



2020 Outlook: How to Raise Money in Europe

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- Europe represents a significant pool of capital for private equity...

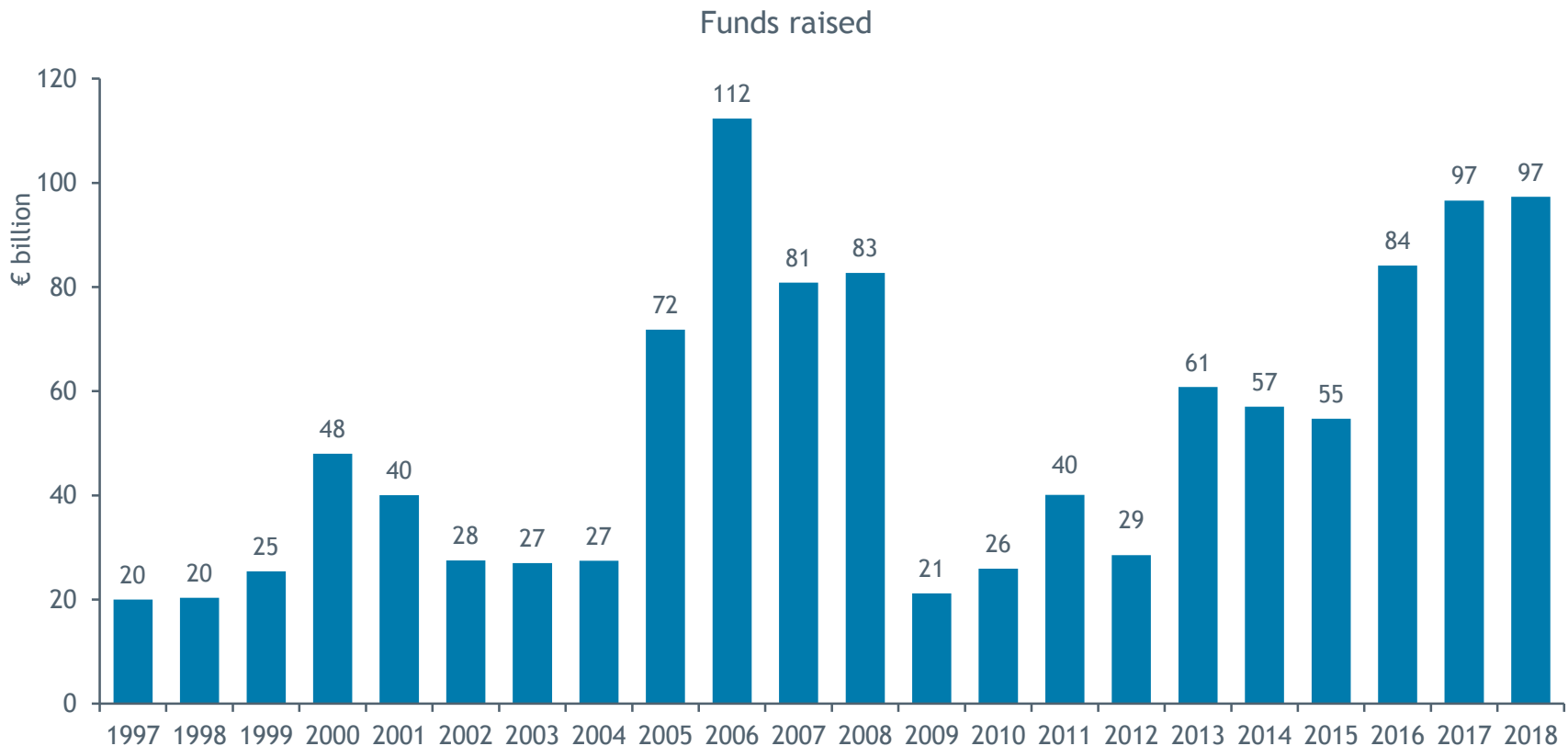
Setting an EU marketing strategy:

- **Consider** the tax and regulatory concerns of EU institutional investors.
- **Anticipate** their due diligence and their decision-making process.
- **Navigate** the EU regulatory mine-field.
- **Take into account** Brexit.
- And lastly, **predict** the future path EU regulators may take...



