



Private Equity

in 33 jurisdictions worldwide

Contributing editor: Casey Cogut

2011



Published by
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Private Equity 2011

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Private Equity 2011

Published by
Law Business Research Ltd
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London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910
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ISSN 1746-5524

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Formation and terms operation

1 Forms of vehicle

What legal form of vehicle is typically used for private equity funds formed in your jurisdiction? Does such a vehicle have a separate legal personality or existence under the law of your jurisdiction? In either case, what are the legal consequences for investors and the manager?

The usual vehicle for the formation of private equity funds in England and Wales is a limited partnership (LP), which is established under the UK Limited Partnerships Act 1907 (LP Act). A limited partnership established in England and Wales does not have legal personality separate from its partners. Note, however, that a limited liability partnership, incorporated pursuant to the Limited Liability Partnerships Act 2000, does have separate legal personality although they are rarely used as private equity fund vehicles.

The limited partnership will comprise one or more general partners, who are liable for the debts and obligations of the partnership, and one or more limited partners, who must contribute capital to the partnership but will not generally be liable for the debts and obligations of the partnership beyond the amount of the capital contributed. Investors will become limited partners. The general partner is typically a newly incorporated limited liability company (or another LP), so as to 'ring-fence' its liabilities as general partner, and delegates its investment management responsibilities to a manager that is authorised by the UK Financial Services Authority (FSA). The duties of the manager will be set out in a management contract.

The LP is tax-transparent for UK tax purposes.

Limited partnerships established in England and Wales should be distinguished from limited partnerships established in Scotland and Northern Ireland. Such limited partnerships are also governed by the LP Act but are registered in different parts of the UK. Scottish limited partnerships have separate legal personality and are commonly used for feeder partnerships or as funds of funds.

2 Forming a private equity fund vehicle

What is the process for forming a private equity fund vehicle in your jurisdiction?

In England and Wales, the establishment of an LP is a quick and relatively inexpensive process. The general partner and initial limited partner will generally enter into a 'shortform' limited partnership agreement to establish the partnership and the partners will subscribe nominal capital to the partnership. Form LP5 is signed by or on behalf of the general partner and limited partner and filed with the Registrar of Limited Partnerships in England and Wales (Companies House) together with a fee for £20 (or £50 for a same-day registration), although these costs are expected to increase from April 2011. The form will contain details of:

- the LP's name (which must end with 'limited partnership' or 'LP');
- the general nature of the LP's business;

- the name of each general partner;
- the name of each limited partner;
- the amount of the capital contribution of each limited partner and whether it was paid in cash or in another specified form;
- the address of the proposed principal place of business of the LP; and
- the term, if any, for which the LP is to be entered into (beginning with the date of registration).

Companies House will issue the certificate of registration as a limited partnership, the issue of this certificate being conclusive evidence of the existence and registration of the LP.

When 'closing' of the private equity fund takes place, the short-form limited partnership agreement will generally be amended and restated to include the final terms negotiated between the partners, and the investors will be admitted as limited partners and advance their capital contributions to the LP.

3 Requirements

Is a private equity fund vehicle formed in your jurisdiction required to maintain locally a custodian or administrator, a registered office, books and records or a corporate secretary, and how is that requirement typically satisfied?

There is no requirement for the LP to have a local (or, indeed, any separate) custodian, administrator or corporate secretary.

The principal place of business of the LP must, upon its application for registration to Companies House, be in England and Wales. Following registration, the principal place of business may be changed to a place outside England and Wales (including a place outside the UK), although the change must be notified to Companies House.

The LP's books must be kept at its principal place of business, which, as mentioned above, may be outside of England and Wales. Limited partners are generally entitled to inspect the books and accounts of the partnership.

A manager of an LP that is authorised by the FSA will, in practice, typically be responsible for safeguarding and administering the LP's investments provided it has permission from the FSA to carry on that particular regulated activity. While some LPs choose to appoint a third-party custodian, currently this is not required.

When the recently approved EU Directive on Alternative Investment Fund Managers (AIFM Directive) is transposed into UK law, expected in early 2013, it will require a manager that is authorised under it to appoint a depositary for each alternative investment fund it manages, in addition to a number of other requirements.

4 Access to information

What access to information about a private equity fund formed in your jurisdiction is the public granted by law? How is it accessed? If applicable, what are the consequences of failing to make such information available?

Details of the names of the partners and the capital contributions of limited partners to the LP are filed with Companies House and are publicly available. The information may be accessed by ordering it from Companies House and paying a fee. The information is archived on microfiche and is not currently available on the internet.

