marketing activity is subject to German regulatory supervision is determined by the actual circumstances of such activity. In this context, relevant indications include:

- use of the German language for the promotion (unless the content is clearly aimed at investors in other German speaking countries);
- use of German law as the governing law for the contractual relationship;
- use of German contact details (i.e. contact person, email address, telephone number or address);
- the distribution of unsolicited emails to recipients in Germany;
- the possibility of downloading information and sales material which is in the German language.

The operation of a website with secure access granted only to a limited number of persons with which the operator already maintains a business relationship will in principle not be viewed as a public marketing activity which might trigger any licensing or registration requirements.

7.3 Non-specific marketing

Regulatory issues in the context of an Internet promotion can be avoided if products are only promoted on an abstract basis without giving details on specific products and without providing information which would be necessary to subscribe to the products.

8 Will marketing in accordance with the answers above lead to the establishment of a place of business in your jurisdiction? If so, what would the consequences be for the fund or promoter?

The marketing of a non-German private equity fund (whether or not a foreign investment fund \((\text{ausländisches Investmentvermögen})\)) in Germany by a non-German promoter as such should not lead to the assumption that the fund has thereby established a place of business \((\text{Betriebsstätte})\), and therefore a taxable presence, in Germany. This is because such activity cannot be interpreted as assisting the fund’s actual business activity, i.e. the investment of its assets in private equity holdings. The promoter should not be entitled to act as a proxy for the fund in the context of the fund raising.
Offer documentation

9 In order to demonstrate knowledge and compliance with the restrictions outlined above would you recommend the use of any particular wording in any offer documentation? Please provide an example of any such wording and indicate whether its use is mandatory or advisory.

9.1 When is wording mandatory?

As explained above (see paragraphs 4.1 and 4.2), as long as the offering is not made public or as long as a public offering does not involve transferable securities (Wertpapiere), no prospectus or other offering documentation is required by mandatory law. In this context, please note that a public offering cannot be avoided simply by using wording to the effect that the promotion in question is not meant to be a public offering. Instead, the question of whether a promotion is a public offer or not has to be determined by the actual facts and circumstances of such promotion.

9.2 General risk disclosure rules

Irrespective of whether mandatory law requires a sales prospectus or not, general risk disclosure rules applying to the solicitation of investment opportunities need to be complied with. Such rules apply both to the promoter of the fund and to the fund itself. As a consequence, it is always advisable to have a prospectus available for potential investors in order to address liability issues and to demonstrate that adequate information has been provided to the investors about potential investment and tax risks.

10 Is there any requirement that the offer documentation or any part of it should (a) be in your local language or (b) deal with any other local considerations (e.g. tax)?

10.1 Language requirements

Even in the case of a promotional activity requiring a sales prospectus in accordance with the Sales Prospectus Act (Wertpapier-Verkaufsprospektgesetz), such prospectus can also be written in English since English is deemed to be a language that is commonly used and accepted in the context of cross-border securities trading in Germany. Please note, however, that in cases where an English language prospectus is the only marketing material, additional liability risks may be triggered since a German investor could argue that he has not been properly informed about the potential investment risks (if he is not able to correctly understand the content of such prospectus).

10.2 Local considerations

Even in the absence of mandatory legal requirements it is always advisable to include a specific section into the offer documentation used in Germany which includes at least certain information about German placement and information agents and which gives an overview about the German tax treatment of an investment.
Penalties for non-compliance with marketing restrictions

11 In the event of a breach of any of the restrictions outlined above what are the possible consequences by way of criminal or regulatory sanctions and civil claims by investors against the fund or promoter?

11.1 Regulatory sanctions

The public marketing of non-German private equity funds which are classified as foreign investment funds (auslandische Investmentvermögen) without prior registration of these funds with the Financial Services Supervisory Authority (Bundesanstalt für Finanzdienstleistungs-aufsicht) is a regulatory offence and can result in an administrative fine of up to €100,000. The public marketing of non-German private equity funds in violation of the provisions of the Sales Prospectus Act (Wertpapier-Verkaufsprospektgesetz) is also a regulatory offence and can result in an administrative fine of up to €500,000.

There are no criminal sanctions.

11.2 Licence violations

The performance of investment broking services (Anlagevermittlung) in the context of the promotion of private equity funds in Germany, without the offeror having the necessary licence as a financial services institution, is a criminal offence and can result in a prison sentence of up to three years or a fine.

11.3 Civil claims

It should be noted that, in principle, contracts entered into in violation of regulatory requirements are not deemed to be void. Civil law claims by investors would tend to be based on insufficient information about potential investment risks.

Additional factors

12 Are there any additional legal, licensing or other requirements or restrictions in your jurisdiction which may impact on any marketing undertaken in accordance with the answers above?

The promotion of private equity funds in Germany is, of course, always subject to the general laws governing the sale of financial products (including general third party liability and unfair competition rules).

13 Are there any other matters you ought to bring to our attention (i.e. exchange controls, money laundering, public offer regulations)?

The promotion of private equity funds can be subject to the general money laundering rules under the Money Laundering Act (Geldwäschegesetz).
14 Are the laws and regulations outlined above expected to be amended to any material extent in the foreseeable future? If so please describe a timescale and the possible impact of the proposed changes.

The investment regime described above is based on a “Bill to modernise the German Investment Regime” (Investmentmodernisierungsgesetz), which was passed on 28 November 2003 by the German Parliament and by which the current regulatory regime of the Investment Act (Investmentgesetz) and the current tax regime of the Investment Tax Act (Investmentsteuergesetz) have been enacted as of 1 January 2004. Nevertheless, it could well be that there are some amendments to the investment regime in the foreseeable future to clarify certain issues that have come up in the application of the new laws. This could also include a further clarification that private equity funds will in any event be excluded from the scope of applicability of the Investment Act (Investmentgesetz) and the Investment Tax Act (Investmentsteuergesetz).

As mentioned in paragraph 4.1, it is also very likely that the scope of the Sales Prospectus Act (Wertpapier-Verkaufsprospektgesetz) will be extended in the near future to cover the public offering of such forms of participation in private equity funds which are not deemed to be transferable securities (Wertpapiere). In this context, the German government has published a draft “Act for the Enhancement of Investor Protection” (Anlegerschutzverbesserungsgesetz) on 10 March 2004, which could be passed by the German parliament by the end of the third quarter of 2004.
Typical fund vehicles

1 What is the local structure commonly used for private equity funds? How does the law of your jurisdiction classify a private equity fund structured in that way? Please consider and describe any requirement to register the fund with local regulatory authorities.

1.1 Local structures

The local structures most commonly used for domestic private equity funds are:

(i) a Dutch limited partnership (commanditaire vennootschap);

(ii) a Dutch company with limited liability (besloten vennootschap met beperkte aansprakelijkheid); and

(iii) a Dutch public company with limited liability (naamloze vennootschap).

The regime with respect to Dutch limited liability companies does not differ much from the regime with respect to Dutch limited partnerships as far as registration/licence requirements are concerned because both structures fall within the scope of the Act on the Supervision of Investment Institutions (Wet toezicht beleggingsinstellingen) (the ASII).

The conditions for obtaining a licence under the ASII differ for an investment fund and an investment company. A detailed discussion of these different conditions falls outside the scope of this paper.

1.2 Classification

A private equity fund structured as a Dutch limited partnership, not being a legal entity, will in principle qualify as an investment fund (beleggingsfonds) under the ASII.

A private equity fund structured as a Dutch limited liability company (i.e. a legal entity) will in principle qualify as an investment company (beleggingsmaatschappij).

1.3 Regulatory registration requirements

Licence requirements

Under Section 4 of the ASII the following acts are prohibited unless a licence is obtained:

(i) dealing in or from The Netherlands outside a restricted circle,

(ii) soliciting or obtaining funds or other goods for participation in an investment institution (i.e. an investment fund or an investment company), and

(iii) offering shares or rights of participation in such institution.

Investment institutions

The ASII defines an “investment institution” as either a legal entity or an investment fund, not being a legal entity, in respect of which funds or other assets are solicited or obtained for the purpose of collective investment for the benefit of the participants, with a view to sharing the proceeds of such investments among its participants. The ASII applies equally to open-ended or closed-end investment institutions.

As the wording “in or from The Netherlands” indicates, the prohibition contained in Section 4 of the ASII applies to all investment institutions residing outside The Netherlands, which solicit for and obtain funds from Dutch residents, as well as all investment institutions residing in The Netherlands, regardless of where they obtain or solicit their funds.
If someone deals in or from The Netherlands, solicits or obtains funds or other goods for participation in an investment institution or offers shares or rights of participation in such institution within a restricted circle the licence requirement does not apply. The term “restricted circle” is not defined in the ASII, although some considerations of importance, which clarify the meaning of the term, are contained in the explanatory memorandum to the ASII, in statements from the Dutch Central Bank and in statements from the Netherlands Authority for the Financial Markets (AFM) (see further the response to question 5). In any event, an offer to a single person will qualify as an offer within a restricted circle, unless subsequent offers to single persons are made.

An ASII licence can be obtained from the AFM. In order to obtain a licence, certain requirements must be met regarding, among others, capital adequacy, conduct of business, management, publication of a prospectus, expertise and trustworthiness. An investment fund must have an administrator (beheerder) and a custodian (bewaarder). Certain exemptions to the license requirement may be applicable (see the response to question 5). On the basis of Section 18 ASII the AFM holds a register of all licensed investment institutions.

Venture Capital Companies

It should be noted that, provided that certain criteria are met, private equity funds will qualify as “venture capital companies” (participatiemaatschappijen) and not as investment institutions as defined in the ASII. Consequently, these funds are not subject to the licence requirement. The following four cumulative criteria must be met in order for a fund to qualify as a venture capital company:

(i) the venture capital company must invest in shares of companies, which are impossible or difficult to market with the public;

(ii) the participation must only be terminable after consultation with the investee companies;

(iii) the venture capital company must exercise influence on the management of the investee companies and be actively involved with the investee companies; and

(iv) the venture capital company must enter into investment agreements with the investee companies, which contain the requirements listed under (ii) and (iii).

Although not subject to the ASII provisions, venture capital companies (and others) may, under certain circumstances, fall within the scope of the Act on Supervision of Securities Trade 1995 (ASST 1995). Investment institutions that are registered under Section 18 of the ASII are not subject to the ASST 1995 provisions. If this is the case, certain exemptions (such as a professionals exemption) may be available (see the response to question 5).

2 Are foreign limited partnerships treated differently to the local structure described in the response to question 1? If so, what are the differences and does it depend on the jurisdiction of origin of the limited partnership?

2.1 Difference in treatment

Some foreign limited partnerships (and other foreign structures) are treated differently to the local structures (see further paragraph 2.1.2 below).
2.1.1 UCITS exception

An exception from the licence requirement exists for foreign investment institutions that are UCITS and that have obtained a European passport - these will normally be corporate structures, rather than limited partnerships. These institutions only have a notification duty and the obligation to submit certain documents.

2.1.2 Non-UCITS treatment

Other foreign investment institutions are subject to a policy rule concerning foreign investment institutions. These institutions can be split into investment institutions that are adequately regulated elsewhere and investment institutions that are not adequately regulated elsewhere.

Adequately regulated institutions

Foreign investment institutions that are adequately regulated must apply for an ASII licence but are exempted from many requirements because the AFM relies on supervision in the country of origin of the institution.

Inadequately regulated institutions

Investment institutions that are not adequately regulated in their country of origin can only obtain a licence if very burdensome supplemental requirements are met that make it possible for AFM to supervise these institutions. These requirements include the following:

(i) the institution must be connected with a regulated financial institution in The Netherlands;

(ii) two members of the board of management must live in The Netherlands; and

(iii) at the request of the AFM, the external auditor of the institution must be available in the Netherlands.

In the view of the AFM, investment institutions such as limited partnerships and corporate vehicles from the United States, Jersey, Guernsey and Luxembourg are adequately regulated. Investment institutions from England, Bermuda, the Caymans and the Virgin Islands are not adequately regulated.

3 Are foreign corporate structures treated differently to the local structure described in the response to question 1? If so, what are the differences and does it depend on the jurisdiction of origin of the corporate structure?

As mentioned in the response to question 1, a corporate structure (i.e. a legal entity) will in principle qualify as an investment company under the ASII while a non-corporate structure will in principle qualify as an investment fund. For differences in treatment, see the response to question 2 above.
Promotion and marketing issues

4.1 General restrictions

According to Section 4 of the ASII, the promotion or offering of interests in an investment institution in or from The Netherlands without a licence is prohibited. Investment institutions established outside the Netherlands become subject to such licensing requirements if their services are being offered or promoted/marketed in the Dutch market (i.e. to the Dutch public). In this respect, see the response to question 1 in which the prohibition is discussed in more detail.

4.2 Foreign investment institutions

If a foreign investment institution has obtained an ASII licence (for the requirements see the responses to questions 1 and 2) or if an exemption is available (see question 5) it would be possible to promote the fund to both institutional investors as well as (high net worth) individuals as well as to make visits to The Netherlands. Without a licence (or an exemption), the possibilities for promoting a fund are limited (see further the response to question 7). Institutional investors will often fall under the professionals’ exemption (see the response to question 5). High net worth individuals, in principle, do not fall under any exemption.

5 Are there any exemptions from the restrictions identified above? Please advise how to ensure that any marketing will fall within applicable exemptions and avoid formalities to the maximum extent possible.

5.1 Restricted circle

As already indicated in the response to question 1, the prohibition of Section 4 ASII does not apply if someone deals in or from The Netherlands, solicits or obtains funds or other goods for participation in an investment institution or offers shares or rights of participation in such investment institution within a restricted circle.

Considerations that are of importance in determining whether an offer is made within a restricted circle are that:

(i) the group of persons to whom the offer is made is of limited size and is accurately defined;

(ii) these persons have a “certain relationship” with the offeror, implying that, apart from the financial relationship, other relationships exist between the parties involved, for example, employees of the offeror; and

(iii) it must be clearly stated in the offer that acceptance is the exclusive privilege of the group of persons in the “restricted circle” to which the first and second considerations are applicable.

Because it is sometimes rather difficult to assess whether or not an offer is made in or outside a restricted circle, it is advisable to obtain legal advice to ascertain whether Section 4 does or does not apply to a particular situation.
5.2 Other exemptions

In addition, the following exemptions from the prohibition of Section 4 ASII exist:

*Professionals only*

One longstanding exemption is available when the offer of securities is made to professional investors only. The following are examples of institutions generally held to be professional investors: banks, pension funds, insurance companies, central governments, large international and supranational institutions and other comparable entities, including treasuries and finance companies of large enterprises, which in the process of conducting a business or profession trade or invest in investment objects.

*Small investment institutions*

Small investment institutions that meet the following criteria are not subject to the prohibition of Section 4 ASII:

(i) participation is limited to a maximum of 25 natural persons;
(ii) investment is limited to a maximum of €9,075.60 per investor;
(iii) the money or other goods are not solicited or obtained, or the securities are not offered, by natural persons who are legal entities which, in the course of their occupation or business, deal or invest in investment objects; and
(iv) the small institution does not enter into obligations on behalf of investors.

*Limited investments*

This exemption applies if the following conditions are satisfied:

(i) the funds or other goods are offered or obtained by an investment institution of which less than 50% of its balance sheet total consists of investments; and
(ii) less than 50% of the total revenue of such investment institution is obtained from its investments.

*Venture capital companies*

As indicated in the response to question 1, venture capital companies that meet certain criteria are not considered to be investment institutions as defined in the ASII. However, these companies might, in certain circumstances, fall within the scope of the ASST 1995. If this is indeed the case, several exemptions might be available.

6 If the fund or promoter has a branch office or associate in your jurisdiction that is appropriately regulated for promotion of vehicles such as the fund how would this affect the answers provided to questions 4 and 5 above?

If the fund is represented in The Netherlands by a branch that is properly registered pursuant to Section 18 ASII, there would in principle be no restrictions on promoting the fund. Details of the regulations to which the branch will be subject in order to be able to obtain a licence, such as capital adequacy, publication of a prospectus etc., are set out in the response to question 1.
Will the use of the Internet or a website to promote a fund in your jurisdiction be possible and, if so, would it have any impact on the answers provided above? Please consider any special rules concerning the use of email and any conditions or constraints that apply to the use of the Internet or a website generally. Please also consider whether it would be possible to operate a website with secure access granted only to specified institutional investors and individuals.

7.1 Unregistered investment institutions

On 23 June 1999, the Dutch Central Bank (which was the ASII supervisor until all ASII supervision was transferred to the AFM) published a policy rule in respect of media (i.e. Internet, e-mail, bulletin boards, telephone, television, fax, papers, direct mail, brochures etc.). The policy rule deals with the question of the circumstances under which an investment institution that is not registered pursuant to Section 18 of the ASII violates Section 4 ASII because of the use of certain media.

According to the policy rule, whether or not a fund is active in the Netherlands (via the Internet or another medium) would, amongst other things, depend on circumstances such as:

(i) the provision of information regarding Dutch (tax) issues or regulations;
(ii) the absence of a list of countries to which the services are limited;
(iii) the sending of e-mails to Dutch citizens;
(iv) the existence of hyperlinks pursuant to which visitors of the website will reach websites on which they can apply for participation rights in an investment institution.

The AFM is in principle prepared to give its opinion on whether or not Section 4 of the ASII would be deemed to be violated in a specific case.

An investment institution which is not registered pursuant to section 18 of the ASII will in any event be deemed to violate Section 4 of the ASII if it directly sends any advertisements or prospectuses to one or more citizens of The Netherlands. No violation will take place in case of:

(i) a document which is not addressed to a specific person or persons and which shows only the name or the logo of the investment institution;
(ii) information on the investment which is sent incidental to the specific request of a (potential) investor; or
(iii) publication of a prospectus of a foreign investment institution without details of how to apply.

7.2 Registered investment institutions

Investment institutions that are registered pursuant to Section 18 of the ASII are only subject to the policy rule concerning advertisements of investment institutions. Advertisements, as defined in the policy rule, include messages:

(i) in a paper or magazine;
(ii) on television, radio or film;
(iii) on the Internet or through e-mail; and
(iv) other visual forms of media.
In any event the following rules must be complied with:

(i) it must be clear that the advertisement comes from an investment institution;
(ii) the name of the investment institution must be mentioned in the advertisement;
(iii) the advertisement must mention that the investment institution has an ASII licence;
(iv) all statements in the advertisement must be true and not misleading;
(v) the advertisement must contain wording to the effect that the value of the investment can fluctuate and that results in the past are no guarantee for the future; and
(vi) the advertisement must set out clearly where the public can obtain copies of the prospectus.

In addition, there are some rules with respect to the publication of the expected or realised (return on) investment ratios. The most important rules are that the reference period must be stated and that ratios that are calculated over more than one year may only be published as an average of all years.

8 Will marketing in accordance with the answers above lead to the establishment of a place of business in your jurisdiction? If so, what would the consequences be for the fund or promoter?

It should not lead to the establishment of a place of business, although specific advice needs to be taken on each situation.

Please note, however, that it is very difficult for foreign investment institutions from inadequately regulated countries (see the response to question 2) to obtain an ASII licence. If no exemption from the licensing requirement is available, one option might be to open a regulated branch in The Netherlands (although this might also be quite burdensome).

Offer documentation

9 In order to demonstrate knowledge and compliance with the restrictions outlined above would you recommend the use of any particular wording in any offer documentation? Please provide an example of any such wording and indicate whether its use is mandatory or advisory.

9.1 Possible requirements

The AFM can require that registered investment institutions incorporate certain data in their prospectus. Any specific wording would in principle be advisory. Sample wording cannot be provided because this would depend very much on the circumstances.

9.2 Exemption wording

The use of any particular wording is not necessary if an exemption is available. However, it is in any case advisable to use wording in the offer documentation that indicates which exemption the company benefits from. Any such wording would be advisory.
10 Is there any requirement that the offer documentation or any part of it should (a) be in your local language or (b) deal with any other local considerations (e.g. tax)?

10.1 Language requirements

UCITS that do not have a licence in The Netherlands but go through the notification procedure will have to submit certain documents (such as the articles of association, the prospectus and a statement from the supervisory authority in the home country) in the Dutch language.

A foreign prospectus must be recognised by the AFM. The AFM can demand that the prospectus is in Dutch or in another language (most likely English) if this is, in the view of the AFM, necessary for an adequate supply of information to the public.

10.2 Local considerations

Offer documentation may also have to comply with certain other local requirements (e.g. tax) which are beyond the scope of this special paper.

Penalties for non-compliance with marketing restrictions

11 In the event of a breach of any of the restrictions outlined above what are the possible consequences by way of criminal or regulatory sanctions and civil claims by investors against the fund or promoter?

11.1 Regulatory and criminal sanctions

If the AFM is of the opinion that an investment institution has violated Section 4 (or certain other Sections) of the ASII it may report the same to the judicial authorities. The judicial authorities in that case can decide to prosecute the investment institution, which, under certain circumstances, could even lead to criminal sanctions (i.e. imprisonment). Furthermore, the AFM may publish a warning to the Dutch public in relation to the investment institution concerned and notify the supervisory authority of the country where such investment institution is established. The AFM can also decide to impose an order for periodic penalty payments. Finally, the AFM can impose an administrative penalty up to an amount of €900,000 for each violation.

11.2 Civil claims

Generally, investment institutions could incur civil liability to investors for incorrect or misleading information incorporated in the prospectus.

Additional factors

12 Are there any additional legal, licensing or other requirements or restrictions in your jurisdiction which may impact on any marketing undertaken in accordance with the answers above?

It should be noted that registered investment institutions must, in principle, provide clients (or potential clients) with a Financial Information Leaflet (Financiële Bijsluiter). The exemptions from this obligation are very limited. In any case, it would be advisable to obtain legal advice as to the form and content of the Financial Information Leaflet.
13 Are there any other matters you ought to bring to our attention (i.e. exchange controls, money laundering, public offer regulations)?

The concept of exchange controls is not recognised in The Netherlands. The general regulations with respect to money laundering apply to financial institutions (including investment institutions). There are no specific rules with respect to investment institutions.

14 Are the laws and regulations outlined above expected to be amended to any material extent in the foreseeable future? If so please describe a timescale and the possible impact of the proposed changes.

The ASII regime is not expected to change significantly, other than in line with general regulatory developments in the European Union that the Netherlands will be bound to implement in due course.

In addition, the Dutch legislator is working on a new Code of Financial Law that might result in some changes to existing laws. At present, it is not possible to outline either a timescale or the impact of possible changes.
1 What is the local structure commonly used for private equity funds? How does the law of your jurisdiction classify a private equity fund structured in that way? Please consider and describe any requirement to register the fund with local regulatory authorities.

1.1 Local structure

The most commonly used structure for domestic private equity funds is a Swedish limited partnership (kommanditbolag).

1.2 Classification

A Swedish limited partnership has legal personality, although with respect to taxation, it is deemed to be a flow-through entity.

A Swedish limited partnership carrying out standard private equity activities (which implies that it does not raise funds from the public but only from identified investors\(^\text{10}\)) will not be deemed to carry out investment services, pursuant to the Swedish Securities Operations Act, or fund operations, pursuant to the newly adopted Swedish Investment Funds Act.

1.3 Regulatory registration requirements

A Swedish limited partnership must be registered with the Swedish Trade Register in order to gain legal personality, which in most cases is a pure formality.

Swedish private equity funds carrying out standard private equity activities will not be subject to the regulation or supervision of the Swedish Financial Supervision Authority (SFSA).

2 Are foreign limited partnerships treated differently to the local structure described in the response to question 1? If so, what are the differences and does it depend on the jurisdiction of origin of the limited partnership?

Foreign limited partnerships that have legal personality will be treated in the same manner as a Swedish limited partnership.

Under the Swedish Securities Operations Act, the management of financial instruments for a client requires a licence from the SFSA to conduct securities business. It is debatable whether such a licence would be required if the structure includes a foreign limited partnership which lacks legal personality and a general partner or a management company holding financial instruments on behalf of the investors, depending on the activities performed in Sweden.

3 Are foreign corporate structures treated differently to the local structure described in the response to question 1? If so, what are the differences and does it depend on the jurisdiction of origin of the corporate structure?

Please see the response to question 2. This should, with the necessary changes, also be applicable to foreign limited liability companies.

\(^{10}\) The Swedish Financial Supervision Authority has indicated that the group of identified investors may not exceed 100 investors.
4 What restrictions (if any) are imposed by the laws of your jurisdiction on promoting and marketing the funds described above? Are there any restrictions on who can promote the funds in question or are there any registration or authorisations required for the person promoting?

