

THE PRIVATE EQUITY
REVIEW

ELEVENTH EDITION

Editor
Stephen L Ritchie

THE LAWREVIEWS

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REVIEW

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PREFACE

The 11th edition of *The Private Equity Review* comes on the heels of a record-breaking year for dealmakers in 2021. Despite the continued impact of the global covid-19 pandemic, the volume and value of both US and global buyouts soared to all-time highs in 2021, with more than US\$1 trillion of global activity attributed to private equity sponsors – at roughly 25 per cent of global deal value, the highest share ever. Deal activity was propelled by a confluence of factors, including favourable macroeconomic conditions leading to increased confidence in boardrooms, accommodating central bank policies, an abundance of cheap financing, robust stock markets, substantial corporate cash and the pace of innovation across industries. IPO and merger and acquisition activity by special purpose acquisition corporations (SPACs), skyrocketed to unprecedented levels, with more than 300 de-SPAC transactions announced in 2021 for a total of over US\$600 billion. Private equity (PE) sponsors also sought out larger public targets in record numbers, with overall take-private value eclipsing that of previous years. In keeping with the theme, sponsor-backed leveraged buyouts above US\$1 billion peaked in 2021, as did exits above US\$1 billion, in part due to more public exits with higher multiples fuelled by the boom in de-SPAC transactions and IPOs. With continued confidence in the performance of PE as an asset class, fundraising activity remained strong, with PE funds amassing aggregate capital of over US\$1.3 trillion raised and record amounts of available capital ('dry powder') (one estimate puts the latter at over US\$1.6 trillion).

In 2021, PE's enormous impact and the continuing creativity of PE dealmakers was demonstrated. Given PE funds' success, creativity and available capital, we are confident that PE's role in the global economy will continue to grow, not only in North America and western Europe, but also in developing and emerging markets in Asia, South America, the Middle East and Africa, notwithstanding ongoing and potential political, regulatory and economic challenges.

PE professionals need practical and informed guidance from local practitioners about how to raise money and close deals in multiple jurisdictions. *The Private Equity Review* has been prepared with this need in mind. It contains contributions from leading PE practitioners in 16 different countries, with observations and advice on PE deal-making and fundraising in each.

As PE has grown, it has also faced increased regulatory scrutiny throughout the world. Adding to this complexity, regulation of PE is not uniform from country to country. As a result, the following chapters also include a brief discussion of these various regulatory regimes.

I want to thank everyone who contributed their time and labour to making this 11th edition of *The Private Equity Review* possible. Each of these contributors is a leader in their respective markets, so I appreciate that they have used their scarce and valuable time to share their expertise.

Stephen L Ritchie
Kirkland & Ellis LLP
Chicago, Illinois
March 2022

Part I

FUNDRAISING

SOUTH KOREA

*Chris Chang-Hyun Song, Tae-Yong Seo and Sang-Yeon Eom*¹

I GENERAL OVERVIEW

Regulations on onshore private equity (PE) funds² were first introduced in South Korea in 2004 following the enactment of the Indirect Investment Asset Management Business Act. In 2009, this Act and the Securities and Exchange Act were integrated into a new law known as the Financial Investment Services and Capital Markets Act (FSCMA), which primarily regulates fundraising, formation, management and operation of private equity funds in South Korea. Since 2004, there has been a remarkable growth in the South Korean PE fund market, with the number of PE funds increasing from two in 2004 to 855 as at the end of 2020.³

During the early years following the introduction of PE funds in South Korea, limited partners (LPs) were mostly financial institutions. However, as the PE fund market expanded, large pension funds such as the National Pension Service (NPS) have been actively participating as anchor investors. More recently, the number of smaller PE funds, with a commitment amount of 100 billion won or less, has been increasing, and project-based funds formed to acquire specific investment targets comprise 77.1 per cent of all PE funds registered with the Financial Services Commission (FSC).

Previously, only financial institutions such as banks, securities companies and asset management companies acted as general partners (GPs); however, the number and variety of institutions acting solely as general partners have increased, and as a result, they now comprise 72.7 per cent of the total number of GPs in South Korea.

The first table below indicates the number of registered PE funds in South Korea and the second table refers to the total commitment amounts and total invested amounts in recent years.⁴

1 Chris Chang-Hyun Song, Tae-Yong Seo and Sang-Yeon Eom are partners at Shin & Kim LLC.

2 New technology business investment partnerships prescribed in the Specialised Credit Finance Business Act and venture investment partnerships prescribed in the Act on Promotion of Venture Investment are similar to a venture capital fund as used in the United States and Europe, and can be considered as a private equity fund in a broader sense. For the purposes of this chapter, we discuss the private equity fund governed by the Financial Investment Services and Capital Markets Act.

