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Presidency note in preparation of the second political trilogue

Following the Council Working Party (CWP) on 1 March 2023, a first political trilogue was held on 8 March in Brussels (see Flash Note circulated by the Council Secretariat on 10 March). At the trilogue the Presidency and the European Parliament presented their positions in the areas where the texts of the two institutions differ, with the exceptions of issues which had not been discussed at the preparatory CWP. A second political trilogue will take place on 19 April in Strasbourg. Two technical meetings took place on 15 and 16 March and further technical meetings are scheduled for 28 and 29 March. Certain progress has already been made.

In the forthcoming CWP on 30 March, the Presidency plans to present the main political divergences identified between the Council General Approach (Council GA) and the ECON Report which were not discussed at the 1 March CWP and invites Member States (MS) to state their positions on the said differences. The first part of this note, therefore, deals with **depository services, Annex I and II to the Council conclusions on the revised EU list on non-cooperative jurisdictions for tax purposes** ('Annex I and II'), **cooperation between competent authorities, powers of the AIFM and employee savings schemes**. In addition, given the input from the EP at the first trilogue, the second part of this note will revisit the issues of **delegation, liquidity management tools, loan originating AIFs, undue costs, non-executive director, sustainability issues and white label services**, to identify the way forward.

Please note that all references to line numbers below refer to the 4CT circulated 16 February by the GSC on behalf of the Presidency.

Issues not discussed during CWP 1 March 2023

1. Depositary services

The amendments to the provisions on depositary services in Article 21 of AIFMD by the Council and the EP positions are to a great extent the same. However, there are some differences.

1.1 Conditions for appointing a depositary in another Member State (Article 21 AIFMD)

One of the main differences is the threshold for the aggregate amount of assets under custody on behalf of EU AIFs managed by EU AIFMs in the national depositary market of the home Member State of the AIF. The competent authorities of the home Member State of the AIF may allow the appointment of a depositary established in another Member State if the assets under custody are below this threshold. In the Council GA, this threshold is EUR 30 billion (line 145f, *art. 21(5), first subparagraph, point (c)(ii)(b)*). The EP raises the threshold to EUR 60 billion (line 145f, *art. 21(5a), point (ii)(b)*). In the calculation of assets under custody, the Council includes only authorised EU AIFs managed by EU AIFMs, whereas the EP includes both authorised and registered EU AIFs managed by EU AIFMs. Instead of assets under custody as in the Council GA, the EP refers to both financial instruments that can be held in custody (*art. 21(8), point (a)*) and other assets (*art. 21(8), point (b)*). The impact of the different basis for calculations proposed by the Council and the EP is unclear and thus will have an impact on the aggregate amount of assets in a national depositary market and when the threshold will be reached in such markets

In the Council GA, there are additional provisions on the possibility to appoint a depositary in another Member State (lines 145g to 145i, *art. 21(5), second to fourth subparagraphs*). There it is stated that even if the above-mentioned conditions are fulfilled, the authorisation to allow the appointment of a depositary in another Member State shall be granted on a case-by-case assessment on the lack of relevant depositary services in the jurisdiction of the AIF, given the investment strategy of the AIF (line 145g, *art. 21(5), second subparagraph*).

The EP also proposes changes to the third countries regime in AIFMD in respect of conditions for the appointment of a depositary in a third country

(lines 147 to 148a, *art. 21(6), first subparagraph, points (c) and (d)*). These changes are addressed in section 2.2 below along with other provisions which deal with Annex I and II issues.

1.2 Comprehensive study on introducing an EU depositary passport (Article 69b AIFMD)

Another main difference is the review clause in Article 69b. According to the Council GA, the Commission shall review the functioning and appropriateness of the power of competent authorities to allow the appointment of a depositary in another Member State, including the relevance of the quantitative criteria of the above-mentioned threshold (line 241, *art. 69b(1), point (d)*). The EP instead requires the Commission to carry out a comprehensive study on the potential benefits and risks of introducing an EU depositary passport, and also assess the effectiveness and the impact on financial stability of a depositary passport (line 241, *art. 69b(1), point (d)*, and line 241b, *art. 69b(1a)*).

