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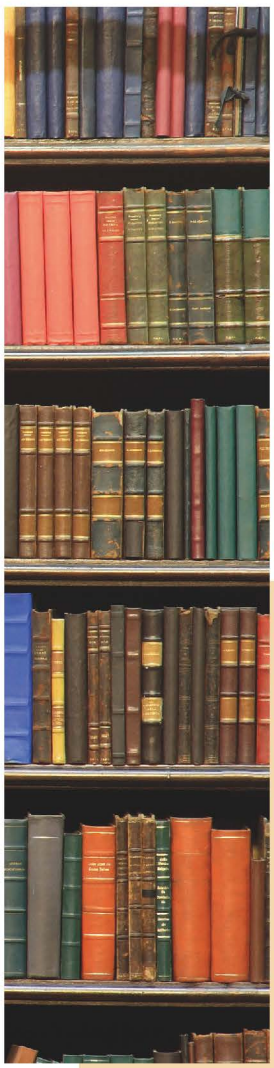
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



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Petitions

What are the issues relating to digitalisation in company law?

IN-DEPTH ANALYSIS FOR THE JURI COMMITTEE

EN

WORKSHOP ON THE FUTURE OF EUROPEAN COMPANY LAW

2016

DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

What are the issues relating to digitalisation in company law?

IN-DEPTH ANALYSIS

Abstract

Upon request by the JURI Committee, this paper sets out areas where digitalisation could bring benefits in the company law area, looking at issues such as online formation of companies, electronic filing of documents, safeguards for information, information sharing by business registries, digital communication between a company and its shareholders including relating to general meetings, a company's email address and URL, electronic company records, and digital signature of contracts and execution of documents.

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CONTENTS

LIST OF ABBREVIATIONS

Art.	Article
BRIS	Business Registers Interconnection System
eIDAS	electronic identification and trust services for electronic transactions
ICLEG	The Informal Company Law Expert Group
SOLVIT	Solutions to Problems with EU Rights, service provided by the national administration in EU countries and Iceland, Liechtenstein and Norway
URL	Uniform Resource Locator

GENERAL INFORMATION

KEY FINDINGS

- There are many ways in which companies and those dealing with companies can use digitalisation to improve their communications and access to information.
- Currently some companies are unable to use digitalisation to the extent they would like to do so because company law requires them to use hard copies to provide information or communicate with others. Those dealing with companies cannot always access information digitally and this can make it harder for them to access information.
- The EU has already taken some steps to enable some companies to use digital technology, but these steps are fairly limited and in many cases only apply to companies whose shares are admitted to trading on a regulated market.
- It is important for any action to be technology neutral to allow companies and others to use the technology that is most appropriate to them and to take advantage of developments in technology. It may, however, be appropriate to require common standards in some cases, for example where information is to be provided to a national business registry or between national business registries.
- To reap the benefits of digitalisation some changes in law may be necessary. It would also be possible to improve matters by sharing best practice and developing standard approaches in some cases.
- The cost of requiring companies, registries or others to use digital technology needs to be considered as well as the benefits of using technology.
- Any proposal should consider which types of company it should apply to (all or only some).
- It is not always possible to form a company online. Some Member States allow some companies to be formed online. In some Member States it is necessary for a person to be physically present in the Member State where they wish to form the company. This can make it harder and more expensive to incorporate a company there if the person comes from another Member State. It would be helpful to gather more information about which companies can be formed online at present and why Member States do not allow online formation of other types of company.
- Online formation of companies is easier where national business registries provide a standard set of constitutional documents which can be personalised to some extent.
- It is not always possible to file documents with national business registries online. There is a core group of documents that registries must allow to be filed electronically, but companies are often required to file other documents and there is no requirement to allow electronic filing of these other documents.
- It is not always possible to access all information about companies online. National business registries must provide a core set of company information electronically. However not all information has to be provided in this way and electronic copies of information are only certified as “true copies“ if the applicant explicitly requests this.

- Safeguards for online formation and online filing of documents are important. National business registries could share best practice as to how best to provide safeguards for companies and others.
- Companies and others providing information about companies have to provide the same information more than once. Better use of digitalisation could simplify this.
- Companies cannot always use digital technology to communicate with shareholders or others. If a company wishes to use digital technology to communicate, there are many possibilities to do so.
- Shareholders should decide whether a company should use digital technology. The approval needed in any case should be a matter for national law.
- Shareholders of existing companies who do not wish to use digital technology should be protected so that they are not forced to do so.
- Uncertainties in existing company law may dissuade companies from using digital technologies for shareholder meetings.
- Standard formats for information provided digitally could improve information flow for shareholders and others.
- Better use of digitalisation could improve voting at shareholder meetings of listed companies.
- Companies with a website could use a registered URL to provide certain information to the public. This could make it more easily accessible and cheaper. It may be desirable to require some companies to do this and to specify minimum information that must be available.
- Companies should be able to keep required records digitally. Those with rights to access company information should be able to make requests digitally. There may be cases where it will not be appropriate for companies to provide information digitally or safeguards are needed to prevent information being used inappropriately.
- Companies should be able to have electronic signatures and to execute documents digitally and enter into contracts electronically.

1. THE CURRENT POSITION

The company law of the Member States of the EU takes different approaches to the use of digitalisation. When company law was first written down more than 100 years ago, digitalisation was not a possibility and company law assumed that hard copies of documents would be used to form a company, to provide information to regulators and the public and for companies to communicate with their shareholders and others (and vice versa). It was also typically the case that shareholders would come from the jurisdiction where the company was formed and so it would be easy for them to meet physically to take decisions.

