

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

*Association for Dutch Stock Listed REITs*

C/o NSI N.V., FBI Vereniging Secretary, Postbus 3044, 2130 Hoofddorp, The Netherlands, email:  
[daniel.van.dongen@nsi.nl](mailto:daniel.van.dongen@nsi.nl)

Tel # 31 20 7630300

European Securities and Markets Authority  
103 Rue de Grenelle  
75007 Paris  
France

Submitted only online at: [www.esma.europa.eu](http://www.esma.europa.eu)

25 January, 2013

Dear Sir, Madam,

We welcome the opportunity to respond to your Consultation paper regarding "**Guidelines on key concepts of the AIFMD**", dated 19 December 2012 (ESMA/2012/845).

The members of the Association for Dutch Stock Listed REITs are the following real estate companies: Corio N.V., Eurocommercial Properties N.V., NSI N.V., Unibail-Rodamco S.E., VastNed Retail N.V. and Wereldhave N.V. They are listed at NYSE Euronext Amsterdam, and they own and operate international property portfolios. Their listed shares are freely tradable on a continuous basis amongst existing and potential shareholders and are included in the main indices of NYSE Euronext Amsterdam (the AEX-index and the MidCap-index respectively). Their total market capitalisation is approximately Euros 45 billion.

The aforesaid real estate companies are (sometimes) referred to as "Dutch REITs" or "DREITs". 'REIT' is a term that historically refers to a 'Real Estate Investment Trust' - a property vehicle that has a special 'flow-through' tax status. However, the term 'REIT' is now a brand that has come to be used in the market to describe listed property companies more generally (rather than 'Trusts') including even those that do not have a special tax status. They are involved in a range of activities related to the construction, refurbishment, investment, operation and management of real estate.

The DREITs are members of the European Public Real Estate Association ("**EPRA**") and fully support the EPRA response to the consultation paper. Nonetheless, we wish to provide the following additional response to **Questions 8 and 9**, regarding ordinary companies with general commercial purpose.

**Question**

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

Yes, we agree.



C/o NSI N.V., FBI Vereniging Secretary, Postbus 3044, 2130 Hoofddorp, The Netherlands, email:  
[daniel.van.dongen@nsi.nl](mailto:daniel.van.dongen@nsi.nl)

Tel # 31 20 7630300

In conjunction therewith, we note the following. Due to the fact that the current regulatory status of property companies such as the DREITs differs between the Member States of the EU, it is important that ESMA clarifies their status under the AIFMD. This will ensure a (regulatory) level playing field within the EU. For instance, in the Netherlands the DREITS are currently regulated as investment institutions. However, in other jurisdiction their competitors/peers are not regulated as such, since they are viewed as ordinary companies. This should not continue after the AIFMD takes effect.

In our view, notwithstanding their current regulatory status in the Netherlands, DREITs and similar property companies are not different from ordinary companies. The key characteristics of such property companies are:

- Listed on a stock exchange;
- No obligation to buy back shares from shareholders (i.e. not "open-end");
- They implement a corporate strategy, **not** a defined investment policy;
- Active involvement in the day-to-day management of property, including construction, acquisition, refurbishment, operation and property management. This is different from e.g. a private equity fund, which through its shareholdings may be actively involved with portfolio companies but does not run the day-to-day management and operations of such portfolio companies. The involvement of DREITs does not end at shareholder level but extends to the level of the "real" assets and relates to operational activities at this level;
- Various stakeholders, such as shareholders, tenants and employees; not only, or primarily, investors.

The activities of the DREITs, their active and day-to-day management of their assets/properties, their governance structure, the absence of a defined investment policy, 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 other stakeholders such as tenants and employees (see question 9 below), are well-founded arguments that the AIFMD is not applicable to them.

***9. Which are in your view the key characteristics defining an ordinary company with general commercial purpose?***

First of all, an asset class, such as real estate, does in itself not determine whether a company qualifies as an ordinary company or as an AIF. In other words, a company that is active in real estate, such as the DREITS, should not as a result thereof automatically qualify as an AIF.