Q1: Concerning depositary services, have Member States identified any other differences other than those already mentioned?

Q2: What are the Member States views on the differences of the threshold between the Council (EUR 30 bn) and the EP (EUR 60 bn), given the different basis for these calculations?

Q3: What are the Member States views on the Council's additional provisions for the assessment of the application to appoint a depositary in another Member State?

Q4: What are the Member States views on the review clause proposed by the EP imposing the Commission to carry out a comprehensive study on the potential benefits and risks of introducing an EU depositary passport?

Q5: What is most important for Member States regarding the different aspects of the depositary services?

2. Third country regime - Annex I and II to the EU list of non-cooperative jurisdictions for tax purposes

2.1 Third country regime - marketing of AIFs (articles 35 to 37, 40 and 42 AIFMD)

The EP proposes some amendments **to the conditions for marketing of non-EU AIFs and for EU AIFs managed by non-EU AIFMs**. There are corresponding amendments to the provisions on conditions for the marketing in the Union with a passport of a non-EU AIF managed by an EU AIFM (lines 183 to 184b, *art. 35 AIFMD*), authorisation of non-EU AIFMs intending to manage EU AIFs and/or market AIFs managed by them in the Union (lines 191 to 192b, *art. 37 AIFMD*), conditions for the marketing in the Union with a passport of non-EU AIFs managed by a non-EU AIFM (lines 199 to 200b, *art. 40 AIFMD*), to the provisions on conditions for the marketing in Member States without a passport of non-EU AIFs managed by an EU AIFM (lines 187 to 189b, *art. 36 AIFMD*) and AIFs managed by a non-EU AIFM (lines 203 to 205b, *art. 42 AIFMD*).

One of the conditions in both the Council GA and in the EP Report is that the third country must not be mentioned in Annex I to the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes. In the EP proposal, this is specified as the list **applicable at the time of the AIFM's application for authorisation**.

The EP proposes a specific provision on closed-ended AIFs: **if the third country where the non-EU AIF is established is added to Annex I** to the Council conclusions on the revised EU list on non-cooperative jurisdictions for tax purposes after the time of the AIFM's application for authorisation, **closed-ended funds shall continue to be considered to meet the criterion above for a period of two years**.

The EP also proposes that **a third country that has been continuously mentioned in Annex II** to the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes **for a period of over three years shall be considered to be mentioned in Annex I** to those conclusions.

2.2 Appointment of a depositary in a third country (article 21 AIFMD)

The EP proposes corresponding changes to the third country regime in the AIFMD as the ones on conditions for marketing of AIFs described above in respect of conditions for the appointment of a depositary in a third country (lines 147 to 148a, *art. 21(6), first subparagraph, points (c) and (d)*).

One of the conditions in both the Council GA and in the EP Report is that the third country where the depositary is established is **not identified as a high-risk third country. In the EP proposal, this is specified to the time of the AIFM's application for authorisation** (line 147, *art. 21(6), first subparagraph, point (c), AIFMD*).

The EP proposes a specific provision on closed-ended AIFs: **If the third country where the non-EU AIF is established is added to Annex I** to the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes after the time of the AIFM's application for authorisation, **closed-ended funds shall continue to be considered to meet the criterion above for a period of two years** (line 148, *art. 21(6), first subparagraph, point (d), AIFMD*).

The EP also proposes that **a third country that has been continuously mentioned in Annex II** to the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes **for a period of over three years shall be considered to be mentioned in Annex I** to those conclusions (line 148a, *art. 21(6), second subparagraph, AIFMD*).

Q1: Concerning the third country regime, have Member States identified any other differences other than those already mentioned?

Q2: What are Member States views on the EP proposal to refer to **Annex I to the EU list** applicable **at the time of the AIFM's application for authorisation**? Should the same approach be used for the marketing of AIFs and depositary services?

