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- Shareholder Rights Directive II Position Paper -

Association of Global Custodian-European Focus Committee

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1. INTRODUCTION

The European Focus Committee of the Association of Global Custodians (AGC-EFC) in this paper calls attention to important concerns regarding the Shareholder Rights Directive II (SRD II) as well as transposition of SRD II by member states into national law. It identifies a series of major problems, and it proposes legislative change to solve these problems.

The analysis and views set out in this paper relate principally to Chapter 1a of SRD II, and to the three operational processes (general meetings, financial corporate actions, and shareholder identification) covered by that Chapter.

This paper does not cover the question regarding whether the implementation deadline for SRD II operational requirements should be postponed, as this question has already been covered in a joint industry association letter dated 9 April.

Established in 1996, the Association of Global Custodians (the "AGC") is a group of 12 global financial institutions[1] that each provides securities custody and asset-servicing functions primarily to institutional cross-border investors worldwide. As a non-partisan advocacy organization, the Association represents members' common interests on regulatory matters and market structure. The member banks are competitors, and the Association does not involve itself in member commercial activities or take positions concerning how members should conduct their custody and related businesses.

[1] The members of the Association of Global Custodians are: BNP Paribas; BNY Mellon; Brown Brothers Harriman & Co; Citibank, N.A.; Deutsche Bank; HSBC Securities Services; JP Morgan; Northern Trust; RBC Investor & Treasury Services; Skandinaviska Enskilda Banken; Standard Chartered Bank; and State Street Bank and Trust Company.

Background on Securities Custodians and the AGC

Securities custodians play a critical role in the global financial system by providing to investors (1) access to entitlements in securities issued by companies as well as (2) services necessary to give effect to investors' rights in these securities, including facilitating settlement of their sale and purchase and the exercise of voting rights, rights offerings, payment of dividends and income, processing of reclaims for withheld taxes. Securities custodians also facilitate availability of collateral arrangements which have become increasingly critical for capital markets since the financial crisis in view of the increasing need for financial collateral taking the form of investment securities.

Customers range from retail and private client investors to large highly regulated investment funds, institutional investors (such as pensions) and supranational entities (such as sovereign funds) throughout the world.

A very large portion of the services that securities custodians typically provide are performed for investors on a cross-border basis, requiring a chain of trusted custodians providing the necessary linkages to enable investors in one jurisdiction to purchase, own and exercise rights with respect to securities in another jurisdiction. Facilitation of safe and efficient cross-border holdings – and of rights attached to such holdings - are key elements in the development of markets to support companies' efforts to raise capital: this is a result that is consistent with the European Commission's Capital Markets Union agenda for the EU.

The AGC has long engaged extensively with government and regulatory authorities throughout the world to support their work to better understand our industry and ensure the safe and efficient provision of securities custody services for the benefit of investors and the financial system as a whole.[2] The Association continues to support these efforts and stands ready to provide assistance and information – within the boundaries of competition and antitrust constraints - as authorities require. The AGC-EFC for many years has encouraged international, European and other national authorities to harmonise laws and practices relating to the holding, disposition and other exercise of rights relating to intermediated securities.

[2] The AGC-EFC's work recently in this arena include:

1. Presenting to the International Organization of Securities Commission ("IOSCO") in plenary and submitting a contribution in response to its *Principles regarding the Custody of Collective Investment Schemes' Asset Consultation Report* (CR07/2014);
2. Addressing the so-called the Giovannini Barriers together with new identified barriers under the auspices of the European Post-Trade Forum ("EPTF");
3. Responding to the European Commission's 2017 Consultation on post-trade in a Capital Markets Union[2] (the "2017 EC Consultation");
4. The UK FCA's continuing development of the Clients Assets Sourcebook (CASS); and
5. Extensive engagement with the European Commission, ESMA and EU national competent authorities on custodial account structures (*i.e.*, omnibus versus segregated and related issues) through the intermediated holding chain of custody for investment funds under the UCITS Directive and the Alternative Investment Fund Managers Directive (AIFMD).

Moreover, throughout the past two years, the AGC-EFC has participated in extensive industry efforts to develop market standards for implementation of SRD II.

2. EXECUTIVE SUMMARY

The main objectives of Chapter 1a of SRD II, together with the SRD II Implementing Regulation, are:

(i) to facilitate the exercise of rights by end investors, with respect to both general meetings and financial corporate actions, so that end investors do have the effective capability to exercise their rights;
(ii) to grant issuers the ability to identify the owners of the shares they have issued; and
(iii) to create common, pan-European operational processes with respect to general meetings, financial corporate actions, and shareholder identification.

Regrettably, despite making every effort to prepare for implementation, we have concluded that SRD II is unlikely to achieve its objectives fully.

Even after implementation of SRD II, not all end investors will have the ability to participate in general meetings and not all issuers will have the effective ability to identify their end investors of their shares.

We are also disappointed that SRD II has not facilitated common pan-European operational processes as national-level developments have proven.

These shortcomings, coupled with the legal mechanism contemplated in SRD II to ensure the application of its requirements, increase legal risks and operational burdens for intermediaries in the custody chain, so that, rather than facilitating access to European capital markets for end investors, SRD II may well instead act as a barrier to access.

SRD II requirements have extra-territorial effect and apply to each intermediary in the custody chain. In some cases, the SRD II requirements also apply to end investors.

Intermediaries throughout the custody chain, and in some cases end investors, will be obliged to comply with requirements and operational processes that vary by country of issuance of a share.

In itself, this is an operational burden for intermediaries and end investors. But, in addition, there is also legal risk. This arises because an intermediary may be unable to comply with its SRD II obligations (in cases where it is unable to facilitate the exercise of rights or identify end-investors), and because the specific requirements applying to securities issued in a particular country are in some cases unclear, or open to different legal interpretation.

Main SRD II challenges

As a Directive, to take effect, SRD II must be transposed by each of the member states into national law, leaving open the likelihood of differences under various national laws. A second related high-level challenge is that SRD II does not cover important elements of operational processes.

Divergent national transpositions of SRD II, imposing divergent existing national requirements, have the practical effect of requiring divergent operational processes in order to comply.

The most important specific SRD II challenges are:

(i) lack of a common definition of shareholder;
(ii) lack of common requirements for the attribution of entitlements; and
(iii) specific and different national requirements for the exercise of rights (such as requirements for powers of attorney in some but not all member states).

In addition, divergent national transpositions have also led to different national determinations of which securities fall within the scope of the SRD II requirements and differences in the details of some of the requirements themselves (such as the requirements with respect to confirmation of entitlement and proof of entitlement).

Solutions

European Union institutions and bodies should adopt a Shareholder Rights Regulation (SRR).

