Memo

DACSI 22-1159

From : DACSI

Re : **Response to the ESMA call for evidence on SRD2 implementation**
version 1.0 (as submitted) 28 Nov 2022

What follows is the text of DACSI's response to ESMA's call for evidence "Implementation of SRD2 provisions on proxy advisors and the investment chain" (DACSI 22-2155).
This response is submitted by on 28 November.

General remarks

We highly appreciate this call for evidence, whereas our members observe ample issues in the implementation of SRD2, in particular in cross-border requests and responses for shareholder identification.

DACSI and its members remain fully committed to the implementation of common, pan-European, efficient and harmonised processes that deliver the objectives of SRD2.

Against this background, DACSI Members emphasise that SRD2 is a major market infrastructure project that was launched without key harmonisation in targeted areas.

We answer the general questions (section 3, Q1-15) and the questions for intermediaries (Q59-71).
We agree with having our answer made public.

Section 3 – General questions

Q 1 What is the nature of your involvement in financial markets?

c. Intermediary – credit institutions

We – DACSI – are a trade association based in The Netherlands. Our membership consists of 10 banks and the domestic CSD. In responding to this call for evidence we take the view of the intermediaries, which are all banks/credit institutions. These banks vary in size, are either locally or globally oriented, and serve wholesale and retail clients, domestic and international.

Q 2 Please specify if you are a non-EU or EU actor, and in the latter case, in which Member State you (or, if you are an association, your members) are based/most active in.

EU actors – most active in The Netherlands.

On shareholder identification, transmission of information and facilitation of the exercise of shareholder rights

Q 3 Do you consider that shareholder identification, within the meaning of Article 3a, has improved following the entry into application of this provision and the Implementing Regulation?

To a large extent.

DACSI members note that both the data quality and the transmission speed have improved compared to the pre-SRD2 situation, as a result of significant efforts by intermediaries to allow STP processing via ISO and SWIFT. However, the provisions for shareholder identification have not (yet) delivered on their promises. We illustrate this in our answer to Q 11.

Q 4 Do you consider that harmonising the definition of shareholder across the EU is a necessary step to ensure the full effectiveness of Article 3a provisions?

Fully.

The lack of a harmonised definition of "shareholder" at European level has raised interpretative doubts about the fulfilment of the obligations for intermediaries under the current legislation and has contributed to increasing the costs, complexity and risks of participating to European capital markets. In this context, DACSI Members support the Commission's initiative to introduce a harmonised EU-wide definition of 'shareholder' and further clarify rules governing the interaction between investors, intermediaries and issuers. We are convinced by ensuring improved legal clarity, such harmonisation is for the benefit of investors, intermediaries, and EU capital markets overall.

Q 5 In your opinion, who should be regarded as 'shareholder' for the purposes of the SRD if this definition was to be harmonised across the EU?

The natural or legal person on whose account or on whose behalf the shares are held, even if the shares are held in the name of another natural or legal person who acts on behalf of this person (beneficiary shareholder).

The beneficiary shareholder is the one the issuer should interact with under SRD2; the custody technique used in a jurisdiction(s) along the chain should be irrelevant.

Q 6 Do you consider that the transmission of information along the chain of intermediaries has improved following the entry into application of Article 3b and the Implementing Regulation?

To a large extent.

In general, many issuers (at the upper end of the chain) and many end investors (at the bottom of the chain) cannot process messages in ISO format, and are not part of the SWIFT network. This results in challenges at both chain ends.

DACSI members note the following about the bottom of the chain:

- Pre-SRD2, information was already transmitted effectively to wholesale/institutional investors using ISO formats and SWIFT channels; transmission to retail investors was eliminated by ample intermediaries because of cumbersome and costly communication;
- Post-SRD2, little changed with regard to wholesale/institutional investors, but transmission to all end investors is now compulsory and hence effectuated in the NL market.