If filings with Companies House are not made properly, the general partner faces a fine of £1 per day for each day the default continues. Some commentators are of the view that, in respect of limited partnerships registered prior to the UK Legislative Reform (Limited Partnerships) Order 2009, which came into force on 1 October 2009, failure to properly register the LP or registrable changes to the LP could affect the limited liability status of the partnership.

Other information relating to the LP and its business, including constitutional documents and partnership accounts, are not available to the public. Such information is generally made available to the partners, but the limited partnership agreement will typically oblige partners to keep information confidential.

Where investors, such as UK local authorities, are subject to the UK Freedom of Information Act 2000 (FOIA) or similar laws, they may be required to disclose certain information received by them from funds in which they invest. For this reason, the information disclosed by funds to investors subject to FOIA is generally restricted. There are also exemptions to the disclosure requirements of FOIA investors, including for information that, if disclosed, could prejudice the commercial interests of any person (including the investor) and for information that, if disclosed, would result in an actionable breach of confidence.

5 Limited liability for third-party investors

In what circumstances would the limited liability of third-party investors in a private equity fund formed in your jurisdiction not be respected as a matter of local law?

The LP Act provides that a limited partner shall not be liable for the debts and obligations of the LP beyond the amount of its capital contribution, unless the limited partner 'takes part in the management of the partnership's business' in which event it will be liable 'for the debts and obligations... incurred while he so takes part in the management as though he were a general partner'.

The LP Act does not define what constitutes 'management' for this purpose, although there is a statutory right for limited partners to inspect the books of the partnership and examine into, and consult with the general partner on, the state and prospects of the partnership business. It is generally accepted that a limited partner's rights under a typical private equity limited partnership agreement, including participation by a representative of the limited partner on the LP's advisory committee or similar body, do not result in it taking part in the management, and the fund's UK legal counsel will normally issue a legal opinion to this effect.

In relation to limited partnerships registered prior to 1 October 2009, some commentators also argue that incorrect registration can imperil the limited liability status of the partnership (see question 4).

6 Fund manager's fiduciary duties

What are the fiduciary duties owed to a private equity fund formed in your jurisdiction and its third-party investors by that fund's manager (or other similar control party or fiduciary) under the laws of your jurisdiction, and to what extent can those fiduciary duties be modified by agreement of the parties?

The general partner has an obligation to manage the partnership business. As a partner in a partnership, the general partner will also be subject to various fiduciary obligations, mostly notably the duty to act in good faith. Generally such duties may be expanded or restricted by contract in accordance with the terms of the limited partnership agreement. Any contractual narrowing of the fiduciary duties of the general partner must be clearly expressed and will be narrowly construed by the English courts.

The duties and obligations of a third-party manager will be set out in its management agreement.

Where the general partner or manager is FSA authorised, it must comply, at the highest level, with the FSA Principles for Businesses, which are a general statement of the fundamental obligations of such persons under the UK regulatory system. The Principles cover, for example, integrity, skill, care and diligence, management and control, financial prudence, customers' interests and conflicts of interest.

7 Gross negligence

Does your jurisdiction recognise a 'gross negligence' (as opposed to 'ordinary negligence') standard of liability applicable to the management of a private equity fund?

While English law recognises the concept of negligence, it has no concept of 'gross negligence' as distinct from 'ordinary negligence'. That said, English courts have on various occasions been required to construe contracts that include the phrase 'gross negligence'.

Notwithstanding this, the contractual test for excluding the exculpation and indemnification of a general partner or manager in the limited partnership agreement for a UK private equity fund will typically be based on 'gross negligence' rather than 'ordinary negligence'.

8 Other special issues or requirements

Are there any other special issues or requirements particular to private equity fund vehicles formed in your jurisdiction? Is conversion or redomiciling to vehicles in your jurisdiction permitted? If so, in converting or redomiciling limited partnerships formed in other jurisdictions into limited partnerships in your jurisdiction, what are the most material terms that typically must be modified?

The LP Act stipulates that an investor's capital may not be returned prior to the termination of the LP. For this reason, an investor's commitment to the LP is typically structured predominantly by way of a non-interest bearing loan (eg, 99.99 per cent of the commitment amount) together with a small portion of capital (eg, 0.01 per cent of the commitment amount), since loans repaid during the life of the partnership are not liable under the LP Act to be repaid.

