

Consultation on Investment Services Rules for Investment Services Providers regarding Encouragement of Long-Term Shareholder Engagement

Ref: 07-2019

Date: 08 May 2019

Closing Date: 24 May 2019

NOTE: This document, circulated by the MFSA for the purpose of consultation, is in draft form and consists of proposals. Accordingly, these proposals are not binding and are subject to changes and revisions following representations received from Licence Holder and other involved parties. It is important that persons involved in the consultation bear these considerations in mind.

1. PURPOSE

On the 20th May 2017, Directive (EU) 2017/828 of the European Parliament and of the Council of **the 17 May 2017 (hereinafter referred to as "SRDII")**, which amends Directive 2007/36/EC, as regards the encouragement of long-term shareholder engagement, was published in the Official Journal of the European Union and it came into force on the 10th June 2017. SRDII aims to encourage transparent and active engagement by shareholders of listed companies by revising **the current Shareholders' Rights Directive 2007/36/EC. Member States are required to transpose SRDII by the 10th June 2019.**

The purpose of this Consultation Document is to enable the MFS A to obtain feedback on the proposed changes in the rulebooks arising from the transposition of SRDII. In this regard, any comments and feedback are to be addressed to the Securities and Markets Supervision by email on InvestmentPolicy@mfsa.com.mt. Interested parties are kindly asked to submit any comments in writing by not later than Friday, 24 May 2019.

2. SCOPE

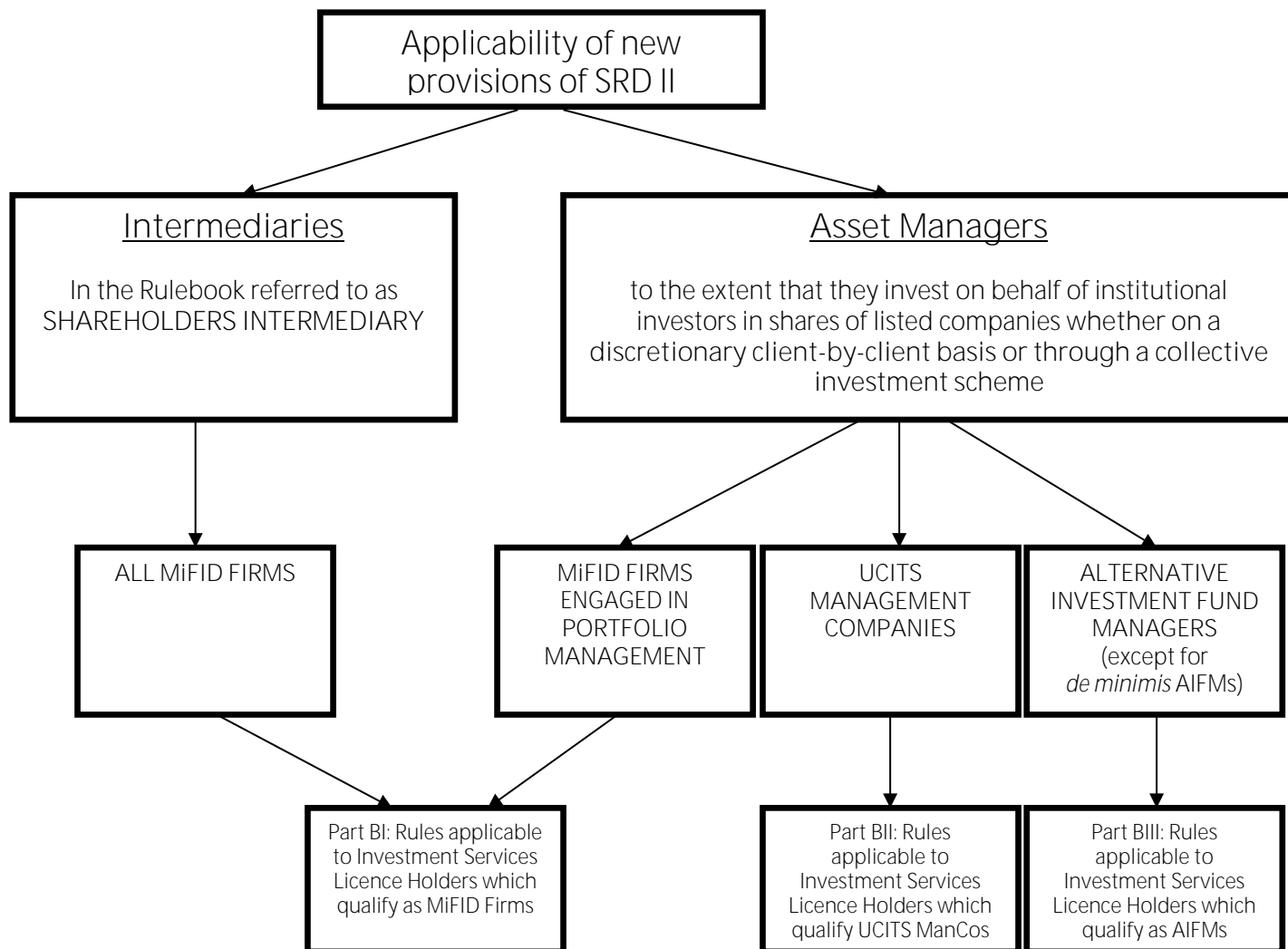
SRDII establishes further requirements in relation to the exercise of certain shareholder rights attached to voting shares in relation to general meetings of companies which have their registered office in a Member State and the shares of which are admitted to trading on a regulated market situated or operating within a Member State. It also establishes specific requirements in order to encourage shareholder engagement, in particular in the long term. These specific requirements apply in relation to identification of shareholders, transmission of information, facilitation of exercise of shareholders rights, transparency of institutional investors, asset managers and proxy advisors, remuneration of directors and related party transactions.