An SRR notably should include the following measures:

- A common pan-European definition of shareholder that identifies the end investor (or "ultimate account holder") as being the shareholder, and as being the party entitled to exercise rights that have been attributed to securities positions;
- A common rule on the attribution of entitlements, namely a rule that entitlements are attributed based on booked positions at the Issuer CSD as of close of business on record date. This rule builds on, and is fully consistent with, Article 3 of the CSD Regulation;
- Requirements on the sequence of dates, including a rule setting out a minimum time gap between the record date and the issuer deadline, to ensure that all record date holders have the effective ability to exercise their rights;
- A prohibition on additional national requirements for the exercise of rights (such as requirements for powers of attorney);
- A common definition of which securities fall within the SRD II/SRR requirements; and
- To the extent necessary, and in case of lack of compliance with market standards, more detailed requirements relating to key operational processes.

An SRR should also deal with some of the specific gaps and inconsistencies of the current SRD II text (including the problem of the confusion between confirmation of entitlement and proof of entitlement).

Given that some of these measures relate to the relationship between issuers/issuer agents and CSDs, there is a possibility that some of these measures need to be addressed in the upcoming review of CSDR.

3. BACKGROUND ON SRD II

SRD II comprises both a Directive (Directive (EU) 2017/828) and an Implementing Regulation (Commission Implementing Regulation (EU) 2018/1212).

The deadline for the transposition of the Directive into member state law was 10 June 2019. The Implementing Regulation applies from 3 September 2020.

Given that – as of the date of this paper - several member states still have not yet transposed the Directive, and given that the Implementing Regulation is not yet applicable, the analysis in this paper is provisional, and subject to change.

The requirements set out in the Directive take effect through their transposition into national law. The requirements transposed into a national law relate to securities of issuers located in that country.

Formally, SRD II sets out requirements relating to voting shares in companies. Depending on national transpositions of the Directive, the related requirements actually imposed under SRD II may, or may

not, apply to investment funds. In at least one country, the national legislator has applied some SRD II requirements to corporate bonds.

SRD II contains three main sections:

(i) Requirements regarding the identification of shareholders, transmission of information and facilitation of exercise of shareholder rights (Chapter 1a);
(ii) Requirements regarding the transparency of investment strategies and engagement policies of institutional investors, asset managers and proxy advisors; and
(iii) Requirements regarding the right to vote on a company's remuneration policy, and on the transparency and approval of related third-party transactions, as well as requirements for board approvals (applied to both standard-listed and premium-listed companies beginning 10 June 2019).

The discussion in this paper relates to the Chapter 1a of SRD II (the "First Section"). It does not address the other two parts of SRD II.

The first part of the First Section of SRD II sets out requirements relating to three distinct operational processes, namely (i) shareholder identification, (ii) general meetings and (iii) financial corporate actions.

Applicability of SRD II requirements to intermediaries in the custody chain

As transposed into a specific national law, SRD II requirements apply to securities of issuers located in the country of relevant issuers, and to all intermediaries and custodians holding these securities. SRD II contains requirements relating to the services that intermediaries and custodians in the custody chain provide to their clients. The requirements apply to all intermediaries in the custody chain, no matter where the intermediary is located.

This legal mechanism has the consequence that an intermediary or custodian that provides a client with a securities account on which the client holds securities of issuers located in several different EU member states is subject to requirements under the national law of each of those member states.

SRD II requirements are intended to facilitate the effective exercise of rights of end investors. In some cases, and depending on the national transposition, they also create obligations for end investors, such as an obligation to receive a meeting notification.

If all the national transpositions of SRD II had identical effect, then the requirements with which an intermediary or custodian or end investor are obliged to comply would will be identical. If the national transpositions are different, then the processes required to comply with requirements will be also be different depending on the member state.

This consequence was recognised at the time of preparation of SRD II. The SRD II Level 2 legislation took the legal form of a Regulation as an attempt to harmonise operational requirements, to middling effect (discussed below).

Supporting materials

Many of the challenges set out in this paper have been identified for a long time. One notably interesting paper that provides helpful information on shareholder identification processes and on timing gaps between record dates and general meeting dates is the April 2017 Report from ESMA entitled "Shareholder identification and communication systems".

In addition, as part of their work to comply with the obligations set out in SRD II, members of the AGC-EFC have conducted extensive legal analysis of member state laws and member state transpositions of SRD II. Many of the specific points contained in this paper derive from that analysis.

4. MAIN CHALLENGES WITH SRD II REQUIREMNTS

The main shortcoming of SRD II is that it falls short of providing for common pan-European operational processes. The main problems, arising out of differences in the national transpositions of SRD II, or out of existing national requirements and practices, are as follows:

(a) Lack of a common definition of shareholder

SRD II does not itself contain a definition of the term shareholder, but uses the definition contained in the original Shareholder Rights Directive I (SRD I).

SRD I defines the 'shareholder' as 'the natural or legal person that is recognised as a shareholder under the applicable law'. This means that the definition of shareholder under SRD II depends on national corporate or securities law of the country of issuance of a security as well as the national transposition of SRD II. In this respect, the laws in many countries are different.

The practical consequence is that the party identified as the shareholder under SRD II may vary by country of issuance of a security, by legal form of a security (registered or bearer), and by the specificities of the custody chain.

In many, but not all, cases, domestic investors investing in domestic securities will be identified as the shareholder. This is because typically such custody chains are short (with just the issuer CSD, and one intermediary, in the custody chain), and because national corporate or securities laws, and national operational procedures, have been written, and designed, with such custody chains in mind.

Cross-border investors typically use longer custody chains (often with two or three intermediaries in the custody chain). This means that the case of an investor holding securities for which an intermediary higher up the custody chain (i.e., closer to the issuer CSD) is recognised as legal owner (or "shareholder", using SRD II terminology) is much more frequent for cross-border investors, than for domestic investors in domestic securities (see ***Figure 1*** below).

