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# Briefing

## SRD II – Implementation of new rights and obligations for Issuers, Shareholders and Intermediaries under Irish Law

April 2020

The Shareholder Rights Directive 2017/828 (“**SRD II**”), which amends the Shareholder Rights Directive 2007/36 (“**SRD I**”), has been transposed into Irish law by the EU (Shareholders’ Rights) Regulations 2020 (the “**SRD II Regulations**”)<sup>1</sup>.

This briefing sets out a summary of the new rights for listed public limited companies (“**PLCs**”) and shareholders under the SRD II Regulations and the requirements for facilitating interaction between PLCs, shareholders and intermediaries. For a summary of other key areas introduced by the SRD II Regulations, please see [here](#).

The SRD II Regulations apply from 30 March 2020 with a number of transitional provisions.

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### 1. Scope of the SRD II Regulations

As noted in our separate briefings on this topic, the changes introduced by the SRD II Regulations apply to PLCs incorporated and registered in Ireland whose shares are admitted to trading on a regulated market in an EU member state (“**Member State**”),<sup>2</sup> (a “**traded PLC**”) and so cover any Irish PLC whose shares are admitted to trading on Euronext Dublin and/or, for example, the main market of the London Stock Exchange.

<sup>1</sup> The SRD II Regulations amend and supplement the Companies Act 2014 (as amended) (the “**Act**”) by the inclusion of Chapters 8A, 8B, 8C and 8D in Part 17 of the Act and a new Schedule 21.

<sup>2</sup> The SRD II Regulations do not apply therefore to: (i) PLCs listed on Euronext Growth as it is not a regulated market within the meaning of SRD II; (ii) PLCs incorporated and registered elsewhere in the European Union (even if listed on Euronext Dublin) who fall within the remit of the Member State of its incorporation; or (iii) PLCs incorporated and registered outside the European Union. Corporate UCITS and AIFs are expressly excluded from the definition of a “traded PLC” in respect of the requirements for facilitating interaction between companies and shareholders.

## 2. What's new for Issuers, Shareholders and Intermediaries?

### *Right for traded PLCs to Identify Shareholders and the Role of Intermediaries*

SRD II requires Member States to ensure that traded PLCs have the right to identify their shareholders. This right is already embedded in Part 17 of the Act which allows a PLC to investigate the identity of any party that holds an interest in its issued share capital. This right is also typically provided for in the constitution of a traded PLC. The SRD II Regulations bolster this right by allowing traded PLCs to request information from intermediaries so that they can identify their shareholders.

On the request of a traded PLC or its nominee (the 'requester'), a relevant intermediary must provide information on the identity of that PLC's shareholders or the details of the next intermediary, if any, in the chain of intermediaries who holds the shareholder identity information. This obligation is not subject to any *de minimus* shareholding. An intermediary that receives a request and is in possession or control of the relevant information must, as soon as is practicable, provide the requester with the information or confirm that it does not possess or control such information. Where the intermediary is in a chain, the intermediary must transmit the request to each other intermediary in the chain and provide their details to the requester.

### *Transmission of Information*

Where a shareholder in a traded PLC requires information in order to exercise the rights attaching to their shares, the traded PLC must, as soon as practicable after becoming aware of that requirement (and save where the traded PLC transmits the information directly to the shareholder), provide an intermediary that provides services in relation to that shareholder's shares with either the required information or, where the information is available on the traded PLC's website, a notice indicating where on the website the required information can be found. The intermediary must then transmit the information to the shareholder. Where the intermediary is part of a chain of intermediaries, the intermediary must transmit the information to each other relevant intermediary with the purpose of providing the information to the shareholder as soon as practicable.

### *Facilitation of the Exercise of Shareholder Rights*

Intermediaries must facilitate the exercise of a shareholder's rights including the right to participate and vote at general meeting. This must comprise one of the following:

- the intermediary making arrangements for rights to be exercised by the shareholder (or its nominee); or
- the intermediary exercising the rights attaching to the shares on the shareholder's explicit authorisation and instruction and for the shareholder's benefit.

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Key to the new rights of traded plcs and shareholders under the SRD II Regulations, is the role of intermediaries including those within a chain of intermediaries

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For the purpose of facilitating the exercise of shareholder rights in this way, the SRD II Regulations set out requirements for the transmission of information as between the issuer, intermediaries and shareholders and the sequence within which this transmission must occur. The information to be transmitted includes: (i) the entitled position of shareholders; (ii) notices of participation; (iii) voting receipts; and (iv) recording and counting of votes.

Of particular note for traded PLCs, is that when votes are cast, the traded PLC (or, subject to certain exceptions, the relevant intermediary) must send:

- (i) as soon as practicable, an electronic confirmation of receipt to each person who has cast an electronic vote; and
- (ii) on request by a shareholder, confirmation that the shareholder's vote has been validly recorded and counted at a general meeting.

