Comments

of the German Banking Industry Committee on the Draft Commission Implementing Regulation laying down minimum requirements implementing the provisions of Directive 2007/36/EC of the European Parliament and the Council as regards shareholders identification, the transmission of information and facilitation of exercise of shareholders rights

(Ref. Ares(2018)1944240 – 11/04/2018)

Register of Interest Representatives
Identification number in the register: 52646912360-95

Our ref
Ref. DK: 413-VN
Ref. DSGV: 7101/00

Contact: Michael Pullen
Telephone: +49 30 20225- 5659
Telefax: +49 30 20225- 5665
E-Mail: Michael.Pullen@DSGV.de

Berlin, May 9, 2018

The **German Banking Industry Committee** is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public-sector banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks finance group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. Collectively, they represent more than 1,700 banks.

Coordinator:
German Savings Banks Association
Charlottenstraße 47 | 10117 Berlin | Germany
Telephone: +49 30 20225-0
Telefax: +49 30 20225-250
www.die-deutsche-kreditwirtschaft.de

I. General remarks

- Many thanks for giving us the opportunity to provide feedback at an early stage on the draft Implementing Regulation supplementing Chapter Ia of Shareholders' Rights Directive II (SRD II).

- **We appreciate the European Commission's intention not to implement new systems and processes but to support existing, well-functioning message structures such as SWIFT.** Relying on minimum standards and encouraging the industry to establish further self-regulatory standards will help new solutions flourish and allow the industry to continuously work on process improvements and adopt best practices.

- The commitment to leave existing, well-functioning processes untouched refers, in our view, to the affected processes as a whole, irrespective of whether or not they are system-supported. **The only thing that ultimately matters in this respect is achieving the objective pursued in SRD II.** So it is, for example, immaterial whether shareholders receive information on general meetings electronically by way of straight-through-processed data/documents or by some other means. The crucial point in implementation of SRD II is purely and simply that they receive such information in good time. **The Implementing Regulation should thus only set detailed requirements where absolutely necessary and otherwise allow intermediaries latitude when it comes to meeting the new requirements.** For example, requirements such as '*without delay*' set in Articles 3a and 3b of SRD II are sufficient in many cases; they do not need to be specified further by the Implementing Regulation, as such requirements often produce further ambiguity ('*close of business day*' time zones). See in this connection our comments on Article 9 (4) below.

- Due to legal requirements information may have to be provided to shareholders in paper format. The time needed to send and return documents by post means that additional time buffers have to be built in when planning a general meeting. Though conversion to electronic format allows straight-through processing (STP), providing this information is a time-consuming process**. For such cases, a clear exemption from the 'same-day-transmission' requirement is therefore needed for intermediaries to enable them to comply with the Regulation.** Forwarding the information '*without undue delay*' should be sufficiently clear, while allowing the required flexibility.

- **One area of concern is the extraterritorial applicability** of the provisions of both the Directive and the delegated draft Regulation. This will lead to various issues related to implementation of the requirements in practice, from significant delays due to the variety of time zones that need to be considered, to conflicting legal frameworks and a potential lack of enforceability.

- Of particular importance in – but not only in – a cross-border context is the existence of multi-tier chains of intermediaries. In the great majority of cases, it is such a chain that enables shareholders to participate in a company and exercise their rights as shareholders. **Within this chain, an individual intermediary cannot, however, tell whether its client is actually a shareholder of the company whose shares it holds.** Behind institutional clients in particular, there are often other clients who may be intermediaries or also shareholders. This has to be taken into account in all intermediary information requirements. It remains questionable whether third-country intermediaries feel bound by the information requirements and comply with these on their part.

- **One of the main obstacles is not the chain of intermediaries but 28 different national company laws in Europe, and particularly extraterritorial applicability.** Neither registration for the general meeting nor voting instructions, for example, can generally be processed in an automated manner. Owing to differences in the local legal situation, it is not possible to use standardised forms for foreign companies. Holdings of foreign shares are often held for the bank administering the account by a further intermediary (subcustodian) in the country where the company is domiciled, and it is the latter which registers the shares for the general meeting. Forwarding information to this intermediary in the company's home member state is largely a manual process. Thus, the 'same-day-transmission' principle (Article 9) will not fit in either case.

- **In implementation of SRD II and application of the Implementing Regulation, intermediaries must be allowed long enough run-up periods to implement the new rules and requirements in any already existing formats (e.g. SWIFT messages).** The new requirements, particularly the format specifications and field definitions set out in the Annex to the Implementing Regulation, will result in a significant need for modification of already existing formats such as ISO or SWIFT. For example, it usually takes about 18 months to redefine an ISO field, since all European markets have to agree on the new definition. The introduction of a new ISO format is likely to take even longer. Only then can intermediaries implement the new formats in their systems.