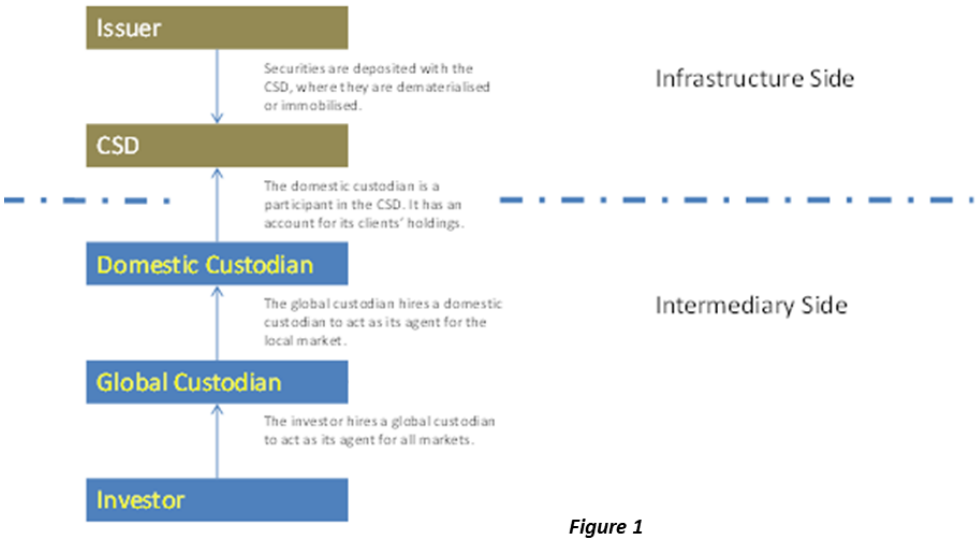

Figure 1

Annex 3 provides additional information on which person or entity in the custody chain is recognised as the shareholder.

Case of shareholder being higher up the custody chain than the end investor

From the perspective of the operational processes covered by SRD II, where an entity higher up the custody chain than the end investor is recognised under national law as the shareholder, two main problems arise. (See Annex 1 for a definition of the term "end investor").

The first problem relates to the shareholder identification process. The purpose of the shareholder identification process under SRD II is to bring transparency to custody chains, and to allow issuers to identify the investors in their shares. The SRD II Implementing Regulation sets out an operational process that has been designed to identify the party at the bottom of a custody chain, namely the end investor.

If an entity higher up the custody chain is identified as the shareholder in accordance with applicable national law, there are two consequences. Firstly, intermediaries lower down the custody chain are not under an SRD II legal obligation to provide issuers with information regarding their clients. Secondly, if intermediaries lower down the custody chain do provide such information, they risk doing so without the benefit of SRD II protections on the disclosure of information (Article 3a, paragraph 6 and existing safe harbour protections), and thus may be in breach of legal or contractual obligations. Accordingly, if an entity higher up the custody chain is identified as the shareholder in accordance with applicable national law, then it is likely that many intermediaries lower down the custody chain will not provide information regarding their clients.

The second problem is that if an entity higher up the custody chain is identified as the shareholder in accordance with applicable national law, SRD II obligations and rights do not apply lower down the custody chain. Specifically, intermediaries may not have an obligation to pass on general meeting information further down the custody chain, and end investors may have difficulty in exercising voting rights.[3]

Case of entity recognised as shareholder under SRD II not being in the custody chain

Some national transpositions of SRD II go so far as to impose obligations on entities that are not even in the custody chain of in-scope securities (i.e. an entity that does not hold itself the securities as a custodian): nevertheless, in these cases, these entities appear to be treated as a shareholder, mandating the application of SRD II operational processes. This could occur in the event that an end investor holds a position in a separate security (such as a convertible bond or a depositary receipt) that is linked to or based on an underlying share (that itself falls within the scope of the SRD II requirements).

Such a scenario is highly problematic. The relationship, for example, between a depositary receipt issuer and a depositary receipt holder is not a custody relationship. Accordingly, the application of SRD

[3] This second problem could potentially manifest itself throughout the entire corporate action process (including both financial corporate actions and general meetings), but in practice it is most likely to arise in relation to the general meeting process. This is for two reasons:

1. the operational changes brought about by SRD II are much more significant for general meeting processes than for the processes relating to financial corporate actions, and
2. general meeting processes (both the notification process and the process for the exercise of voting rights) are significantly different from the processes relating to financial corporate actions.

II requirements that are designed for custody relationships are difficult, and in some cases impossible, to apply in practice.

Workarounds and legal risk

In some cases, the national transposition of SRD II requirements, while leaving untouched the national definition of shareholder as a party high up the custody chain, specifically requires that some SRD II requirements continue to follow the custody chain down to the end investor. This is the case in several countries with respect to the requirements regarding shareholder identification. (See Annex 3 for some examples).

Such an approach may be viewed as a useful way of working around the problem of the end investor not being recognised as the "legal" owner under national law. However, such an approach is conceptually weak, with significant disadvantages and risks.

Even if the end investor is disclosed as being the shareholder, this does not necessarily translate to the end investor in practice having all the rights that would be expected under SRD II. The fact that two separate entities (legal owner and end investor) may both have rights relating to the ownership of securities is itself a source of complexity, and of legal risk.

Understanding and managing this complexity and risk is burdensome, notably for foreign investors, but also for domestic investors. Even in countries with a well-established legal distinction between legal ownership and beneficial ownership – and well-established market practices to facilitate the exercise of shareholder rights – the effective facilitation of these rights may be dependent on intermediaries' willingness to carry out investors' instructions. If intermediaries do not carry out investors' instructions, case law suggests investors should still be protected on public policy grounds (e.g., in the UK, see recent *Tesco* case[4]); however, questions arise as to whether it is sensible to rely on litigation for investors to ensure their instructions are carried out, and on what legal basis. In the case of Ireland, whilst Irish implementing legislation specifically provides for the disclosure of end investors as per SRD II shareholder identification requirements, Irish law still considers the ability of end investors to exercise their rights is dependent on intermediaries carrying out their instructions since a share in a company is considered held by a member entered on the register of members: companies are not bound to recognise beneficial ownership or other interests on its register of members. As a result, end investors are reliant on Irish courts to protect them on the basis of a "purposive interpretation" of the term "shareholder" so as not to deprive them in the Irish transposing measures of the intention expressed in SRD II.

Annex 2 contains some more information on why it matters who in the custody chain is considered the shareholder.

(b) Lack of common requirements regarding the attribution of entitlements

With respect to general meetings and financial corporate actions, SRD II sets out requirements relating to the transmission of information (regarding general meetings and financial corporate actions), and on the facilitation by intermediaries of the exercise of rights. But SRD II does not set out requirements regarding the attribution of entitlements, such as the amount of voting rights in a general meeting, or the amount of new shares in a securities distribution.

[4] *SL Claimants v Tesco plc* [2019] EWHC 2858 (Ch), at, 88.

One generally applicable rule on the attribution of entitlements or rights is that they are attributed based on booked security positions at the issuer CSD as of close of business on record date (even if there is a subsequent reallocation process based on pending transactions as of record date). This approach is in line with the logic and approach of the CSD Regulation (CSDR), and, in particular, of Article 3 of CSDR which mandates that publicly-traded securities be issued in a CSD.

However, in some countries, some categories of rights are allocated based on security positions that are recorded in a register (for registered securities), and not on the positions recorded at the issuer CSD. If the register is automatically updated based on positions at the CSD, there is no problem, as the two sets of records are aligned. But if positions in the register are not automatically updated, and if an end investor holds as of record date a position that has been booked at the issuer CSD without that position being recorded in the register, the end investor will lose rights, and in many cases will lose the right to participate in a general meeting.

