EUROPEAN CENTRAL BANK

EUROSYSTEM

AMI-SeCo Corporate Events Group

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Transmission of responses to an SI disclosure request in the Italian market

1. Background

In its 2021 compliance assessment exercise (the conclusions of which were documented in the 2021 Corporate Events Compliance Report) the CEG concluded that the Italian market practice of transmitting the response to a SI disclosure request through the custody chain is not in line with the SI Standards. As a result, the CEG agreed to revise downwards the level of compliance of the Italian market with Standard 3.1.

In March 2022, the Italian NSG submitted a paper to the CEG for discussion. The paper (i) provided further information on the different options available to issuers in the Italian market regarding the receipt of responses to an SI request and (ii) invited the CEG to consider changing the text of SI Standard 3.1.

Following an initial discussion on the matter in its April 2022 meeting, the CEG agreed to prepare a short note (the present note) further analysing the case presented by the Italian market and the questions it triggers. During the CEG meeting on 30 June 2022, it was agreed that the text of this note would be revised and expanded to give a more detailed analysis of the legal texts.

The issues raised by the Italian NSG paper and the CEG analysis of these issues are set out in section 2. The pros and cons of the different potential answers to question 2 from both a legal and operational perspective are further analysed in section 3. Section 4 sets out the conclusions of the CEG.

2. Questions

The issues raised by the Italian NSG paper can be summarised into two questions as follows:

Question 1: *Is the sending of information through the custody chain compliant with the Shareholder Identification (SI) Standards?*

Analysis / Answer: The SRD2 shareholder identification process contains two core flows of information, namely (i) the distribution of the identification request, and (ii) the responses to an identification request.

With respect to the distribution of an identification request, the SRD2 legal texts and market standards explicitly foresee the possibility that such requests are transmitted through the custody chain, so that for such messages the use of the custody chain is compliant.

With respect to the transmission of a response to an identification request, the SRD2 legal texts set out general principles whereby each intermediary that has received a request responds “directly to the

company or to a third party nominated[1] by the company" and that "Member States shall ensure that the company is able to obtain information regarding shareholder identity from any intermediary in the chain that holds the information" without specifying the position in the intermediary chain (Article 3a, paragraph 3, first sub-paragraph of the Level 1 SRD text).

In this context, the SI standards do not explicitly prohibit an intermediary from fulfilling its obligations by transmitting its responses through the custody chain to the issuer CSD, or to a participant of the issuer CSD, for onward transmission to the company or its agent. The transmission of responses in such a manner would achieve the objectives of the SRD2 obligation, and for this reason can be considered as compliant with the SI standards providing that any other relevant regulatory requirements, such as with relation to the timing of the responses and compliance with GDPR requirements, are met.

Question 2: *Can the issuer mandate that information is provided through the custody chain?*

Analysis / Answer: Two potential answers to this question are set out below for consideration by the CEG. The pros and cons of option A and option B from a legal and operational perspective are further analysed in section 3 of this note.

Potential answer option A	**Potential answer option B**
Yes, if the issuer has chosen this option in the request, according to the provision of the Directive 2017/828 Article 3a and the Implementing regulation 2018/1212 (see Table 1 - Request to disclose information regarding shareholder identity, field "Scope of the Request" where it is stated that "*Specification whether the request is to be forwarded to and responded by the other intermediaries down the chain of intermediaries. If not, field to be left unpopulated).*	The answer to the previous question stated that an intermediary may be able to meet its obligation to respond to an SRD2 shareholder identification request by sending a response through the custody chain. This raises the question of whether an issuer can mandate that this response be sent through the custody chain. The answer to this question is no. An intermediary should always have the option to send a response directly to the company or to the agent appointed by the company.

[1] The term "third party nominated by the company" refers to an agent appointed by the company and that provides services to the company, such as the service of collating responses by intermediaries

3. Pros and cons of the alternative answers to question 2

This section is comprised of two parts:

- Part (i) looks at the degree of compliance of each answer to Question 2 from the perspectives of Level 1, Level 2, the Italian transposition, other national transpositions, and the text of the SI Market Standards.
- Part (ii) looks at the impacts of each answer to Question 2 from an operational perspective (both of issuers and of intermediaries).

