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COMMISSION STAFF WORKING DOCUMENT

On possible national regulatory barriers to the use of new digital technologies in the interaction between investors, intermediaries and issuers (Action 12 of 2020 Capital Markets Union Action Plan)

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I. INTRODUCTION

The European Commission adopted on 24 September 2020 “[A Capital Markets Union for people and businesses – new action plan](#)” (2020 CMU Action Plan)¹, envisaging 16 actions to make decisive progress towards completing the Capital Markets Union, i.e. a fully functioning and integrated market for capital where investments and savings flow across all Member States.

Seven actions specifically aim at addressing the key CMU objective of integrating national capital markets into a genuine single market. In particular, Action 12 aims at facilitating cross-border investor engagement, in a context where ‘Europeans, especially young people increasingly want to have a say in how companies are being run, notably as regards sustainability issues’. The 2020 CMU Action Plan therefore states that ‘shareholder engagement must ... be further facilitated by making voting easier for all investors and corporate actions more efficient, in particular in a cross-border context’².

As new digital technologies could improve this situation, the Commission committed, as part of Action 12, to examining possible national barriers to the use of new digital technologies in the interaction between investors, intermediaries and issuers. The Annex to the 2020 CMU Action Plan specifies that ‘the Commission will ... investigate ... whether there are national regulatory barriers to the use of new digital technologies 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.’

This Staff Working Document presents the assessment and conclusions on this point of Action 12.³

The importance of the topics covered by this assessment has only gained importance during the Covid-19 pandemic when companies were often unable to hold general meetings (GMs) with physical attendance because of lockdowns, restrictions on cross-border travel and other restrictive measures introduced in this period. Several Member States adopted temporary

¹ COM(2020)590.

² According to Action 12: ‘To facilitate cross-border investor engagement, the Commission will consider introducing an EU definition of “shareholder” and further clarifying and harmonising rules governing the interaction between investors, intermediaries and issuers. It will also examine possible national barriers to the use of new digital technologies in this area.’

³ Under the other part of Action 12, the Commission committed ‘to assess: (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 ...’. In this context, and duly taking into account recent market developments and paying particular attention to effectiveness and efficiency considerations, as well as to legal certainty aspects, the Annex envisaged to investigate in particular the following:

- the attribution and evidence of entitlements and the record date,
- the confirmation of the entitlement and the reconciliation obligation,
- the sequence of dates and deadlines,
- any additional national requirements (in particular, requirements of powers of attorney to exercise voting rights), and
- communication between issuers and central securities depositories (CSDs) as regards timing, content and format.

emergency legislation allowing companies, for instance, to hold GMs with only on-line participation (purely virtual meetings) or with both on-line and in person participation (hybrid meetings),⁴ even if such options were not envisaged in the companies' articles of association or by-laws. Since then, some Member States have enacted permanent legislation regulating the possibility for hybrid or purely virtual GMs under certain conditions⁵, and others are also considering doing so⁶.

There is no obligation at EU level for companies to allow shareholders to participate and vote at GMs electronically, and there is no right for shareholders in that regard. Experience gained over the last few years has shown that both purely virtual and hybrid GMs have advantages but can also pose some challenges with respect to the exercise of shareholder rights. This Staff Working Document focuses on whether national regulatory barriers exist to the use of new digital technologies for establishing the identity of the company's shareholders, for participation and voting by shareholders in GMs or for any other purposes related to the exercise of shareholder rights or other issuer-(intermediary-)shareholder interactions.