There is nothing in the LP Act that prevents an overseas partnership from registering as a limited partnership in England and Wales provided that its principal place of business is in England and Wales and it otherwise fulfils the requirements of the LP Act (such as having at least one general partner and one limited partner that has made a capital contribution to the partnership). Some tailoring of the constitutional documents of the overseas partnership is likely to be required (for example, to distinguish between an investor's capital contribution and loan commitment as described in the preceding paragraph). The UK and overseas tax consequences would also need to be considered.

9 Fund sponsor bankruptcy or change of control

With respect to institutional sponsors of private equity funds organised in your jurisdiction, what are some of the primary legal and regulatory consequences and other key issues for the private equity fund and its general partner and investment adviser arising out of a bankruptcy, insolvency, change of control, restructuring or similar transaction of the private equity fund's sponsor?

The LP Act does not provide that the bankruptcy or insolvency of the general partner will result in the automatic dissolution of the LP, and accordingly the terms of the limited partnership agreement are determinative. These will usually provide that, upon the bankruptcy or insolvency of the general partner, a specified majority of limited partners can elect whether or not to continue the LP with a new general partner. Similarly, the limited partnership agreement will determine the rights (if any) of the investors to remove the general partner or any rights arising upon a change of control of the general partner. The limited partnership agreement will typically allow the general partner to assign its interest in the LP to an entity in the same corporate group, whether to facilitate a restructuring or otherwise. An assignment outside its corporate group would generally require the approval of a specified majority of limited partners.

The position of any third-party manager of the LP will be determined in accordance with the terms of the management agreement.

Regulation, licensing and registration

10 Principal regulatory bodies

What are the principal regulatory bodies that would have authority over a private equity fund and its manager in your jurisdiction, and what are the audit and inspection rights available to those regulators?

In relation to the limited partnership itself, LPs are usually specifically designated as 'unregulated collective investment schemes' for the purposes of the UK Financial Services and Markets Act 2000 (FSMA).

In relation to the general partner or, where appointed, the manager of an LP, where it acts in the UK as the manager or operator of an LP, it will require to be authorised and regulated by the FSA under FSMA. FSA-authorised firms must comply with applicable regulatory requirements. These include the FSA Principles for Businesses, which are intended as concise statements of the fundamental standards expected of all firms, rules requiring effective systems and controls and adequate risk management arrangements, division of roles between its senior management to ensure that their individual responsibilities for the various aspects of the business are always clear, designation of an individual as having responsibility for oversight of the firm's compliance function, business standards in the areas of conduct of business, client assets and market conduct and prudential standards setting the financial resources requirements applicable to authorised firms by type.

The FSA has wide powers to:

- gather from authorised persons information or documents it specifies;
- require an authorised person to commission a skilled person's report on any particular matter;
- investigate matters; and
- provide assistance to overseas regulators.

The FSA has power to investigate concerns including:

- regulatory concerns about authorised firms and individuals employed by them;
- suspected market abuse, misleading statements and practices or insider dealing; and
- suspected contraventions of the prohibition on unauthorised regulatory activity.

The FSA has power to take the following enforcement action:

- discipline authorised persons and approved persons;
- impose civil penalties for market abuse;
- apply to court for injunctions against persons contravening relevant requirements; or
- order restitution of profits arising from contravening relevant requirements.

Further, the UK tax authorities also have rights of audit and inspection over the books and financial records of the manager and the LP.

11 Governmental requirements

What are the governmental approval, licensing or registration requirements applicable to a private equity fund in your jurisdiction? Does it make a difference whether there are significant investment activities in your jurisdiction?

A limited partnership registered in England and Wales does not generally need to comply with any governmental approval, licensing or registration requirements, other than the registration and filing requirements with Companies House (see question 2). The general partner or manager may be required to be authorised by the FSA (see question 10). This position does not alter depending on whether or not the private equity fund undertakes significant investment activities in the UK.

12 Registration of investment adviser

Is a private equity fund's manager, or any of its officers, directors or control persons, required to register as an investment adviser in your jurisdiction?

As noted above, the LP's manager or, if different, the investment manager of the LP's assets must be authorised by the FSA in order to operate and manage in the UK a collective investment scheme (such as a private equity fund). In addition to such authorisation, authorised persons must themselves take reasonable care not to allow individuals to perform 'controlled functions' without the approval of the FSA. 'Controlled functions' include the following: director, chief executive, partner, apportionment and oversight, compliance oversight, money laundering reporting and customer functions (for example, advising and managing investments).

13 Fund manager requirements

Are there any specific qualifications or other requirements imposed on a private equity fund's manager, or any of its officers, directors or control persons, in your jurisdiction?

