



FSUG feedback on the Draft Implementing Regulation on minimum requirements in the transmission of information for the exercise of shareholders rights

The Financial Services User Group (FSUG) advises the European Commission in the preparation of legislation or policy initiatives which affect the users of financial services, provides insight, opinion and advice concerning the practical implementation of such policies, and proactively seeks to identify key financial services issues which affect users of financial services.

The FSUG welcomes the opportunity to comment on the draft Implementing Regulation (IR) laying down minimum requirements implementing the Shareholders Rights Directive II as regards shareholders identification, the transmission of information between issuers and shareholders and the facilitation of the exercise of shareholders' rights.

The Regulation takes important steps towards facilitating cross-border voting and ensures a harmonised application of its requirements which reduces the risk of fragmentation across Member States.

Now, the information flow between issuers and investors should be accelerated since the IR requires intermediaries to process information on a same-day basis¹. The Regulation will also help to open the currently closed intermediary market, enhancing the competition and reducing costs for investors.

Last but not least, the FSUG welcomes that the IR does not tie the release of an issuer's vote confirmation to requests for votes being cast electronically. In our view, SRD II and the IR do not foresee such a restriction for good reasons: A restriction to votes cast electronically would mainly benefit institutional investors that may use service providers/proxy agents that cast their votes electronically. Private investors on the other hand for cost reasons cannot make use of such service providers and have to choose other means to exercise their vote, for example, by postal mail.

¹ See article 9 of the Implementing Regulation

Even though it was not within the remit of the IR to tackle the shortcomings of SRD II itself, it seeks to address some of the issues at hand. Still, the FSUG would like to underline the following points:

A lack of harmonised definitions

Even though the IR represents important steps to facilitate cross-border voting and ensures a harmonized application of its requirements to reduce the risks of fragmentation across Member States, it cannot remedy the lack of harmonised definitions in SRD II itself, such as e.g. the definition of “intermediary” or “shareholder”. This lack of harmonisation will remain to act as an impediment to reaching a level playing field across Member States.

A definition of “intermediaries” with loopholes

The IR in its article 1(4) refers to article 2(d) of the Shareholders Rights Directive II² : *“intermediary means a person, **such as** an investment firm (...), a credit institution (...) and a central securities depository (...) which provides services of safekeeping of shares, administration of shares or maintenance of securities accounts on behalf of shareholders or other persons”*.

Although “intermediaries” are now defined in the SRD II (article 2(d), (EU) 2017/828), the definition does not include service providers who nowadays are significantly involved in the (cross-border) voting process and are an integral part of the information flow between the issuer and the investor.

This omission could lead to an interruption of the information flow since those service providers are not directly bound by the IR but can only be obliged to follow its obligations, including deadlines, by contractual agreements.

Given the dominance of certain service providers, FSUG sees a clear need that Member States make use of the possibility provided by article 2 (d) of the SRD II (“such as” clause) and include such service providers in their respective definitions as intermediaries when transposing the Directive into their national legislative framework.

The definition of “shareholder” left to Member States’ discretion

The Directive does not define the term “shareholder” but leaves the definition to Member States.

The absence of a clear definition of the term “shareholder” at EU level could be problematic for instance for shareholders in Member States who are still operating a nominee concept (a registered owner who holds the shares on behalf of the actual owner, the end-investor, under a custodial agreement).

² DIRECTIVE (EU) 2017/828 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement

The FSUG calls on the Commission to be clearer in the IR with regard to the rights end investors have, especially how the IR ensure that the information flow does not end at nominee level but that the end investors receive the information from the issuers through the chain of intermediaries. To that end, the FSUG recommends that a provision is included in Article 5 no.1 of the IR that ensures that the confirmation of entitlement provided by the last intermediary is accepted by issuers, regardless whether the last intermediary is part or not of any centralised securities system.

A record date that should be harmonised across the Member States

As defined in article 1(7) of the Implementing Regulation, a record date is *“the date set by the issuer, on which the rights flowing from the shares, including the right to participate and vote in a general meeting, as well as the shareholder identity, shall be determined, based on the settled positions struck in the books of the issuer CSD or other first intermediary by book-entry at the close of its business”*.

Although article 1(7) of SRD II does prescribe the conditions surrounding the setup of the record date, it does not set a uniform record date before the general meeting. Currently, the record date varies significantly between Member States. Where the record date is close to the general meeting, shareholders (especially private shareholders in a cross-border environment) may not be able to exercise their voting rights due to the long chain of intermediaries.

Therefore, the FSUG believes that the Commission should introduce a uniform record date throughout Europe which should be set at least five calendar days before the general meeting. The Commission should also harmonise the deadline set by the issuers to attend the general meeting (the deadline to which shareholders must answer to confirm or not their attendance to the general meeting).

Higher fees for cross-border voting rights

The IR aims at preventing diverging implementation of the Directive as it would increase the risks and costs of cross-border operations. However, intermediaries will still be able to charge higher fees to shareholders exercising their cross-border voting rights.

About FSUG

The Financial Services User Group (FSUG) is an expert group set up by the European Commission in order to involve users of financial services in policy-making.

FSUG's tasks include

- to advise the Commission in the preparation and implementation of legislation or policy initiatives affecting the users of financial services
- to proactively identify key issues affecting users of financial services
- to advise and liaise with financial services user representatives and representative bodies at the EU and national level.