dutch fund and asset
MANAGEMENT ASSOCIATION

position paper

Shareholders Rights Directive II

DUFAS[1] is generally speaking satisfied with the proposal to expand the Shareholders Rights Directive.[2] But we believe the relationship between an asset manager and his clients should be governed exclusively by the sector specific directives (UCITS, AIFM, MiFID, IORP). And we have some comments and questions regarding the practical effects and proportionality and added value of some of the proposed measures.

Article 3a - identification of shareholders

We believe that the identity of all shareholders which are identified should be made transparent to all other shareholders by the company in question. Shareholders can much easier exercise their engagement efforts if they know who their colleagues are. This requires an additional provision, which would be extremely appropriate in a proposal for a directive on shareholders rights.

Identifying shareholders may be more burdensome for companies than they believe it is worth, leading to refraining from identification of even the shareholders with substantial holdings. This is especially true when companies are widely held by private individuals, while institutional owners dominate the voting. It would be worthwhile therefore to have only shareholders identified above a certain threshold, for instance 0,5%. This would make it possible to identify the most important shareholders with a view to communication and shareholder engagement, while respecting the privacy of the smaller shareholder.

Intermediaries will demand fees for this service of passing on information which identifies shareholders. These costs should be managed in the interest of both companies and shareholders, because costs may induce shareholders to refrain from exercising their voting rights. Therefore, identification of shareholders should only be done when relevant. A company should only be allowed to use these identification powers in the period between the announcement of a shareholders meeting and the meeting itself.

We do not understand why only natural persons are allowed to rectify or erase any incomplete or inaccurate data (para 3). Why are legal persons not allowed to do that? And who is to verify the accuracy of the changes?

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1 DUFAS, the Dutch Fund and Asset Management Association, is the industry association of asset managers and managers of collective investment schemes in the Netherlands. Our association has, next to independent asset managers, members from the banking sector, the Insurance sector, the real estate sector, the pension funds sector and custodians.

2 2014/0121 (COD), COM(2014) 213 final.

We would also like to know why there are no safeguards of confidentiality of the data gathered by the company regarding the identity of its shareholders, apart from the stipulation that these data need to be destroyed after 24 months.

Collective investment schemes which are traded on a trading venue have to be exempted from the shareholder identification rules of article 3a. The reason for this is that the shareholders in such a fund are also the clients of an investment firm (a bank or portfolio manager). From the perspective of the bank or broker, it would be highly undesirable if it were possible that the fund manager had easy access to the identities of the shareholders, especially since many fund managers are also competitors of banks and portfolio managers, or are portfolio managers themselves. Basically it would enable fund managers to get into contact directly with the clients of banks and portfolio managers, thus bypassing banks and portfolio managers. This kind of 'poaching' should not be made possible. At the same time it would also be undesirable if these schemes were to withdraw from trading on these trading venues and thereby lose the liquidity they want to provide to their customers.

Article 3c - Facilitation of the exercise of shareholder rights

This provision should apply to all elements in the chain between the company and the shareholders. Proxy solicitors, voting facilitators and voting advice bureau's and notaries play an important role in the functioning of the 'voting chain', and are thus intermediaries in our view, but they do not maintain securities accounts for clients, as provided for in the new definition of "intermediary".

This provision should stipulate that an intermediary remains responsible for execution of its obligations even when he outsources some or all of it to a third party.

It should be realised that facilitating the exercise of shareholder rights is a MiFID ancillary service. This means MiFID applies and there is government supervision on this service.

Article 3d - transparency on costs

Para 1 seems to be worded in such a way that intermediaries may not make packages of all custody services for one combined fee. We do not see why this should not be allowed.

Intermediaries will demand fees for this service of passing on information which identifies shareholders. These costs should be managed in the interest of both companies and shareholders, because costs may induce shareholders to refrain from exercising their voting rights.[3] Provisions should be included to avoid excessive or disproportionate pricing by intermediaries, such as one can find in European directives on networks for telecommunication, railways or energy, where service providers and client also depend on an infrastructure provider.