II. BACKGROUND OF THE ASSESSMENT TASK

The relevant legal framework at EU level is laid down in Directive 2007/36/EC (Shareholder Rights Directive – SRD)⁷, as amended by Directive (EU) 2017/828 as regards the encouragement of long-term shareholder engagement (Shareholder Rights Directive 2 – SRD2)⁸, and the Commission Implementing Regulation (EU) 2018/1212⁹. This Directive gives the right to listed companies to identify their shareholders and requires intermediaries (i.e. investment firms, credit institutions and central securities depositories providing services of safekeeping of shares, administration of shares or maintenance of securities accounts on behalf of shareholders or other persons)¹⁰ to cooperate in that identification process. Together with the Commission Implementing Regulation (EU) 2018/1212, it aims to improve the communication by listed companies with their shareholders, in particular the transmission of information along the chain of intermediaries, and requires the latter to facilitate the exercise

⁴ In this document, the term 'purely virtual general meeting' is used as referring to a GM in which shareholders cannot participate in person and have to make use of on-line methods of participation. The term 'hybrid general meeting' refers to a GM in which either electronic or online participation and participation via physical presence is possible. See ICLEG Report on virtual shareholder meetings and efficient shareholder communication, point 6.

⁵ For example, Spain (Law 5/2021, of 12 April) or Germany (Gesetz zur Einführung virtueller Hauptversammlungen von Aktiengesellschaften und Änderung genossenschafts-sowie insolvenz- und restrukturierungsrechtlicher Vorschriften v. 20.7.2022, BGBl. I, 1166).

⁶ For instance, Austria, Finland, Ireland, the Netherlands.

⁷ Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, OJ L 184, 14.7.2007, p. 17 (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32007L0036>).

⁸ 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 (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32017L0828>).

⁹ Commission Implementing Regulation (EU) 2018/1212 of 3 September 2018 laying down minimum requirements implementing the provisions of Directive 2007/36/EC of the European Parliament and of the Council as regards shareholder identification, the transmission of information and the facilitation of the exercise of shareholders rights, OJ L 223, 4.9.2018, p. 1 (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018R1212>).

¹⁰ See definition of 'intermediaries' in Article 2(d) of SRD. These are usually referred to as 'financial intermediaries'.

of shareholders rights¹¹. These rights include the right to participate and vote in GMs and financial rights such as the right to receive the distributions of profits or participate in other corporate events initiated by the issuer or a third party.

Article 8 of the SRD regulates the participation of shareholders in the GM by electronic means and stipulates in paragraph 1 that ‘Member States shall permit companies to offer to their shareholders any form of participation in the general meeting by electronic means ...’. It also establishes in paragraph 2 that ‘[t]he use of electronic means ... may be made subject only to such requirements and constraints as are necessary to ensure the identification of shareholders and the security of the electronic communication, and only to the extent that they are proportionate to achieving those objectives.’ This is without prejudice to any legal rules which Member States have adopted or may adopt concerning the decision-making process within the company for the introduction or implementation of any form of participation by electronic means. Member States can therefore subject electronic participation to the decisions of the board, etc.

In relation to the use of new technologies, recital 4 of the Commission Implementing Regulation (EU) 2018/1212 explains that ‘[i]n order to facilitate the exercise of shareholders rights and make it more efficient, particularly across borders, the use of modern technologies in communication between issuers and their shareholders and by intermediaries, including other service providers which are deployed for these processes, should be encouraged. Any communication between intermediaries should, to the extent possible be transmitted using machine-readable and standardised formats which are interoperable between operators and which allow straight-through processing. However, intermediaries should make accessible to shareholders, who are not intermediaries, information and the means to react using widely available modalities, which enable straight-through processing by intermediaries.’

By way of background to the assessment task, it is also useful to refer to the [Final Report of the High Level Forum on the Capital Markets Union \(A New Vision for Europe’s Capital Markets\)](#), published in June 2020. The High Level Forum on the Capital Markets Union was an expert group composed of industry executives, international experts and scholars created to feed into the work on the Capital Markets Union policies¹². The 17 recommendations from the High Level Forum to the Commission and Member States for advancing the CMU include a ‘recommendation on shareholder identification, exercise of voting rights and corporate actions’ (Recommendation 9)¹³, under the objective of “Building stronger and more efficient market infrastructure”. This recommendation invited the Commission, *inter alia*, to:

‘... facilitate the use of new digital technologies to (i) enable wider investor engagement by supporting the exercise of shareholder rights and more specifically voting rights, in particular in a cross-border context, and (ii) make corporate action and general meetings processes more efficient. That would notably include (i) facilitating shareholders’ voting using digital means,

¹¹ See in particular Articles 3a (on identification of shareholders), 3b (on transmission of information) and 3c (on facilitation of the exercise of shareholder rights) of SRD, to which more detailed reference is made in the relevant sections below, and recital (1) of the Commission Implementing Regulation (EU) 2018/1212.