Some Member States, including Denmark and the UK have made changes to their company law to enable companies to be formed online without the person forming the company having to be physically present in the country of incorporation or provide hard copies of documents. They also allow further information that must be provided to the business registry after the company has been incorporated to be provided electronically. They allow companies to communicate with shareholders and others electronically and allow shareholders and others to participate in company meetings electronically. This reflects the fact that, increasingly, individuals, companies and regulatory bodies communicate with each other digitally and expect to be able to do so in all aspects of their lives. It has also become increasingly common for companies to have shareholders from different Member States. These shareholders may wish to participate in meetings without having to be physically present at a particular location. Companies also deal with customers, suppliers and others from an increasingly large number of countries. They often deal with them online. It has become easier for companies to provide information about themselves electronically to the public, either through their own website or through the national business registry to which they are subject. Although the public can access information from a company's business registry, this may not be as easy as accessing information from the company's own website.

This paper sets out areas where digitalisation could bring benefits in the company law area. It looks at areas where there are issues and where changes to EU company law could facilitate the use of digitalisation by companies and those dealing with companies. It also looks at areas where steps could be taken, by sharing good practice rather than changing the law, which could also help to improve the use of digitalisation in the company law area.

1.1. Steps already taken by the EU

The EU has already taken some steps to recognise the increasing use of digital technologies in the company law area. Member States must ensure that certain stated documents can be filed with their national business registry by electronic means[1]. Member States must ensure that letters and order forms, including those sent electronically, contain certain information about the company and that company websites contain this information. This information is the registry where information is kept about the company, the company number, the legal form of the company, the company's registered office, if appropriate that the company is being wound up and, if the company's capital is mentioned, the subscribed and paid up capital.

The business registries in the EU are taking steps, as a result of Directive 2012/17[1], to make it easier to access information about EU companies. This Directive requires a Business

[1] Directive 2012/17 of the European Parliament and of the Council of 13 June 2012 amending Council Directive 89/666/EEC and Directives 2005/56/EC and 2009/101/EC of the European Parliament and of the Council as regards the interconnection of central, commercial and companies registers Text with EEA relevance, OJ L 156, 16.6.2012, p. 1.

Registries Interconnection System (BRIS) to be established. Electronic communication of information relating to cross border mergers of companies and branches of companies registered in another Member State between the business registries will be easier. Users of the registries will be able to use credit and debit cards to pay online to access information.

Issuers whose securities are admitted to trading on an EU regulated market must be allowed to use electronic means if they wish, subject to shareholder approval and certain conditions being met.[2] These include a requirement that the use of electronic means must not depend on the location of the shareholder's seat or residence and that shareholders must be contacted in writing to request their consent to using electronic means to convey information. If they do not object within a reasonable time they are deemed to have consented but they can ask for information to be provided in hard copy form at any time in the future. Issuers will also be required to prepare their annual financial report in European Single Electronic Format (ESEF) from 1 January 2020 provided that the European Securities and Markets Authority has conducted a cost benefits analysis. ESMA must submit draft regulatory technical standards to the Commission no later than 31 December 2016.

The Shareholder Rights Directive[3], which applies to issuers with shares admitted to trading on an EU regulated market, requires those companies to make certain information available to shareholders on the company website. It requires Member States to enable shareholders to put items on the agenda for a general meeting and table draft resolutions by electronic means. Member States must also enable shareholders to appoint a proxy and revoke that appointment electronically. The issuer must publish voting results on its website. Issuers must be allowed to offer shareholders the ability to participate at general meetings electronically, including by real-time two-way communication enabling shareholders to address the meeting from a remote location and a mechanism to vote before or during the meeting without appointing a proxy who is physically present at the meeting. A proposed Directive to amend the Shareholder Rights Directive is currently being negotiated.

The eIDAS Regulation[4] is intended to enable secure and seamless electronic interactions between businesses, citizens and public authorities. It allows businesses to use their own national electronic identification scheme to access public services in other Member States where eIDs are available and creates a European internal market for electronic trust services. It provides that a company's electronic seal shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in an electronic form or that it does not meet the requirements for qualified electronic seals. A qualified electronic seal shall enjoy the presumption of integrity of the data and of the correctness of the origin of that data to which the qualified electronic seal is linked. A qualified electronic seal based on a qualified certificate issued in one Member State shall be recognised as a qualified electronic seal in all other Member States.

There are other proposals that are being discussed, including allowing single-member private limited companies to be registered online, using a template of the constitutional instruments that would have to be available online.[5]

[2] Directive 2004/109 as amended by Directive 2013/50 of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC Text with EEA relevance, OJ L 294, 6.11.2013, p. 13.
[3] Directive 2007/36, of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, OJ L 184, 14.7.2007, p. 17.
[4] Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, OJ L 257, 28.8.2014, p. 73.
[5] Commission proposal COM(2014) 212 of 9 April 2014.

1.2. The approach to digitalisation

There has been an enormous change in digitalisation in the EU in recent years and it is likely that this will continue in the future. The technology changes rapidly and is becoming readily available to increasing numbers of people at a decreasing cost. This means that the EU should be careful, when taking action in this area, to be technology neutral as far as possible, so that prescriptive requirements do not become out-of date and so that the users of the technology are free to use the technology that is most appropriate to their particular situation and to adapt to new technology as it appears. There are areas, such as the interconnection of the business registries, where it may be appropriate to specify common standards to ensure that systems are compatible with each other. In such cases, it may be appropriate to deal with such matters at Level 2, so that it is easier to readdress the issues on a timely basis if there are technological developments.