Concerning the upper end of the chain we note:

- Pre- and post-SRD2, a real problem lies with interfaces used by issuers to connect into the intermediary chain. Many issuers – financial institutions being a positive exemption - cannot process messages in ISO format themselves, and are not connected to SWIFT. This leads to delays and other difficulties.
- Only a completely and correctly filled ISO message can be processed STP without (manual) intervention. Therefore, issuers - who are the (golden) source of information according to the SRD2 and the DFVO - should be obliged to either use the ISO formats commonly used in the intermediary chain and with the same quality and timeliness as intermediaries, or to engage with an agent with the same effect.
  DACSI members observe that most EU-based agents apply the proper processes (via CSD as first intermediary) and formats (ISO messages).
- At a more operational level, the STP process is significantly disturbed by the possibility of only partially filling tables 3 and 8.

Q 7 Do you consider that the facilitation of the exercise of shareholder rights by intermediaries has improved following the entry into application of Article 3c and the Implementing Regulation?

To a limited extent.

Since the entry into application of new SRD2 requirements, a number of improvements have been made.

However, due to the specificity of requirements under each national regime of company law, the cross-border exercise of shareholders' rights at general meetings is still marked by difficulties, complex manual processes and considerable legal risks.

Ample intermediaries have outsourced the transmission/casting of votes to external service providers. Albeit this is effective, issuers (and their agents) observe that the communication of votes:

- is often at the deadline; this seems incompatible with the obligation for the entire chain to forward votes/instructions 'without delay";
- is very often aggregated into "block votes"; this hinders issuers in their obligation to confirm cast votes and to report back voting results.

Q 8 Do you consider that transparency, non-discrimination and proportionality of charges for services provided by intermediaries in connection with shareholder identification, transmission of information and exercise of shareholder rights (i.e., in compliance with Article 3d) have improved following the entry into application of this provision?

Not at all.

DACSI members observe a general lack of transparency on the topic, as sources are difficult to obtain and often available in the respective national language only. This makes it difficult to assess whether costs are proportionate. Therefore, it is difficult, or even impossible, for agents and intermediaries to make sound pre-calculations and to provide transparency in the costs they charge.

Hence, in the European context, it would be desirable for member states to make their cost regulations available in English and for ESMA to publish a link to these regulations. We anticipate that, with all information properly available, the various local constraints – cost charging allowed or not - turn out to be incompatible.

Specifically, the charges incurred by (some) CSDs for sending meeting notices (table 3) are stiff and probably not proportionate. The resulting high cost level turns out to be an impediment for small issuers to use the CSD channel for communication with their shareholders.

Q 9 Do you consider that the practices of third-country intermediaries (i.e., intermediaries which have neither their registered office nor their head office in the EU but provide services with respect to shares of EU listed companies) are in line with the provisions of Chapter Ia and the Implementing Regulation?

To a limited extent.

DACSI members see requests from foreign (often non-EU) agents on behalf of an NL issuer directly to one or more intermediaries without proper authentication, and/or not including all minimum information, and/or not using "formatted electronic form using standards ….".

Q 10 Do you consider that the processes put in place by intermediaries for the purpose of implementing Chapter Ia (i.e., shareholder identification, transmission of information and facilitation of the exercise of shareholder rights) are working in line with the relevant provisions of the SRD2 and the Implementing Regulation?

To a large extent.

DACSI members observe requests where the (foreign) recipient requires responses in non-standard form/format, e.g. spreadsheets; such requests are denied in general.

Q 11 Have you encountered any specific obstacles or difficulties in the practical application of the SRD2, namely Chapter Ia and the Implementing Regulation, also in light of the SRD2's transposition in Member States' national law (e.g., regarding transparency of fees when a service is provided by more than one intermediary in a chain of intermediaries or when the company is allowed to request the CSD, another intermediary or third party to collect information regarding shareholder identity)?

In relation to:

a) Shareholder identification;

We experience that non-EU intermediaries (custodians) tend not to respond at all;
It is unclear whether the SRD2 processes can be applied to shares in an EEA but non-EU country that are listed on an EU trading venue.
In some EU countries (last) intermediaries submit their responses to requests "at the deadline", instead of "without delay"; they apply "at deadline" in any case, while that exception from "without delay" is intended for defined complicated situations (specified in SI Standards).
Projects to deliver information in an automated (ISO 20022) e.g. SEEV form have been delayed by foreign intermediaries due to low priority (no business case, only to comply to regulation without any risk of getting fined by lack of auditing).
As long as (last) intermediaries do not report on the format required by the Marker Standards, it will remain a challenge for the issuer/agent consolidating the received information.

