

# Shareholder Rights Directive II: The Belgian Perspective

April 22, 2020

On April 16, 2020, Belgium adopted the law transposing the Shareholder Rights Directive II<sup>1</sup> (“SRD II Law”), almost one year after the ultimate transposition deadline of the directive.

SRD II adds to the framework initially established by the Shareholder Rights Directive I<sup>2</sup> and provides in essence for: (i) enhanced involvement of shareholders in companies’ remuneration policy; (ii) rules regarding transactions with related parties; (iii) an institutionalized way through which companies can identify their shareholders; and (iv) transparency obligations applicable to institutional investors, asset managers and proxy advisors.

- The **remuneration policy** will be separate from the “remuneration report”, and become subject to a **binding vote** by the shareholders’ meeting.
- The **remuneration report** will be subject to enhanced **content** and **disclosure requirements**, while remaining subject to a **non-binding vote** by the shareholders’ meeting. Among other things, the scope of **individual disclosure** is extended, and will cover directors, members of the supervisory board and management board and daily managers.
- The rules on related party transactions will have an **extended scope of application** and cover transactions with a “related party” within the meaning of IAS 24. Companies will also have to **publicly disclose** these transactions, at the latest when the decision is taken or the transaction is concluded.
- Listed companies will have the **right to ask intermediaries for identification of their shareholders**. In addition, **intermediaries** will be required to **facilitate the exercise of shareholder rights**, for instance by transmitting information between the company and its shareholders.
- **Institutional investors, asset managers and proxy advisors** are subject to **additional transparency obligations**.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

**Laurent Legein**

+32 2 2872122

[legein@cgsh.com](mailto:legein@cgsh.com)

**Laurent Ruzette**

+32 2 2872149

[lruzette@cgsh.com](mailto:lruzette@cgsh.com)

**Géraldine Bourguignon**

+32 2 2872143

[gbourguignon@cgsh.com](mailto:gbourguignon@cgsh.com)

**Marijke Spooren**

+32 2 2872075

[mspooren@cgsh.com](mailto:mspooren@cgsh.com)

**Frederic Peeters**

+32 2 2872246

[fpeeters@cgsh.com](mailto:fpeeters@cgsh.com)

**Ruben Foriers**

+32 2 2872082

[rforiers@cgsh.com](mailto:rforiers@cgsh.com)

**Alexia Duquesne**

+32 2 2872072

[aduquesne@cgsh.com](mailto:aduquesne@cgsh.com)

**Kasper Theunissen**

+32 2 2872108

[ktheunissen@cgsh.com](mailto:ktheunissen@cgsh.com)

<sup>1</sup> Directive (EU) 2017/828 of the European Parliament and the Council of May 17, 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement (“SRD II”).

<sup>2</sup> Directive 2007/36/EC of the European Parliament and of the Council of July 11, 2007 on the exercise of certain rights of shareholders in listed companies.



The SRD II Law brings a variety of changes to the Code of Companies and Association (“CCA”), the law of May 2, 2007 on the disclosure of major holdings in issuers whose shares are admitted to trading on a regulated market (“Transparency Law”), and sector-specific financial laws. In general, the legislator opted for a faithful transposition of SRD II and, in the areas where SRD II granted discretion to the Member States, chose continuity based on policy choices that had already been made in the past.<sup>3</sup>

This alert memorandum addresses the main changes for Belgian listed companies introduced by the transposition of SRD II, plotted against the background of the pre-existing legal framework.

## I. REMUNERATION POLICY AND REPORT

Directors’ remuneration has long been an area of focus in corporate governance and shareholder engagement debates since it is considered to be one of the key instruments for companies to align their interests and those of their directors and executives.

While a legal framework governing remuneration reports has existed in Belgium since the corporate governance law of April 6, 2010, the SRD II Law strengthens the framework by introducing a binding vote on the remuneration policy and requiring more granular disclosure in the remuneration report. It does not introduce any changes to the substantive rules on remuneration.

