

The Informal Company Law Expert Group
(ICLEG)

**Report on
virtual shareholder meetings and efficient
shareholder communication**

August 2022

The current ICLEG was established by the European Commission (EC) in 2020 to assist it with expert advice on issues of company law and corporate governance and it held its first meeting on 2 July 2020. The agendas of its meetings are available online at the webpage on Register of Commission Expert Groups and Other Similar Entities maintained by the European Commission¹.

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¹ [Register of Commission expert groups and other similar entities \(europa.eu\)](https://ec.europa.eu/commission/expert-groups-and-other-similar-entities/)

In 2021, the European Commission requested ICLEG to consider the issue of virtual shareholder meetings and efficient shareholder communication in the framework of Action 12 of the 2020 Capital Markets Union Action Plan, and five ICLEG members (Mónica Fuentes Naharro, Marco Lamandini, Lina Mikaloniené, Christoph Teichmann and Martin Winner) were charged with producing a report on behalf of the Group. Gerald Spindler provided expertise on this work as observer. After consultation within the Group, this report reflects the advice of ICLEG to the European Commission as to matters that ICLEG believe merit further consideration.

Disclaimer: This Report has been drafted by the ICLEG (Informal Company Law Expert Group). The views reflected in this Report are the views of the members of the ICLEG. They do not constitute the views of the European Commission or its services.

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A. Introduction

1. In Action 12 of its Capital Markets Union 2020 Action Plan (CMU Action Plan), the Commission announced its intention to assess, as part of its evaluation of the implementation of the Shareholder Rights Directive 2 (SRD2)² to be conducted by Q3 2023, “(i) *the possibility of introducing an EU-wide harmonised definition of ‘shareholder’, and; (ii) “if and how the rules governing the interaction between investors, intermediaries and issuers as regards the exercise of voting rights and corporate action processing can be further clarified and harmonised”*.³ In addition, in the same action, the Commission committed to “*investigate, by Q4 2021, whether there are national regulatory barriers to the use of new digital technologies*” in this area “*that could make communication between issuers and shareholders more efficient and facilitate the identification of shareholders by the issuers or the participation and voting by shareholders in general meetings*”.⁴
2. In order to contribute to this task, and in particular to the assessment on new digital technologies, the Commission’s Informal Expert Group on Company Law and Corporate Governance (ICLEG) set up a subgroup on the use of digital tools in company law. This draft paper was prepared by this subgroup, starting in the spring of 2021, and finalised in the spring of 2022. In its first part (B.), it summarises the results of a questionnaire sent out to ICLEG members on virtual shareholder meetings and draws some preliminary high-level conclusions. The second part (C.) deals briefly with other possible barriers to the exercise of shareholder rights related to general meetings and other issues of communication with shareholders that are addressed by the CMU Action Plan and the Final Report of the High Level Forum on Capital Markets Union⁵, which the Commission also considered when developing the Action Plan. The third part (D.) will summarize the conclusions.

² 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 (OJ L 132, 20.5.2017, p. 1–25).

³ Action 12 of the 2020 CMU Action Plan (cf. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Capital Markets Union for people and businesses – new action plan, COM(2020) 590 final, p. 13 and Annex, p. 7).

⁴ Idem.

⁵ A new Vision for Europe’s capital markets – Final Report of the High Level Forum on the Capital Markets Union, June 2020.

B. Electronic participation and virtual shareholder meetings

I. Preliminary observations

3. **Basis.** This part of the paper is the result of a questionnaire on virtual shareholder meetings answered by ICLEG members. We have received questionnaires from the following countries: Austria, Denmark, France, Germany, Ireland, Italy, Lithuania, Luxembourg, the Netherlands, Norway, Poland, Spain. This paper deals with the current situation in these countries and does not analyse ongoing legislative projects.
4. **Aim.** The following does not purport to give an exhaustive comparative overview of national regulations but tries to examine some core issues: possibility to organise purely virtual general meetings under national law, who can decide on offering electronic participation to the shareholders or organising purely virtual general meetings under national law, what shareholder rights can be exercised electronically, and shareholder identification for the purposes of participation and voting at general meetings. At the end, we will turn to the practical importance of virtual meetings and electronic participation, and the reasons for deficiencies if any.
5. **Structure.** In the following, we will start by analysing each topic for listed companies generally and then turn to rules in effect during the pandemic, before looking at unlisted public and private companies in some instances. We did not receive a lot of detailed information on the regulation of details of the organization of virtual meetings or electronic participation in private companies. This leads us to assume that regulation is sketchy and that a wider stock-taking consultative exercise with the industry on such practical aspects would be very advisable to better identify how the law in books translates into law in action and common practices. Where adequate we will close with remarks as to possible policy choices on the European level.
6. **Definitions.** In the following, we use the term “purely virtual meeting” for a general meeting in which shareholders cannot participate in person, but have to make use of online methods of participation. Where we use the term “electronic participation” this refers to the opportunity (but not the obligation) for shareholders to participate electronically in a general meeting. A “hybrid meeting” is a meeting in which both electronic participation and participation via physical presence is possible.

II. Purely virtual and hybrid meetings

7. **Listed companies.** The first core issue is whether meetings can be purely virtual or whether shareholders have the right to participate in a physical meeting even if electronic participation is possible (hybrid form), in accordance with Art. 8 SRD and its national implementation. Before COVID-19, the majority of Member States covered by this paper⁶ requested a physical meeting with a corresponding right⁷ of shareholders to participate physically, at least for listed companies. However, a sizeable number provides for purely virtual meetings in listed companies.⁸ In Spain, these rules have been introduced during the recent pandemic but will remain in force thereafter; for that reason, we will treat the Spanish situation as independent of COVID-19. Similarly, in a recent law adopted in July 2022, the German legislator empowered (listed and unlisted) public companies to have purely virtual meetings, making use of the experiences gained during the pandemic.⁹ In Italy, it is controversial whether a purely virtual meeting is now to be considered admissible, provided that the articles of association so stipulate and a two way electronic participation is warranted.¹⁰ Even in some of the Member States allowing purely virtual meetings, such as Denmark and Ireland, purely virtual meetings are not common, which may be due to the companies' perception that shareholders should not be forced to participate electronically.¹¹
8. **Special rules for listed companies during COVID-19.** Not surprisingly, this has changed due to COVID-19. Even those Member States hesitant to introduce meetings without the right of shareholders to participate physically have done so, generally for the years 2020 and

⁶ Austria, France, Germany, Italy, Luxembourg, the Netherlands, Norway, Poland.

⁷ However, listed companies must be allowed to offer to their shareholders any form of participation in the general meeting by electronic means according to Art. 8 of SRD I.