Do we foresee “Fortress Europe”?

Overview - All Private Equity – Fundraising 1997–2018 - Industry statistics - Amount

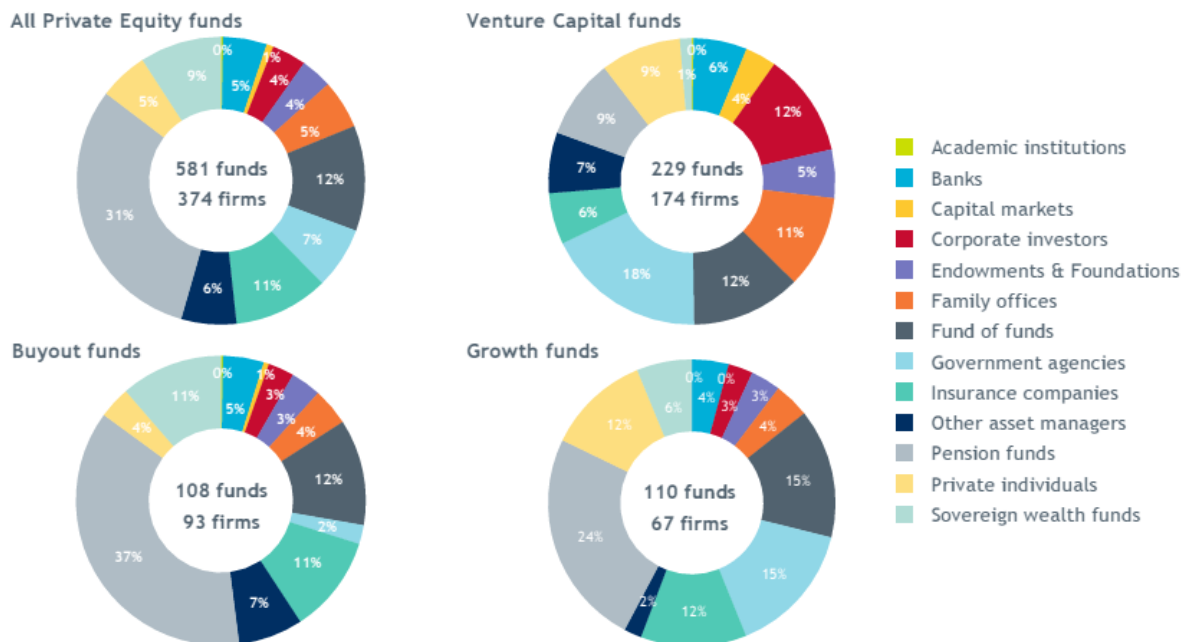


Source: Invest Europe / Thomson Reuters (2000-2006) & Invest Europe / EDC (2007-2018)