### A. Remuneration policy

Under the new regime, listed companies must establish a remuneration policy, and submit it to a vote by the shareholders’ meeting. Under the current CCA rules, the remuneration policy already is subject to a shareholders’ vote, but only indirectly as part of the annual vote on the remuneration report, and on a non-binding basis.

- **Scope.** The remuneration policy should cover directors, members of the supervisory board and

management board, other executives (*i.e.*, “members of a committee where the general management of the company is discussed”) and daily managers. Although the shareholders’ meeting does not have the power to determine the remuneration of the members of the management board, executives and daily managers, via its vote on the remuneration policy, it will indirectly be able to weigh in.

- **Components.** As a general matter, the remuneration policy should contribute to the company’s strategy, long-term interests and sustainability. An overview of the remuneration policy’s components is set out in the summary table on the next page, highlighting those that are new.
- **Nature and frequency of the vote.** The remuneration policy will be submitted to a separate vote by the shareholders’ meeting (simple majority; no quorum) each time there is a material change<sup>4</sup>, and at least every four years.

The legislator opted to make the vote by the shareholders’ meeting “binding” (under SRD II, the vote also could have been advisory), meaning that companies may only pay remuneration to the relevant persons in accordance with a remuneration policy that has been approved by the shareholders’ meeting. If the policy is not approved, and there is no previously approved remuneration policy (which will be the case as long as the shareholders’ meeting has not yet approved the remuneration policy pursuant to the SRD II Law), companies may continue to apply their past remuneration practice. If the policy is not approved, but there is an approved remuneration policy in place, such remuneration policy will continue to apply. If the remuneration policy is rejected by the shareholders’ meeting, companies must submit a revised remuneration policy to the next shareholders’ meeting.







<sup>3</sup> The SRD II Law also makes certain technical amendments to the CCA, which are not covered by this alert memorandum.

<sup>4</sup> As “material change” is not defined in the SRD II Law, the company should assess what constitutes a material change based on the comprehensive remuneration framework of the company.

*Focus – Components of the remuneration policy**Current CCA*

1. The **remuneration principles**, together with an indication of the **relationship between remuneration and performance**.
2. The **relative proportion** of the remuneration components.
3. The characteristics of performance related **benefits in shares, options or other rights to acquire shares**.
4. Information on the remuneration policy for the **next two financial years**.
5. Any **significant change** in the remuneration policy with respect to the financial year covered.

*SRD II Law*

1. The **different components of fixed and variable remuneration**, including all bonuses and other benefits in whatever form, and their **relative proportion**.
- New**  2. An explanation of how the **pay and employment conditions** of employees were **taken into account** in establishing the remuneration policy.
- New**  3. Where a company awards variable remuneration, the **criteria for the award of the variable remuneration**, in particular: (i) the financial and non-financial performance criteria, including, where appropriate, criteria relating to corporate social responsibility; (ii) an explanation of how they contribute to the company's strategy, long-term interests and sustainability, (iii) any deferral periods and the possibility for the company to reclaim variable remuneration
- New**  4. Where the company awards share-based remuneration, **vesting periods** and where applicable **retention of shares** after vesting and explain how the share-based remuneration contributes to the company's strategy, long-term interests and sustainability.
- New**  5. The duration of the **contracts or arrangements of directors, other executives and daily managers** and the applicable **notice periods**, the main characteristics of **supplementary pension or early retirement schemes** and the **terms of termination and payments linked to termination**.
- New**  6. The **decision-making process** followed for the determination, review and implementation of the remuneration policy, including, measures to avoid or manage conflicts of interests and, where applicable, the role of the remuneration committee or other committees.
- New**  7. Any **significant changes** and **how it takes into account the votes and views of shareholders** on the policy and reports since the most recent vote on the remuneration policy.