b) Transmission of information;

Only a completely and correctly filled ISO message can be processed STP without (manual) intervention. Therefore, issuers - who are the (golden) source of information according to the SRD2 and the DFVO - should be obliged to either use the ISO formats commonly used in the intermediary chain and with the same quality and timeliness as intermediaries, or to engage with an agent with the same effect.

c) Facilitation of the exercise of shareholder rights;
Votes cast through service providers are often received at the deadline, or even thereafter.
d) Costs and charges by intermediaries;
Costs/charges for attending shareholder meetings and finally falling on the shareholder are still not transparent.
Costs/charges applied in the process of disclosure and finally falling on the issuer are complex, not harmonised and not transparent.
e) Non-EU intermediaries.

Q 12 If you have encountered any difficulties or obstacles to the fulfilment of obligations under Chapter Ia (also relating to cross border elements - both within and outside the EU - and in light of the SRD2's transposition in Member States' national law), how do you think improvements could be made going forward?

In relation to:
a) Shareholder identification;
Actors – whether issuer agent or intermediary – are highly dependent on the performance of other actors who fall under another jurisdiction and hence another competent authority. So, each actor has an interest in others being compliant with the applicable rules, resulting in generally low priorities where efforts are to be made. The dispersed - and sometimes even absent – responsibilities frustrate effective monitoring and enforcement.
b) Transmission of information;
c) Facilitation of the exercise of shareholder rights;
the practice of aggregating votes by service providers (hindering confirmation and reporting back) should be abandoned;
d) Costs and charges by intermediaries;
e) Non-EU intermediaries.

Q 13 Overall, do you consider that Chapter Ia provisions have improved shareholder engagement, thereby supporting the long-term value creation and sustainability objectives established by the Directive?

No opinion.

Q 14 Do you believe that rules on the following points should be further clarified and/or harmonized?

a. Attribution and evidence of entitlements (incl. as regards the record date position);
Don't know
b. The sequence of dates for corporate actions and deadlines;
Yes Some key dates need more precise definitions; their logical order needs to be embedded in these definitions; national legal provisions need revision in order to accomplish this.
Harmonising the parameters completing the sequence (fixed, minimum and maximum time intervals between key dates) would be highly beneficial, although not strictly necessary.
c. Possible additional national requirements (e.g., requirements of powers of attorney to exercise voting rights);
Don't know
d. Transmission of information (incl. rules on communications between CSDs and issuers/issuer agents).
Don't know

Q 15 For elements that are not explicitly covered by the above questions but that are still related to Chapter Ia or the Implementing Regulation, do you have any other issue that you want to raise?

-

Section 6 – Questions for intermediaries

Q 59 Have you encountered any doubt or ambiguity in assessing which Member State and NCA is competent over your activities in this area?

Fully.

Whereas the SRD2 has been transposed into multiple national laws, the regulatory authority is at best determined based on the legislation of the issuer or issuance. But the obligations to transmit information, to forward requests and to answer them, as well as to facilitate rights exercise apply to intermediaries in multiple jurisdictions. It is often unclear which authority is competent over a particular obligation/task as part of a chain.

In several legislations – e.g. Germany and The Netherlands – no authority has been designated at all.

Q 60 How frequently do you receive shareholder identification requests when compared to the pre-SRD2 period?

More frequently.

Pre-SRD2, the NL market saw less than a handful of identification requests per year; typically, only domestic custodians replied to requests on behalf of NL issuers, which made the information of limited value. A manual process was required.
Post-SRD2, the NL market saw appr. 45 requests re domestic ISINs on annual basis, and appr. 30 re foreign ISINs.

Q 61 Following the entry into application of the SRD2, when receiving a shareholder identification request, have you encountered obstacles in providing all the required information regarding shareholder identity to requesting issuers?

Yes.

The retrieval of the relevant data internally does not cause problems, but difficulties arise for intermediaries where there are special national ways of implementing the SRD2.

For example, some member states have extended the scope of SRD2 to securities other than listed shares (e.g. bonds/funds in France). When responding to such requests, which are labelled as SDR2 requests, conflicts with data protection (GDPR) may also arise. Intermediaries must therefore not only address operational issues, but also manage legal risks.