Although the FSA no longer requires examinations to be passed in the non-retail context, an FSA-authorised fund manager must ensure that its partners and employees have the skills, knowledge and expertise necessary for the discharge of the responsibilities allocated to them. Many partners and employees of the manager will have passed exams satisfactory to the FSA, which enables the manager more easily to judge those persons as sufficiently competent. The process by which the manager reaches this judgment should be documented.

UK law regarding capital adequacy requirements has been updated in order to comply with EU directives. The EU Capital Requirements Directive (CRD) sets out capital requirements for investment firms, in line with the EU Markets in Financial Instrument Directive (MiFID), in order to ensure consistent application within the EU of the international framework for capital requirements.

A venture capital firm's capital requirement is determined primarily by whether or not it is subject to the requirements of the CRD. Since November 2007, a firm will be subject to the CRD only if it is subject to the requirements of MiFID (that is, it is an MiFID investment firm) for all or part of its business. In order for a venture

capital firm to be subject to MiFID, it needs to carry on one or more investment services and activities relating to financial instruments, as defined by MiFID. A venture capital firm will fall outside MiFID if all of its business falls within an exemption under the Directive; and, therefore, the question whether a venture capital firm is subject to MiFID and the CRD will depend upon what a firm does in practice.

The exemption from MiFID for collective investment undertakings and their managers is likely to be relevant for venture capital firms who operate funds. The FSA interprets the 'manager' to be the operator of the fund and not a person who is just managing the assets of the fund (unless that person is also the operator).

A venture capital firm that falls outside MiFID will be subject to the lightest available financial resources requirement; that is, its own funds requirement will be only £5,000.

The AIFM Directive contains various other regulatory requirements to which, following its implementation, most EU fund managers will be subject, for example, capital requirements, transparency requirements (that is, reporting to regulators and disclosure to investors), valuation and depository requirements, restrictions on delegation, and a requirement to implement a policy on remuneration.

14 Political contributions

Describe any rules – or policies of public pension plans or other governmental entities – in your jurisdiction that restrict, or require disclosure of, political contributions by a private equity fund's manager or investment adviser or their employees.

There are none at present in the UK.

The UK Bribery Act 2010, which has yet to be implemented, will make it an offence to pay or receive bribes or bribe foreign public officials. In addition, there is a new corporate offence where a commercial organisation fails to prevent a bribe being paid on its behalf. The definition of what constitutes a bribe is sufficiently wide as to cover political contributions in certain circumstances. Once the Act is implemented, private equity firms will, accordingly, need to either avoid making such contributions altogether or put in place tight internal policies governing the making of such contributions. The Bribery Act was originally scheduled to enter into force in April 2011, but the timing of its implementation has been pushed back.

15 Use of intermediaries

Describe any rules – or policies of public pension plans or other governmental entities – in your jurisdiction that restrict, or require disclosure by a private equity fund's manager or investment adviser of, the engagement of placement agents, lobbyists or other intermediaries in the marketing of the fund to public pension plans and other governmental entities.

The UK has not enacted specific 'pay-to-play' rules similar to those in the US. The European Private Equity and Venture Capital Association (EVCA) has issued a draft code of conduct aimed at European placement agents that are members of the EVCA.

16 Bank participation

Describe any legal or regulatory developments emerging from the 2008 financial crisis that specifically affect banks with respect to investing in or sponsoring private equity funds.

The 2008 financial crisis has led, and is likely to continue to lead, to increased regulatory capital requirements for banks in the UK, alongside those in the rest of the EU and other jurisdictions. This is in turn likely to lead to reduced allocations by banks to private equity funds and the possible divestment by banks of existing portfolios of private equity investments.

Taxation

17 Tax obligations

Would a private equity fund vehicle formed in your jurisdiction be subject to taxation there with respect to its income or gains? Would the fund be required to withhold taxes with respect to distributions to investors? Please describe what conditions, if any, apply to a private equity fund to qualify for applicable tax exemptions.

Tax transparency means that the LP is not a taxable entity for the purposes of UK income tax, capital gains tax or corporation tax. Instead, income and gains are treated as accruing directly to each partner and the partners are taxed as if they have acquired and held an interest in the partnership assets themselves.

