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Consultation paper "ESMA's draft technical advice to the European Commission on possible implementing measures of the Alternative Investment Fund Managers Directive" (ESMA/2011/209)

Dear Ms. Ross,

DWS Investment GmbH highly appreciates the opportunity to present its view on ESMA's preliminary recommendations for implementing measures to the AIFMD. Please note that we have limited our response to those parts of the consultation paper which concern us most.

Our following considerations refer to the draft implementing measures in the numerical order as presented in the consultation paper.

Part IV. General Operating Conditions:

IV.1. Possible Implementing Measures on Additional Own Funds and Professional Indemnity Insurance

Box 6: Potential risks arising from professional negligence to be covered by additional own funds or professional indemnity insurance

We disagree with treating risks in relation to fraud as a category of professional negligence. Fraudulent acts can never be committed negligently, but only deliberately. Please also be aware that fraud is a category which is generally not insurable. ESMA's recommendation in Box 6 paragraph 2.(a), therefore, goes beyond the Level 1 text. Having said this, we also disagree with the wording in paragraph 8 of the explanatory text. We would agree that the AIFM is obliged to implement adequate internal control systems which are construed to avoid fraudulent behavior within the AIFM's organization. Only if the AIFM violates the aforementioned obligation, he may be held liable for losses due to fraudulent acts by relevant persons. In judging the liability risks by relevant persons, in the first instance the appropriate indemnity insurance to be provided by the relevant persons should be taken into account in the necessary risk assessment. The same is true with regard to the risk of improper valuation of assets and the calculation of the unit/share price. In case of an appointed external valuer, its insurance coverage should be considered first. As a result, both, fraud and improper external valuation do not form part of relevant liability risks which must be covered either by additional own funds or an indemnity insurance.

Box 8: Quantitative Requirements

We support ESMA's intention to define clear quantitative requirements for capitalization.

Q14: Paragraph 4 of Box 8 provides that the competent authority of the AIFM may authorise the AIFM to lower the percentage if the AIFM can demonstrate that the lower amount adequately covers the liabilities based on historical loss data of five years.

We consider a period of five and more years as appropriate.

Box 11: Due diligence requirements

Q16: Paragraphs 4 and 5 of Box 11 set out additional due diligence requirements with which AIFM must comply when investing on behalf of AIFs in specific types of assets e.g. real estate or partnership interests. In this context, paragraph 4 (a) requires AIFM to set out a business plan. We agree with the term business plan.

We ask ESMA to clarify, that open-ended funds with specific types of assets (e.g. real estate) very often do not have a limited duration, but follow an eternal investment approach.

Box 18: Inducements

We support the idea to implement MiFID / UCITS standards on inducements in the Level 2 measures of the AIFMD. On the other hand we strongly disagree to extent the inducement rules to all activities of collective portfolio management if in fact this would result in encompassing not only direct marketing, but also indirect marketing as one could conclude paragraph 30 of the explanatory text.

In contrast to ESMA's statements in paragraph 30, we understand that the upcoming PRIIPs initiative will not cover marketing fees paid for third-party distribution, but will only extend MiFID standards to direct marketing of fund managers and to intermediaries not yet subject to the EU framework. ESMA should also consider that there is no need for further investor protection. Already today, investors receive knowledge of any fees and commissions obtained by the intermediaries as the latter are under the obligation to disclose fees and commissions prior to the sale of a product to the investors.

Box 30: Functional and Hierarchical Separation of the Risk Management Function

We support the idea of separation of risk and fund management functions, both functionally and hierarchically.

We ask ESMA to clarify the meaning of "operating units". From our point of view it should also be possible to cover risk management functions within other operating units like Fund Accounting, Compliance or Finance.

To ensure independent performance of the risk management function, we support to implement safeguards in the general management process and to document conflicts of interest in the conflicts of interest policy of the AIFM.

IV.V. Possible Implementing Measures on Liquidity Management

Box 31: Liquidity Management Definitions

Q20: Currently, we are not in the position to answer Q20 as there is no clear understanding about the definition of "special arrangements". The same is true regarding the terms "gates" and "side pockets".

We ask ESMA to provide clear definitions for "special arrangements", "gates" and "side pockets".

Box 32: Liquidity Management Policies and Procedures

3. (b) ESMA states that the AIFM shall monitor the liquidity profile of the portfolio of the AIF's assets, having regard to the marginal contribution of individual assets. For these purposes AIFMs shall take into account the profile of their investor base including the type of investors in the AIF.