This question of which securities position is the basis for the distribution of entitlements is not the only problem arising as a result of the lack of common requirements regarding attribution of entitlements.

SRD II does not set out requirements with respect to the timing of key dates for a general meeting or for a financial corporate action. This has a specific impact on the attribution of entitlements for general meetings.

One notable problem occurs if the date for the attribution of entitlement (the "record date") is too close to the issuer deadline for voting instructions for that general meeting. If the gap in time between these two dates is too short, which is the case in some countries, then the consequences are that (i) some record date holders are not able to vote, and (ii) many end investors have to send voting instructions that anticipate their future record date positions (with the risk that these anticipated positions will be incorrect, in which case their votes will rejected, anyway). For securities that are provided as collateral, there is a related problem in that when a collateral giver issues its voting instruction it may not know who the future record date holder will be; accordingly, the voting instruction may contain incorrect information with respect to the shareholder, and thus may not comply with SRD II requirements.

It is relevant to note that the SRD II Implementing Regulation recognises this problem, as it contains a suggestion that the last intermediary in the custody chain (i.e. the service provider to the end investor) "may caution the shareholder as regards the risks attached to changes in the share position close to record date". It should, however, be said that this suggestion, as a solution to the underlying problem, is inadequate.

(c) Existence of specific national requirements regarding the exercise of entitlements

National transpositions of SRD II have in most cases not adapted existing national operational processes to the processes contemplated in SRD II. For example, five European Union countries still require end investors to provide, in paper form, and in order to be able to exercise their votes, signed power of attorney documents.

Such requirements for power of attorney documents create differences in operational processes, and act as a barrier to the exercise of votes. They are an operational burden both for end investors, and for intermediaries, and they create the risk that a voting instruction will be rejected (for example, if the power of attorney is out-of-date or incorrect, or if the name on the power of attorney is not the same name as the name received by an issuer following a shareholder identification request).

In the framework of a common pan-European operational process for the exercise of voting rights, such requirements are unjustifiable, and are impossible to explain to end investors, whether they are located inside or outside the European Union.

5. OTHER SRD II CHALLENGES

There are several other problems with SRD II, with respect both to the national transpositions, and to the SRD II requirements themselves.

As with many other aspects of SRD II, the impacts of these problems are much greater for cross-border investors and intermediaries than for domestic investors and intermediaries.

Differences in scope of securities

As a result of differences in the national transpositions of SRD II, the range of the securities that fall within the scope of the SRD II requirements, may vary by country. SRD II gives member states the specific option to include, or not to include, interests in investment funds within the scope of SRD II requirements. In at least one country, national authorities have decided to apply SRD II requirements to securities, namely corporate bonds, that do not formally fall within the scope of SRD II. In several countries, there is uncertainty as to whether depositary receipts, either directly, with depositary receipts being categorised as in-scope securities, or indirectly, with a holder of a depositary receipt being identified as a shareholder of the underlying shares, are within the scope of the SRD II requirements.

Differences in the scope of securities create problems, as it may not be clear to an intermediary or custodian or end investor located in a different country which securities fall within the scope of the requirements, and which do not. For example, an issuer located in one country may issue corporate bonds in a different country, and under a different national law. Uncertainty as to the applicability of the requirements creates both a risk of a lack of compliance, and a risk of over-compliance (i.e. risk of compliance without the necessary legal basis, and without the necessary legal protections).

Differences in operational processes - disclosure of intermediaries

SRD II allows for optionality in member state transposition with respect to whether intermediaries are obliged to provide information on their clients that are themselves intermediaries.

This optionality relates to the case in which the national law of a member state identifies shareholder as an entity that is lower down the custody chain. As explained above, if the shareholder identified as an intermediary higher up the custody chain, then that intermediary will not provide information on its client.

In the event the shareholder is recognised under national law as lower down the custody chain, then a higher-tier intermediary is faced with three scenarios with respect to disclosing information on clients who are themselves intermediaries.

One scenario is that the member state transposition mandates disclosure of information on the other intermediaries through the chain. This scenario is in line with the Market Standards that have been developed regarding Shareholder Identification: the Market Standards prescribe full disclosure of positions held by intermediaries in order to give issuer/issuer agents the possibility to reconcile the disclosure information that they receive. Under this scenario, intermediaries will provide information on clients that are intermediaries and they have legal protection under national law when they do so.

A second possible scenario is that member states outright prohibit the disclosure of information of the other intermediaries. Under this scenario, intermediaries will not provide such information.

The third, common, scenario is that the member state transposition neither mandates, nor prohibits, disclosure. Under this scenario, it is unclear what intermediaries should do. One key problem is that intermediaries who do provide information will not benefit from legal protection in the event that they provide sensitive information. Some intermediaries may well provide information, as this will be in line with the Market Standards on Shareholder Identification described above: these intermediaries may consider the risk of disclosure of potentially sensitive information to be low. Other intermediaries however may consider this risk to be unacceptably high.

Each intermediary will have to build into its systems processing logic that matches each of these scenarios based on their individual interpretation and risk assessments of national law requirements and risks.

It is important to note that this optionality under SRD II, and these different scenarios, serve no benefit. Everyone (issuers, issuer agents, intermediaries and end investors) has an interest in achieving one common operational process, namely the process that is set out in the Market Standards on Shareholder Identification, and that discloses the identity of end investors, and of all intermediaries.

Differences in operational processes - end investor opt-out

With respect to the general meeting process, an uncertainty persists regarding whether end investors have a right to opt out from receiving general meeting notifications.

The SRD II Level 1 text obliges member states to ensure that intermediaries are required to transmit general meeting notifications to their clients. But this text gives few additional details, and it does not explicitly cover the question of whether and under what circumstances an end investor can opt out.

The SRD II Level 2 text, setting « minimum requirements », in some respects does allow for shareholders to vary receipt of relevant information – or the modalities by which it is to be provided to them - by contract.[5] Many in the industry have interpreted Article 2(4) of Level 2 as allowing for end investors to select by contract the information they wish to receive, and in what form, with reference to the requirements set out in Art3(b) and (c) of Level 1. However, as this has not been explicitly and unambiguously set out (i.e., more than one interpretation is possible), this has led to a degree of confusion and legal uncertainty and the likelihood of inconsistent interpretation of what is permitted, and how it is permitted.

Many national transpositions do not explicitly cover the “opt out” question: in these cases, the legal situation is unclear.

The situation is, however, clear for securities for which the end investor is not considered under national law to be the shareholder. In such a case, there is no obligation on the intermediary, so that the end investor can exercise an “opt out”.

Taking all of the foregoing into account, last intermediaries are placed in a difficult position.