Withholding taxes

Since an LP is treated as transparent, no tax is withheld solely in respect of partnership distributions. It would, however, be common for investments into UK assets to be structured through a UK tax-resident company. Payments of interest from such a vehicle to partners in a private equity fund could potentially be subject to UK withholding tax at the rate of 20 per cent. The UK has an extensive network of double tax treaties to reduce this withholding tax and other structures are commonly used in order to remove any UK withholding tax liability. There is no withholding tax on dividends from a UK company. If, exceptionally, a private equity fund with non-UK resident investors holds UK real estate, there may also be withholding tax on the partnership's real estate income.

Tax exemptions

The transparent treatment of partnerships means that tax exemptions will not apply to the private equity fund itself. Nevertheless, partners may qualify for exemptions depending on their individual circumstances.

18 Local taxation of non-resident investors

Would non-resident investors in a private equity fund be subject to taxation or return-filing requirements in your jurisdiction?

Provided non-resident partners hold their interests in the private equity fund as an investment and not as part of their trading activities, and provided the private equity fund is not itself engaged in a trade, non-resident investors will not be subject to UK taxation (other than the withholding taxes described above). A typical private equity fund is unlikely to be engaged in a UK trade, but this will always need to be assessed on a fund-by-fund basis. If an investor holds its interest in the private equity fund for the purposes of its own trade, the fund may need to undertake additional structuring to avoid the general partner or manager constituting a taxable permanent establishment, branch or agency of that investor. The general partner or manager of the LP may, in certain circumstances, be obliged to report details of the partners of the LP and amounts allowed or payments made to them to the UK tax authorities.

19 Local tax authority ruling

Is it necessary or desirable to obtain a ruling from local tax authorities with respect to the tax treatment of a private equity fund vehicle formed in your jurisdiction? Are there any special tax rules relating to investors that are residents of your jurisdiction?

It is not necessary to obtain tax rulings in respect of a fund established in England and Wales or elsewhere in the UK as a limited partnership.

There is no special treatment for investment returns from a private equity fund to non-UK resident investors and normal rules relating to receipts from partnerships will apply.

20 Organisational taxes

Must any significant organisational taxes be paid with respect to private equity funds organised in your jurisdiction?

No organisational taxes are payable on the establishment of the fund, although care should be taken if an investor contributes an asset (rather than cash) to the LP. The investor may, rarely and depending on its individual circumstances, make a taxable disposal on the contribution and the LP may be liable for VAT and stamp taxes (depending on the nature of the asset contributed and the structuring of the contribution).

21 Special tax considerations

Please describe briefly what special tax considerations, if any, apply with respect to a private equity fund's sponsor.

Individual principals or executives of fund managers may be granted an interest in the LP, which entitles them to a share in the profits once target amounts have been returned to investors ('carried interest'). If the fund executive acquires the entitlement to carried interest in connection with an employment (for example, with the fund's manager), then the right to carried interest will be an 'employment-related security' and the executive must pay full market value for his or her interest or pay income tax (currently at a maximum rate of 50 per cent) on the difference between what he or she pays and the market value. Employer and employee national insurance contributions will also be due and payable by the executive and his or her employer (currently at 12.8 per cent and 1 per cent respectively but due to increase to 13.8 per cent and 2 per cent respectively from 6 April 2011).

The terms of the carried interest may be subject to restrictions such as leaver provisions or restrictions on transfer. If this is the case, the value that the executive should pay for the acquisition of the carried interest is its value as if the restrictions did not apply. If the executive does not pay the unrestricted market value for his or her interest, he or she needs to enter into a statutory election to pay an employment income tax charge on the unpaid amount (discussed below). Failing this, a proportion of his or her carried interest may remain within the employment income tax regime.

If the executive pays unrestricted market value for his or her entitlement to carried interest (or elects to pay income tax up-front on the shortfall – discussed further below), the taxation of future returns generated by the carried interest will depend on the nature of the underlying profits of the LP. As the carried interest typically arises on the disposal of an underlying asset, the executive is likely to be taxed at capital gains tax rates (currently 28 per cent) rather than employment income tax rates.

HM Revenue & Customs (HMRC) acknowledges the difficulties in valuing carried interest and has published a Memorandum of Understanding (MoU) with the British Venture Capital Association. Provided that certain conditions set out in the MoU are met, HMRC accepts that the security for these purposes is in the interest in the fund rather than in the underlying securities, and that the amount the executives pay for their carried interest is equal to its unrestricted market value. In most circumstances, compliance with the MoU will mean that very little or no tax is due on the acquisition of carried interest by the fund's executives and that their future returns from the fund are likely to be subject to capital gains tax instead. The MoU only covers carried interest received at the start of the fund or before any investment has risen in value. A subsequent receipt of carried interest may generate an income tax liability.