Q3: Similarly, regarding the EP proposal on a **transitional period for closed-ended funds** of two years, if the third country is added to the list after the AIFM's application for authorisation, what are the Member States view? Should the same approach be used for the marketing of AIFs and depositary services?

Q4: What are Member States views on the EP proposal to treat Annex II jurisdictions as Annex I jurisdictions if they have been on the Annex II list for a period of three years? Could Member States provide arguments for their position in this regard?

3. Other issues

3.1 Cooperation between the competent authorities (article 50 AIFMD and articles 84 and 98 UCITSD)

The amendments to the provisions in Article 50 of AIFMD on cooperation between the competent authorities of the Member States and ESMA when there are suspicions of acts contrary the directive and informing the ESRB when relevant for financial stability, are to a great extent similar in the Council GA and in the EP Report. However, there are some significant differences, and some differences in the wording.

The main difference is the role of ESMA in fostering supervisory convergence. The Council has opted **for guidelines rather than draft regulatory technical standards** as in the EP text on when 1) the competent authorities of the home Member State of an AIFM exercise their powers in respect of an AIFM's use of LMTs and 2) the competent authorities of the host Member State of an AIFM request the competent authorities of the home Member State of the AIFM to exercise its powers (lines 230 and 231, *art. 50(7) AIFMD*). There are corresponding differences in the UCITSD (lines 336 and 337, *art. 84(3f) UCITSD*).

Here the difference between the Council and EP text on the possibility for competent authorities to activate and deactivate redemption gates (discussed at the previous CWP) has implications for the aforementioned powers of competent authorities thus also on the choice between guidelines and RTS.

The EP proposes some further amendments to the provisions of AIFMD on the obligations for the competent authorities of the Member States to cooperate with each other and with ESMA and the ESRB (lines 219, 226 and 227, *art. 50(5) and 50(5f) AIFMD*), regarding the criteria for when 1) a competent authority of one Member State may notify ESMA and competent authorities of other Member States, 2) the competent authority of a host Member State may request the competent authority of the home Member State to exercise its powers, and 3) the competent authority of a home Member

State shall inform the competent authority of a host Member State and ESMA. Similar amendments are proposed also to the UCITSD (lines 339 to 341, *art. 98(3) UCITSD*) and the provisions on when 1) the competent authority of a host Member State may request the competent authority of the home Member State to exercise its powers, and 2) the competent authority of a home Member State shall inform the competent authority of a host Member State and ESMA.

3.2 Powers of AIFMs (article 6 and Annex I AIFMD)

While the EP and Council positions are rather similar with regard to the powers of AIFMs, some differences remain on the subject of **ancillary services** and the list of functions an AIFM may perform.

The Council has added a new point to the list of *non-core services* an external AIFM may be authorised by Member States to provide, namely, **including any ancillary service which is a continuation of the services already undertaken** by the AIFM (line 68b, *art. 6(4), point (b)(iv)*). Neither the Commission's nor the EP's texts include this provision. In the subsequent paragraph the Council also removes the requirement that an AIFM must be authorised to provide management of portfolios of investments to be able to be authorised to provide non-core services (line 71b, *art. 6(5), point (b)*). At the same time, the Council broadens the scope of which activities an AIFM shall not be authorised to only provide to include the activity of *originating loans on behalf of the AIF* and *servicing securitisation special purpose entities* (line 71d, *art. 6(5), point (c)*). Finally, the Council removes the possibility for AIFMs to be authorised to provide administration of benchmarks which are used in their managed AIFs (line 71f, *art. 6(5), point (e)*).

The EP text does not include any of the above amendments. Instead, the EP text includes the addition of the **management of joint ventures and of mandates in respect of immovable property** to other functions an AIFM may additionally perform in the course of the collective management of an AIF (line 372a, *Annex I, point 2(ca)*).