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### 3. Costs of Intermediaries

The SRD II Regulations require all intermediaries to publicly disclose any fees they charge for services that they have been required to introduce under the SRD II Regulations and the fees charged should be on a non-discriminatory basis and proportionate to the cost of delivering those services. Intermediaries must also be in a position to justify any differences between fees levied in the domestic and cross-border exercise of rights.

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### 4. General Considerations

#### *Who is an 'intermediary' for the purpose of these new rules?*

The SRD II Regulations apply to intermediaries insofar as they provide services to shareholders or other intermediaries in respect of shares of any PLC with its registered office in Ireland and admitted to trading on an EU regulated market (i.e. a traded PLC). This includes third-country intermediaries with neither a registered office nor head office in Ireland or elsewhere in the European Union.

An intermediary is defined under the SRD II Regulations as a person providing services of safekeeping of shares, administration of shares or maintenance of securities accounts on behalf of shareholders or others, such as investment firms, credit institutions and central securities depositories.

#### *What about data protection obligations?*

The SRD II Regulations provide that the personal data of shareholders can be processed by the requester, traded PLC or intermediary insofar as it is necessary to either identify or communicate directly with shareholders or to facilitate the exercise of shareholder rights and shareholder engagement with the traded PLC. Subject to compliance with the Irish Data Protection Acts 1988 to 2018 and General Data Protection Regulation, the traded PLC or intermediary can process this data for the purposes prescribed in the SRD II Regulations.

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Increased cost of compliance with the new rules

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An intermediary disclosing information regarding shareholder identity in accordance with these provisions will not be considered to be in breach of any disclosure restriction imposed by contract or legislative, regulatory or administrative provision.

### *Is there a prescribed format for requesting and sending information?*

To harmonise practices across Member States, the European Commission published an implementing regulation (EU 2018/1212) on 4 September 2018 (the “Implementing Regulation”) which has direct effect in Ireland and sets out the minimum requirements and standardised formats to be used when a traded PLC requests shareholder identification information and where information is sent between a traded PLC and its shareholders through intermediaries. The Implementing Regulation includes specific formats and minimum information requirements for:

- requests for a shareholder’s identity and the response to such requests;
- notices of general meetings and notifications of other corporate events;
- confirmation of entitlements to exercise shareholder rights at a meeting;
- notices of participation at a general meeting;
- confirmation of receipt of votes; and
- confirmation of recording and counting of votes.

Information must be transmitted using electronic machine-readable and standardised formats which are interoperable between operators and which allow straight-through processing. Technical and organisational measures aimed at ensuring security, integrity and authentication of information being transmitted are also required.

### *Are there deadlines for transmission of information?*

While the SRD II Regulations require information to be passed on “as soon as practicable”, the Implementing Regulation provides more clarity as to the timelines to be complied with in respect of shareholder identification requests and the transmission of information on corporate events and shareholder actions. These timelines typically require action “without delay”, with requests to be sent on by intermediaries no later than the same business day of receipt, save where the request was received after 4.00 pm on a business day, in which case the request must be sent onward by 10.00 am on the next business day.

The Implementing Regulation also provides that a traded PLC initiating a corporate event must provide information about the corporate event to intermediaries no later than on the same business day that it announces the event under applicable law, save where the traded PLC has sent the information or the notice directly to shareholders (or nominees).

### *When do the new rules come into effect?*

The new provisions relating to interaction between traded PLCs, shareholders and intermediaries under the SRD II Regulations and the Implementing Regulation come into effect on 3 September 2020.

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## 5. Practical Considerations

- Traded PLCs (including their company secretaries and investor relations teams) and various intermediaries will need to familiarise themselves with the new standardised formats for sending information to relevant parties and ensure internal systems and procedures are in place to satisfy the new rules.
- There is a heavy burden of compliance among intermediaries in particular, especially where a chain of intermediaries consists of custodians or other operators in multiple layers and/or when omnibus client accounts are used. Meeting mandatory timelines may prove challenging, particularly for intermediaries at the end of the chain.
- An increase in the number of shareholder disclosure requests from traded PLCs are anticipated, given it will now be easier to make such requests. Intermediaries in scope will need to prepare for the administrative and cost implications of dealing with this.
- Industry participants will need to engage with one another to establish secure technology systems capable of speaking to one another using electronic machine-readable formats, among other things. With no guidance under the Implementing Regulations as to what this means, it is not clear yet whether new IT systems or IT system upgrades will be required to support this.

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**Fines of up to €5,000 apply and/or a term of imprisonment of up to six months for failure to comply with any of the provisions.**

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## 6. Enforcement and Penalties

Where a person fails to comply with any of the provisions under SRD II Regulations set out above, that person and, where that person is a company, the company and any officer who is in default will be guilty of a category 3 offence, punishable on summary conviction by a fine of up to €5,000 and/or a term of imprisonment of up to six months.

## Contacts

McCann FitzGerald has been closely monitoring the development of SRD II, as well as being experienced in advising our clients on the existing shareholder rights and regime. For more information or general advice as to what the new SRD II Regulations mean for your business, please contact:



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