⁸ Denmark, Ireland. Although the situation is not clarified in Lithuania, the draft proposal of the amendment of the Law on Stock Companies as of 17 December 2021 No.21-34243 permits a purely virtual shareholders' meeting if the articles of association provide for such a mode (approved unanimously by shareholders holding voting shares), and, upon request of shareholders possessing 1/10 of the voting rights (if the articles of association do not provide for a lower threshold), a duty for the company to enable shareholders' electronic participation and electronic voting at the shareholders' meeting. The board will have to approve internal rules for electronic participation and electronic voting at the shareholders' meetings. According to the *travaux préparatoires*, internal rules cannot reduce shareholders' participation rights.

⁹ Gesetz zur Einführung virtueller Hauptversammlungen von Aktiengesellschaften und Änderung genossenschafts- sowie insolvenz- und restrukturierungsrechtlicher Vorschriften v. 20.7.2022, BGBl. I, 1166.

¹⁰ This interpretation is influentially advocated by Assonime, the association of listed companies and by the Notaries of Milan with their Massima 200/2021; a majority of authors are however not yet persuaded.

¹¹ Under Danish law, the purely virtual meeting would have to be introduced in the company's articles by a normal resolution, which means that the resistance of up to one third of the votes or the capital could be overcome by the meeting's resolution.

partially 2021 and/or 2022.¹² Under French law, special rules apply only if sanitary restrictions are in place at the time of the meeting; apart from purely virtual meetings, listed companies can opt (for cost reasons) for “closed door sessions” without any direct shareholder participation (either in person or virtually), but voting ex ante and a live web-stream. In Italy, as an alternative to virtual meetings, special rules during COVID-19 allow for a “closed door session”, with attendance (either physical or only virtual) of the designated representative appointed by the company to collect proxies from the shareholders and to attend and vote accordingly.¹³ Spain and Germany introduced purely virtual meetings during the pandemic, first on a temporary basis but now indefinitely. In most other countries, it is still unclear whether the experiences of 2020/21 will lead to more permanent changes.¹⁴

9. **Unlisted and private companies.** The landscape is more varied as far as unlisted or private companies are concerned. In some Member States the same rules apply to all sorts of companies, either in their entirety¹⁵ or at least partially¹⁶, which means that purely virtual meetings in unlisted or private companies are possible in Denmark, Ireland and Spain, and are possible but not uncontroversial in Italy, but not in the other countries mentioned. In some other countries unlisted companies can hold purely virtual meetings, while that option is not open to listed companies.¹⁷ In a third group of countries, which clearly distinguish between private and public companies, purely virtual meetings are a possibility in private companies only.¹⁸ During the pandemic purely virtual meetings were (are) possible in all jurisdictions for all types of companies.¹⁹
10. **Remarks.** If one understands electronic participation in European law as a tool to enable cross-border shareholders to participate in general meetings, there is little justification for

¹² Austria, Italy, Luxembourg, the Netherlands, Norway. In Italy the special regime is applicable until 31 July 2022 (Law Decree No 228/21 converted into Law No 15/22). For Germany and Spain see below.

¹³ Art. 106 Law Decree 18/2020 converted into Law 27/2020.

¹⁴ For example, in April 2022 Ireland opted to further extend its temporary measures until 31 December 2022.

¹⁵ Denmark, Ireland, Italy, Poland. In Italy, Art. 2370 Civil Code applies to listed and unlisted companies, whereas the complementary regime implementing Art. 8 SRD in Italy is set out in Art. 127 of the Consolidated Act on Finance and applies only to listed companies.

¹⁶ Austria, Italy, Lithuania (a few specific rules for listed companies), the Netherlands, Spain.

¹⁷ France.

¹⁸ Austria, Germany.

¹⁹ However, in some countries, such as Italy, the rules were different for partnerships or other unincorporated entities, for which fully virtual meetings were prohibited. In Lithuania, the legislative approach concerning virtual members' meetings is not uniform with respect to different types of companies either (e.g., there are no specific rules introduced for small partnerships, commercial partnerships, etc.).

either forcing Member States to introduce purely virtual meetings or for prohibiting such meetings. Rather, Member States should have leeway in this respect – always provided that electronic participation is allowed for those shareholders willing to make use of such an opportunity even when the general meeting is held physically (for a policy recommendation see below # 16). A case may be made that purely virtual meetings must be accessible in special circumstances such as the COVID-19 pandemic – see below # 58.

III. Decision on electronic participation and purely virtual general meetings

11. Before the pandemic there were two different situations – countries allowing purely virtual meetings and countries allowing electronic participation (see II. above).
12. **Listed companies – purely virtual meetings.** As far as purely virtual meetings (for a definition see above # 6) are concerned, they require that the articles of association specifically allow for this possibility in Denmark, which means that shareholders decide, while in Ireland the board of directors decides even in the absence of any specification in the articles. In Spain, purely virtual meetings will be possible even after the pandemic²⁰ if foreseen in the articles of association; the situation is similar in Germany, although the provision in the articles is valid for only up to five years and the articles can empower the directors to hold purely virtual meetings without making such meetings mandatory. In none of these countries shareholders opposing such a decision are covered by any special protective measures.
13. **Listed companies – electronic participation.** As far as the possibility to participate digitally in a general meeting that members otherwise can attend in person is concerned, we can distinguish three groups. In the majority of countries the shareholders decide via (an amendment of) the articles of association.²¹ In some countries, the articles can also empower the board of directors and/or the supervisory board to enable such participation.²² In other countries, the board of directors decides on electronic participation if the articles do not contain a provision to the contrary, i.e., forcing the company to provide the possibility of

²⁰ See # 7 above about the specialties of Spanish law, where purely virtual meetings were allowed in a transitory way during the pandemic but have remained – with slight changes, by means of Law 5/2021 (<https://www.boe.es/buscar/act.php?id=BOE-A-2021-5773>) – in their companies Act (Ley de Sociedades de Capital – LSC) after that.

²¹ Austria, France, Germany, Italy, the Netherlands, Spain.

²² Austria, Germany, the Netherlands.

electronic participation.²³ In Luxembourg, the right to participate electronically is always granted by law even without such a provision in the articles.²⁴

14. **Special rules for listed companies during COVID-19.** Due to COVID-19 almost²⁵ all countries surveyed requiring a provision in the articles of association changed that rule and empowered the board of directors²⁶ to make that decision.²⁷ This was true both for electronic participation and for purely virtual meeting, regardless of whether this latter possibility already existed²⁸ or was introduced during the pandemic.²⁹
15. **Unlisted and private companies.** For unlisted and private companies, Member States generally follow the rules in force for listed companies. This means that before the pandemic in most jurisdictions the members decided about the type of meeting or participation via an amendment of the articles,³⁰ while in some this decision fell to the board.³¹ However, in Luxembourg electronic participation is only an option for the company, which is different for listed companies, where it is mandatory for the company to provide for the right to participate electronically, while in Norway, Germany, and Austria for private companies a purely virtual meeting is always possible with the consent of all members; additionally, under the Norwegian law of private companies, members always have the right to participate electronically. Under COVID-19 rules, where they existed, the board of directors or the body convening the meeting (if not the board) decided on the modus of the meeting in all Member States.
16. **Remarks.** As a result, one can say that, outside COVID-19, in all countries but Luxembourg shareholders can decide on electronic participation. The only difference is the default rule: In most countries surveyed, without a provision in the articles of association electronic participation is not possible, while in a sizeable minority of Member States electronic participation is allowed unless the articles of association specifically preclude it. If one understands electronic participation as a tool enabling participation in shareholder meetings in Europe, one could fathom a rule whereby such participation must be possible under

²³ Denmark, Lithuania, Norway, Poland.