- **Derogations.** Temporary derogations from the applicable remuneration policy are allowed (i) in exceptional circumstances, *i.e.*, circumstances where a derogation is necessary to serve the long-term interests and sustainability of the company or to assure its viability (*e.g.*, the appointment of a crisis manager in case of financial difficulties) and (ii) provided that these are granted pursuant to the procedure described in the remuneration policy and only apply to elements of the remuneration policy for which derogations are allowed.
- **Publication.** The remuneration policy and the result of the vote of the shareholders' meeting must be published on the website of the company, and remain publicly available, at least for the period during which the policy applies.
- **Entry into force.** The remuneration policy must be submitted for the first time to the shareholders' meeting approving the annual accounts of the first financial year starting as of June 30, 2019. Most Belgian companies have a December 31<sup>st</sup> financial year end, such that for these companies, this will be the shareholders' meeting in the spring of 2021.

## B. Remuneration report

Listed companies must draw up a clear and understandable remuneration report, complying with the remuneration policy approved *ex ante* by the shareholders' meeting (*see* section A. above). Importantly, under the new regime, the remuneration report must comply with enhanced disclosure and content requirements.

- **Scope.** The remuneration report should cover information on remuneration paid during the past financial year to directors, members of the supervisory board and management board, daily managers and other executives, *i.e.*, the same individuals as those covered by the remuneration policy (and the remuneration report under the current rules).

<sup>5</sup> Share-based components and severance fee should be disclosed on an individual basis.

### Focus – Scope of the remuneration report

Current CCA	SRD II Law
<u>Global basis:</u> <sup>5</sup> <ul style="list-style-type: none"> <li>• Executive directors (other than CEO)</li> <li>• Members of the management board</li> <li>• Daily managers</li> <li>• Other executives</li> </ul>	<u>Global basis:</u> <sup>6</sup> <ul style="list-style-type: none"> <li>• Other executives (including CEO if not daily manager)</li> </ul>
<u>Individual basis:</u> <ul style="list-style-type: none"> <li>• Non-executive directors</li> <li>• Members of the supervisory board</li> <li>• CEO</li> </ul>	<u>Individual basis:</u> <ul style="list-style-type: none"> <li>• Directors</li> <li>• Members of the supervisory board</li> <li>• Members of the management board</li> <li>• Daily managers</li> </ul>



- **Content.** The content of the remuneration report has been expanded (*see* the next page for an overview). Importantly, although this was not contemplated by SRD II, the remuneration report should disclose the ratio between the highest remunerated executive and the least remunerated employee within the company. This is one of the only instances where the SRD II Law goes further than what is required by SRD II.

### Focus – EC Guidelines on the presentation of the remuneration report

The European Commission has published guidelines on the presentation of the remuneration report (EC Communication, “Guidelines on the standardized presentation of the remuneration report under Directive 2007/36/EC”, March 1, 2019), providing guidance on the reporting of remuneration, including standardized detailed tables. Although these guidelines are non-binding, it is expected that they will set the standard of what is considered appropriate disclosure.

<sup>6</sup> Share-based components and severance fee should be disclosed on an individual basis.

*Focus - Remuneration report under the SRD II Law*

- **Total remuneration split out by component:**
  - base remuneration;
  - variable remuneration;
  - pension;
  - other components of remuneration (such as insurance and other benefits in kind).
- **Relative proportion** of fixed and variable remuneration.
- Explanation on **how the total remuneration complies with the remuneration policy**, including how it contributes to the long-term performance of the company.
- Information on **how the performance criteria were applied**.
- Number of **shares, stock options or any other rights to acquire shares**, and their **key characteristics and exercise conditions** (including price and exercise date and any modification of these conditions).
- Justification and decision on whether the person concerned may receive **severance pay**, and the basis for the calculation.
- Information on the **use of claw back for variable remuneration**.
- Information on **any deviations from the remuneration policy**.
- New**  — **Annual change of remuneration, of the performance of the company and of the average remuneration on a full-time equivalent basis of employees** (excluding directors) over the five last years, presented in such way that it allows a comparison with the remuneration of directors and managers.
- New**  — **Ratio between the highest remunerated executive and the least remunerated employee within the company**.

