

# Applied International Corporate Finance

von

Prof. Dr. Dr. Dietmar Ernst, Prof. Dr. Dr. Joachim Häcker

2., komplett überarbeitete und erweiterte Auflage

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#### 4.4.2.1.2 Investors and marketing

Investoren  
und  
Marketing

**Question:**

What issues regarding potential investors and marketing of the initiative should be considered at the early stages?

**Explanation:**

An efficient and well planned marketing campaign is vital in ensuring that fundraising is successful. Many jurisdictions also regulate the marketing of funds and restrict it to certain types of investors (such as institutional and professional investors) and in some jurisdictions, these restrictions may apply to early informal discussions with potential investors. Planning identifies relevant jurisdictions giving the initiators the opportunity to obtain appropriate advice.

**Recommendation:**

The initiators should clearly identify the investors and types of investor that they wish to attract to the initiative in any relevant jurisdiction. Before commencing fundraising, the initiators should establish what restrictions apply to the marketing of funds in each jurisdiction where they wish to market the initiative.

#### 4.4.2.1.3 Structuring

Fondsstruktur

**Question:**

What issues on the structure of the initiative should the initiators consider during the early stage planning?

**Explanation:**

Although the final structure of a fund is usually a result of negotiations with investors, an initial outline structure is necessary to allow the initiators to market the fund. Certain categories of target investor may have an impact on the structure of the initiative (such as US-based ERISA investors). The solutions to these issues tend to be similar in all funds and they may be addressed at the planning stage if it is intended to market the fund to such investors.

**Recommendation:**

The initiators should identify an initial outline structure for the fund, including suitable vehicle(s) for the fund and custody arrangements. Wherever possible, the initiators should take account of likely requirements of targeted investors when considering these structures (including their tax requirements). During the structuring planning, the initiators should also consider what arrangements they will make for the custody of investments held by the fund.

#### 4.4.2.2 Fundraising

Kapital-  
beschaffung

The fundraising stage (which is also often referred to as the marketing stage) is the stage at which the basis of the manager's relationship with the investors is established. It is important that the principles of integrity, transparency and skill, care and diligence are observed during this stage to ensure that an appropriate relationship is formed with the investors.

**Initiatoren** 4.4.2.2.1 *Initiators***Question:**

How should responsibility during the fundraising period and prior to the establishment of the fund structure be apportioned?

**Explanation:**

During the fundraising period the manager is sometimes not yet established and the structure of the fund will not usually be finalised. However, the initiators will be involved in establishing the initiative and will undertake fundraising. The initiators will usually have certain responsibilities during fundraising, (e.g., responsibilities for complying with applicable marketing laws, responsibilities for the information provided to potential investors on the initiative and responsibilities relating to the verification of the origin of funds invested with a view to preventing money laundering).

**Recommendation:**

Tasks and responsibilities during the fundraising stage of an initiative should be clearly identified and apportioned amongst the initiators appropriately. It should also be made clear to potential investors which responsibilities will be undertaken by the manager once it is established and what (if any) the initiators' role will be once the manager is established.

**Zielinvestoren** 4.4.2.2.2 *Target investors***Question:**

What potential investors should the initiators target for an initiative?

**Explanation:**

In many jurisdictions there are restrictions on the types of investors to whom it is permissible to promote funds. Investments in funds are usually regarded as high-risk investments and funds are usually primarily aimed at experienced investors who are considered to be fully aware of the potential risk of making an investment in a fund.

Often restrictions only permit marketing of funds to potential investors for whom they are suitable. The tests for determining suitability vary from jurisdiction to jurisdiction. In some jurisdictions, the potential investor's net worth or the minimum size of investment may be one ground for permitting marketing.

**Recommendation:**

Initiators should comply with any local legal restrictions on marketing funds. Failure to comply with these requirements may mean that any agreement to invest may be unenforceable. In some jurisdictions breach of these restrictions is also a criminal offence and, in addition to being liable for damages, initiators may be subject to fines and imprisonment.