If carried interest is awarded later in the life of the fund or is not compliant with the MoU, it is common practice to require the executive to make an election required for the purposes of part 7 of the UK Income Tax (Earnings and Pensions) Act 2003 (that is, a 'section 431 election') to pay an employment income tax charge (together with related national insurance contributions) on the difference between the initial unrestricted market value of the carried interest and the

amount actually paid by the executive. A section 431 election must be made jointly by the executive and his or her employer within 14 days of the acquisition of the carried interest entitlement. Once the election is made the executive will be treated as if he or she had paid unrestricted market value on acquisition so that the profits of his or her carried interest will retain their underlying character – generally, gains. Since this is an election to pay an income tax charge there may be some tax payable at the time of the election. However, assuming the carried interest yields gains, this election avoids such gains being taxed as employment income.

It is now common practice for private equity houses to establish their UK operations as limited liability partnerships. The use of these vehicles renders the senior executives self-employed so that they generally fall outside the employment-related securities regime entirely and need not concern themselves with the complexities described above. Self-employment also has more general tax advantages such as savings in national insurance contributions.

22 Tax treaties

Please list any relevant tax treaties to which your jurisdiction is a party and how such treaties apply to the fund vehicle.

The UK is party to over 100 double tax treaties. However, since a limited partnership is treated as transparent for UK tax purposes, it is unlikely that a private equity fund structured as a limited partnership will be able to or need to benefit from these treaties.

The relevant tax treaty for any claims will, instead, be that between the jurisdiction in which the vehicle or investment held by the fund is resident and the jurisdiction in which the investor is resident. The success of any such claim may depend on whether both jurisdictions recognise the tax transparency of the LP.

23 Other significant tax issues

Are there any other significant tax issues relating to private equity funds organised in your jurisdiction?

Stamp duty will be potentially payable on transfers of interests in a private equity fund structured as a limited partnership. The amount of the stamp duty is technically up to 4 per cent of the consideration paid but this is capped at an amount equal to 0.5 per cent of the value of the relevant proportion of any UK marketable securities owned by the fund. In practice, there are ways of mitigating the impact of any stamp duty charge by, for example, executing the transfer documents outside the UK and keeping them 'offshore' or dividing the transfer documents so that loan and capital are transferred separately.

Although an LP is tax-transparent for income and gains purposes, fund structures must also consider VAT issues. Broadly, VAT will be chargeable on management services provided to a party resident in the UK (or another EU country). This can be dealt with by forming a VAT group or by structuring the fund so that the recipient of the services is outside the EU. If there is an extensive network of advisers located in EU jurisdictions further complexity may arise and, again, an offshore recipient structure can generally address this. Cost implications of any structures need to be balanced against the actual risk of VAT leakage and this will need to be reviewed on a fund-by-fund basis.

Selling restrictions and investors generally**24 Legal and regulatory restrictions**

Describe the principal legal and regulatory restrictions on offers and sales of interests in private equity funds formed in your jurisdiction, including the type of investors to whom such funds (or private equity funds formed in other jurisdictions) may be offered without registration under applicable securities laws in your jurisdiction.

Interests in limited partnerships established in the UK or elsewhere may be offered to an unlimited number of UK offerees provided that

an exemption from the UK restriction on 'financial promotions' applies and the interests are not generally offered to the public.

Generally, unregulated collective investment schemes investing in private equity may be promoted to, among others, persons within the following categories:

- investment professionals (see below);
- institutions (see below);
- certified high-net worth individuals;
- sophisticated investors; and
- self-certified sophisticated investors.

Any person can communicate a financial promotion to persons who fall within these exemptions. In addition, the FSA rules provide a number of further exemptions for use only by FSA-authorised persons.

The 'investment professionals' exemption includes communications to persons authorised by the FSA, persons exempt from the requirement to be authorised by the FSA, governments, local authorities and international organisations and persons whose ordinary activities involve them in participating in such funds for the purposes of a business carried on by them.

The 'institutions' exemption includes communications to:

- a body corporate which has or whose parent has called-up share capital or net assets of not less than £5 million (or £500,000 if it or its parent has more than 20 members);
- unincorporated associations and partnerships having net assets of not less than £5 million; and
- trustees of trusts which, broadly, have assets of £10 million or more.

If, exceptionally, the minimum commitment of an investor to the LP is less than €50,000, the EU Prospectus Directive will need to be considered.

25 Types of investor

Describe any restrictions on the types of investors that may participate in private equity funds formed in your jurisdiction (other than those imposed by applicable securities laws described above).