4.1 Licensing requirements

Only investment firms licensed in Sweden, or licensed in another EEA state and passported into Sweden under the ISD, may conduct securities business (including private placements) with respect to financial instruments in Sweden. This applies irrespective of the jurisdiction or structure of the fund.

However, when the interests in an entity may not be transferred without the prior written consent of the general partner, board of directors or other relevant persons, the question arises as to whether such fund interests can be deemed to be “financial instruments” as defined under Swedish law. Under Swedish law, “financial instruments” are defined as “market paper and other rights or obligations intended to be traded on the securities market”. Therefore, it is most unlikely that an interest in a limited partnership, the transfer of which is subject to restrictions, is deemed to be a “financial instrument” under Swedish law. The Securities Operations Act, therefore, would not be applicable to such fund interests. Nevertheless, there being little guidance in the law, we believe that, since the fund interests are financial products marketed and sold in the financial market as financial investments, it would be appropriate to seek advice from local counsel, taking into account the specific terms of the offered fund interests, before starting to market them.

4.2 General rules

General rules for the promotion and marketing of products, including fund interests, are laid down in the Market Practices Act (1995:450). Under this act, all marketing activities must comply with “good marketing practice” and be fair to consumers and businessmen. The Market Practices Act also includes more specific rules on, for example, misleading advertising, comparative advertising, special offers, sender identification and unsolicited marketing.

4.3 Marketing to individuals

The distribution of offering materials to individuals (including high net worth individuals) and telephone solicitation are subject to the following rules:

(a) offering materials must not be sent to an individual by fax without his/her prior consent (preferably in writing); and

(b) offering materials can be sent to an individual by mail or e-mail, and an individual may be contacted by telephone, as long as such individual has not indicated otherwise.

Individuals who do not wish to receive marketing materials by mail, or be contacted by telephone in connection with the marketing of products or services, can register in specific central registers (so called Nix registers for mail and telephone). The offeror must check the Nix registers prior to making contact with the individual, unless an established customer relationship exists or the individual has given his consent to the offeror to be contacted for marketing purposes.
5 Are there any exemptions from the restrictions identified above? Please advise how to ensure that any marketing will fall within applicable exemptions and avoid formalities to the maximum extent possible.

There are no exemptions likely to be applicable under Swedish law, save for the “restricted circle” exemption referred to in the response to question 1. Again, this would apply irrespective of the jurisdiction or structure of the fund.

6 If the fund or promoter has a branch office or associate in your jurisdiction that is appropriately regulated for promotion of vehicles such as the fund how would this effect the answers provided to questions 4 and 5 above?

The responses to questions 4 and 5 above would not be affected.

7 Will the use of the Internet or a website to promote a fund in your jurisdiction be possible and, if so, would it have any impact on the answers provided above? Please consider any special rules concerning the use of email and any conditions or constraints that apply to the use of the Internet or a website generally. Please also consider whether it would be possible to operate a website with secure access granted only to specified institutional investors and individuals.

Subject to compliance with the marketing restrictions set out above, there are no specific rules that prohibit use of the Internet, e-mail or other means of electronic communication when communicating with Swedish investors, whether the fund is local or foreign.

It should be noted that the Electronic Commerce Act (based on Directive 2000/31/EC) includes information requirements that must be fulfilled prior to the conclusion of a contract by electronic means. Further, the Nordic Consumer Ombudsmen have adopted a position paper on e-commerce and marketing on the Internet intended to clarify the concept of “good marketing practice” on the Internet and corresponding communications systems such as mobile communication. The position paper includes rules on advertising identification, information obligations, electronic contracts, payment and liability for the content of websites.

8 Will marketing in accordance with the answers above lead to the establishment of a place of business in your jurisdiction? If so, what would the consequences be for the fund or promoter?

Assuming there is no branch office or other dependent agent in Sweden and on the basis that marketing is conducted from outside Sweden or through personal visits to Sweden by representatives of the fund for meetings with investors, the answer is most likely to be no. However, it is never possible to give a full answer to this question without knowing in more detail what the fund promoter proposes to do and with what other business activities it may be concerned, and specific advice should always be taken in advance of carrying out any marketing activities in Sweden.
Offer documentation

9 In order to demonstrate knowledge and compliance with the restrictions outlined above would you recommend the use of any particular wording in any offer documentation? Please provide an example of any such wording and indicate whether its use is mandatory or advisory.

Although there is no requirement to include a legend in the private placement memorandum under Swedish law, we recommend that the following wording be used:

“This Private Placement Memorandum has not been nor will it be registered with or approved by Finansinspektionen (the Swedish Financial Supervisory Authority). Accordingly, this Private Placement Memorandum may not be made available, nor may the Fund’s interests offered hereunder be marketed and offered for sale in Sweden, other than under circumstances which are deemed not to be an offer to the public in Sweden under the Swedish Financial Instruments Trading Act (1991:980) or the Swedish Investment Funds Act (2004:46).”

10 Is there any requirement that the offer documentation or any part of it should (a) be in your local language or (b) deal with any other local considerations (e.g. tax)?

No, there are no such requirements.

Penalties for non-compliance with marketing restrictions

11 In the event of a breach of any of the restrictions outlined above what are the possible consequences by way of criminal or regulatory sanctions and civil claims by investors against the fund or promoter?

11.1 Regulatory sanctions

The SFSA may order anyone, carrying out activities falling within the regulatory regime of the Swedish Investment Funds Act or the Securities Operations Act without a licence for such activities, to discontinue such activities. Such an order may either be directed at a foreign entity or anyone operating in Sweden on behalf of the foreign entity, and such prohibitive injunction may be issued subject to a conditional fine.

If an investment firm (domiciled in the EEA), which is conducting operations in Sweden in reliance on a passported licence, infringes the Securities Operations Act or demonstrates in any other manner that it is unsuitable to carry out such operations in Sweden, the SFSA may order it to remedy this. If the investment firm fails to comply with the order, the SFSA can notify the competent governmental authority in the investment firm’s home country. Where the situation is still not remedied, the SFSA may prohibit the investment firm from assuming new obligations in Sweden. Prohibitive injunctions issued by the SFSA pursuant to the Securities Operations Act may be subject to a conditional fine.
The Market Practices Act provides for several remedies/sanctions depending on the nature of the violation. The detailed rules on, for example, misleading advertising and special offers carry the following sanctions:

(i) a prohibitive injunction (subject to a conditional fine);
(ii) market disruption fees between SEK 5,000 and SEK 5 million (around €550 to €500,000); and
(iii) third party damages.

Only a prohibitive injunction is available in cases of violation of the general requirement to carry on “good market practice”.

There are no criminal sanctions.

11.2 Civil claims

The main principle under Swedish law of tort is that damages for pure economic loss (i.e. economic loss inflicted without any injury to person or damage to property) may only be rewarded if it has been caused by a criminal act, for example fraud. There are a few exemptions to this principle, to be found primarily in statutory law, but also in case law. For example, a board member could be held liable for damages to investors provided that it has negligently violated rules on prospectuses found in the Swedish Companies Act. (It should however be noted that the Companies Act contains only a few rules on prospectuses. Most rules regarding prospectuses are found in other legislative acts. It should further be stressed that such liability does not cover offer documents that are not formally qualified by law as prospectuses and that in much of the marketing for private equity funds, no formal prospectuses are issued.) It has moreover been argued in the legal literature that damages for pure economic loss should be awarded under certain circumstances, for example, if the culprit has violated a rule of conduct which aims at protecting a specific interest.

Pursuant to Swedish law of contracts, pure economic loss suffered by a party to a contract shall be compensated by the other party if it has been incurred by a wilful or negligent act. Under certain circumstances, the liability might even be strict and will thus apply regardless whether the loss was inflicted intentionally or by negligence. The parties are of course always free to agree to increase or restrict the scope of liability in their contractual relationship. However, as an exemption to this general principle of contracts, it is generally held among lawyers that a company may not be contractually liable to pay damages to its shareholders or holders of other equity related securities if the claim relates to the subscription or acquisition of the shares or the equity related securities. This principle is based on a court ruling from the 1930s. The rationale behind this exemption is to protect the creditors of the company.

Additional factors

12 Are there any additional legal, licensing or other requirements or restrictions in your jurisdiction which may impact on any marketing undertaken in accordance with the answers above?

No, there are no additional requirements.
13. Are there any other matters you ought to bring to our attention (i.e. exchange controls, money laundering, public offer regulations)?

13.1 Foreign holdings disclosure requirements

Swedish investors are required to disclose information on holdings of foreign securities to the Swedish tax authorities. In addition, any person (generally a bank) who carries out any payment to or from Sweden exceeding SEK 100,000 on behalf of private individuals fiscally resident in Sweden or exceeding SEK 150,000 on behalf of Swedish legal entities must report such payments to the Swedish Tax Authorities in case of private individuals or to Statistiska Centralbyrån in case of Swedish legal entities.

13.2 Money Laundering

The Money Laundering Act (1993:768) contains anti-money laundering provisions applicable to, amongst others, investment firms conducting securities operations from a permanent establishment in Sweden. Under the Money Laundering Act, identification should be carried out by the investment firm:

(i) when a person wants to establish a business relationship with the investment firm (for example by opening a securities account); or

(ii) when a transaction (or several connected transactions) carried out by the investment firm exceeds SEK 110,000 (even if none of the persons involved in the transaction has, or intends to establish, a business relationship with the investment firm).

Private equity/venture capital companies would normally not need to comply with the Swedish money laundering regulations and guidelines, provided that such companies are only conducting business typical for such companies. Swedish counsel should however be contacted if there is any uncertainty as to whether anti-money laundering provisions apply.

14. Are the laws and regulations outlined above expected to be amended to any material extent in the foreseeable future? If so, please describe a timescale and the possible impact of the proposed changes.

In July 2002, Directive 2002/58/EC (on privacy and electronic communications) was adopted. Pursuant to this directive, prior consent from the customer will be required in all EU Member States, not only for direct marketing via fax and automatic calling machines, but also for unsolicited communications for direct marketing purposes by means of e-mails. An exception to this opt-in rule will apply where an established customer relationship exists and the commercial message concerns similar products or services. Such changes have been implemented in the Swedish Market Practice Act.
Typical fund vehicles

1 What is the local structure commonly used for private equity funds? How does the law of your jurisdiction classify a private equity fund structured in that way? Please consider and describe any requirement to register the fund with local regulatory authorities.

1.1 Local structure

The most common structure used for a Finnish fund is a Finnish limited partnership (kommanditisyntiö, Ky). Other legal vehicles are not common in venture capital or private equity investments and in practice do not seek financing from outside investors but rather operate as joint ventures or public entities.

1.2 Classification

Although the Finnish limited partnership has a legal personality, when it comes to taxation, it is a flow-through entity.

1.3 Regulatory registration requirements

Like other forms of enterprise, limited partnerships must be registered with the Finnish Trade Register, which in most cases is a mere formality. The names of partners and the capital contributions of limited partners are publicly available at the Trade Register.

A Finnish limited partnership fund carrying out standard venture capital or private equity activities has never been deemed to be an investment firm subject to the provisions of the Finnish Investment Firms Act (IFA). In fact, investment services may only be provided by limited companies and certain credit institutions. Thus, such a partnership is comparable to a joint venture formed as a limited company, and is not subject to licensing, regulation or supervision. As explained below in the response to questions 4 and 5, offering the interests or shares in either entity may nevertheless be subject to the requirements of e.g. the Finnish Securities Markets Act (SMA).

2 Are foreign limited partnerships treated differently to the local structure described in the response to question 1? If so, what are the differences and does it depend on the jurisdiction of origin of the limited partnership?

2.1 Treatment of foreign limited partnerships

As with Finnish limited partnerships, the issue most commonly discussed in relation to foreign limited partnerships is what marketing rules must the fund-raising of a fund comply with (see the responses to questions 4 and 5). As discussed in paragraphs 2.2 and 2.3, the type of fund may affect the treatment of foreign funds.

See, however, the response to question 2 on the interpretation of “asset management”.
2.2 Significance of legal personality and decision-making

For foreign limited partnerships that do not have a legal personality and that have given all the decision-making rights to their general partner or a management company, the question whether the activities of the fund or its manager constitute an "investment service" becomes more problematic. This problem is emphasised by the fact that (although venture capital funds have been active for over 10 years in Finland) the terms venture capital and private equity are basically unknown in Finnish financial regulation and there is not a single published statement issued by the Finnish Financial Supervision Authority (FSA).

The IFA states that "asset management" is one of the investment services that is subject to the Act; meaning that asset management is subject to appropriate licences, burdening regulation and supervision by the FSA. Asset management has been defined as managing securities on the basis of an agreement under which a client authorises the manager to make the necessary decisions. With Finnish funds that have a legal personality and in relation to which the investors often have decision or veto rights over investments, it has been reasonably easy to argue that such a structure does not constitute an investment service. As there is no relevant practice in the area, it remains somewhat unclear how foreign funds should be treated as they might be structured differently (i.e. no investor decision rights on investments and the fund not necessarily having legal personality). Should such a fund constitute an investment service (i.e. asset management performed by the general partner/manager to the investors), it should be noted that the Act stipulating the rights of a foreign investment firm to offer services in Finland (FIFA) is more lenient on investment firms incorporated in a country within the European Economic Area.

2.3 The open-ended question

If a fund is deemed to be open-ended (the interpretation of which is still not entirely clear), it will be subject to the marketing provisions of the Finnish Mutual Funds Act (MFA). This Act requires either a procedure to be followed with the FSA (in the case of funds from the EEA area that comply with the EC Mutual Funds Directive) or the Ministry of Finance (other funds) before marketing commences. The procedure includes the submission of certain materials to the Finnish authorities. However, to be open-ended a fund should be open to all investors and raise funds from the public and the fund rules cannot restrict the range of unit-holders fund. Accordingly, the vast majority, if not all, of private equity funds should therefore be deemed to be closed-ended funds.

3 Are foreign corporate structures treated differently to the local structure described in the response to question 1? If so, what are the differences and does it depend on the jurisdiction of origin of the corporate structure?

Please see the response to question 2. A deviation from a limited partnership structure with respect to transferability of an interest in the fund could affect the applicability of the SMA (see paragraph 4.4 below).
Promotion and marketing issues

4 What restrictions (if any) are imposed by the laws of your jurisdiction on promoting and marketing the funds described above? Are there any restrictions on who can promote the funds in question or are there any registration or authorisations required for the person promoting?

4.1 Open-ended funds

As set out above in the response to question 2, open-ended funds are subject to the MFA. However, as private equity funds are not usually deemed to be open-ended for the purposes of the MFA, open-ended funds will not be analysed in detail in this paper.

4.2 General limitations

There is no general limitation as to who may promote a fund. However, there are certain factors that should be taken into consideration. Firstly, the licences of investment firms (and the articles of association of any firm) may restrict the activities that they may carry out. Secondly, active marketing could be considered to be soliciting subscribers or arranging subscriptions, which constitutes an investment service and is subject to the provisions of the IFA and FIFA.

4.3 Closed-ended funds

Closed-ended funds may be subject to the offering provisions of the SMA. This, again, is a question that is open to interpretation especially when it comes to private equity funds. With regard to the SMA, two separate issues are discussed in the following paragraphs 4.4 and 4.5, whereas exemptions are outlined in paragraph 5.

4.4 Application of the SMA

The general scope of application of the SMA provides that the SMA is applicable to:

(i) the issuance of securities into “general circulation”;

(ii) trading with securities in “general circulation”; and

(iii) public trade in securities.

In this respect, although the Act’s definition of a ‘security’ has been broadened, the SMA notes that it is applied to securities that are “commonly transferable” and that are issued into “general circulation” together with several similar securities.

“Commonly transferable” has been interpreted to mean that entities other than members of a pre-defined, limited group have access to the securities in question. Due to most similar offerings not being public (see paragraph 4.5 below), this criterion is not usually analysed further. It is, however, evident that public quotation is not a condition for the application of the SMA and the intent of an issuer is not sufficient unless an actual restriction on transfers is applicable.

The interpretation of the SMA in situations like this is not entirely clear. Perhaps the most likely interpretation would be that where the fund agreements provide strict transfer restrictions, the interests in the fund are not commonly transferable or in “general circulation”, thus the SMA would not be applicable to the offering.
Also, in Finnish legal literature, albeit on a general level, it has been stated that collective investment schemes with a closed-end nature do not necessarily fall within the scope of application of either the SMA or the MFA.

However, although there is not even an informal position by the FSA on the matter, it should be noted that the FSA has interpreted certain similar instruments to be subject to the SMA and therefore it is not clear how strict transfer restrictions would need to be in order for a security not to be “commonly transferable”. Therefore, this issue remains somewhat unclear until a fund sponsor requests an opinion from the FSA.

4.5 Public offering requirement

Even if the SMA is interpreted to be applicable to the interests of a closed-end private equity fund, due to the usually limited amount of offerees there would not usually be an obligation to draft a prospectus under the SMA. According to the SMA the obligation to draft a prospectus or listing particulars arises where an application is made for securities to be publicly traded or where they are offered to the “public”. The FSA has published a statement on its interpretation of the concept of “public offering”:

“Meeting the criteria for ‘public offering’ as referred to in the SMA depends on the target group of the offer. The FSA considers that any offering of securities to more than one hundred investors should generally be regarded a public offering. As the number of potential investors is determined, an individual interest group can be considered to constitute a single investor. Consequently, e.g. entities that belong to the same group or are controlled by the same person may be considered as a single investor as long as the investment decisions of such entities are made by a single body. Similarly, a group of investors can be regarded as a single investor when its decisions on investments are made by a custodian on the basis of a full power of attorney. A list of the investors to whom securities are offered in Finland must be submitted to the FSA at request. The obligation to provide such a list lies with the issuer and the possible manager of the share issue.”

Usually the Finnish group of offerees is not likely to constitute the “public” as interpreted by the FSA. A record of the Finnish offerees should be kept. See also paragraph 5.2.

5 Are there any exemptions from the restrictions identified above? Please advise how to ensure that any marketing will fall within applicable exemptions and avoid formalities to the maximum extent possible.

5.1 Private placement exemption

As noted above in paragraphs 4.4 and 4.5, the application of the SMA is not entirely clear, but, in any event, as long as there is a restricted target group a prospectus approved by the FSA is usually not required in a private offering. Restricting the target group to less than 100 Finnish investors (preferably professional investors) is in fact the best way to avoid formalities. In a scenario where the SMA would be deemed applicable and the target group would mean that there is a public offering, there still may be exemptions available.

Finnish law deals with two types of offering documents, generally speaking one more strictly regulated and to be published in connection with admission to a stock exchange (commonly translated as listing particulars) and one to be published in other offerings targeting the public (prospectus). In the private equity/venture capital context, the necessary document would be the latter (if required at all) and the term “prospectus” has therefore been used in this memorandum to refer to such document.
There is a decree regulating the contents of prospectuses, which contains several exemptions. Some of these are partial (providing for a short form prospectus) and some exempt the offeror totally from the obligation to draft a prospectus. Some exemptions require an application to and permission from the FSA, whereas others do not. Of the latter kind, one in particular may be relevant for a private equity fund sponsor: there is no obligation to publish a prospectus if the offered securities cannot be acquired for a consideration of less than €40,000 or in instalments or shares with a nominal value of less than €40,000. This appears to present an easy way out, but one should exercise caution where the fund agreements allow the general partner to accept lesser amounts.

5.2 Ambit of exemption

One should bear in mind that even where there is no obligation to draft a prospectus, there are relevant provisions in the SMA if the SMA is considered to apply to the offering (see paragraph 4.4 above). These provisions prohibit marketing in breach of “good market practice”, using “inappropriate” methods or untrue or misleading information. The SMA also requires disclosure of sufficient information on factors that materially affect the value of the security. This requirement, depending on the target group, may come close to the requirement to draft a prospectus.

6 If the fund or promoter has a branch office or associate in your jurisdiction that is appropriately regulated for promotion of vehicles such as the fund how would this affect the answers provided to questions 4 and 5 above?

The disclosure requirements and, generally speaking, exemptions do not depend on the residence of the offeror or promoter. The provisions of the SMA on approving foreign prospectuses would only be relevant if the foreign prospectus has been approved by an appropriate foreign authority.

7 Will the use of the Internet or a website to promote a fund in your jurisdiction be possible and, if so, would it have any impact on the answers provided above? Please consider any special rules concerning the use of email and any conditions or constraints that apply to the use of the Internet or a website generally. Please also consider whether it would be possible to operate a website with secure access granted only to specified institutional investors and individuals.

There are no provisions in the SMA specifically addressing the use of the Internet, a website or email and therefore any marketing of funds using these methods would fall under the general rules. FSA statements, which have in principle been drafted with a view to IPOs and similar arrangements, only include scattered references i.e. to the correction of marketing information on a website, the use of proxies and IT system capacity and reliability. One FSA statement allows for a prospectus to be published on a web site, but requires it to be available in printed form as well, with the website version matching the printed version in all respects. As these statements are based on the FSA’s interpretation of the SMA, the preliminary question is whether the SMA is applicable at all (see paragraph 4.4 above).

As regards the provisions of the SMA, the use of an open-access website in marketing would probably be interpreted as marketing to the public (see paragraph 4.5 above). Whether email marketing would be considered to be inappropriate (see paragraph 5.2 above) would need to be evaluated on a case-by-case basis. In the absence of any specific practice or regulations, the question remains unclear.
However, it must be borne in mind that the FSA has issued a statement according to which it requires all marketing materials (including advertisements, letters and scripts for radio and television advertisements) to be submitted to it. This statement, however, most obviously only refers to public offers.

8 Will marketing in accordance with the answers above lead to the establishment of a place of business in your jurisdiction? If so, what would the consequences be for the fund or promoter?

On the basis that marketing is conducted from outside Finland, or through personal visits to Finland by representatives of the fund for meetings with investors, the general answer is no. However, it is not possible to give a full answer to this question without knowing in more detail what the fund promoter proposes to do and with what other business activities it may be concerned. Specific advice should always be taken in advance of carrying out any marketing activities in Finland.

Offer documentation

9 In order to demonstrate knowledge and compliance with the restrictions outlined above would you recommend the use of any particular wording in any offer documentation? Please provide an example of any such wording and indicate whether its use is mandatory or advisory.

There is no requirement for specific legends or warnings (save for where the SMA requires a regulated prospectus to be published, in which case the FSA considers that the prospectus should include, among other things, information on the tax treatment of the investment). In some cases, however, in addition to customary sections on risk factors or investment considerations the offerors have included a legend or warning in an offering memorandum. Such legend could be in the following form (where the fund is closed-ended and where the target group does not mean a public offering in Finland):

“Notice for Finnish Residents
Subscriptions for limited partner interests in the fund will only be accepted from a very limited number of professional investors and any transfers of limited partner interests are subject to the consent of the general partner [which will not be given with respect to other transferees than those being professional investors]. Thus, interests in the fund may only be held by a limited number of professional investors approved by the general partner. Because of this closed-ended nature of the fund, the fund and any subscription of limited partner interests in the fund are not subject to the provisions of the Finnish Securities Markets Act (arvopaperimarkkinalaki, 495/1989) or the provisions of the Finnish Mutual Funds Act (sijoitusrahastolaki, 48/1999). Accordingly, prospective limited partners should note that this memorandum is neither a prospectus within the meaning set forth in the Finnish Securities Markets Act nor a fund prospectus as defined in the Finnish Mutual Funds Act. Prospective investors should also note that neither the general partner nor the management company is an investment firm (sijoituspalveluyritys) as defined in the Finnish Investment Firms Act (laki sijoituspalveluyrityksistä, 579/1996), nor are they subject to the supervision of the Finnish Financial Supervision Authority (rahoitustarkastus).”
10  Is there any requirement that the offer documentation or any part of it should (a) be in your local language or (b) deal with any other local considerations (e.g. tax)?

10.1 Language requirements

The Finnish decrees regulating the contents of listing particulars or a prospectus state that such offering documents must be drafted in either Swedish or Finnish, unless the FSA consents to the offeror using another language. This, however, only applies where the publication of a prospectus (or listing particulars) is required by the SMA. Even where the SMA is deemed to be applicable and the target group would require a prospectus, the FSA would probably give its consent to a prospectus in English with a Finnish summary, where the offer is clearly targeted at professional investors.¹³

10.2 Local considerations

There are generally no specific local requirements. In relation to tax issues (where the SMA is deemed to apply), the FSA has considered that, in order for the information disclosed to be sufficient, for example an issuer launching a new type of instrument on the market, all necessary information on, including the type of security and its tax treatment, must be provided.