3.3 Employee savings schemes (articles 31 and 43 AIFMD)

While AIFMD already exempts *employee savings schemes* and *employee participation schemes* from the scope of AIFMD (*art. 2(3), point (f)*) the EP proposes further exemptions, derogating “*AIFs constituted exclusively for the purpose of purchasing company shares and proposed to employees of these companies within the framework of employee savings schemes*” from the provisions on marketing of units or shares of

EU AIFs in the home Member State of the AIFM to professional investors (line 181f, *art. 31(6a)*) and marketing of AIFs to retail investors (line 205d, *art. 43(3a)*). Neither the Commission's nor the Council's texts include these amendments.

Q1: Concerning other issues, have Member States identified any other differences other than those already mentioned worth highlighting?

Q2: What are Member States views on EP's proposal regarding:

- 1) Cooperation between the competent authorities?
- 2) Powers of AIFMs?
- 3) Employee savings schemes?

Possible ways forward on issues discussed during CWP 1 March 2023

Q1: What are Member States views on the different issues, delegation, loan originating AIFs, liquidity management tools and new amendments from the EP, when it comes to ranking them in order of importance?

4. Delegation

At the CWP on 1 March, several political differences between the Council and the EP mandates were identified. These concern the information on delegation to be provided when fund managers apply for authorisation (lines 85 to 85n, *art. 7(2), 7(2a) and 7(4a) AIFMD*, lines 262 to 262m, *art. 7(1) and 7(1a) UCITSD*), the provisions on delegation of functions (lines 142 and 142a, *art. 20(3) and 20(4a) AIFMD*, line 276c, *art. 13(2b) UCITSD*), the reporting obligations to competent authorities (lines 169 to 171s, *art. 24(1) and 24(2) AIFMD*, lines 302 to 302x, *art. 20a(1a) to 20(1c) UCITSD*), and the peer review on the application of the delegation regime (lines 193 to 197, *art. 38a AIFMD*, lines 342 to 345, *art. 101a UCITSD*).

The Council is almost unanimously against the introduction of new reporting fields and would like to see that the reporting requirements are streamlined such that one avoids duplicating or overlapping requirements in the different

articles. Some Member States suggested moving some requirements from article 24 to article 7 or article 20 but are against duplicative requirements in different articles. While some Member States would like to see that the quantitative reporting requirements in the Council GA be removed in the final text, a majority of Member States would like to defend the Council approach.

The EP, however, insists on having duplicative and overlapping requirements in articles 7 and 24. This is despite the EP's own text on streamlining reporting requirements. The reasoning of the EP is that the information requirements are highly relevant for the competent authority when making the determination on whether to authorise an AIFM or not. The Presidency notes that the current text of the AIFMD in article 7(2), point (e), requires "information on arrangements made for the delegation and sub-delegation to third parties of functions as referred to in Article 20". The Council therefore does not see any merit in adding an exhaustive list of information requirements to level 1 in the text of article 7.

The Presidency is open to explore in more detail the suggestion of some Member States to move some requirements from article 24 or article 20 to article 7. However, this would not meet the EP demands since the EP considers it important that the requirements are in both article 7 and in article 24 or 20. Given that the Council considers that it had achieved a very delicate balance in the area of delegation, the Presidency will try to defend the Council GA as much as possible.

Q1: Do Member States agree that there is no additional merit in adding an exhaustive list of information requirements given the current text on article 7(2)? If yes, could Member States provide arguments for the lack of merit in including the list in the level 1 text?

Q2: With regard to the many **differences in article 7** on application of authorisation, how would Member States rank the following differences in the EP text and would Member States be open to compromise on one/some of these:

- 1) Certain **additional information requirements on level 1** to competent authorities suggested by the EP at the application on authorisation (lines 85 to 85k, *art. 7(2), point (e), AIFMD*, lines 262 to 262k, *art. 7(1), first subparagraph, point (e), UCITSD*).