EU fund-raising – type of investors

Funds raised by type of investor

2018 - Incremental amount raised during the year - % of total amount



Source: Invest Europe / EDC

2018 European Private Equity Activity



FUNDRAISING

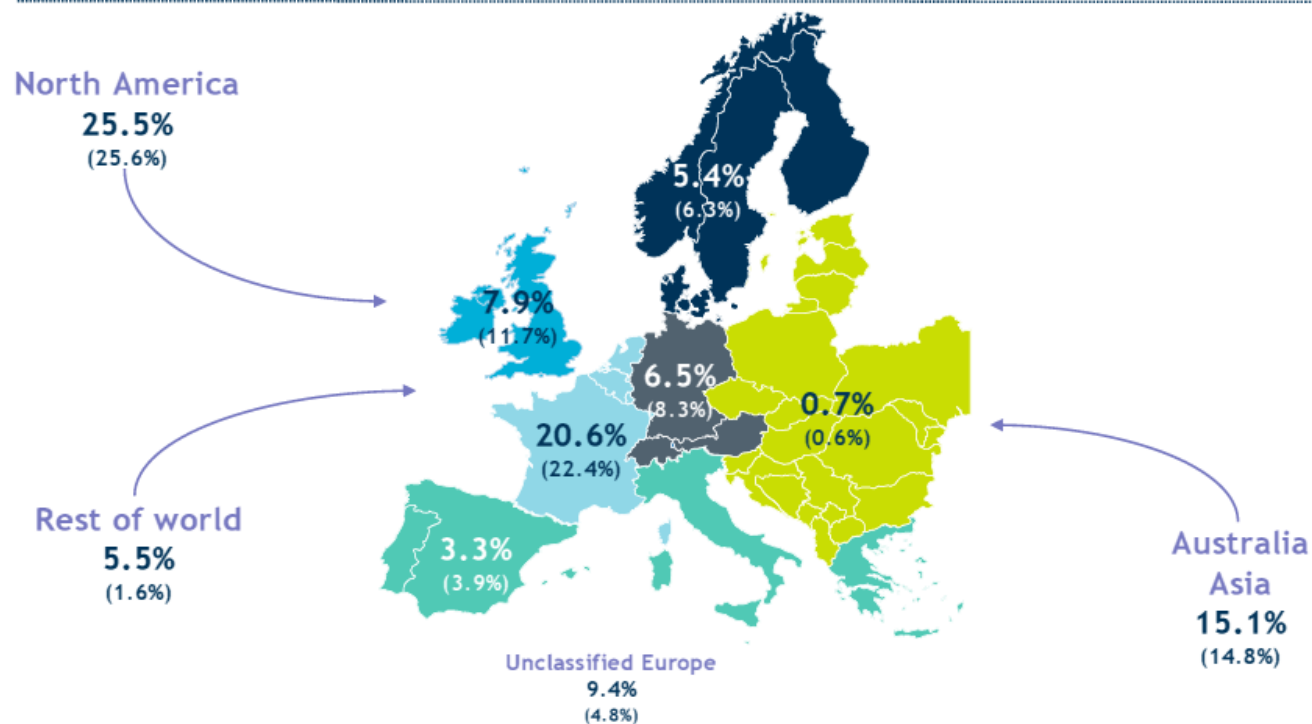
INVESTMENTS

DIVESTMENTS

16

All Private Equity - Fundraising geographic breakdown

2018 (2017) - Source of funds - % of total amount



We will discuss:

- Impact of Brexit on EU fund-raising
- Different ways to access EU investors, and benefits of the **AIFMD marketing passport**.
- State of play of **national private placement regimes** and “third country” passport.
- The most common **EU structures**, and how to establish them.
- The requirements (tax and regulatory) of **EU insurers** and **pension funds**.
- How to access **high net worth investors** in the EU.
- Some important future considerations, including **ESG disclosure**.

- Impact on investor sentiment
- If Brexit happens, the UK's withdrawal from the EU (at end of any transitional period) means loss of EU “passport” for UK managers and UK funds
- Following loss of the marketing passport, UK managers must switch to private placement in Europe – effectively putting them in the same position as US managers
- Equally, it could mean loss of access by EU investors to UK funds – but, in practice, that will be addressed by UK private placement registration
- Some EU institutional investors require or prefer EU funds and EU managers (e.g. under Solvency II and German insurance regulation)
- Luxembourg and Ireland are now popular places to establish EU-based private fund managers, and Luxembourg partnership dominates
- Future relationship: currently unknown, but “equivalence” seems most likely

Marketing in the EU

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In practice, marketing must be carried out on the basis of:

- National private placement regimes (available in some but not all EU states)
- Marketing passport (which requires EU structure – EU manager and EU fund)
- Prospectively, marketing passport for non-EU managers (“third country passport”)

Jurisdiction	Timing	Notes
Belgium	Up to 14 days, but in practice may take longer	
Denmark	Up to 3 months	Appointment of depositary required
Finland	Up to 2 months	AIFM must be subject to supervision in its home country (e.g. an SEC registered investment adviser)
France	Not applicable	
Germany	Up to 2 months (up to 4 months for a feeder/master structure)	Appointment of depositary required
Ireland	3 to 5 days	
Luxembourg	Immediate	
Netherlands	Immediate	AIFM must be subject to supervision in its home country (e.g. an SEC registered investment adviser)
Norway	Up to 4 to 5 months	AIFM must be subject to supervision in its home country (e.g. an SEC registered investment adviser)
Spain	Not applicable	
Sweden	Up to 2 months	
UK	1 to 2 days	

What are the benefits of AIFMD marketing passport?