Penalties for non-compliance with marketing restrictions

11 In the event of a breach of any of the restrictions outlined above what are the possible consequences by way of criminal or regulatory sanctions and civil claims by investors against the fund or promoter?

11.1 Regulatory and criminal sanctions

The Finnish Market Court may prohibit marketing measures that are inappropriate and it may also oblige a person to rectify any inappropriate marketing. In connection with such a ruling, it may also order conditional fines (in the only relevant recent cases such fines amounted to €20,000). The FSA may in certain cases issue public statements and warnings. Where an investment firm under the supervision of the FSA participates in the offering, the FSA could also revoke the operating licence of such a firm if it has breached applicable laws. In certain cases, an offering could also be subject to the marketing provisions of the Finnish Consumer Protection Act in which case the Consumer Ombudsman could also be involved. As this is seldom the case with private equity funds, this issue is not further analysed here. The SMA contains provisions on securities market offences and the Finnish Penal Code contains provisions on securities market crimes. An offering of securities made in breach of the SMA could fall under either category. Offences are punishable by fines only, whereas the maximum penalty for a securities market crime relating to disclosure is imprisonment for two years. In theory, other penal provisions (such as provisions on fraud) could also be relevant. The provisions of the Penal Code on the penal responsibility of legal entities are applicable to the Chapter of the Penal Code regulating securities market crimes. This means that in certain cases a legal entity may be ordered to pay fines in the event that a securities market crime has been committed as a result of its operations.

¹³ By comparison, the FSA has stated the following: “Public-offer prospectuses or listing particulars for debt securities or debt security programmes with a subscription and trade lot of at least €200,000 may be drawn up exclusively in English. They must, however, contain the debt security terms or a summary of the terms in Finnish or Swedish. The consent of the FSA to use English must be applied for in connection with the application for approval of the prospectus. If the FSA gives its consent, it reserves 10 business days to examine the prospectus.”
11.2 Civil claims

The SMA contains a very general provision on civil liability; basically, this merely provides that damages caused by actions that are contrary to the SMA (or regulations issued pursuant to it) must be compensated. Depending on the individual case, there may be also other grounds for civil liability. As there is very little Finnish court practice in the area, questions such as who would bear the liability and how potential damages would be measured remain uncertain.

Additional factors

12 Are there any additional legal, licensing or other requirements or restrictions in your jurisdiction which may impact on any marketing undertaken in accordance with the answers above?

As mentioned above in paragraph 5.2, the SMA may set some requirements for marketing even if no actual prospectus (within the meaning set out in the SMA) is required. Where the target group also comprises individuals (even high net worth individuals), the provisions of the Consumer Protection Act should also be taken into account.

13 Are there any other matters you ought to bring to our attention (i.e. exchange controls, money laundering, public offer regulations)?

As the private equity and venture capital industry is not recognised in Finnish legislation, the question on the applicability of money laundering requirements to the fund-raising process is not clear. However, a recent amendment to the relevant Act broadened the range of entrepreneurs that must comply with the client identification requirements of the Act (obviously targeting areas that cannot be precisely defined), and accordingly it is advisable for a Finnish sponsor to identify all investors to the fund as required by the Act.

14 Are the laws and regulations outlined above expected to be amended to any material extent in the foreseeable future? If so please describe a timescale and the possible impact of the proposed changes.

The Finnish government may have become slightly more aware of the Finnish private equity industry. A report drafted by the Ministry of Finance notes the insufficiency of public sector finance and the importance of developing the environment for private equity by ensuring free movement of capital and national competitiveness. Furthermore, the political program for the new Finnish government included a section on the intention of the government to aim for an increase in the investment by foreign investors in Finnish funds. This would in practice probably mean re-evaluating the tax treatment of limited partners. As these ideas have been announced only very recently, no concrete measures have been taken as yet.

The implementation of EC directives 2001/107/EC and 2001/108/EC has been prepared. The Governmental Bill regarding the matter proposes, among others, changes to the MFA (including the provisions on marketing foreign mutual funds in Finland), IFA and the SMA, and the enactment of a separate act on the activities of foreign mutual fund management companies.
Typical fund vehicles

1 What is the local structure commonly used for private equity funds? How does the law of your jurisdiction classify a private equity fund structured in that way? Please consider and describe any requirement to register the fund with local regulatory authorities.

1.1 Local structures

Danish company law and tax law do not contain any corporate vehicle for the specific purpose of private equity investment.

The local structures commonly used for private equity funds in Denmark are limited partnerships, limited companies (A/S Company), or private limited companies (ApS Company).

(a) Limited partnerships

In Denmark, a limited partnership may be established as either a limited partnership (kommanditselskab) or as a limited partnership company (partnerselskab). In both cases, the general partner is personally, jointly and unlimitedly liable for the partnership’s obligations. The limited partners are only liable for the amount they commit.

The difference between a limited partnership and a limited partnership company is that the company has an actual share capital, which consists of the investments made by the limited partners. The share capital must be fixed and must be fully paid up in connection with the formation of the company. The limited partnership company is governed by the Danish Companies Act.

Both types of partnerships are tax transparent, which means that the general partner and the limited partners are taxed directly on the profit or loss of the partnership. If the partnership is made up of foreign investors, these will be taxed in Denmark on their proportion of the profit.

(b) Limited companies

An A/S Company must have a registered share capital of at least DKK 500,000 (€ 67,000), at least one managing director, and a board of directors consisting of at least three members. An A/S Company is governed by the Danish Companies Act.

(c) Private limited companies

An ApS Company must have a registered share capital of at least DKK 125,000 (€ 17,000) and must have either a board of management with at least one managing director or a board of directors with at least one member. An ApS Company is governed by the Danish Private Companies Act.

1.2 Classification

The corporate vehicles mentioned above are classified in the Danish companies legislation, but not specifically with respect to private equity funds.

1.3 Regulatory registration requirements

Both limited partnership companies, A/S companies and ApS companies (a limited partnership (kommanditselskab)) must be registered with the Danish Commerce and Companies Agency, which is a prerequisite for the formation of the company. Registration with the Danish tax authorities is necessary if the fund is to hire employees. With respect to the authorisation to buy, sell and/or promote securities to the public, please see the answer to question 4 below.
2 Are foreign limited partnerships treated differently to the local structure described in the response to question 1? If so, what are the differences and does it depend on the jurisdiction of origin of the limited partnership?

Overseas limited partnerships, whether or not having legal personality may also be used for private equity funds. Such structures are also considered as tax transparent, which means that a Danish investor will be taxed in Denmark proportionally on the profit or loss of the fund. Foreign entities are treated equally to the Danish entities with respect to establishing and marketing private equity funds. Please see the answer to question 4 below regarding the authority to publicly promote securities in Denmark.

3 Are foreign corporate structures treated differently to the local structure described in the response to question 1? If so, what are the differences and does it depend on the jurisdiction of origin of the corporate structure?

Overseas corporate structures are treated the same as their Danish equivalents. Please see the answer to question 4 below regarding the authority to publicly promote securities in Denmark.

4 What restrictions (if any) are imposed by the laws of your jurisdiction on promoting and marketing the funds described above? Are there any restrictions on who can promote the funds in question or are there any registration or authorisations required for the person promoting?

4.1 General restrictions

Regulations on the promotion and marketing of funds can be found in different Danish legal frameworks. Thus, promoting and marketing of funds are subject to regulation in, among other pieces of legislation:

(a) the Danish Securities Trading Act (the STA), which, among other things, deals with exclusivity for certain authorised players

(b) the Executive Order on the First Public Offer of Certain Securities (the Executive Order), which regulates the preparation and filing of a prospectus when the offered shares/interests are not going to be listed on a Danish stock exchange - i.e. in practice the Copenhagen Exchange;

(c) the Danish Marketing Practice Act (the MPA); and

(d) the Danish Consumer Contracts Act (the CCA), which regulate marketing measures directed at consumers in particular.

In general, it should be noted that Danish law does not differentiate between different groups of individuals. Thus, no specific regulation exists in terms of so-called high net worth/sophisticated individuals.

4.2 The Danish Securities Trading Act

Pursuant to section 4 of the STA, only Danish authorised credit institutions, investment companies (broker-dealers), mortgage credit institutions, the Danish central bank, and the Financial Administration Agency have the exclusive right to market to the public on a professional basis as buyers, sellers or intermediaries of securities.
Denmark

Non-Danish entities within the EU (or EEA), which have the necessary authorisation in their home country, are entitled to carry out similar activities by virtue of the EU passport rules.

Authorisation and passported status may be checked on the website of the Danish Financial Supervisory Authority (the FSA) (www.ftnet.dk/register).

Pursuant to section 4(2) of the STA, this exclusivity does not apply to public offerings made by an issuer regarding securities issued by such issuer. This exemption is subject to a strict interpretation and it does not apply to, among others, a subsidiary offering securities in its parent company. It is unclear whether a general partner of a limited partnership qualifies as "an issuer" for purposes of section 4(2). An assessment thereof must be made on a case-by-case basis.

The term "the public" is not defined and the FSA has construed the term rather narrowly.

Due to the complexity of the Danish provisions and very limited case law/FSA practice, specific advice on marketing and promotion of securities should be sought on a case-by-case basis. Depending on the circumstances, it may be advisable to allow for a matter to be specifically addressed by the FSA when planning the offer and the timetable.

As mentioned above, activities relating to buying, selling and/or promoting securities to the public on a professional basis are restricted to certain authorised entities. In general, EU and EEA entities authorised to carry out such activities in their home country may be authorised to carry out similar activities in Denmark, subject to notification of the FSA.

4.3 Executive Order on First Public Offers of Certain Securities

Pursuant to chapter 12 of the STA, and the Executive Order applicable to offering of certain securities not going to be listed on a Danish stock exchange, a prospectus must be prepared and filed with the Danish Securities Council prior to an offering being made. Offers of shares and limited partnership interests generally fall within the securities covered by the Executive Order.

The Executive Order sets out a number of exemptions from the prospectus requirement allowing for an offer to be structured in such a way that the filing and prospectus requirements do not apply, on which see further the response to question 5 below.

4.4 Marketing law issues

Contacting potential investors in Denmark may raise certain marketing law and consumer law issues, particularly in terms of the marketing measures applied. These provisions apply to the fund or promoter whether Danish or non-Danish.

Section 6a of the MPA provides for a general prohibition against undertakings approaching anyone, i.e. legal persons as well as individuals, including high net worth individuals, by way of electronic mail, automatic calling systems or fax with marketing or promotional material unless such persons have specifically consented thereto (opt-in). However, if the fund has obtained the potential investor’s email address in the context of a previous sale, the email address may in certain circumstances be used for direct marketing of similar products.
Furthermore, the fund or the promoter may not approach individuals (even a professional investor or a high net worth individual) by other means of distance communication, e.g. a personal letter, with a view to selling the fund’s interests, if such individual has objected thereto (opt-out). An individual may opt-out either by communicating this directly to the fund or by way of a general registration in the central register of persons specifying that the individual does not wish to receive marketing material.

Furthermore, pursuant to section 2(1) of the CCA, there is a general prohibition on approaching consumers by telephone or personally at the consumer’s private address, place of work or any other non-public place with a view to selling or offering goods or services. On the other hand, this prohibition does not apply if the consumer has clearly given a prior consent for the Fund to contact the consumer, e.g. by way of an agreement. Institutional investors and other legal entities are not considered to be consumers, provided that they act within the scope of their professional trade. On the other hand, non-professional associations that act for private, non-commercial purposes, may qualify as consumers. As Danish law does not differentiate between high net worth individuals and other individuals, it may be difficult in some instances to determine whether the investment is made within the professional trade of such high net worth individual or for private purposes. This must be determined on a case-by-case basis.

5 Are there any exemptions from the restrictions identified above? Please advise how to ensure that any marketing will fall within applicable exemptions and avoid formalities to the maximum extent possible.

5.1 The Danish Securities Trading Act

There are no exemptions from the authorisation requirement as set out in section 4 of the STA other than as described in paragraph 4.2 above.

5.2 Executive Order on First Public Offers of Certain Securities

As mentioned above in paragraph 4.3, the Executive Order sets out a number of exemptions to the general rule that a prospectus must be prepared and filed prior to an offer being made.

The exemptions likely to be relied on in an offering of private equity funds are:

(a) offers of securities to individuals or legal persons who acquire securities in the context of their trade, profession or occupation;

(b) offers of securities to a limited circle of individuals and/or legal persons;

(c) offers of securities with an aggregate sales price of less than DKK 300,000 (around €40,000); and

(d) offers of securities, which are offered in denominations of at least DKK 300,000, and/or securities which can be acquired only for a consideration of at least DKK 300,000 per investor.

Whereas exemptions (c) and (d) are so-called safe harbour exemptions, the exemptions listed in (a) and (b) above are subject to continuing interpretation by the FSA. Exemption (a) applies generally to large institutional investors, including banks and pension funds. The “limited circle” qualification set out in exemption (b) is construed, according to current practice, as meaning offers made to 10-15 investors.
Denmark

In order to avoid formalities in connection with an offer of interests in a private equity fund, such as the preparation of a prospectus, the offer to potential Danish investors should be structured in such a way that the offer will qualify for an exemption from the prospectus requirements. The exemptions are cumulative.

6 If the fund or promoter has a branch office or associate in your jurisdiction that is appropriately regulated for promotion of vehicles such as the fund how would this affect the answers provided to questions 4 and 5 above?

Making the offer through an entity authorised to carry out marketing activities in Denmark will satisfy the authorisation requirement set out in section 4 of the STA.

An entity authorised to carry out marketing activities in Denmark must comply with the provisions in the MPA and the CCA; such entity must also comply with the rules and guidelines on honest and sound business principles and good practice applying to financial undertakings, including banks and investment companies (broker dealers).

The rules on preparation and filing of a prospectus apply irrespective of which entity is marketing the offer.

7 Will the use of the Internet or a website to promote a fund in your jurisdiction be possible and, if so, would it have any impact on the answers provided above? Please consider any special rules concerning the use of email and any conditions or constraints that apply to the use of the Internet or a website generally. Please also consider whether it would be possible to operate a website with secure access granted only to specified institutional investors and individuals.

Subject to compliance with the authorisation requirements set out in section 4 of the STA and the marketing restrictions set out in the MPA and CCA, there are no rules that prohibit the use of the Internet or a website to promote an offer. However, if the offer does not qualify for an exemption from the prospectus requirements, the Executive Order lays down certain requirements as to content and publication of such prospectus.

Marketing activities carried out on the Internet or through a website outside Denmark, but targeted at Danish investors, may lead to the application of Danish securities and marketing laws on such offers.

With respect to the use of emails as a means of communicating the offer, please refer to paragraph 4.4 above.

A technical limitation of access to a website is advisable if the offer is made only to certain targeted investors.

8 Will marketing in accordance with the answers above lead to the establishment of a place of business in your jurisdiction? If so, what would the consequences be for the fund or promoter?

Marketing activities will not lead to the establishment of a place of business in Denmark.
Offer documentation

9 In order to demonstrate knowledge and compliance with the restrictions outlined above would you recommend the use of any particular wording in any offer documentation? Please provide an example of any such wording and indicate whether its use is mandatory or advisory.

It is not mandatory under Danish law to use a specific legend. It is, however, advisable to include a legend in the offer documentation. The wording should be drafted in compliance with the exemption(s) relied on for purposes of exempting the offer from prospectus requirements.

An offer made to Danish institutional investors may read:

“This [Memorandum] has not and will not be filed with the Danish Securities Council and the marketing and offering of [Interests in the Fund] have not and will not be made to persons in Denmark, except to persons whose ordinary activities involve them in acquiring securities for the purpose of their business or otherwise in circumstances which have not resulted and will not result in an offer to the public in Denmark within the meaning of Executive Order No. 166 of 13 March 2003 on prospectuses at the First Public Offer of Certain Securities.”

10 Is there any requirement that the offer documentation or any part of it should (a) be in your local language or (b) deal with any other local considerations (e.g. tax)?

10.1 Language requirements

If the offer does not qualify for an exemption under the Executive Order, a prospectus must be prepared and filed with the Danish Securities Council prior to the offer being made to Danish investors. The prospectus must be drafted in Danish, Swedish, Norwegian, English or another language approved by the Danish Securities Council.

10.2 Local considerations

A prospectus prepared in compliance with EU directive 80/390/EEC and approved by another EU member state authority may replace a prospectus prepared in accordance with the Executive Order without including any local law information.

Penalties for non-compliance with marketing restrictions

11 In the event of a breach of any of the restrictions outlined above what are the possible consequences by way of criminal or regulatory sanctions and civil claims by investors against the fund or promoter?

11.1 Criminal sanctions

Violation of the authorisation requirements set out in the STA is a criminal offence and the offender may be fined. Violation of the prospectus requirement is also a criminal offence and again the offender may be fined.
Denmark

11.2 Regulatory sanctions

Violation of the MPA and CCA is supervised by the Danish Consumer Ombudsman, who interprets these acts quite strictly. Violation of section 6a of the MPA regarding unsolicited e-mails etc. is subject to a fine. Fines based on the MPA can be substantial.

11.3 Civil claims

There is no case law on civil claims made by investors against an issuer based on violation of the prospectus requirement, i.e. that no prospectus has been prepared even if the offer did not qualify for an exemption from prospectus requirements, or against an unauthorised promoter. There is no specific legal basis for such claim. However, it cannot be ruled out that an investor may be successful in claiming compensation for any losses incurred in such respect or even in claiming that the investment is void. In general, investors can sue for damages if the prospectus contains misleading information.

Additional factors

12 Are there any additional legal, licensing or other requirements or restrictions in your jurisdiction which may impact on any marketing undertaken in accordance with the answers above?

There are none.

13 Are there any other matters you ought to bring to our attention (i.e. exchange controls, money laundering, public offer regulations)?

There are no exchange control requirements that apply in connection with the marketing and promotion of interest or shares in a private equity fund. Exchange control reporting is, however, required for statistical purposes when transferring funds in excess of DKK 250,000 (around €33,500) into or out of Denmark.

The Danish money laundering provisions have recently been revised and the scope of required reporting under these provisions has been expanded implying that compliance with the money laundering provisions may be relevant even before funds are transferred.

14 Are the laws and regulations outlined above expected to be amended to any material extent in the foreseeable future? If so please describe a timescale and the possible impact of the proposed changes.

The rules and regulations laid down in the securities laws and marketing laws are to a great extent based on EU directives and are as such subject to revision upon the adoption of new EU directives within these fields. Thus, we expect the Executive Order to be amended consequent to the implementation of the new Prospectus Directive.
Typical fund vehicles

1 What is the local structure commonly used for private equity funds? How does the law of your jurisdiction classify a private equity fund structured in that way? Please consider and describe any requirement to register the fund with local regulatory authorities.

1.1 Local structures

The local structures most commonly used for domestic private equity funds are either:

(a) Spanish limited liability companies (Sociedad Anónima), in which case the resulting structure will be a Sociedad de Capital de Riesgo (SCR); or

(b) investment funds, in which case the resulting structure will be a Fondo de Capital Riesgo (FCR).

1.2 Classification

Both of these local structures have a specific status, regulated by law (Law 1/1999, dated January 5), which is discussed further in paragraph 1.3 below.

1.3 Regulatory registration requirements

Such status can only be acquired if the incorporation of the local structure is authorised by the Ministry of Economy, following a favourable report from the Spanish Stock Market supervisor, the Comisión Nacional del Mercado de Valores (CNMV). For the CNMV to issue its report, a complete application on the proposed SCR or FCR must be filed by the promoter, describing, among other things, the nature of the project, the identity of its promoters, the means and resources of the SCR or FCR and the types of proposed investors.

After the incorporation of the local structure has been authorised by the Ministry of Economy, it must be incorporated and registered both with the Registrar of Companies and with the CNMV, which will thereafter supervise its activity. Supervision by the CNMV entails, most notably, the regular presentation of information prepared by the local structure according to the content and format requirements established by the CNMV, and the CNMV’s capacity both to inspect and discipline the structure.

1.4 Other possible structures

The regional Basque Government has regulated a specific corporate structure for channelling private equity investments, in the form of Sociedades de Promoción de Empresas. These are limited liability companies, who must have their principal place of business within the Basque region. Their incorporation needs authorisation from the Basque Government, to be granted in terms substantially similar to those of the SCR. After incorporation, they will be subject to supervision by the Basque Administration.

While other corporate local structures are legally possible, the local structures described above are the only ones that are locally recognised as specialising in private equity. It would also be possible to create Collective Investment Schemes (CIS) specialising in private equity (Especializado en valores no negociados). Such schemes are heavily regulated and their creation requires an administrative authorisation from the CNMV after filing a request in terms substantially similar to those outlined above. However, the existing limitations on concentration and diversification ratios generally render these CIS unattractive as vehicles for channelling private equity investments.
2 Are foreign limited partnerships treated differently to the local structure described in the response to question 1? If so, what are the differences and does it depend on the jurisdiction of origin of the limited partnership?

2.1 Difference in treatment

The treatment of overseas limited partnerships will be entirely different from that of the local structures described in response to question 1.

2.2 Outline of treatment

Overseas partnerships are unregulated structures (or at least not regulated by the CNMV) and their distribution will be subject to the ordinary rules governing offers (see further the response to question 4 below). The jurisdiction of origin of the limited partnership does not make a difference from a regulatory standpoint.

Traditionally there have been substantial uncertainties as regards characterisation for tax purposes with respect to those non-Spanish entities that do not adopt the form of a corporation. The absence of a clear tax regime and the existence of procedural issues have created significant difficulties for Spanish investors, who have refrained from directly investing in these kinds of entities except in cases where their tax treatment was not an issue.

New tax rules are applicable, as from 1 January 2003, to non-corporate foreign investment vehicles. Under the current wording, such entities will be tax transparent if they have a legal nature similar to entities that would be tax transparent under Spanish law, such as civil corporations, joint proprietorships, estates or similar associations. Whether or not a limited partnership or a foreign fund qualifies as a tax transparent entity is still to be decided by the tax authorities. Thus, we consider that the scenario of tax treatment of overseas funds remains uncertain even if the new law has established clear procedural rules.

2.3 Jurisdictional differences

Specific restrictive tax provisions are applicable to investments channelled through tax haven jurisdictions, such as Guernsey, Jersey, Cayman and Maltese limited partnerships.

3 Are foreign corporate structures treated differently to the local structure described in the response to question 1? If so, what are the differences and does it depend on the jurisdiction of origin of the corporate structure?

3.1 Difference in treatment

From a regulatory standpoint, neither the corporate structure nor the jurisdiction of origin will make a difference: rules governing offers should always apply. Even if the overseas structure has been defined as a CIS in its jurisdiction of origin, it may be advisable not to attempt its distribution in Spain as a CIS, but rather under the general rules. The reason for this is that overseas CIS can only be distributed as such in Spain if so authorised by the CNMV, and the CNMV will not authorise them unless such CIS belong to a class equally recognised by Spanish regulations, which would normally not be the case.

From a tax standpoint, corporate structures provide a clearer investment scenario than partnership schemes, as explained in the response to question 2 above.
3.2 Jurisdictional differences

Specific restrictive tax provisions are applicable to investments channelled through tax haven jurisdictions, such as Guernsey, Jersey and the BVI.

Promotion and marketing issues

4 What restrictions (if any) are imposed by the laws of your jurisdiction on promoting and marketing the funds described above? Are there any restrictions on who can promote the funds in question or are there any registration or authorisations required for the person promoting?

4.1 General restrictions

Offers in Spain are regulated by Royal Decree 291/92, dated 27 March (the Decree). Its regulations will apply, among others, when it is deemed that promotional activities are being carried out in Spain. “Promotion” is defined as any form of communication directed at promoting the acquisition of the offered stocks. In any case, there is a presumption that promotional activities are being carried out whenever the means of communication employed are telephone calls originating from the promoter or the offeror, door to door visits, personalised mailings, emails or other electronic means used in a distribution campaign.

4.2 Promotional activity

The first issue to be decided is, therefore, whether the promotion or marketing of the overseas fund in Spain can be considered as a “promotional activity”. This would not be the case if the information concerning the overseas fund had been supplied to Spanish customers at their request, or on an individual basis.

If it is deemed that promotional activities are being carried out in Spain (as will often be the case), the registration of certain information with the CNMV will be requested. The stringency of this requirement varies depending on the nature of the investors to whom the offer is directed. Offers directed to the general public will necessitate the registration of a complete prospectus, audited reports and other complementary information, which can be quite a complex procedure. However, if the investors to whom the offer is addressed are institutional investors or high net worth individuals, the offer may benefit from one of the exceptions allowing for the registration of simplified information (see further the response to question 5 below).