3 Financial Supervisory Service, July 2021.

4 Source: Financial Supervisory Service, July 2021.

Year	2015	2016	2017	2018	2019	2020
Number of funds	316	383	444	580	721	855

Year	2015	2016	2017	2018	2019	2020
Total commitment amount (A)(× trillion won)	58.5	62.2	62.6	74.4	84.3	97.1
Total invested amount (B)(× trillion won)	38.4	43.6	45.5	55.5	61.7	70.6
Investment ratio (B)/(A)	65.6%	70.1%	72.7%	74.6%	73.2%	72.7%

The table below indicates the number of PE funds established throughout the year, sorted by volume of commitment amounts.

Year	Total commitment amount	2015	2016	2017	2018	2019	2020
Large	At least 300 billion won	8	7	5	13	8	12
Medium-sized	100 billion to 300 billion won	22	22	22	33	36	38
Small	Up to 100 billion won	46	80	108	152	162	168
Total	76	109	135	198	206	218	

The table below indicates the number of institutions acting solely as GPs (independent GPs) and the number of financial institutions participating as GPs (FI GPs).

Year	2015	2016	2017	2018	2019	2020
Independent GPs	94 (56.3%)	115 (60.5%)	138 (66%)	168 (66.1%)	210 (69.1%)	245 (72.7%)
FI GPs	73 (43.7%)	75 (39.5%)	71 (34%)	86 (34.9%)	84 (30.9%)	92 (27.3%)
Total	167	190	209	254	300	337

On 21 October 2021, the amended FSCMA came into effect and implemented some major changes to the PE funds ecosystem. Previously, private funds were classified into two categories based on the investment objective of the fund – hedge funds and PE funds. The amended FSCMA unifies the investment object of the fund and instead distinguishes the investors into two categories – general investors and institutional investors. The private funds are now classified into two new categories based on the investors of the fund – private funds for general investors and private funds for institutional investors. Accordingly, private funds for institutional investors can function as other types of funds such as private debt funds or private credit funds, in addition to PE funds and private funds for general investors can also invest in equity without restrictions in principle. Hereinafter, we shall discuss in depth the PE funds in the form of the private funds for institutional investors. The major changes to the FSCMA are discussed further in detail in Section III.

II LEGAL FRAMEWORK FOR FUNDRAISING

i Incorporation of a PE fund

The legal form of a PE fund in South Korea is a corporate vehicle, limited company under the Korean Commercial Code (KCC), which is similar to a limited partnership in US law. The formation of a PE fund requires a minimum of one GP with unlimited liability and one LP⁵ with limited liability. In practice, nearly all GPs act as managing partners of PE funds.

The qualification requirements for an LP are as follows:

- a* professional investors as prescribed in the Enforcement Decree of the FSCMA (mostly financial institutions and pension funds as well as private funds for institutional investors, private funds for general investors made up of investors with LP qualifications in private funds for institutional investors, persons registered with the Korea Financial Investment Association as a stock-listed corporation with a balance of financial investment products of 10 billion won (5 billion won for investment in externally audited corporations) or more, foreigners equivalent to professional investors; or
- b* investors prescribed by Enforcement Decree as persons with expertise or relevant risk-taking abilities (executives and management personnel of GP who invest 100 million won or more, parent companies that own 50 per cent or more of the shares of GP and invest more than 100 million won, persons registered with the Korea Financial Investment Association as unlisted corporations with an average monthly balance of financial investment products of 50 billion won or more in the last year, persons who invest 10 billion won or more in a PE fund as a foreign corporation without a Korean investment share, etc.).

As PE funds are also categorised as private placement funds, the total number of members must be 100 or below. A filing with respect to the incorporation of a PE fund must be made to the FSC within two weeks of the registration of its incorporation with the court.

ii Registration requirements for GPs

When the PE fund regime was first introduced in South Korea in 2004, there was no statutory licence or qualification requirement for a GP. In 2013, the FSCMA was amended to include certain requirements for an entity contemplating becoming a GP in South Korea with additional amendments made in 2021. To register as a GP, the following conditions must be satisfied:

- a* a minimum capital of 100 million won;
- b* compliance by each executive officer of the GP with Article 5 of the Act on Corporate Governance of Financial Companies;
- c* employment of at least two individual fund managers with certain relevant professional requirements;
- d* setting up of an internal compliance policy to identify, assess and manage the possibility of conflicts of interest; and
- e* maintaining sound financial standing and social credibility as prescribed in the Enforcement Decree of the FSCMA.

