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ESMA  
103, rue de Grenelle  
F - 75007 Paris

7<sup>th</sup> January 2013

**Re:** Guidelines on Key Concepts of the AIFMD

Dear Sir/Madam,

We are pleased to submit this comment letter on the European Securities and Market Authorities (ESMA) Discussion Paper; Guidelines on Key Concepts of the AIFMD. We are submitting these comments on behalf of alstria office REIT-AG, which is the largest German listed commercial property company. alstria is listed at the Frankfurt stock exchange in the Prime standard (ISIN DE000A0LD2U1).

Senior management of alstria would be pleased to meet with your representatives to discuss any questions regarding our comments.

We thank ESMA for the opportunity to comment with respect to this very important project. Please contact Olivier Elamine, Chief Executive Officer of alstria ([uelamine@alstria.de](mailto:uelamine@alstria.de) or +49 40 226341330) if you would like to discuss our comments.

Respectfully submitted,



Olivier Elamine  
Chief Executive Officer  
alstria office REIT-AG

**Comment Letter Submitted by**

**alstria office REIT-AG**

**In response to the**

**Discussion Paper**

**Guidelines on Key Concepts of the AIFMD**

**Issued by the European Securities and Market Authorities (ESMA)  
19th December 2012**

ESMA  
103, rue de Grenelle  
75007 Paris

**Re: Discussion Paper; Guidelines on Key Concepts of the AIFMD**

Dear Sir/Madam,

**Introduction to alstria**

alstria office REIT-AG (symbol: AOX, ISIN: DE000A0LD2U1) is an internally managed real estate company focused solely on acquiring, owning and managing office real estate in Germany. alstria is listed at the Frankfurt stock exchange and is the largest office property company in Germany.

alstria owns a portfolio of more than 80 German office properties valued at more than EUR 1,7 billion. alstria office REIT-AG is a member of the European Public Real Estate Association, and fully supports the comments EPRA has made in relation to the discussion paper.

However, considering the importance of the discussion paper for our industry we have decided to further actively participate into the AIFM discussion by providing you with specific company view on some of the questions you are raising in the discussion paper.

Kind Regards

Q1: Do you agree with the approach suggested above on the topics which should be included in the guidelines on key concepts of the AIFMD? If not, please state the reasons for your answer and also specify which topics should be re-moved/included from the content of the guidelines.

We agree with the approach suggest by ESMA. However we are concerned that, despite the enormous amount of work and input so far, the proposed guideline will create a grey area for a number of operating companies. These companies would not know whether or not they should be considered as an AIFM.

Q2: What are your views on/readings of the concepts used in the definition of AIF in the AIFMD? Do you agree with the orientations set out above on these concepts? Do you have any alternative/additional suggestions on the clarifications to be provided for these concepts?

We broadly support ESMA views, and more specifically welcome the fact that:

*'It is only when all the elements included in the definition of AIFs under Article 4(1)(a) of the AIFMD are present that an entity should be considered an AIF.*

Q3: What are your views on the notion of 'raising capital'? Do you agree with the proposal set out above? If not, please provide explanations and possibly an alternative solution.

We broadly agree with the notion of raising capital as described by ESMA. However we feel that two fundamental elements of the capital raising are missing from the description of discussion paper. These two elements where highlighted by the SMSG opinion of April 2012. They relate to the fact that:

- there should be an express linking of the capital raising with the defined investment policy
- the capital raising should be done by or on behalf of a "sponsor" which plans (itself or through a group member) to make a profit out of the management of the capital raised from third party/external sources

We believe these elements are the key to make the clear distinction between regular operating companies, which raise capital for "General corporate purpose", and seek to make return on the capital invested in it underlying business, and an AIF which is raising capital in order to invest it in a defined way, with the aim of generating fees out of the management of this capital.

Q5: Do you agree with the proposed guidance for identifying a 'collective investment undertaking' for the purposes of the definition of AIF? If not, please explain why.

We welcome the clarification that an ordinary company with general commercial purpose should not be considered as a collective investment undertaking. However, as highlighted by your question 9, the main difficulty remains in defining an ordinary company. We are concerned that the concept of pooled returns is not helping, as it

could apply in extenso to any listed company raising capital on the market. It is unclear to us what the concept of pooled returns is trying to cover, and why "pooled return" is different than "return". We would appreciate clarification and better definition of pooled return.