5 Are there any exemptions from the restrictions identified above? Please advise how to ensure that any marketing will fall within applicable exemptions and avoid formalities to the maximum extent possible.

5.1 General exemptions

There are various distinct cases in which the offer of an overseas fund to Spanish customers may benefit from the registration of simplified information. The main cases are:

(a) offers made exclusively to institutional investors, such as pension funds, CIS, insurance companies, credit entities and registered broker-dealers (Sociedades de Valores), who, professionally and usually, invest in securities. Such acquirors may not transmit the securities to investors belonging to a class other than those described before;
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(b) offers made to less than 50 investors (regardless of whether they are institutional investors or not);

(c) offers made for an amount of less than €6,010,121. All offers made within a 12 month period will be considered to form part of a sole offer for the purposes of determining whether the indicated threshold has been reached. There has been some discussion as to which offers should be taken into account for this purpose, and although there is no authoritative interpretation, consensus appears to be that for this purpose only offers (i) by the same promoter or fund and (ii) of securities of the same class ought to be considered; or

(d) offers where customers must individually invest at least €150,253 each.

5.2 Private individuals

As can be seen, private individuals do not, as such, feature on the list. However, they can be considered to be covered by exemption (b) and in many cases their investment will be structured, for local tax reasons, through a CIS, thus falling under the exemption set out in (a) above.

5.3 Practicalities

Formalities required include the following:

(a) a prior communication to the CNMV by the fund, the promotor, or whomever will act as distributor;

(b) filing and depositing with the CNMV documents evidencing the fund’s issuance of the securities to be distributed to Spanish customers, the characteristics of these securities, and the rights and obligations they confer upon those holding them.

The CNMV may, and typically will, ask for further information. All in all, the procedure of registration takes between four and six weeks.

6 If the fund or promoter has a branch office or associate in your jurisdiction that is appropriately regulated for promotion of vehicles such as the fund how would this affect the answers provided to questions 4 and 5 above?

Under Spanish regulations, promotion of investments can only be executed by an investment services firm, authorised by the Ministry of Economy or the branch of an investment services firm authorised in another EEA Member State. The fact that the overseas fund is being promoted by any such entity will not affect the responses provided to questions 4 and 5 above.
7 Will the use of the Internet or a website to promote a fund in your jurisdiction be possible and, if so, would it have any impact on the answers provided above? Please consider any special rules concerning the use of email and any conditions or constraints that apply to the use of the Internet or a website generally. Please also consider whether it would be possible to operate a website with secure access granted only to specified institutional investors and individuals.

The use of the Internet or a website to promote a fund in Spain will not automatically imply that promotional activities are being carried out in Spain (subject to compliance with the marketing restrictions set out in the response to question 4 above). In particular, no promotional activities will be deemed to be being carried out if access to the website has been limited to entities or individuals having a pre-existing relationship with the fund or the promoter (for example, evidenced by the use of PINs and passwords). In this case, the fund could be marketed within the limits described in the responses to questions 4 and 5 above.

Please also refer, however, to the response to question 14 below.

8 Will marketing in accordance with the answers above lead to the establishment of a place of business in your jurisdiction? If so, what would the consequences be for the fund or promoter?

On the basis that marketing is conducted from outside Spain, or through personal visits to Spain by representatives of the fund for meetings with investors, from a regulatory perspective the answer should be no. As regards tax, the permanent establishment risk should be assessed following OECD guidelines, although, if properly structured, a marketing activity carried out under such terms should not, as a general rule, create a permanent establishment risk. However it is never possible to give a full answer to this question without knowing in more detail what the fund promoter proposes to do and with what other business activities it may be concerned, particularly if advice to investors is involved, and specific advice should always be taken in advance of carrying out any marketing activities in Spain.

Offer documentation

9 In order to demonstrate knowledge and compliance with the restrictions outlined above would you recommend the use of any particular wording in any offer documentation? Please provide an example of any such wording and indicate whether its use is mandatory or advisory.

9.1 Unapproved funds

Assuming that no fund marketing activities at all are undertaken in Spain it is advisable to include appropriate restrictive wording in all the fund documentation. A possible wording would be as follows:
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“This (document) has not been deposited, nor have its contents been registered with the CNMV. No promotional activities are being carried out in Spain in relation to the fund. No filing has been made with the CNMV concerning this Fund, and all available information must be provided directly by the Fund to the Spanish customer. Any decision as to whether or not to acquire/subscribe parts of the Fund must be negotiated directly between the customer and (the Fund).”

9.2 Exempted marketing

If some promotional activities are to be carried out, with the marketing of the fund being directed at any of the categories of investors detailed in paragraph 5.1 above, and only a limited amount of information will be filed with the CNMV, it may also be advisable (although it is not mandatory) to include certain wording in the fund documentation presented to Spanish customers. Possible wording would be as follows:

“The fund has registered information with the CNMV in application of the exemptions established in article 7 of Royal Decree 291/92, dated March 27, and it may only be promoted to the categories of customers and in the terms established therein. No one falling outside such categories should rely on any of the information in this (document). The transmission of this (document) to any customer in Spain other than the categories specified is unauthorised and may contravene the Stock Market Act. Accordingly, prior to accepting an application from any applicant who claims to fall within any of the above categories, verifiable evidence of the applicant’s status may be required.”

9.3 Customer initiative

In the event that no publicity is being carried out in Spain, and further to the inclusion of the indicated wording in the fund documentation, it may be advisable to ask customers to sign a document stating that information concerning the fund has been provided to them at their request.

10. Is there any requirement that the offer documentation or any part of it should (a) be in your local language or (b) deal with any other local considerations (e.g. tax)?

10.1 Language requirements

Documents filed with the CNMV that are to be used in an offer addressed to the general public must be translated to the Spanish language. If the offer is not to be addressed to the general public, but to a limited group of investors (such as described in point 5 above), there is no rule to the effect that the use of the Spanish language in any offer documentation is mandatory. Customarily, the fund documentation will be presented either in English or in Spanish.

10.2 Local considerations

Although the offer document can contain limited representations as to taxation and a general risk warning that prospective investors should take their own advice, it is customary for the document to contain detailed but generic representations as to how the fund and its investors in Spain are to be taxed.
Penalties for non-compliance with marketing restrictions

11 In the event of a breach of any of the restrictions outlined above what are the possible consequences by way of criminal or regulatory sanctions and civil claims by investors against the fund or promoter?

11.1 Regulatory sanctions

Breach by an unauthorised person of the restrictions on offers set out in the response to question 4 above is an administrative offence, and in the event of contravention the person responsible may be liable to a fine, imposed by the Ministry of Economy on a favourable report from the CNMV. The fine may be one of the following: an amount equal at least to the benefits obtained but no greater than five times those benefits; or if this criterion cannot be applied, the highest of the following amounts: 5% of the resources of the person in breach of the restriction, 5% of the proceeds used to perpetrate the infringement, or €300,506.

Further to the fines imposed on the person responsible, in the case of corporate entities the individuals acting as its directors could also face fines (the highest of the following amounts: up to 5% of the resources used to perpetrate the breach, or €300,506) and personal sanctions (a suspension in their functions as directors for a period of up to three years, or disqualification from acting as directors for a period ranging from five to ten years). The personal sanctions will only affect individuals carrying on their activities in Spain.

Breach by an unauthorised person of the restrictions on offers is not treated as a criminal offence and therefore no criminal sanctions are attached to it.

11.2 Civil claims

In the event that an investor has made a commitment to the fund on the basis of unlawful marketing by the fund or promoter, the contract could be voidable at the instance of the investor, on the basis of having received insufficient information, for example if no prospectus had been registered where it was necessary. In such a case, the customer will be entitled to recover monies paid out and to receive compensation for any loss sustained as a result of the investment (unless a court were to hold that in all the circumstances the information put at the customer’s disposal had been sufficient, fair and not misleading, in which case the court has the discretion to allow the investment to stand).

11.3 Additional sanctions

The fact that the promoter is unregulated or even not established in Spain will not exclude the imposition of sanctions by Spanish authorities. It is also worth pointing out that if the promoter, though unregulated in Spain, is subject to regulation in its place of establishment, the CNMV would be likely to liaise with its local regulator and the promoter could therefore also face sanctions in its country of establishment, and would consequently risk suffering reputational damage.
Additional factors

12 Are there any additional legal, licensing or other requirements or restrictions in your jurisdiction which may impact on any marketing undertaken in accordance with the answers above?

Promotion of investments in Spain may be carried on in terms that are complete, fair and not misleading. This may require rewording of the documents used in other jurisdictions. If a prospectus is to be used for retail distribution, it will have to be translated into Spanish. The promoter must also appoint a paying agent in Spain who will be responsible for handling payments to and from investors.

13 Are there any other matters you ought to bring to our attention (i.e. exchange controls, money laundering, public offer regulations)?

Spanish regulations contain detailed anti-money laundering provisions. However, this issue would arise at the time of accepting commitments to the fund, rather than during initial marketing.

14 Are the laws and regulations outlined above expected to be amended to any material extent in the foreseeable future? If so please describe a timescale and the possible impact of the proposed changes.

Although there are certain modifications to the present regulations in the pipeline, none of them seems very immediate. One of the proposed regulations would notably facilitate the promotion of overseas funds to institutional or qualified investors, waiving in these cases the requirement that a prospectus or other information be filed, provided the promotion was contained in strictly defined terms both in respect to the persons to whom it is addressed and in respect to the terms in which it is made.

It is also worth noting that Spain has implemented the Electronic Commerce Directive. This has the broad effect that, for certain forms of communication that originate in another EEA Member State, which are electronic in nature (e.g. delivered via a website) and in relation to which certain other conditions apply, the promotion involved ceases to be regulated by Spanish promotional restrictions (as discussed in the responses to questions 4 and 5 above) and will instead be regulated by the relevant provisions of the law of the originating Member State.
Typical fund vehicles

1 What is the local structure commonly used for private equity funds? How does the law of your jurisdiction classify a private equity fund structured in that way? Please consider and describe any requirement to register the fund with local authorities.

1.1 Local structure

The investment fund structures available in Portugal are as follows:

(a) undertakings for collective investment in transferable securities\(^{14}\);
(b) special undertakings for collective investment\(^ {15}\); and
(c) venture capital funds (FCR).

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\(^{14}\) The concept of an undertaking for collective investment in transferable securities (OICVM) replaces the former concept of an investment fund. OICVMs were introduced by Decree-Law n. 252/2003, of 17 October 2003, amending the legal framework applicable to investment funds (fundos de investimento mobiliário or FIM), and thus adapting Portuguese legislation to the amendments introduced to Council Directive n. 85/611/CEE of 20 December 1985.

An OICVM is a collective undertaking without legal personality. Its assets belong to the investors (or participants) in co-ownership. Nonetheless, the assets in the OICVM cannot be used to satisfy any personal debts of the unitholders.

The assets in the fund are represented by participation units without a nominal value, which represent an ideal share in the assets of the OICVM. An OICVM's portfolio must be invested in highly liquid assets, such as:

- listed securities and instruments of the monetary market;
- recently issued non-listed securities, provided that the issue conditions include an undertaking to make a listing request;
- participation units in other OICVMs;
- banking deposits;
- listed derivative financial instruments; or
- unlisted derivative financial instruments, provided that they meet certain conditions.

In addition, the law establishes strict limits as to the percentage of the portfolio that may be allocated to each type of the assets listed above.

OICVMs can be open-ended or closed ended, depending on whether the number of participation units to be issued is predetermined.

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\(^{15}\) Special undertakings for collective investment (Organismos Especiais de Investimento or OEI) are a particular type of OICVM, thus subject to the regime of Decree-Law 252/2003, of 17 October 2003 and to the CMVM Regulation n. 15/2003, which further develops the OEI regime.

The OEI's name must reflect its investment policy and thus must always contain the wording “special undertaking for collective investment”.

OEIs are characterised by a more flexible asset portfolio, which may be comprised of, inter alia:

- securities;
- participation units in other OICVMs;
- derivative financial instruments and liquidity; and
- other durable assets of assessable value, which are not real estate properties.

This particular type of undertaking may enter into loan transactions of securities and/or cash, as well as securities repo transactions or derivative transactions, up to a limit of 50% of the net global value of the fund’s asset portfolio.

OEIs are not subject to a minimum portfolio size. In addition, the net global portfolio value of an OEI may be lower than the minimum value generally set for OICVMs (i.e. €1.25 million).

The minimum subscription value of participation units is €15,000 (or €30,000, if the OEI’s assets are mainly comprised of durable assets – long lasting assets, such as equipment, machinery, but in no case immovable assets).

Moreover, and unlike other OICVMs, OEIs may have less than 100 investors, provided that such is permitted in the management regulations.
Venture capital funds – which are neither limited partnerships nor corporate vehicles - are the most commonly used structures for private equity funds investing in venture capital. This is not only because it is the legal framework specifically enacted for venture capital, but also because the investment constraints established by the regime applicable to the vehicles listed under (a) and (b) above are not appropriate for this type of investment policy.

1.2 Classification

Decree-Law n. 319/2002 of 28 December 2002, as amended, establishes the legal framework applicable to private equity activity in Portugal. This legal statute sets forth the conditions for incorporation and activity of the two venture capital vehicles available in Portugal: venture capital funds (FCR) and venture capital companies (SCR).

**FCRs**


There are two types of FCR, used according to the profile of the prospective investors:

(a) FCRs for sophisticated investors (FIQs), and
(b) FCRs for the general public (FPs).

The Decree-Law referred to above provides an exhaustive list of sophisticated investors, which includes:

(a) the State and other national or foreign public entities;
(b) EU and international financial institutions;
(c) SCRs and FCRs;
(d) credit institutions;
(e) financial companies;
(f) investment companies;
(g) collective investment vehicles and their respective management companies;
(h) insurance companies;
(i) management companies of pension funds;
(j) holding companies;
(k) foundations and associations;
(l) open ended companies;
(m) entities placing units on behalf of third parties;
(n) independent consultants; and
(o) holders of qualified stake-holdings in the entities referred to in (c) to (k).

The minimum capital required for FCRs (either FIQs or FP) is €1 million.
Portugal

The management of FCRs must be entrusted to a management company, as FCRs do not have a legal personality. Such management companies cannot hold more than 30% of the units\(^{16}\) in each FCR managed by them.

Management companies of FIQs can be either:

(i) an SCR;
(ii) a regional development company; and/or
(iii) any management company legally authorised to manage close-ended investment funds.

\textbf{SCRs}

An SCR must be incorporated as a public limited company (\textit{Sociedade Anónima}, S.A.), and is subject to a minimum capital requirement of €750,000.

Investment in venture capital is still taking its first steps in Portugal. Most market participants have past experience in undertakings for collective investment, which explains the popularity of FCRs over SCRs.

\section*{1.3 Regulatory registration requirements}

\textbf{FCRs}

FCRs are subject to the supervision of the Portuguese Securities Market Commission (CMVM).

Subscription of units in FIQs is subject to prior registration with the CMVM.

The incorporation of FPs is subject to prior authorisation by the CMVM and the subscription of the units to prior registration.

The CMVM may request the submission of additional information, as well as demand that amendments are made to the documents provided.

In addition, a prospectus containing information on the FP and the management company must be approved by the CMVM.

\textbf{SCRs}

SCR are subject to prior registration with the CMVM.

\section*{2 Are foreign limited partnerships treated differently to the local structure described in the response to question 1? If so, what are the differences and does it depend on the jurisdiction of origin of the limited partnership?}

\subsection*{2.1 Difference in treatment}

Foreign limited partnerships themselves are not subject to prior registration or authorisation of the CMVM.

Distribution of the units of foreign limited partnerships will be subject to the rules governing offers of securities. This will not depend on the structure of the limited partnership, or its jurisdiction of incorporation, but only on the nature of the offer (whether public or private). The rules are discussed further in the response to question 4 below.

\(^{16}\) The term units will be used for any rights or interests of participants in private equity funds regardless of the legal form adopted by such vehicles.
In the case of public offers of the units of foreign limited partnerships, in more than one EU Member State, the supervising authority of the EU Member State (where such partnership has its head office) will be entitled to approve the prospectus. The prospectus should include a comparative analysis between Portuguese law and the law of the State where the partnership has its head office. In addition, the prospectus must include reference to the tax framework applicable in Portugal to the units, the financial institution that will represent the partnership in Portugal and the way in which all relevant information to the public shall be published, and from what source it will be available.

3 Are foreign corporate structures treated differently to the local structure described in the response to question 1? If so, what are the differences and does it depend on the jurisdiction of origin of the corporate structure?

Please refer to the response to question 2 above.

Promotion and marketing issues

4 What restrictions (if any) are imposed by the laws of your jurisdiction on promoting and marketing the funds described above? Are there any restrictions on who can promote or any registration or authorisations required for the person promoting?

4.1 The difference between public offers and private placements

Public offers

An offer of securities is deemed to qualify as a public offer if it is addressed to undetermined private investors, including offers placed with the use of mass media marketing tools and offers to at least 200 persons.

Private placements

Under Portuguese law, an offer of securities is deemed a private placement if:

(i) it is possible to identify the addressees and those addressees are not more than 200 persons resident in Portugal; and

(ii) in the marketing operation no mass media marketing tools are used.

In addition, a private placement also occurs when the offer of securities is addressed exclusively to institutional investors (i.e. credit institutions, investment firms - within the definition of Council Directive 93/22/EEC, collective investment undertakings, management companies of collective investment undertakings, insurance companies, management companies of pension funds, pension funds and other duly incorporated financial institutions).

As FIQs are only offered to institutional investors, marketing of the units in FIQs is always governed by the rules applicable to private placements.

4.2 The rules relating to public offers and private placements

Public offers

A public offer of an FP is subject to the following restrictions:

(i) the CMVM must not only authorise the incorporation of the FP, but also the offer itself; the offer announcement may only be published after such authorisation is granted and must contain certain prescribed information;
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(ii) the offer announcement must be published at the time of the disclosure of the prospectus in the mass media (and in the Stock Exchange Bulletin if the units are intended to be listed);

(iii) all marketing material is subject to prior authorisation of the CMVM;

(iv) placement and promotion of units in FPs must be made by financial intermediaries\(^\text{17}\) authorised to carry on placement of public offers in Portugal, either because such entities:

(a) have been incorporated in Portugal and duly registered before the Portuguese Central Bank and CMVM;

(b) have been duly registered before the Portuguese Central Bank and CMVM under the free provision of services regime pursuant to Directive 2000/12/CE (in case of credit institutions) or Directive 93/22/CE (for investment companies); or,

(c) have a branch in Portugal; a branch may be established in the case of European Union companies pursuant to the Directive 2000/12/CE (for credit institutions) and Directive 93/22/CE (for investment companies) under the free establishment regime\(^\text{18}\);

(v) upon termination of the offer, its outcome is immediately assessed by the financial intermediary (or in the stock exchange if the units are to be listed).

Private placements

Typically, FPs (by their nature) will not make private placements. If an FIQ is to make a private placement, the subscription of its units is subject to prior registration with the CMVM. There are no additional requirements.

If a foreign vehicle is to make a private placement, it is not necessary to obtain prior authorisation from the CMVM or to prepare and submit a prospectus. If the units of foreign limited partnerships were to be listed on a regulated market, then the private placement would need to be subsequently notified to the CMVM for statistical purposes. It is not common for this notification requirement to apply in relation to private placements, as the units are not usually listed\(^\text{19}\).

5 Are there any exemptions from the restrictions identified above? Please advise how to ensure that any marketing will fall within applicable exemptions and avoid formalities to the maximum extent possible.

Offers where the minimum consideration paid by any investor is €50,000 are exempt from the rules applicable to public offers and private placements.

In addition, and as stated above in the response to question 4, Portuguese law allows a simplified marketing procedure for private placements.

\(^{17}\) Financial intermediaries are:

a) credit institutions and investment firms authorised to exercise financial intermediation activities in Portugal;

b) managing entities of collective investment undertakings authorised to exercise this activity in Portugal;

c) entities with functions correspondent to those referred to in the previous items that are authorised to exercise any financial intermediation activities in Portugal.

\(^{18}\) In the case of non-EU companies (and credit institutions) a branch may be established pursuant to an authorisation procedure to be filed before the Central Bank and the CMVM. Non-EU branches are subject to both prudential and business of conduct local rules.

\(^{19}\) Such communication must be forwarded to the CMVM (using a standard form) within a period of 10 working days following the issue of the securities or their registration in the holders’ bank account.
6 If the fund or promoter has a branch office or associate in your jurisdiction that is appropriately regulated for promotion of vehicles such as the fund how would this affect the answers provided to questions 4 and 5 above?

The answers to questions 4 and 5 above would not be affected.

7 Will the use of the Internet or a website to promote a fund in your jurisdiction be possible and, if so, would it have any impact on the answers provided above? Please consider any special rules concerning the use of email and any conditions or constraints that apply to the use of the Internet or a website generally. Please also consider whether it would be possible to operate a website with secure access granted only to specified institutional investors and individuals.

As a general rule, all financial services may be carried out at a distance (including through the internet). Thus, placement of units may be carried on through an Internet site for both public offers and private placements. The site must be managed by a financial intermediary authorised to carry out the placement of securities in Portugal. Fifteen days before the site is made available to the public, the financial intermediary must grant the CMVM access to the site and provide the following information on:

a) security and reliability;

b) data confidentiality and integrity;

c) the information made available on the site;

d) the equipment used, including the mode of access to the Internet, indication of the Internet Service Provider and whether the server is the intermediary's own or the site is hosted on the server of an Internet Service Provider;

e) an indication of the target population for the services to be provided, including whether they are institutional or non-institutional investors and whether or not they are resident in Portugal and if not, their respective countries of residence;

f) the form and method of establishing a contractual relationship with the investors, plus a draft of the relevant contract.

The site ought to clearly specify when an agreement is deemed to enter into force. Please note that in the case of retail investors the agreement will only enter in force three days after the execution of the agreement. During those three days the retail investor is granted a right to withdraw from the agreement and may walk away without penalty or need to provide a reason for doing so.

A copy of an identification document must be provided to the financial intermediary before any investor's instruction is executed.

Before the financial intermediary executes an instruction it must disclose the estimated cost of the transaction on the basis of

a) the price established by the investor; or

b) the latest market price if no indication of the price has been specified by the investor.

The financial intermediary must provide its clients with information on the status of execution of the instruction and confirm when a transaction has been performed.
8 Will marketing in accordance with the answers above lead to the establishment of a place of business in your jurisdiction? If so, what would the consequences be for the fund or promoter?

A place of business will only be deemed to have been established whenever a “relevant connection” is deemed to exist with the Portuguese territory. A relevant connection is deemed to exist whenever:

(a) subscriptions of units relate to securities traded on Portuguese Markets,

(b) the services (i.e., the activities and actions involved in such services) are carried out in Portugal,

(c) the fund or the entity representing the fund discloses in Portugal information relating to activities and actions regulated by Portuguese law\(^{20}\).

From a tax perspective, the risk that the fund or the promoter is deemed to have a permanent establishment in Portugal should be accessed according to the guidance in an OECD Convention.

A definitive answer will depend on the particular situation.

Offer documentation

9 In order to demonstrate knowledge and compliance with the restrictions outlined above would you recommend the use of any such wording and indicate whether its use is mandatory or advisory.

In a private placement of units, we would suggest that the following wording is included in the relevant documentation:

“Each of the fund and its legal representatives has agreed that (i) it has not directly or indirectly taken any action or offered, advertised or sold or delivered and will not directly or indirectly offer, advertise, sell, re-sell, re-offer or deliver any units in circumstances which could qualify as a Public Offer pursuant to the Código dos Valores Mobiliários (the Portuguese Securities Code) or otherwise than in accordance with all applicable laws and regulations and (ii) it has not directly or indirectly distributed and will not directly or indirectly distribute any document, circular advertisements or any offering material except in accordance with all applicable laws and regulations”.

\(^{20}\) According to Portuguese tax law (pursuant to the OECD Convention), permanent establishment is deemed to exist in the following scenario:

- existence of a “place of business”, i.e. a facility such as premises or, in certain instances, machinery or equipment;
- place of business must be “fixed”, i.e. it must be established at a distinct place with a certain degree of permanence;
- the carrying on of the business of the enterprise through this fixed place of business are subject to both prudential and business of conduct local rules.
Is there any requirement that the offer documentation or any part of it should (a) be in your local language or (b) deal with any other local considerations (e.g. tax)?