It gives access to professional investors in all EU states...

- Some EU countries do not allow access of non-EU funds or non-EU managers (or set difficult conditions):
 - **Difficult** or **impossible** countries include France, Italy, Austria and Spain
 - **Intermediate** countries include Germany and Denmark
 - **Easy** countries include UK, Luxembourg, Ireland, Sweden and Belgium
 - Finland and Norway now problematic with Cayman Islands manager
- Access to limited types of high net worth individual investors in some countries (e.g., Germany, Denmark, Finland, Sweden, UK).

It provides speed to market...

- Marketing passport obtained with one-off filing with “home state” authority, with 30-day deadline for authority to make any comments.

It may give regulatory “cover” ...

- AIFM authorisation is sufficient in all states for marketing activities and may assist with loan origination activities.

- Managers will need to file a pre-marketing notification with the “home state” regulator within 2 weeks of commencement of pre-marketing activities:
 - specifying the Member States in which and the periods during which the pre-marketing is taking or has taken place;
 - including a description of the pre-marketing including information on the investment strategies presented; and
 - a list of the AIFs which are the subject of pre-marketing.
- Impact on reverse solicitation:
 - Any subscription by investors, within 18 months of the AIFM having begun pre-marketing, for units or shares of an AIF referred to in the information provided in the context of pre-marketing, or of an AIF established as a result of the pre-marketing, is considered the result of marketing and is subject to a marketing notification.

National private placement regimes are unlikely to disappear soon...

Anticipated timetable under AIFMD	Where are we now?
July 2015: ESMA opinion on functioning of passport and NPPRs and advice on application of the passport to non-EU AIFMs and non-EU AIFs	July 2016: ESMA advice on its review of 12 non-EU countries, with (qualified) positive assessment of 9 countries (Canada, Guernsey, Japan, Jersey, Switzerland, Hong Kong, Singapore, Australia and US)
Commission to adopt delegated act within 3 months of opinion to specify date of third country passport	In light of Brexit, uncertainty as to positive assessment of UK as a third country.
Within 3 years of adoption of delegated act: ESMA opinion on the functioning of the third country passport and advice on termination of “parallel” NPPRs	No further steps on grant of third country passport, and possible that forthcoming AIFMD review will re-open procedure to grant passport.

- Currently, permitted pre-marketing activities in EU Member States vary on a country-by-country basis
- A new pre-marketing definition to the AIFMD will be introduced by the Cross Border Distribution Directive (implemented into national law by August 2021)

Permitted pre-marketing activities	Not permitted pre-marketing activities
<p>Distribution of draft prospectus or offering documents, provided they do not contain sufficient information to allow investors to take an investment decision and clearly state that:</p> <ul style="list-style-type: none">• they are not an offer or an invitation to subscribe to units or shares of an AIF; and• the information should not be relied upon because it is incomplete and may be subject to change.	<p>Manager not permitted to present information to potential investors that:</p> <ul style="list-style-type: none">• is sufficient to allow investors to commit to acquiring units or shares of a particular AIF;• amounts to subscription forms or similar documents whether in a draft or a final form; or• amounts to constitutional documents, a prospectus or offering documents of a not-yet-established AIF in a final form.

Certain EU regulated investors for EU funds will base their investment decision on the jurisdiction of the fund and the manager

Insurer risk weightings

- Under Solvency II, EU insurance companies benefit from a lower capital reserve treatment if the fund is an EU fund, closed ended and not leveraged – but without regard to the location of the manager

Pension funds permitted investments

- Certain countries have special requirements and only permit investments in EU structures (e.g., in Germany, investments in debt funds are only permitted if the EU AIF is managed by an EU AIFM)



Establishing an EU structure

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- Parallel or EU only structure?
- SCS: limited partnership with legal personality
- SCSp: legal partnership without legal personality (easier to set up)
- SCA: limited partnership limited by shares – sometimes used (for example) for German tax-exempt investors
- FCP also sometimes uses (special collective investment scheme without legal personality)
- Both SCS and SCSp and corporate structures (e.g., SCA) can be structured as a “RAIF” (unregulated but registered with CSSF, not relevant for SCS and SCSp) or “SICAV-SIF” (regulated) and thereby obtain certain tax and investment regulatory benefits under Luxembourg law.
- Umbrella structures possible, allowing for:
 - Several “sleeves”
 - Direct/indirect investment
 - Different economics, etc.