[5] For example, Article 2(4) of the Implementing Regulation provides in relevant part: *The intermediaries shall allow access to the shareholders, who are not intermediaries, to all information, as well as any modalities for shareholder actions through generally available tools and facilities, unless otherwise agreed by the shareholder.*

Firstly, they will need to determine what their policy is for securities for which the situation is unclear. Eliminating all legal risk might entail forcing all end investors in the relevant securities to receive notifications of general meetings, even if the client explicitly refuses to receive such notifications. Without a very clear legal justification, such a step would be especially difficult to take for non-European last intermediaries with non-European clients.

Secondly, last intermediaries will need to manage any operational differences between securities for which an opt-out is possible, and those for which the situation is unclear.

Gaps in SRD II obligations – deadlines of intermediaries / complex national processes

There are gaps in the obligations set out under SRD II, which create potential problems for intermediaries and end investors.

With respect to general meetings and financial corporate actions, SRD II places an obligation on the last intermediary in the custody chain that its deadline for its client (the end investor) be no more than three business days prior to the issuer deadline. As such, this requirement is reasonable. But SRD II does not place matching obligations on issuers, on national general meeting and corporate action processes, and on other intermediaries in the custody chain, and thereby does not create the pre-conditions that would allow last intermediaries to comply with this requirement.

One major risk arises out of the fact that SRD II does not place obligations on issuers/issuer agents to provide a full "golden operational record" i.e. a full announcement in electronic form with respect to general meetings and other corporate events. This means that there is the risk that announcements will be delayed as intermediaries access information on websites.

We are currently aware of two European countries (Romania and the Slovak Republic) that for some types of corporate actions have such complex and burdensome national operational processes that it is impossible for last intermediaries in custody chains of three or more intermediaries (including the issuer CSD) to meet the three-business day requirement.

Lack of coverage of other shareholder rights

SRD II covers only a limited set of shareholder rights, and, notably, does not cover the right to place resolutions on the agenda of a general meeting.

Confusion between confirmation of entitlement and proof of entitlement

The SRD II Implementing Regulation confuses a confirmation of entitlement message (i.e. a message from an account provider to its client confirming a record date position) with a "proof of entitlement". As a consequence, the Implementing Regulation obliges intermediaries to send "confirmation of entitlement" messages containing information that the intermediary may well not have and that is, in any event, irrelevant for a "confirmation of entitlement" message. SRD II does not set out any operational process whereby a "proof of entitlement" could be accepted on a cross-border basis.

Lack of harmonisation of nationally-specific identifiers for private individuals (natural persons)

SRD II includes in some cases a requirement for the use of a nationally-specific identifier (based on the nationality of the investor) to identify in a message to an issuer a private individual (natural person) as a shareholder. These requirements are highly complex and burdensome, both for intermediaries and for issuers, and appear to have no rationale. In some circumstances, intermediaries may find it

impossible to comply fully with these requirements. They should be replaced by a requirement to use a common identifier.

6. OPPORTUNITIES ARISING FROM SRD II

One of the major objectives of SRD II, and the SRD II Implementing Regulation, was to create three common, pan-European operational processes, namely, the shareholder identification process, the general meetings process, and the process with relation to financial corporate actions.

As set out above, failings and gaps in SRD II, and in current national transpositions of SRD II, will not lead to the full achievement of this objective.

Nonetheless, SRD II is a positive step forward, as it does contribute to creating some of the pre-conditions for such common, pan-European operational processes, which – if implemented – would create significant opportunities.

If fully implemented in line with the approach set out in SRD II Implementing Regulation, the SRD II process for the identification of end investors would create the possibility for existing nationally-specific shareholder identification and registration processes to be retired. In many cases, these legacy processes provide little information on cross-border investors, and are a barrier to market access for cross-border investors and intermediaries.

Similarly, the SRD II shareholder identification process also creates opportunities to improve withholding tax processing.

Technological innovation provides major opportunities for improving the flow of information in the custody chain. Steps taken by SRD II to introduce common pan-European operational processes facilitate the introduction of new technological solutions.

7. STEPS TO BE TAKEN TO ACHIEVE THE OBJECTIVES OF THE DIRECTIVE AND THE CAPITAL MARKETS UNION PROJECT

Despite the potential of SRD II, the current text of SRD II, and the current national transpositions of SRD II, will not have the effect of facilitating the harmonised access by end investors and intermediaries to European capital markets and European securities.

They will rather have the effect of creating a barrier to accessing European markets and securities.

SRD II places new and complex burdens on intermediaries holding European securities. Each intermediary will have to manage new, mutually divergent requirements for European securities and will potentially be liable in the event of non-compliance with these requirements. This creates increased risk for intermediaries. In some cases, either because of specific national requirements, or because of non-compliance with the requirements by other parties in the chain, intermediaries may be unable to comply with the SRD II requirements.

In the lifecycle of a capital markets investment, the custody process is critical, as it covers a major part of the lifecycle and as it provides the mechanism whereby the investor receives most of the benefits from its investment. Without efficient custody processes, there is no investment, and there is no Capital Markets Union (CMU).

In order to build a CMU, there is a need for the European Union institutions and bodies to adopt a Shareholder Rights Regulation (SRR).

The SRR should notably contain the following two measures:

- A common pan-European definition of shareholder that identifies the end investor (or "ultimate account holder") as being the shareholder, and as being the party entitled to exercise rights that have been attributed to securities positions.
- A common rule on the attribution of entitlements, namely a rule that entitlements are attributed based on booked positions at the Issuer CSD as of close of business of record date. This rule builds on, and is fully consistent with, Article 3 of CSD Regulation.

These two requirements are the core building blocks for the exercise of shareholder rights. They specify who is entitled to exercise shareholder rights, and how many rights that shareholder can exercise.

Whilst these requirements are necessary for the exercise of rights, they are not sufficient: they also need to be complemented by the following additional requirements:

- Requirements on the sequence of dates, including a rule setting a minimum time gap between the record date and the issuer deadline, so that all record date holders have the effective ability to exercise their rights.
- A prohibition of additional national-specific requirements regarding the exercise of rights (such as requirements for powers of attorney)
- A common definition of which securities fall within the SRD II/SRR requirements
- To the extent needed, and in case of lack of compliance with market standards, more detailed requirements relating to key operational processes.

The SRR should also deal with some of the specific gaps and inconsistencies of the current SRD II text (including the problem of the confusion between confirmation of entitlement and proof of entitlement).

Given that some of these measures relate to the relationship between issuers/issuer agents and CSDs, these measures likely need to be addressed in the upcoming review of CSDR.

8. CONCLUSION

SRD II is an ambitious and complex piece of legislation, covering complex operational processes. It is a significant step forward towards developing harmonised pan-European operational processes that allow all end investors the ability to exercise rights according to their shareholdings and that do present barriers to cross-border investment for investors and intermediaries.