(i) Degree of compliance from the perspectives of Level 1, Level 2, Italian transposition, other national transpositions, and the SI Standards text

	Option A	*Option B*
Level 1	*Non-compliant*	*Compliant*
Level 2	*Non-compliant*	*Compliant*
Italian transposition	*Compliant*	*To be checked. Does the Italian transposition allow Option B, or does it prohibit Option B?*
Other national transpositions	*Non-compliant*	*Compliant*
SI Standards	*Non-compliant*	*Compliant*

To support the analysis the relevant provisions of the SRD II Directive and the SRD II Implementing Regulation are cited below. An assessment is then provided for each.

⇨ **Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement (Text with EEA relevance)**

The following provisions are relevant to the issue at hand:

Article 3a

(a) Identification of shareholders

2. Member States shall ensure that, on the request of the company or of a third party nominated by the company, the intermediaries communicate without delay to the company the information regarding shareholder identity.

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. Member States shall ensure that the company is able to obtain information regarding shareholder identity from any intermediary in the chain that holds the information.

Member States may provide for the company to be allowed to request the central securities depository or another intermediary or service provider to collect the information regarding shareholder identity, including from the intermediaries in the chain of intermediaries and to transmit the information to the company.

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.

…

8. The Commission shall be empowered to adopt implementing acts to specify the minimum requirements to transmit the information laid down in paragraph 2 as regards the format of information to be transmitted, the format of the request, including their security and interoperability, and the deadlines to be complied with. Those implementing acts shall be adopted by 10 September 2018 in accordance with the examination procedure referred to in Article 14a(2).

Assessment:

Paragraph 2 of Article 3(a) creates an obligation for intermediaries to respond to a shareholder identification request from an issuer or its agent.

Paragraph 3 of Article 3(a) provides some details on this obligation, and paragraph 8 of Article 3(a) sets out the powers of the European Commission to adopt an implementing act that would provide further details.

With respect to the obligation placed on each intermediary to respond to a shareholder identification request, the first sub-paragraph of paragraph 3 of Article 3(a) explicitly describes a process whereby each intermediary in the custody chain responds directly to the company or its agent: "… Member States shall ensure … 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".

The key question raised by the two subsequent sub-paragraphs of paragraph 3 of Article 3(a) is whether they create an optionality for member states so that member states can override the process set out in the first sub-paragraph, and can put in place an alternative process (such as mandating the transmission of responses through the custody chain).

In this respect, the following considerations are relevant:

1) The wording ("shall ensure") used in the first sub-paragraph (setting out the process for transmitting responses) is different from the wording ("may provide") in the two subsequent sub-paragraphs.
2) The second sub-paragraph explicitly gives optionality with respect to the choice of the entity mandated to collect the information. It does not explicitly give optionality with respect to how that information should be transmitted to the collection agent.
3) The third sub-paragraph relates to the information to be provided by an intermediary. It does not explicitly cover the question of how that information should be transmitted to the issuer or its agent.
4) The text of both the second and third sub-paragraphs is compatible with an interpretation that these two sub-paragraphs do not create optionality with respect to the process for transmitting responses, but rather simply provide additional information with respect to this process.

Based on the legal text, and on these considerations, the following conclusions can be drawn:

1) The text of SRD2 Level 1 explicitly sets out a process whereby each intermediary in the custody chain transmits its response directly to the issuer or its agent.
2) The text of SRD2 Level 1 does not explicitly contain the possibility for member states to override this process, and to put in place another process.
3) The text of SRD2 Level 1 explicitly empowers the European Commission to adopt an implementing act setting more details on the transmission mechanism for responses.

⇨ **COMMISSION IMPLEMENTING REGULATION (EU) 2018/1212 of 3 September 2018 laying down minimum requirements implementing the provisions of Directive 2007/36/EC of the European Parliament and of the Council as regards shareholder identification, the transmission of information and the facilitation of the exercise of shareholders rights (Text with EEA relevance)**

The following provisions are relevant to the issue at hand:

Article 9

Deadlines to the be complied with by issuers and intermediaries in corporate events and in shareholder identification processes

6. The request to disclose shareholder identity made by an issuer or third party nominated by the issuer shall be transmitted by intermediaries, in accordance with the scope of the request, to the next intermediary in the chain without delay and no later than by the close of the same business day as the receipt of the request. Where the intermediary receives the request after 16.00 during its business day, it shall transmit the information without delay and no later than by 10.00 of the next business day.