The new provisions in SRDII affect *inter alia* investment services licence holders operating as: (i) intermediaries; and (ii) asset managers, as explained in Sections 4 and 5 below.

The provisions of SRDII, as transposed into the relevant Sections of the Investment Services Rules, shall apply to certain licence holders which provide services in relation to shares of a listed company which are traded on a regulated market situated or operating within an EU/EEA Member State, insofar as such company has its registered office in Malta.

SRDII does not apply in the case of the use of resolution tools, powers and mechanisms provided for in Title IV of [Directive 2014/59/EU](#) of the European Parliament and of the Council.

The applicable provisions have been transposed as follows:



3. DEFINITIONS

The new definitions introduced by SRDII have been added to the Glossary to the Investment Services Rules for Investment Services Providers applicable to AIFMs and UCITS Management Companies and to the MiFID Rulebook.

<p><i>'Institutional Investor'</i></p>	<p>'institutional investor' means:</p> <ul style="list-style-type: none"> (a) an undertaking carrying out activities of life assurance within the meaning of points (a), (b) and (c) of Article 2(3) of Directive 2009/138/EC of the European Parliament and of the Council (4), and of reinsurance as defined in point (7) of Article 13 of that Directive provided that those activities cover life-insurance obligations, and which is not excluded pursuant to that Directive; (b) an institution for occupational retirement provision falling within the scope of Directive (EU) 2016/2341 of the European Parliament and of the Council (5) in accordance with Article 2 thereof.
<p><i>"Proxy Advisor"</i></p>	<p><i>"Proxy Advisor"</i> means a legal person who analyses, on a professional and commercial basis, the corporate disclosure and, where relevant, other information of listed companies with a view to informing investors' voting decisions by providing research, advice or voting recommendations that relate to the exercise of voting rights;</p>
<p><i>"Shareholders Intermediary"</i></p>	<p><i>"Shareholders intermediary"</i> means a Licence holder acting as an intermediary when investing in shares of listed companies on behalf of shareholders being natural or legal person that is recognised as a shareholder under the applicable law;</p>

4. SHAREHOLDERS INTERMEDIARIES

SPDII defines a new function applicable to all MiFID firms engaged in relation to shareholders of listed companies. Chapter Ia of the SRDII provides for the identification of shareholders, transmission of Information and facilitation of exercise of shareholders' rights.

