

*Vereniging ter behartiging van de gezamenlijke belangen
van beursgenoteerde fiscale vastgoedbeleggingsinstellingen*

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European Securities and Markets Authority

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Dear Sir, Madam,

We welcome the opportunity to respond to your consultation paper on possible implementing measures of the Alternative Investment Fund Managers Directive (the "Directive"). We write this response to you on behalf on the "Dutch Association for the joint interests of listed property investment companies" ("Vereniging ter behartiging van de gezamenlijke belangen van beursgenoteerde fiscale vastgoedbeleggingsinstellingen"). This Association has the following six members, Corio N.V., Eurocommercial Properties N.V., Wereldhave N.V., Unibail-Rodamco, NSI N.V. and VastNed Retail N.V., all six stocklisted property companies.

Before responding to the consultation (the "Consultation") in detail, we would like to take this opportunity to give a brief description of our business and ask your attention for two issues of a general nature which relate directly to the Consultation.

In the light of this open relationship we would like to explain to you our concerns as listed property companies on the risks that the proposed regulation on the "AIFM" potentially presents to stock listed Dutch REITS.

1 General

Listed real estate companies and scope of the Directive

Corio N.V., Eurocommercial Properties N.V., Wereldhave N.V., Unibail Rodamco, NSI N.V. and VastNed Retail N.V. are closed-end real estate investment companies (Dutch REITs, or "DREITs") established in the Netherlands and listed at NYSE Euronext Amsterdam, with substantial international property portfolios, with a total value of well over EUR 30 billion. The listed shares are traded on a continuous basis by auction and are included in the main indices of NYSE Euronext Amsterdam (the AEX-index and the MidCap-index respectively).

The strategies of the DREITs are not aimed at generating returns by means of actively investing and divesting with a view to distribute the proceeds to their shareholders. Each of the DREITs has multiple subsidiaries situated in different countries. DREITs have a long-term view and focus on rental income and enhancing the value of their properties. The

involvement of DREITs with the day-to-day operations of their properties does not resemble the activities of a collective investment undertaking but that of a (multinational) corporation and its holding company. DREITs are not investment products.

In our view it is important that a common position by EU member states is taken on the applicability of the Directive to listed closed-end real estate investment companies, such as DREITs and their equivalents in other EU member states. The above mentioned nature of the activities of the DREITs and the fact that they do not only act in the interests of their shareholders but have to take into consideration also the interests of tenants, employees and others are well-founded arguments to argue that the Directive is not applicable to the DREITs.

Irrespective of this initial position and without prejudice to the foregoing, we would like to take this opportunity to provide you with our observations if, notwithstanding the above, the Directive and the delegated acts will be applicable to our sector.

We also note that DREITs are already subject to strict (regulatory) obligations due to the fact that they are listed on a regulated market (e.g. the Transparency Directive). DREITs publish their audited financial statements in accordance with IFRS. We kindly request that ESMA takes the existing obligations into account in its final advice so as to avoid that new rules conflict with such existing obligations.

The Consultation and real estate

Although real estate is mentioned in the Consultation, the Consultation seem to take as a starting point that the investments take place in financial instruments. The Consultation does not take the specific characteristics of real estate as an asset class and closed-end real estate investment companies (like DREITs) into account.

The provisions and positions in the Consultation are primarily written for AIFM managing AIF's which invest in financial instruments. We kindly request that ESMA recognises the distinctive characteristics of real estate as an asset class and provides the flexibility for DREITs and other (listed) real estate companies to meet the requirements of the Directive in a way that is in line with their business.

2 Delegation

General; boxes 63 and 67

DREITs not only invest in real estate situated in different countries but also have group companies in those countries in order to have an active presence to deal with the local real estate on a day-to-day basis and stay in close contact with those local markets. These group

companies operate stand-alone in their jurisdiction. The group companies are consolidated in the financial statements of the listed parent company. DREITs are organised similar to multinational corporations and not as traditional collective investment schemes.

Activities performed by the local subsidiaries could qualify as critical and important functions. Although we understand that it is difficult to set a list of types of tasks which are critical or important, the current examples do not provide sufficient clarity in practice. It can be questioned whether there is delegation in the situations mentioned and secondly the examples only seem to refer to the business of the AIFM and not the actual investments. For example, in case of real estate a distinction can be made between asset management and property management. The latter dealing with the actual day-to-day aspects of a specific property.

The first question which arises is whether the situation in which several activities are performed by group companies qualifies as delegation and secondly how the obligation of article 20 (1)(c) of the Directive should be fulfilled. The group companies performing the activities are currently not authorised or registered for asset management.

In our view the obligation of article 20(1)(c) of the Directive should not apply to the activities performed intra-group because these activities should not qualify as delegation. The entities are primarily put in place for corporate reasons. Consequently, the structures used by DREITs are not comparable to the situation in which e.g. part of the portfolio management is delegated to another asset manager (not being a group company) because of its expertise in specific financial instruments.