¹² [High-Level Forum on capital markets union \(europa.eu\)](#).

¹³ See pages 16 and 79-81 of the [Final Report of the High Level Forum on the Capital Markets Union \(A New Vision for Europe’s Capital Markets\)](#).

(ii) streamlining processes and systems for identifying shareholders, and (iii) providing financial market participants with more legal certainty as regards the holding and circulation of security tokens (such as tokens representing voting rights) using new technologies.’

More particularly, the High Level Forum referred to challenges for the use of new technologies that ‘relate to:

- (i) legal and regulatory barriers in a number of EU countries regarding the acceptance of a digital or electronic vote by the issuer or their agent,
- (ii) the identification process [of shareholders],
- (iii) online communication during general meetings, and
- (iv) the complexity of security and trustworthiness requirements associated with the GDPR.’

This recommendation eventually informed Action 12 of the 2020 CMU Action Plan.

III. ASSESSMENT OF POSSIBLE REGULATORY BARRIERS TO THE USE OF NEW DIGITAL TECHNOLOGIES

As part of the investigative and analytical work to deliver under Action 12 of the 2020 CMU Action Plan, the Commission services have consulted the Company Law Expert Group (CLEG)¹⁴ in an extended format, which included representatives of Member States’ authorities and relevant stakeholders¹⁵. The Commission services also consulted the Informal Expert Group on Company Law and Corporate Governance (ICLEG)¹⁶, which consists of independent experts appointed in their personal capacity. The two expert groups were asked if they had identified any national regulatory barriers to the use of new digital technologies 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 GMs. The Commission services have also considered academic literature and other publications, studies and position papers to which reference is made in this Staff Working Document, where appropriate.

¹⁴<https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?lang=en&groupID=1456>. A specific meeting of the Company Law Expert Group (CLEG) and targeted stakeholders to discuss Action 12 of the 2020 CMU Action Plan took place on 25 November 2021 (see [Register of Commission expert groups and other similar entities \(europa.eu\)](#)).

¹⁵ The experts from the following Member States/EEA countries took part in the meeting: Austria, Belgium, Bulgaria, Croatia, Czechia, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Italy, Ireland, Latvia, Liechtenstein, Lithuania, Luxemburg, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden. In addition, representatives of the following stakeholders also took part (from among the several who were invited): AFEP, AFME, Better Finance, CCBE, CNUE, DSW, ECSDA, Eumedion, EuropeanIssuers, Shareaction and SMEUnited.

¹⁶<https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?lang=en&groupID=3036>. The ICLEG ‘Report on virtual shareholder meetings and efficient shareholder communication’, August 2022 (https://ec.europa.eu/info/sites/default/files/report_on_virtual_shareholder_meetings_and_efficient_shareholder_communication.pdf) is published in DG JUST A3 corporate website: [Company law and corporate governance | European Commission \(europa.eu\)](#)).

New digital technologies can be understood broadly, including e.g. distributed ledger technology (DLT)¹⁷ or blockchain¹⁸, or various other Information and Communication Technology (ICT) solutions used for shareholder-issuer communication or for electronic participation and voting (including real-time participation and vote in hybrid and purely virtual GMs).

When assessing whether there are regulatory barriers at national level to the use of new technologies, the Commission services paid close attention to the two main possible contributions of new technologies to facilitating shareholder engagement, as mentioned identified in Action 12 of the 2020 CMU Action Plan, as follows:

- a. Communication between issuers and shareholders and the identification of shareholders by the issuers
- b. Participation and voting by shareholders in general meetings (GMs)¹⁹, including the specific cases of holding hybrid or purely virtual GMs.