Q7: Do you agree with the analysis on the absence of any day-to-day investor discretion or control of the underlying assets in an AIF? If not, please explain why.

We understand the rationale of this argument; however we would rather use it in a negative way. Rather than saying that AIF investors should not have day-to-day control of the assets, we would suggest saying that if investor have day-to-day control of the assets then the entity is not an AIF.

The rationale for our position is that investor in an ordinary business do not have day to day control over the assets. We are therefore concerned that the way the criterion is being put forward could lead to evidence of a regular business being an AIF.

Q8: Do you agree that an ordinary company with general commercial purpose should not be considered a collective investment undertaking? If not, please explain why.

We strongly agree with this position, on the understanding that it cannot be the Commission's intention to bring the entire corporate sector (publicly quoted and private sector) within the scope of AIFMD.

Q9: Which are in your view the key characteristics defining an ordinary company with general commercial purpose?

We believe that the following elements tend to demonstrate that an entity is a regular operating company:

#### 1) Operations

An ordinary company is always internally managed. The main field of operation of an operating company is defined in its bylaws, but the management of the company is free to act within these boundaries.

An operating company is more than just its management. It usually employs directly a number of staffs that are in charge of implementing its business strategy. Not only all the key decision processes are insourced, but all the key execution and operating processes needed to run the business are insourced as well.

Operating businesses not only have direct control on the day to day business but its own staffs actually perform the task of the day to day management.

The corporate identity of an operating company is usually a trademark owned by the entity itself and protected by copyrights regulations. It operates its own corporate communication which is not shared with any other entity.

## 2) Reporting

An operating company usually reports in line with its industry practice. In particular it will not report Assets Under Management (AUM) or Asset Management fee as one of its KPI.

The reporting of the operating entity will usually be available to investors in a venue which is specific to the operating entity.

## 3) Capital raising

An operating entity usually requires the prior approval of its shareholders to raise new equity capital. The entity does not run a continuous process of raising new equity capital. Raising equity capital remains an exceptional process which is linked to the needs of the underlying business.

**The new capital raised does not generate any new/additional fee stream, and no entity within the sphere of the issuer is planning to generate profit solely because the new capital exists.** We believe this is a key differentiating factor between an operating business and an AIF/AIFM which still need to be taken in consideration by ESMA.

By opposition we believe the following elements tend to demonstrate that an entity is not an operating entity:

### 1) Operations

An AIF usually does not employ enough staff to actually perform the day to day operation of its business. Most of the key execution processes and operations are outsourced, although key decision processes can be insourced.

While the AIF can have direct control on the day to day management (mainly through decision making power), the actual management itself is actually outsourced.

An AIF usually shares its corporate identity and branding with the AIFM, or other funds managed by the AIFM. It usually do not own, its name which is a trademark of a third party.

### 2) Reporting

An AIFM, will report financial results in line with its defined investment policy. An AIFM will report on changes in its AUM, or fee stream. AUM and fee are the two key KPI for an AIFM.

Reporting specific industry matrix will remain of secondary importance to the AIF. Reporting of the AIF is usually available at the same sources than other AIF managed by the same AIFM.

### 3) Capital raising

Some AIF (open-ended funds) will raise capital without the need for existing shareholders approval.

**The new capital is raised in order to grow the AUM of the AIFM, and as such to increase the fee stream to the AIFM.** We believe this is a key differentiating factor between an operating business and an AIF/AIFM, which still needs to be taken in consideration by ESMA.

Q12: Do you agree with the proposed indicative criteria for determining whether a 'defined investment policy' exists for the purposes of the definition of AIF? If not, please explain why.

We are still very much concerned that the proposed guidelines of defined investment policy are too vague, and would de facto capture any kind of corporate bylaws. We believe it should be clearer that the defined investment policy should be more restrictive than what would usually be found in a normal operating company bylaw.

We note that ESMA have removed from the list of indicators the references to a clearly disclosed investment policy and the requirement for consent to changes in investment policy. We understand the reasons for doing this, but believe that, as a lack of these criteria is a general characteristic of 'ordinary companies with general commercial purposes' these criteria could be re-introduced into the list of indicative criteria for identifying such companies.