Digitalisation can enable large numbers of users from a wide variety of locations and backgrounds to do something quickly and cheaply. Sometimes, to reap the full benefit of this, it is desirable to adopt a common standard. For example, digitalisation could facilitate a system under which a company could be formed anywhere in the EU by providing the same standard set of information. However, the benefits of a common approach must be weighed against the benefits of allowing a more customised approach which is tailored to the particular needs of a Member State or users of a system.

One aspect of digitalisation is that it not only allows people to substitute electronic communication for hard copy communication (email for letters), but that it can also allow new ways of doing things. It is important to bear this in mind when thinking about how digitalisation might bring benefits in the company law area.

The cost of requiring a company, business registry or other party to use digital technology is an important consideration in deciding whether to require digital technology to be used in any area. Member States that have already moved to a system of allowing companies to be formed online and filings to be made online can provide evidence not only about the costs of doing this but also about the benefits of doing so. This can include fewer problems in incorporating a company or filing documents (because the online system can prompt people to provide the required information and provide answers to common questions) and freeing manpower to deal with other tasks (because more routine tasks are handled by the technology).

In deciding what approach to take in any area, it is important to remember that there can be considerable differences between the ability and willingness to take advantage of digital technology at an individual level and also at an organisational level. Some companies have one or a small number of shareholders who are located close to each other. They may not want to use digital technology. Smaller companies may not benefit from economies of scale to the same extent as large companies and may be less able to afford an investment in digital technology. However, it may also be the case that a small one person company is set up by an entrepreneur who wants to be able to use digital technology in relation their company in the same way as they do in the rest of their life. This suggests that an approach that is facilitative may be helpful and that any proposal to require the use of digital technology to the exclusion of a hard copy approach should be carefully scrutinised.

1.3. The principle of mutual recognition

The principle of mutual recognition has also contributed to achieving the European Union's four fundamental freedoms. It is not always necessary to harmonise laws to promote these freedoms and protect against discrimination. The Court of Justice of the EU has emphasised that Member States have an obligation to remain proportionate in their requirements and to accept declarations and certificates from other Member States as being equivalent to those

required by their own authority. Cooperation between the authorities of different Member States may achieve the same result as requiring a company or citizen to comply with the requirements of a particular Member State.

In the company law area, competent authorities should consider whether they can accept certificates, documents or other information that an individual or a company has already provided in its home Member State as satisfying requirements. Better sharing of information between relevant competent authorities could help to facilitate this.

It might also be useful to consider whether national competent authorities should be reminded of this principle, and whether they should be required to put details on their website of how to complain (for example through the SOLVIT network or by notifying the Commission of a complaint) if a company or other person believes that a requirement to provide certificates, documents or other information that is already available from their home Member State does not respect the principle of mutual recognition.

2. COMMUNICATIONS BETWEEN A COMPANY AND ITS BUSINESS REGISTRY

2.1. Online formation of companies

Some Member States, including Denmark, France, Ireland, Lithuania, Luxembourg, Poland Spain and the UK allow some sorts of companies to be formed online. Other Member States do not allow this. Where online formation of a company is possible, it tends to be quicker and cheaper for a person to set up a company. Some national business registries take the view that allowing online formation is beneficial, because the business registry can provide information about how to set up a company in a way that is easily accessible and that this can reduce the number of cases where the person wishing to set up the company provides incorrect information. It can also reduce the time taken to set up the company. In some cases, the national business registry provides a template of constitutional documents that can be used to set the company up. It also allows the person setting up the company to pay online to do this.

Some Member States require notaries to be involved with the formation of a company. They may require a person wishing to form a company to appear before the notary and require the notary to submit the relevant documentation to form the company. If Member States wish to continue with this approach, then it will not be possible to reap the full benefits of digitalisation in connection with the formation of companies unless it is possible for a person wishing to set up a company to meet the requirements to provide information to the notary digitally rather than having to appear before the notary in person.

There are obviously costs that a national business registry will incur in moving to a system that allows online formation of companies. Depending on the number of companies formed and the savings that can be made over time as a result of automating the system more, registries should be able to recoup these costs over time, at least when sufficient numbers of companies are formed.

It would be helpful to understand better why some Member States have allowed some types of companies to be formed online but not others. This may be a question of the costs involved in setting up the necessary systems compared to the number of companies of that sort that are formed. If the number of companies formed is sufficiently small it may be difficult to justify incurring the necessary costs to allow online formation. Alternatively, there may be something specific to the information required to form a particular sort of company that makes it harder for this information to be provided online. It would be helpful to gather more information about the current approach of different Member States to allowing online formation of companies: which types of companies can be formed online and why the Member State does not allow online formation of particular types of company.

Online formation of companies is likely to be easier where a Member State provides a standard set of articles or other constitutional document. This would apply to the company formed online by default. It should be possible to change the standard set of articles or other constitutional document once the company is formed. It may also be possible for Member States to allow someone forming a company to choose to use a customised set of articles or other constitutional document when the company is formed if they want to, rather than using the standard set of articles or other constitutional documents. Standard sets of documents could be made available online by the national business registry. The national business registry could also provide some standard guidance about the sorts of cases in which the standard set of documents would or would not be appropriate. For example, whether it is drafted on the assumption that there will be a single shareholder or small number of shareholders where the persons forming the company want a large degree of flexibility as to how decisions are made by the directors.

In some Member States a standard set of articles or other constitutional documents typically contains some information that is specific to the company concerned. For example, it may contain the company's name and the place of its registered seat. In such cases, the national business registry should allow the person forming the company to provide these details to it, so that they can be incorporated into the standard set of information.