Article 3e on third-country intermediaries, states that Chapter Ia also applies to intermediaries which do not have a registered office or head office established in the Union when providing services referred to in Article 1(5).

5. ASSET MANAGERS

Asset Managers

Asset Managers are subject to provisions of Chapter Ib of SRDII relating to transparency requirements when investing in shares of listed companies on behalf of an institutional investor, whether on a discretionary client-by-client basis or through a collective investment undertaking.

Proxy Advisors

SRDII introduces a new category of service providers, namely proxy advisors, which engage with shareholders in respect of investment decision in relation to shares of a listed company. It is noted that asset managers are requested, under the disclosure requirements, to disclose the use of the services of proxy advisors, as defined in the relevant definition under Section 3 of this Consultation Document.

6. PROPOSED IMPLEMENTATION

Paragraphs A to C below concern the proposed transposition of Articles 3a and 3d of Chapter Ia of SRDII relating to the Shareholders Intermediaries. The relevant transposition will be effected in Part BI of Investment Services Rules for Investment Services Providers.

A Identification of shareholders		
<i>reproduced for reference only</i>	3. Where there is more than one intermediary in a chain of intermediaries, Member States shall ensure that the request of the company, or of a third party nominated by the company, is transmitted between intermediaries without delay and that the information regarding shareholder identity is transmitted directly to the company or to a third party nominated by the company without delay by the intermediary who holds the requested information . [...]	
	<i>Articles 3a(3) of the Directive (EU) 2017/828</i>	<i>Proposed MFSA approach</i>
<i>proposed implementation (A)</i>	Member States may additionally provide that, at the request of the company, or of a third party nominated by the company, the intermediary is to communicate to the company without delay the details of the next intermediary in the chain of intermediaries.	At the request of the listed company, or of a third party nominated by the company, the Licence Holder shall communicate to the company without delay the details of the next intermediary in the chain of intermediaries.

Action required:

- A.1 Do you agree with the proposed MFSA approach to this transposition as set out under paragraph A above?
- A.2 If you do not agree with the proposed approach, could you propose any alternative approach which MFSA could consider provided such approach is in line with SRD II?
- A.3 If you do not agree at all that MFSA should adopt such approach, please give us justifiable reasons for your non-agreement.

B	Identification of shareholders	
	<i>reproduced for reference only</i>	<p>4. [...]</p> <p>Without prejudice to any longer storage period laid down by any sector specific Union legislative act, Member States shall ensure that companies and intermediaries do not store the personal data of shareholders transmitted to them in accordance with this Article [3a] for the purpose specified in this Article for longer than 12 months after they have become aware that the person concerned has ceased to be a shareholder.</p>
	<i>Articles 3a(4) of the Directive (EU) 2017/828</i>	<i>Proposed MFSA approach</i>
<i>proposed implementation (B)</i>	Member States may provide by law for processing of the personal data of shareholders for other purposes.	Not to be implemented

The MFSA is not implementing this provision, opting to rely on Regulation (EU) 2016/679 of the European Parliament and of the Council (“GDPR”) as the latter is all encompassing.

Action required:

- B.1 Do you agree with the proposed MFSA approach to this transposition as set out under paragraph B above?
- B.2 Do you agree that this issue is already covered in the GDPR?

C Non-discrimination, proportionality and transparency of costs		
<i>reproduced for reference only</i>	<p>1. Member States shall require intermediaries to disclose publicly any applicable charges for services provided for under this Chapter separately for each service.</p> <p>2. Member States shall ensure that any charges levied by an intermediary on shareholders, companies and other intermediaries shall be non-discriminatory and proportionate in relation to the actual costs incurred for delivering the services. Any differences between the charges levied between domestic and cross-border exercise of rights shall be permitted only where duly justified and where they reflect the variation in actual costs incurred for delivering the services.</p>	
	<i>Articles 3d(3) of the Directive (EU) 2017/828</i>	<i>Proposed MFSA approach</i>
<i>proposed implementation (C)</i>	3. Member States may prohibit intermediaries from charging fees for the services provided for under this Chapter [Ia].	Not to be implemented

The MFSA will leave fee charging at the discretion of the company depending on the nature of business and expenses involved. Nonetheless, the Directive specifically provides in 3d(2) that any fees levied must be proportionate and non-discriminatory.