SRD II has several shortcomings however. The most notable are:

- Lack of a common definition of shareholder (as the entity recognised as shareholder varies by country, security, and by place of end investor in the custody chain)
- Lack of common requirements on the attribution of entitlements
- Lack of requirements prohibiting additional national requirements for the exercise of rights
- Lack of a common scope (as, depending on the national transposition, the scope can be extended to other securities beyond equities)

The specific SRD II mechanism whereby SRD II requirements (as transposed into the law of the country of the issuer) apply to all intermediaries and investors in the custody chain (including third-country intermediaries and investors) creates the risk that – in the event of different national transpositions - SRD II will increase complexity for cross-border intermediaries and investors.

It is anticipated that in many countries the SRD II operational process for shareholder identification will not identify the end investor.

SRD II will need to be complemented by further legislative steps, both at the EU- and at the member state-level.

One key measure at the European level is the introduction of Shareholder Rights Regulation that includes a common definition of shareholder as “end investor” or “ultimate account holder”.

The AGC-EFC stands ready to provide further information and assistance to EU authorities.

ANNEXES (appended)

1. **Definition of end investor / Reasons for attributing ownership to the end investor**
2. **Why it matters who in a custody chain is treated as the shareholder**
3. **Current national definitions of shareholder**
4. **Role of market standards**
5. **What is meant by requirements on the sequence of dates / Issue of record date for general meetings**

ANNEX 1

Definition of end investor / Reasons for attributing ownership to the end investor

The approach of attributing ownership rights of securities in a custody chain to the "end investor" has three main benefits:

(i) there is a simple and clear rule to determine who the "end investor" is;
(ii) the approach is in line with the existing pan-European legislation (notably MiFID) and existing pan-European market standards; and
(iii) in most cases the approach is in line with the underlying economic reality (as in most cases the end investor has provided the funds to purchase the securities).

For a securities position, the "end investor" is the person or entity at the end of a custody chain i.e. the person or entity who holds the securities with a securities account provider, but who itself does not place the securities on any securities account that it itself provides. The intermediary with which the "end investor" holds the securities is the "last intermediary". All intermediaries in the custody chain from the "last intermediary" to the participant in the issuer CSD are both securities account holder and securities account provider: this account structure is inherent in the chain of custody pursuant to which each account provider is accountable solely to its proximate account holder, who in turn is obligated under its applicable national law to act in the interests of its own customers (creating another account provider/account holder tier lower down in the chain).

The provision of securities accounts is a regulated function. Intermediaries are under regulatory and supervisory obligations to distinguish clearly between securities positions that they hold on behalf of each of their clients and securities positions that they hold for other clients or on their own account (i.e. where they are the "end investor").

It should be noted that the "end investor" is not necessarily the party that is "entitled" to receive the proceeds from a corporate action (such as an interest payment). The "end investor" may well have a contractual, or other, arrangement with a third party whereby it transfers to the third party such proceeds.

In some documents, the term "ultimate account holder" is used to refer to the "end investor".

ANNEX 2

Why it matters who in a custody chain is treated as the shareholder

The precise legal and operational significance of who in the custody chain is considered the shareholder depends on national law.

The following is a short indicative discussion of some potential generic problems:

1/ Insolvency risk

If an intermediary in the custody chains is considered the shareholder of a securities position, and if that intermediary enters into insolvency proceedings, then (depending on the specificities of national law) there is the risk that the securities position be treated as part of the bankruptcy estate of that intermediary. This would place the end investor at risk of losing the securities.

Given that such a risk is typically unacceptable both for the end investor and for any other intermediaries lower down the custody chain, then such a situation would be an effective barrier, both for the end investor, and for the intermediaries lower down the custody chain, to accessing that national capital market.

2/ Segregation of assets

In countries where under national law there is the risk that a securities position of an end investor is potentially included in the bankruptcy estate of an intermediary, it is standard practice for such securities positions to be held in such a manner that the end investor is recognised as the shareholder.

This typically requires segregation of the position by end investor in the books of an intermediary in the country of the issuer. Such segregation is typically expensive and burdensome for cross-border investors, and cross-border intermediaries. This may be manageable for securities positions held on behalf by cross-border wholesale investors, but typically represents a major barrier to entry for cross-border retail investors.

3/ Financial corporate actions

The question of who is the shareholder of a securities position rarely affects the processing of financial corporate actions.

Financial corporate actions fall into two categories, namely distributions and reorganisations.

Distributions (such as dividend and interest payments) are processed through a cascade process down the custody chain.

Reorganisations (whereby an existing security is replaced by something else) are processed using an existing resource (i.e. the existing security). The processing is based on movements of that security at the level of the issuer CSD. What matters in the process is who is entitled to send instructions to the issuer CSD to move the resource, and not necessarily who is the shareholder.

4/ General meetings / Other general meeting-related processes

The question of who is the shareholder of a securities position may well affect the processing of votes at a general meeting, and other general-meeting related rights.

Unlike the right to participate in a reorganisation, general meeting-related rights are usually not materialised in the form of a resource. In addition, the exercise of general meeting-related rights may take place outside of the custody chain.

Issuers need a satisfactory mechanism to be certain that an entity exercising general meeting-related rights really is entitled to exercise those rights. For this reason, and for securities issued in registered form, issuers in many countries treat the entity whose name is on the share register as being the entity that is entitled to exercise those rights.

ANNEX 3

Current national definitions of shareholder

The following is intended to provide background to indicate where there is and is not legal certainty regarding the definition of shareholders under national law – and the consequences of this in the context of SRD II implementation. ***This information is for illustrative purposes only and may not be relied upon by third parties as legal or other advice: it is also subject to change as many jurisdictions indicated are still under review.***

It is emphasised that where legal clarity is not achieved, even if disclosure of end-investor shareholders may be considered "defensible" under member state national law, questions remain as to whether intermediaries may reliably disclose such information without risking breach of other laws. Service providers have been forced to assess risk and draw individual conclusions around legal risks.

EEA Country	Shareholder (Bearer/Demat shares	Shareholder (Registered shares)	Notes
Austria	End Investor	Name on register, however, for SH identification purposes, in order to give effect to SRD II, this "should" be the last person in the chain who is not acting in an intermediary capacity and who can exercise voting rights.	Definitive legal advice cannot be obtained confirming the FMA would follow a particular approach on the identity of the shareholder.
Belgium	End Investor	The term "shareholder" refers to any holder of a right in rem over a share, provided such right entitles its holder to vote at the general meeting of the company (regardless of whether the shareholder is recorded in the company's share register or not). As a result, the end investor is expected to be named on the share register.	Rights *in rem* over shares include (i) ownership, (ii) rights of usufruct and (iii) rights of pledge. The main feature of rights in rem is that they are enforceable against third parties. This appears to create some legal confusion where there is more than one intermediary in the chain of custody of dematerialised shares: intermediaries may not be permitted to respond to shareholder identification requests by providing "N" (this is still under review). **Voting**: Power of Attorney (in paper form) signed by the end investor is required for voting.