The requirement is from our point of view not practicable. We do not know such details for all our clients.

3. (c) requires that AIFMs shall, where the AIF invests in other collective investment undertakings, monitor the approach adopted by the managers of those other collective investment undertakings to the management of liquidity, including through conducting periodic review, to monitor changes to the redemption provisions of the underlying collective undertakings in which the AIF invests.

The requirement is from our point of view not practicable as such information about clients of target funds is not available.

IV.VI. Possible Implementing Measures on Investment in Securitisation Positions

Box 35: Requirements for retained interest

In paragraph 1, as a result of the fact, that most CLOs are independent investors and third-party purchaser of loans, which source loans as an investment in the open market, these open-market-CLOs should be exempt with respect to Article 17 (1) (a) AIFMD, i.e. AIFMs should be allowed to invest in securities issued by open-market-CLOs even if the sponsors do not retain any net economic interest in the issued CLO notes.

There is the opinion of some law firms, CLO managers have to be categorized as sponsor according to CRD II, resulting in the requirement of retaining a net economic interest of the securitization. However, in most cases these CLOs are independent investors, which buy loans in the open market as an investment after processing partly comprehensive due diligence on these loans and actively manage the loan portfolios (i.e. active buy, hold, sell decisions). Furthermore, managers of these funds achieve the bulk of their compensation only if the CLO performs as expected. If investors in the CLOs do not receive their interest payments, managers do not receive most of their fees, i.e. CLO managers are incited by the CLO structure/documentation to invest in a reasonable and responsible manner. These characteristics show that CLO securities are different from other securitizations, in particular open-market-CLOs differ from the originate-to-distribute models, in which lenders make loans and securitize them in order to remove them from their balance sheet.

Based on the characteristics of open-market-CLOs as aforementioned, AIFMs should be allowed to invest in broadly syndicated securities issued by open-market-CLOs without an additional protection from risk retentions by the sponsors (i.e. potentially the CLO managers).

Box 42: Grandfathering provisions

ESMA only recommends a grandfathering period until 31 December 2014 for securitization positions in AIFs that were issued before 1 January 2011. We deem it crucial to have a grandfathering period in place which also applies to securitizations issued after 1 January 2011. It would not be in the best interest of the investors if the AIFM is required to immediately dispose of those securitizations which do not comply with the criteria of the Directive. This grandfathering period should at least be three years from the transposition date (21 July 2013) as it seems realistic to forecast that the European securitization market will become less liquid in the future under the EU regime for securitization positions. As a consequence, it will become much more difficult to still sell securitization positions in the best interest of the investors, in particular, if this had to occur under time pressure.

Box 43: Investments by UCITS

We ask ESMA to clarify that the same grandfathering period as suggested here above for Box 42 applies for securitization investments in UCITS.

V.III. Depositary Functions

Box 78: Definition of financial instruments to be held in custody

Both options presented by ESMA in Box 78 are far too narrowly worded and would cause – for the disadvantage of the investors in an AIF – many financial instruments not being held in custody, thereby limiting the strict restitution liability of the depositaries provided in Art. 21 para. 12, 2. Sub-para. Of the AIFMD.

Both options do not take into account the market practices. For instance, with regard to Option 1, in Germany financial instruments are usually not registered in the sole name of the depositary.

Option 2 does not work as in many non-EU markets – due to the absence of a central depositary – settlement systems do not at all exist.

We, therefore, suggest to replace Options 1 and 2 by a third option as we deem it crucial to find a wording which is practical, reflects the market practice, does avoid uncertainties which assets are now held in custody, and protects the investors' interest mostly:

Option 3:

"they are financial instruments with respect to which the depositary has the right of disposal/can effectuate the transfer of title or interest."

As there may still be uncertainties for the AIFM/AIF whether a financial instrument is eligible to be held in custody/is in fact held in custody or not, an examination and information duty of the depositary should be stipulated:

The depositary shall be obliged to examine for all financial instruments (as defined in Section C of Annex I to DIRECTIVE 2004/39/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 April 2004), acquired/ to be acquired for an AIF/ belonging to an AIF whether they can be held in custody according to [paragraph 3 in Box 78]. If the result of such an examination shows, that a financial instrument cannot be held in custody by the depositary or a sub-custodian in the depositary's name, the depositary has to inform the AIFM and/ or the Investor(s) accordingly. In case of the availability of different methods for registering a financial instrument the depositary has to select such method which effectively results in holding the financial instrument in custody.