— **Individual vs. aggregated disclosure.** During the legislative process, various debates took place on whether the remuneration of executives should be disclosed on an aggregated or individual basis. Under the current regime, only the remuneration components of non-executive directors, members of the supervisory board and the CEO must be disclosed on an individual basis whereas the remuneration components (other than the share-based components and the severance fee) of members of the management board, executives and daily managers may be disclosed on an aggregated basis, which had to be adjusted in light of SRD II. The SRD II Law maintains an important difference

in treatment by submitting directors, members of the supervisory board and management board, and daily managers to disclosure on an individual basis while permitting aggregated disclosure for other executives.<sup>7</sup> In practice, this means that companies who opted for a one-tier governance system yet have established an *ad hoc* management committee do **not** need to disclose remuneration information of the members of such committee on an individual basis (provided such members are not otherwise daily managers<sup>8</sup>) while companies who opted for a two-tier governance will need to do so for their members of the management board (“*conseil de direction*” / “*directieraad*”).

<sup>7</sup> Certain political parties introduced an amendment to abolish this difference in treatment for executives, on the basis that this corresponds to a more faithful transposition of SRD II. Ultimately, such amendment was unsuccessful.

<sup>8</sup> The CEO who is not daily manager (rare in practice) would fall under the aggregate disclosure regime (whereas, under the current CCA, the remuneration of the CEO must in any event be disclosed on an individual basis).

- **Advisory vote.** The shareholders’ meeting’s vote on the remuneration report remains advisory and non-binding (simple majority; no quorum). Listed companies should however explain in the next remuneration report how the vote was taken into account.
- **Entry into force.** Companies will have to prepare the “new style” remuneration report for the first time in relation to the first financial year starting as of June 30, 2019 (*i.e.*, most companies will have to prepare the report in relation to the financial year that started on January 1, 2020, and submit it to the shareholders’ meeting in the spring of 2021).

## II. RELATED PARTY TRANSACTIONS

Transactions with related parties require scrutiny, because they may give the related party the opportunity to appropriate value belonging to the company and all its shareholders. Belgian company law – through article 524 of the former company code, now article 7:97/7:116 of the CCA – has long required listed companies to follow a specific procedure with respect to related party transactions. The SRD II Law introduces fairly limited changes to the procedure, but broadens its scope of application and introduces a new obligation to publicly announce all related party transactions.

- **Scope.** Under the current CCA rules, the specific procedure must be followed for transactions between (i) a Belgian listed company or its Belgian subsidiaries on the one hand and (ii) an affiliated party of such listed company or such subsidiary that is not a subsidiary of the listed company on the other hand. The scope is now broadened to include transactions which involve a foreign subsidiary (rather than just Belgian subsidiaries) and transactions which involve a “related party” (rather than just an “affiliated party”).

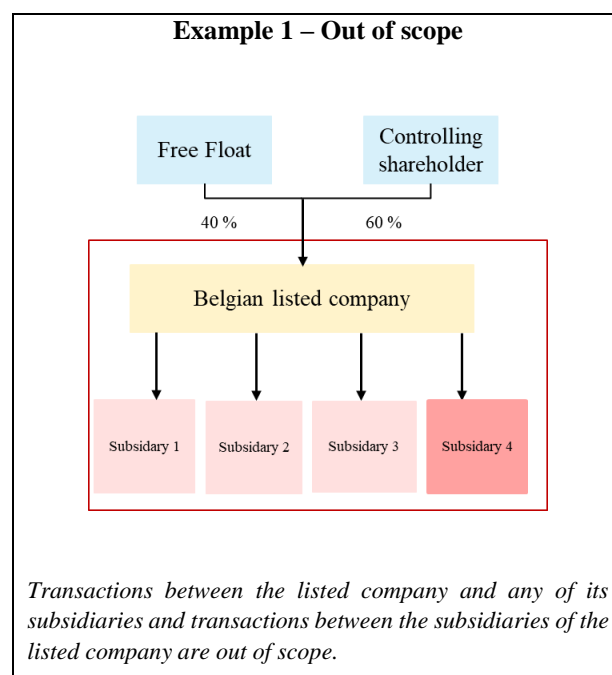
### **Focus – Related party vs. Affiliated party**

The concept of “related party” is broader than that of “affiliated party”, and is defined by reference to the IAS 24 rules.