			Given that custody of Belgian registered shares is not provided by the CSD, intermediaries usually do not offer custody services for Belgian registered shares. In practice, this means that only Belgian investors can hold Belgian registered shares.
Bulgaria	Dual definition (name registered at the CSD, and end investor)	Dual definition - a "two-level identification" is assumed: both the end-investor and the "direct" shareholder (who is registered at the CSD) should be considered the "shareholder" under SRDII.	Disclosure obligations apply down to end investor. Bulgarian law remains uncertain regarding whether an end-investor actually is considered a "shareholder": deference appears to be given to the intent of the Directive and is based in part on an "understanding" that the provisions of the SRD II Implementing Regulation provides for a shareholding to be identified as a "nominee" (with respect to a custodian or sub-custodian) or "beneficial" shareholding (for the end-investor), or in more complex structures as "unknown". This appears to enable a nominee to exercise voting rights as a registered direct shareholder in the CSD whilst at the same time the end-investor can be identified on request of the issuer by the CSD (or the last intermediary), so that the objectives of SRDII of identification and facilitation of exercise of rights are both achieved. However, uncertainty persists.
Croatia	CSD participant	A shareholder would be the entity that is registered as a holder of shares in a company's share register, or in the case of dematerialised shares, in the CSD.	Croatian law recognises both a 'registered holder' (CSD participant) and a 'lawful holder' (beneficial owner). There is uncertainty as to whether SRD II requirements apply to the 'lawful' owner.

Cyprus	N/A	N/A	As of the date of this writing, no draft legislation has been made public. This creates legal uncertainty.
Czech Republic	Client of participant of Czech CSD	Client of participant of Czech CSD	Shareholder requirements require segregation by end investor in the books of the participant of the Czech CSD. This is a barrier to accessing the Czech market. However, this also means that shareholders are already identified at the CSD.
Denmark	The person holding the share certificate (assuming no restrictions imposed by the company)	Client of CSD participant	Danish law does not recognise a distinction between legal and beneficial ownership: the person registered with the CSD is considered the owner of a share in a Danish public limited company. As a result, disclosure obligations would appear to stop at the level of the registered shareholder, which would be the party registered at the CSD. For omnibus ("nominee") accounts at the CSD, and in order to vote a general meeting, there is a need for (i) a registration process before record date, and (ii) a (paper) Power of Attorney signed by the end investor.
Estonia	End investor	End investor	Disclosure requirements apply down to the end investors.
Finland	End investor	End investor	In order to be able to vote, an end investor whose securities ae held on an omnibus account at the CSD has to have its securities registered on a temporary register.
France	End investor	End investor (for securities registered in the name of an intermediary). Registered holder	Where dematerialised securities are registered in the name of the intermediary, the shareholder is still considered the "end-investor", with the intermediary empowered to disclose

		i.e. end investor (for other registered securities).	identifying information of its customer. However, in practice, shares typically are registered in the name of the end investor by means of segregation through the custody chain. This is a barrier to accessing the French market.
Germany	End investor	Name on register (usually a name associated with the CSD participant (dispo shares) or the client of the CSD participant)	For registered shares, the SRD II disclosure requirements apply down to the entity whose name on the register. There is no guidance as to the requirements to qualify a shareholding as a nominee shareholding or a beneficial shareholding under German law. With respect to shareholder identification requests, German legal counsel advise that “N” vs “B” identifiers may be appropriate in cases of actual or potential separation between "legal ownership" and "beneficial ownership", i.e., if a holder of registered shares holds them for the benefit of a third person. Unfortunately, legal counsel adds that the provision of German law implementing SRD II (new Section 67d AktG) does not provide for the provision of information regarding the identity of beneficial owners: Section 67d AktG only provides for a right of information regarding the identity of the shareholder (i.e. the holder of the right in rem (dinglicher Rechtsinhaber)). For registered shares that are not registered in the name of the end investor, a temporary registration process (before record date) may

			be required in order to be able to vote. Record dates on German securities are in some cases not compliant with European standards.
Greece	Name associated with securities account at the CSD, or (in the case of omnibus accounts at the CSD) name associated with account held with the CSD participant	Name associated with securities account at the CSD, or (in the case of omnibus accounts at the CSD) name associated with account held with the CSD participant	Standard practice for cross-border investors is for segregation at the level of the Greek CSD (for equities). This is a barrier for accessing the Greek market. However, this also means that shareholders are already identified at the CSD.
Hungary	Name associated with the account at the CSD	Name associated with the account at the CSD	Disclosure requirements apply down to the end investors. Power of attorney signed by end investor required to vote.
Iceland	N/A	N/A	Draft legislation expected to be may be available October/November 2021. Legal uncertainty will result from the delay.
Ireland	Not applicable	CSD participant	Disclosure requirements apply down to the end investor per SRD II implementing legislation.
Italy	N/A	N/A	As of the date of this writing, the consultation process regarding the secondary legislation implementing SRD II is not yet complete in Italy. There therefore remains uncertainty concerning the concept of "shareholder" for the purposes of SRD II. Legal counsel advises that until the conclusion of the consultation process and the adoption of the relevant regulations, it will not be possible to provide clarity with respect to the interpretation of the definition and the implications arising in connection with the shareholders' register. Relevant guidance is expected to be set

			out in a “second level regulation”, due shortly.
Latvia	N/A	The person in whose name the respective account for financial Instruments (securities account) has been opened wherein the shares are booked.	Treatment of shareholder identification requests still under review. Power of attorney required to vote.
Liechtenstein	The person shown on the register managed by the depositary.	The person shown in the company's share register.	“B” is expected to be identified by responding intermediaries where they hold registered shares on behalf of end investors. However, legislation remains in draft form: the anticipated effective date of implementing legislation in Liechtenstein is 1 Jan 2021. Legal uncertainty results from the delay.
Lithuania	End investor	End investor	“Legal ownership” mainly determines who the shareholder is: a person is considered a shareholder even if they hold shares for the benefit of another person. However, there is no guidance as to whether the above approach would apply in the context of SRD II. Legal counsel advise that a “substance over form” principle is commonly applied in Lithuania, but there remains substantial risk that different interpretations can be applied.
Luxembourg	The holder as on the depository's register will be the shareholder.	The owner of a securities account on which the shares are credited. If an intermediary (acting as agent) has been registered, then the shareholder will be the owner of the	Luxembourg law does not recognise a distinction between "beneficial ownership" and "legal ownership" and only recognises the legal ownership of shares. Therefore "shareholder" would refer to ownership in the “legal sense” rather than the “economic