VI. Possible Implementing Measures on Methods for Calculating the Leverage of an AIF and the Methods for Calculating the Exposure of an AIF

Box 93: General Provisions on Calculating the Exposure of an AIF

We ask ESMA, that the proposed methods for calculating the exposure of an AIF should only apply for funds which use derivatives as an investment but not for hedging purposes only. Funds using derivatives only for hedging purposes shall be excluded from calculating leverage and exposure numbers.

We disagree with ESMA's approach in paragraph 3 of Box 93 that the AIFM shall calculate the exposure with both the Gross Method set out in Box 95 and the Commitment Method set out in Box 96. Either method should be appropriate to avoid excessive implementation and ongoing costs.

Box 99: Exposures involving third party legal structures

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Q 59: We prefer option 3 of Box 99 as additional payment liabilities can be followed best.

Q 60: Notwithstanding the wording of recital 78 of the Directive, we consider that leverage at the level of a third party financial or legal structure controlled by the AIF should only be included in the calculation of the leverage of the AIF in cases of obligations beyond market value.

VII. Possible Implementing Measures on Limits to Leverage or Other Restrictions on the Management of AIF

Box 100: Principles specifying the circumstances under which competent authorities will exercise the powers to impose leverage limits or other restrictions on AIFM

We ask ESMA to specify by which procedure limitations and restrictions will be imposed. We recommend to at least consulting the investment manager or a committee of relevant market participants beforehand.

VIII. Transparency Requirements

VIII.II. Possible Implementing Measures on Disclosure to Investors

Box 107: Periodic Disclosure to Investors

Q 66: The definition of ESMA in Box 31 regarding “special arrangements” is unclear and causes uncertainties. In paragraph 9 of the explanatory text for Box 31, ESMA mentions “side pockets” and “gates”. Prior to answering Q66, a clear definition of “special arrangements” as well as “side pockets” and “gates” would need to be in place.

Q 67: We prefer option 1 in Box 107. We advocate the opinion, that a disclosure of the most important risk parameters is sufficient. On the other hand, thresholds and limits defined only for internal purposes as an early warning mechanism should not be disclosed to investors.

Option 2 includes stress tests, which might be seen as an information overload to many investors. Stress tests are therefore from our point of view inappropriate.

Q 68: We believe ESMA should not be more specific on how the risk management system should be disclosed to investors.

VIII.III. Possible Implementing Measures on Reporting to Competent Authorities

Box 109: Format and Content of Reporting to Competent Authorities

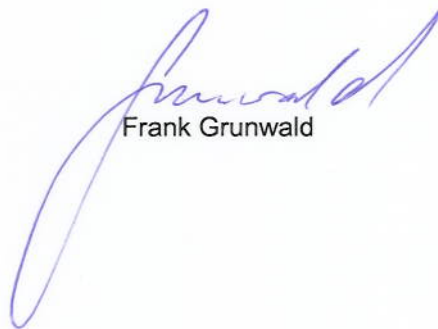
As it is already set forth in Art. 24 of the Level 1 Directive, we also see the need for a reporting to the competent authorities in order to be able to achieve one of the most crucial objectives of the Directive, i.e. to detect potential systematic risks. However, having this objective in mind, we do not believe that for certain fund types, the quarterly frequency as well as the content of the reporting as suggested in Annex V of the consultation paper is required to achieve this goal.

Considering the types of funds and their investment strategies as listed on page 434 of the consultation paper (Annex V), we see the need to differentiate between (i) those funds listed in column 1 and funds of hedge funds (listed in column 3) on the one hand, and (ii) those types of funds which pursue a conservative investment strategy including leverage and portfolio composition on the other hand. For the second category of funds, an annual reporting to the competent authorities and an adapted format of Annex V would in our view be sufficient to achieve the Directive’s objective as described above. Those funds of the second category should in particular, but not limited to, include those funds which are already supervised and monitored today by a competent authority on national level, as for instance the German open-ended real estate funds, the so-called “Mixed Funds” as well as the so called “Other Funds” which all do not fall under the UCITS regime but are regulated by the same German Act as the UCITS funds. For the funds described under (ii) above, the set of reporting details is far too broad and does not generate additional value for the authorities. A focus on the most important risk parameters should be

appropriate due to the other risk profile of those funds in comparison to the funds described under (i) above.

With best regards

Holger Naumann


Frank Grunwald