²⁴ Under Polish law, the public transmission of the GM is mandatory.

²⁵ The exception being Lithuania, which introduced no special rules concerning Covid-19.

²⁶ In some countries, e.g., Germany, together with the board of supervisors.

²⁷ Austria, Denmark, France, Germany, Luxembourg, the Netherlands, Poland, Spain.

²⁸ Denmark.

²⁹ Austria, France, Germany, Luxembourg, the Netherlands, Norway, Poland, Spain (see # 7 above).

³⁰ Austria, Germany, France, Italy, the Netherlands, Norway (for unlisted public companies), Spain.

³¹ Denmark, Ireland, Lithuania, Poland.

mandatory law in a listed company, irrespective of whether the articles of association allow for such a possibility or of whether the board is in favour of this type of participation. One could then discuss whether there should be an exception to such a rule for listed SMEs due to the cost involved with electronic participation. As far as purely virtual meetings are concerned, outside of the pandemic Member States only permit them, if at all, on the basis of the articles. This seems to be a reasonable provision given that the level and quality of exchange is not the same as in physical meeting. However, a case can be made that in order to foster resilience, in exceptional circumstances purely virtual meetings should be possible even without a shareholder vote on the issue; in the view of many, the pandemic has proven that Member States have sufficient leeway to introduce such rules.

IV. Rights to be exercised electronically

17. **Preliminary remark.** An important issue is which type of rights can be exercised electronically, i.e., whether the company can limit the rights to be exercised or whether in any case the full array of rights must be available (including the right to table proposals or to raise questions). In most cases³², Member States do not foresee special rules as to the technical implementation³³ but sometimes instead refer to the rights that must be available to shareholders.³⁴ How to implement these rights is typically the responsibility of the board, which often makes use of specialised service providers.³⁵ The details for exercising shareholder rights must generally be part of the convocation.³⁶
18. **Listed companies – purely virtual meetings.** Where purely virtual meetings are available, outside of COVID-19 shareholders generally must be able to exercise (in a virtual context which allows two-ways participation and thus mirrors in the digital domain the same features of a physical meeting) the same rights as in a physical meeting, i.e., viewing, hearing,

³² One exception would be the need to provide the shareholder with an electronic confirmation of receipt of the votes (see e.g., Austria, Germany, Lithuania (for listed companies), Luxembourg).

³³ See e.g., France, the Netherlands.

³⁴ See e.g., Denmark, Germany, Spain (Art. 182 bis.3 and 521.2 and 521.3 LSC).

³⁵ See e.g., Denmark, France, Italy, Norway, Poland. However, there are good arguments that the company should be under a duty to save the web stream for shareholders to exercise their rights.

³⁶ See e.g., Austria, Germany, Ireland, Lithuania, Luxembourg, the Netherlands, Spain.

speaking, proposing, and voting.³⁷ However, in Spain directors may answer the questions that are posed by shareholders in the virtual meeting within seven days after that meeting³⁸. In Germany, the board may require that shareholders deposit their questions at least three days before the meeting and the board has to answer at least one day before the meeting, presumably in writing; shareholders have the right to ask additional questions in the virtual meeting if they are either follow-on questions arising from answers given by the board or refer to new circumstances which have arisen after the deadline for raising written questions has passed.

19. **Listed companies – electronic participation.** The situation varies if shareholders are not only able to participate electronically but can also attend the meeting in situ. In some countries, irrespective of the articles electronic participation must cover all shareholder rights in this situation as well.³⁹ In other Member States this is left to the articles. In such countries, the articles can enable the shareholders to exercise only certain rights electronically, such as the voting right, while for others, such as the rights to speak or make proposals, a physical presence in the meeting is necessary.⁴⁰ In the Netherlands, a shareholder who attends electronically waives his/her right to speak, but has the right to follow the proceedings in real time and to vote.
20. **Special rules for listed companies during COVID-19.** Under COVID-19 rules, a number of the normal requirements usually applicable have been relaxed considerably in many countries, while in others such requirements continue to apply.⁴¹ First, in many countries it is sufficient that shareholders may be enabled to follow the meeting optically and acoustically, but it is not necessary that they can intervene directly. However, they must be otherwise enabled to make

³⁷ See Denmark, Germany, and Spain. In Spain, in hybrid meetings (Art. 182 LSC) directors may provide that questions and proposals have to be brought in advance, but after the reform of the companies Act (by Law 5/2021) the prevailing interpretation considers that this is not acceptable for purely virtual meetings, where all the shareholders must have the possibility – as in a physical meeting – to speak, propose, ask questions, etc. As for purely virtual meetings in listed companies, shareholders must have the right to delegate or to exercise their voting rights in advance (Art. 521.3 LSC).

³⁸ See Art. 182 LSC. Of course, since this possibility may give room to “empty” shareholder’s information rights, it is considered that the delay (of directors answering within 7 days) must be justified.

³⁹ Denmark, Norway.

⁴⁰ Austria, France, Germany, Italy, Luxembourg. In Spain, hybrid meetings imply that directors (ex Art. 182 LSC) can ask shareholders to bring questions and proposals in advance.

⁴¹ The latter is the case in Denmark (although here practice seems to have been permissive by allowing broadcasted meetings without two-way communication), Italy, Lithuania, Luxembourg, Norway, Poland, Spain.

requests or “speak”, e.g. via a chat or e-mail.⁴² Second, in many Member States shareholder rights, and especially the right to ask questions, have been modified or restricted:

21. In Germany, the right to receive answers to questions initially was reduced to a possibility of asking questions (with the board selecting questions to be answered), where these questions had to be posed at least two days before the meeting; this was subsequently changed in that the deadline was shortened to one day and that questions have to be answered, but the board may decide how to answer them (separately, in writing, etc.).⁴³ In France, if sanitary restrictions make a physical meeting impossible, shareholders have the right to vote *ex ante*, to pose questions in writing and to follow the meeting via a webstream (meeting *huis clos*); the board may allow further virtual participation, which was not taken up in practice. Other countries leave further details open, e.g., by stipulating that shareholders must be given “a reasonable opportunity to participate”.⁴⁴ In the Netherlands, in purely virtual meetings, the right to ask questions must be respected, but shareholders may be required to ask questions up to 72 hours in advance, which then have to be answered in the meeting; most Dutch companies did not opt for more interactive meetings. In Italy, CONSOB has recommended that the full draft text of the tabled proposal for each resolution should be published well before the meeting and the agenda must be particularly specific, to allow a reasonable timeframe to interested shareholders to table alternative proposals (which must then be published on the company’s website); moreover, the cut off date for questions is recommended at seven days prior to the meeting, and at two days prior to the meeting for the relevant answers.
22. Hence, in many Member States COVID-19 rules have been more restrictive as far as the shareholders’ right to intervene in the meeting is concerned, which probably is a result of the fact that such meetings were obligatory due to COVID-induced restrictions. In Austria, listed companies may foresee that shareholders can only cast their vote⁴⁵ via four representatives elected by the company, which rule aims at minimising the danger of technical problems.⁴⁶ In turn, in Italy, although COVID-19 rules enabled both virtual meetings and participation via a

⁴² Austria.