If fundraising is, as is normally the case, restricted to potential investors who can reasonably be considered to be experienced enough to properly evaluate the risk of the investment, they should be obliged to confirm in their application documentation that they are suitably experienced and that they understand and accept the risks

of the investment. Initiators should maintain a record of all persons to whom they market the initiative and a record of all information provided to them.

If for any reason less experienced investors are accepted, consideration should be given to any additional information, warnings and ongoing protections they may require.

#### 4.4.2.2.3 Origin of funds

Herkunft  
eines Fonds

##### **Question:**

Should the initiators be responsible for controlling the origin of the funds offered for investment in a fund with a view to preventing money laundering or other illicit practices?

##### **Explanation:**

Much of the present EU and national regulation on money laundering is limited to the 'classical' financial markets which are subject to some sort of supervision through a supervisory authority. In addition, the definition of what is money laundering varies from jurisdiction to jurisdiction (e.g., in some cases it may only be illegal to launder drug and terrorism money whilst others may prohibit the laundering of proceeds of any illegal or illicit activity).

The application of anti-money-laundering legislation to the private equity and venture capital industry varies throughout Europe. In some jurisdictions there are no legal obligations imposed on the initiators or managers to carry out checks or implement procedures to prevent investors from money laundering through funds. In others (such as the UK) the manager is required not only to verify the identity of the investors, but also to conduct similar checks on co-investors, companies in which the fund invests and the directors of those companies.

##### **Recommendation:**

Initiators and managers should comply with the relevant local rules in any jurisdiction where they market the initiative. In addition, during fundraising, initiators should take steps to ensure that investments are not made to effect money laundering. These steps should include verifying the origin of funds offered for investment and the identity of potential investors. Investment should not be accepted where the source of the investment causes concern (e.g., where the investment originates in a FATF black-listed country) or the investor's identity cannot be verified.

Subscription documentation should also include suitable warranties from investors in the fund regarding the origin of money invested, although such warranties should not be considered to be a substitute for making appropriate enquiries. The fund documentation may include provisions that allow the manager to require investors to withdraw from the fund, if the manager reasonably believes that the investment has been made in order to undertake money laundering.

#### 4.4.2.2.4 Investors

Investoren

##### **Question:**

What issues regarding investors should the initiators consider?

**Explanation:**

The quality and reliability of investors affect all those investing in a fund because it normally has drawdowns throughout its life. If one investor defaults, even when suitable sanctions are applied, other investors are likely to be disadvantaged.

Moreover, some investors may require specific opt-out or excuse clauses which will allow them not to participate in certain investments. If these issues are not addressed during fundraising, the fund may not have sufficient capital to implement the investment strategy.

**Recommendation:**

The initiators should seek to obtain a sufficient level of investment, diversification and quality of investors to reduce the risk and impact of default by any one investor.

Any withdrawal of an investor should be subject to strictly defined exceptional situations.

*4.4.2.2.5 Structure of the offer: terms of investment***Question:**

Should different investors be offered different terms?

**Explanation:**

The terms of investments in a fund will normally be the result of negotiation. Investors may be keen to get certain preferential rights or economic advantages (such as positions on investment committees, preferential co-investment rights, reduced management fees or a participation in carried interest). Trade and strategic investors will have different priorities in investing to those of financial investors.

The extent to which specific investors are granted influence over the management of the fund should be considered carefully. If such influence alters the management structure of the fund it can compromise investors' limited liability. Substantial influence on the management of a fund (in particular the decisions to invest or divest) can subject the fund to merger regulations and notification requirements with undesirable consequences for it and the investors.

**Recommendation:**

Whenever possible, the initiators of a fund should try to ensure that all investors in a fund benefit from equal treatment.

Wherever possible, preferential treatment or specific economic benefits to individual investors or investor groups should be justifiable (e.g., with reference to the large amount invested by a preferred investor or by specific experience of an investor which adds additional value to the fund).