		securities account to which the shares are credited.	sense". As a result, an intermediary, such as a CSD participant, would be considered the shareholder. Whilst legal counsel believe disclosure down to the end investor in accordance with SRD II expectations "could be defended", this is not assured.
Malta	Person entered in the register of members, i.e., the name associated with the account at the CSD	Person entered in the register of members, i.e., the name associated with the account at the CSD	Disclosure requirements stop at the level of the legal shareholder: a shareholder in a Maltese company will be deemed to be the first intermediary in the chain which is listed on the register of members of the Maltese company as holding the relevant shares. This interpretation also applies where the first intermediary in the chain listed on the register of members is doing so in a nominee capacity.
Netherlands	Ultimate beneficial owner – an economic owner who holds the right to vote on shares.	Ultimate beneficial owner – an economic owner who holds the right to vote on shares.	Because the concepts of nominee shareholding and beneficial shareholding do not fit well with the Dutch concepts of ownership, there remains uncertainty as to how to respond to shareholder identification requests. It is clear that a CSD may respond on behalf of participants either as "N" (where the participant holds as custodian) or "O" (where the participant holds for its own account), but legal counsel believe "B" is not expected to be used. Legal counsel advise that whilst disclosure through the chain to the end investor may be "defensible", this is not assured.
Norway	N/A	N/A	Draft legislation was expected to be made available early July 2020, but as of the date of this

			writing we have yet to catch sight of it. Legal uncertainty will be the result. Power of attorney required to vote
Poland	The person shown in the company's share register.	The person shown in the company's share register.	In Poland there is no specific definition of the term "shareholder" for the purposes of SRD II. Separation of legal ownership from beneficial ownership is not recognized in Polish law: the legal owner of the shares is therefore expected to be the "shareholder" for the purposes of Polish implementation of SRD II. Full segregation at the CSD level for end investors is the norm in any case. Barrier to entry: the common practice for full segregation by end investor at the CSD level.
Portugal	Client of the CSD participant	Client of the CSD participant	Under Portugal's "First Layer" approach, disclosure requirements stop at the level of the CSD participant (who will provide information on the client of the CSD participant). Depending on the name recorded at the CSD participant, other SRD II obligations (notifications, pricing etc) may either stop at the CSD participant or stop further down the chain of custody.
Romania	End investor	End investor	Romanian law does not provide guidance on the distinction between N and B codes, however, legal counsel believes the industry's approach to disclosing through to the end investor is "defensible" but not assured.
Slovakia	Name on register held by the CSD (CSD	Name on register held by the CSD (CSD	If an intermediary is nominee of another intermediary or of an

	participant or client of CSD participant)	participant or client of CSD participant)	end client, the N or B code could be used - bearing in mind that nominee will still be identified as a shareholder. Disclosure through to end investor is thus permitted.
Slovenia	Account name recorded at the CSD or at the CSD participant	Account name recorded at the CSD or at the CSD participant	Changes to Slovenian transposition are expected, however, current draft legislation envision disclosure through the chain to end investor. Barrier to entry: common practice for full segregation by end investor either at the CSD or at the CSD participant
Spain	Client of CSD participant	Client of CSD participant	Where there is more than one intermediary in a chain of intermediaries, legal counsel indicates there should be no response to shareholder identification requests. Instead, only the contact details of the next intermediary should be provided to the issuer (or its agent) on request. Only the last intermediary would then provide beneficial ownership information to the company.
Sweden	Account name recorded at the CSD	Account name recorded at the CSD	Disclosure obligations stop at the level of the legal shareholder, however, the party listed as account holder on a nominee CSD account is not per se considered the Shareholder [under] Swedish law: "economic rights" of nominee-registered shares are considered granted to the CSD participant on behalf of the end-investor Shareholder. Therefore, disclosure requirements may be read to apply down to the end investor. For omnibus ("nominee") accounts at the CSD, and in order

			to vote a general meeting, there is a need for (i) a registration process before record date, and (ii) a (paper) Power of Attorney signed by the end investor.
United Kingdom	Not applicable	CSD participant	No transposition. No SRD II disclosure process. Existing UK disclosure process continues to apply outside of SRD II.

ANNEX 4

Role of market standards

With respect to corporate events, market standards (soft law) play a critical role that is complementary to the role of regulation (hard law).

Corporate events involve the communication between multiple different parties (issuers, intermediaries, and end investors), and require a common understanding by all parties of the detailed terms of the event, so that all parties can process it in a compatible and synchronised manner.

Regulation is helpful as it creates a common framework (of definitions, and of processes) with which all parties are obliged to comply.

Market standards are helpful as they can set requirements that are more detailed and more flexible than regulatory requirements. They are also helpful as they can offer interpretative guidance to market participants.

Market standards have the weakness that they are not mandatory, so that divergent practices are possible. For this reason, the monitoring of compliance with market standards in an important activity.

Market standards are especially weak if they clash with national law. In such cases, market standards do not offer a solution, and there is a need for legislative change.

Cross-sector working groups set up to develop pan-European best market practices have been an active feature of industry efforts to facilitate an efficient and effective preparation and implementation of SRDII and its implementing regulation.

An SRD II Industry Task Force Steering Committee coordinates standards development, and compliance monitoring. The Steering Committee provides a governance and coordination framework for four task forces: General Meetings; Shareholder identification; Golden Operational Record; and Messaging.

All four task forces have made major progress towards elaborating best market practice documents for SRD II implementation and compliance.

ANNEX 5

What is meant with regard to requirements on the sequence of dates / Issue of record date for general meetings

SRD II and market standard documents identify and define a series of key dates for the processing of a corporate event.

Requirements on the sequence of dates are the requirements that specify the linkages between the key dates in a corporate event in order to facilitate processing by all parties in the custody chain

One important rule is that the record date for a securities or cash distribution should be a number of days after the ex-date (the first day of trading with entitlement to the distribution) that is equal to the number of days in the standard settlement cycle minus one day. The purpose of this rule is to facilitate processing by ensuring that trades that are executed on the day before the ex-date settle on the record date, and so that the buyers are the record date holders, and receive the distribution. Buyers on ex-date will not be record date holders, as their trades will settle after record date.

Another important rule is that there be a sufficient period of number of days between record date for a general meeting and the issuer deadline for voting instructions, so that all record date holders can vote. Currently, and as identified by ESMA in the 2017 Report, several countries mandate in national law that there be a maximum of two days between record date and general meeting date, so that there is at most just one day between record date and issuer deadline. This is a problem that cannot be solved by market standards documents alone: it requires a change in law.