The EU could consider whether Member States should be required to allow at least some types of company to be formed online (and, if so, which types of companies) and whether this should extend to all types of companies. It could also consider whether Member States should be required to provide standard constitutional documents which persons forming companies online could use if they wish. It could also consider whether the information to be provided for the online formation of companies (or certain types of company) should be harmonised or whether there are good reasons to allow this to continue to be a matter for national law.

2.2. Online filing of company information after incorporation

Companies must provide certain stated information to their national business registries from time to time after they have been incorporated. For example, they may be required to file a copy of their financial accounts and to register the appointment or resignation or removal of a director or auditor. Under Directive 2009/101 [6](which repealed and replaced the First Company Law Directive) Member States must ensure that certain information can be filed by electronic means. This is the company's constitution, changes to the constitution, the complete text of the constitution as amended, details of those authorised to represent the company in dealings with third parties and legal proceedings and those who administer, supervise and control the company, the capital subscribed (at least once a year), accounting documents, changes to the registered office, whether the company is being wound up, the appointment of a liquidator, termination of a liquidation, striking off of the company and any declaration of nullity by the courts (the "Core information").

It is usual for national business registries to require additional information from companies, but there is no EU requirement that these registries have to allow this further information to be provided electronically. The Directive allows Member States to require all companies or certain categories of companies to file all documents (or certain categories of documents) electronically. The EU could consider requiring Member States to enable all information that must be provided to a national business registry to be provided electronically. In some cases Member States require certain information to be provided by someone other than the company e.g. where a notarial deed is required. The EU could consider requiring Member States to enable such information also to be provided electronically to the national business registry.

2.3. Safeguards for company information provided

Where persons are allowed to provide information relating to the formation of a company electronically or are allowed to file further information electronically, there is a question as to how to verify the information provided appropriately and provide safeguards. Member States that already allow online formation and electronic further filing have experience of dealing with

[6] Directive 2009/101 of the EP and the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent, OJ L 258/11,which replaced the First Company Law Directive First Council Directive 68/151.

these matters. For example, safeguards may involve the person providing the information having to use a password or PIN or, where information is being changed, the national business registry notifying the company and/or person whose information has been changed, so that they can take action if the change is not properly authorised. Good practice by national business registries who already deal with such matters could be shared more widely.

It is obviously important also that the requirements that exist to prevent and combat money laundering are followed. It is therefore important that any consideration of safeguards should take account both of the need to meet the anti-money laundering requirements as well as allowing companies and individuals to take advantage of digitalisation when providing information either to form a company or to provide further information about it.

It might be possible to identify some minimum standards that all national business registries could agree to adopt to provide reassurance that information provided electronically is correct and to minimise the possibility of fraud. It would be important to consult publicly on any proposals as to minimum standards and to involve companies, others who file information with business registries, the business registry itself and users of business registry information in the consultation to make sure that any safeguards are appropriate, practical and cost effective and that the system will provide appropriate reassurance to companies and other users of the system.

3. INFORMATION PROVIDED BY BUSINESS REGISTRIES

At present, a person can apply to a business registry for a copy of information which is part of the Core Information either electronically or in hard copy form. Copies must be obtainable in electronic form or hard copy form as the applicant chooses, However, there is an option for a Member State not to provide documents in electronic form if (i) the documents were filed in paper form before a stated date (which cannot be later than 31 December 2006) and (ii) a stated period (which cannot be shorter than 10 years) has elapsed between the date of filing and the date of the application for the documents.

If a national business registry provides electronic copies of information about a company they will only be certified as "true copies" if the applicant explicitly requests this. This is in contrast with the position for hard copies, where they must be certified as "true copies" unless the applicant dispenses with this. The EU could consider requiring electronic copies of information about companies provided by national business registries to be certified as true copies in all cases.

4. INFORMATION SHARING BY BUSINESS REGISTRIES

The Business Registries Interconnection System (BRIS) allows data to be exchanged relating to branch disclosure notifications and cross border merger notifications. However, the information available about a company from each national business registry is more extensive than that. In addition, information that is relevant to companies, for example, relating to the disqualification of directors and insolvency matters, may be kept by other registries. There could be benefits for both companies and the public if more information that is already publicly available in one Member State could be made available in all Member States using BRIS. The EU could consider whether there are other types of information relating to companies, but kept by other registries, that would also be of benefit to the public if more registries were to share such information.

The EU could also consider whether technology could be used to help companies provide information they are required to provide. For example, if a company has a branch in another Member State it is required to make filings with the national business registry of the Member State where the branch is located. Technology could, however, enable information filed with the national business registry of the Member State where the company is incorporated to be provided automatically to the national business registry of any Member State where the company has a branch.

In due course, it might be possible to identify other registries (i.e. registries other than a national business registry) which could also benefit from a system which would enable a company to provide information once to its national business registry, with that information then being provided to all relevant registries which need it (rather than the company having to provide it separately to each relevant registry).

5. COMMUNICATIONS BETWEEN A COMPANY AND ITS SHAREHOLDERS AND OTHERS

5.1. Freedom for companies to use digital technology if they wish

Member States should be required to allow companies to use digital technology in their relationships with shareholders and others if they want to do so. The informal Company Law Expert Group, in its report on digitalisation in company law dated March 2016, recommended that the European Commission should consider taking action so that Member States are required . Because companies are subject to company law, the existing law may require them to use hard copy communications with their shareholders and others and vice versa. The company law may need to be changed to make it clear that a company can choose to use digital technology.
The technology that a company wishes to use should be a matter for the company, rather than being prescribed by company law, this should not be laid down in an EU act. The ICLEG Report also recommended that companies should be allowed to make use of any technology without prior consent from public authorities.

