



MORE TRANSPARENCY DUE TO THE SHAREHOLDER RIGHTS DIRECTIVE II

Implementing the European Shareholder Rights Directive II, new provisions regarding the identification of shareholders will enter into force on 3 September 2020, which will lead to increased transparency on the capital markets.

The European Parliament and the Council of the European Union have adopted the Directive (EU) 2017/828 amending Directive 2007/36/EC¹ regarding the encouragement of long-term shareholder engagement in listed European companies on 17 May 2017 („SRD II“). With certain exceptions, the member states were required to implement the SRD II into national law by 10 June 2019. In Austria, the provisions under the SRD II were largely implemented in the Austrian Stock Exchange Act and the Austrian Stock Corporation Act. However, the provisions regarding the identification of shareholders and the facilitation of the exercise of shareholder rights will only enter into force on 3 September 2020.

The SRD II aims to create an attractive environment for

shareholders of listed companies within the European Union and to further improve the corporate governance of listed companies. The SRD II thereby provides for minimum requirements to be implemented by the member states that shall ensure an effective and sustainable shareholder engagement, facilitate the exercise of shareholder rights and improve the access to information between market participants in cross-border environments. Contrary to its predecessor Directive 2007/36/EC, the SRD II is not limited to specific corporate law issues, but also encompasses regulations for certain financial market participants, such as intermediaries and institutional investors, that take on an important role in identifying shareholders and securing as well as transmitting relevant information.

Key elements of the SRD II

- ✦ Right of listed companies to identify their shareholders
- ✦ Increased transparency of institutional investors, asset managers and proxy advisors
- ✦ Involvement of shareholders in the remuneration policy of the company
- ✦ Increased transparency in relation to related party transactions

Right of listed companies to identify their shareholders

Listed companies shall have the right to identify their shareholders provided these hold at least 0.5% of the shares or voting rights in the company.² Correspondingly, intermediaries (i.e. in particular custodian banks) are obliged to provide the company with the re-

levant information, being in particular the identity of the shareholder and the amount of its shareholding. However, such reporting obligations only apply if the shareholding reaches or exceeds the minimum threshold of 0.5%. If the shareholding at a single

¹Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies.

²So far, listed companies only had limited possibilities to identify their shareholders if the minimum notification threshold of 4% (or 3%, respectively) was not reached and if the respective shareholder did not participate in the general meetings.

intermediary does not reach or exceed this threshold, the intermediary is only required to provide the identity of the shareholder if it has received information by the respective shareholder that the minimum threshold of 0.5% is reached or exceeded through custody accounts at different intermediaries. The shareholders are obliged to provide such information to all concerned intermediaries, provided

that the applicable sanction regime is unclear.³ To implement the provisions on shareholder identification, a new fifth main section was inserted in the Austrian Stock Exchange Act (sect. 177 ff of the Austrian Stock Exchange Act). **The new provisions regarding the identification of shareholders and the facilitation of the exercise of shareholder rights will enter into force on 3 September 2020.**

Increased transparency of institutional investors, asset managers and proxy advisors

In order to increase transparency regarding institutional investors' and asset managers' approach to shareholder engagement and improve the ability of shareholders to make informed investor decisions, institutional investors and asset managers are required to, *inter alia*, develop and disclose an engagement policy that sets out how they intend to integrate shareholder engagement in their investment strategy. Among others, the engagement policy shall outline and describe the chosen investment strategy, how shareholder engagement is integrated in such investment strategy and which different engagement activities are intended to be performed to reach the set goals. On the basis thereon, institutional investors and

asset managers shall annually disclose how the engagement policy has been implemented, including a description of voting behavior as well as an explanation of the most significant votes. Proxy advisors must disclose reference to the code of conduct which they apply and report on its application. If the legal requirements are not complied with, the institutional investor, asset manager or proxy adviser concerned must publicly disclose a clear and reasoned explanation why one has chosen not to comply therewith („comply or explain“). The corresponding provisions are set out in the new sect. 185 ff of the Austrian Stock Exchange Act and already entered into force on 10 June 2019.