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

*Association for Dutch Stock Listed REITs*

C/o NSI N.V., FBI Vereniging Secretary, Postbus 3044, 2130 Hoofddorp, The Netherlands, email:  
[daniel.van.dongen@nsi.nl](mailto:daniel.van.dongen@nsi.nl)

Tel # 31 20 7630300

In addition to the characteristics set forth in the EPRA response mentioned above, a key characteristic of an ordinary company with a general commercial purpose, as opposed to an AIF, is that an ordinary company is not exclusively or primarily focussed on the interests of its shareholders/investors. In its decision making and operations, an ordinary company also has to take into consideration the interests of other stakeholders such as its customers (in the case of property companies: tenants) and its employees. *(We note that this does not mean that the interest of the shareholders/investors of an ordinary company are not safeguarded. They must be taken into account when weighing the interests concerned in the decision making process. In the case of DREITs, they are subject to strict (regulatory) obligations due to the fact that they are listed on a regulated market (e.g. the Transparency Directive and Netherlands Corporate Governance legislation) and that DREITs must publish their audited financial statements in accordance with IFRS.)*

Furthermore, ordinary companies are actively involved in the day-to-day management and operation of their assets. For example, DREITs are involved in the development and redevelopment of real estate (their assets) but also manage the day-to-day maintenance activities relating to the real estate (the so-called property management). Thus maintaining and enhancing the value of their assets and optimizing operating income from the assets (such as rent from tenants), like any other ordinary company does or should do with its assets.

We would be grateful if our suggestions are included in the Guidelines, or if ESMA provides separate guidance on the regulatory status of property companies, such as the DREITs, as described above.

We are fully available for any questions you may have or to provide any additional information about 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



Encl.: EPRA Reponse

## **EPRA Response to ESMA Consultation Paper ESMA/2012/845**

### **Guidelines on key concepts of the AIFMD**

The European Public Real Estate Association (EPRA) is the voice of the European publicly quoted real estate sector. EPRA represents listed property companies, (including REITs) as well as the investment institutions who invest in listed property companies and the firms and individuals who advise and service those businesses. Between them our 200 members own, manage and operate over €250bn of commercial and residential real estate.

#### **General Comments**

EPRA welcome the opportunity to provide input on ESMA's Consultation Paper (CP). The development of guidance to identify funds within a range of different business models, strategies, asset classes and structures across Europe and worldwide is an extremely challenging but critical exercise.

In order to have a framework that allows businesses, investors and regulators to make a reasoned assessment of whether they fall within the scope of the AIFMD, without a process whereby decisions are made after the event by regulatory intervention or court action, it is first necessary to have a clear understanding of how ordinary companies (or any form of ordinary business enterprise), which are not funds, are outside of the AIF definition. We therefore welcome the introduction of the concept of an *"ordinary company with general commercial purpose"* and the recognition that these are not intended to be within the scope of the AIFMD. However, we are concerned that the guidelines as proposed will still result in a significant amount of uncertainty in the identification of businesses with *"general commercial purpose"*.

We believe it is important to point out that, contrary to the statement in the CP, the key concepts discussed in the CP are as important for these commercial businesses intended to be outside the scope of the AIFMD, as they are for the *"asset management companies and trade associations of asset management companies managing funds falling in the scope of the Alternative Investment Fund Managers Directive and investors investing into such funds."*

This is particularly the case for capital intensive businesses like real estate. The real estate sector is a sector that has a very wide range of companies, funds and other business structures involved in a range of activities related to the construction, refurbishment, investment, operation and management of commercial property. Some of these businesses are structured as funds and others are clearly not. These types of activities are often referred to as involving 'investment' or 'property/asset management', but the underlying business of providing accommodation services to businesses and citizens is clearly a commercial business like any other. We believe that the key identifier of a fund is precisely how it behaves in its relationship with an investor - as an intermediary in providing investment exposure to the underlying activity or asset.

The real estate sector, perhaps more than other industry sector, overlaps the AIFMD scope boundary. This is why the key concepts discussed in the CP are particularly important to listed companies in the commercial property sector, who own, operate, develop and manage property to provide accommodation services to business and individuals. These companies are regulated in the same way as any other ordinary publicly quoted company, but there remains uncertainty with regards to specifically how the AIF definition does not apply to these businesses.