In our view the described structures (listed real estate companies with a corporate structure comprising (foreign) group companies) should not be subject to the delegation requirements nor should group companies be required to become authorised for asset management. A solution could be to introduce an appropriate definition of third parties, excluding such group companies. We kindly request that ESMA takes the structure of DREITs and other (listed) real estate companies into account in its final advice since these legal structures cannot be compared to 'traditional' delegation by AIFM's investing in financial instruments.

3 Depositary

3.1 General

The Consultation does not deal with the question which institutions can be appointed as a depositary besides banks and investment firms. Pursuant to the Directive, in the case of closed-end funds which invest in assets which cannot be held in custody (e.g. real estate), the depositary may also be an entity which carries out its depositary function as part of its professional business. Such entity must be subject to mandatory professional registration. In case of DREITs the depositary will only perform the supervisory function and not the function of safe keeping of assets. Consequently, and again taking into account the characteristics of the

DREIT, it is important that DREITs have flexibility and can e.g. also appoint a Dutch trust office, the valuer or use an accountant for the supervisory tasks.

We kindly request that certainty is provided about which entity may act as a depositary as referred to in article 21(2)(c) of the Directive, and this includes professionals like the auditor, the valuer of the real estate or a regulated trust office.

3.2 Cash monitoring; box 76

Generally, it is not clear to which cash flows the Directive and Consultation refers. In the case of DREITs, there is no redemption and/or issuance of shares. Secondly, and we refer to our comment under paragraph 2, DREITs have multiple active subsidiaries in several jurisdictions dealing with day to day business of the real estate. Consequently, it is almost impossible to actively monitor the huge number of the cash flows, e.g. cash flows relating to service charges, maintenance, cleaning, wages, legal costs etc.

We strongly prefer the approach taken in option 2, again with the comment that the final advice should take the characteristics of DREITs and other (listed) real estate companies into account, including the fact that these companies are obliged to publish audited financial reports which are in accordance with IFRS. Option 1 is not workable for DREITs. The result of option 1 would be that the depositary would have to be integrated in the DREIT and would have to mirror every cash payment or receipt. Furthermore, DREITs have dozens of bank accounts with different banks in multiple jurisdictions.

3.3 Ownership verification; box 81

In the case of DREITs it is impossible that assets get lost. Consequently, a much more simple verification procedure should be possible, focussing on the procedures that are in place and taking a risk based approach to the documentation of the real estate titles.

In our view, it is only beneficial to require documentary evidence upon the acquisition or sale of a significant asset and upon a significant corporate action. Insignificant assets such as fixtures and fittings in a property should not be included.

We kindly request that ESMA allows for flexibility in the requirements regarding the verification of the ownership of the real estate, focussing on the procedures that are in place and taking a risk based approach to the documentation of the real estate titles. Consequently, we strongly prefer Option 1 in box 81.

In case of DREITs with subsidiaries and real estate in multiple jurisdictions it is only possible to provide a reasonable verification of ownership. The depositary should be allowed to rely on confirmations from experts in other jurisdictions. Furthermore, the depositary should be allowed to only provide a reasonable verification as to the ownership of assets even if not all documents are still available (for instance a legal title search that has to go back many years is usually incomplete).

4 Periodic disclosure to investors

DREITs are already subject to strict transparency requirements because they are admitted to trading on a regulated market. Option 1 in box 107 provides the most flexibility for DREITs in disclosing the relevant information to the investors. Furthermore, due to the principle based nature of option 1 investors will receive useful information, contrary to the situation in which the content is prescribed (as in option 2) but does not match with the characteristics of the AIFM.

5 Reporting to the competent authorities

The proposals currently laid down in boxes 109 and 110 are clearly written for collective investment schemes which primarily invest in financial instruments. DREITs invest in real estate for a long term and are listed on a regulated market and are therefore already subject to strict transparency requirements. The current proposal would create a burden for the DREITs while adding little to no value from a supervisory perspective.

Paragraph 3 (d) (ii) of box 109 states that the terms of the financing should be provided. The exact terms of the financing are commercially sensitive, usually confidential, and, taking into account the other requirements already in place, do not seem to provide any additional value in supervising the AIFM. Furthermore, it can be questioned whether the European Commission would have the legal authority to impose this requirement in a delegated act.

We request that more flexibility is provided in the reporting requirements depending on specific characteristics of the AIFM. Furthermore, the one month period within which the information has to be provided is not feasible. We are already subject to strict reporting deadlines for quarterly, interim and annual (financial) reports (e.g. based on the Transparency directive) and stock exchange rules. Reporting on an international property portfolio including valuations, requires more time than one month. We kindly request that ESMA follows the existing deadlines applicable to our sector.

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We are fully available for any questions you may have or to provide any additional information about real estate as an asset class or the characteristics of the activities of DREITs.

Yours sincerely,

On behalf of the Board of the Association

Evert Jan van Garderen, Chairman

Daniel van Dongen, Secretary

Tom de Witte, Treasurer