Involvement of shareholders in the remuneration policy of the company

Listed companies must establish a remuneration policy for its directors. The remuneration policy must be prepared by the supervisory board and must be submitted for vote at the general meeting. Although such vote only has advisory character, the directors may only be paid in accordance with a remuneration policy that has been put to a vote by the general meeting. If the general meeting rejects the proposed remuneration policy, a revised policy has to be prepared for the shareholders for the next general meeting. Further, the remuneration policy must be put to a vote

in case of a material change and, in any case, every four years. This new remuneration regime shall ensure an increased involvement of shareholders when it comes to the remuneration of the companies' directors („say on pay“).⁴ While the remuneration policy shall *ex ante* ensure an appropriate remuneration, annual remuneration reports shall ensure an *ex post* transparency. The SRD II provisions on remuneration policy were mainly implemented in sect. 78a ff of the Austrian Stock Corporation Act and already entered into force on 10 June 2019.

Increased transparency in relation to related party transactions

Apart from the new provisions on mandatory remuneration policies, the amendments to the Austrian Stock Corporation Act in particular also concern so-called related party transactions. Pursuant to the new sect. 95a of the Austrian Stock Corporation Act material transactions, i.e. transactions exceeding a value of more than 5% of the balance sheet total of the concerned company,

with related parties require the approval of the supervisory board. If the value of such a related party transaction exceeds more than 10% of the balance sheet total of the concerned company, the transaction must, in addition, be publicly announced. The new regime is applicable to related party transactions entered into after 31 July 2019.

³ A violation against such information obligation is not clearly sanctioned under administrative law. Further, default on such obligation is not clearly sanctioned with the suspension of voting rights (i.e. unlike in the case of a violation of the disclosure requirements pursuant to sect. 130 of the Austrian Stock Exchange Act). Legal practice will show whether this constitutes an unintentional legal gap.

⁴ The new obligation to present a remuneration policy to the general meeting applies for the first time to general meetings held in financial years starting after 10 June 2019. Thus, companies with a balance sheet date „31 December 2019“ are required to present such policy at the annual general meeting held in the year 2020.

Implementing Regulation (EU) 2018/1212

The European Commission has adopted an implementation regulation, Regulation 2018/1212⁵, which sets out the minimum requirements for the implementation of the provisions of the SRD II. As such, the regulation contains essential specifications with regard to format, language, content, and technical requirements relevant for the exchange and transmission of information between intermediaries, listed companies and shareholders. The regulation aims to ensure uniform standards, efficient and reli-