Subject to complying with the selling restrictions described above and the anti-money laundering requirements described below, there are no other material UK restrictions on the types of investors that may participate in private equity funds formed in England and Wales or elsewhere in the UK.

26 Identity of investors

Does your jurisdiction require any ongoing filings with, or notifications to, regulators regarding the identity of investors in private equity funds (including by virtue of transfers of fund interests) or regarding the change in the composition of ownership, management or control of the fund or the manager?

Companies House must be informed within seven days of changes to any of the following:

- the LP's name;
- the general nature of the LP's business;
- the principal place of business;
- the partners or the name of any partner;
- the term or character of the LP;
- the sum contributed by any limited partner; and
- the liability of any partner by reason of his or her becoming a limited instead of a general partner or a general instead of a limited partner.

In addition, where there is an assignment of the interest of a limited partner, notice of that change has to be advertised in the London

Gazette 'forthwith' and, until advertised, the assignment is deemed under the LP Act to be of no effect.

Where a general partner or manager that is authorised by the FSA undergoes a change in control, both it and the new or increasing controller will need to notify the FSA. Prior clearance from the FSA is required for the acquisition of control or a specified increase in control of an FSA-authorised entity. In the case of FSA-authorised entities that qualify as MiFID investment firms, the control threshold is 10 per cent and, in the case of non-MiFID firms, 20 per cent.

27 Licences and registrations

Does your jurisdiction require that the person offering interests in a private equity fund have any licences or registrations?

As described in question 24, interests in a fund may be promoted in the UK by any person provided that an exemption applies.

However, if a person marketing the fund in the UK carries on 'regulated activities' such as 'arranging deals in investments' in the UK in connection with the marketing, that person is generally required to be authorised by the FSA or authorised elsewhere in the European Economic Area and 'passported' into the UK.

28 Money laundering

Describe any money laundering rules or other regulations applicable in your jurisdiction requiring due diligence, record keeping or disclosure of the identities of (or other related information about) the investors in a private equity fund or the individual members of the sponsor.

An FSA-authorised general partner or manager of the LP will be subject to the obligations in relation to money laundering set out in the rules and regulations of the FSA, and also to the obligations set out in certain statutes, statutory instruments and other regulations, including the UK Terrorism Act 2000, Proceeds of Crime Act 2002 and Money Laundering Regulations 2007.

In particular, under FSA Rules a firm must establish and maintain effective systems and controls that enable it, among other things, to identify, assess, monitor and manage the money laundering risk. A firm must appoint an individual based in the UK as money laundering reporting officer with responsibility for oversight of its compliance with this area and provide appropriate training to its employees. The Money Laundering Regulations 2007 require firms to appoint a nominated officer to receive internal reports relating to knowledge or suspicion of money laundering and to establish adequate and appropriate policies and procedures in order to prevent operations relating to money laundering or terrorist financing covering customer due diligence, reporting, record-keeping, internal control, risk assessment and management, compliance management and communication.

Investors will generally be required to complete a questionnaire in order that the general partner or manager can discharge its obligations in relation to anti-money laundering and 'know your client'.

Exchange listing

29 Listing

Are private equity funds able to list on a securities exchange in your jurisdiction and, if so, is this customary? What are the principal initial and ongoing requirements for listing? What are the advantages and disadvantages of a listing?

A number of private equity funds have been listed in the UK. Typically these are structured as offshore companies that are listed on the London Stock Exchange's main market, the Alternative Investment Market (AIM) or the Specialist Fund Market (SFM). These companies may invest into, or alongside, a UK limited partnership.

The London Stock Exchange formed the SFM in 2007 as a new market designed to appeal to investment funds with sophisticated investors. Limited partnerships are eligible to be listed on the SFM,

Update and trends

The most significant upcoming development in the UK is the AIFM Directive. This is scheduled to be implemented in UK law, as well as the law of other EU member states, by early 2013. Aspects of the Directive are discussed elsewhere in this chapter. The Directive will, for the first time, introduce a harmonised EU-wide regulatory regime for managers of alternative investment funds, including private equity funds. In the UK, managers of investment funds have for a number of years been required to be authorised by the FSA, and accordingly many of the Directive requirements are likely to be more readily assimilated into UK law and practice than in certain other EU member states.

In the US, the Dodd-Frank Wall Street Reform and Consumer Protection Act initially looked likely to require many non-US advisers to investment funds to register with the US Securities and Exchange Commission (SEC) during 2011. However, the latest, but not yet final, SEC guidance will exempt most non-US advisers from registration for so long as they do not manage money from an office in the US, although many will still need to make certain limited filings with the SEC and may be subject to examination by the SEC.