Under the SRD, intermediaries have an obligation with regard to both the identification of shareholders and the communication between issuers and shareholders: they have to transmit information along the chain of intermediaries or directly to the issuer or the shareholder (Articles 3a, 3b and 3c), and they also have to otherwise facilitate the exercise of shareholder rights (Article 3c).

a. Communication between issuers and shareholders, and the identification of shareholders by the issuers

In principle, no specific national legal barriers as such to the use of new digital technologies for the communication between issuers and shareholders (including via the intermediaries in accordance with Articles 3b and 3c of SRD) and the identification of shareholders by the issuers (within the meaning of Article 3a of SRD) have been observed²⁰. Company laws are

¹⁷ ‘Distributed ledger technology’ or ‘DLT’ means a technology that enables the operation and use of distributed ledgers. ‘Distributed ledger’ means an information repository that keeps records of transactions and that is shared across, and synchronised between, a set of DLT network nodes using a consensus mechanism (see definitions in Article 2 of 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). [ISO 22739:2020\(en\), Blockchain and distributed ledger technologies — Vocabulary](#) defines ‘distributed ledger technology’ or ‘DLT’ as technology that enables the operation and use of distributed ledgers, and it defines ‘distributed ledger’ as ledger that is shared across a set of DLT nodes and synchronized between the DLT nodes using a consensus mechanism. A distributed ledger is designed to be tamper resistant, append-only and immutable containing confirmed and validated transactions.

¹⁸ [ISO 22739:2020\(en\), Blockchain and distributed ledger technologies — Vocabulary](#) defines ‘blockchain’ as distributed ledger with confirmed blocks organized in an append-only, sequential chain using cryptographic links. Blockchains are designed to be tamper resistant and to create final, definitive and immutable ledger records.

¹⁹ As part of the question on the participation and voting of shareholders in GMs, the case of hybrid and purely virtual GMs has been looked at more closely in this section, given its increased relevance since the COVID-19 restrictions.

²⁰ Experts from Denmark, Germany, Spain, the Netherlands and Sweden were clear in that sense as regards their respective national legislations, and so were some stakeholders (see minutes from the CLEG meeting that took place on 25 November 2021: [Register of Commission expert groups and other similar entities \(europa.eu\)](#)).

technology-neutral as they neither privilege nor prohibit explicitly the use of any particular technology.

Nevertheless, there seems to be some operational and practical challenges on the ground that may indirectly hinder the use of new digital technologies for the communication between issuers and shareholders and the identification of shareholders by issuers.

First and foremost, some stakeholders²¹ have reported that long and complex chains of intermediaries and the use of omnibus accounts (where securities of several clients of an intermediary are credited to the same account), may still hinder the effective and proper identification of the shareholders by the issuers. This, in turn, makes difficult the exchange of information between issuers and shareholders and casting votes electronically, especially in cross-border situations in the European Union²². The stakeholders concerned claim that this could be due to the lack of appropriate harmonization of the information exchange systems and/or of the supervision of intermediaries as regards their obligation to transmit information and to otherwise facilitate the exercise of shareholder rights²³.

Some stakeholders also stress that further standardization of technologies and automatic processes used through the chain of intermediaries could help as regards the compatibility of different intermediaries' systems and avoid the difficulties created by differences in the tools used. DLT has been mentioned by several stakeholders as a possible tool to streamline the exchange of information along the chain of intermediaries, particularly in a cross-border context²⁴. The High Level Forum on the CMU explicitly referred to the new digital technologies such as DLT as a means of shortening the chain of intermediaries and streamlining the underlying processes. The High Level Forum claimed that new digital technologies (i) could help to have all relevant information communicated directly to all end-investors or improve communication more broadly and (ii) that new technologies used to identify shareholders should be applied to the entire chain of intermediaries.