The sorts of activities where a company is likely to want to use electronic communications include:

1. Giving notice of a shareholder meeting or other meeting;
2. Providing information to those entitled to attend a meeting before the meeting;
3. Allowing a shareholder to appoint a proxy or representative to attend a meeting or exercise other rights at a meeting;
4. Voting at a meeting eg on a resolution to be passed at the meeting;
5. Adding an item to the agenda of a meeting, or a resolution to be put at the meeting or asking a question to be put at a meeting;
6. Taking part in a meeting without being physically present in a particular location;
7. Receiving the results of decisions taken at a meeting;
8. Providing the annual report and accounts and any other financial information (e.g. half yearly information);
9. Providing information in connection with a shareholder exercising their rights (e.g. to convert securities or exercise an option);
10. Allowing a shareholder to exercise rights (e.g. giving notice to the company);
11. Communicating a takeover offer or proposed merger to shareholders, employees and other interested parties.

5.2. Taking the decision and protection for shareholders

If, as proposed (see above 5.1.), a company is to be allowed to choose whether or not to use digital technology in its communications, various questions arise. First, how should the company make this decision? Typically, national law will prescribe how such a decision should be taken. The usual approach is that the shareholders should decide (rather than it being a matter left for directors to decide). National law will also typically set out the type of resolution needed, for example whether a simple majority is sufficient or whether a higher percentage of shareholders must vote in favour. Generally, the approach in the company law field has been to leave such matters to national law to determine. This respects the differing corporate governance systems of Member States.

The second issue to consider is whether a company should be able to require all shareholders to use digital technology when dealing with the company or whether there should be

protections for existing shareholders who wish to continue to receive and use hard copy communications. There is a difference between (i) companies which are formed on the basis that they will use digital technology, so that all those who become shareholders know that this is the approach to be taken, and (ii) existing companies which have used hard copy communication in the past and which wish in future to use digital communications. In this latter case, there is an argument that existing shareholders should be protected so that they can continue to require the company to communicate with them in hard copy form and allow them to communicate in hard copy form if they wish. There may also need to be some protection to ensure that, where the company is required to provide information to them, this remains free of charge and, if the information is not required to be provided to them free of charge, that the cost they pay for a hard copy is proportionate and does not exceed the actual cost.

Another question is whether a shareholder should be able to change the choice they have made, for example whether a shareholder who has originally chosen to receive hard copy communications should later be able to agree to receive electronic communications and whether they should be able to revert back to requiring hard copies. Once a company has moved to using electronic communication with all its shareholders there may be a significant cost for it in reverting to providing hard copies to a few shareholders.

In each case, it is important to consider whether the question is being asked and answered in relation to all companies, both private and public and whether listed or not, or only in relation to certain sorts of companies (and, if so, which).

In cases where a company has not passed a shareholder resolution to allow it to use electronic communications generally with shareholders who agree and provide their details, there is a question as to whether the company should nonetheless be able to agree with individual shareholders to provide and receive information electronically. If so, should there be an obligation on the company to make this possibility available to any shareholder who wants it?

Where electronic communications with shareholders are used, there will be questions about when a notice will be deemed to be sent when sent by email, whether notice can be given for example by putting it on a website and notifying the shareholder (by email or in hard copy form) that it is available to them and what happens if the email bounces back. Although these are important practical questions they are quite detailed and may be thought to be best left to national law to determine. Again, the question of a different approach for different types of companies needs to be considered. It might be worth asking, for example, whether there would be a benefit for listed companies and their shareholders in adopting a common approach to such matters.

As explained above, listed companies are already allowed to use digital technology in connection with their general meetings. In practice very few do so and in some Member States there are doubts about the legal position where there are problems with the technology. It has become more usual for listed companies to have shareholders from different jurisdictions, which can make physical attendance at a meeting more difficult. It has also become more usual for the real investor in a listed company not to be the shareholder of the listed company but to use a nominee or custodian to act as the shareholder. The real investor may also use a proxy adviser or someone else to assist with reviewing information from the listed company and to give instructions to vote or exercise rights. This has given rise to practical difficulties both in making sure that information about a general meeting reaches the real investor (or the person they wish to use) in a timely fashion, in enabling the real investor (or the person they wish to use) to make sure that its instructions to vote are executed in a timely fashion and in checking that the listed company has received the votes to which the instructions relate. A listed company is likely to have difficulties in practice in reconciling the votes cast by shareholders with the instructions given by the real investors (or someone on their behalf) because of the complexity of the systems used for this purpose.

5.3. Impediments to using digital technology at general meetings

In considering these issues, first it would be useful for Member States to consider whether there are impediments in their existing laws which discourage some or all companies from using digital technology in practice. For example, will a resolution to be passed at a general meeting be declared invalid if the system used for shareholders to participate electronically fails during a meeting or if shareholders cannot use a voting system. If so, it would be advisable to consider what these impediments are and whether it would be possible to remove them or to provide more certainty as to how to avoid the problem arising, what the position would be if the problem does arise and whether steps can be taken to deal with a problem that arises so that a valid meeting can be held.

It might also be helpful to share best practice amongst listed companies relating to the use of technology at general meetings and the associated actions relating to general meetings. This should involve listed companies, their shareholders, real investors, those involved in receiving information and transmitting voting instructions and the organisations that can provide the relevant electronic facilities.