Delays occur when the issuer/agent sends the SI request to an intermediary who is not the first intermediary (CSD); such intermediary is often not equipped to assess the documents supporting the authorisation – which leads to manual intervention -, if this is submitted at all. Similarly, correct and timely responses encounter obstacles when the request for information is in a divergent format or is even incomplete.

Q 62 With reference to the previous question, can you please describe if your response would change in connection to cross-border shareholder identification, especially when involving third-country intermediaries?

Yes, with regard to cross-border identification involving a third-country intermediary.

DACSI intermediaries see requests from foreign (often non-EU) agents on behalf of NL Issuer sent directly to them without proper authentication, not including all minimum information, and/or not using "formatted electronic form using standards ….".

Q 63 Following the entry into application of the SRD2, is the shareholder identification request and the relevant information required (e.g., shareholder identity data, etc.) always transmitted to you in a format that allows straight-through processing within the meaning of Article 2(3) of the Implementing Regulation?

No.

Intermediaries do sometimes receive requests in formats that do not allow straight-through processing. See also the answer to Q10.

Q 64 Following the entry into application of the SRD2, do you communicate the information necessary for the exercise of shareholder rights (i.e., Article 3b) (e.g., general meeting notice, notice of participation, etc.) in a format which allows straight-through processing within the meaning of Article 2(3) of the Implementing Regulation?

Yes.

The notification about the AGM and other corporate events is transported in an ISO message via STP in the intermediary chain to the last intermediary and the institutional shareholder.

Retail shareholders cannot be reached using ISO formats. Therefore, the last intermediary informs the retail client by another communication tool, in some jurisdictions even by post. For further details see also answer to Q6.

Q 65 Following the entry into application of Article 3b, have you experienced any improvements in the downstream transmission of information to investors for the exercise of their rights along the chain of intermediaries?

No.

Within the intermediary chain, communication via STP worked smoothly via ISO/SWIFT even before SRD2.

Q 66 Following the entry into application of the SRD2, have you experienced any changes in how frequently you receive upstream voting indications from investors at any level of the chain of intermediaries?

Don’t know.

Q 67 What type of system(s) have you put in place to communicate with shareholders in compliance with Article 2 (4) of the Implementing Regulation?

A fully-electronic system.

Communication with institutional shareholders will continue to take place fully electronically via STP using ISO formats and to a large extent via SWIFT.

The financial institutions acting as intermediaries have in general put a lot of resources into ensuring that fully electronic communication should be possible, and our view is that most of the intermediaries have put in place a fully-electronic system.

Retail shareholders on the other hand are partly informed via electronic mailboxes or similar (proprietary) tools, partly by post, varying per country due to legislation and/or local practice. As an effect, the issuer's communication with shareholders in another jurisdiction than the country of issuance still depends on the colourful collage of national practices.

Q 68 Do you provide to your clients any electronic tools to facilitate the exercise of shareholder voting, including at cross-border level?

Yes.

In some cases, our members enable their clients to vote via an electronic platform or other electronic facility. To do this, they contract with different providers, or develop proprietary platforms. Some of our members thus also enable retail shareholders to vote via an electronic medium, in which the confirmation of the vote etc. is then also carried out.

Q 69 Have you experienced difficulties in complying with the timelines envisaged by Article 9 of the Implementing Regulation (e.g., the cut-off date)?

Don't know.

Q 70 Following the entry into application of the SRD2, in which way have you ensured that the costs you have charged for providing the services of Chapter Ia are transparent, proportional or non-discriminatory?

No position: for reasons of competition law, our members do not discuss the costs they charge.

Q 71 Do you consider that Market Standards elaborated by the industry for the application of the provisions of Chapter Ia are useful to complete the regulatory framework in this area?

Fully.

Such Standards are very useful in general. This is pretty well illustrated by the Market Standards for Corporate Actions Processing, which provided an effective framework for common reference on the path to implementation.

Although much more recent, the Standards for Shareholder Identification (art 3a) are evenly useful. While compliance is still problematic, we are convinced that the availability and use of these Standards are necessary for the process towards full application of the Chapter 1a provisions.
Therefore, we see a strong need for Standards for General Meetings (covering art 3c at least), which are lacking now. We look forward to the work undertaken by the Joint Working Group.