Some stakeholders have identified additional collateral issues that may be indirectly related to the use of new technologies for facilitating communication between issuer and shareholders and for the identification of shareholders by issuers. These issues are:

- (i) the lack of harmonization at EU level of the definition of shareholder;
- (ii) the fact that, in six Member States, companies are allowed to request the identification of shareholders only for those holding more 0.5% of shares and voting rights, as allowed by Article 3(1) of SRD²⁵;

²¹ See [minutes](#) of CLEG meeting of 25 November 2021.

²² '[Barriers to shareholder engagement 2.0: SRD II implementation study](#)', Report by Better Finance & DSW, January 2022 - see pages 5 and 6.

²³ See CLEG minutes and [Report by BetterFinance & DSW](#), page 26.

²⁴ See a Member State's opinion in the CLEG meeting minutes. Also see Van der Elst, C., & Lafarre, A. (2021). Shareholder voice in complex intermediated proxy systems: Blockchain technology as a solution? *The Stanford Journal of Blockchain Law and Policy*, 4(1), 29-52.

²⁵ As published by ESMA in accordance with the SRD2 (revised version published on 14 December 2021), the following six Member States apply a minimum threshold – all of them having the same, 0.5% threshold – for the identification of shareholders: Austria, Cyprus, Estonia (for nominee accounts only), Italy, the Netherlands, and Slovakia. See: [esma32-380-143 national thresholds for shareholder identification under the revised srd.pdf \(europa.eu\)](#).

- (iii) the lack of timely information related to corporate actions received by shareholders (which, for instance, may prevent a shareholder from obtaining an admission card needed to participate in a GM)²⁶;
- (iv) the fact that the SRD does not fully harmonise the definition of the record date (the date on which shares have to be held by a shareholder in order to be entitled to participate in and vote at GMs); and lastly,
- (v) the fact that, in some Member States, the record date is set shortly before the GM and this may result in shareholders not being able to exercise their rights, or take an informed voting decision in time²⁷.

The uncertain regulatory environment about the tokenisation of shares and shareholdings has also been pointed out as a potential issue that could also have an impact in this field²⁸. Several Member States are currently discussing internally a reform of their legislation in order to facilitate the use of blockchain for creating and managing the shares of a company (e.g. Germany and Luxembourg for listed companies)²⁹; others have already done so (e.g. Poland for the so-called Simple Joint-Stock Company – Prosta Spółka Akcyjna)³⁰. The rights that are typically attached to a share could be linked to tokens distributed via blockchains (so-called security or investment tokens)³¹.

At this stage, experts do 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 laws are not a major barrier to the application of DLT to tokenise shares. Second, such company law problems may exist but are not the most pressing ones at this stage in comparison to other issues.³² Experts mention that DLT requires a legal framework that is not limited to company law (e.g. GDPR compliance and capital markets law would be also relevant)³³.

The deployment of certain DLT or blockchain uses, particularly relating to permissionless blockchain³⁴, may also be influenced by the EU legal framework in areas such as data protection and capital markets or securities law³⁵. Considering that blockchains aim at

²⁶ See [Report by BetterFinance & DSW](#).

²⁷ See [Report by BetterFinance & DSW](#) and the [minutes of CLEG meeting on 25 November 2021](#). Some of these questions will be subject to the assessment envisaged under the second part of Action 12 of the 2020 CMU Action Plan planned for Q3 2023.

²⁸ See [Final Report of the High Level Forum on the Capital Markets Union \(A New Vision for Europe's Capital Markets\), page 80 in fine](#).

²⁹ 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.

³⁰ See Act of July 19, 2019, amending the Commercial Companies Code and certain other acts.

³¹ ICLEG '[Report on virtual shareholder meetings and efficient shareholder communication](#)', August 2022, point 51.

³² See ICLEG Report point 49.

³³ See ICLEG Report point 54.

³⁴ 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'). See ICLEG Report point 47.

³⁵ See ICLEG Report point 52.

preserving all transactions and at safeguarding them against all kind of ex-post modifications, compliance with obligations under the GDPR³⁶, including the ‘right to erasure’ under Article 17 GDPR, the right of rectification under Article 16 GDPR and the data minimization principle under Article 5 (1) c GDPR, needs to be assessed.

