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| Submitted online at: www.esma.europa.eu | | | |  |
| European Securities and Markets Authority  103 Rue de Grenelle  75007 Paris  France | | | |
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| Our ref. | spoorb\Documents\My Documents\Word\Response to ESMA consultation key concepts AIFMD |  |
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| Re: | Guidelines on key concepts of the AIFMD | | | |
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| 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).

We limit our response to **Question 5.**

***Question***

***5. 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.***

No. In our view, the term 'collective investment undertaking' has no meaning independent from: 'raise capital from a number of investors' *(= 'collective')*, with a view to investing *(= 'investment undertaking')* it in accordance with a defined investment policy for the benefit of those investors', as set forth in the definition of AIF.

It will provide more clarity, and will cause less debate, to define an AIF by reference to, and with guidance by ESMA on, the criteria 'raising capital', 'number of investors' and 'defined investment policy'. Defining a collective investment undertaking in addition thereto, is only confusing. In case of any doubt as to whether a specific type of entity or activity qualifies as an AIF, it will provide more clarity if ESMA specifically addresses such entity or activity, rather than introducing a generic definition of collective investment undertaking and/or ordinary company with general commercial purpose (see below).

In connection therewith, we also disagree with the statement in paragraph 24 of the Consultation paper, in which ESMA seeks stakeholders' views on the key elements for the purposes of further defining the notion of an ordinary company with general commercial purpose. Defining an ordinary company with general commercial purpose, in order to use it as part of the definition of collective investment undertaking, is not a suitable approach. It does not help to define a term *(collective investment undertaking)* by defining another *term (ordinary company with general commercial purpose)* and then excluding the latter term from the former. It is similar to defining an apple by saying that it is not a pear, and then define the pear.

The recitals of the AIFMD distinguish in many places between AIFM/AIF and listed or non-listed companies. There is of course no doubt that ordinary companies fall outside the scope of the AIFMD. The same goes for many other types of entities and activities which are obviously not regulated by the AIFMD. The way to distinguish an AIF from all such other entities and activities that fall outside the scope of the AIFMD is to concentrate on the substantive elements in the definition of AIF as mentioned above: 'raising capital', 'number of investors' and 'defined investment policy'.

The term *pooled return* is also confusing in this respect, as it contains another distinction of *collective investment* versus an *ordinary company with general commercial purpose*. The latter is now, in this definition of pooled return, referred to as an 'entity acting for its own account and whose purpose is to manage the underlying assets as part of a commercial or entrepreneurial activity'. The concept of *pooled return* does not have a meaning which is different from the elements in the definition of AIF: "with a view to investing it in accordance with a defined investment policy for the benefit of those investors". The term *pooled return* does not provide more clarity; it is another term for the same concept.

Finally, the AIFMD contains a definition of 'holding company'. If, notwithstanding the above, a definition of 'ordinary company with general commercial purpose' will be introduced by ESMA, such introduction should be without prejudice to the existing definition of *holding company*. In other to avoid uncertainty, it would be very helpful if this is also mentioned by ESMA in its Guidelines.

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| Yours sincerely,  De Brauw Blackstone Westbroek N.V.  Investment Management Group |
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| **Bernard Spoor** |