We can envisage a situation whereby national regulators would potentially confuse listed property companies and 'REITs'<sup>1</sup> with real estate funds - because the underlying business activities of real estate funds are similar to those undertaken by property companies and REITs. However, this approach would miss a critical distinction from the investor's perspective which is fundamental to the identification of funds and the development of useful ESMA Guidance. Real estate funds must have a clearly defined and fixed investment policy, on the basis of which they raise money and against which investors assess and reward their performance. Such funds cannot generally choose to change their investment focus from one sub-sector to another (for example, shopping centres to offices) or between assets with very different risk/return profiles. By contrast, there is no such constraint on listed property companies and REITs, who simply have a business strategy which offers the flexibility required by an operating business and which can in any event be changed from time to time, on a full opportunistic basis, by the management (attracting positive or negative reactions from investors and the market in general).

This risk of confusion is perhaps greater for property companies that have REIT status – because of the misleading 'investment trust' terminology (European REITs are corporations not trusts) and the wide variety of companies and business models that are commonly referred to as 'REITs'. European property companies that do have REIT status undertake very similar commercial activities to property companies without REIT status. An assessment of whether these businesses are AIFs, or not, should focus on whether the entity is a collective investment undertaking with a defined investment policy, rather than on its taxation status.

***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.***

EPRA Comment: We support the approach and the topics to be included in the guidelines on key concepts of the AIFMD. However, we are concerned that the guidelines as proposed still leave a significant grey area in the identification of ordinary companies with "general commercial purpose".

Overall, our view is that the guidelines on key concepts discussed in the CP provide a good platform for developing a sensible European-wide interpretation of the AIFMD. As stated in our response to the

---

<sup>1</sup> 'REIT' is a term that historically refers to a 'Real Estate Investment Trust' - a property vehicle that has a special 'flow-through' tax status. However, the term 'REIT' is now a brand that has come to be used in the market to describe listed property companies more generally (rather than 'Trusts') including even those that do have a special tax status.

ESMA Discussion Paper (AIFM (ESMA/2012/117)) published in February 2012, it is our strong view that the clearest path to appropriately identifying the type of European and global businesses that are the intended target of the Directive is to focus on the unique relationship that a fund has with its investors versus that of an ordinary commercial enterprise. In particular the existence of a Collective Investment Undertaking and a Defined Investment Policy, compared with that of ordinary commercial business.

We support ESMA's consistent position that "concentrating on the asset classes of AIFs or the investment strategies applied to those asset classes is not the correct approach". The types of assets classes and investment strategies which form the basis of an ordinary commercial business are variously described as, for example 'trading', 'provision of services', 'investment', 'development' etc. and we believe that attempting to apply the Directive by identifying specific asset classes or business strategies considered to be commercial or otherwise would inevitably result in an inconsistent and inappropriate application and be contrary to our understanding of the Directive's intended purpose.

Any guidance provided on the identification of commercial businesses should not create a bias towards the more the obvious commercial activities like, for example, product manufacturers and retailers. There are many commercial business activities that are capital intensive businesses like the real estate sector where terms like 'investment' and 'property/asset management' are regularly used and which might otherwise lead to a conclusion that these are funds. In our view, all corporate commercial businesses essentially 'invest' shareholder's capital in the same way; in the provision/production of the underlying asset, product or service as well as the various components needed to run a perpetual business as a going concern - employees, research, marketing, development of the business, its social values and public image, finance and administration functions etc. This is very different to a fund whose purpose is essentially to provide returns to investors that match the investment into the underlying asset.

***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?***

EPRA Comment: We support the clarification 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.***

EPRA Comment: We broadly agree with the notion as proposed, but it could be improved if it attempted to distinguish the type of capital raising undertaken by normal publicly quoted commercial businesses versus those of a fund. This could cover, for example, the non-identifiable nature of investors in an Initial Public Offering, the fact that a typical shareholder decides for themselves when to buy, sell or hold for their own reasons and they usually buy or sell by secondary trading on the stock markets

without involving the company as a counterparty. Their decisions may be based on the dividends they expect to receive, whether they think the business will increase or decrease in value and a number of other considerations.

The comments made by SMSG are helpful here. Specifically:

- 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 additional elements raised by the SMSG are helpful in making the distinction between regular operating companies and AIFs. A regular operating company will typically raise capital for 'general corporate purpose' (or for specifically identified activities within the scope of their general corporate purpose), with a view to generating total returns on the capital invested in the underlying business, whereas an AIF will raise capital in order to invest it in a defined way, with the aim of generating fees out of the management of this capital.