- 2) The requirement that an AIFM/a UCITS management company **shall report to the competent authority** “*any material changes that may affect the scope of the authorisation by that authority and in particular any modification on the arrangements of the delegation and sub-delegation to third parties*” (line 85n, *art. 7(4a) AIFMD*, line 262m, *art. 7(1a) UCITSD*) rather than as in the Council text, that an AIFM shall keep the information provided to its competent authorities updated (line 85l, *art. 7(2a) AIFMD*).
- 3) The inclusion of “*any changes in the scope of authorisations by those authorities, and in particular of material changes to the information provided in accordance with paragraphs 2 and 3 of article 7*” into **the information NCA quarterly shall inform ESMA** of (line 87, *art. 7(5) AIFMD*).

Q3: What are Member States positions on the EP proposal that a description of the human and technical **resources employed by or committed to a delegate for performing those services on a delegated basis**, shall 1) be provided by the AIFM/UCITS management company at the time of authorisation (line 85i, *art. 7(2), point (e)(ii), AIFMD*, line 262i, *art. 7(2) point (e)(vii), UCITSD*) and 2) be regularly reported by the AIFM/UCITS management company to the competent authorities (line 171h, *art. 24(2), point (eb)(ia), second indent, AIFMD*, line 302j, *art. 20(1a), point (ii), second indent, UCITSD*)?

Q4: EP retains some wordings on **third countries** (line 196, *art. 38a(1), AIFMD* and line 344, *art. 101a(1), UCITSD*) and **letter-box entities** (lines 196 and 239 *art. 38a(1) and art. 69b(1), point (b) AIFMD* and lines 344 and 348, *art. 101a(1) and art. 110a UCITSD*) in the articles on peer review and the review clause. Would Member States be open to discuss compromises in this regard if these wordings were removed?

Q5: Would Member States be open:

- Towards the EP proposal that ESMA shall conduct a one-off **peer review** of the application of the delegation regime (lines 193 to 197, *art. 38a AIFMD*, lines 342 to 345, *art. 101a UCITSD*).
- Towards the EP proposal **to add a provision stating that the AIFM/UCITS management company shall ensure that the management of the AIFs/UCITS for which it is AIFM/UCITS**

management company, complies with the AIFMD/UCITSD (line 142a, *art. 20(3a) AIFMD*, line 276c, *art. 13(2b) UCITSD*).

Q6: Regarding the EP proposal **to clarify that the AIFM's liability shall not be affected** by the delegation of functions to a third party, or by any further sub-delegation, **irrespective of the regulatory status or location of any delegate or subdelegate** (line 142, *art. 20(3) AIFMD*), the Presidency has noted the Council position that this is already covered by the current AIFMD text and could possibly call in question the importance of other factors. Would Member States nonetheless be open to accepting the EP text if it results in an overall agreement on delegation issues which the Council could accept?

5. Loan originating AIFs

On loan originating AIFs several political differences between the Council and the EP were identified in the last WP. These concern the possibility for Member States to prohibit AIFs servicing credit granted to consumers and AIFs granting loans to consumers (line 71, *art. 6(4), point (d), and line 120c, art. 15(4da)*), the leverage limit (line 111a, *art. 15(4aa)*), the risk retention period (line 121, *art. 15(4e), in the GA art. 15(4f)*) and the definition of loan originating AIFs and fund structure (line 67f, *art. 4(1), point (apc)*, and lines 124 and 125b, *art. 16(2a) and 16(2aa)*).

Given the strong support in Council for allowing Member States to nationally prohibit AIFs from servicing consumer credits and originate loans to consumers, it seems that the Member State option is not up for discussion from the Council side. It is also clear that Council is not open to a compromise without leverage limits for loan originating AIFs.

In addition, the Commission has drafted a non-paper addressing some of the main differences on loan originating AIFs and has included suggestions on possible compromises. These include 1) increasing the leverage limit to 300% of NAV for open-ended funds while removing the limit entirely for closed-ended funds, 2) some possibilities for loan originating AIFs to be open-ended, 3) risk retention as per the Council GA, and 4) a removal of the proposed EP definition on loan originating AIFs.

Q1: What are Member States view on the proposed compromises in the Commission non-paper with regard to:

- 1) Leverage limits?
- 2) Open-ended loan originating AIFs?
- 3) Risk retention?
- 4) Definition of loan originating AIFs?