II. Remarks on the draft Implementing Regulation

- **Article 1 (2) und (9)**: Instead of ‘*issuer CSD*’, the term ‘*CSD*’ as defined in Regulation 909/2014 should be used, as the ‘*issuer CSD*’ role is already specified in the term ‘*first intermediary*’. Additionally, a separate ‘*issuer CSD*’ definition should not be introduced without considering the implications on the rest of the CSD regulatory environment beforehand.

  Proposed amendments:

  ‘(2)'~~issuer~~ CSD' means the central securities depository, ~~which provides the core service referred to in point 1 (initial recording of securities in a book-entry system) or point 2 (providing and maintaining securities accounts at the top tier level) of Section A of the Annex to~~ ***as defined in*** *Regulation (EU) No 909/2014 with respect to the shares traded on a regulated market;*

  (9)'first intermediary' means the ~~'issuer~~ CSD' or other intermediary nominated by the issuer, who maintains all the share records of the issuer by book-entry with respect to the shares traded on a regulated market, or holds all those shares on behalf of the shareholders of the issuer. The first intermediary can also act in the role of last intermediary;’

- **Article 1 (12):** ‘*last participation date*’: we would suggest adding a sentence stating that ‘*depending on the means of transfer, the last participation dates might differ*’.

- **Article 1 (new):** A definition of ‘*close of business*’ is required. Suggestion: ‘*close of business*’ refers to 18.00 CET in the time zone of the party concerned.

- **Article 1 (new):** A definition of ‘*beginning of the next business day*’ should be added. Suggestion: the ‘*beginning of the next business day*’ requirement should be understood as before 12.00 CET (i.e. noon) on the next business day in the time zone of the party concerned.

- **Article 2 (2):** We expressly welcome it that company information has to be additionally made available in a language customary in the financial markets. Particularly retail investors need to be provided with company information in a format and language they can understand, as it cannot be assumed that all 28 EU member state languages are understood everywhere. **The obligation to translate information such as the invitation to the general meeting lies solely with the company issuing the information. This must be expressly stipulated by the Implementing Regulation.** On no account can intermediaries be required to translate company information. The SRD only obligates intermediaries to forward the information they receive from the company but not to process/translate it, with the exposure to liability this may involve.

- **Article 2 (4):** Change ‘*unless agreed by the shareholder*’ to ‘*unless otherwise agreed by the shareholder*’. This wording would make clear that the ultimate shareholder may also be informed in paper format. See also under Article 2 (4).

- **Recital 3, Article 8**: We welcome the Commission’s commitment to ensuring that the Implementing Regulation leaves the usual formats and already functioning processes for communication between company, shareholder and intermediary essentially untouched. This concerns particularly interbank communication that is often effected via SWIFT and the handling of corporate actions that, in our view, already work smoothly today across borders as well.

- The commitment to modern communication technologies, which we also welcome, should on no account lead to established and, as the case may be, legally required communication channels no

longer being possible solely because they are not electronic and/or do not allow any straight-through processing.

- **We therefore understand Article 2 (4) and recital (4) to mean that communication between the last intermediary (Article 1 (6)) and the ultimate shareholder can also by post/in paper format.** While straight-through processing is thus interrupted by a change of medium, communication with the ultimate shareholder is otherwise not possible in Germany. Retail investors mostly do not participate in electronic communication, e.g. by means of an electronic mailbox, though this is in principle possible, either because they do not want to or because they have no internet access. In such cases, the last intermediary is nevertheless obligated to inform the shareholder, i.e. its client. After all, besides duties under company law, there are naturally also contractual duties in the bank-client relationship that cannot simply be ignored by the bank/last intermediary because the client does not have an electronic mailbox.

  The change of medium in communication between retail investor and last intermediary should also be taken into account in the **deadlines set under Article 9**. The exemption from the 'same-day' principle provided for in Article 9 (6), subparagraph 3 falls short of the mark, as it covers only shareholder identification (Article 9 (6)). See also under our '*General remarks*' above.

  In cases where the only possible way to transmit such information to the shareholder is the postal service, it will often be objectively impossible to produce the required number of letters and mail them until the end of the business day or even the next business day. Therefore, we have to assume that the deadlines stated in Article 9 (3) do not apply to the transmission of information by means of postal service.

- We would also understand recital 4 as distiguishing between communication between intermediaries and communication between intermediaries and shareholders (who are not intermediaries). In the latter case, intermediaries are encouraged to use modalities which enable straight-through processing but are not required to ensure that such modalities can be used in communication every shareholder. Where the modalities of communication with shareholders do not allow for a transmission on the same business day or at the beginning of the next business day (Article 9 (3)), such deadlines do not apply.

- **Article 9 (4):** The phrase '*no later than on the same business day*' should be removed – in principle, as long as the information reaches the issuer by the deadline, the objective is achieved and no further pressure is needed (this additional pressure might actually result in omissions or errors). The '*without delay*' requirement should be sufficient.