However, when a listed company raises capital via a rights issue or placing, it is often the case (depending on the corporate governance rules in the particular jurisdiction) that it will be required to provide information to the market on why it is raising that capital. Notwithstanding whether the corporate governance rules of a particular country requires a listed company to disclose reasons for raising capital, it is generally viewed as good market practice for companies to provide information to shareholders on the business case for raising the capital – such as the expansion of the businesses into new territory, the acquisition of another company, or in the case of a property company the intention to commence a development or acquire land and property. These types of corporate communication should not be confused as being defined investment policies.

***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.***

EPRA Comment: In our view, the introduction of the term 'pooled return' is potentially helpful in providing guidance as to the type of business which is an AIF. However, we have concerns that the description of 'pools together capital', 'pooled return' and 'pooled risk' could apply to any quoted commercial company regardless of its business. It remains unclear what the concept of pooled returns is precisely trying to cover, and why a 'pooled return' is different than a total 'return' that any company would seek to deliver.

In order to make the guidance clear, the key challenge must be to identify why an 'ordinary', 'entrepreneurial' company is not pooling capital in this way. In this respect, the concept of distinguishing between AIFs and businesses that manage the underlying assets and the reference to an entity acting for its own account is helpful in identifying 'ordinary' companies that are not intended to be within scope.

If the concept of pooled return is to be used then it should be seen solely in context of the guidelines mentioning 'pooled capital' i.e. capital from a number of investors can be raised which then allows for larger and multiple investments, compared to a non-pooled single investor capital commitment. It should not say whether, and in which way risk-diversification is achieved or returns are provided.

***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.***

EPRA Comment: This could be a sensible concept, particularly in the context of joint ventures, where this type of control is clearly indicative of an enterprise not being a fund. However, in the context of "ordinary companies with general commercial purposes" who are publicly quoted, it is not particularly helpful. Shareholders in quoted companies are not engaged in day-to-day control over the underlying assets, but they do exercise control through voting at shareholder meetings or ultimately through their actions for buying or selling the shares. The way the criterion is proposed could lead to an inappropriate conclusion of ordinary commercial businesses being viewed as 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.***

EPRA Comment: We agree with this position - it cannot be the Commission's intention to bring the entire corporate sector (publicly quoted and private sector) within the scope of AIFMD. However, the approach raises many questions around how such an 'ordinary' company or 'general commercial purpose' would be defined and why the focus should be on companies themselves, rather than the identification of a commercial business?

In order to have a framework that allows businesses, investors and regulators to make a reasoned assessment of whether they fall within the scope of the AIFMD, without a process whereby decisions are made after the event by regulatory intervention or court action, it is first necessary to have a clear understanding of why and how 'ordinary' companies (and any other type of business activity) that are not funds are outside of the AIF definition. We believe that this aspect has not yet been given due consideration in the process of developing the AIFMD. This is reflected in the introduction to the CP, which poses the question: *"Who should read this paper?"*; and responds by saying: *"This document will be of interest to asset management companies and trade associations of asset management companies managing funds falling in the scope of the Alternative Investment Fund Managers Directive and investors investing into such funds."* In our view, this CP is also highly relevant to those businesses, including property businesses, that are not asset managers or funds but where some uncertainty exists as to how precisely they do not meet the definition of an AIF.

We have some concerns that efforts to provide helpful guidance on what is precisely, an ordinary company with general commercial purposes, could distract from the most useful objective which is to positively identify the characteristics of a Collective Investment Undertaking with a Defined Investment Policy.



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

EPRA Comment: We believe the following criteria could be useful in identifying ordinary companies with general commercial purposes, versus funds. We have highlighted those which we consider to be potentially most useful:-

*For all companies (listed and unlisted)*

- **Having a perpetual corporate existence, permanent share capital which is transferable, but not contingent on the investment horizon or status of individual shareholders**
- **Having a perpetual and continuously evolving business operating model, as opposed to seeking new investors on the basis of a defined investment policy for each fund that has a differing finite life**
- **Management and operation of the underlying assets**
- **Responsibility for contracts with service providers etc. Direct relationships with customers**
- **Having “internalized management” so that the business plan of the holding company and of each company in its group is executed by full-time employees**
- **Having a substantial number of employees at group level**
- **New shareholder 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. By contrast, new capital is raised by an AIF to grow the AUM of the AIFM, and as such to increase the fee stream to the AIFM (a key differentiating factor between an operating business and an AIF/AIFM)**
- **Reports using a number of KPIs – not just NAV (e.g combination of cash flow analysis, asset-to-liabilities ratios and growth in earnings or dividends)**
- **Reports in line with its specific industry’s practice. In particular it will not report Assets Under Management (AUM) or Asset Management fees as one of its KPI’s**
- **The corporate identity of an ordinary commercial company is a 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. By contrast, an AIF will usually share its corporate identity and branding with the AIFM, or other funds managed by the AIFM. It usually does not own its name which is a trademark of a third party**
- **Taking social responsibility over the long term as a business in public on issues such as reputation, corporate values, and shareholder values**
- **Employee policies in place related to building own resources for supporting the long term existence and growth of the company with employee protection and responsibility values including diversity**