An affiliated party is anyone who (i) controls the listed company, (ii) is controlled by the listed company or (iii) forms a consortium with the listed company.

A related party covers affiliated parties but also anyone who (i) exercises “significant influence” over the company<sup>9</sup>, (ii) qualifies as key management personnel, (iii) is a close family member of a related party.

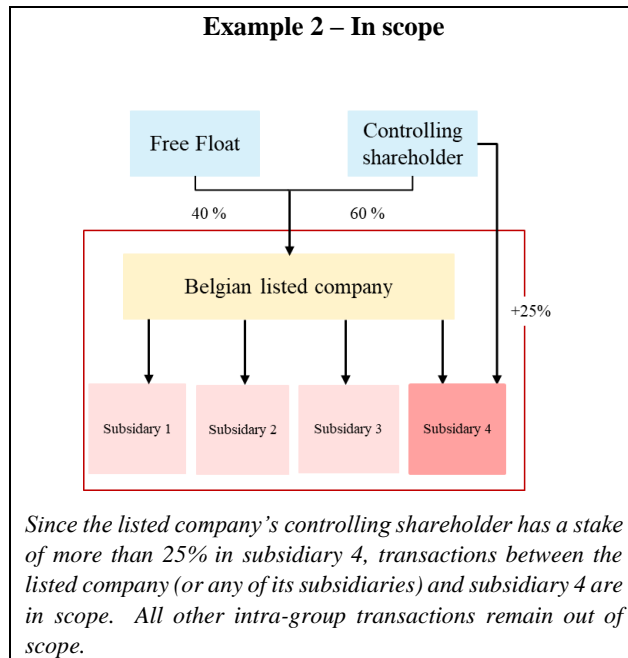
In addition, and in line with the current CCA rules, the SRD II Law confirms that the procedure must be followed if the counterparty of the listed company or its subsidiaries is another subsidiary of the listed company in which the controlling shareholder of the listed company has 25% or more of the share capital (*see below*).



<sup>9</sup> Under the IAS 28 rules, significant influence is understood as the power to participate in the financial and operating policy decisions of an entity (but is not in control over those policies). Significant influence may be gained by share ownership, law or agreement. An

entity holding 20% or more of the voting power (directly or through subsidiaries) in another entity is presumed to have significant influence over the latter.





— **Exceptions.** The SRD II Law nuances the existing exceptions. As is the case under the current CCA rules, the procedure will not apply to:

- transactions entered into in the ordinary course of business and concluded on normal market terms. The SRD II Law adds that the board of directors or the supervisory board, as the case may be, must adopt an internal policy to assess periodically whether these conditions have been complied with; and
- transactions that represent less than 1% of the company's net assets (calculated on a consolidated basis). The SRD II Law specifies that the transactions with the same related party will be aggregated on a rolling 12 months' basis for the calculation of this threshold.

In addition, the SRD II Law introduces new exceptions for:

- transactions regarding remuneration of directors, executives or daily managers, or certain elements of their remuneration<sup>10</sup>;

<sup>10</sup> Remuneration decisions can of course still be subject to the directors' conflicts of interest rules (article 7:96/7:115 CCA).

- share buybacks, disposals of treasury shares, distributions of interim dividends and capital increases out of the authorized capital without limitation or cancellation of preferential subscription rights; and
- exemptions granted by the prudential supervisor for decisions taken by credit institutions in execution of the stability measures taken by the supervisor in accordance with the law of April 25, 2014 on the status and supervision of credit institutions.

— **Procedural requirements.** The procedure for entering into related party transactions remains largely unchanged. If it applies, an *ad hoc* committee of three independent directors, possibly assisted by an independent expert,<sup>11</sup> must prepare an opinion on the merits of the transaction before the board of directors or the supervisory board, as the case may be, can resolve on the matter.

The statutory auditor is involved as well, and assesses the accuracy of financial information included in the *ad hoc* committee's opinion.

The board is not required to follow the advice from the committee but any deviations from the advice need to be recorded in the minutes.