5.4. Use of standards formats for information

Digital technology may offer a practical way to make information connected to a meeting of a listed company more readily available not just to shareholders but also to the real investors behind the shareholders and to the public more generally. The proposal to amend the Shareholder Rights Directive[7] already contains some provisions aimed at addressing the problems of providing information to shareholders. It proposes that intermediaries should communicate information from the listed company to shareholders without delay and transmit information from shareholders necessary to exercise their rights to the company without delay and facilitate the exercise of shareholder rights, including the right to participate and vote in shareholder meetings.

Digital technology could offer a practical way for listed companies to produce information about a general meeting in an agreed format and to provide it in an agreed way. For example, standardised information could be provided and published on a single website which would be used for this purpose for all listed companies. This could help shareholders, intermediaries and real investors to identify information more easily and to transmit information in the standard form more easily. This approach to providing standardised information could also be extended to other actions by companies, such as further issues of shares or the exercise of shareholder rights e.g. to convert securities.

There may also be benefits in agreeing a market standard approach for listed companies across the EU to identify accounts and investors, similar to the approach used in the United States of America. If there were a standard form of proof of entitlement to attend and vote at a shareholder meeting and exercise shareholder rights that all listed companies would accept, this would simplify shareholders exercising their rights. If a system could be devised that all listed companies, shareholders, intermediaries and investors could use for voting or if minimum standards could be set when giving or receiving voting instructions, this could help to ensure that votes can be sent quickly and cost effectively through the relevant participants in the process. Ideally this would extend to a system to enable listed companies to confirm how many votes have been received and counted and how this links to the original instructions given.

[7] Proposal for a Directive amending Directive 2007/36/EC, COM(2014)0213 of 9.4.2014

There would obviously be costs associated with any such initiative and the question of who should bear such costs would need to be carefully considered.

Some work has already been undertaken on the reasons for problems with voting shares in listed companies and the ways in which the problems could be addressed. Some market standards have been produced but are not always followed. The discussion paper by the Shareholder Voting Working Party[8], which considered the position in the UK, shows that a detailed assessment is needed to identify where changes could be made. It also contains information about the approach in some other Member States and non-Member States and refers to work being done by other vote confirmation groups in the Netherlands.

The EU could consider a more coordinated approach to identify the problems shareholders and others experience in receiving information and providing information and casting votes, the problems of listed companies in confirming whether or not votes have been cast and confirming to an investor who holds shares through a nominee or custodian (or someone acting on their behalf) whether or not votes have been cast. Any review of this area should include listed companies, their agents who provide services relating to general meetings, those who provide nominee or custody services, proxy voting advisory firms, investors and any other interested parties.

5.5. Appointing a permanent representative for a stakeholder

At present, although the Shareholder Rights Directive allows a shareholder of a listed company to appoint a proxy holder electronically to attend and vote at a general meeting and to speak and ask questions in the general meeting, which may be done by electronic means if the company chooses to allow this, Member States may choose to limit the appointment to a single meeting or to meetings held in a specified period. This means that there may only be a short period of time in which a shareholder can appoint someone and in practice this may make it difficult for the shareholder to take advantage of these possibilities. Digital technology could help to ensure that information provided by a listed company to its shareholders generally is provided directly to a person appointed by a shareholder as their permanent representative (instead of to the shareholder) where the shareholder has requested this. This would enable the real investor behind a shareholder of a listed company to have themselves (or someone else they designate) appointed as the permanent representative entitled to receive information from the company digitally instead of it being sent to the shareholder.

It would also be worth considering whether a permanent representative appointed in this way could or should be recognised by the company as the person entitled to exercise all the rights that the shareholder could exercise in place of the shareholder. Again, it should be possible for such rights to be exercised digitally.

If such an idea is to be pursued, there are various issues that would need to be considered. Should this only apply to listed companies (where it is likely to be of the greatest interest) or should it extend more widely? Should it only be possible to appoint a permanent representative in respect of all the shares held by a shareholder or should a shareholder be able to appoint a permanent representative in respect of some shares only (and be able to appoint different permanent representatives in respect of different numbers of shares)? The usefulness of the proposal will be severely limited if a shareholder can only appoint one permanent representative in respect of all the shares held. This is because shareholders are often custodians or nominees who act for a large number of investors, each investor being entitled to different shares. Some investors may want to take advantage of such a proposal whilst others may not. It is therefore most likely to be useful if the shareholder can appoint one or

[8] Shareholder Proxy Voting: Discussion Paper on Potential Progress in Transparency published July 2015.

more permanent representatives, with each permanent representative being appointed in respect of a stated number of shares.

There are likely to be various issues which will need to be considered, particularly where a shareholder changes the number of shares that it holds. If the number of shares held by a shareholder changes, the listed company will want to know if a permanent representative is still authorised in respect of the same number of shares, or to be told if the relevant number of shares in respect of which the permanent representative is appointed has changed. There may need to be an obligation on a shareholder who has appointed a permanent representative to inform the listed company if there is a change in the number of shares to which the permanent representative's appointment relates. It may also be desirable for the listed company to have the right to require the shareholder and/or permanent representative to confirm the number of shares to which the appointment relates. It may also be desirable for the relevant company law to set out that the company is entitled to receive instructions from the permanent representative in relation to the shares for which it has been appointed. It would need to be clear whether it is only the shareholder who can appoint and end the appointment of the permanent representative and change the number of shares to which the appointment relates (or whether the permanent representative should also be able to notify the company that its appointment has ended). The listed company is unlikely to want to be put under any obligation to check the relationship between the shareholder and the permanent representative other than to check that the shareholder has appointed the permanent representative in relation to a specified number of shares.