The response to the request to disclose shareholder identity shall be provided and transmitted by each intermediary to the addressee defined in the request without delay and no later than during the business day immediately following the record date or the date of receipt of the request by the responding intermediary, whichever occurs later.

The deadline referred to in the second subparagraph shall not apply to responses to requests or those parts of requests, as applicable, which cannot be processed as machine-readable and straight-through processing, as provided for in Article 2(3). It shall also not apply to responses to requests that are received by the intermediary more than seven business days after the record date. In such cases, the response shall be provided and transmitted by the intermediary without delay and in any event by the issuer deadline.

Assessment:

Article 9(6) is compatible with the response process set out in the first sub-paragraph of paragraph 3 of Article 3(a) of the Level 1.

However, Article 9(6) is apparently incompatible with a response process whereby intermediaries would be obliged to send responses through the custody chain.

This is for two reasons:

1) Firstly, Article 9(6) states, inter alia, that ‘’the response to the request to disclose shareholder identity shall be provided and transmitted by each intermediary to the addressee defined in the request’’. Table 1 of the Implementing Regulation only includes the possibility for the company to specify one party to act as recipient (which may be the issuer or any other third party as outlined above). There is no provision for the company to specify multiple or unknown parties (i.e. all those in the chain) as recipient of the information, as would be appropriate if each intermediary had the obligation to send the response to its upper-tier intermediary.
2) Secondly, the response deadlines set out in Article 9(6), namely, the requirement that the response shall be transmitted “by each intermediary to the addressee defined in the request without delay and no later than during the business day immediately following the record date or the date of receipt of the request by the responding intermediary, whichever occurs later” are appropriate for direct responses, but they would be inappropriate, and inconsistent with other requirements of the Implementing Regulation, if they applied to last intermediaries transmitting responses through the chain of intermediaries. The relevant comparison is with Article 9(4) of the Implementing Regulation, which, for responses relating to shareholder actions, and transmitted through the chain of intermediaries, allows for a period of three days between the deadlines of a last intermediary and of an issuer.

The text of the Implementing Regulation is particularly important to the analysis at hand given that the objective of the Implementing Regulation is to ensure a harmonised implementation of the Directive as per part 2 of the recitals below.

(2) This Regulation aims to prevent the diverging implementation of the provisions of Directive 2007/36/EC, which could result in the adoption of incompatible national standards, thereby increasing the risks and costs of cross- border operations and thus jeopardising their effectiveness and efficiency, and resulting in additional burdens for intermediaries. The use of common formats of data and message structures in transmissions should enable efficient and reliable processing and interoperability between intermediaries, the issuer and its shareholders, thus ensuring the efficient functioning of Union capital markets for shares.

(ii) Impacts from an operational perspective (both of issuers and of intermediaries).

	Option A	*Option B*
Italian Issuers / Issuer Agents	*Operational ease / Established procedure for issuers in the Italian market / Gaps in responses (non-Italian intermediaries and investors)*	*Operational changes / Complexity of managing multiple separate responses / Benefit in complete coverage (including non-Italian intermediaries and investors)*
Non-Italian Issuers / Issuer Agents	*Not applicable*	*Current SRD2 SI process*
Italian Intermediaries	*Obliged to manage two separate processes (Option A for Italian securities, and Option B for non-Italian securities)*	*Change in process for Italian securities / Advantage of one common SRD2 SI process for all European securities*
Non-Italian Intermediaries	*No response given legal, regulatory and operational obstacles*	*Current SRD2 SI process*

4. Conclusion

Based on its previous discussions, and on the analysis in this paper, the CEG reconfirms its view that the current Italian practice requiring that shareholder identification responses be sent through the custody chain is not in line with the SI Standards.

The CEG agrees to publish, as part of a future CEG FAQ document, the answer to Question 1, and answer B to Question 2.