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Draft regulatory technical standards on types of AIFMs and Guidelines on key concepts of the AIFMD

BAK Reg Nr: 23869471911-54

The Federal Chamber of Labour is by law representing the interests of about 3.2 million employees and consumers in Austria. It acts for the interests of its members in fields of social, educational, economical, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership.

Introduction:

Rec 3 of the AIFMD points out the goal to cover all forms of collective investment vehicles. The Chamber of Labour strongly supports the goal to avoid areas of weak or missing regulation in financial markets.

On your Questions:

Draft regulatory technical standards on types of AIFMs

19 December 2012 | ESMA/2012/844

Annex I - Summary of questions

Q1: Do you agree with the approach suggested above on the topics which should be included in the draft regulatory technical standards? If not, please state the reasons for your answer and also suggest an alternative approach.

Yes, it seems sensible to take the proposed issues first and develop appropriate regulation for the other points mentioned later on, esp. after level 2 consultations. But the currently proposed RTS are only one step in the process which by no means can be regarded sufficient for all the remaining questions concerning the definitions listed in article 4. We expect more work to be necessary to disentangle holding companies (Art 4, para.1 (o))from AIFMs managing AIFs which acquire control of non-listed companies and issuers which are dealt with in Section II of the AIFMD (Directive (2011/61/EU)).

Q7: Do you consider that there is a need to develop further typologies of AIFMs where relevant in the application of the AIFMD? If yes, please provide details on the additional typologies sought.

Even so we consider it appropriate to wait for the publication of the AIFMD Level 2 provisions, we do believe that there will be the need to specify criteria to disentangle holding companies (Art 4, para 1 (o)) from AIFMs managing AIFs which acquire control of non-listed companies and issuers which are dealt with in Section II of the AIFMD (Directive (2011/61/EU)).

Given the response quoted in Annex V, Question 3 para 46ff of this consultation document, we do not see a clear concept of holding company by now.

We strongly support the aim stated in the discussion paper (ESMA/21012/117 para 16) not to allow the exclusion of holding companies, to circumvent the provisions of the AIFMD, especially the provisions of Section II of the AIFMD.

Guidelines on key concepts of the AIFMD 19 December 2012 | ESMA/2012/845

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.

As mentioned above in our reply to Q7 of the consultation on | ESMA/2012/844 we do strongly believe that there will be the need to specify a narrow definition of holding companies to be excluded from the applicability of the AIFMD.

Given the response quoted in Annex V, Question 3 para 46ff of this consultation document, we do not see a clear concept of holding company by now.

We strongly support the aim stated in the discussion paper (ESMA/21012/117 para 16) not to allow the exclusion of holding companies, to circumvent the provisions of the AIFMD, especially the provisions of Section II of the AIFMD.

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?

In drawing the conclusions from the regulatory shortcomings during the financial crisis one of the main outcomes was the need to have a comprehensive regulation of all major institutions in the financial industry. Recital 3 of the AIFMD points out the need for a “comprehensive and common arrangement for supervision.” Therefore we welcome the rather general approach in defining an AIF and consequently an AIFM.

We strongly advocate a wide definition of AIF to avoid circumventions of the provisions of the AIFMD as pointed out in para 11.

If the elements defining an AIF have to be fulfilled simultaneously together with the definition of each single element has to be interpreted rather generously.

To give an example: the number of investors should also consider investors which are hidden or organised behind one or more layers of legal or organisational entities. In order to achieve the goals of the regulation, a full look-through approach is a ‘conditio sine qua non’.

This becomes obvious when taking the exemption in Article 3 para 1 into consideration. If AIFs servicing a single investor would be exempt from the start this additional exemption for investment organisations servicing single parent companies would be useless.

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.

The general definition or an intended transfer of capital to the manager from others seems plausible. The generous exemption for “family offices” however does not. Recitals are there to give hints on the interpretation but not to constitute special exemptions thereof. Family vehicles therefore should be exempt only if they lack any formal legal structure, apart from being owned by particular persons. The AIFMD provides ample opportunities to avoid regulations for small (below EUR 100 Mio AuM) or single parent-company investment-offices (Art 3 para 1). Especially concerning information rights for employees in firms taken over by AIFs, it seems unduly to deny this rights just because the investors are tied by family ties however defined.

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.

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

Characteristics of an ordinary company with general commercial purpose are among others the organisation of a production, logistic or design process which goes beyond giving directions to managers in companies owned by the entity.

The fact that this definition would exclude holding companies from the set of ordinary companies is intended. The Directive explicitly excludes holding companies, which implies that they would be in the intended scope of the directive as stated in Art 2 para 1.

Q10: Do you agree with the proposed guidance for determining whether a ‘number of investors’ exists for the purposes of the definition of AIF? If not, please explain why.

We do agree that “number of Investors” should be interpreted with a view to the legal or contractual constraints on the entity and not with a view on the actual number of Investors at any single point in time.

Furthermore we are in favour of including cases where single investors like Pension- funds, Insurance Companies or other intermediaries represent bigger groups of Investors.

Herbert Tumpel
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on behalf of the direktor general
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