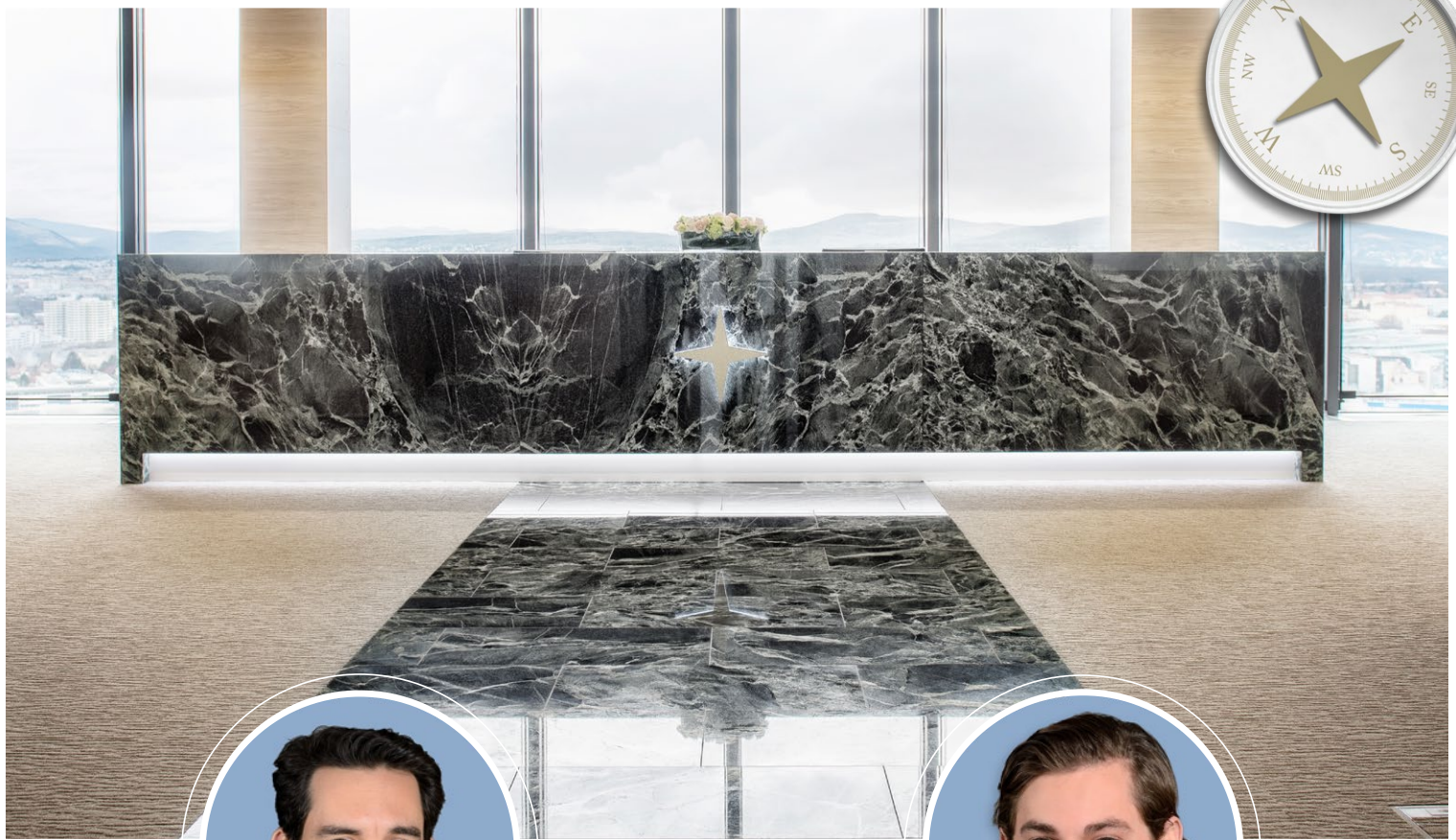
able processing and interoperability between intermediaries, listed companies and shareholders in order to ensure an efficient and effective functioning of European capital markets for shares. Intermediaries and other market participants are encouraged to independently refine the formats to adapt such formats to the needs of different markets (i.e. depending on the requirements of the member state concerned). The regulation applies from 3 September 2020.

Timing

In accordance with the requirements under the SRD II, the vast majority of the Austrian transposition acts already entered into force (retroactively) on 10 June 2019. However, the provisions addressed in the beginning of this newsletter concerning the identification of shareholders and the facilitation of the exercise of

shareholder rights (sect. 179 to 181 of the Austrian Stock Exchange Act and, correspondingly, sect. 189 Z 1 to 4 of the Austrian Stock Exchange Act, each in the version laid down in the Federal Act BGBl. I No. 64/2019) will enter into force on 3 September 2020.

⁵ 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.



PHILIPP NIDAL KARAMAN
Partner



+43 (0) 1 606 3647 301



n.karaman@ehlaw.at



MARTIN ZANKL
Associate



+43 (0) 1 606 3647



m.zankl@ehlaw.at

We hope that our explanations have given you a first basis for your further decision-making. For further questions we are happy to help you on these topics (especially if new developments arise).

Your Eisenberger & Herzog team

The information, opinions and legal views in this article are not intended to be comprehensive and in any case cannot replace an individual examination based on the special circumstances.
No liability is accepted for the content of this article.



Wienerbergstraße 11, 1100 Wien | Österreich | +43 1 606 36 47, F: +43 1 606 36 47-58 | office@ehlaw.at | www.ehlaw.at