Action required:

- C.1 Do you agree with the proposed MFSA approach to this transposition as set out under paragraph C above?
- C.2 Do you see any deleterious effect on shareholders in respect to the proposed MFSA approach?

Paragraphs D to F concern the proposed transposition of Articles 3g and 3i of Chapter Ib of SRDII relating to the Asset Managers. The relevant transposition will be effected in Part BI, BII and BIII of Investment Services Rules for Investment Services Providers.

D	Engagement policy
<p><i>reproduced for reference only</i></p>	<p>1. Member States shall ensure that institutional investors and asset managers either comply with the requirements set out in points (a) and (b) or publicly disclose a clear and reasoned explanation why they have chosen not to comply with one or more of those requirements.</p> <p>(a) Institutional investors and asset managers shall develop and publicly disclose an engagement policy that describes how they integrate shareholder engagement in their investment strategy. The policy shall describe how they monitor investee companies on relevant matters, including strategy, financial and non-financial performance and risk, capital structure, social and environmental impact and corporate governance, conduct dialogues with investee companies, exercise voting rights and other rights attached to shares, cooperate with other shareholders, communicate with relevant stakeholders of the investee companies and manage actual and potential conflicts of interests in relation to their engagement.</p> <p>(b) Institutional investors and asset managers shall, on an annual basis, publicly disclose how their engagement policy has been implemented, including a general description of voting behaviour, an explanation of the most significant votes and the use of the services of proxy advisors. They shall publicly disclose how they have cast votes in the general meetings of companies in which they hold shares. Such disclosure may exclude votes that are insignificant due to the subject matter of the vote or the size of the holding in the company.</p> <p>2. The information referred to in paragraph 1 shall be available free of charge on the institutional investor’s or asset manager’s website.</p>

	<i>Articles 3g(2) of the Directive (EU) 2017/828</i>	<i>Proposed MFSA approach</i>
<i>proposed implementation (D)</i>	Member States may provide for the information to be published, free of charge, by other means that are easily accessible online.	Not to be implemented

The Authority considers **the Licence Holder’s website as sufficient**. Requesting Licence Holders to publish such information via other means that are easily accessible online could put unnecessary financial burden on Licence Holders.

Action required:

- D.1 Do you agree with the proposed MFSA approach to this transposition as set out under paragraph D above?
- D.2 **Do you agree that providing information on the License Holder’s website is sufficient** or do you suggest using also another online channel/ medium of communication?

E	Transparency of asset managers	
<i>reproduced for reference only</i>	<p>1. Member States shall ensure that asset managers disclose, on an annual basis, to the institutional investor with which they have entered into the arrangements referred to in Article 3h how their investment strategy and implementation thereof complies with that arrangement and contributes to the medium to long-term performance of the assets of the institutional investor or of the fund. Such disclosure shall include reporting on the key material medium to long-term risks associated with the investments, on portfolio composition, turnover and turnover costs, on the use of proxy advisors for the purpose of engagement activities and their policy on securities lending and how it is applied to fulfil its engagement activities if applicable, particularly at the time of the general meeting of the investee companies. Such disclosure shall also include information on whether and, if so, how, they make investment decisions based on evaluation of medium to long-term performance of the investee company, including non-financial performance, and on whether and, if so, which conflicts of interests have arisen in connection with engagements activities and how the asset managers have dealt with them.</p>	
	<i>Articles 3i(2) of the Directive (EU) 2017/828</i>	<i>Proposed MFSA approach</i>
<i>proposed implementation (E)</i>	<p>Member States may provide for the information in paragraph 1 to be disclosed together with the annual report referred to in Article 68 of Directive 2009/65/EC or in Article 22 of Directive 2011/61/EU, or periodic communications referred to in Article 25(6) of Directive 2014/65/EU.</p>	<p><i>Part BI – MiFID Firms</i></p> <p>Such disclosure shall be made in the annual report in line with provisions of Rule [1.4.19] of Conduct of Business Rulebook and shall include reporting on: [...]</p> <hr/> <p><i>Part BII – UCITS ManCos</i></p> <p>Such disclosure shall be made in the annual report in line with provisions of SLC [5.16A] in this Part and shall include reporting on: [...]</p>