Q2: Do Member States have any flexibility with respect to the EP proposals on the following?

- 1) The definition by the EP which would mean a narrower subset of LOFs fall under the requirement to be closed-ended and the leverage limits suggested by the Council.
- 2) Incorporating some of the elements of the definition, e.g., a threshold, into article 16 on closed-ended structure instead of a definition on loan originating AIFs?
- 3) The risk retention period. If so by how much?

6. Liquidity management tools

At the CWP on 1 March, several political differences between the Council and the EP mandates were identified. These concern the ability of NCAs or, in the case of third country AIFMs or AIFs, of ESMA to require the activation or deactivation of LMTs (lines 207, 216, 221 to 224, *art. 46(2), point (j), 47(4), point (d), and 50(5a) to 50(5d) AIFMD*; line 327, *art. 84(2), point (b), UCITSD*) and RTS or guidelines on characteristics and use/selection and reporting of LMTs (lines 132 and 133, *art. 16(2f) and 16(2g) AIFMD*; lines 297 and 298, *art. 18a(3) and 18a(4) UCITSD*), on the use of redemption in kind (lines 126c and 126d, *art. 16(2b) AIFMD*, lines 296b and 296c, *art. 18a(2) UCITSD*) and side pockets (lines 126 and 127, *art. 16(2b) and 16(2c) AIFMD*, lines 296, 323c and 326, *art. 18a(2), art. 57(2a) and 84(2), point (a), UCITSD*). Additionally, technical differences were also identified with regard to the list of liquidity management tools (lines 375-380, *Annex V AIFMD*, lines 390-398, *Annex IIa UCITSD*).

Concerning the issue of NCA/ESMA being able to require the activation or deactivation of LMTs, the Presidency explained at the political trilogue that the Council position was based on the issues of responsibility, accountability and moral hazard as discussed in the last working party meeting. There should

be no question as to the manager's responsibility when employing LMTs. The manager's accountability stems from this responsibility. In addition, the ability of the NCA/ESMA to require the activation and deactivation of LMTs could lead to moral hazard on the part of the manager.

With respect to **side pockets**, the Presidency highlighted the recent need for the use of side pockets due to unforeseen circumstances and therefore stressed the need of the availability of this tool irrespective of whether the use of side pockets is in the fund rules or not. Concerning **redemption in kind**, the restrictions foreseen by the Council are for the protection of retail investors for whom redemption in kind is not always appropriate. Lastly, the Council position on the need for **RTS on definitions and guidelines on the selection, use and reporting of LMTs** was defended based on the need for a precise understanding of the tools but allowing for more flexibility on use/selection and reporting given a wide range of circumstances that might require the use of LMTs.

Q1: What are the most important areas for Member States regarding LMTs?

Q2: Are there any areas where MS could show flexibility?

7. New amendments from EP

On the many new amendments introduced by the EP, several political differences between the Council and the EP were identified in the last CWP. These concern **undue costs** (lines 103c to 103i, *art. 12(3a) AIFMD*, lines 292e to 292p, *art. 14(2a) and 14(2b) UCITSD*), **non-executive director** (line 103a, *art. 8(1), point (ca), AIFMD*, lines 256a and 323a, *art. 7(1), point (ba), and art. 29(1), point (ba), UCITSD*), **sustainability** (line 37a, *recital 28a*, line 83, *art. 7(2), point (c)*, lines 97b and 97c, *art. 7(6) AIFMD*, line 253b, *art. 5(8) UCITSD*) and **white label services** (lines 103l, 103n to 103q, *art. 14(2a) and art. 14(4a) AIFMD*, lines 292r to 292v, *art. 14(3a) and 14(3b) UCITSD*).