5 In practice, however, it is required to have at least two LPs, as a PE fund is subject to dissolution if the number of LPs is less than two. This does not apply where a pension fund becomes the sole LP of a PE fund.

iii PE fund asset management methods

The asset classes that a Korean PE fund is permitted to acquire are changed from a positive method to a negative method in accordance with the amendment to the FSCMA in 2021 and, in principle, there are no restrictions. Now, PE funds may borrow up to 400 per cent of its net assets.

Investments of PE funds can be made in securities issued by a special purpose company (SPC). Asset management practices prohibited by PE funds are as follows:

- a* Disposal of real estate in Korea within one year (the period stipulated in the articles of incorporation of the PE fund when the PE fund acquires the unsubscribed houses) of acquiring it. Excluding cases where land and buildings created or installed in accordance with real estate development projects are sold or where PE funds are dissolved.
- b* Disposal of land without buildings or other structures before implementing a real estate development project on the land. Excluding cases where it is unavoidable to dispose of the land because it is objectively difficult to carry out the real estate development project due to the deterioration of the business viability caused by the enactment, amendment or repeal of relevant laws and regulations after the land had been acquired for the real estate development project or where PE funds are dissolved.
- c* Act of GP directly lending the PE fund's assets to individuals, adult entertainment bar business owners and other gambling facility owners and operators or using linked transactions with lending business companies or online investment-linked financial companies for the purpose of avoiding such direct lending.
- d* Issuance of the collective investment securities of the PE funds to a person other than the state, the Bank of Korea and certain professional investors (referring to financial institutions, finance-related public institutions, collective investment schemes, funds, corporations running mutual aid projects, local governments, certain stock-listed corporations, etc.). Excluding cases where there is no risk of impairing the stable operation of the PE funds such as when the purpose of the borrower to whom the PE fund lends money is (1) to acquire, develop, lease, operate, manage, improve or equivalent business thereto in domestic or foreign real estate, or invest in such business or (2) to acquire, establish, expand, improve or operate special assets or equivalent business thereto, or invest in such business.

However, banks, insurance companies, savings banks, specialized credit finance companies (excluding new technology business finance companies), Korea Credit Guarantee Fund, Korea Technology Finance Corporation, Credit Union, Credit Information Company and Korea Asset Management Corporation, etc. (Financial Institution GPs) must manage PE fund's assets in the following manner:

- a* they must acquire 10 per cent or more of the issued and outstanding shares with voting rights in a target company; or
- b* if an investment is being made in relation to less than 10 per cent of the issued and outstanding shares or the total capital amount, the investment must be allowed to:
 - exercise authority over major management matters, such as appointment and dismissal of executives, structural change or new investment through investment contracts; or
 - become the largest shareholder of an investment target company (Management Participation in Target Companies).

Since the first introduction of the PE fund regime in South Korea, there have been concerns that chaebols (large, family-run conglomerates) would be likely to exploit the PE fund scheme for the purpose of expanding their businesses or unfairly supporting their affiliates. The FSCMA includes the following provisions to prevent potential abuse of the PE fund by chaebols.

If a PE fund that is an affiliate of a ‘business group subject to limitations on cross shareholding’ (a ‘restricted business group’) as prescribed in the Monopoly Regulation and Fair Trade Act, or a PE fund whose GP is an affiliate of a restricted business group, acquires a target company as an affiliate, it must sell its shares in the target company to a third party other than its affiliate within five years.

A PE fund that is an affiliate of a restricted business group or a PE fund whose GP is an affiliate of a restricted business group is prohibited from acquiring equity securities of an affiliate.

iv Incorporation of an SPC

The FSCMA allows investment by a PE fund by way of incorporating an SPC. Requirements for establishing and operating an SPC are as follows:

- a* the SPC is a joint-stock company or a limited company under the KCC;
- b* the SPC is established and operated for the purpose of efficient investment in specific corporations or specific assets;
- c* a shareholder or a member of the SPC is a private fund or an SPC invested by a private fund, an executive officer of the target company, the major shareholder or a person designated by the Enforcement Decree to the FSCMA, provided that the PE fund’s shareholding ratio in the SPC is 50 per cent or above;
- d* the sum of (1) the number of shareholders of the SPC or the number of members of a private fund and (2) the number of non-PE fund shareholders or members, is 100 or below; and
- e* the SPC does not employ a full-time executive officer or staff and does not maintain a place of business other than a head office.