		<p><i>Part BIII – AIFMs</i></p> <p>Such disclosure shall be made in the annual report in line with provisions of SLC 7.01 in this Part and shall include reporting on: [...]</p>
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Action required:

- E.1 Do you agree with the proposed MFSA approach to this transposition as set out under paragraph E above?
- E.2 If you do not agree with the proposed approach, could you propose any alternative approach which MFSA could consider provided such approach is in line with SRD II?
- E.2 If you do not agree at all that MFSA should adopt such approach, please give us reasons for your non-agreement.

F Transparency of asset managers		
<i>reproduced for reference only</i>	<p>1. Member States shall ensure that asset managers disclose, on an annual basis, to the institutional investor with which they have entered into the arrangements referred to in Article 3h how their investment strategy and implementation thereof complies with that arrangement and contributes to the medium to long-term performance of the assets of the institutional investor or of the fund. Such disclosure shall include reporting on the key material medium to long-term risks associated with the investments, on portfolio composition, turnover and turnover costs, on the use of proxy advisors for the purpose of engagement activities and their policy on securities lending and how it is applied to fulfil its engagement activities if applicable, particularly at the time of the general meeting of the investee companies.</p> <p>Such disclosure shall also include information on whether and, if so, how, they make investment decisions based on evaluation of medium to long-term performance of the investee company, including non-financial performance, and on whether and, if so, which conflicts of interests have arisen in connection with engagements activities and how the asset managers have dealt with them.</p>	
	<i>Articles 3i(3) of the Directive (EU) 2017/828</i>	<i>Proposed MFSA approach</i>
<i>proposed implementation (F)</i>	<p>3. Member States may where the asset manager does not manage the assets on a discretionary client-by-client basis, require that the information disclosed pursuant to paragraph 1 also be provided to other investors of the same fund at least upon request.</p>	<p><i>Part BI – MiFID Firms</i></p> <p>Provided further that where the Licence Holder does not manage the assets on a discretionary client-by-client basis, it shall disclose the information pursuant to Rule [R4-7.9.3.1] also to other investors of the same collective investment scheme at least upon request</p>

<i>proposed implementation (F)</i>		<p><i>Part BII – UCITS ManCos</i></p> <p>Provided further that where the Licence Holder does not manage the assets on a discretionary client-by-client basis, it shall disclose the information pursuant to SLC [6.08] also to other investors of the same Scheme at least upon request</p>
		<p><i>Part BIII – AIFMs</i></p> <p>Provided further that where the Licence Holder does not manage the assets on a discretionary client-by-client basis, it shall disclose the information pursuant to SLC [12.08] also to other investors of the same collective investment scheme at least upon request</p>

Action required:

- F.1 Do you agree with the proposed MFSA approach to this transposition as set out under paragraph F above?
- F.2 If you do not agree with the proposed approach, could you propose any alternative approach which MFSA could consider provided such approach is in line with SRD II?
- F.3 If you do not agree at all that MFSA should adopt such approach, please give us reasons for your non-agreement.

Remarks

Any feedback and comments may be submitted to the Investment Firms team, within Securities and Markets Supervision at MFSA in writing before the deadline stipulated in Section 1 above via: InvestmentPolicy@mfsa.com.mt. Comments submitted after this deadline or submitted via other means may not be processed.

The protection of individuals with regard to the processing of personal data by the MFSA is based on Data Protection Act (CAP. 586).

The MFSA reserves the right to draft the final transposed text in line with its supervisory role and it may partly implement and/or not implement any feedback received at its sole discretion.