ČAOCP

CZECH ASSOCIATION
OF SECURITIES
BROKERS

European Securities and Markets Authority

103 rue de Grenelle

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Discussion paper "Key concepts of the Alternative Investment Funds managers Directive and types of AIFM"

The Czech Association of Securities Brokers represents the interests of investment firms based in the Czech Republic. We comment on the abovementioned discussion paper as follows:

Question 1

Yes. The directive is intended to cover only undertakings that raise capital from a number of investors which in our view does not cover family office vehicles or vehicles the purpose of which is exclusively the management of family wealth. This is true with no regard to the specific legal form of the vehicle and with no regard to the fact that there could be more persons who are beneficiaries of the vehicle.

Question 2

Yes, in case of joint ventures. It should be made clear that joint ventures are outside the scope of the directive. Under joint ventures, we understand business ventures of a very small number of persons that are relatively equal in terms of influence in the venture and whose relationship is governed by a contract. This should be again true with no regard to the specific legal form of such venture (company, association without legal personality).

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Question 3

Yes, because we do not consider the definition in Article 4/1/(o) very clear. According to the definition the business purpose of the holding company is "to carry out business strategy or strategies through its subsidiaries, associated companies or participations in order to contribute to their long-term value…". In many cases, however, it will not be apparent that a company has such a purpose and it is therefore not clear how a company will prove such a purpose to the regulator in case of doubt. In our country, no such business activity is registered in the commercial register as purpose of a company.

The definition is also not very clear materially. Unclear is for example

(i) the meaning of "long term value",
(ii) the meaning of carrying out a strategy through subsidiaries – in many legal systems a subsidiary is considered a separate company carrying out its own business strategy, not a holding company's business strategy, although the strategy is approved by the general meeting (sole shareholder),
(iii) the significance of "commercial purpose" of the holding company – the holding company may have other activities apart from those described in Art. 4/1/(o),
(iv) the meaning of the "main purpose" in Art. 4/1/(o)/(ii) – obviously in every kind of holding company it may be inevitable to sell the assets from time to time or even regularly.

We are concerned that due to unclear definition vehicles that are not materially AIFs could be unnecessarily brought into the regime of the AIFMD with the consequent administrative burdens. Therefore we would appreciate relevant explanation of the definition, with regard to this risk.

Questions 5-8

Regarding „number of investors" the discussion paper states that "where the AIFs rules (…) do not restrict the sale of units/shares to a single investor, the AIF is considered to be raising capital from a number of investors". If we understand it correctly, this means that some kind of communication by way of business (point 26) in relation to 2 investors is enough to qualify the vehicle as an AIF.

We do not agree with such an approach and consider it to be contrary to both the wording and sense of AIFMD. In Czech version of AIFMD the term "větší počet" is used meaning "greater number". Also

the German version uses the term “Anzahl” meaning generally “greater number”. We are of the opinion that the phrase “more than one investor” would be used if this was the intended meaning of the AIFMD.

Therefore, we suggest an approach of clarifying the meaning of “number of investors” taking into account that AIF is materially a collective investment undertaking, not a private venture of a few investors. An orientational number of investors should be specified. In our view, this number is around 10 investors.

Question 14

We do not see a reason, either material or in the text of the directive, why MiFID firms should be excluded from being appointed an AIFM. MiFID firms are authorized to provide both core services of an AIFM – portfolio management and risk management. We do not believe the AIFMD necessarily requires that a new, special kind of entities is created by the law of the EU member states that is called AIFM. Therefore, we believe that the expertise of MiFID firms should be used in the management of AIFs without the necessity of creating a special entity and obtaining a special license.

Obviously, a MiFID firm acting as an AIFM would have to conform with the conditions specified in Article 6 of AIFMD, that would effectively require it to specialize mainly on management of AIFs and discretionary portfolio management and to provide other investment services only as “non-core services” (Art. 6/4/(b)).

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