*Applicable to publicly quoted companies only*

- **Having shares regularly traded on a nationally recognized stock exchange**

- **Issuing debt in the public markets from time to time that is often subject to rating agencies' review and subject to management decisions - which evidently cannot be in line with a predetermined investment policy**
- There tends to be a very wide range of shareholders in these companies, including individuals, companies, pension funds, insurance companies and many others
- Shareholders decide for themselves when to buy, sell or hold their investments for their own reasons and they usually buy or sell by secondary trading on the stock markets without involving the company as a counterparty. Their decisions may be based on the dividends they expect to receive, whether they think the business will increase or decrease in value and a number of other considerations.

***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.***

EPRA Comment: We broadly agree with the indicative criteria proposed. However, 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, or communicated by a public company undertaking, for example, a rights issue. 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 typical characteristic of "ordinary companies with general commercial purposes" these criteria could be re-introduced into the list of indicative criteria for identifying such companies.

Moreover, the existence of a Defined Investment Policy should neither be inferred based only on the corporate purpose of a company nor on tax requirements driving the business strategy of that company.

***Q14: Do you consider appropriate to add in Section IX, paragraph 16(b) of the draft guidelines (see Annex V) a reference to the national legislation among the places where (in addition to the rules or instruments of incorporation of the undertaking) the investment policy of an undertaking is referenced to?***

EPRA Comment: We have some concerns with this proposal as it potentially brings into play a wide range of national legislation that will not be helpful in encouraging a harmonized approach. There are many, wide ranging national tax laws which are used as policy tools by governments to influence the management decisions of commercial businesses and stimulate certain behaviors. For example, specific tax treatments are granted to oil and gas companies, tax relief for R&D expenditure, tax benefits for property companies that develop and manage property for the long term ('REIT'<sup>2</sup> legislation), and tax relief for certain types of capital expenditure which benefit companies who follow particular investment policies (tax depreciation). We do not fully understand the types of investment policies that ESMA has in

---

<sup>2</sup> 'REIT' is a term that historically refers to a 'Real Estate Investment Trust' - a property vehicle that has a special 'flow-through' tax status. However, the term 'REIT' is now a brand that has come to be used in the market to describe listed property companies more generally (rather than 'Trusts') including even those that do have a special tax status.

mind in this question, but are concerned that including such a statement in the guidelines could open the door for more confusion. All other things being equal, the businesses mentioned above should be viewed as ordinary commercial businesses and it would be incorrect to view them as having specific investment policies simply because their management chooses to comply with certain requirements in order to benefit from a specific taxation treatment.

The above comments are consistent with our original response to the February DP and noted in this consultation document at Para 88:

*A couple of respondents recommended clarifying that a restriction imposed by legislation (e.g. leverage limits, trading activity, minimum distribution requirements, risk management, etc.) in order to obtain certain taxation benefit should not be considered as a defined investment policy (i.e. a restriction imposed by law to a company that chooses to benefit from the REIT regime should not be considered as an investment policy).*

The management of a REIT can, at any time, choose to change its commercial activities in accordance with its articles of incorporation, such that it no longer qualifies for the tax benefits available under REIT tax legislation. This is not a decision that would require prior investor approval and is no different to any other decision taken by management of a property company or any other business to change its strategy to achieve a particular tax treatment.

For enquiries related to this response, please contact:



Gareth Lewis – Director, EPRA

T +32 (0)2739 1014

M +32 (0)471 100 800

[gareth.lewis@epra.com](mailto:gareth.lewis@epra.com)

Square de Meeus 23, B1000 Brussels • Belgium

T +32 (0)2739 1010 F +32 (0)2739 1020 [www.epra.com](http://www.epra.com)