In the modern age of electronic data communication through the internet, we do not see any good reasons for differentiating rates between foreign and domestic service provision,

[3] M.C. Schouten. *The Decoupling of Voting and Economic Ownership*, p. 75.

as provided for in para 2.

Article 3e - third country intermediaries
This article is vital for an effective regime for identification of shareholders. Even so, the problems of cross-border custody chains will remain, albeit for a much smaller number of jurisdictions.

In some countries national privacy laws prohibit intermediaries from divulging the information meant in article 3a. This problem of conflicting national laws in the home state of the third country intermediary remains. It would be useful to have an inventory of such jurisdictions.

Article 3f - transparency of engagement policy
This article is phrased in such a way that it requires of all asset managers and institutional investors to have an engagement policy. This in contradiction to para 4. For those asset managers, institutional investors and their ultimate beneficial owners who do not believe in the philosophy behind this requirement, this requirement is not proportional. While we recommend it to all, DUFAS believes that it is up to the manufacturer and/or the asset owner to decide whether he/she wants an engagement policy. This would also bring para 1 more in line with the comply-or-explain provision in para 4. The provision should therefore be rephrased to say that all asset managers and institutional investors who have an engagement policy, to be transparent about it.

The article should, but does not, take into account that engagement policies of asset managers may vary from fund to fund and from mandate to mandate. Art. 21 of Commission directive 2010/43/EU[4] and article 37 of the AIFMD Commission Delegated Regulation No 231/2013[5] already require transparency from each UCITS and AIFM. The SRD II provision

[4] The article reads:
Article 21, Strategies for the exercise of voting rights
1. Member States shall require management companies to develop adequate and effective strategies for determining when and how voting rights attached to instruments held in the managed portfolios are to be exercised, to the exclusive benefit of the UCITS concerned.
2. The strategy referred to in paragraph 1 shall determine measures and procedures for:
(a) monitoring relevant corporate events;
(b) ensuring that the exercise of voting rights is in accordance with the investment objectives and policy of the relevant UCITS;
(c) preventing or managing any conflicts of interest arising from the exercise of voting rights.
3. A summary description of the strategies referred to in paragraph 1 shall be made available to investors. Details of the actions taken on the basis of those strategies shall be made available to the unit-holders free of charge and on their request.

[5] The article reads:
Article 37, Strategies for the exercise of voting rights
1. An AIFM shall develop adequate and effective strategies for determining when and how any voting rights held in the AIF portfolios it manages are to be exercised, to the exclusive benefit of the AIF concerned and its investors.
2. The strategy referred to in paragraph 1 shall determine measures and procedures for:
(a) monitoring relevant corporate actions;
(b) ensuring that the exercise of voting rights is in accordance with the investment objectives and policy

needs to be brought in line with UCITS and AIFMD. Making this type of information public for each individual mandate would involve making public commercially sensitive information, such as the identity of clients for which the asset manager exercises a mandate. It is not very proportionate to make all this information public. Many mandates of an individual asset manager may have only small differences between them, making it not very informative either to make all this information public.

So in the interest of a level playing field the SRD II should refer to these two provisions. In sofar as the ambition is to regulate funds that are not UCITS or AIF, which have no 'European passport' and are regulated on the Member State level only,[6] we advise to copy the text of the AIFM delegated regulation and/or the UCITS IV commission directive.