Any preferential treatment should be made transparent to all other investors in a way that such investors at least know that certain other investors may benefit from preferential treatment. Investors should not generally participate in the day-to-day management (including the investment decision process) of the fund. Where they do so, they should be aware of the legal risks that arise from doing so in certain jurisdictions.

Where a fund is structured as multiple parallel partnerships or entities, the initiators should prevent one such entity or a single minority investor (in the context of the whole fund) being able to unduly influence the fund or block special resolutions without adequate justification.

#### 4.4.2.2.6 Structure of the documentation

Dokumenta-  
tionsstruktur

##### **Question:**

What documentation should the initiators produce with respect to the fund and what matters should it address?

##### **Explanation:**

Due to the ongoing negotiations until final closing of a fund, documentation tends to be continually revised to reflect all discussions with investors. However, certain core elements describe the offer and its essential characteristics.

These core elements will usually be addressed in a combination of documentation that will normally include an information memorandum (often the main 'marketing' document) and the constitutional documents of the fund.

Local laws in the jurisdictions where the initiative is marketed may set out requirements on the structure and content of the information memorandum and constitutional documents. Continuous amendment of documentation can, if not addressed appropriately, mean that not all potential investors receive the same information about the fund before they make an investment.

##### **Recommendation:**

An information memorandum or similar fund documentation should be made available prior to first closing. Constitutional documents establishing the fund should also be produced. Appropriate information should be provided to all investors to ensure that all investors receive the same information. Between the first and the final closing this information should be updated if required and such updates should be disclosed to both existing and potential investors so that all have received the same information.

Appropriate advice should be sought on the requirements of the laws in all jurisdictions where the fund is promoted.

The fund documentation should contain full and true information presented in a manner which is clear, fair and not misleading. Appropriate steps should be taken to ensure and record the accuracy and completeness of the documentation. Where the fund documentation requires it, any substantial changes to the documentation after first closing must be approved by the existing investors.

It is recommended that the fund documentation should address at least the following issues:

- the investment scope of the fund (e.g., target economies, target regions, etc.);
- the investment policy, investment criteria and investment period of the fund, including the applicable investment, lending and borrowing guidelines and investment restrictions (NB: These must be set out particularly clearly as, often, these important matters will not be set out in any detail in other key documents, and they are usually incorporated by cross-reference to the information memorandum);

- the provisions that the manager will make for follow-on investments;
- a description of the legal structure of the fund;
- a description of the management structure and the management team, identification of the key executives of such team and the regulation of key man events (such as departure of a key executive);
- a summary of the powers of the manager;
- conflict of interest resolution procedures;
- whether any advisory or investors' committee will be established and what its function will be;
- how transaction and directors' fees received by the manager will be treated;
- the carried interest arrangements;
- co-investment rights and powers;
- the mechanics for drawdown of commitments;
- default mechanics in the event of investors' defaults on drawdowns (which should normally impose significant sanctions on default to reduce the risk of such default);
- the cost and fee structure (including expenses borne by the fund);
- the valuation principles that will apply;
- the reporting obligations that the manager will have to investors;
- exit strategies;
- how distributions to investors will be made;
- term, termination and liquidation procedures for the fund;
- any restrictions on the circumstances in which the initiators or the manager will be permitted to establish any other fund with a similar investment strategy or objective;
- the policy on co-investment with other funds managed by the manager or any of its associates;
- the circumstances in which investments may be purchased from or sold to other funds managed by the manager or its associates;
- the pricing of interests, units, shares, etc.; and
- a summary of the risk factors that are relevant to investment in the fund, including a general warning to investors of the risks that are inherent in investing in funds, and also any particular risk factors that may adversely affect the fund's ability to carry out the investment policy or to meet any projection or forecast made. The fund documentation (information memorandum or similar and constitutional documentation) should be prepared and made available to investors in sufficient time for them to consider it prior to closing. Appropriate subscription documentation and confirmation of a participation should also be circulated.