⁴³ The rules currently in force in Germany are explained at # 18.

⁴⁴ Ireland.

⁴⁵ And submit proposals or object to resolutions.

⁴⁶ In practice, the same results have been achieved in Italy, albeit on a voluntary basis: representation of shareholders by proxies, who attended the virtual meeting.

designated representative elected by the company, all listed companies used the latter option and, reportedly, never the former.

23. **Remarks.** In general, the reduction of certain shareholder rights during COVID-19, especially the right to ask questions, was criticised in many countries, e.g., France or Germany. There are concerns that reducing shareholders' rights may potentially have an impact on the balance of powers between shareholders and managers as well as on the accountability of the board.⁴⁷ On the other hand, in many listed companies, shareholders decide on their voting behaviour long before the meeting anyway, e.g., by using the services of proxy advisors. Hence, in some countries the focus seems to shift towards information before the meeting, in most cases written. Of course, the situation is different for non-professional shareholders⁴⁸ and for most unlisted or private companies, where shareholder meetings continue to play a central role.

V. Shareholder identification for participation and voting in general meetings

24. **Listed companies.** In all jurisdictions, shareholder identification is a central issue. Many Member States repeat the SRD provision according to which the companies may only make the use of electronic means subject to such requirements that are necessary, inter alia, to ensure the identification of the shareholders.⁴⁹ Other Member States require companies to introduce methods to authenticate the sender.⁵⁰ Other jurisdictions do not address the issue explicitly.⁵¹
25. In many jurisdictions, in practice companies identify shareholders via individual access codes sent to the shareholders, which, presumably, is often done by specialised service providers.⁵² In other countries similar methods of authentication are generally used, presumably on the basis of two-factor authentication.⁵³ Strictly speaking, this is not a method of identifying shareholders, as it only ascertains that the person participating is in possession of the access

⁴⁷ <https://betterfinance.eu/wp-content/uploads/Virtual-AGMs-in-the-EU-FINAL-2.pdf>, p. 15, 18, 30-31.

⁴⁸ E.g., <https://betterfinance.eu/wp-content/uploads/Virtual-AGMs-in-the-EU-FINAL-2.pdf>, p. 12.

⁴⁹ E.g., Lithuania, the Netherlands, Poland.

⁵⁰ E.g., Denmark, Norway.

⁵¹ Austria.

⁵² See e.g., Austria.

⁵³ Lithuania, Norway.

data sent out by the company to the shareholder's address.⁵⁴ This is rightly deemed to be sufficient, as the risk of misuse of the access data is a risk best borne by the shareholder.

26. To the contrary, voting by phone is not possible in some jurisdictions due to the lack of identification possibilities.⁵⁵ The use of the blockchain seems to be in an experimental phase in some countries only.⁵⁶
27. **Special rules for listed companies during COVID-19.** The national treatment of the issue of shareholder identification does not seem to have changed in substance due to the pandemic but has been emphasized in some Member States.⁵⁷
28. In some Member States, it is reported that non-resident shareholders have experienced problems in participating in the meeting due to problems with identification (e.g. in France, problems with the access to the meeting by non-resident individual shareholders as the platform used for the registration of shareholders is limited to the domestic context; in the Netherlands, problems with live participation by institutional investors that are clients of international custodians rather than of Dutch banks, as identification data got lost in the chain of custodians).⁵⁸
29. **Remarks.** As far as legislation is concerned, it is hard to see how to regulate much further than prescribing that companies must take adequate and non-discriminatory measures in order to identify their shareholders. The precise details vary according to the state of technical development and the services on offer. We do not know whether it would be possible to provide a common European identification mechanism, either solely for the purposes of

⁵⁴ See also Lithuania, where the shareholders do not have to present an identity document when voting electronically. The concern is mirrored for Norway.

⁵⁵ See France. The problem, that is access to the shareholder's phone, has, however, some similarity to the one of access to the codes used for identification.

⁵⁶ E.g., in France, where the IT company Atos first provided such services in 2020. In Spain, IBERDROLA is currently using blockchain technology to certify shareholdings, proxies and votes for the general meeting of June 17th, 2022 (for some details see <https://www.iberdrola.com/press-room/news/detail/iberdrola-first-company-to-use-blockchain-to-certify-shareholdings-general-shareholders-meeting>). The first experience in Spain was that of Banco Santander's general meeting held March 23th, 2018, even though there blockchain voting was applied "in parallel" to the "real" - physical meeting, just to check how it would work (see for information <https://www.santander.com/content/dam/santander-com/es/documentos/historico-notas-de-prensa/2018/05/NP-2018-05-17-Santander%20y%20Broadridge%20utilizan%20por%20primera%20vez%20tecnolog%C3%ADa%20blockchain%20para%20votar%20en%20una%20ju-es.pdf>).

⁵⁷ Austria.

⁵⁸ <https://betterfinance.eu/wp-content/uploads/Virtual-AGMs-in-the-EU-FINAL-2.pdf>, p. 10, 24, 29-30; <https://en.eumedion.nl/clientdata/217/media/clientimages/Evaluation-AGM-season-2021-DEF.pdf?v=210709094651>, p. 1, 3.

company law or with a broader remit.⁵⁹ It may be worth noting that, in the context of the Italian implementation of Directive 2019/1151, Legislative Decree No 183/2021 has specified that the identification of the parties willing to set up an online company in Italy is made by the public notary on a bespoke electronic platform established and managed by the Italian Notaries by checking, as to Italian citizens, their Electronic ID or electronic Passport and as to European nationals equivalent instruments notified under Art. 9 E-IDAS Regulation.

VI. Electronic participation and purely virtual meetings in practice

30. **General.** As a rule, electronic participation had not been a huge success before the pandemic. Most jurisdictions surveyed for this assessment report little adoption in practice.⁶⁰ Only few surveys mention practical importance of electronic participation in cross-border settings.⁶¹
31. **Special rules for listed COVID-19.** Not surprisingly, this has changed during the pandemic. In all countries electronic participation and especially purely virtual meetings became very important. For the future, the expectation is that the importance will continue to be higher than before COVID-19.⁶²

VII. Reasons for limited importance

32. **General.** If one turns to the reasons for the limited importance, one must distinguish between barriers to purely virtual meetings and electronic participation on the one hand and the availability of other mechanisms on the other. We will focus on legal reasons and exclude the issue whether dominant shareholders or the board of directors may have an interest in lowering attendance in the meeting in order to enhance their power. The following barriers refer specifically to listed companies, not to unlisted or private ones.
33. **Proxies.** One important reason for the lack of adoption of electronic participation seems to be the ready availability of another mechanism for taking part in the general meeting, namely the

⁵⁹ Of course, taking into account, e.g. Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity (SEC(2021) 228 final) - (SWD(2021) 124 final) - (SWD(2021) 125 final).