7.1 Undue costs

The Council does not support the new items the EP has introduced in its report. It became clear at the CWP on 1 March and in the written comments submitted by the Member States that the Council opposes the prescriptive requirements suggested in the undue cost proposal. A common perception among the Member States is that these kinds of questions should be dealt with horizontally. There is also concern that the proposal **ventures into the area**

of competition law. At the first political trilogue, the EP further explained the rationale behind the proposal. The EP believes that the Retail Investment Strategy will not be enough and that there is need for a reference also in sector-specific legislation. ESMA currently does not have access to appropriate data, which it would receive from NCAs under the proposed provision. The EP finds the collection of data to be important and the EP is open to discuss how this should be done effectively.

7.2 Non-executive/independent director

The EP's addition on **non-executive/independent director** was not supported by the Council. Although the Council supports provisions in the AIFMD on dealing with conflicts of interest, the Council does not support the proposal on non-executive directors. Many Member States consider the current conflict of interest requirements in the AIFMD to be sufficient. Others are concerned about the increased costs for the AIFMs and ultimately for the investors. Another, perhaps more technical, question that has been raised by some Member States is that the requirement to appoint a non-executive director would not be compatible with their company law structure and in particular with two-tier board structures that exist in some Member States.

7.3 Sustainability

The general view of the Council is that it does not support the EP's **sustainability provisions**. Member States are not in favour of the EP proposal to regulate funds' names to avoid greenwashing. Some Member States show flexibility, but the overall position is that this should be dealt with horizontally, e.g., in the SFDR review. Further, Member States note that ESMA recently conducted a public consultation in this respect and that this should be analysed before any actions are taken.

The EP also proposes that AIFMs include information in its programme of activities on how to **comply with its obligations under the SFDR** when it applies for authorisation (line 83, *art. 7(2), point (c)*). Based on the written comments by the Member States on the 4CT circulated 16 February, there is some flexibility also in this area, though some Member States are more sceptical and would like to deal with also this question horizontally.

Further, the EP report includes a recital 28a under which ESMA is requested to update its guidelines on sound remuneration policies to align incentives **in**

remuneration policies with managing ESG risks (line 37a, *recital 28a*). The recital should be construed as pertaining to article 13(2) of the AIFMD. Based on the written comments by the Member States on the 4CT circulated 16 February, there is not much flexibility in this area, as most Member States are sceptical and would like to deal with this question horizontally.

7.4 White label services

As regards **white label services**, the Council is reluctant to support the EP proposal. Member States consider that there are several issues with the drafting of the proposal, such as the text concerning third party control of an AIF, which should not be possible under the AIFMD, and other parts such as the notion of heightened scrutiny. The general view of the Council is that the current rules on conflicts of interest for AIFMs should be sufficient. Issues have also been raised regarding the fact that the EP's proposed definition is different from how ESMA defines white label services (see, for instance, ESMA's letter on the AIFMD review, 18 August 2020). Some Member States are open to show flexibility subject to redrafting.

Q1: Would Member States be open to compromise on any of the **new EP amendments** listed above? If so, in which instances?

Q2: Given that the topic of **undue costs** is very important to the EP, would Member States be open to either:

1) A descriptive exercise on costs whereby ESMA prepares a **report** but where all the prescriptive parts of the EP suggestion are removed? This would require data input by NCAs to ESMA.

2) Explore additional reporting **data fields** on cost in article 24 AIFMD and the corresponding article in UCITS?

Q3: Would Member States be open to the EP proposal of a **non-executive/independent director** if some sort of a solution can be found for the legal issues that have been raised by some MS?

Q4: Previously Member States have expressed strong disagreement with the EP proposals on **sustainability**. Would Member States be open to any part of the EP proposals?

Q5: Would Member States be open to consider the EP proposal on **white label services** with some redrafting in article 14(2a) AIFMD respectively article 14(3a) UCITSD if the RTS on *conflicts of interest* and *the criteria to be used by the relevant competent authorities to assess these* with regard to white label services (lines 103m-103q, *art. 14(4a)*, AIFMD, lines 292q-292v, *art. 14(3b)*, UCITSD) is either:

- 1) Exchanged for additional provisions in the already existing RTS on conflicts of interests.
- 2) Substituted for guidelines.
- 3) Removed entirely.