In relation to the use of DLT in capital markets (securities) law³⁷, for the sake of completeness, reference should be made to 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 technology³⁸. It introduces a DLT pilot regime for market infrastructures which will offer an opportunity to assess the benefits of using DLT for reporting purposes and test the technology under controlled conditions.

Considering the aforementioned elements, even if no specific national legal barriers to the use of new digital technologies for the purposes of communication between issuers and shareholders and on the identification of shareholders by the issuers have been identified, some operational and practical challenges when it comes to the use of those new digital technologies for those purposes have been observed, as mentioned above. They may, to some extent, be addressed by targeted regulation in other areas, possible future market developments, standardization of technology and automated processes used by the private sector as a way to improve the transmission of information – directly between the issuer and the shareholder or through the chain of intermediaries – and the identification of shareholders. These potential market developments should be monitored, similarly to the development of practical use cases of DLT and blockchain and compliance of those use cases with EU law in areas such as data protection and capital markets or securities law. Attention should also be paid to the future conclusion of the DLT pilot regime for market infrastructures under Regulation (EU) 2022/858.

A possible harmonization at EU level of the shareholder definition, the appropriateness of the maximum threshold defined in SRD2 in terms of percentage of shares held for allowing listed companies to request the identification of shareholders and the possible harmonisation of the

³⁶ 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 (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1–88 (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R0679>).

³⁷ Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (CDDR), OJ L 257, 28.8.2014, p. 1–72 (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014R0909>).

³⁸ 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 (<https://eur-lex.europa.eu/eli/reg/2022/858/oj>). Without prejudice to the report and review clause contained in its Article 14, according to Article 15 of this Regulation, ESMA shall publish annual interim reports in order to provide market participants with information on the functioning of the markets, to address incorrect behaviour of operators of DLT market infrastructures, to provide clarifications on the application of this Regulation and to update previous indications based on the evolution of distributed ledger technology. Those reports shall also provide an overall description of the application of the pilot regime provided for in this Regulation, focusing on trends and emerging risks, and shall be submitted to the European Parliament, the Council and the Commission. The first such report shall be published by 24 March 2024.

record dates in SRD2, will be subject to a separate assessment that the Commission will carry out to deliver on the other part of Action 12 of the 2020 CMU Action Plan³⁹.

b. Participation and voting by shareholders in general meetings

In line with Article 8 of the Shareholder Rights Directive that stipulates that ‘Member States shall permit companies to offer to their shareholders any form of participation in the general meeting by electronic means ...’, Member States introduced the possibility for companies to allow the participation of shareholders and voting in GMs by electronic means and to enable voting without the need to be physically present or appoint a proxy who is physically present at the meeting. As companies may decide whether and how electronic participation should be available for shareholders, such e-participation is not a shareholder right in EU law.

While the stakeholders consulted – representatives of Member States, experts in company law and stakeholder associations – did not identify specific regulatory barriers in the national legislation to the use of new digital technologies for the participation and voting by shareholders in GMs, several mentioned that specifying in national legislation the implications and practical aspects of the use of new digital technologies in this regard would bring more certainty for all stakeholders involved. Aspects such as certainty as to the acceptance, correct recording and counting of votes by the issuers when these are transferred via electronic means⁴⁰, recognition of electronic signatures, non-paper proxy voting, or efficient issuance of powers of attorney were in particular mentioned⁴¹. There could be possibilities to improve electronic voting and voting by separate groups of shareholders (e.g. those connected remotely and voting electronically in real-time may have issues not affecting those that are present in a hybrid meeting). Voting electronically before the date of a GM may also create uncertainties when using both electronic ISO20022 messages⁴² and available e-voting systems⁴³, as neither shareholders nor their proxies can be certain about the final draft of a resolution if the latter is modified during the GM. One stakeholder association representing large companies suggested that automatic processes through the chain of intermediaries should be standardized to be able to deliver a virtual admission card to the shareholder who wants to vote *in absentia* during the meeting.