The article further requires in para 3 that institutional investors and asset managers publicly disclose their engagement policy annually, as well as how it has been implemented and the results thereof. It requires institutional investors and asset managers to disclose for each company in which they hold shares, if and how they cast their votes in shareholder meetings and provide an explanation of their voting behavior. We do not objection to disclosure of the engagement policy, nor its implementation. But we do object to the required level of detail, for two reasons:

- This detailed requirement will very likely jeopardize dialogues institutional investors have with corporations in the context of their engagement policy. Many dialogues might not take place when shareholders do not have the freedom to promise the management of the company a certain level of confidentiality, which is natural since engagement discussions often take on the form of negotiations.
- We believe the level of detail is unnecessarily burdensome, especially where relatively small positions are concerned. An investment portfolio of a collective investment scheme or the portfolio of a discretionary mandate generally consists of several hundreds (if not thousands) of individual titles. When each vote cast in each shareholders meeting is to be complemented with an explanation, this will become either a very expensive exercise, or it will become useless because it will lead to standardised explanations which will apply to all situations, such as "on xyz we have voted yes/no/abstain because this is in line with our general engagement policy".

Therefore, this article needs to be adjusted so that the results only need to be disclosed in general terms and with a proper delay.

Article 3g - disclosure of investment strategy

This article requires the institutional investor to disclose the main elements of his arrangement with his asset manager. It therefore belongs in MiFID II and not in SRD II. Firstly it has to be noted that an institutional investor may employ directly or indirectly

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of the relevant AIF;

(c) preventing or managing any conflicts of interest arising from the exercise of voting rights.

3. A summary description of the strategies and details of the actions taken on the basis of those strategies shall be made available to the investors on their request.

[6] These are non-UCITS which meet with the criteria for being exempt from the AIFM directive (2011/61/EU) under article 3.

many asset managers. Secondly, it refers to "long term performance" without defining what "long term" means. Thirdly, the text of para 2(c) is unclear.

Para 2(e) assumes that a "target portfolio turnover ratio" is a key element of an investment strategy, while it typically is not. Changes in a portfolio may i.a. be the consequence of a risk management strategy and may be higher in times when markets are more volatile than other times.

The provision seems to assume that institutional investors or asset managers are short term investors. This is untrue. In any portfolio, be it a collective investment scheme or a mandate, there will be an investment strategy that involves "strategic" holdings, buy-and-hold holdings, which may be held for many years, even decades, and there will be non-core holdings which can be sold or substituted for others as market conditions or the changing situation of the company in question may require. A Portfolio Turnover Ratio does not capture this.[7]

Article 3h - transparency of asset managers

This provision, like article 3g, belongs in MiFID II and not in SRD II.

It is unclear how the provision would work when the asset manager contracted by the institutional investor, contracts another asset manager to manage parts of the portfolio.

Para 1 assumes that an asset manager's investment strategy is always the same for each mandate and for each collective investment scheme. This is typically not the case and the provision needs to reflect this. If it does not, the level of abstraction of an asset manager's investment strategy would be too high to be useful.

Para 1 can be practically applied to each individual discretionary mandate with an institutional investor. But it cannot be applied to collective investment schemes. Collective investment schemes such as a UCITS and an AIF typically have a prospectus or an information document which legally require them to detail their investment strategy. It is the client/participant who has to decide whether this is compatible with his/her needs and wishes.

We do not believe there is a good reason to stipulate that this transparency should be given to the institutional investor every 6 months. We believe it should be up to the institutional investor to determine whether he requires this information more frequently than annually.

Para 3 provides that this information has to be provided free of charge, and "in case the asset manager does not manage the assets on a discretionary client-by-client basis", i.a. in case of collective investment schemes, it has to be provided to others on request. This provision is not necessary as all UCITS and AIFs have to have websites. It would be much

[7] See for example a study commissioned by Eumedion, entitled The Duration and Turnover of Dutch Equity Ownership, A Case Study of Dutch Institutional Investors.

more effective and efficient to provide for disclosure by offering or making available this information on the funds' or fund managers' website.

Article 3i - Transparency of proxy advisors

DUFAS wonders how these provisions work in connection with the recently published Code of conduct.[8] We believe the SRD II should have a provision that proxy advisors should always act in the interest of its clients.

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[8] See http://bppgrp.info/wp-content/uploads/2014/03/BPP-ShareholderVoting-Research-2014.pdf