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Berlin, March 23rd, 2012

Comments on the Discussion Paper on Key Concepts of the Alternative Investment Fund Managers Directive and types of AIFM

Dear Madam or Sir,

We would like to thank ESMA for the opportunity to comment the discussion paper on key concepts of the Alternative Investment Fund Managers Directive and types of AIFM.

The German Property Federation ZIA is a membership organisation founded in order to represent the interests of the whole real estate industry. We pursue the objective to create an environment in which real estate investments can prosper. Therefore, ZIA advocates the interests of the German real estate industry vis-à-vis the political decision makers in Germany and in the EU. Our more than 150 members – including the biggest companies in the property industry – represent the industry at any stage of the supply chain. Our membership also includes a various number of property linked associations. ZIA was founded in 2006 and is a member of the Federation of German Industries (Bundesverband der Deutschen Industrie).

ZIA represents – besides open ended and closed ended real estate funds – several listed and unlisted real estate companies as well as German REITs. Due to that, ZIA highly welcomes ESMA's initiative to clarify the scope by developing criteria to identify the types of AIF in existence with a view to establishing a harmonised application of the AIFMD. We believe ESMA is right in ensuring the alignment of supervisory practices among European national competent authorities in the interpretation of certain key concepts of the Directive.

In broad terms, ZIA agrees with ESMA's central statements especially with respect to the orientations set out in section 4 of the paper (definition of AIF).

With this proviso, we would like to comment in more detail on certain questions of the discussion paper as follows below.

IV. Definition of AIF

Question 1:

Do you see merit in clarifying further the notion of family office vehicles? If yes, please clarify what you believe the notion of 'investing the private wealth of investors raising external capital' should cover.

In general, family offices do not raise capital. Rather, its role is to manage and let grow existing wealth for the benefit of current and future members of the family.

Question 2:

Do you see merit in clarifying the terms 'insurance contracts' and 'joint ventures'? If yes, please provide suggestions.

ZIA believes that it is necessary to clarify the term 'joint ventures' at EU-level in order to have consistent interpretations across different national jurisdictions.

The characteristic feature of a joint venture is that each participant in the joint venture undertaking will have a contractual right to participate in, and will in fact participate in, the key strategic decisions relating to the undertaking. In contrast, AIF investors do not generally expect to retain active involvement in decisions about the management of the AIF, whereas it is typically very important to joint venture participants to be involved in key decisions.

Further, significant portfolio and risk management decisions are generally not transferred to a fund manager in joint ventures, but are exercised jointly by all investment participants.

While a joint venture will always have at least two participants, it will often have no more than two participants, and the private, bespoke, negotiated nature of a joint venture arrangement means that capital cannot be raised from the public. However, we believe that the more robust distinction between AIFs and joint ventures is the way participants in a joint venture will retain control over important decisions throughout the life of the undertaking, rather than allowing a manager the discretion to manage the undertaking as he wishes within the bounds of a defined investment policy.

Question 5

Do you agree with the orientations set out above on the content of the criteria extracted from the definition of the AIF?

In general, we agree with the orientations set out in section 4 of the paper. Our view is that the wording of the Directive provides the basis for a proper determination of the AIFM's scope, consistent with the objective of the legislation. In particular, we believe that the interpretation of the term "defined investment policy for the benefit of those investors" should be used to determine a dividing line between funds and normal companies.

In order to meet the criterion defined investment policy it is necessary that the fund pursues an investment strategy that has been agreed with the investor before the investment decision has been taken and cannot be modified without the approval of the investor. This agreement is normally taken in the prospectus and the subscription documents. Moreover, the control of the investment policy is also often guaranteed by the supervisory authorities, especially regarding open ended funds.

This clearly defined investment strategy has to be distinguished from the term business strategy and the formulation of business goals. These are part of every rational economic decision and are necessary for the decision-making in an economically active undertaking.

Examples are medium and long-term business plans as well as budget and financial planning taking into account equity and debt capital as required by current rules, such as Basel II in the framework of debt financing. These documented economic decisions are subject to an ongoing evaluation process and can at any moment be modified by the executive board. The members of the board are not bound by a contractually stipulated portfolio strategy.

Regarding these aspects, real estate companies do not differ from operative undertakings in other branches. Real estate companies are rather average companies whose business purpose is mainly the acquisition, development, rent, lease and selling of real estate. They also follow a strategy that is continuously verified by market requirements and that has been established by the executive board or management without being bound by a program agreed with investors and creditors. Compliance with this strategy is not subject to supervision by an authority.

The same goes for German REITs which differ from traditional real estate companies mainly by an obligatory listing on the stock exchange and a special tax regime which follows the principle of tax transparency of the REIT. Therefore, what is said above also applies to German REITs.

According to this reasoning, the passage „defined investment strategy" in the AIFM-Directive is only fulfilled, if

- already during the acquisition of a share the strategy builds the basis for the investment decision due to a binding agreement between investor and company,
- the strategy can only be modified in accordance with the investor and – concerning open-ended real estate funds – the supervisory authority and
- the pursuance of the portfolio strategy is solely in the interest of investors.

Question 7

Do you agree with the orientations set out above on the notion of raising capital? If not, please provide explanations and an alternative solution.

Para 27 argues that the absence of capital raising should not be conclusive evidence that an entity is not an AIF. We accept that the example given sounds reasonable, but as a general matter the raising of capital is one of few very clear and specific elements that define an AIF. It seems inappropriate to be willing to set it aside.

Question 10

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

We do not disagree with what is laid down in para 34. However, we believe that the more important point to focus on is not whether investors have "day-to-day" discretion or control over the AIF's assets (they would plainly never have that), but rather on whether they can and do participate in the making of key strategic decisions relating to the management of the AIF.

As mentioned above in our response to question 2, a key characteristic of a joint venture is that the joint venture participants will agree upon certain matters that are so important that one party acting alone cannot decide them, even if that party has sole or primary day-to-day management of the joint venture. In an AIF, on the other hand, the defined investment policy would typically allow the AIFM sufficient discretion and authority to make all important decisions without having to secure the agreement of investors.

We would very much appreciate if these comments were taken into account in the further development of the measures of the Alternative Investment Fund Managers Directive. Please do not hesitate to contact us, if further advice on these matters is required.

Yours sincerely,

Axel v. Goldbeck　　　　Carsten Rothbart