— **Abstention by directors.** The SRD II Law further clarifies that if a director is "involved" in the transaction, he or she must abstain from participating in the deliberation and voting on such transaction. If all directors are involved in the transaction, the matter must be referred to the shareholders' meeting.

The preparatory works suggest that this abstention requirement goes beyond the general conflicts of interest rules and also applies to mere functional conflicts of interest, *i.e.*, it applies if the director has a function or a mandate with the counterparty, regardless of whether the director has a financial

<sup>11</sup> The SRD II Law specifies that the committee of independent directors is free to decide whether or not to engage an independent expert.

interest that is contrary to the interest of the company.

— **Disclosure requirements.** While SRD II included the possibility for the Member States to differentiate between the scope of application of the procedural requirements and the disclosure requirements, the SRD II Law does not make a distinction between the type of related party transactions that are covered by these.

- **Public announcement.** The SRD II Law introduces an obligation to publicly disclose related party transactions, at the latest when the decision is taken or the transaction is concluded.

The announcement must include the name of the counterparty, information on the nature of the relation with the counterparty, the date and value of the transaction and all other information which is necessary to assess whether the transaction is reasonable and fair from the perspective of the company and its shareholders (who are not a related party) and in particular the company's minority shareholders.

The opinion of the *ad hoc* committee and, as the case may be, the motivation of the board to deviate from the opinion of the committee as well as the advice from the statutory auditor, will no longer need to be included in the annual report, but will need to be disclosed together with the transaction announcement.

#### **Focus – MAR obligations**

In case the related party transaction also qualifies as “inside information” under the Market Abuse Regulation, the listed company can comply with this new disclosure requirement by including the necessary information on the counterparty and the transaction assessment in its MAR press release (which should be labelled and filed in STORI as “inside information”).

- **Annual report.** The annual report must include an overview of all announcements that were made during the past year. The annual report should also continue to note any material constraints or obligations imposed by the listed company's controlling shareholder.

— **Entry into force.** The SRD II Law's provisions on related party transactions will enter into force 10 days following publication in the Belgian Official Gazette. Given the tight timeframe awarded to companies to comply with the new provisions, particular attention should be paid to revising, as soon as possible, internal policies on related party transactions.

### **III. IDENTIFICATION OF SHAREHOLDERS, TRANSMISSION OF INFORMATION AND FACILITATION OF EXERCISE OF SHAREHOLDER RIGHTS**

Shares of listed companies are often held through a complex web of intermediaries which makes it difficult for companies to identify their shareholders. Some shareholder rights advocates have voiced concerns that this constitutes a barrier to effective and direct communication between the company and its shareholders, and renders the exercise of shareholder rights more difficult. The SRD II Law aims to address these concerns by granting listed companies the right to identify their shareholders and by institutionalizing certain information flows between listed companies and their shareholders.

Under this new framework, intermediaries<sup>12</sup> who provide custodial services with respect to shares of listed companies incorporated in Belgium (regardless of the intermediary's country of incorporation) will have an important role to play, as they will be required to communicate to listed companies the identity of its shareholders (*see* section A. below), transmit information between the company and its shareholders

<sup>12</sup> *I.e.*, investment firms, credit institutions and central securities depositories who provide certain services (*i.e.*, safekeeping of

shares, administration of shares or maintenance of securities accounts) on behalf of shareholders or other persons.



(see section B.), and facilitate the exercise of shareholder rights (see section C.).

### A. Identification of shareholders

Listed companies will have the right to “look through” the chain of intermediaries, and identify their shareholders, by directing a request for identification to the relevant intermediary.<sup>13</sup>

#### *Practical Impact*

It remains to be seen what the practical impact of the right to seek shareholder identification will be for Belgian listed companies.

- As listed companies occasionally instruct service providers to produce a detailed overview of their shareholder base, this right to identification may be helpful to ensure cooperation by the intermediaries.
- For listed companies with a dispersed shareholder base, the right to identification may enable them to proactively engage in a dialogue with smaller shareholders to ensure that they will reach the required majorities to adopt certain important resolutions.