10.1 Language requirements

In the case of foreign vehicle the prospectus may be drafted in one of the languages commonly used in the financial markets. The requirement for the document to be in the Portuguese language has recently been relaxed, for both public and private offer documents. The CMVM may, however, require that the prospectus for a public offer include an addendum in Portuguese describing the main characteristics and risks of the units being offered.

10.2 Local considerations

In the case of units issued by foreign vehicles, the CMVM may require that the offer document includes a legal opinion confirming that the fund has been properly incorporated and the units issued in accordance with the applicable law. The offer document should also include a comparative analysis between Portuguese rules and rules of the jurisdiction where the vehicle has been incorporated. As stated above, a prospectus only has to be prepared for public offers.

Penalties for non-compliance with marketing restrictions

11 In the event of a breach of any of the restrictions outlined above what are the possible consequences by way of criminal or regulatory sanctions and civil claims by investors against the fund or promoter?

11.1 Criminal sanctions

It is a criminal act for the representatives of a fund to engage in conduct that creates a false or misleading impression as to the market or price or value of its units by disclosing false, incomplete, exaggerated or biased information whenever such conduct is deemed to induce another person to buy or subscribe the units of the fund. A maximum imprisonment of three years or a fine may be imposed.

The officers (including controllers) of the financial intermediary (acting as promoter of the fund), will also be guilty of an offence if they are shown to have consented to the offence, and may be liable to imprisonment for a term not exceeding two years or a fine.

11.2 Regulatory sanctions

Failure to comply with the rules on public offers may be deemed either a very serious or a serious offence.

The carrying on of a regulated activity - placement of securities - by a non-authorised person is a very serious offence.

The disclosure of information not written in Portuguese or without translation to Portuguese, when required, is a less serious offence.
The following financial penalties may be imposed by the CMVM:

a) between €25,000 and €2.5 million for very serious offences;
b) between €12,500 and €1.25 million, for serious offences;
c) between €2,500 and €250,000, for less serious offences.

In addition to the penalties described above, the CMVM may apply the following disciplinary measures:

a) the offender may be required to return the money and property transferred under the relevant agreements and pay an amount equal to the profits accrued from the unauthorised business;
b) the offender may be restrained from carrying on his/her profession or from performing management or direction functions in any financial intermediary;
c) publication, at the expense of the offender, of a statement disclosing to the public the penalty applied;
d) cancellation of permission to carry on the regulated activity.

11.2 Civil claims

According to the Portuguese Securities Code, the fund/promoter may be liable for damages suffered by investors due to misleading information included in the offer document (except if evidence is provided that they acted without fault).

In addition, the fund/promoter may be required to compensate the investors for breach of contractual obligations, e.g., whenever evidence is provided that the carrying out of their activities caused a loss to the investor.

Additional factors

12 Are there any additional legal, licensing or other requirements or restrictions in your jurisdiction which may impact on any marketing undertaken in accordance with the answers above?

No.

13 Are there any other matters you ought to bring to our attention (i.e. exchange controls, money laundering, public offer regulations)?

Money laundering rules are contained in Decree-law nr. 325/95, dated 2 December 1995 and Decree-law nr. 313/93, dated 15 September 1993.

Under such laws credit and financial institutions are subject to a number of disclosing and reporting duties whenever incorporated in Portugal or whenever such entities have branches or agents established in Portugal.
Credit institutions and financial institutions are required to:

- verify the identity of the investors by demanding that full identification and a copy of the relevant documents is provided;
- restrain from carrying out an investment order, with a duty to report to the authorities, if there is any suspicion of money laundering.

Thus, credit institutions and financial intermediaries are required to have in place a system and train staff to ensure that all relevant suspicions are reported to the authorities and that no transaction is in fact carried on if a suspicion has arisen (thus the relevant moment to determine if a reporting obligation exists is when the subscription order is being executed).

14 Are the laws and regulations outlined above expected to be amended to any material extent in the foreseeable future? If so please describe a timescale and the possible impact of the proposed changes.

The Portuguese Securities Code was recently amended by Decree-law nr. 66/2004, dated 24 March 2004, which entered into force on 25 March 2004. It is expected that in the near future some existing regulations will be amended by CMVM. The changes will most likely affect procedural rules and not the material regime applicable to incorporation and distribution of FCRs or units in other foreign vehicles.
Typical fund vehicles

1 What is the structure commonly used for private equity funds? How does the law of your jurisdiction classify a private equity fund structured in that way? Please consider and describe any requirement to register the fund with local regulatory authorities.

1.1 Local structure

The local structure most commonly used for domestic private equity funds is the closed-ended fund Fondo Comune d'investimento Mobiliare di Tipo Chiuso (Fondo Chiuso). It is defined, by article 1, letter l) of Legislative Decree, 24 February 1998, n. 58, as an independent property, divided into units, belonging to a plurality of investors.

1.2 Classification

The Fondo Chiuso is regulated by articles 34 and ff. of above-mentioned Legislative Decree n. 58/1998 and by regulations of the Banca d'Italia (amongst others, 1 July 1998 and 20 September 1999) and of the Commissione Nazionale per la Società e la Borsa (Consob) (amongst others, 1 July 1998, n. 11522 and 14 May 1999 n. 11971).

The Fondo Chiuso belongs to the general category of Organismi di Investimento Collettivo in Valori Mobiliari (OICVM), as defined by article 1 of Directive 85/611/EEC.

1.3 Regulatory registration requirements

The basic elements comprising the fund structure are:

(a) the management company (Società di Gestione del Risparmio - SGR);
(b) the assets of the fund;
(c) the investors;
(d) the custodian bank (Banca Depositaria).

The management company

The SGR is structured as a limited liability company in the form of an S.p.A. (Societa per Azioni). The SGR must be authorised by the Bank of Italy and is included in a special register.

It acts on behalf of the investors in the fund and in their interest. Under Italian law the SGR assumes the obligations and responsibilities of a mandatory agent (mandatario) vis-à-vis the investors in the fund.

The SGR assumes full responsibility for the management of the fund, including all decisions to invest and divest. Notwithstanding, it can delegate management functions (deleghe di gestione) to qualified intermediaries (for example other SGRs), which must carry out their role within the guidelines given by the management company.

The SGR draws up the by-laws (Regolamento) of the Fondo Chiuso, which must be approved by the Bank of Italy.
The Regolamento provides, amongst other things, the following rules:

(a) the fund's name;

(b) the qualification of investors, if the Fondo Chiuso is reserved to qualified investors (Fondo Chiuso Riservato): qualified investors are those included in the list set out in the article 1, letter h), of the Ministerial Decree of 24 May 1999, n. 22821.

(c) the purpose of the fund (including the investment policy);

(d) the subscription term for units in the fund: the subscription must be closed within 18 months from the authorisation of the Regolamento by the Bank of Italy22;

(e) the minimum subscription size;

(f) the feature of the fund certificates;

(g) the rules concerning the method and frequency of the calculation of the fund unit value;

(h) the rules concerning the method and frequency of the publication of the fund unit value;

(i) the life of the fund, which for the Fondo Chiuso cannot exceed 30 years plus an extension of three years (periodo di grazia);

(j) the terms and conditions of distributions: the proceeds of the fund can also be distributed to investors as advance payments during the life of the fund;

(k) the cost sharing: the costs charged to the fund (including the management fee), those charged to the SGR and those charged to the investors must be indicated; and

(l) the rules concerning liquidation of the fund.

The custodian bank

The Banca Depositaria, which is also a regulated entity (a credit institution), ensures the conservation of the assets held by the Fondo Chiuso and verifies the legality of the issue of units in the fund and the redeeming of the same.

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21 Ministerial Decree n. 228/1999, provides that qualified investors are:
(i) investment companies, banks, stockbrokers, asset management companies (Società di Gestione del Risparmio), variable capital investment companies (Società di Investimento a Capitale Variabile), pension funds, insurance companies, bank group holding companies and persons registered in the lists under Articles 106, 107 and 113 of the Consolidated Act of laws on banking and credit sector (the Consolidated Banking Act);
(ii) foreign persons authorised to carry out, by virtue of regulations in force in their countries of origin, the same activities carried out by the persons described above;
(iii) banking institutions; and
(iv) natural persons and juridical entities and other entities, in each case with specific competence and experience in operations relating to financial instruments. Such specific competence and experience should be expressly declared in writing by those natural persons, or by the relevant legal representatives of such juridical or other entities.

22 For a public offer, the 18 month term would start from the issuance of the placing document (Prospetto Informativo).
2 Are foreign limited partnerships treated differently to the local structure described in the response to question 1? If so, what are the differences and does it depend on the jurisdiction of origin of limited partnership?

2.1 Difference in treatment

The marketing and offering in Italy of foreign OICVMs (which includes funds) is subject to different supervisory authority controls according to whether they are harmonised or non-harmonised OICVMs. As mentioned in paragraph 2.3 below, most foreign private equity funds will fall into the category of non-harmonised OICVMs, whether they take the form of limited partnerships or corporate vehicles, as they will be closed-ended. The differences with Italian private equity funds are explained further in this paper.

2.2 Harmonised OICVMs

In general, article 42 of Legislative Decree n. 58/1998 provides that the offer in Italy of harmonised foreign OICVMs (i.e. OICVMs pursuant to Directive 85/611/EEC) must in the first instance be communicated to the Bank of Italy and Consob. The offering can start only two months after receipt of that communication. During such period, the authorities can (i) ask for further clarification/documentation or (ii) prohibit the offering.

2.3 Non-harmonised OICVMs

The offer in Italy of non-harmonised OICVMs (i.e. the OICVMs that aren’t subject to the Directive, including, closed-ended funds and, in general, all foreign companies substantially similar to closed-ended funds) is subject to prior authorisation by the Bank of Italy, which will consult with Consob before giving its decision.

2.4 Bank of Italy approval

The purpose of the Bank of Italy is:

(a) to monitor the foreign financial instruments which are introduced in Italy;
(b) to grant authorisation only to foreign funds whose structures are similar to that of the Italian funds.

The above-mentioned communication or authorisation can be avoided if no offer is to be made in Italy, either through long-distance communications (for example, the delivery of an offering circular or information memorandum). Consequently, there should be no offer in Italy if the investor expresses its interest in the foreign initiative and goes abroad to the place where the management company of the fund is located to sign the form of adherence to the fund. Obviously, this behaviour shouldn’t be a remedy to elude the application of the Regulation. This could happen if the described procedure is utilised for example by more than two investors.

3 Are foreign corporate structures treated differently to the local structure described in the response question 1? If so, what are the differences and does it depend on the jurisdiction of origin of the corporate structure?

See the response to paragraph 2 above.
Promotion and marketing issues

4 What restrictions (if any) are imposed by the law of your jurisdiction on promoting and marketing the funds described above? Are there any restrictions on who can promote or any registrations required for the person promoting?

4.1 Authorisation restrictions

The promotion and the marketing of units of a Fondo Chiuso is considered by Italian legislation as a servizio di investimento (investment service). Such activity is limited to authorised intermediaries, for example:

(a) intermediaries registered in the list prepared under article 107 of the Consolidated Banking Act;

(b) SGR;

(c) banks; and

(d) investment companies.

4.2 Investment incentive restriction

Other restrictions are provided by the rules of the Italian Law relating to the investment incentive (sollecitazione all’investimento). Each public offering or promotion of, among other things, Fondo Chiuso units must be considered as an investment incentive, in compliance with the provision of article 1, letter t) of Legislative Decree n. 58/1998. Article 94 of the mentioned Legislative Decree n. 58/1998, provides that such offering or promotion must first be communicated to Consob, with a document (prospetto informativo) containing the details of the issuer and the products which are going to be offered.

5 Are there any exemptions from the restrictions identified above? Please advise how to ensure that any marketing will fall within applicable exemptions and avoid formalities to the maximum extent possible.

5.1 Authorisation requirement

There is no exemption from the authorisation requirement. Nevertheless, a Decree of the Minister of Economy and Finance will be enacted in the near future to define (inter alia) the investment services.

5.2 Investment incentive exemptions

Article 100 of the Legislative Decree n. 58/1998 (as executed by article 33 of Consob Regulation n. 11971/1999) expressly provides that the investment incentive restrictions do not apply, amongst other things, if the offers:

(a) are addressed only to “professional investors”;  
(b) are addressed to no more than two hundred investors;  
(c) concern financial instruments the value of which does not exceed €40,000;  
(d) require a minimum unitary investment of €250,000.
6 If the fund or promoter has a branch office or associate in your jurisdiction that is appropriately regulated for promotion of vehicles such as the fund how would this affect the answers provided questions 4 and 5 above?

The answers provided to questions 4 and 5 above would not be affected.

7 Will the use of the Internet or a website to promote a fund in your jurisdiction be possible and, if so, would it have any impact on the answer provided above? Please consider any special rules concerning the use of email and any conditions or constraints that apply to the use of the Internet or a website generally. Please also consider whether it would be possible to operate a website with secure access granted only to specified institutional investors and individuals.

According to Consob communications\(^\text{23}\), the promotion of Fondo Chiuso units by Internet or a website should be dealt with in accordance with Article 32 of Legislative Decree 58/1998 and Article 72 (and following) of Consob Regulation n. 11522/1998, concerning methods of long-distance promotion and marketing of financial instruments.

Article 72 of Consob Regulation n. 11522/1998 regulates the methods of long-distance communication that permit the establishment of contact between the promoter and the investor\(^\text{24}\).

The above-mentioned methods must maintain the privacy and confidential character of the information and messages.

8 Will marketing in accordance with the answers above lead to the establishment of a place of business in your jurisdiction? If so, what would the consequences be for the fund or promoter?

The general answer is no, on the basis that marketing is conducted from outside Italy, or through personal visits to Italy by representatives of the fund for meetings with investors. Nevertheless, it is necessary to know the specific details of the offering of the fund’s units (and what other business activities may be involved) in order to give a complete answer. Specific advice should always be taken in advance of carrying out any marketing activities in Italy.

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\(^{24}\) The provisions of article 72 f.i. govern the marketing of investment services, financial instruments and other financial products by authorised persons based on means of distance communications permitting a contact to be established with individual investors:
   a) with the possibility of dialogue or other forms of rapid interaction;
   b) with or without the possibility of rapid interaction where the documents or messages have a contractual content.
Italy

Offer documentation

9 In order to demonstrate knowledge and compliance with restrictions outlined above would you recommend the use of any particular wording in any offer documentation? Please provide an example of any such wording and indicate whether its use is mandatory or advisory.

9.1 Public offers

If the fund’s units are offered to the public, as mentioned previously, a prospetto informativo should be drawn-up according to the provision of Consob Regulation n. 11971/1999. The prospetti informativi must conform with the format of the example drafts attached to the above-mentioned Regulation.

9.2 Non-public offers

If no public offer is to be made, the use, in the offering circular, of specific wording such as the following is strongly recommended:

“This document does not constitute an offer or a solicitation by any person in any jurisdiction. In particular, this document may not be distributed to the public in Italy or used in connection with any offer for subscription or sale of securities in Italy.”

10 Is there any requirement that the offer documentation or any part it should (a) be in your local language or (b) deal with any other local considerations (e.g. tax)?

10.1 Language requirements

As far as it is assumed that the fund is not authorised by the Bank of Italy and is not actively marketed to Italian investors, there is no obligation to translate the offer documentation into Italian.

Otherwise, if the foreign fund is going to be marketed in Italy, its offering is communicated or authorised by Bank of Italy (see paragraph 2 above) and the offering documentation is translated into Italian. Furthermore, with regard to non-harmonised funds, the legal representative must certify the compliance of the translated document with the original one.

10.2 Local considerations

The public offering of foreign financial instruments (included shares issued by a foreign entity) to Italian investors is subject to the issuing of a prospetto informativo. Article 98, paragraph 1 of Legislative Decree n. 58/1998, (as executed by the above-mentioned Consob Regulation n. 11971/1999) provides that if a prospetto informativo is approved by the competent authorities of a member of the EU, the same document (prospectus) can be used in Italy on condition that it has been recognised by Consob. Article 10 of the above-mentioned Consob Regulation n. 11971/1999, sets out the conditions necessary to obtain recognition.

If a new prospetto informativo must be drafted for Italian investors, it should follow the format provided by Consob Regulation n. 11971/1999. There are particular provisions for non-harmonised closed-end funds.
If none of the formats approved by Consob (and attached to the above mentioned regulation) can be used, the offeror can ask Consob to provide for the content of a suitable prospetto informativo.

**Penalties for non-compliance with marketing restrictions**

11 In the event of a breach of any of the restrictions outlined above what are the possible consequences by way of criminal or regulatory sanctions and civil claims by investors against the fund or promoter?

11.1 Criminal sanctions

The unauthorised carrying out of specific activities, such as the management of closed-end funds, is punishable, in accordance with Article 166 of Legislative Decree 58/1998, by a jail term from six months up to four years and a fine from €2,065 up to €10,329.

11.2 Regulatory sanctions

Specific penalties are provided by Article 191 of Legislative Decree 58/1998 if a public offering (sollecitazione all’investimento) is made which infringes the rules outlined above. For example:

- any person who makes a public offering without the preliminary communication to the Consob (as mentioned in paragraph 4.2) shall be punished by a pecuniary administrative sanction of between one tenth and one half of the total value of the financial products marketed, but not exceeding €103,291 – if the total value of the financial products marketed is not determinable, a pecuniary administrative sanction of between €5,164 and €103,291 shall apply;
- a pecuniary administrative sanction of between €5,164 and €103,291 shall also be applied to anyone who makes a public offering in violation of prescriptions relating the publication of the prospectus (prospetto informativo) and its authorization by Consob.

11.3 Civil claims by investors

Investors can sue the promoter and the Consob\(^{25}\) in order to ask the indemnity for suffered damages by the executing investment incentive in violation of the above-mentioned rules and prescriptions.

**Additional factors**

12 Are there any additional legal, licensing or other requirements or restrictions in your jurisdiction which may impact on any marketing undertaken in accordance with the answer above?

The promotion of funds in Italy is always subject to the general laws governing the sale of financial products, including general third party liability and unfair competition rules.

\(^{25}\) Supreme Court sentence 3 March 2001, n. 3132.
13 Are there any other matters you ought to bring to our attention (i.e. exchanges controls, money laundering, public offer regulations)?

The promotion of funds in Italy can be subject to general money laundering rules under Law Decree 3 May 1991, n. 143, converted into the Law on 5 July 1991, n. 197 (Article 4).

14 Are the laws and regulations outlined above expected to be amended to any material extent in the foreseeable future? Is so, please describe a timescale and the possible impact of the proposed changes.


On 3 February 2004 a bill was published relating to the reorganisation of the savings system. This, when approved by Parliament, should create a new authority for the custody of savings.
Typical fund vehicles

1 What is the structure commonly used for private equity funds? How does the law of your jurisdiction classify a private equity fund structured in that way? Please consider and describe any requirement to register the fund with local regulatory authorities.

1.1 Local structure

The local structure most commonly used for domestic private equity funds is a Belgian company limited by shares (naamloze vennootschap/société anonyme). In recent years however, the legislator has created two specific types of undertakings for collective investment (instelling voor collectieve belegging, ICB/organisme de placement collectif, OPC) to further investments in private equity:

(a) the public privat (publieke privat/privaat public); and
(b) the private privat (private privat/privaat privé).

So far, there are only two “public privaks”. The regulatory framework of the “private privat” was established last year and this investment vehicle may have a more promising future.

1.2 Classification

A private equity fund structured as a company limited by shares will be unregulated, if its shares are not offered to the public in Belgium.

In contrast, a private equity fund in the form of a public privat or a private privat must obtain a licence.

Public Privat

A public privat can be constituted either by way of a contract, or as an investment company.

(i) Public privaks of the contractual type (privaat)

The privaat takes the form of an investment fund (beleggingsfonds/fonds de placement), i.e. a set of jointly owned assets managed by a management company (beheersvennootschap/société de gestion), which, as such, has no legal personality.

(ii) Public privaks as investment companies (beleggingsvennootschap/ société d’investissement)

These have their own legal personality. They can be incorporated as:

(a) a company limited by shares (naamloze vennootschap/société anonyme); or
(b) a limited partnership by shares (commanditaire vennootschap op aandelen/ société commandite par actions)

and are subject to company law, except for specific provisions.

The securities representing ownership in a public privat or privaat are offered to the public and must be listed on a stock exchange.

Private Privats

A private privat can only be constituted as an investment company. It can be incorporated as:

(a) a company limited by shares (naamloze vennootschap/société anonyme);
(b) a limited partnership by shares (commanditaire vennootschap op aandelen/société en commandite par actions); or
Belgium

The latter form is comparable to a limited partnership in the UK and can in all likelihood be regarded as a tax transparent vehicle under the laws of the UK and most continental jurisdictions.

The private privak is a non-public company: capital cannot be raised through a public offer. In order to preserve the private character of the investment, each investor (whether an institution or an individual) must invest at least €250,000. As a result, the special rules for public offer of securities do not apply.

1.3 Regulatory registration requirements

**NV/SA**

“Ordinary” NV/SA are unregulated.

**Public Privaks**

Belgian public privaks must be registered with the Banking, Finance and Insurance Commission (BFIC).

In order to be registered, a public privak must prove that it has the technical and financial resources, and an accounting and administrative organisation, appropriate to its activities. The board of directors has to be sufficiently autonomous and the members of the board of directors must have appropriate experience to carry out their functions properly.

An essential document for the application is the prospectus. It must include all the information which potential buyers of units need to be able to make a full assessment of the investment policy and of the related risks.

A public privak can only be registered if the BFIC (i) has authorised the management company or the investment company, (ii) has accepted the management regulations or the contents of the articles of association, and (iii) has approved the appointment of the depository.

**Private Privaks**

A private privak (private privak/privaat privé) can only be constituted as an investment company in the legal forms mentioned above in paragraph 1.2.

The private privak must comply with, amongst other things, the following requirements:

- the funds must be exclusively collected from private investors, who must each invest at least €250,000 on their own behalf (this means both institutions and individuals);
- the sole purpose of the fund must be that of collective investment in securities issued by non-listed companies;
- the existence of the private privak must be limited to a maximum period of 12 years; and
- no investor can have more than 16% of the voting rights in the fund (other criteria regarding subscription to shares in the fund also apply).

The articles of association of the company must be submitted, for approval, to the Ministry of Finance and the private privak has to be registered with a special service at the Ministry of Finance.
2 Are foreign limited partnerships treated differently to the local structure described in the response to question 1? If so, what are the differences and does it depend on the jurisdiction of origin of the limited partnership?

If a foreign limited partnership seeks funding in Belgium, without making a “public offer”, it will not be treated differently to the local structures described in response to question 1.

However, if a foreign limited partnership wants to make a public offer in Belgium, EEA funds can benefit from a European passport of the prospectus that must be made available. The original prospectus must be supplemented with only a few elements (see below). In contrast, a non-EEA fund will be obliged to draft a new prospectus.

3 Are foreign corporate structures treated differently to the local structure described in the response to question 1? If so, what are the differences and does it depend on the jurisdiction of origin of the corporate structure?

If a foreign corporate structure seeks funding in Belgium, without making a “public offer”, it will not be treated differently compared to the local structures described in response to question 1.

However, if a foreign corporate structure wants to make a public offer in Belgium, EEA funds can benefit from a European passport for the prospectus that must be made available. The original prospectus must be supplemented with only a few elements (see below). In contrast, a non-EEA fund will be obliged to draft a new prospectus.

Promotion and marketing issues

4 What restrictions (if any) are imposed by the laws of your jurisdiction on promoting and marketing the funds described above? Are there any restrictions on who can promote the funds in question or are there any registration or authorisations required for the person promoting?

4.1 Non-public offers

NV/SA

A non-public offer is not regulated. No specific rules apply as to who can promote and market shares in a private fund, or to whom the marketing can be directed. Investors in a fund incorporated as an ordinary company limited by shares can be approached by using a private placement memorandum.

Nevertheless, some restrictions can be found in the Act of 14 July 1991 on commercial practices and the information and protection of consumers (Wet van 14 juli 1991 op de handelspraktijken en de voorlichting en de bescherming van de consument), which is not applicable to public offers. The Act includes specific rules on promoting and marketing of products, including rules dealing with advertising (misleading, comparative), the obligation to inform consumers, illegal selling practices and abusive provisions and is applicable to financial instruments, including securities representing ownership in a private equity fund structured as a company limited by shares.
Also, based on the Royal Decree nr. 71 of 30 November 1939 on peddling with securities and door-to-door selling of securities, goods or food products (Koninklijk Besluit van 30 november 1939 betreffende het leuren met roerende waarden en demarchage met roerende waarden en goederen of eetwaren) it is prohibited to sell securities, or to advertise for such selling, through house calls.