The initiators should take advice to establish whether the law in any jurisdiction where the documentation will be sent requires any other issues to be addressed.

**Question:**

What responsibilities arise with respect to marketing presentations?

**Explanation:**

Presentations and information provided by the initiators which influence investors' decisions are often subject to the law of all jurisdictions where an initiative is promoted.

These laws will often apply to information provided to investors, irrespective of the media by which it is communicated.

In some circumstances, presentations may be made to potential investors at an early stage and the information provided to them may influence their decision to invest, even though they have not yet received any documentation. It is important that potential investors are made aware of any changes to information provided to them at any point during the fundraising process, so that they are able to make a balanced investment decision based on correct information.

**Recommendation:**

Initiators must comply with local laws which relate to the marketing of funds in all jurisdictions where the initiative is promoted and appropriate professional advice should be obtained.

Initiators should ensure that information provided to potential investors and promotional statements made to them in whatever form (e.g., in telephone calls, meetings, slide or PowerPoint presentations, letters, e-mails, websites, etc.) even at an early stage, is correct and fairly presented. Any subsequent material changes to such information should be communicated to potential investors.

*4.4.2.2.8 Track records and forecasts***Question:**

What information should be provided about the track record of the management team and how far should forecasts be made?

**Explanation:**

Potential investors are generally interested in the track record of the management team and the initiators may also wish to make forecasts regarding likely performance in the fund's chosen sectors, target IRR, etc. It is very easy for such material to be misread or to mislead potential investors, particularly in view of changing circumstances or if there is selective presentation of material.

**Recommendation:**

Statements and forecasts set out in the information memorandum or in other documents should not be made on the basis of selective data which is unrepresentative, misleading or incomplete. The basis of all such statements and forecasts should, in any event, be fully disclosed in the fund documentation. In particular, the period to which any track record information relates should be disclosed.

Initiators should ensure that when there is any material change that affects such information prior to final closing, it is disclosed to all investors.

Track record information may be confidential (for example, to previous employers or portfolio companies) and the initiators should ensure that appropriate consent is obtained before it is used.

Dauer des  
Fund Raising

4.4.2.2.9 *Time period for fundraising*

**Question:**

Is there any specific period during which fundraising must be completed?

**Explanation:**

It is important that the initiators do not allow fundraising to continue indefinitely, as this can prevent the manager from implementing the fund's investment strategy whilst resources continue to be committed to marketing.

**Recommendation:**

The fund documentation should specify a date when fundraising will be completed. If it does not do so, the initiators and the manager should ensure that fundraising is completed within a reasonable time after first closing of the fund.

Consideration should be given to charging interest or equivalent compensatory payments to those who invest late in the fundraising cycle.

Investition

4.4.2.3 *Investing*

When making investments on behalf of the fund, the manager must implement the fund's investment policy with due skill, care and diligence.

Due Diligence

4.4.2.3.1 *Due diligence*

**Question:**

What due diligence should be done when evaluating an investment and to what level of detail?

**Explanation:**

The due diligence process undertaken by the manager is vital. The information acquired during the process, together with the manager's own knowledge and expertise, will form the basis of any investment decision. The due diligence process will usually have a number of objectives: obtaining 'corporate' information about the investee business (such as the extent of its assets and liabilities and the likelihood of litigation against it) and also evaluating any technology, research or business opportunity that may play a part in the manager's investment decision, assessing the market for the product or service being offered and likely exit opportunities for the fund.

**Recommendation:**

A manager should seek sufficient information to allow it to properly evaluate the investment proposition being put to it and to establish the value of the investee business.

This information should address all appropriate issues (which may include the financial position of the investee business, the experience and ability of its management team, the market in which the investee business operates, the potential to exploit any technology or research being developed by the investee business, possible scientific proof of any important concept, protection of important intellectual property rights, pensions liability, possible environmental liabilities, litigation risks and insurance matters).