In summer 2010, the UK government announced its intention to abolish the tripartite regulatory system comprising HM Treasury, Bank of England and the FSA, resulting in the FSA ceasing to exist in its current form, and to establish three new regulatory bodies, the Financial Policy Committee (FPC), the Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA). The functions of these three new regulators will incorporate the majority of those

currently performed by the FSA. The FPC will sit within the Bank of England and be responsible for macro-prudential regulation and will consider macro issues affecting economic and financial stability. The PRA will be a subsidiary of the Bank of England and responsible for the micro-prudential regulation of those firms that the government considers should be subject to significant prudential regulation (this will likely not include private equity firms). The FCA will be responsible for the conduct of business regulation of all firms, including those regulated by PRA, will inherit the majority of the FSA's market conduct regulatory functions and will be responsible for the prudential regulation of firms not regulated by PRA. The government will publish more detailed proposals including draft legislation early in 2011 and aims for the new structure to come into force by the end of 2012.

The UK Bribery Act 2010 will, when it is implemented, require private equity firms to carefully consider their corporate entertainment programmes for investors, in particular foreign public officials such as officers at sovereign wealth funds, and to review their oversight rights with respect to placement agents appointed by them.

With a likely competitive fundraising market and a number of UK and pan-European private equity firms returning to the market, investors are likely to continue to focus on the economic terms and investor protections in private equity limited partnership agreements. The publication by the Institutional Limited Partners Association of version 2.0 of the 'Private Equity Principles' in January 2011 will provide a framework for some of those discussions, especially for North American investors.

although as yet no limited partnerships have been listed. Applicants must adhere to the Admission and Disclosure Standards of the London Stock Exchange and demonstrate that their securities will be transferable. However, none of the eligibility criteria that will apply to entities listed on the main market will apply to the SFM, which aligns it more closely with Euronext Amsterdam. The applicant must prepare a prospectus compliant with the EU Prospectus Directive.

The key benefits of a listing are, for investors, that they will have increased liquidity for their interests by being able to trade them on the listed market and, for the fund, that it will have access to investors who prefer to, or are required to, invest only in listed securities.

Disadvantages include increased public disclosure and some additional cost. Historically, the securities of listed investment funds have traded at less than net asset value, which would limit the increased liquidity benefits.

30 Restriction on transfers of interests

To what extent can a listed fund restrict transfers of its interests?

Securities traded on the SFM must be 'freely negotiable' and eligible for electronic settlement. It is generally possible to include mechanisms to prevent or rectify transfers that would create tax or regulatory difficulties for the fund.

Participation in private equity transactions

31 Legal and regulatory restrictions

Are funds formed in your jurisdiction subject to any legal or regulatory restrictions that affect their participation in private equity transactions or otherwise affect the structuring of private equity transactions completed inside or outside your jurisdiction?

There are no such prescribed legal or regulatory restrictions in the UK. The limited partnership agreement will usually set out contractual limitations on investments agreed between the sponsor and investors, such as geographic or sector investment restrictions, investment diversification requirements and restrictions on investing in listed securities or in other pooled investment funds.

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32 Compensation and profit-sharing

Describe any legal or regulatory issues that would affect the structuring of the sponsor's compensation and profit-sharing arrangements with respect to the fund and, specifically, anything that could affect the sponsor's ability to take management fees, transaction fees and a carried interest (or other form of profit share) from the fund.

As a result of UK VAT considerations, the general partner of an LP established in England and Wales will usually be entitled to receive a priority share of the income and gains of the fund, or a loan if there are no or insufficient income and gains, rather than a management fee. Where a separate manager is appointed, the general partner and manager will typically become part of a single VAT group in respect of the payment of the management fee from the general partner to the manager or, alternatively, the general partner will be located

offshore so that any fees payable are outside the scope of VAT (see question 23).

On 1 January 2011 a revised version of the FSA Remuneration Code took effect and its scope was extended to include all investment firms that are within the scope of the EU Capital Adequacy Directive. Most UK private equity firms will not be in scope. Those that are in scope will be required to comply with a light touch regime on the grounds of proportionality.

The AIFM Directive will, from early 2013, require fund managers authorised under the Directive to implement remuneration policies and practices for those categories of staff 'whose professional activities have a material impact on the risk profiles of [funds] they manage'. The detail of these requirements will become clearer as the 'Level 2' rules under the Directive are issued.

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