**Private privaks**

No specific rules apply as to who can promote and market shares in a private privak, or to whom the marketing can be directed. Private privaks, by their nature, are not capable of making a public offer. Each investor must invest at least €250,000 in the private privak, thereby ensuring that the securities offer is not “public” (see the response to paragraph 5).

### 4.2 Public offers

In contrast, the BFIC is responsible for supervising the promoting and marketing of public issues of securities. This responsibility is currently defined in the Act of 22 April 2003 on public offers of securities (Wet betreffende de openbare aanbiedingen van effecten); it aims to protect investors by imposing, upon companies wishing to make a public offer of securities, the obligation to provide accurate and complete information so as to enable investors to make an informed judgement.

This is achieved through a prospectus that is submitted to the BFIC’s review before being made available to the public. The prospectus must include all the information which is necessary for the public to be able to make an informed assessment of the company’s assets, financial condition, results and prospects, and of the rights attached to the proposed securities. A public offer of securities can only take place after the prospectus has been approved by the BFIC and has been disclosed to the public.

The criteria for determining whether an offer is public are laid down in the Royal Decree of 7 July 1999. A transaction or offer is considered as being public where one of the following criteria has been met:

(i) advertising is used (announcements in the press, mailing of promotional material, etc.); or

(ii) intermediaries which are not acknowledged as authorised intermediaries are involved in placing the securities; or

(iii) more than fifty non-institutional or non-professional investors are approached.

Other restrictions can be found in the Act of 11 March 2003 regarding certain legal aspects of services of the information society (Wet van 11 maart 2003 betreffende bepaalde juridische aspecten van de diensten van de informatiemaatschappij): i.e. advertising may not be sent by electronic mail (for example, email or short message service on mobile phones) without the prior specific consent of the addressee; the identification of the sender of electronic mail for advertising must be clear.

It is not required that the issuer appoints an intermediary to intervene in the placement of securities that are offered to the public. However, if the issuer decides to appoint an intermediary, the aforementioned Act of 22 April 2003 determines that only intermediaries listed in the law may be involved (such as banks and investment firms).
Public privaks, by their nature, will always be subject to the public offering restrictions because a public privak must be listed on a stock exchange: the general criteria that are mentioned above for determining whether an offer is public, therefore, will not apply. No other specific rules apply as to who can promote and market shares in a public privak, or to whom the marketing can be directed.

5 Are there any exemptions from the restrictions identified above? Please advise how to ensure that any marketing will fall within applicable exemptions and avoid formalities to the maximum extent possible.

Even if a transaction would normally qualify as a public offer, based on the above mentioned criteria of the Royal Decree of 7 July 1999, it is not considered to be public if:

(a) the offer amounts to at least €250,000 per individual investor (whether an institution or a “high net worth individual”); or

(b) is intended exclusively for certain categories of professional and institutional investors listed in the Royal Decree.

A list of professional investors is laid down in the Royal Decree of 7 July 1999 (KB 7 juli 1999 over het openbaar karakter van publieke verrichtingen). The list includes, inter alia, financial institutions and stockbroking firms.

These rules are the general law. Public and private privaks have their own rules enlarging on the general law. Public privaks are always deemed to make a public offer, as they are listed on the stock exchange, so no exemptions exist. Private privaks, as mentioned in paragraph 4.1, are not capable of making a public offer: one of the criteria of a private privak is that each investor must invest at least €250,000, which brings it directly within sub-paragraph (a) above.

6 If the fund or promoter has a branch office or associate in your jurisdiction that is appropriately regulated for promotion of vehicles such as the fund how would this affect the answers provided to questions 4 and 5 above?

The answers to questions 4 and 5 would not be affected.

7 Will the use of the Internet or a website to promote a fund in your jurisdiction be possible and, if so, would it have any impact on the answers provided above? Please consider any special rules concerning the use of email and any conditions or constraints that apply to the use of the Internet or a website generally. Please also consider whether it would be possible to operate a website with secure access granted only to specified institutional investors and individuals.

Assuming that the fund will only involve investments addressed at professional investors or investors who at least invest €250,000 (i.e. a “private offer”), the use of the Internet or a website will be possible, subject to the above-mentioned rules that apply with the necessary changes.

If the offer is public, the issuer must take into account that all advertisements regarding the offer, including publicity on a website, must be submitted to the BFIC beforehand.
Belgium

The BFIC will also require that the prospectus made available online is the same as the approved prospectus.

Concerning the use of emails, additional restrictions can be found in the Act of 11 March 2003 regarding certain legal aspects of services of the information society (Wet van 11 maart 2003 betreffende bepaalde juridische aspecten van de diensten van de informatiemaatschappij): i.e. advertising may not be sent by electronic mail (email, short message service on mobile phones, etc) without the prior specific consent of the addressee, except if the addressee is a legal entity; the identification of the sender of electronic post for advertising must be clear.

It would be possible to operate a website with secure access granted to certain specified institutional investors and individuals, if they qualify as institutional investors and high net worth investors in accordance with the criteria laid down in the Royal Decree of 7 July 1999.

8 Will marketing in accordance with the answers above lead to the establishment of a place of business in your jurisdiction? If so, what would the consequences be for the fund or promoter?

The marketing under the conditions described above does not lead to the establishment of a place of business in Belgium.

Offer documentation

9 In order to demonstrate knowledge and compliance with the restrictions outlined above would you recommend the use of any particular wording in any offer documentation? Please provide an example of any such wording and indicate whether its use is mandatory or advisory.

Wording such as the following is recommended in the case of non-public offers:

“This private placement memorandum does not constitute an offer to sell or the solicitation of an offer to purchase or subscribe any securities issued or to be issued by the private equity fund. The distribution of this document in certain jurisdictions may be restricted by law. Any person who is in the possession of this private placement memorandum is required by the private equity fund to inform themselves about, and to observe, any such restrictions. Any such person should understand that no action has been or will be taken which would allow an offering of the securities to the public in Belgium. Accordingly, the securities may not be offered, sold or delivered, and neither this document nor any other offering materials relating to these securities may be distributed or made available to the public in Belgium.

The securities must not be offered, distributed or sold in Belgium except in compliance with the requirements for a non-public offering laid down in the Articles 2 & 3 of the Royal Decree of 7 July 1999. Hence, individual sales of these securities to any person in Belgium may only be made if:

(i) no unauthorised intermediary has been involved; and
(ii) the offer has not been advertised to more than 50 individuals; and
(iii) not more than 50 potential investors have been approached.
Belgium

Individual sales of these securities to professional investors, as defined in Article 3 of the Royal Decree of 7 July 1999, are permitted, as well as individual sales for a consideration of at least €250,000 per investor.”

10 Is there any requirement that the offer documentation or any part of it should (a) be in your local language or (b) deal with any other local considerations (e.g. tax)?

10.1 Language requirements

Assuming that the offer will not be public, there are no specific requirements that the offer documentation should be in one of the local languages, or deal with any other local considerations. In the case of a public offer of the securities issued by the fund, the offer documentation should be in French, Dutch or German, the three local languages in Belgium, or in any other language accepted by the Banking, Finance and Insurance Commission. English is accepted by the BFIC. When drafting a prospectus in English, a summary in French or Dutch must also be submitted to the BFIC.

10.2 Local considerations

Because a private offer is not regulated, there is no mandatory language to be included in the offer documentation.

However, if the offer is public, a prospectus that can benefit from its European passport must be supplemented with information on (i) the tax treatment of the proceeds of the investment, (ii) the financial institutions who sell the securities and (iii) the methods used to make notices to the public available.

Penalties for non-compliance with marketing restrictions

11 In the event of a breach of any of the restrictions outlined above what are the possible consequences by way of criminal or regulatory sanctions and civil claims by investors against the fund or promoter?

11.1 Criminal and regulatory sanctions

The breach of public offering rules (e.g. not drafting a prospectus, publishing false information, etc) may give rise to the following sanctions:

(a) criminal sanctions: imprisonment from one month up to one year and/or a penalty of €75 up to €15,000;

(b) administrative sanctions imposed by the Banking, Finance and Insurance Commission: penalties from €2,500 up to €2.5 million.

Breaches of the Act of 14 July 1991 on commercial practices and the information and protection of consumers (see the response to question 6) may lead to criminal sanctions: namely, imprisonment up to 5 years and/or penalties up to €100,000, depending on the nature of the violation.

Breaches of the Act of 11 March 2003 regarding certain legal aspects of services of the information society (see question 7) may lead to criminal penalties: fines up to €25,000 depending on the nature of the violation.
11.2 Civil claims

The Act of 22 April 2003 on public offers of securities provides specific sanctions for the issuer and/or the persons responsible for the content of the prospectus in the event the prospectus and related materials are not complete, correct or include false statements.

Investors in a private placement can use general principles of Belgian pre-contractual liability for claims for damages suffered, based on a false or incomplete information memorandum. However, there is no established Belgian case law on the matter.

Additional factors

12 Are there any additional legal, licensing or other requirements or restrictions in your jurisdiction that may impact on any marketing undertaken in accordance with the answers above?

No.

13 Are there any other matters you ought to bring to our attention (i.e. exchange controls, money laundering, public offer regulations)?

The Act of 11 January 1993 on preventing the financial system from being used for money laundering (Wet 11 januari 1993 tot voorkoming van het gebruik van het financieel stelsel voor het witwassen van geld) contains no specific measures with regard to private equity funds. In practice, however, it is recommended that money laundering checks are undertaken.

There are no exchange control requirements applying in connection with the marketing and promotion of interests or shares in a private equity fund.

14 Are the laws and regulations outlined above expected to be amended to any material extent in the foreseeable future? If so please describe a timescale and the possible impact of the proposed changes.

Although no dramatic changes should be expected in the short term, there are some pending legal developments that make it necessary to follow up on the regulatory framework described above:

- a law will be adopted shortly on certain forms of collective management of investment portfolios; the current proposal has created a legal structure for possible new types of investment vehicles, although such categories must be given further shape in future Royal Decrees;
- the following European Directives await their implementation in Belgian law:
  - the Prospectus and Market Abuse Directives;
  - the Financial Instruments Markets Directive (new ISD);
  - the Directive on Distance Marketing of Consumer Financial Services.
Typical fund vehicles

1 What is the local structure commonly used for private equity funds? How does the law of your jurisdiction classify a private equity fund structured in that way? Please consider and describe any requirement to register the fund with local regulatory authorities.

1.1 Local Structure

The local structure most commonly used for private equity funds is a limited partnership established under the Limited Partnership Act 1907.

1.2 Classification

A private equity fund structured as a limited partnership is not classified for regulatory purposes.

1.3 Regulatory registration requirements

A private equity fund structured as an Irish limited partnership does not require registration with any regulatory authority.

In order to be properly constituted and to ensure the limited liability of the limited partners the fund requires registration with the Registrar of Companies under the Limited Partnership Act 1907, but the fund itself does not require regulatory approval.

The manager of the fund, if not actually a partner in the fund and if carrying on the management from Ireland, would require to be registered under the Investment Intermediaries Act which implements the Investment Services Directive.

2 Are foreign limited partnerships treated differently to the local structure described in the response to question 1? If so, what are the differences and does it depend on the jurisdiction of origin of the limited partnership?

A foreign limited partnership will not require any particular Irish regulatory approval. Partnerships, whether Irish or non-Irish, are not regarded as bodies corporate for purposes of Irish law and accordingly no different treatment applies to foreign limited partnerships. In particular no distinction is made between a limited partnership established under the laws of one foreign jurisdiction as distinct from another.

3 Are foreign corporate structures treated differently to the local structure described in the response to question 1? If so, what are the differences and does it depend on the jurisdiction of origin of the corporate structure?

No, foreign corporate structures are not treated differently to the local structure described in question 1.
4 What restrictions (if any) are imposed by the laws of your jurisdiction on promoting and marketing the funds described above? Are there any restrictions on who can promote the funds in question or are there any registration or authorisations required for the person promoting?

There are three possible restrictions of which promoters ought to be mindful:

4.1 General restriction on offering participations in a fund

It is prudent to consider a transferable interest in a fund, whether structured as a partnership or a body corporate, as constituting an investment instrument for the purpose of the Investment Intermediaries Act 1995 (as amended) (the IIA Act). A placement agent or similar intermediary by whom the promotion was undertaken would most likely constitute an investment business firm for the purpose of the IIA Act.

An investment business firm is defined as any person (other than a member firm of the Irish Stock Exchange) who provides investment business services or investment advice to third parties on a professional basis. Investment business services is defined to include receiving and transmitting, on behalf of investors, orders in relation to one or more investment instruments.

Subject to what is said below, the person promoting the fund in Ireland would likely be regarded as an investment business firm carrying on business in Ireland and would require authorisation either by the Irish Financial Services Regulatory Authority (IFSRA) or the Competent Authority in another Member State of the European Union which is competent for the purpose of the Investment Services Directive.

A non-Irish investment business firm would not be regarded as operating in Ireland where it has no branch within Ireland and where:

(a) its head or registered office is in a country other than a Member State of the European Union;
(b) its head or registered office is in a Member State of the European Union other than Ireland and it is a firm which does not provide any investment business service in respect of which it is required to be authorised in its home Member State for the purpose of the Investment Services Directive; or
(c) it is a firm which is authorised in a Member State of the European Union other than Ireland for the purpose of the Investment Services Directive but which provides investment business services of a kind for which authorisation under the Investment Services Directive is not available, when it is providing such services, unless it is providing investment business services or investment advice to individuals in Ireland who do not themselves provide one or more investment business services or investment advice to a professional on a professional basis.

A placement agent which is not regulated for the purpose of the Investment Services Directive in Ireland or elsewhere would be restricted from promoting the fund to private individuals in Ireland even if they are high net worth or sophisticated and even if the offer in Ireland is only made to a restricted number of persons and can be regarded as not being an offer to the public.
4.2 Offering interests in a fund structured as a partnership

Additionally, the Unit Trust Act 1990 provides that any person concerned with the management or supervision of a scheme made for the purpose of or having the effect, solely or mainly of providing facilities for the participation by the public as beneficiaries in profits or income arising from the acquisition, holding, management or disposal of securities or any other property whatsoever shall not, without the approval of IFSRA, sell or purchase interests in the scheme or make solicitations in respect of such sale or purchase.

IFSRA’s approval may be subject to such conditions as IFSRA thinks fit to impose.

Any such sale or purchase or solicitation without prior approval or without compliance with any condition to which approval is subject, constitutes an offence.

Offering partnership interests to the public generally in Ireland would fall within Section 9 of the Unit Trust Act and accordingly the prior approval of IFSRA would be required.

There is no definition of what constitutes the public for the purpose of the Unit Trust Act. Promoters and advisers in Ireland tend to be guided by the reference to offers of shares or debentures to the public set out in the Companies Act, 1963 to 2003 (the Companies Acts).

The Companies Acts provide that:

“Any reference in these Acts to offering shares or debentures to the public shall be construed as including a reference to offering them to any section of the public whether selected as clients of the person issuing the prospectus or in any other manner but this shall not be taken as requiring any offer or invitation to be treated as made to the public if it can be properly regarded in all the circumstances is not being calculated to result, directly or indirectly, in the securities becoming available to persons other than those receiving the offer or invitation or otherwise as being a domestic concern of the persons making and receiving it.”

Where an Irish company proposes to issue shares in a non-public offering, it is generally accepted that an offer to 20-25 people would not constitute an offer to the public thus requiring a prospectus. By way of extrapolation, similarly an offer to a number of people in Ireland not exceeding 20-25 would be regarded as not constituting an offer to the public of a scheme or participation in a scheme requiring prior approval by IFSRA. It should be noted however that this is an extrapolation by practitioners and in any particular circumstances appropriate professional advice ought to be taken before promoters conclude that no regulatory approval is necessary.

4.3 Offering interests in a fund structured as a body corporate

It would be unusual for an Irish venture capital fund to be structured as a company because such a fund would be taxable in its own account.

If a fund was structured as a non-Irish body corporate and shares or securities with similar rights in that non-Irish body corporate were being offered it would be necessary to ensure that the offering did not breach the provisions of the Companies Acts regulating the offering in Ireland of shares or debentures of foreign bodies corporate.
The law regulating the offer of securities of non-Irish bodies corporate is set out in a number of different provisions of the Companies Acts and a full analysis of the offering of securities of a non-Irish body corporate is beyond the scope of this note. However it should be possible for promoters of a non Irish body corporate to be satisfied that an offer of securities of the body corporate made in Ireland only to persons whose ordinary business it is to buy or sell shares or debentures (whether as principal or agent) would not require the preparation or filing of any prospectus.

An offer of securities of non-Irish body corporate to persons not falling within that category might require preparation and filing of a prospectus.

It should be noted that sophisticated or high worth individuals do not necessarily fall within the category of persons whose “ordinary business it is to buy or sell shares or debentures”, and thus even a limited circulation in Ireland of offers of securities of a non-Irish body corporate to persons other than institutional investors with the circulation of the form of application for such securities would be a breach of Irish law unless a prospectus compliant with Irish requirements has been prepared and filed with the Companies Registration Office in Ireland. Specific advice should always be sought.

5 Are there any exemptions from the restrictions identified above? Please advise how to ensure that any marketing will fall within applicable exemptions and avoid formalities to the maximum extent possible.

5.1 Exemptions relating to the marketing of limited partnerships

Generally speaking, promoting and marketing funds in Ireland appears to be done on a one to one basis. Where marketing is done on that basis it ought to be possible to avoid breaching Section 9 of the Unit Trust Act and it would be immaterial whether a fund structured as a partnership was an Irish limited partnership or a non-Irish limited partnership. This would still mean that the number of people marketed to would need to fall within the “restricted circle” exemption outlined above in paragraph 4.2.

5.2 Exemptions relating to the marketing of bodies corporate

Where the fund is structured as a foreign body corporate a promotion only to institutional investors would generally be exempt from any restriction on marketing, but specific advice should always be sought.

6 If the fund or promoter has a branch office or associate in your jurisdiction that is appropriately regulated for promotion of vehicles such as the fund how would this affect the answers provided to questions 4 and 5 above?

It would not affect those answers. Regulation of offerings is distinct from regulation of a business activity of a branch office or associate. For reasons of reputation, it may heighten the need to ensure offerings are compliant.
7 Will the use of the Internet or a website to promote a fund in your jurisdiction be possible and, if so, would it have any impact on the answers provided above? Please consider any special rules concerning the use of email and any conditions or constraints that apply to the use of the Internet or a website generally. Please also consider whether it would be possible to operate a website with secure access granted only to specified institutional investors and individuals.

There is no particular prohibition in Irish law on the use of the internet or email for marketing purposes. These would be viewed as an extension of traditional marketing methods and the law applicable to those as detailed above would be equally applicable to offerings by email or the internet. Particular care, however, would need to be taken that an offering being made by email or use of the internet or a website was not one which was capable of being widely accepted so as to constitute an offering to the public. A common method to ensure this in relation to internet access is to have a secure site with limited password access.

8 Will marketing in accordance with the answers above lead to the establishment of a place of business in your jurisdiction? If so, what would the consequences be for the fund or promoter?

On the basis that marketing is conducted from outside Ireland, or through personal visits to Ireland by representatives of the fund for meetings with investors, the answer should be no. However, it is never possible to give a full answer to this question without knowing in more detail what the fund promoter proposes to do and with what other business activities it may be concerned, and specific advice should always be taken in advance of carrying out any marketing activities in Ireland.

**Offer documentation**

9 In order to demonstrate knowledge and compliance with the restrictions outlined above would you recommend the use of any particular wording in any offer documentation? Please provide an example of any such wording and indicate whether its use is mandatory or advisory.

9.1 We would recommend a rubric such as the following:

“If [addressee] does not wish to take an ownership interest in the fund then this information memorandum should be returned to [the promoter]. No person other than the addressee may rely or act upon this information memorandum.”

We would recommend that each offering memorandum be clearly numbered and wording such as the following be included on the cover thereon:

“No. [1] of [max of 25]

This Information Memorandum is addressed solely to [name the addressee] and is furnished solely for the purpose of enabling [addressee] to evaluate the Fund and determine whether to take an ownership interest therein. If [addressee] does not wish to participate in Fund this Information Memorandum should be returned to [sender]. No other person may rely upon, or take any action in respect of, this Information Memorandum.”
10 Is there any requirement that the offer documentation or any part of it should (a) be in your local language or (b) deal with any other local considerations (e.g. tax)?

10.1 Language requirements

If the offer is made only in circumstances that are exempt from regulation as set out above then there is no requirement of law that the documentation be in English.

10.2 Local considerations

Again, if the offer is made only in circumstances that are exempt from regulation as set out above then there is no requirement of law that the documentation deal with local considerations. If the offer document constituted a prospectus offering securities in a non-Irish body corporate, then either:

(a) it would have to be a prospectus in respect of which the mutual recognition provisions provided for in the EU Prospectus Directive could be relied upon and in that case there would require to be added to the prospectus the following:

- a summary of the tax treatment of Irish resident holders of the securities;
- the name and address of the paying agents of securities in Ireland, if any; and
- a statement of how notice of meetings and other notices from the issuer of securities will be given to Irish resident holders of the securities; or

(b) the prospectus would have to comply with the requirements of the Companies Acts.

11 In the event of a breach of any of the restrictions outlined above what are the possible consequences by way of criminal or regulatory sanctions and civil claims by investors against the fund or promoter?

11.1 Criminal sanctions

A breach of Section 9 of the Unit Trust Act may result in an imposition of a fine of up to €12,700 and/or imprisonment for a term not exceeding five years. Additionally where the offence under the Unit Trust Act is proved to have been committed with the consent or approval of or to have been facilitated by any wilful neglect on the part of any person being a director, manager, secretary, member of any committee of management or other controlling authority of such body corporate or an official of such body corporate, that person shall also be guilty of an offence.

A person offering securities of a non-Irish public without a prospectus compliant with Irish law in circumstances where the same is required can be liable on conviction to a term of imprisonment not exceeding two years or a fine not exceeding €5,000 or both. It is likely that application for a criminal sanction would be brought by a regulatory authority or by the Director of Public Prosecutions. Any such application might have an adverse effect on an application for, or for renewal of, regulatory approval to act, for example as an investment business firm.
11.2 Civil claims

Where an investor could demonstrate that failure to comply with Irish law resulted in loss to them then liability in a civil claim would be more likely.

Where a promoter of a fund is acting as an investment business firm but is not regulated as required (see paragraph 4.1 above) then such person would not be able to enforce an agreement entered into with an investor in Ireland if the investor refused to complete its subscription.

12 Are there any additional legal, licensing or other requirements or restrictions in your jurisdiction which may impact on any marketing undertaken in accordance with the answers above?

None specific to the marketing of funds.

13 Are there any other matters you ought to bring to our attention (i.e. exchange controls, money laundering, public offer regulations)?

Ireland has implemented money laundering regulations as required by EU Directives. Money laundering regulation would be more applicable however to actual investments in the fund rather than to marketing.

14 Are the laws and regulations outlined above expected to be amended to any material extent in the foreseeable future? If so please describe a timescale and the possible impact of the proposed changes.

No.
Typical fund vehicles

1 What is the local structure commonly used for private equity funds? How does the law of your jurisdiction classify a private equity fund structured in that way? Please consider and describe any requirement to register the fund with local regulatory authorities.

1.1 Local Structure

Private equity funds in Luxembourg may be established either as:

(a) regulated vehicles, either with a corporate structure or in the form of non-incorporated entities (co-ownership of the fund portfolio without a vehicle with legal personality, managed by a management company and a custodian bank); or

(b) corporate non-regulated vehicles, in particular partnerships limited by shares (sociétés en commandite par actions) or public limited companies (sociétés anonymes).

Non-regulated vehicles usually classify as taxable holding structures (sociétés de participation financière, or SOPARFIs).

Private equity funds must be established as regulated structures if their units or shares are intended to be publicly marketed; public marketing is assumed if the offer of units or shares is not restricted to a limited number of potential investors (circular letter CSSF no. 91/75). Further advice should be sought as to whether public marketing will be deemed to occur in any individual case.

1.2 Classification

Regulated vehicles

A regulated private equity fund will be classified as a Undertaking for Collective Investment (UCI) as regulated by the Luxembourg law on Undertakings for Collective Investment (loi sur les organismes à placement collectif) of 30 March 1988, as amended and restated by the law of 20 December 2002 on undertakings for collective investments (the UCI Law). In addition to the laws in question, various issues are regulated by a series of circular letters issued by the Luxembourg Supervisory Authority (Commission de Surveillance du Secteur Financier, CSSF), the most important being the circular letter no. 91/75 of 21 January 1991 (the legislation is available on the internet site of the CSSF: www.cssf.lu).