⁶⁰ Austria, Denmark (one single case before the pandemic), France, Lithuania, the Netherlands (first hybrid meeting in 2019), Norway, Poland.

⁶¹ Luxembourg.

⁶² Explicitly Denmark, the Netherlands.

use of representatives or proxies. Such representatives can in general both vote and participate in the deliberations on behalf of the shareholder. This is a well-established system in many Member States, such as Austria or Germany, which companies know and trust not to cause special issues. In addition, well-established service providers, such as lawyers and investors' associations provide the requisite services. All these issues seem to be important in many Member States in influencing the low level of adoption of electronic participation.⁶³ Similar arguments can be made about similar voting methods, such as e-mail or letter, which can be used to cast a vote without attending the meeting. It is also worth noting, as to proxies, that in one Member State (Italy) it is required that electronic voting be exercised directly by the shareholders; therefore, it is claimed that the proxy holder should not be entitled to vote electronically.⁶⁴

34. Whether that is problematic is another issue. This depends on whether the system works for cross-border representation (“if it ain’t broke, don’t fix it”) and, of course, on the costs involved; both issues would have to be addressed in more detail. The analysis may vary if the aim for a European initiative is something else than cross-border representation.
35. **Insecurity.** One concern in many Member States⁶⁵ seems to be that technical issues may negatively impact on the legal validity of resolutions taken in the general meeting. In other words, companies are afraid that errors in the systems used or the proceedings⁶⁶ may give legal grounds to challenge resolutions. Of course, this perception may change after the experiences gained during the pandemic. Some Member States, such as Austria and Germany, have introduced special rules making challenging resolutions taken in virtual meetings due to the malfunctioning of the virtual tool more difficult; similarly, in Italy there are influential voices that suggest limiting, as in Germany, the possibility to challenge resolutions due to the malfunctioning of the virtual tool only in case of wilful misconduct or gross negligence⁶⁷. As such virtual tools have proven to be generally reliable, rules of this type seem appropriate. Even though European company law typically does not address remedies, the European legislator could consider introducing similar rules excluding remedies to address the

⁶³ Austria, Denmark, Norway, Poland.

⁶⁴ Arg. ex Art. 141(1), 143-ter and 143 CONSOB Regulation on issuers.

⁶⁵ Austria, France

⁶⁶ We do not know whether there are problems related to the record date in virtual meetings.

⁶⁷ Assonime, No. 14/2021.

companies' concern that electronic participation may result in additional challenges to resolutions; alternatively, the legislator could specifically require Member States to deal with this issue in their national law.

36. **Voting methods.** Unreliable voting mechanisms or problems with open and secret ballots have not been reported from Member States surveyed. In Italy, however, CONSOB has released a warning to listed companies drawing their attention to the very importance of preserving full confidentiality on the votes cast.
37. **Cost.** For some Member States⁶⁸, it has been mentioned that (especially) listed SMEs shy away from digital meetings and electronic participation due to the cost involved with installing such a system. However, there are few reliable data on the types and magnitude of costs involved.
38. **Fear of excessive questions.** In some Member States there have been worries among companies that electronic participation may lead to excessive questioning because shareholders may act less restrained in a digital setting.⁶⁹ This has led to clarifications and restrictions in the context of COVID-19 legislation on virtual meetings in various Member States.⁷⁰ To the contrary, in some Member States there seems to be a perception that purely virtual meetings may make it easier for directors to shirk uncomfortable questions.⁷¹
39. **Formalities.** Generally, formalities, even where they exist⁷², especially in the form of an authentic instrument (notarial deed) or other participation by notaries in all or in special situations,⁷³ are not considered as a barrier to virtual meetings.⁷⁴ This may be because due to recent, partially pandemic-induced developments notaries themselves increasingly apply digital tools in their work.⁷⁵
40. **Rules.** If the regulatory approach is too general or the legislation lacks clarity (e.g., whether a purely virtual meeting is permitted), this may impact decision-making of both companies and

⁶⁸ France, Italy, Norway.

⁶⁹ Germany, Ireland.

⁷⁰ E.g. Austria, Denmark, Germany.

⁷¹ Norway.

⁷² No formalities exist e.g., in Denmark, France, Norway.

⁷³ E.g., Austria, Germany, Luxembourg, Spain (where the notary is mandatory in purely virtual general meetings of listed companies – 521.3 LSC - and, for unlisted, whenever the 1% or 5% of the capital ask for it, respectively, in public and private limited liability companies).

⁷⁴ Explicitly Italy. In Spain the virtual participation of the notary in a virtual meeting is not considered a problem but a safeguard (521.3 LSC).

⁷⁵ See e.g., Austria and Spain.

shareholders in selecting virtual participation. European legislation setting up some additional core parameters could help by giving Member States guidance as to their national regulation and to the way to address barriers to implementation.

C. Other possible barriers to the exercise of shareholder rights and to the communication between issuers and shareholders

I. Definition of shareholder

41. **Problem.** The harmonisation of rules on the identification of shareholders, on the facilitation of the exercise of shareholder rights and on the communication between the companies and their shareholders to some extent suffers from the lack of a common definition of shareholder, which is crucial as far as passing on information and facilitating shareholder actions by the intermediaries (banks, investment services providers etc.)⁷⁶ are concerned. This is not harmonised in the SRD, which in Art. 2 (b) defines ‘shareholder’ as the natural or legal person that is recognised as a shareholder under the applicable law. As a result, the party entitled to receive information and to exercise rights varies from country to country, presumably based on the applicable company law.
42. **Importance.** This is especially important when economic entitlement and legal property do not go hand in hand. This is the case e.g., with omnibus accounts, where one intermediary holds the shares in its own name and in one account but on behalf of other persons, or more generally with nominee shareholders. Is the nominee shareholder the last intermediary within the meaning of Art. 1(6) of SRD Implementing Regulation 2018/1212 or is it itself the shareholder? In other words, does it depend on the economic entitlement to proceeds from the share (i.e., the beneficial, not the nominee shareholder) or on the legal position to exercise the rights connected to the shares (i.e., the nominee, not the beneficial shareholder)? We do not know whether this is an issue only for issuers, who presumably would like to get better access to those with economic entitlement, or also for other market participants. For that reason, we recommend consulting on the issue.
43. **Approach.** If one frames the issue as defining what shareholding under (domestic) company law should mean, it may become very difficult to reach any result on the European level. If, however, “shareholding” is translated into particular rights that are attached to a share (e.g. receiving information prior to the meeting, right to ask questions, right to vote, right to receive dividends), the issue could become less contentious. Based on this approach, one could start with an analysis of the issues for which the need for harmonisation is more pressing. This

⁷⁶ See definition of “intermediary” in Art. 2(d) SRD.

could result in a harmonised approach not for the concept of “shareholding” as a whole but for particular rights which are attached to a share, with an aim to identify the relevant person who could be either the shareholder or a person acting on behalf of the shareholder. Such an approach would be more deferential to different traditions as far as the actual exercise of particular right attached to the share is concerned. Hence, we suggest discussing the different issues separately in order to identify the need for harmonisation and not starting by an abstract discussion of definitions.