5.6. General meetings and data protection

In many Member States, including Denmark, France, Italy and Spain, the press may be invited to attend the annual general meetings of listed companies. This is an effective way to ensure there is publicity for the proceedings at the general meeting which may be of interest to the public.

If companies wish to record and transmit the proceedings at their meetings both to shareholders and to the public more generally it is important that the law is clear as to whether or not this is permitted. Such recording and transmission may involve identifiable individuals who may not have given express consent to the proceedings being recorded and transmitted and may refuse to do so. It is not entirely clear how the General Data Protection Regulation[9] which allows for the processing (recording and distribution) of data in certain circumstances applies where there is also a public interest in a company being able to transmit and record meetings, to assist shareholder engagement, to facilitate cross-border investment and to meet the public interest in the general meetings of certain companies.

It would be helpful to make it clear that where a listed company has decided, in accordance with the relevant legal requirements of its applicable governance system, to transmit proceedings at a general meeting or a meeting of a class of shareholders or other securityholders and those entitled to attend the meeting have been advised that this is the case, that those participating in the meeting will be deemed to have given their individual consent to the processing of data both by transmitting the meeting and storing it and accessing it electronically. The position in relation to other companies could also be considered.

[9] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119, 4.5.2016, p. 1.

5.7. General meetings – whether a physical meeting is necessary

Traditionally, a meeting of shareholders comprises a physical meeting of the shareholders. As set out above, listed companies must be allowed to offer their shareholders any form of participation by electronic means, including by real-time transmission of the general meeting, real-time two-way communication enabling shareholders to address the meeting from a remote location and a mechanism for casting votes before or during the meeting without the need to appoint a proxy who is physically present. Some listed companies have suggested that they should be able, with shareholder approval and subject to certain safeguards, to dispense with the requirement for a physical meeting altogether. The proposal is that the company would send out the relevant information that would be sent out if a physical meeting were to take place and shareholders would be asked to vote on the resolutions that would be proposed in the same way as if a physical meeting were to take place. They would be able to vote by electronic vote or by postal vote or by any other means acceptable in the relevant Member State. There would, however, be no physical meeting at which directors would attend or which a shareholder could attend in person.

Such a proposal would need to be subject to consultation to see if it would be acceptable. Some shareholders may think that it is important for there to be a fixed time and date for discussion of the matters being proposed and any proposed resolutions, and that the directors should be available to answer any questions at that time. There could be a discussion as to whether this could instead be replaced by allowing shareholders to raise questions relating to the subject matter within a defined time period and putting an obligation on the company to answer these questions and make the answers available to all shareholders. There could also be a right for a minimum number of shareholders to have the right to require a physical meeting to be held on giving a specified amount of notice. A consultation could ask if any further safeguards would be needed.

5.8. Company's email address

Where a company has decided to use electronic communications to provide information to shareholders and to receive information from shareholders, there is a question as to whether the company should be required to provide an email address or some other electronic address as the email address or other electronic method shareholders should use to contact the company or provide information to it. There is a question as to whether any such requirement should apply to all companies who have decided to use electronic communications or be limited only to listed companies. If it is decided that some or all companies should be subject to such a requirement, there is a question as to whether the company should be required to file this information at its national business registry under Directive 2009/101 and should be required to make it public on its website. The company should be able to change this address from time to time, subject to having to update the information filed with the national business registry and on its website.

5.9. Company's designated URL

Many companies have a website. Shareholders and members of the public use the company's website to access information about the company. Where a company is part of a group of companies, although the website may contain information relating to the group of companies the website will not necessarily include information about every individual member of the group.

Some companies do not have a website. The reasons for this may differ. For example, they may be too small, they may not deal with the public, they may be part of a group and rely on information provided by a group website. It does not seem appropriate to require all companies to have a website.

For companies that do have a website, it may be helpful to allow them to make better use of their website to provide certain information, whether to shareholders, securityholders or others. However, if a company is to use its website more formally to provide certain information it would be helpful for there to be certainty as to which is the relevant page for a particular company. Although many companies use a URL that replicates the company name fully or in part, there is increased competition for URLs and it may be difficult to be sure what the URL is for a particular company.

It would be helpful if Member States were required to ensure that their national business registry must allow companies incorporated in that Member State and the branches of other companies to register a particular URL as its designated URL. The URL designated by the company for this purpose would not have to be the homepage of its website used for other purposes. The company would also have to be able to change its designated URL from time to time by filing this information with the national business registry. The designated URL should provide clear information about the specific company to which it relates. This could be done, for example, by reference to the company's legal entity identification number as assigned to it by its national business registry.

Once a company has a designated URL that is registered with its national business registry, it should be allowed to use that URL to provide information that is mandated by law (whether EU law or national law). However, the company should continue to be required to provide information to the business registry as well. This approach would mean that shareholders and members of the public would be able to access information about the company both via the national business registry and via its designated URL.

In some Member States, companies are required to publish certain information such as a requirement to print an advertisement, to make a declaration or publish a notice in a newspaper. If a company were allowed to publish the relevant advertisement, declaration or notice on its designated URL instead, that would reduce its costs and should be readily accessible to shareholders and the public. A consultation could consider whether a company should have to obtain shareholder approval first to take advantage of such a change.

It would be worth considering whether there should be an obligation for companies that have a website to register a URL with their national business registry and to provide certain information on that URL. If so, there should be a discussion as to whether this obligation should only apply to certain companies, for example listed companies or companies above a certain size.