v Monitoring of PE fund by regulators

In South Korea, the FSC and the Financial Supervisory Service, the executive body of the FSC, oversee PE funds and GPs managing the PE funds. If an onshore PE fund or a GP violates the relevant laws, the FSC has the power to do the following:

- a* cancel its registration;
- b* suspend all or part of its business;
- c* demand that the PE fund dismiss, suspend from duty or issue a warning or admonition with regard to its officers;
- d* issue a warning or admonition against the PE fund;
- e* demand that the PE fund dismiss, suspend from duty, reduce salaries of, reprimand, or issue warnings or admonitions to, its employees; or
- f* issue a remedial order or demand certain measures for compensation of the damages incurred by its investors.

III REGULATORY DEVELOPMENTS

The FSCMA provides the general legal framework for the PE fund regime, including incorporation of a PE fund, asset management and requirements of GPs and LPs, among other matters. A meeting of members of a PE fund, liquidation of a PE fund and other business affairs that are not governed by the FSCMA are covered under the KCC. Since the inception of the PE fund regulations, there have not been many changes from a regulatory perspective; however, there were significant amendments to the PE fund-related provisions of the FSCMA in 2015. Some of the important changes are noted below:

- a* Previously, registration with the FSC was required prior to the incorporation of a PE fund. This has been changed to allow a filing with the FSC after the incorporation of the fund.
- b* Previously, a PE fund was prohibited from incorporating multiple layers of SPCs (i.e., having its first SPC incorporate a second SPC, and so on). This is no longer applicable, and a PE fund may have multiple layers of SPCs.
- c* A strategic investor can become a member of an SPC. Previously, only a PE fund, an executive officer or the major shareholder of a target company could become a member of an SPC.

At the end of 2016, the amendment to the FSCMA introduced PE funds specifically designed for the purpose of investing in start-up companies and venture companies (start-up and venture PE fund). The start-up and venture PE fund enjoys certain corporate tax benefits if it invests 50 per cent or more of its assets in a venture business or a technology and innovation-driven small or medium-sized enterprise within two years of its incorporation.

In October 2021, the FSCMA was amended to unify the investment objective of private funds, which were previously divided into hedge funds and PE funds based on the investment objective of the funds. After the amendment, private funds are now classified into private funds for general investors and private funds for institutional investors.

The major changes accordingly to the amended FSCMA are as follows:

- a* PE fund may invest in any type of assets in principle. However, a PE fund established by the Financial Institution GP is limited to investment in Management Participation in Target Companies.
- b* PE fund's LP qualification is limited to certain institutional investors.
- c* PE fund's permitted number of partners has changed from 49 to 100.
- d* PE fund may borrow funds and PE fund is permitted to incur indebtedness of up to 400 per cent of its net assets.
- e* PE fund is now permitted to be an LP of a PE fund (previously, this was not permitted).
- f* The 15-year limit on the duration of PE fund has been removed.
- g* PE fund's GP is subject to inspection by the Financial Supervisory Service (previously, only the PE fund was subject to inspection).
- h* Fund managers of PE fund's GP must now meet certain professional requirements.

IV OUTLOOK

Since the first introduction of the onshore PE fund scheme in 2004, there has been a continuous growth of the PE fund market in South Korea. In particular, there has been a remarkable expansion in the market in the past decade, and, in fact, PE funds have been

leading South Korea's M&A sector for many years. It is expected that the South Korean PE fund market will continue to grow in the near future while large pension funds, such as the NPS, will continue to play the role of anchor investor to large PE funds.

One of the current features of the South Korean PE fund market is that secondary PE funds are not yet very active compared with in seasoned PE markets such as the United States and the European Union. This is mainly because a few large pension funds tend to widely allocate their investments to various PE funds, which results in overlapping of LPs in many PE funds. However, the need for secondary PE funds has been developing and it is expected that the number of secondary PE funds will increase.

Additionally, it is expected that the private placement fund market will grow rapidly as the amendment to the FSCMA mentioned above expanded the scope of investment methods and asset classes, and eases the standard of being recognised as 'private placement'. As the amendments to the FSCMA have significantly eased the restrictions on asset management of PE funds, it is expected that PE funds will increase the size of their capital and workforce, and accordingly it is also expected that the Korean PE fund market will become more active.

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