Under the CSSF regulation, UCIs (i.e. regulated entities, whether incorporated or not) qualify as venture capital schemes (fonds/sociétés à capital risque) if their investment policy foresees the investment of at least 20% of their net asset value in high risk assets.

Any UCI must provide for a Luxembourg-based custodian and a Luxembourg-based central administration which are both approved by and responsible to the CSSF. The CSSF, in turn, has a responsibility to ensure the adequate protection of investors’ interests. The central administration is, in particular, charged with the regular calculation of the net asset value and, in general, the reporting to and the communication with the investors.

The marketing of units or shares may be effected via banks or financial sector professionals (professionels du secteur financier, psf) and may be organised by nominees.

Non-regulated vehicles

Non-regulated vehicles are usually established as corporate entities and qualify then as regular commercial companies.

The management company of a non-incorporated, regulated scheme may establish investment accounts with a view to marketing the units or shares of UCIs managed by it.
1.3 Regulatory registration requirements

**Regulated vehicles**

A regulated private equity fund is subject to approval by the CSSF; its approval is effected by its inscription on the official list of Luxembourg undertakings for collective investment.

**Non-regulated vehicles**

There is no approval requirement for non-regulated funds, but the lack of regulation may in turn, limit the ability of the fundraiser to market to a wide audience.

2 Are foreign limited partnerships treated differently to the local structure described in the response to question 1? If so, what are the differences and does it depend on the jurisdiction of origin of the limited partnership?

Foreign limited partnerships which qualify in their home jurisdiction as UCIs may be marketed within or from Luxembourg, subject to the approval of the CSSF. They must be, in their respective home country, subject to permanent supervision by a supervisory body that acts to protect the interest of investors. Whether a private equity structure qualifies as undertaking for collective investment, depends on the provisions of the home country legislation. Any private equity structure that does not qualify as a UCI, i.e. that is not regulated under its respective home legislation and, if required, so approved by the CSSF, is treated as any regular commercial entity. This would most probably be the case in relation, for example, to UK limited partnerships which themselves are not regulated. An important notion in this context is that the marketing outside Luxembourg is also controlled by the Luxembourg legislation, which can be of importance for non-European promoters which use the Grand-Duchy as a platform for their EU marketing.

3 Are foreign corporate structures treated differently to the local structure described in the response to question 1? If so, what are the differences and does it depend on the jurisdiction of origin of the corporate structure?

Any UCI requires the approval of the CSSF; following such approval, it may be marketed within or outside of Luxembourg as any Luxembourg-based scheme. Any promotion of interests in corporate schemes which do not qualify as UCIs may be subject to Luxembourg public offer regulations (see further paragraph 4.2 below).

**Promotion and marketing issues**

4 What restrictions (if any) are imposed by the laws of your jurisdiction on promoting and marketing the funds described above? Are there any restrictions on who can promote the funds in question or are there any registration or authorisations required for the person promoting?

4.1 General restrictions

Due to the specific semi-offshore character of Luxembourg, Luxembourg legislation covers not only marketing of financial services or instruments within Luxembourg, but also marketing from Luxembourg, in particular into other EU member states. It is therefore useful to seek advice as to what extent the Luxembourg legislation applies in addition to the target legislation if Luxembourg is used by any promoter as a sort of platform for financial products.
Any private equity scheme which is intended to be publicly marketed must qualify as a UCI under the provisions of the law and therewith becomes a regulated scheme. Whether a scheme is publicly marketed is not precisely answered by the legal and regulatory provisions. The intention to offer units or shares in a scheme to a larger group of investors is sufficient to fulfil this criterion; the limit therefore was set at ten investors.

The CSSF regulation states that the shares or units issued in any scheme which must be regulated have to be of a nominal value of at least €15,000.

Any regulated UCI must publish a prospectus, which must contain certain information as defined by the law. Furthermore, the law provides for the publication of annual and semi-annual reports as well as, on at least every issue or redemption of units or shares, the publication of the net asset value in at least two newspapers one of which must be a Luxembourg newspaper.

4.2 Restrictions on persons promoting private equity schemes

Restrictions apply for persons promoting regulated schemes, i.e. UCIs. Units or shares of UCIs may only be promoted by banks or by persons who are specifically authorised to distribute such units or shares. These persons qualify as psfs and are regulated by the Luxembourg law on the financial sector dated 5 April 1993, as amended (the Financial Sector Law). Any such psf, its directors and shareholders must be approved by the CSSF, must show satisfactory technical and human infrastructure and must have available funds of not less than €620,000. Banks and financial sector professionals from other EU member states may promote units or shares of UCIs within or from Luxembourg without the need to satisfy these provisions, as long as they satisfy the provisions of their home jurisdiction, but must notify such promotion to the CSSF.

5 Are there any exemptions from the restrictions identified above? Please advise how to ensure that any marketing will fall within applicable exemptions and avoid formalities to the maximum extent possible.

Luxembourg legislation is intended to comprehensively cover UCIs and all connected financial services by both the UCI Law and the Financial Sector Law and the connected circular letter of the CSSF.

Whether or not a scheme qualifies as a regulated UCI essentially depends on the promoter’s intention to “publicly” offer the shares or units of such scheme or not: if there is an intention or even the possibility of such public offering, the scheme automatically qualifies as UCI. The question, as mentioned above, can not be answered in a clear-cut way: the offer of shares or units to a limited, individually identified circle of addressees would most probably not qualify as a public offering; any marketing to a wider circle of not individualised, unidentified addressees (e.g. road shows, stands at conferences etc.) may qualify as public offering even if the number of investors is limited. It is crucial to seek advice on this issue in relation to the specific scheme.
6. If the fund or promoter has a branch office or associate in your jurisdiction that is appropriately regulated for promotion of vehicles such as the fund how would this affect the answers provided to questions 4 and 5 above?

The provisions that apply to the establishment, the promotion and the marketing of UCIs relate to the scheme as such. Whether units or shares of the scheme may be marketed by foreign promoters or service providers depends on the application of the relevant EU rules.

7. Will the use of the Internet or a website to promote a fund in your jurisdiction be possible and, if so, would it have any impact on the answers provided above? Please consider any special rules concerning the use of email and any conditions or constraints that apply to the use of the Internet or a website generally. Please also consider whether it would be possible to operate a website with secure access granted only to specified institutional investors and individuals.

There are no specific rules for the promotion of a fund via the Internet. Marketing of financial products via the Internet is subject to the general rules on electronic commerce as contained in the law on electronic commerce dated 14 August 2000. As regards financial services, in particular, the CSSF published a survey in 2001 which, in addition to an analysis of the existing Internet connections used by Luxembourg banks and psf, contains recommendations on how to make appropriate use of the electronic means of communications. One important aspect for the CSSF, which becomes relevant in the context of private equity schemes, is the requirement to provide risk warnings to potential clients via the various technical means (e.g. pop-up windows and similar means). Any such electronic promotion may in no circumstance replace the publication and reporting requirements established by the law. In addition thereto, the above mentioned report (at p. 58) expressly refers to the provisions relating to the prevention of money laundering which must be followed in the event of the internet communication with investors.

8. Will marketing in accordance with the answers above lead to the establishment of a place of business in your jurisdiction? If so, what would the consequences be for the fund or promoter?

The mere establishment or the marketing of a fund in Luxembourg by a foreign, EU promoter does not constitute a permanent establishment for that promoter; the fund is regarded as a financial product and the offer of its units and shares are part of that financial product. Promoting and marketing from a EU member state follows the general EU rules on the free marketing of financial services within the European Union; promoting and marketing from non-EU member states must be specifically approved by the CSSF and requires a Luxembourg based infrastructure (management company, custodian bank etc.). To the extent that infrastructure set up in connection with the establishment of a fund forms part of the promoter’s corporate group, it may constitute a place of business in Luxembourg.
**Offer documentation**

9 In order to demonstrate knowledge and compliance with the restrictions outlined above, would you recommend the use of any particular wording in any offer documentation?

There is no specific text required or recommended for insertion into the prospectus of a UCI, such a document being the central information document for the interested investor. However, one has to bear in mind that private equity schemes established as UCIs are deemed to be reserved for qualified investors investing at least €10,000 in any such UCI. Furthermore, the law and the CSSF regulations contain general information requirements, such as precise indications of the investment policy and risk indications (see, in particular, circular letters of the CSSF no. 91/75 and no. 02/80).

Marketing material may not refer to the approval of the scheme by the CSSF in order to avoid any impression of an evaluation expressed by such approval by the CSSF.

The offer documentation must be available free of cost for any interested investor at the place of business of the relevant fund or its promoter.

10 Is there any requirement that the offer documentation or any part of it should (a) be in your local language or (b) deal with any other local considerations (e.g. tax)?

10.1 Language requirements

French and German are official languages in Luxembourg and any presentation and publication in either of both languages are accepted. For the purpose of the approval of a UCI, the CSSF accepts documentation in English and there is no problem in negotiating with the Supervisory Authority in English. However, official publications which might become necessary, such as the publication of the articles of association of the management company of a UCI, its own articles of association or its management regulations, must be followed by a translation into French or German and any notary deed will be in one of the official languages.

10.2 Local considerations

Although the offer document can contain limited representations as to taxation and a general blandishment that prospective investors should take their own advice, it is customary for the document to contain detailed but generic representations as to how the fund and its investors in Luxembourg are to be taxed.

**Penalties for non-compliance with marketing restrictions**

11 In the event of a breach of any of the restrictions outlined above, what are the possible consequences by way of criminal or regulatory sanctions and civil claims by investors against the fund or promoter?

11.1 Regulatory and criminal sanctions

The UCI Law contains, in its articles 120 ss., various sanctions against the individuals in charge of the management of a UCI; these range from fines to imprisonment. In the event of any irregularities in connection with the management of a UCI, the CSSF may also withdraw its approval by de-registering the UCI from the official list of UCIs.
11.2 Civil claims

In the event that an investor made a commitment to the fund on the basis of unlawful marketing by the fund or promoter, the contract will be voidable at the instance of the investor, who will be entitled to recover monies paid out and to compensation for any loss sustained as a result of the investment (unless a court were to hold that in all the circumstances the promotion had been fair and not misleading, in which case the court has the discretion to allow the investment to stand).

11.3 Additional sanctions

Luxembourg legal practice on UCIs gives specific importance to the promoter of an investment scheme. The promoter has no explicit legal definition or role in the context of the approval of a Luxembourg UCI, but is held responsible by the CSSF for the appropriate management of the relevant UCI. If elements of the specific infrastructure presented in the proposal of a UCI to the CSSF are estimated by the latter to be not entirely satisfactory, the CSSF may request the presentation of a co-promoter which then would typically be a Luxembourg bank or psf. Since the promoter has no defined legal role in the context of the approval of a UCI, there is no formal sanction against such promoter if the UCI does not comply with any specific legal requirement. However, the CSSF will then typically invoke the moral responsibility of the promoter with a view to protecting the investors’ interests.

Additional factors

12 Are there any additional legal, licensing or other requirements or restrictions in your jurisdiction which may impact on any marketing undertaken in accordance with the answers above?

Any offer of units or shares in a UCI must comply with general rules of law, which, in particular, strictly limits any solicitation of financial services (démarchage). Specific advice should also be sought to the extent a promoter standardises its offers and applies general terms and conditions in its subscription forms.

13 Are there any other matters you ought to bring to our attention (i.e. exchange controls, money laundering, public offer regulations)?

The Luxembourg finance sector legislation contains specific obligations in relation to all financial service providers as regards money laundering. Knowledge of the respective customer and monitoring of client relations is, in this context, of particular importance. The CSSF regularly communicates with the finance sector participants on developments in connection with money laundering.

For UCIs, the provisions of the CSSF circular letter no. 91/75 refer to the responsibility of the Luxembourg central administration in relation to measures deemed to the protection of the UCI against money laundering.
14 Are the laws and regulations outlined above expected to be amended to any material extent in the foreseeable future? If so please describe a timescale and the possible impact of the proposed changes.

In the course of spring 2004 an important reform is expected with the law on the so-called sociétés d’investissement à capital risque (SICAR). This will, for the first time, establish a particular legal framework for venture capital and private equity funds, in particular, as regards their corporate form. The law will provide for a flexible regulatory framework for venture capital and private equity funds, including, e.g., the possibility to establish single shareholder structures.

A further important legislative reform will be the reform of the money laundering legislation, which will enlarge the addressees and their responsibility in relation to the prevention of the use of the financial system for money laundering.
Typical fund vehicles

1 What is the local structure commonly used for private equity funds? How does the law of your jurisdiction classify a private equity fund structured in that way? Please consider and describe any requirement to register the fund with local regulatory authorities.

1.1 Local structure

There is no local Swiss structure that is perfectly suitable for private equity funds.

The only viable Swiss structure available to private equity funds in Switzerland is an “investment company”. Indeed, the limited partnerships so often used in other countries do not have any Swiss equivalent.

The investment company is a Swiss corporation limited by shares (société anonyme, Aktiengesellschaft) governed by Articles 620 ff. of the Swiss Code of Obligations (SCO). Ordinarily, a standard Swiss holding company (HoldCo) is set up as a two-layer structure with a wholly owned offshore subsidiary. HoldCo collects funds by issuing shares to the public and the targeted private equity investments are then made through the offshore subsidiary. Several companies structured in this way have been listed on the Swiss Exchange (SWX) over the past few years.

In view of all the disadvantages of the Swiss investment company – including cumbersome capital increase procedures, absence of any redemption rights, extensive shareholders’ rights as compared to the usual limited partnerships structure – the structure that is mainly used for private equity investment vehicles in Switzerland is a foreign limited partnership (please see the response to question 2 below).

1.2 Classification

In the current state of legislation, the Swiss Investment Funds Act of 18 March 1994 (IFA) regulates only:

(i) Swiss contractual open-ended mutual funds; and

(ii) “foreign mutual funds” whether in contractual or corporate form, whose shares or units are offered to the public in or from Switzerland (please see the definition described in paragraph 2.1 below).

The Swiss investment company does not fall within the ambit of the IFA and is thus neither classified, nor subject to supervision as a Swiss investment fund. The public offering of shares in a Swiss investment company is governed solely by the provisions of the SCO applicable to Swiss stock companies generally. Please note however that the current legal framework is under revision (please see the response to question 14 below).

26 The Swiss limited partnership governed by Articles 594 et seq of the Swiss Code of Obligations is a standard general partner/limited partner structure with a general partner fully liable for all the partnership’s liabilities and limited partners liable only for up to the amount of their interest. However, there is a major obstacle to using the Swiss limited partnership as a private equity fund. By law, the general partner must be an individual. Given the nature of private equity investments, individuals do not readily assume such risks.
1.3 Regulatory registration requirements

There is no requirement for a Swiss investment company to become registered with the Swiss investment funds supervisory authority, which is the Federal Banking Commission (FBC) or any other authority. The absence of any redemption right granted to the investors precludes any such registration.

2 Are foreign limited partnerships treated differently to the local structure described in the response to question 1? If so, what are the differences and does it depend on the jurisdiction of origin of the limited partnership?

Limited partnerships, regardless of their home jurisdiction, are generally viewed by the FBC as "foreign mutual funds", which can be marketed only within the constraints of the private placement rules. As indicated in paragraph 1.2 above, such restrictions do not apply to Swiss investment companies.

2.1 Definition of foreign mutual funds

Swiss law defines “foreign mutual funds” (Article 44 IFA) as comprising:

(i) contractual and corporate collective investment schemes where investors have redemption rights (open-ended structures) - this typically encompasses UCITS, FCPRs, unit trusts or SICAVs;

(ii) contractual and corporate collective investment vehicles which do not offer any redemption rights to their investors (closed-ended structures), but which are subject in their jurisdiction of incorporation to fund supervision (e.g. SICAFs or certain Dutch investment companies); and

(iii) other types of closed-ended collective investment structures which, although not regulated as mutual funds in their jurisdiction of incorporation as per (ii) above, do not offer a minimum level of investors’ protection. - the FBC has expansively construed this last category so as to include collective investment schemes which do not offer corporate governance rights similar to those available to shareholders in a Swiss stock company (e.g. voting rights, representation on the board or managing body thereof, etc.).

2.2 Classification of foreign limited partnerships

Under the current Swiss regulatory practice, foreign limited partnership structures fall within (iii) above and are consequently classified as “foreign mutual funds” under Swiss law.

2.3 Marketing restrictions

The public offering in or from Switzerland of units of or shares in a non-Swiss mutual fund is subject to the prior authorisation of the fund by the FBC (Article 45 § 1 IFA and Article 1a of the Implementing Ordinance to the IFA, OIFA).

In accordance with Swiss law, foreign mutual funds may only be authorised by the FBC if:

(a) they are subject in their jurisdiction of incorporation to state supervision comparable to Swiss standards; and

(b) the fund’s organisation as well as investment policy are comparable, as regards investor protection, to those of Swiss funds (Article 45 § 2 IFA).
In practice, the FBC considers that state supervision offered by the Member States of the EEA, the United States of America, Guernsey and Jersey is deemed comparable to that offered by Swiss law.

That being said, private equity funds emanating from these jurisdictions do not meet the comparability test referred to under (b) above to the extent limited partnerships do not offer their investors the minimal level of protection of their rights as required by Swiss law and, in particular, a redemption right. As a result, interests in limited partnerships are only suitable for private placement in Switzerland (please see the response to question 5 below).

3 Are foreign corporate structures treated differently to the local structure described in the response to question 1? If so, what are the differences and does it depend on the jurisdiction of origin of the corporate structure?

Foreign private equity funds taking a foreign corporate structure, regardless of their home jurisdiction, are generally viewed by the FBC as "foreign mutual funds", which can be marketed only within the constraints of the private placement rules. As indicated in paragraph 1.2 above, such restrictions do not apply to Swiss investment companies.

3.1 Classification of foreign corporate structures

A foreign collective investment scheme with a foreign corporate structure is classified under Swiss law as a "foreign mutual fund" (please see paragraph 2.1 above). This qualification results from the practice of the FBC to consider that foreign corporate structures usually do not offer a level of corporate governance rights similar to those available to shareholders in a Swiss stock corporation.

3.2 Marketing restrictions

As indicated in paragraph 2.3 above, the public offering in or from Switzerland of units of or shares in foreign mutual funds is subject to prior authorisation of the fund by the FBC.

Private equity funds taking the form of foreign corporate structures do not meet the comparability test referred to in paragraph 2.3(b) above, to the extent they do not offer their investors the minimal level of protection of their rights as required by Swiss law and, in particular, a redemption right. As a result, shares in collective investment schemes taking the form of corporate structures are only suitable for private placement in Switzerland (please see the response to question 5 below).

Promotion and marketing issues

4 What restrictions (if any) are imposed by the laws of your jurisdiction on promoting and marketing the funds described above? Are there any restrictions on who can promote the funds in question or are there any registration or authorisations required for the person promoting?

4.1 Swiss investment company

As indicated in paragraph 1.2 above, the Swiss investment company does not qualify as an investment fund according to the current state of legislation. As a result, the public offering of shares in a Swiss investment company is governed by the rules applicable to Swiss stock companies generally. Such rules require in particular the preparation of a prospectus.
As regards the authorisation requirements for the promoter (other than the Swiss investment company itself), the public offering of shares in or from Switzerland may only be conducted by a licenced securities dealer.

4.2 Public offering of foreign mutual funds

The public offering in or from Switzerland of units of or shares in a foreign mutual fund requires the prior authorisation of the fund by the FBC (Article 45 § 1 IFA). The criteria for obtaining such authorisation are set out in paragraph 2.3 above.

The concept of “public offering”, within the meaning of the IFA, encompasses “any solicitation which is not exclusively directed to a narrowly limited number of persons”, regardless of the form of the solicitation (e.g. public advertisement, mass mailing, NAV publication, cold calls, road shows etc.).

As already mentioned, private equity funds typically do not meet the authorisation requirements set out by the IFA (please see paragraphs 2.3 and 3.2 above). Unregistered foreign mutual funds may thus only be distributed in or from Switzerland either by way of private placement (please see the response to question 5 below), or at the unsolicited request of the prospective investors.

4.3 Authorisation requirements for the distributor

Any public offering of foreign mutual funds in or from Switzerland requires the prior authorisation of the promoter by the FBC (Article 22 IFA and Article 1a OIFA). Swiss banks, broker-dealers and insurance institutions are exempted from the requirement to obtain such authorisation (Article 23 OIFA).

5 Are there any exemptions from the restrictions identified above? Please advise how to ensure that any marketing will fall within applicable exemptions and avoid formalities to the maximum extent possible.

As indicated above in paragraphs 4.2 and 4.3 above, the authorisation requirements applicable to foreign mutual funds and the distributor do apply where a public offering takes place in or from Switzerland.

On 28 May 2003, the FBC issued a circular on the concept of public offering of mutual funds (FBC Circular No. 03/1), which sets out the criteria for the private placement of units of, or shares in, mutual funds. The criteria distinguishing private placement from public offering are both quantitative and qualitative.

No public offering is deemed to take place in the following circumstances:

(a) Quantitative criteria

The quantitative threshold applied by the FBC to differentiate a public offering from a private placement is whether 20 offerees or more are being approached in a given financial year, regardless of the success of the offer made and, subject to qualitative criteria set out below, of the sophistication, status or wealth of the targeted investors.
In other words, the quantitative threshold only applies to investors who do not fall within the scope of any other exemption (see (b) below), i.e. who neither qualify as “institutional investors”, nor benefit from the discretionary management mandate exemption. Thus, it remains possible to offer units of or shares in an unregistered mutual fund concurrently to an unlimited number of institutional investors and up to 20 other investors.

(b) Qualitative criteria

There are two exceptions, from the authorisation requirement for investment funds, based on qualitative criteria:

Institutional investors

No public offering is deemed to occur if the offer is targeted exclusively at institutional investors. Unregistered foreign funds can thus be offered to an unlimited number of such investors, to the extent that:

(i) the offer is made exclusively to such investors; and

(ii) through the usual channels (e.g. one-to-one contacts, road shows, etc.), without any form of public advertisement.

In substance, the concept of “institutional” investors comprises banks, broker-dealers, fund management companies, insurance companies and pension funds, as well as the treasury departments of large industrial and commercial undertakings. By contrast, independent financial advisers (IFAs) and high net worth individuals are specifically excluded from that definition.

Discretionary management mandate

The distribution of foreign mutual funds by a Swiss financial institution to its existing clients is allowed without any quantitative limitation, to the extent the subscriptions:

(i) are made by the institution itself on the clients’ behalf; and

(ii) are based upon a written discretionary management mandate, the contents of which must meet certain standards.

6 If the fund or promoter has a branch office or associate in your jurisdiction that is appropriately regulated for promotion of vehicles such as the fund how would this affect the answers provided to questions 4 and 5 above?

This would not affect the answers provided to questions 4 and 5 above in any material way, to the extent that any public offering in or from Switzerland of units of or shares in a foreign mutual fund would still be subject to the prior registration of the fund with the FBC (please see paragraph 4.2 above).
Switzerland

7 Will the use of the Internet or a website to promote a fund in your jurisdiction be possible and, if so, would it have any impact on the answers provided above? Please consider any special rules concerning the use of email and any conditions or constraints that apply to the use of the Internet or a website generally. Please also consider whether it would be possible to operate a website with secure access granted only to specified institutional investors and individuals.

Subject to compliance with the marketing restrictions set out in paragraphs 4 to 6 above, there are no special rules which would prohibit the use of the Internet, a website or email to communicate with potential investors. In that respect, the contents of a website would be deemed to constitute a public offering in Switzerland where the website is targeted at prospective investors domiciled in Switzerland (e.g. use of a "ch" domain name, links to other Swiss-specific content, contact details of Swiss representatives/distributors etc.) and the other criteria of a public offering are met.

Under the FBC circular on the concept of public offering, a website would not be deemed to constitute a public offering in Switzerland to the extent:

(a) the offering to Swiss based investors is expressly excluded by a specific disclaimer; or
(b) the access to the website is restricted.

Disclaimer

The disclaimer must be automatically displayed each time the website is accessed. A confirmation from the prospective investor to the effect that he read and understood the disclaimer should also be requested prior to granting access to the rest of the website.