If the idea of a designated registered URL is adopted, there is a question of whether there should be mandatory information which must be included on the URL and, if so, what it should be. As a minimum it would seem advisable for the page to include the company's name and legal identification number. It could include the other information which the company is required to file with the national business registry or a link to the national business registry where such information is available. Any information available on the designated URL should

be available free of charge. One of the purposes of this approach would be to provide the public with easy and costless access to the information that is available at the national business registry. As it is becoming more common for those wishing to find out information about a company to come from another jurisdiction, there may be problems in understanding the information where it is provided in a language the user does not understand. There might be a benefit in requiring companies to provide certain basic information in a standard format and standard order, so that the user will know, for example, that the item numbered 1 will always be the company's full name and the item numbered 2 will always be its registered office etc.

6. COMPANY RECORDS AND ACCESS TO THEM

Company law normally requires a company to keep certain records, for example a record of its register of members and details of its directors. National law may also give rights to shareholders and sometimes to members of the public to require the company to provide copies of all or part of the records to them upon request.

It may not always be clear whether a company is permitted to keep such records in digital form. It may also not be clear whether a shareholder or other person with the right to demand a copy of the records may make the demand electronically if they wish (as well as in hard copy form) or whether a company that receives a demand for a copy may or must provide the information in electronic form, at least if it is kept in electronic form.

It would seem desirable to require Member States to permit all companies to keep any record that they are required to keep in electronic form if they so wish. Some companies may prefer to keep records in hard copy form, for example, where they are a small company. It does not seem sensible for such companies to be compelled to keep records in electronic form.

If a company uses an electronic address for a shareholder (either in addition to a physical address or instead of such an address), it would seem sensible for the company to be required to keep a record of that information as part of the information it keeps about its shareholders.

Where a shareholder or another person has the right to require the company to provide information to them, it would seem appropriate to allow that person to request the relevant information either electronically (assuming the company has an email address) or in hard copy.

The question of whether a company should be permitted or required to provide information electronically raises some potentially difficult issues. There may be benefits in allowing information to be provided electronically, particularly where it is kept in electronic form, because this is likely to be easy and cheap. However, depending on the information to be provided there may be concerns about providing the information to a third party in electronic form as this may make it easy for the recipient to use the information in ways other than the intended purpose for which the right is provided. For example, if a company keeps a shareholder's email address as part of the information it keeps on shareholders and is required to provide details of shareholders to other shareholders or third parties, is it appropriate for the company to provide the shareholder's email address, particularly if the company has concerns about the way in which the recipient will use that email address?

Safeguards to deal with potential problems could include, for example, requiring the person who is exercising their right to require information to be provided to confirm the purpose for which they want to use the information, restricting the purpose for which they can use the information and allowing the company to apply to court or an appropriate regulator for an order that it need not provide the information if it believes the information will be misused.

7. CONTRACTS AND EXECUTION OF DOCUMENTS

Typically, company law sets out the requirements that a company must follow to execute a document or enter into a contract. As company law was written when companies could only execute hard copy documents or authorise someone to sign a hard copy contract on behalf of the company, it is possible that the relevant provisions of the legislation are framed in such a way that either makes it impossible for a company to enter into contracts electronically or execute documents electronically or leaves some uncertainties as to whether the company has gone through the correct approach in order to validly enter into the contract or execute the document.

For example, is it possible for a company to have an electronic signature and what is needed for someone dealing with a company to be sure that the company has met the relevant requirements? There may be requirements, such as a requirement for someone to attest a signature, which in practice may make it difficult or impossible for a company to meet the relevant requirements electronically. eIDAS lays down the conditions under which Member States recognise electronic identification means of natural and legal persons falling under a notified electronic identification scheme of another Member State. It establishes a legal framework for electronic signatures, electronic seals, electronic time stamps, electronic documents, electronic registered delivery services and certificate services for website authentication, However, it does not affect national or EU law related to the conclusion and validity of contracts or other legal or procedural obligations relating to form.

8. CONCLUSION

There are many ways in which companies, those establishing companies and running them and those they deal with could benefit from more use of digitalisation. At the moment, company law may inhibit the full use of digitalisation in various areas. Any proposal either to facilitate the use of digitalisation or to require the use of digitalisation in a particular case should consider carefully whether a change in law at EU level is needed and/or whether the sharing of good practice can also contribute to an improvement. It should also carefully weigh the cost of requiring any action against the potential benefits. It should consider which types of companies should be the subject of any proposal and whether safeguards are needed and, if so, what is proportionate. It should also consider whether the approach can be technology neutral and whether it is appropriate to require common standards in certain cases. It should also consider whether any approach to be adopted is sufficiently flexible to allow companies and others to adapt as technology changes in the future.

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DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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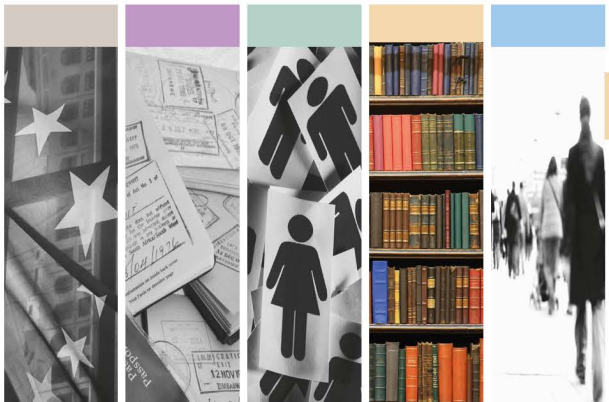

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