Setting up your own EU AIFM requires substance, cost and time



Some key considerations:

- Timing – at what point in the fund-raising process do you engage the host?
- Own fund structure (“above and below” the manco) or sub-fund model?
- Host responsibility for risk management and compliance
- Delegation of portfolio management or advisory arrangement?
- Marketing under the passport – what is the regulatory status of marketing?

Pros	Cons
Portfolio management decision-making process remains outside the EU, with no need to hire portfolio management staff.	External service provider has formal control over the AIF. Investment process may be delayed, particularly with advisory model.
Supporting functions such as compliance and risk management are taken care of by a host AIFM.	Effective outsourcing of EU compliance to host AIFM with attendant risks.
Recognized by regulators.	Regulatory complexity: <ul style="list-style-type: none"> • Marketing on behalf of the AIFM is a regulated activity in some EU countries (if not assumed by AIFM itself, may require a MiFID authorisation) • Pass-down of certain AIFMD obligations to delegate (e.g. remuneration)
Easy and quick to set up and host AIFM can be “rolled off” structure in the future.	Investor perception and due diligence.

Advisory only versus delegation arrangement

Advisory only

Pros	Cons
No AIFMD compliance	Limited influence and delay in execution of investment
	Final decision with AIFM

Delegation of portfolio management

Pros	Cons
Investment decision of portfolio management is with investment team	Delegate needs to comply with certain AIFMD obligations (more stringent in light of Brexit?)
	New ESMA rules: need to justify delegation to non-EU country

Delegation of portfolio management function is a vital and flexible tool...

98% of Irish funds are managed outside Ireland

Possible regulatory lines of attack:

- Is the delegation disguised as an advisory arrangement?
- Are there objective reasons to justify delegation arrangements outside EU – is operational efficiency enough?
- Does the AIFM retain sufficient substance such that it is not a letter box entity?
- Is there a circumvention of the AIFM's responsibilities to investors (e.g. conflicts of interest and staff remuneration)
- Will ESMA have the power to intervene on delegation outside EU? – status of this proposal.



Accessing EU private wealth

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- Increasing interest from EU private wealth in alternative assets, particularly through private bank network
- Possible distribution models include:
 - Co-investment clubs
 - Feeder funds (typically closed-ended)
 - Stand-alone open-ended fund
- Closed-ended model not suitable for all investors and entails administration
- Open-ended model needs to balance investor demand against dragging effect of cash, and liquidity management is key

- **Retail v Professional Client distinction**
 - **Individual investors:** *per se* retail clients, capable of being opted up to professional client (although can be practically difficult to meet)
 - **Family offices:** likely to qualify as *per se* professional clients as “large undertaking” or “other institutional investor” (given professionally run investment process)
- **Passport v private placement**
 - AIFMD Passport only available for professional investors, although some Member States allow marketing to **suitably qualified retail investors** on the basis of the passport
- **PRIIPs KID – point of sale disclosure for any EU retail investor**
 - Main challenges: (i) model all expected costs, including underlying transaction costs, showing the compound effect on return of €10,000 investment and (ii) model fund’s performance according to set performance scenarios (unfavourable, moderate and favourable)
 - For new products, important to find suitable index or other benchmark as basis for performance model
- Note “RDR” ban on commission paid to **UK** intermediaries who distribute to retail investors

Marketing to an EU high net worth investor

Although AIFMD EU passport only for marketing to professional investors, some Member States allow marketing to suitably qualified investors on the basis of the passport:

Jurisdiction	Types of permitted investor
Denmark	An investor who: (i) commits to invest at least €100,000; and (ii) confirms in writing that he is familiar with the risks associated with the contemplated commitment or investment.
Finland and Germany	An investor who: (i) commits to invest at least €200,000; (ii) confirms in writing that he is aware of the risks; and (iii) has the expertise, experience and knowledge to participate in the investment opportunity. Alternatively, an investor who commits to invest at least €10 million.
Italy	An investor who commits to invest at least €500,000.
UK	A ' certified high net worth individual ' (who certifies either that (i) he has annual income of at least £100,000, or (ii) he has net assets of at least £250,000); a ' self-certified sophisticated investor ' (who certifies that: (i) he is a member of a network or syndicate of business angels and have been so for at least the last six months prior to the date of the certificate; (ii) he has made more than one investment in an unlisted company in the two years prior to the date of the certificate; (iii) he is working (or has worked for two years prior) in a professional capacity in the private equity sector, or in the provision of finance for small and medium enterprises; or (iv) he is (or has been for two years prior) a director of a company with an annual turnover of at least £1,000,000); or a ' certified sophisticated investor ' (who has a certificate signed by an authorised firm (other than the firm making the promotion) to the effect that he or she is sufficiently knowledgeable to understand the risks associated with the investment concerned).

Environmental, social and governance considerations

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- Increasing investor requests (and “impact allocations”)
- EU Action Plan for Financing Sustainable Growth launched in 2018 to “Reorient capital flows towards sustainable investment”
- Four concrete legislative proposals
 - Disclosure: how asset managers incorporate ESG factors
 - AIFMD and MiFID rule changes
 - Taxonomy: EU classification system for sustainability activities
 - Benchmarks: low carbon and positive carbon impact
- Private equity, as a long-term strategy, lends itself well to consideration of sustainability risks
- Similar disclosure requirements apply to some EU investors, such as EU occupational pension schemes

- Disclosure Regulation
 - Requirement to publish information on integration of sustainability risks in investment decision-making processes and on websites
 - Website statement on “principal adverse sustainability impacts”: “comply or explain” for smaller firms
 - Remuneration policies must be consistent
 - Pre-contractual disclosure
 - “Sustainable products”: significantly increased requirements
 - From early / mid-2021

- Taxonomy
 - Six environmental objectives
 - Activity must “contribute substantially” to at least one of those, and
 - “Do no significant harm” to any other, and
 - Comply with minimum social safeguards
 - Significance not yet clear, but could be an international standard
 - Not yet agreed: timing unclear
- Effects will be both direct and indirect
 - More disclosure required by EU law
 - Increasing focus of European regulated investors



Investment Management Regulatory Practice

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Our European Funds Expertise

- Our European funds team works very closely across offices. It consists of **UK-, U.S.-, French-, Luxembourg- and German-qualified lawyers** based in London and Frankfurt. When necessary, we also collaborate with our funds colleagues in New York, Washington, D.C. and Hong Kong.
- Debevoise has extensive experience with **all fund structures in European and Non-European jurisdictions** (both as the primary fund vehicle and for feeder, parallel fund and managed account structures), including in the context of blind-pool, pledge and single-asset funds.
- Debevoise has in-depth expertise advising on **all aspects of fund structuring** (type of vehicle, regulated/unregulated, etc.) and the drafting and negotiation of definitive documentation, with local counsel principally responsible for vehicle formation, board resolutions, technical local law issues, legal opinions and other formalities.



Our Global Investment Management Regulatory Expertise

Debevoise fund lawyers and litigators alike regularly advise a broad range of asset management clients on their most complex and challenging regulatory matters in Europe, the United States and internationally, offering clients a **global network of lawyers** who are well versed in regulatory requirements (including marketing rules) of all major jurisdictions.

On AIFMD, Debevoise regularly helps clients find the right setup and structure to market within the EU and address concerns specific to EU investors.

Our Global Investment Management Regulatory Expertise (cont'd)

The firm's European Regulatory practice includes **Patricia Volhard**, **Simon Witney**, **Jin-Hyuk Jang** and **John Young**. At a time of increasing regulatory complexity, we draw upon our involvement with the main European and emerging markets private equity trade associations to ensure funds clients are well equipped to deal with the latest regulatory developments.



We track global marketing laws, rules and regulations and have developed a global survey of the securities and investment management laws relevant to the offer and sale of fund interests **in over 70 jurisdictions**, in addition to our extensive library of flexible model forms, memoranda and precedents.

Your presenters



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