- **No threshold.** The initial draft of the SRD II Law provided that companies could only request the identification of shareholders holding more than 0.5% of the voting rights (as permitted by SRD II). However, during the parliamentary debate, it was acknowledged that the introduction of such threshold could give rise to a number of practical issues. For instance, a shareholder may have multiple security accounts at different financial institutions and may hold the same company’s shares in several capacities. To avoid these issues, the threshold was ultimately abandoned, and has not been included in the final version of the SRD II Law.
- **Procedure and information to be provided.** Upon request from the company (or a third party nominated by the company), the intermediary

should communicate the following information to the company without delay: (i) the shareholder’s name and contact details; (ii) the number of shares held; and (iii) if so requested by the company, the classes of shares held and the acquisition date. The company’s request does not need to be motivated.

#### *Focus - Commission Implementing Regulation (EU) 2018/1212 (“CIR 2018/1212”)*

CIR 2018/1212 lays down certain minimum requirements regarding shareholder identification, the transmission of information and the exercise of shareholder rights.

The goal of CIR 2018/1212 is to enable efficient and reliable processing and interoperability between intermediaries. To this end, it contains rules about the use of common formats for transmission, data, language requirements, message structures, the information to be transmitted and deadlines to be complied with.

- **Chain of intermediaries.** When there are multiple intermediaries in the chain of intermediaries, the company’s request for identification should be transmitted between the intermediaries without delay. Any intermediary in the chain who possesses the requested information may provide such information directly to the company. The company may also request the details of the next intermediary in the chain from an intermediary.
- **Interplay with existing major holding rules.** The Transparency Law already contains provisions aimed at improving transparency of shareholdings in listed companies by requiring shareholders to notify the company and the FSMA in certain circumstances (*i.e.*, upon the crossing of the statutory or the company-specific thresholds). These rules, which boil down to a notification obligation of the relevant shareholder, remain fully intact and are supplemented with a right for the company to proactively seek out clarifications on the composition of its shareholder base.

<sup>13</sup> In practice, this will most likely be the first intermediary (*i.e.*, the intermediary who appears in the company’s share register and maintains the company’s share records by book-entry).

## B. Transmission of information

In complex chains of intermediaries, information is not always passed from a listed company to its shareholders, and shareholders' votes are not always correctly transmitted to the company. This transmission of information is now enhanced by the SRD II Law.

- **Transmission of information.** As a principle, intermediaries are required to transmit to the shareholders the information which the company needs to make available in order for the shareholders to exercise their rights. Conversely, intermediaries are also required to transmit to the company the information received by the intermediaries from the shareholders regarding the exercise of their rights.<sup>14</sup>
- **Information to be transmitted.** CIR 2018/1212 describes the information that has to be transmitted in further detail. It includes the date, time and location of the shareholders' meeting, the agenda, the method of participation by the shareholders (e.g., in person, virtual or through proxy) and the deadline to submit votes. In addition, intermediaries are also required to notify the shareholders of corporate events other than general meetings, such as dividend distributions. Information to be transmitted to the company includes the notice of entitlement (i.e., the names of the persons who are entitled to vote and the number of voting securities they hold) and the notice of participation (i.e., the voting position of the shareholder and the number of votes cast).
- **Chain of intermediaries.** When there is a chain of intermediaries, the information needs to be transmitted between intermediaries without delay, unless the information can be directly transmitted by the intermediary to the company or to the shareholder.

<sup>14</sup> Some of the information to be transmitted also has to be published on the company's website pursuant to the CCA. If the information is already available on the company's website, the intermediaries should inform the shareholders where on the website it can be found.

## C. Facilitation of exercise of shareholder rights

In light of their central role, intermediaries should facilitate the exercise of rights by the shareholders, including the right to participate in and vote at shareholders' meetings.