44. **Timing.** This issue is to be examined by the Commission by Q3/2023 according to the CMU Action Plan. As clarifying the question of who an investor is could be crucial for assessing how one could improve “the interaction between investors, intermediaries and issuers”, we suggest discussing whether and to what extent these issues go hand in hand.

II. Use of new digital technologies

45. **Task.** The CMU Action Plan also foresees examining possible national barriers to the use of new digital technologies “in this area”, i.e., as far as the interaction between investors, intermediaries and issuers, the exercise of voting and participation rights by shareholders in general meetings and corporate action-processing, is concerned. We will address this issue in the following, but also mention barriers arising from European law.
46. **DLT.** The High Level Forum made explicit reference to Distributed Ledger Technology (DLT) as a means of shortening the chain of intermediaries and streamlining the underlying processes. Currently, shareholder registers seem to be outdated at least part of the time. We think that it is important to treat the issue having in mind a certain technology as a reference point, as otherwise it will be very hard to determine whether there are barriers to “digital technologies” in general. This does not mean that the Commission should just look at DLT but start by using DLT as an example. In the following, we use “DLT” and “blockchain”, the most important sub-type, as synonyms.
47. **Types of “blockchains”.** One must distinguish⁷⁷ between publicly accessible DLT, i.e., permissionless, and DLTs administered by the issuers or a central authority, permissioned.

⁷⁷ Similarly, one can distinguish between public and private blockchains, which refers to “reading access”. In public blockchains everyone can read the information on the blockchain. In a private blockchain, reading access needs to be validated by network administrators. The distinctions between permissioned and permissionless vs. private and public

Permissionless blockchains allow any user to pseudo-anonymously join the blockchain network (i.e., to become a “node” of the network), and they do not restrict the rights of the nodes on the blockchain network (i.e., each node has equal rights). Those rights include the possibility for nodes to perform functions such as accessing the blockchain, creating new blocks of data, validating blocks of data, etc. (i.e., “writing access”). A permissioned blockchain, on the other hand, restricts access to the network to certain nodes and may also restrict the rights of those nodes on that network. This means that different nodes might not have equal rights to perform the functions listed above. Both types of blockchain could be employed in company law. The major advantages arise if a permissionless blockchain is used, but this also poses more complex legal issues. The subgroup has contacted experts in the area, who have emphasised the following points:

48. **Opportunities.** DLT offers many opportunities for listed and non-listed companies in the European Union.⁷⁸ DLT-based technologies appear to have some potential to reframe several important aspects of ‘legacy’ corporate law. In the corporate setting, technology may help to dispel informational asymmetries, reducing to almost zero search and transaction costs, and in curbing collective action problems. This may fundamentally modify the principal-agent relationship in any company venture, especially in the case of public companies, making the relation of shareholders and managers quite different from the agency paradigm in offline, “legacy” companies; a paradigm that deeply inspired existing company laws. This situation may have inevitable corporate governance implications⁷⁹. The advent of new technologies may call for company law adjustments and perhaps even some more fundamental reconsideration of several aspects of it. Some argue that in a technology-driven, digital world, ‘platform companies’ are already disrupting many industries and offer a new paradigm of ‘platform governance’, where digital technologies are leveraged to create less hierarchical, more ‘community-driven’ forms of corporate organizations.⁸⁰ Others note that DLT together

blockchains typically, but not necessarily go hand in hand, as a permissioned blockchain may at the same time be public.

⁷⁸ This paragraph follows D. Valiante, M. Lamandini, D. Ramos Muñoz, ‘The European Strategy on Digital Finance’, forthcoming in *The Cambridge Handbook of European Monetary, Economic and Financial Market Integration*, eds, D. Adamski, F. Amtenbrink and J.de Haan, Cambridge University Press, 2022.

⁷⁹ See N. Abriani, G. Schneider, *Diritto delle imprese e intelligenza artificiale* (Bologna, 2021), in particular p. 191-225

⁸⁰ M. Fenwick, J. A. McCahery, E P.M. Vermeulen, ‘The end of “Corporate” Governance (Hello “Platform” Governance)’, ECGI Law Working Paper No 430/2018, December 2018; M. Fenwick, W.A. Kaal, E.P.M. Vermeulen,

with smart contracts⁸¹ have the potential “*greatly to reduce the costs of organising business activities by contract, as opposed to using firms*” and this will “*likely reduce the scope of business activities for which the corporate form is used as an organising device and therefore the scope of activity governed by corporate law*”.⁸² In a seminal study, Lafarre and Van der Elst⁸³ argue that “*blockchain is a technology that can offer smart solutions for classical corporate governance inefficiencies, especially in the relationship between shareholders and the company*” because “*blockchain technology can lower shareholder voting costs and the organization costs for companies substantially*”, it can “*increase the speed of decision making, facilitate fast and efficient involvement of the shareholders*”. Building on the specific competitive advantages of permissioned DLT over classical ledger and on the advantages of smart contracts⁸⁴, they make the point that blockchain and smart contracting can reduce agency costs for both shareholders and companies through the ‘optimisation and modernisation’ of the company’s general meeting.⁸⁵

49. **Company Law.** The experts the subgroup has talked to generally did not readily mention issues of Member States’ company law as a major barrier for tokenisation of shares in public listed companies. This is open to two different interpretations. First, such problems may not exist and company law is not a major barrier to the application of DLT in the area of companies. Second, such company law problems do exist but are not the most pressing ones at this stage in comparison to the issues mentioned below.
50. **Transfer of shares.** On a national level, first it might be necessary to modify the rules for the transfer of shares to allow the application of DLT to the shares. The transfer of shares is still governed by national law and is usually closely connected to the general civil law of a Member

‘Why Blockchain Will Disrupt Corporate Organizations’, TILEC Discussion Paper and ECGI Law Working Paper no 419/2018, October 2018.

⁸¹ Smart contracts-related issues, however, are not a specific subject of this paper. See, e.g., R. H. Weber, ‘Smart Contracts: Do we need New Legal Rules,’ in A. De Franceschi, R. Schulze (eds.), *Digital Revolution - New Challenges for Law*, 2019, p. 299-312; F. Moslein, ‘Legal Boundaries of Blockchain Technologies: Smart Contracts as Self-Help?’ in A. De Franceschi, R. Schulze (eds.), *Digital Revolution - New Challenges for Law*, 2019, *ibid.*, p. 313-326.

