

Irish Regulations | Second Shareholders' Rights Directive

AIFMs, UCITS ManCos and SMICs

The European Union (Shareholders' Rights) Regulations 2020 (the **Irish SRD II Regulations**) come into operation on 30 March 2020. This is the Irish implementing legislation for the Second Shareholders' Rights Directive (**SRD II**)

The Irish SRD II Regulations contain provisions applicable to AIFMs, UCITS ManCos and SMICs authorised and regulated by the Central Bank of Ireland

Where an AIFM, UCITS ManCo or SMIC invests on behalf of investors in shares traded on a regulated market there is a requirement to:

- » have a shareholder engagement policy or to publicly explain why that policy is not in place. The engagement policy or explanation should be made available on a website
- » disclose particular information annually to institutional investors with which a certain arrangement is in place

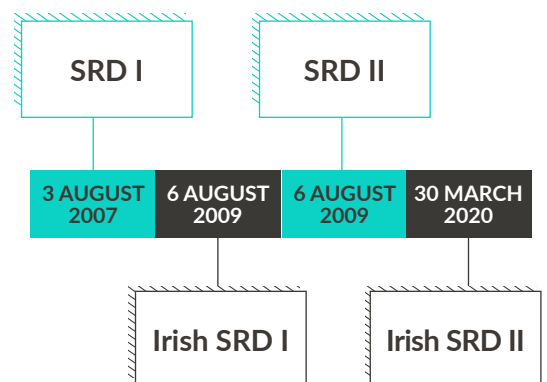
Other requirements in the Irish SRD II Regulations relating to identification of shareholders, transmission of information, facilitation of exercise of shareholders' rights, remuneration of directors and related party transactions do not apply to UCITS or AIFs

Background

The Irish legislation implementing the first Shareholders' Rights Directive (SRD I) established requirements in relation to the exercise of certain rights of shareholders in listed companies. Irish UCITS and non-UCITS funds (today's equivalent are AIFs) were exempted from applying its requirements.

SRD II has an additional focus and aims to encourage long term shareholder engagement. SRD II requirements apply in relation to the 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. Of these provisions, the transparency provisions of the Irish SRD II Regulations are the only ones relevant for investment funds and fund management companies authorised and regulated in Ireland.

The transparency provisions of the Irish SRD II Regulations come into operation on 30 March 2020.



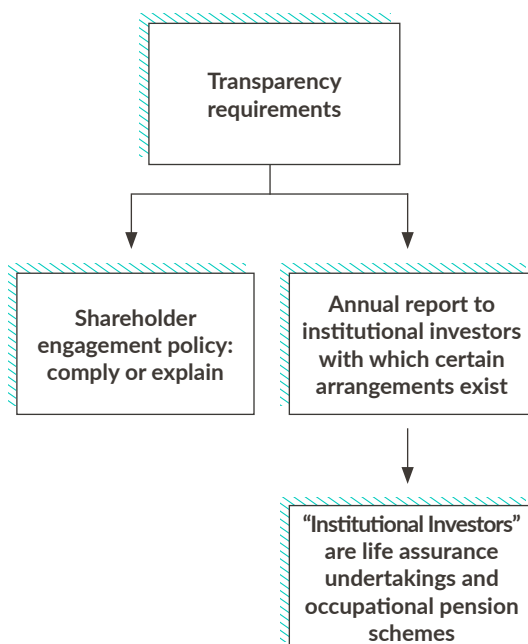
Scope and exemptions

The transparency provisions of the Irish SRD II Regulations apply to relevant asset managers, relevant institutional investors and proxy advisers as those terms are defined in SRD II. Asset managers in SRD II are authorised AIFMs, including internally-managed AIFs, (AIFMs), UCITS management companies (UCITS ManCos) and self-managed UCITS investment companies, which would include self-managed ICAVs (SMICs).

The definition of asset manager also includes MiFID entities. SRD II uses the term asset manager in each applicable provision and does not distinguish between the four different entities. This should be borne in mind when interpreting whether and how the transparency requirements might apply to AIFMs, UCITS ManCos and SMICs. This is particularly the case with the requirement for disclosure to institutional investors.

The requirements in the Irish SRD II Regulations relating to identification of shareholders, transmission of information, facilitation of exercise of shareholders' rights, remuneration of directors and related party transactions apply to traded PLCs. UCITS and AIFs are excluded from the definition of traded PLCs so these requirements do not apply to UCITS which are PLCs even if they are listed.

Transparency requirements



Shareholder engagement policy

The requirements of the Irish SRD II Regulations which apply to AIFMs, UCITS ManCos and SMICs apply to the extent they invest on behalf of investors in shares traded on a **regulated market**.

A regulated market is that defined in MiFID II.

AIFMs, UCITS ManCos and SMICs will be required to either:

- develop and publicly disclose a shareholder engagement policy, as well as disclosing annually how they implement the policy and disclosing how they have voted in general meetings of companies of which they hold shares or
- disclose a clear and reasoned explanation of why they have not complied with any of these requirements

The engagement policy must describe how the entity integrates shareholder engagement in its investment strategy, monitors investee companies on relevant matters, conducts dialogues with investee companies, exercises voting and other rights, co-operates with shareholders, communicates with investee company stakeholders, and manages actual and potential conflicts of interest.

The annual disclosure of the policy's implementation must include a description of voting behavior, an explanation of the most significant votes and any use of proxy adviser services.