- **Exercise of rights.** The intermediary should take the necessary measures to ensure that the shareholders themselves (or a third party appointed by them) can exercise their rights. Alternatively, the intermediary could also exercise these rights upon explicit authorization and instruction of the shareholders and for the shareholders' benefit.
- **Confirmation of votes.** Following a shareholders' meeting, the shareholders are entitled to obtain confirmation that their votes have been validly recorded and taken into account by the company. Any such request should be made within three months following the relevant shareholders' meeting. If votes are cast electronically, the person casting the vote should receive an electronic confirmation that its vote was effectively received.

## D. Costs

Intermediaries should publicly disclose the costs charged by them for each of the services mentioned above. Costs should be non-discriminatory and proportionate in relation to the actual costs incurred for delivering the services. The Belgian legislator did thus not make use of the SRD II option to prohibit intermediaries from charging fees for these services.

## E. Entry into force

The SRD II Law's provisions related to the identification of shareholders, the transmission of information and the facilitation of shareholder rights will enter into force on September 3, 2020.

Intermediaries are furthermore not required to transmit any information to the shareholders if the company communicates directly with all its shareholders.

## IV. TRANSPARENCY OF INSTITUTIONAL INVESTORS, ASSET MANAGERS AND PROXY ADVISORS

### A. Institutional investors and asset managers

In order to increase investor awareness, to encourage shareholder engagement by institutional investors<sup>15</sup> and asset managers<sup>16</sup>, and to promote long-term management of companies, the SRD II Law imposes certain public disclosure requirements on institutional investors (to the extent they invest in shares of companies listed on an EU regulated market, either directly or through an asset manager) and asset managers (to the extent they invest, for the account of institutional investors, in shares of companies listed on an EU regulated market) governed by Belgian law or governed by the law of another EU member state but which carry out cross-border activities in Belgium.

- **Engagement policy.** Institutional investors and asset managers must develop and publicly disclose a policy on shareholder engagement (or explain why they have chosen not to do so), and annually disclose information about the implementation of their engagement policy, in particular regarding the exercise of their voting rights.
- **Annual (public) disclosure.** In addition, the SRD II Law requires a number of annual public disclosures (e.g., for institutional investors, how the main elements of their investment strategy are consistent with the profile and duration of their liabilities and how those elements contribute to the medium to long-term performance of their assets) as well as certain non-public disclosure and reporting obligations for asset managers to institutional investors (e.g., reporting on the key material medium to long-term risks associated with

the portfolio investments, including corporate governance matters).

The FSMA and the NBB will, each for the institutions belonging to their respective supervisory domain, be responsible for monitoring compliance with these obligations.

### B. Proxy advisors

As proxy advisors may have an important influence on the voting behavior of institutional investors and asset managers, the SRD II Law also imposes additional transparency requirements on proxy advisors that either have their seat, head office or an establishment in Belgium, or carry out their activities in Belgium through an establishment located in the EU.<sup>17</sup> For instance prominent global proxy advisory firms ISS (which has an office in Brussels) and Glass Lewis (which has offices in Germany and Ireland) are likely to be subject to these additional transparency requirements.

On an annual basis, each proxy advisor must publicly disclose:

- the code of conduct which it applies (or explain why it does not apply any such code) and report on its application of such code; and
- certain key information relating to the preparation of its research, advice and voting recommendations (among others, the essential features of the methodologies and models applied, main informational sources used, etc.).

Proxy advisors must further disclose, without delay, to their clients any actual or potential conflicts of interest or business relationships that may influence the preparation of their research, advice or voting recommendations, and the actions they have undertaken to eliminate, mitigate or manage the actual or potential conflicts of interest.

<sup>15</sup> *I.e.*, life insurance undertakings and institutions for occupational retirement provision.

<sup>16</sup> *I.e.*, credit institutions, investment firms, alternative investment fund managers and management companies of collective investment undertakings.

<sup>17</sup> To the extent the proxy advisor provides services to shareholders relating to shares of companies having their seat in a Member State and whose shares are admitted to trading on an EU regulated market.

### **C. Entry into force**

The SRD II Law's provisions related to transparency of institutional investors, asset managers and proxy advisors will enter into force 10 days following publication in the Belgian Official Gazette.

CLEARY GOTTLIB