⁸² J. Armour, L. Enriques, A. Ezrachi, J. Vella, ‘Putting Technology to Good Use for Society: the Role of Corporate, Competition and Tax Law’, ECGI Law Working Paper no 427/2018, p. 8.

⁸³ A. Lafarre, C. Van der Elst, ‘Blockchain Technology for Corporate Governance and Shareholder Activism’, Tilburg Law School Legal Studies Research Paper Series, no 7/2018, also published as ECGI Law Working Paper No. 390/2018.

⁸⁴ Lafarre and Van der Elst, *ibid.*, p. 4-5.

⁸⁵ Lafarre and Van der Elst, *ibid.*, p. 8.

State. This is true for public companies where several states, such as Germany, still apply the traditional civil law rules of possession and ownership to the global share and its fractions that represent share ownership. National civil law is also important for private limited companies, which, however, are not the focus of the CMU. For such entities, the main problem is linked to the transmission of membership since some Member States, where the so-called Latin-Germanic notarial system applies (for instance, Germany, Italy and Austria), require an “authentic instrument” (in legal practice a notarial deed or similar) in order for the transmission of membership to be valid as against the company (so that the members can exercise their rights) or, at least, *ad probationem* in order to prove the ownership and be incorporated by directors into the membership register and *ad exercitium* or *utilitatem* in order for the transmission to be opposable to third parties (for instance, Spain). On the other hand, the tokenisation of shares would be compatible with the gatekeeper function of notaries if they oversaw managing the blockchain.

51. **Member States’ company law.** Second, several Member States are currently discussing a reform of their company law in order to facilitate the use of the blockchain for *creating and managing the shares* of a company (e.g., Germany and Luxembourg for listed companies);⁸⁶ others have already done so (e.g., Poland for the so-called Simple Joint-Stock Company – Prosta Spółka Akcyjna)⁸⁷. In other countries, the creation and management of shares via the blockchain is recognised as a problem but not addressed by legislative proposals yet.⁸⁸ The rights that are typically attached to a share could be linked to tokens distributed via blockchains (so-called security or investment tokens). The management of tokens using blockchain technology could also facilitate the identification of shareholders.⁸⁹ However, proper identification within a permissioned DLT would need something more than only the digital identity of the shareholder’s wallet: it would also need the proof of authentication outside the blockchain with the holder’s real identity, which could also be stored in the

⁸⁶ See the paper by P. Maume, M. Fromberger, ‘Die Blockchain-Aktie’, Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (ZHR) 2021, p. 507-555, based on a study commissioned by the German Ministry of Justice.

⁸⁷ See Act of July 19, 2019, amending the Commercial Companies Code and certain other acts; see also OECD, Regulatory Approaches to the Tokenisation of Assets p. 45 (<https://www.oecd.org/daf/fin/financial-markets/Regulatory-Approaches-to-the-Tokenisation-of-Assets.pdf>).

⁸⁸ For Spain, see the barriers arising from Art. 92 para 1 LSC, which establishes that shares can only be represented by certificates or book entries.

⁸⁹ Compare for the following D. Valiante, M. Lamandini, D. Ramos Muñoz, ‘The European Strategy on Digital Finance’, forthcoming in The Cambridge Handbook of European Monetary, Economic and Financial Market Integration, eds, D. Adamski, F. Amtenbrink and J.de Haan, Cambridge University Press, 2022.

blockchain. This, in turn, may pose challenges of coordination between clearing and settlement rules and corporate governance rules. Additional legal barriers arise as current corporate governance rules (including EU law) acknowledge the intermediate nature of equity securities, and state that the company ‘requests’ the identification of shareholders, and the intermediaries ‘communicate’ that information;⁹⁰ this presupposes that there are such intermediaries in control of the register, which is not necessarily the case, especially not with a permissionless blockchain. A DLT system may change the position of different parties, depending on (i) what is the level at which the permission for its use stops (e.g., at the level of custodians, at subsequent levels, comprising funds, for example, or even some significant shareholders), (ii) what information may be introduced in the system (e.g., whether it would include only the information of the parties with permission to use the DLT system, or also of the final investors), and (iii) whether the DLT would need to be complemented with another identification system (e.g., if the DLT system only includes limited information at the level of intermediaries, this would need to be complemented by rules providing for the communication by intermediaries, like there are now). Finally, who operates the DLT identification system would also be extremely relevant. It is not obvious that a private DLT system managed by the company, for purposes of shareholder identification, would sit well with a DLT system managed by a CSD, for purposes of clearing and settlement.

52. **Capital Markets Law.** One major issue for legal practitioners is securities legislation. It is discussed in academic literature and legal practice instead, whether tokens qualify as securities under EU law and whether they require specific disclosure rules.⁹¹ So far, European regulation consists in a DLT pilot regime established by Regulation (EU) 2022/858 of 30 May 2022⁹² expressly permitting market participants under certain conditions to use DLT for experimental trading on a multilateral trading facility. Also, the Commission proposal for a Regulation on Markets in Crypto-assets⁹³ combines a bespoke regulation for utility assets and stable coins,

⁹⁰ Art. 3a SRD, as amended by Directive 2017/828, of 17 May 2017 on long-term shareholder engagement, indicates 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*”.

⁹¹ See for this paragraph D. Valiante, M. Lamandini, D. Ramos Muñoz, ‘The European Strategy on Digital Finance’, forthcoming in *The Cambridge Handbook of European Monetary, Economic and Financial Market Integration*, eds, D. Adamski, F. Amtenbrink and J.de Haan, Cambridge University Press, 2022

⁹² Regulation (EU) 2022/858 of the European Parliament and of the Council of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology, and amending Regulations (EU) No 600/2014 and (EU) No 909/2014 and Directive 2014/65/EU, OJ L 151, 2.6.2022, p. 1.

⁹³ COM (2020)593.

including payments tokens, while using the existing capital markets regulatory framework (with minimal changes, if needed) for investment assets.⁹⁴ Yet, as ESMA noted in its advice,⁹⁵ the boundaries of the legal definition of ‘transferable security’ under Annex I, Section C(1) and Art. 1 para 1 n. 44 of MiFID II are unclear, since the idea of what is ‘negotiable’, on a ‘capital market’ is not fixed.⁹⁶ Similarly, the Central Securities Depository Regulation 909/2014 provides barriers, essentially to permissionless blockchains.⁹⁷ From a market perspective, a permissioned DLT (notably a private and restricted blockchain network offered for service by approved market players) may be useful for the issuance, holding and transfer of securities. There are pilot tests ongoing for shares, bonds, and units of mutual funds.⁹⁸ In France, for instance, since 2016 non-listed shares and debt instruments can be registered and transferred on a distributed ledger.⁹⁹ Currently, only permissioned DLT platform *with a centralised validation model* seem to be possible. Even there, anecdotal evidence shows that existing examples of CSD already using DLT technology are confined only to notary and central maintenance services to keep record of every change resulting from transactions settled through the established Target2Securities (the CSD does not use, therefore, DLT as a security settlement system).¹⁰⁰ In addition, it is debated whether the Anti-Money-Laundering rules would apply to a company managing its shares on a blockchain.