All this information must be freely available on the website of the AIFM, UCITS ManCo or SMIC.

Disclosure to institutional investors

An **arrangement** is where an **asset manager** invests on behalf of an **institutional investor**, whether on a discretionary client-by-client basis or through a collective investment undertaking.

Some analysis will be needed to establish if a particular AIFM, UCITS ManCo or SMIC has entered into an arrangement as defined in the Irish SRD II Regulations. It is clear how a MiFID authorised firm could enter into an arrangement. It should also be straightforward in the case of AIFMs and UCITS ManCos authorised for and engaging in individual portfolio management. For AIFMs and UCITS ManCos managing AIFs and UCITS and for internally-managed AIFMs and SMICs, it will be necessary to analyse each relationship with institutional investors.

If an AIFM, UCITS ManCo or SMIC concludes that it does invest on behalf of an institutional investor by way of an arrangement, the AIFM, UCITS ManCo or SMIC will be required to disclose, on an annual basis, to the institutional investor with which they have entered into the arrangement:

- how their investment strategy and its implementation complies with that arrangement and contributes to the medium to long-term performance of the assets of the institutional investor or of the relevant fund
- key material medium to long-term risks associated with the investments, portfolio composition, turnover and turnover costs, the use of proxy advisors for the purpose of engagement activities and its policy on securities lending and how it is applied to fulfil engagement activities, if applicable, particularly at the time of the general meeting of the investee companies
- whether investment decisions have been made based on evaluation of medium to long-term performance of the investee company, including non- financial performance
- whether conflicts of interests have arisen in connection with engagements activities and how the AIFM, UCITS ManCo or SMIC has dealt with them

Where the information described above is already publicly available, the AIFM, UCITS ManCo or SMIC is not required to provide information to the institutional investor directly.

Institutional investor disclosure of arrangement

Where an institutional investor has an arrangement with an AIFM, UCITS ManCo or SMIC, that institutional investor will be required to make certain disclosures publicly. This is not an obligation of the AIFM, UCITS ManCo or SMIC but it is notable that the information prescribed

in the Irish SRD II Regulations regarding the arrangement will be in the public domain.

Practical application of transparency requirements

In practical terms, compliance with the transparency requirements may be structured differently depending on whether the fund is externally managed or self-managed and, in the case of internally-managed funds, depending on what discretionary powers have been delegated to the investment manager.

Externally-managed UCITS and AIFs could have the shareholder engagement policy at the level of the UCITS ManCo or AIFM. The UCITS ManCo or AIFM could make the annual disclosure to any institutional investors in the externally-managed UCITS or AIF.

It may be possible for a SMIC or internally-managed AIFM to satisfy the requirements of the Irish SRD II Regulations by adopting its investment manager's shareholder engagement policy as its own shareholder engagement policy. This would be an option where certain conditions are satisfied. These include that the SMIC has delegated discretionary asset management, including voting powers, to the investment manager and that the SMIC is satisfied that the investment manager's policy complies with the requirements of SRD II.

Existing regulatory obligations

When assessing how AIFMs, UCITS ManCos and SMICs will comply with the requirements of the Irish SRD II Regulations, we suggest examining any potential crossover with existing regulatory obligations. For example, UCITS and AIFMs are required to have policies on exercising voting rights.

SRD I implementing regulations

In addition to implementing the provisions of SRD II, the Irish SRD II Regulations refer to a European Commission implementing regulation under the SRD I.

The European Commission SRD I implementing regulation, which is directly effective, sets out minimum requirements regarding the provisions of SRD I on shareholder identification, the transmission of information and the facilitation of the exercise of shareholders' rights. These provisions come into effect on 3 September 2020 and apply to traded PLCs, so not to UCITS or AIFs.

Next steps

- » The transparency provisions of the Irish SRD II Regulations are effective on 30 March 2020. AIFMs, UCITS ManCos and SMICs will have to comply with the transparency requirements to the extent they invest on behalf of investors in shares traded on a regulated market. A regulated market is that defined in MiFID II.
- » The first step will be for the AIFM, UCITS ManCo or SMIC to conclude if it invests in shares which are traded on a regulated market.
- » If so, the immediate requirement is to have a shareholder engagement policy in place and available on a website by 30 March 2020 or publicly explain why this has not been done.
- » The next step will be to analyse how the annual disclosure requirements to institutional investors may apply.

You can contact a member of the A&L Goodbody [Asset Management & Investment Funds team](#) for advice and assistance on compliance with the requirements discussed above.

Our team



Brian McDermott
Partner and Head of Asset Management & Investment Funds
+353 1 649 2307
bmcdermott@algoodbody.com



Michael Barr
Partner
+353 1 649 2327
mbarr@algoodbody.com



Stephen Carson
Partner
+44 20 7382 0820
scarson@algoodbody.com



Mary McKenna
Partner
+353 1 649 2344
mmckenna@algoodbody.com



Kerill O'Shaughnessy
Partner
+353 1 649 2422
koshaughnessy@algoodbody.com



Laura Butler
Partner
+353 1 649 2209
lbutler@algoodbody.com



Nollaig Greene
Associate & Knowledge Lawyer
+353 1 649 2359
ngreene@algoodbody.com



Ann Shiels
Associate & Knowledge Lawyer
+353 1 649 2396
ashiels@algoodbody.com

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