For unregistered mutual funds, the disclaimer must expressly indicate that these may not be distributed in Switzerland. For clarity’s sake, a general disclaimer stating that the website does not constitute a public offering in those jurisdictions where the mutual funds in question have not been authorised is not sufficient.

Secure access to the website

The access restriction must allow verification of the domicile or registered address of the prospective investors. Swiss-domiciled investors should only be able to access marketing and other promotional material relating to funds registered in Switzerland or display contact details of fund distributors authorised in Switzerland.

The actual method for securing access is irrelevant (e.g. questionnaire, online form, password etc.), provided that the investor is prompted for the jurisdiction where he is domiciled. The fund distributor operating the website may rely on the indications provided by the investors.

8 Will marketing in accordance with the answers above lead to the establishment of a place of business in your jurisdiction? If so, what would the consequences be for the fund or promoter?

As regards cross border marketing activities, this does not lead in and of itself to the establishment of a place of business in Switzerland. That being said, the answer to this question must be assessed on a case-by-case basis and specific advice should always be taken prior to carrying out any marketing activities in Switzerland.
Offer documentation

9 In order to demonstrate knowledge and compliance with the restrictions outlined above would you recommend the use of any particular wording in any offer documentation? Please provide an example of any such wording and indicate whether its use is mandatory or advisory.

Assuming that the fund has not been authorised by the FBC and that marketing in Switzerland is limited to private placement (please see the response to question 5 above), the recommended restrictive wording, the use of which is not mandatory, would be as follows:

“The Fund has not been registered with the Swiss Federal Banking Commission as a foreign mutual fund pursuant to Article 45 of the Swiss Mutual Fund Act of March 18, 1994. Accordingly, the [shares/units/interests] in the Fund may not be offered or distributed on a professional basis in or from Switzerland, and neither this [designation of the relevant offering document] nor any other offering materials relating to the [shares/units/interests] in the Fund may be distributed in connection with any such offering or distribution. [Shares/units/interests] may only be distributed in or from Switzerland to institutional investors or without any public offering.”

That being said, as a rule, the use of such selling legend would not have any impact in the event the limits of the private placement are in fact exceeded.

10 Is there any requirement that the offer documentation or any part of it should (a) be in your local language or (b) deal with any other local considerations (e.g. tax)?

10.1 Language requirements

If the offering of units of or shares in foreign mutual funds is limited to private placement (please see the response to question 5 above), there is no requirement as to the language of the offering documentation.

10.2 Local considerations

There is no requirement that the offer documentation deals with any local considerations, although it can contain limited representations as to taxation and a general statement that prospective investors should take their own advice.

Penalties for non-compliance with marketing restrictions

11 In the event of a breach of any of the restrictions outlined above what are the possible consequences by way of criminal or regulatory sanctions and civil claims by investors against the fund or promoter?

11.1 Regulatory and criminal sanctions

The public offering of unregistered foreign mutual funds in Switzerland is a criminal offence (Article 69 IFA). In the event of contravention, the person responsible may be liable to a fine of up to CHF 200,000. – or imprisonment for up to six months.
On the regulatory side, an intentional contravention to Article 69 IFA would in all likelihood be considered as an activity contrary to proper banking practice (Article 3 § 2 litt. c of the Banking Act) and would result in sanctions affecting both the promoter (to the extent it is a Swiss bank/broker-dealer) and the management responsible for the unauthorised offering. In practice, any Swiss regulated bank or broker-dealer involved would run the risk of losing its licence should the breach of the IFA be considered to be serious (Article 23quinquies of the Banking Act).

11.2 Civil claims

Investors who subscribed for units or shares in a foreign mutual fund on the basis of unlawful marketing would be entitled to compensation for any loss sustained as a result of the investment provided that:

(i) the promoter acted with intent or negligence (fault), the fault being presumed; and

(ii) a causal link exists between the loss sustained and the promoter’s breach of the applicable legal provisions, i.e. the unlawful marketing (Article 65 IFA).

11.3 Additional sanctions

In the event the promoter, although unregulated in Switzerland, is subject to official supervision in its home jurisdiction, the FBC would be most likely to liaise with the local regulator and the promoter could therefore face local sanctions as well.

Additional factors

12 Are there any additional legal, licensing or other requirements or restrictions in your jurisdiction which may impact on any marketing undertaken in accordance with the answers above?

There are no additional requirements as regards the distribution and marketing in or from Switzerland of private equity funds.

13 Are there any other matters you ought to bring to our attention (i.e. exchange controls, money laundering, public offer regulations)?

The Swiss Federal Act of 10 October 1997 on the fight against money laundering in the financial sector (MLA) and its implementing ordinances contain detailed anti-money laundering provisions. However, KYC issues typically arise only at the time of accepting commitments to the fund, rather than during the initial marketing process.

27 The defendant (i.e. the promoter) may rebut this presumption by showing that it acted with the due care required under the circumstances.
14 Are the laws and regulations outlined above expected to be amended to any material extent in the foreseeable future? If so please describe a timescale and the possible impact of the proposed changes.

On 14 January 2004, the Swiss Federal Council approved a first draft of a law which would result in a complete overhaul of the IFA. The draft, entitled “Federal Law on Collective Investment Schemes” (the Draft), was drawn up by a panel of experts set up by the Federal Department of Finance. The consultation procedure for the Draft began on 1 February 2004 for a period of three months. The Draft will be subject to modifications taking into account the results of the consultation procedure and the debates of the Swiss Parliament. The entry into force of the new legislation is not expected before 2005.

In view of the recent developments and needs of the markets, the primary aims of the revision are to adapt the existing law to the new EU directive of UCITS and to strengthen the competitiveness of Switzerland as a location for collective investment vehicles.

In particular, it is anticipated that the Draft would introduce the following changes:

• The Draft introduces a new form of Limited Partnership for Collective Investment, which will be mainly governed by the provisions of the Swiss Code of Obligations (SCO) governing limited partnerships generally, but a corporate entity would also be authorised to act as general partner. This would provide the Swiss market with a viable local structure for Swiss private equity funds (please see paragraph 1.1 above).
• The concept of the Investment Company with Variable Capital, which has been inspired by Luxembourg legislation, is one of the most innovative proposals. The capital of such structure is not fixed in advance, but corresponds to the net asset value of the fund. This structure would thus allow the continuous issuing and redemption of shares. Like contractual investment funds, the Investment Company with Variable Capital would obviously be open-ended.
• Swiss investment companies would be classified under the Draft as a form of closed-ended collective investment structure and would thus become subject to investment fund supervision. That being said, they will remain mainly regulated by the relevant provisions of the SCO and stock market regulations.
• The Collective Investment Foundation, which is essentially a creation of practice, has also been introduced in the Draft as a new form of open-ended collective investment structure. This structure, based on the provisions of the Swiss Civil Code governing foundations generally, would in addition be subject to fund supervision.
• Swiss independent asset managers, who are not subject to any state supervision on the current state of legislation, would be subject under the Draft to a specific licence requirement, but only to the extent they act as asset managers for Swiss collective investment schemes.
• The Draft introduces few modifications to the current legal framework applicable to foreign mutual funds. Under the Draft, the scope of application of the Act would be clarified so as to explicitly cover all open-ended and closed-ended non-Swiss collective investment schemes whether they are subject to a State supervision in their jurisdiction of incorporation or not.
Typical fund vehicles

1 What is the local structure commonly used for private equity funds? How does the law of your jurisdiction classify a private equity fund structured in that way? Please consider and describe any requirement to register the fund with local regulatory authorities.

1.1 Local Structure

The local structure most commonly used for domestic private equity funds is a limited partnership organised under the laws of the State of Delaware.

1.2 Classification

A limited partnership formed under the Delaware Revised Uniform Limited Partnership Act is a separate legal entity, the existence of which shall continue until cancellation of the limited partnership’s Certificate of Limited Partnership.

For US tax purposes, the limited partnership is considered a flow-through entity. Partnerships do not pay entity-level federal income tax, but they may be required to pay state taxes in certain states. Private equity partnerships, unlike corporations, can generally distribute securities in kind without triggering any tax.

1.3 Regulatory registration requirements

There is no requirement to register a Delaware limited partnership with any regulatory authority. A Delaware limited partnership is formed upon the filing of a Certificate of Limited Partnership with the Secretary of State of the State of Delaware.

If the fund or promoter has a branch office or associate doing business in a particular state other than Delaware, they may be required to register in the state in which that associate or branch office is located.

2 Are foreign limited partnerships treated differently to the local structure described in the response to question 1? If so, what are the differences and does it depend on the jurisdiction of origin of the limited partnership?

2.1 Treatment of foreign limited partnerships

A foreign limited partnership may be used for structuring private equity funds so long as such pooled investment vehicles operate within the series of regulations set forth in the responses to questions 4 and 5. With respect to various structural issues, such as limited liability, the jurisdiction of organisation should be examined.

If the fund or promoter has a branch office or associate doing business in the US, it may be required to register in the state in which that associate or branch office is located.

2.2 Differences in treatment of foreign limited partnerships

Certain types of foreign entities, which are specifically designated in US Treasury Regulations, are treated as corporations for US federal income tax purposes. Any entity of a type that is not specifically designated as a corporation may elect to be treated as a partnership or as a corporation, and, in the absence of such an election, will be classified pursuant to certain default rules.
3 Are foreign corporate structures treated differently to the local structure described in the response to question 1? If so, what are the differences and does it depend on the jurisdiction of origin of the corporate structure?

3.1 Treatment of foreign corporate structures

A foreign corporate structure may be used for structuring private equity funds so long as such pooled investment vehicle operates within the series of regulations set forth in the responses to questions 4 and 5. With respect to various structural issues, such as limited liability, the jurisdiction of organisation should be examined.

If the fund or promoter has a branch office or associate doing business in the US, it may be required to register in the state in which that associate or branch office is located.

3.2 Differences in treatment of foreign corporate structures

Certain types of foreign entities, which are specifically designated in US Treasury Regulations, are treated as corporations for US federal income tax purposes. Any entity of a type that is not specifically designated as a corporation may elect to be treated as a partnership or as a corporation, and, in the absence of such an election, will be classified pursuant to certain default rules.

Promotional and marketing issues

4 What restrictions (if any) are imposed by the laws of your jurisdiction on promoting and marketing the funds described above? Are there any restrictions on who can promote or any registration or authorizations required for the person promoting?

4.1 General restrictions

The typical private equity fund offering in the US must comply with the requirements of several regulations, including:

- the Securities Act of 1933, as amended (Securities Act);
- the Securities Exchange Act of 1934, as amended (Exchange Act);
- the Investment Advisers Act of 1940, as amended (Advisers Act);
- the Investment Company Act of 1940, as amended (1940 Act);
- the Employee Retirement Income Security Act of 1974, as amended (ERISA);
- the Blue Sky securities laws of the various states (Blue Sky Laws); and
- the investment advisers laws of the various states (State Adviser Laws).

For each of these regulations, an exemption would likely be utilised by the private equity fund or its manager, as outlined in the response to question 5 below.

4.2 Promoter restrictions

The National Association of Securities Dealers (NASD) regulates independent broker dealers who offer or promote private equity funds in the United States. In addition, many of the states require registration of broker dealers or placement agents before permitting offerings to investors in their jurisdiction.
Are there any exemptions from the restrictions identified above? Please advise how to ensure that any marketing will fall within applicable exemptions and avoid formalities to the maximum extent possible.

5.1 Exemptions in general

All offerings of securities in the US must be registered with the appropriate securities administrators, unless the offering qualifies for an exemption, a less labour-intensive and comparatively inexpensive alternative. Many private equity funds offered in the US seek exemptions to the regulations set forth in the response to question 4 above. The main exemptions that are commonly sought are set out below.

5.2 The Securities Act

Regulation D under the Securities Act permits issuers to avoid a public offering of securities by offering, on a limited basis, to accredited investors. Such investors must be purchasing for investment purposes and not with a view to resale, and must have had the opportunity to inquire about the details of such offering. Further, the issuer must avoid “general solicitation” of the investing public during the offering process.

In general, accredited investors include (1) any bank, broker dealer, insurance company, investment company, or employee benefit plan, (2) any business development company, (3) any charitable or educational institution with assets greater than $5 million, (4) any director, executive officer or general partner of the issuer, (5) any person with a net worth greater than $1 million, (6) any person with an annual income greater than $200,000 (or greater than $300,000 combined with spouse), (7) any trust with total assets greater than $5 million managed by a sophisticated person, and (8) any entity in which all of the equity owners are accredited investors as described above.

Regulation D states that the issuer shall not offer or sell the securities by any form of general solicitation or general advertising, including (1) any advertisement, article, notice or other communication published in any newspaper, magazine, or similar media or broadcast over television or radio; and (2) any seminar or meeting whose attendees have been invited by any general solicitation or general advertising. The SEC has differentiated between the prohibited “general solicitation or general advertising” and permitted “limited” solicitation or “limited” advertising by focusing on whether, at the time of an offer, the offeror has a pre-existing relationship with the proposed offeree such that the offeror is in a position to determine that the proposed offeree has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the proposed investment.

5.3 The Exchange Act

In order to avoid being treated as a “reporting company” under the Exchange Act, a private equity fund must have less than 500 “holders of record” of each class of equity security. Securities shall be deemed to be “held of record” by each person who is identified as the owner on the records maintained by the issuer. For example each partner listed on a fund’s Schedule A would be a holder of record.

5.4 The Advisers Act

Managers of private equity funds often avoid registration with the Securities and Exchange Commission (SEC) under the Advisers Act by having fewer than 15 clients, with each private equity fund managed by such manager counting as a single client.
5.5 The 1940 Act

Private equity funds would be required to register with the SEC as investment companies under the 1940 Act, but for the exemptions under sections 3(c)(1) and 3(c)(7) of the 1940 Act. The 3(c)(1) exemption limits private equity funds to not more than 100 beneficial owners, and the 3(c)(7) exemption limits private equity funds to ownership by “qualified purchasers” without a limit on the number of beneficial owners. (Note, however, the limitations imposed by the Exchange Act above.) The requirements to be a Qualified Purchaser are more stringent that the requirements to be an Accredited Investor, which were discussed in section 5.2 above. In general, Qualified Purchasers include (1) any person with at least $5 million in investments, (2) any company that owns at least $5 million in investments and is owned by family members, (3) any trust not formed for the specific purpose of acquiring the securities offered, and (4) any person who owns and invests not more than $25 million in investments.

5.6 ERISA

Funds in which benefit plans subject to ERISA invest often take advantage of the exemptions set forth in the plan asset regulations under ERISA, including (1) the Venture Capital Operating Company exemption and (2) limiting participation by employee benefit plans to less than 25%. If no exemption were available and the assets of the fund were deemed to be assets of an investing benefit plan, various provisions of ERISA would apply to the fund and its managers. Among other things, the managers would be ERISA fiduciaries, and the fund would be subject to prohibited transaction rules and other requirements with which the fund would find it difficult to comply. Therefore, most managers use best efforts to cause their funds to qualify for an exception from plan assets treatment.

5.7 Blue Sky and State Advisers Laws

Each of the various states has Blue Sky securities laws and investment advisor registration requirements, many of which have exemptions which mirror the Federal exemptions (in other words, those discussed in paragraphs 5.2 to 5.6 above).

6 If the fund or promoter has a branch office or associate in your jurisdiction that is appropriately regulated for promotion of vehicles such as the fund how would this affect the answers provided to questions 4 and 5 above?

If a fund or promoter has a branch office or associate in the US that is appropriately regulated for promotion of vehicles such as the fund, it would not affect the answers to the previous questions. The same rules would still apply. US law applies to all offerings made to US citizens regardless of the location of the fund or promoter.

If a fund or promoter does have a branch office or associate in the US, it may be required to make certain state filings and to appoint a resident agent for service of process in the state in which the branch office or associate is located to comply with requirements for doing business in the state.
7 Will the use of the Internet or a website to promote a fund in your jurisdiction be possible and, if so, would it have any impact on the answers provided above? Please consider any special rules concerning the use of email and any conditions or constraints that apply to the use of the Internet or a website generally. Please also consider whether it would be possible to operate a website with secure access granted only to specified institutional investors and individuals, and whether it makes any difference where the website is located.

While the SEC has indicated that:

"the placement of private offering materials on a website, without sufficient procedures to limit access to [sophisticated] investors, would be inconsistent with the prohibition against general solicitation," it has also expressed its approval of using electronic media for the delivery of information, provided there has been no general solicitation.

For example, the SEC indicated that an issuer wishing to raise capital in a private placement pursuant to Regulation D could: (i) use a proprietary computer service to deliver offering materials after prospective purchasers have been identified without general solicitation and (ii) transmit such offering materials via electronic mail. In other words, a fund may use a password-protected website to distribute fund documents to pre-identified potential investors, provided that its method of identifying such investors does not constitute general solicitation.

A fund’s potential investors should be identified by traditional methods and then fund documents may be distributed in electronic form, provided that the fund complies with certain procedures. These procedures would include the following: (i) the fund must ensure that the website is password-protected in order to prevent the widespread dissemination of the fund’s offering materials; (ii) the fund should provide the password to a limited number of investors with whom it has some basis upon which to conclude that the investor is sufficiently sophisticated to satisfy the requirements of Regulation D; (iii) the fund should avoid providing the password to investors with whom it has no pre-existing relationship whatsoever; and (iv) the fund should keep detailed records of each potential investor to whom it distributes the password.

Federal law also prohibits the sending of unsolicited advertisements by telephone facsimile machines.

8 Will marketing in accordance with the answers above lead to the establishment of a place of business in your jurisdiction? If so, what would the consequences be for the fund or promoter?

While certain activities conducted by a fund within the US may cause the fund to have a permanent establishment in the US (causing its non-US investors to be taxable on US-source business income of the fund, if any), marketing within the US, in and of itself, generally should not have such consequences, but of course legal advice should be taken on a case-by-case basis.
Offer documentation

9 In order to demonstrate knowledge and compliance with the restrictions outlined above would you recommend the use of any particular wording in any offer documentation? Please provide an example of any such wording and indicate whether its use is mandatory or advisory.

In general, offerings under Rule 506 of Regulation D to accredited investors in the US (please see paragraph 5.2 above) have a requirement that information not be materially misleading and that the offering memorandum contain information that a prudent investor would want to know in making an investment decision. Therefore, offering memoranda typically contain detailed information regarding the investment strategy and objectives of the fund, the background of the principals, the past investment performance of the firm, legal and regulatory issues, tax issues, and a summary of the terms of the offering.

In certain circumstances, specific language is required to be included in the offering documents. In connection with the Blue Sky laws of the states, the following uniform NASAA legends should be included in the Private Placement Memorandum:

“IN MAKING AN INVESTMENT DECISION INVESTORS MUST RELY ON THEIR OWN EXAMINATION OF THE PERSON OR ENTITY CREATING THE SECURITIES AND THE TERMS OF THE OFFERING, INCLUDING THE MERITS AND RISKS INVOLVED. THE SECURITIES OFFERED HEREBY HAVE NOT BEEN RECOMMENDED BY ANY FEDERAL OR STATE SECURITIES COMMISSION OR REGULATORY AUTHORITY. FURTHERMORE, THE FOREGOING AUTHORITIES HAVE NOT CONFIRMED THE ACCURACY OR DETERMINED THE ADEQUACY OF THIS DOCUMENT. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENCE.

THE SECURITIES OFFERED HEREBY ARE SUBJECT TO RESTRICTIONS ON TRANSFERABILITY AND RESALE AND MAY NOT BE TRANSFERRED OR RESOLD EXCEPT AS PERMITTED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, AND THE APPLICABLE STATE SECURITIES LAWS, PURSUANT TO REGISTRATION OR EXEMPTION THEREFROM. INVESTORS SHOULD BE AWARE THAT THEY WILL BE REQUIRED TO BEAR THE FINANCIAL RISKS OF THIS INVESTMENT FOR AN INDEFINITE PERIOD OF TIME.”

The preceding uniform NASAA legends should be presented in capital letters in bold face roman type at least as high as ten-point modern type and at least two points leaded. In addition, several states require their own additional specific legends.

Offering materials of an investment adviser registered with the SEC must comply with the requirements of the Advisers Act, which requires in part, inclusion of a disclaimer with past investment performance that past performance is not necessarily indicative of future performance.

10 Is there any requirement that the offer documentation or any part of it should (a) be in your local language or (b) deal with any other local considerations (e.g. tax)?

10.1 Language requirements

While most offerings in the US are made in English, there is no specific requirement that the offering must be in English. The offering must not contain an untrue statement of material fact or omit to state a material fact that is required to make the offer documentation not misleading.
United States

10.2 Local considerations

As noted in the response to question 9 above, offering materials in the US typically include disclosure about the legal, tax and regulatory scheme of the offering.

**Penalties for non-compliance with marketing restrictions**

11 In the event of a breach of any of the restrictions outlined above what are the possible consequences by way of criminal or regulatory sanctions and civil claims by investors against the fund or promoter?

11.1 General Solicitation

Failure to comply with the exemption requirements discussed in the response to question 5 above, including the requirement that issuers not engage in general solicitation of the investing public during the offering process, may result in a private equity fund losing the exemption from registration needed to complete the offering. As a result, the issuer would need either to register the offering – a costly and labour-intensive process – or suspend the offering for approximately six - nine months.

11.2 Regulatory and Criminal Actions

Additionally, both federal and state regulatory authorities can pursue legal actions against private equity funds and their managers for failing to comply with applicable regulatory obligations. On the federal level, the SEC may bring a civil action against a private equity fund for violations of federal securities laws. The SEC has civil enforcement authority only. It may work closely, however, with criminal law enforcement agencies to bring about prosecution of criminal charges if the violations at issue warrant more severe punishment. State regulatory agencies also can pursue independent legal actions against violators for non-compliance with state securities regulations.

11.3 Civil Actions

Investors in a private equity fund may bring civil actions against the fund and its managers for misdeeds, including misrepresentations in fund promotional materials. The private equity fund, as a result, may incur significant expenditures of money and other resources defending against such lawsuits and paying resulting damages to investors.

**Additional factors**

12 Are there any additional legal, licensing or other requirements or restrictions in your jurisdiction which may impact on any marketing undertaken in accordance with the answers above?

The NASD has recently updated their guidelines with respect to use of related performance data of private equity funds marketed in the United States by placement agents registered as broker dealers with the NASD.
13 Are there any other matters you ought to bring to our attention (i.e. exchange controls, money laundering, public offer regulations)?

13.1 USA PATRIOT ACT

In 2001, the USA Patriot Act was adopted, with far reaching regulations targeted at improving the ability of the US to counter terrorism. In particular, private equity funds and their managers are required to be vigilant with respect to implementing anti-money laundering compliance programs and anti-terrorism financing detection. While the rules are still evolving, the US Department of Treasury has determined that exempted unregistered investment companies, including private equity funds, which do not provide a “right of redemption” within two years of investment, do not need to adopt a formal anti-money laundering compliance program. Note that since hedge funds provide a “right of redemption,” they would be required to adopt such programs. Further, rules are still pending regarding the application of USA Patriot Act anti-money laundering regulations to managers of private equity funds and hedge funds.

13.2 Protecting Sensitive Private Equity Data

The performance data and other sensitive information provided by private equity funds to their investors may not be safe from public disclosure. This issue applies not only to funds marketed in the US, but to any private equity fund that has certain US investors. That is because many investors in private equity funds are public entities – e.g., public pension plans, endowment funds of public universities and publicly traded funds of funds – that are subject to laws that require these limited partners to publish or disclose their own investment results. Many fund managers want to stop this flow of private fund information into the public domain.

Open records laws generally require that a wide range of information held by public agencies be made available to the public upon request. The scope of these laws often covers the limited partnership organisational documents and the data set forth in periodic reports that public pension plans and endowment funds of public universities receive as limited partners of private equity funds. Each state and the federal government have their own versions of open records laws, and these laws vary from one another in important ways that affect private equity fund managers.

Because open records laws and other laws requiring investors in private equity funds to disclose fund results and other information vary so widely, any efforts to avoid disclosure must be tailored to the investors in any given fund.

14 Are the laws and regulations outlined above expected to be amended to any material extent in the foreseeable future? If so please describe a timescale and the possible impact of the proposed changes.

In recent months, the SEC has indicated that it may propose a rule requiring managers of private investment funds to register with the agency under the Investment Advisers Act of 1940. The SEC has indicated that this would be accomplished through a change in the exemption from registration for those managers with 14 or fewer clients. Instead of each fund counting as one client, instead each US limited partner would count as one client. The proposed rule is likely to target managers of hedge funds, rather than private equity funds, but the details will not be known until the pronouncement by the SEC.