- **Article 9 (6),** second subparagraph: If the information is received after a certain time, it should be sufficient to forward the information on the next day.

  Possible suggested wording (from Article 2 (2) DRAFT RTS on Settlement Discipline):

  '2. The allocation and written confirmation referred to in paragraph 1 shall reach the investment firm:

  (a) on the business day within the time zone of the investment firm on which the transaction has taken place; or,

(b) at the latest by 12.00 CET of the business day following the business day on which the transaction has taken place:

(i) where there is a difference of more than two hours between the time zone of the investment firm and the time zone of the relevant professional client; or

(ii) where the orders have been executed after 16.00 CET of the business day in the time zone of the investment firm.

The investment firm shall confirm to the professional client receipt of the allocation and of the written confirmation within two hours of that receipt. Where the allocation and the written confirmation reaches the investment firm later than one hour before the investment firm's close of business, the investment firm shall confirm receipt of the allocation and of the written confirmation within one hour after the start of business on the next business day.'

- **Article 9 (6), third subparagraph**: it is unclear why the applicability of the adjusted deadline is linked to information transmitted more than seven business days after the record date.
- **New Article:** An article allowing an opt-out from transmission of information for clients who do not want to receive certain information or have specific agreements with their intermediaries precluding them from sending that information would be required.
- **New Article:** The number of requests that an issuer can send per year should be limited – several options: fixed number vs. clearly defined triggers – and not exceed one request per issuer and calendar month.
- **New Article:** Further clarification to the effect that an intermediary is only obligated to provide the information available would be highly appreciated, as obtaining some of the information requested in the Regulation and its Annex is not standard practice (e.g. email address, which is not called for under SRD II, recital (5)). Furthermore, it is important to clarify that an intermediary cannot be accountable for any missing information/delay caused by other intermediaries in the chain who do not fulfil their obligations under the revised Shareholder Rights Directive and its supplementing acts.

III. Remarks on the draft Annex

- **General remark:** A general statement should be added, clarifying that the examples in the '*Description*' column are included for illustrative purposes only and cannot be exhaustive.
- **General remark:** Some of the character limitations (e.g. 35 characters for street addresses) are too restrictive
- **General remark:** It must be ensured that any format chosen allows for the use of specific national characters, e.g. ß, ä,ö,ü. This is particularly important for names, street addresses and cities.
- **General remark:** Standardised information via, for example, ISO codes would be required for the following fields; unless already in place, definition of new standards will be required:

  Table 1 - A2 - Type of request

  Table 2 - A3 - Type of request

  Table 3 - A2 - Type of message

  Table 3 - C3 - Type of General Meeting

  Table 3 - E3 - Reference to materials (4 characters potentially not sufficient)

  Table 4 - A2 - Unique identifier of the event (4 characters potentially not sufficient)

  Table 4 - A3 - Type of message

  Table 5 - A2 - Type of message

  Table 5 - A3 - Unique identifier of the event (4 characters potentially not sufficient)

  Table 6 - Type of message

  Table 7 - Type of message

  Table 8 - A2 - Type of corporate event (42 characters potentially not sufficient)?

- **Table 1:**
  - **Threshold quantity limiting the request:** The issuer should not only provide the percentage but also indicate the number of shares determining the threshold, especially since the response must contain the number of shares. Otherwise the need for intermediaries to calculate the absolute numbers themselves not only complicates the process and disrupts STP but is also error-prone and leads to diverging results should underlying reference data (i.e. number of shares issued) differ, depending on the reference data sources used. From a processing perspective, it might be easier to have just one specification in a field. In this case, we suggest only providing the number of shares.

- **Initial date of shareholding:** Suggestion: introduce one definition for the '*initial date of shareholding*'. If the issuer is able to define this on a case-by-case basis, this will complicate automation and might create significant delay in responses. This field will complicate reporting significantly, which is why it should not be a standard field. SRD II allows this, since recital (5) stipulates that this information must only be provided where expressly requested by the company.

- **Identifier for the shareholder as a natural person:** It is suggested that the MiFID transaction reporting identifier be used as an identifier for natural persons. This might not be feasible for shareholders in non-EU countries who are being handled by third- country intermediaries.

- **Table 2:**

  - **Field C.9.**: Completion is not compulsory, as the email address is not part of the mandatory information called for under Article 2j of SRD II. The contact details mentioned in this Article include only the '*full address*'. The email address is merely to be indicated '*where available*', i.e. on an optional basis. This takes account of intermediaries' actual data situation. After all, many retail clients have no email address or do not indicate it. The email address does not play any role in the bank-client relationship. For security reasons, communication does not take place by email. As a result, email details are usually not available. Provision of the postal address enables the company to obtain the email address – where available – directly from its shareholders. It is not the job of intermediaries in the bank-client relationship to collect irrelevant client details for forwarding to the company.

****