53. **GDPR compliance.**¹⁰¹ The GDPR is technologically neutral. Like with any other technology, the controller must choose the most appropriate way to comply with the GDPR in the light of the principle of accountability. For this, important factors are technical design and governance. The current market reality shows that most blockchain use cases outside of cryptocurrency are

⁹⁴ D. Zetzsche, F. Annunziata, D.W. Arner, R.P. Buckley, ‘The Markets in Crypto-Assets Regulation (MICA) and the EU Digital Finance Strategy’, EBI Working Paper Series 2020 – no. 77, p. 10-18.

⁹⁵ ESMA, Advice Initial Coin Offering and Crypto_Assets (www.esma.europa.eu/sites/default/files/library/esma50-157-1391_crypto_advice.pdf), ESMA50-157-1391.

⁹⁶ ESMA Annex 1, Legal qualification of crypt-assets – survey to NCAs (www.esma.europa.eu/sites/default/files/library/esma50-157-1384_annex.pdf), paras. 19-22, pp. 6-7.

⁹⁷ However, ESMA does not see barriers for permissioned blockchains. See ESMA, *Use of FinTech by CSDs*, Report to the European Commission, 2 August 2021, ESMA70-156-4576 at #14 (https://www.esma.europa.eu/sites/default/files/library/esma70-156-4576_report_to_ec_on_use_of_fintech_by_csds.pdf).

⁹⁸ *Ibid.*, p. 13

⁹⁹ French Law no 2016-1691 of 9 December 2016 (“Sapin II law”); Ordonnance no 2017-1674 of 8 December 2017; S.Belmus, D.Guegan, ‘Initial ICOs, tokenisation and corporate governance’, CES Working Papers, 2019.04, p. 18, fn. 77.

¹⁰⁰ ESMA, *see footnote 91*, p. 17

¹⁰¹ We thank the Commission for its input on this issue.

permissioned with a single party or a consortium acting as the gatekeeper and thus as data controller for GDPR purposes. This helps with information obligations such as under Art. 12-14 GDPR. The issue is more complicated with public permissionless blockchains, due to the decentralized nature of the system. Apart from that, as blockchains aim at preserving all transactions and at safeguarding them against all kind of ex-post modifications, data protection obligations under the GDPR that need to be assessed include the ‘right to erasure’ under Art. 17 GDPR, the right of rectification in Art. 16 GDPR, and the data minimization principle under Art. 5 (1) c GDPR.¹⁰² However, technical solutions may put the data beyond use by making it practically inaccessible.¹⁰³ Other technical and governance solutions should be explored further to ensure the compliance of blockchain solutions with GDPR.

54. **Result.** As the design of tokens can vary in different ways, it is difficult to envisage European legislation in the field of company law at this early stage. Experts also mentioned that the blockchain requires a legal framework that is not limited to company law. It might therefore be counter-productive to regulate blockchains in company law without having regard to other use cases of DLT technology. For the time being, regarding company law, we recommend observing the experiences and possible impediments that Member States are facing when regulating tokenisation on the national level. The Commission could ask Member States to report on their national reforms regarding the tokenisation of shares. In addition, the European Union could commission a comparative study on this topic collecting “best practice” from Member States.

D. Conclusions and recommendations

I. Electronic participation and purely virtual shareholder meetings

55. Any analysis for action to be taken at EU level should begin with the question of purpose. Regarding virtual shareholders meetings, we see three possible (not mutually exclusive) purposes for a European regulation of the issue with the following general consequences:

¹⁰² And probably also to the comparable right of rectification of legal persons in Art. 3a para 5 SRD II.

¹⁰³ Standard put forward in the CNIL Blockchain Guidelines, for example. For example, by recording only a commitment, in the form of keyed-hash function on the blockchain, when the right to erasure is executed, the elements of the commitment that makes it verifiable would be erased and thus it would no longer be possible to identify which information has been committed off-chain. The deletion of the secret key can have a similar effect.

56. First, the European legislator could try to enhance capital markets by improving cross-border participation in general meetings. This would imply amending the SRD in order to make its provisions more effective. One could think about making the offering of electronic participation at general meetings to all shareholders mandatory for all – or at least large – listed companies and thus supplementing the shareholders' physical participation right. Additionally, one could think about enabling all listed companies to opt for purely virtual meetings as well. Finally, the legislator could address the barriers to electronic participation and/or purely virtual meetings mentioned above (see # 32 et seq.), especially if electronic participation continues to be only an option for companies. An important decision would have to be taken on the necessary level of detail of regulation, i.e., whether the European legislator should address issues such as shareholder identification, especially as far as its technical details are concerned, details of the right to ask questions or the possibility to challenge resolutions. An approach going into details certainly would make the situation more comparable between Member States, especially for cross-border investors, but it may result difficult to align different national approaches.
57. Second, the legislator could take a broader approach and try to make electronic participation and virtual meetings available to all types of limited liability companies, including non-listed and private companies. There is some justification for such an approach in the fact that more and more SMEs have cross-border membership. This would need a new instrument or an introduction of the pertinent rules in Directive (EU) 2017/1132. For this purpose, an optional approach, requiring Member States to enable all private companies to provide for electronic participation and virtual meetings in their articles, would probably be sufficient. Apart from addressing the barriers mentioned in # 32 et seq., such as cost impositions (which can conceivably be different from those mentioned above for listed companies), probably rather fewer details would need to be addressed at European level.
58. Third, the legislator could try to achieve a higher level of resilience for companies in Europe by introducing mandatory rules on virtual meetings for times of crisis, however defined. If the Commission follows that course, it would have to argue that Member States were not able to suitably and conclusively address the issue when acting during the recent pandemic.

59. Apart from that, the European legislator could review European company forms (especially European Companies – SEs –, but in theory also European Cooperative Societies – SCEs) on whether the regulations are fit for virtual meetings.

II. Other possible barriers to the exercise of shareholder rights and to the communication between issuers and shareholders

60. Regarding issuer-shareholder communication, ICLEG would like to put forward the following procedural ideas, which could lead to further action by the Commission:

61. As far as the definition of “shareholder” is concerned:

- start a broader consultation on the need of a harmonised definition for the purposes of the SRD;
- identify the issues in SRD II for which a harmonised definition is crucial.

62. As far as the use of new digital technologies is concerned:

- observe the experiences and possible impediments that Member States are facing when regulating tokenisation on the national level in company law;
- evaluate barriers to the application of DLT in the context of the communication between issuers and shareholders, the identification of shareholders by the issuers or the participation and voting by shareholders in general meetings, which result from other fields of EU and national law.