At this stage, only a few companies in a few member States provide the services allowing the use of blockchain in an experimental phase for the purpose of participation and voting by

³⁹ See footnote 3 above.

⁴⁰ According to the central securities depository of one Member State, legislation should provide assurance that votes cast electronically by shareholders identified in the chain of intermediaries cannot be rejected after the GM resolution was approved on grounds of allegedly insufficient means of shareholders’ identification undertaken by the issuer.

⁴¹ According to a central securities depository. See also CLEG minutes. Some of these elements will be subject to the assessment envisaged under the second part of Action 12 of the 2020 CMU Action Plan planned for Q3 2023 (see footnote 3 above).

⁴² ISO 20022 - Universal financial industry message scheme is a multi-part International Standard prepared by ISO Technical Committee TC68 Financial Services to enable communication interoperability between financial institutions, their market infrastructures and their end-user communities (for more information see: <https://www.iso20022.org/about-iso-20022>).

⁴³ According to a central securities depository.

shareholders in GMs (e.g. using blockchain technology to certify shareholdings, proxies and votes for the GM)⁴⁴.

Therefore, even if no specific national regulatory barriers to the use of new digital technologies for the participation and voting by shareholders in GMs have been identified, it will be important in the future to keep monitoring the practical challenges and difficulties encountered by the various stakeholders, and consider whether any EU level policy initiatives – legislative action, best practices or technological standards – could be developed to improve the environment for the use of new digital technologies in the participation and voting by shareholders in GMs.

Hybrid and purely virtual general meetings

A specific case of the use of digital tools for shareholder engagement is the participation and voting in hybrid or purely virtual GMs.

Before the Covid-19 pandemic, many Member States did not allow purely virtual GMs⁴⁵. During the Covid-19 pandemic, Member States adopted emergency legislation, as indicated above, establishing the possibility of holding hybrid or purely virtual GMs⁴⁶ even where these options were not envisaged in the articles of association or by-laws of the companies.

In practice, among the advantages of hybrid or purely virtual GMs, these have been reported to have become more environment friendly and less costly for individual shareholders since travels are not necessary to attend the meetings. It has also been mentioned that more votes were cast by institutional investors⁴⁷.

On the other hand, the experience during this period has also shown that some operational or practical problems may occur in relation to the use of digital or electronic technologies in hybrid and purely virtual or digital GMs. Some private investors reported having encountered problems with voting⁴⁸, while others had difficulties with getting access rights for remote participation, or could not fully exercise their rights to ask questions or have them answered. For instance, it has been mentioned that the level of perceived accountability of non-executive and executive directors vis-à-vis shareholders has decreased (the latter had almost no possibility to ask questions in the meetings and cast votes live when the log-in details were lost in the chain of intermediaries, e.g. in the Netherlands, and sometimes it was only possible for foreign shareholders to vote if they had a bank account in a Dutch bank as foreign investors)⁴⁹. Some stakeholders, in particular investors, are concerned that hybrid or virtual GMs may hinder or limit the ability for the shareholders to intervene and speak. “Overly

⁴⁴ See ICLEG Report point 26.

⁴⁵ In the Netherlands, since 2007 Dutch companies had the option to organise hybrid GMs under certain conditions, i.e. a provision in the articles of association enabling shareholders to participate and exercise the right to vote by electronic means. Articles of association can also determine that shareholders are able to vote by electronic means of communication during a certain period prior to the GM.

⁴⁶ For example, Germany introduced the possibility of a full virtual meeting and it was used by most of the companies (95%). Also the Netherlands and Spain.

⁴⁷ See CLEG minutes.

⁴⁸ E.g. in the Netherlands.

⁴⁹ See CLEG minutes.

efficient” virtual meetings have sometimes prevented the shareholders from taking active part in the meeting.

As a consequence of this, the appetite amongst shareholders for virtual meetings in a post-Covid-19 period has been reported to have decreased in some jurisdictions⁵⁰. There are concerns that hampered shareholders’ rights may potentially have an impact on the balance of powers between shareholders and managers as well as on the perceived accountability of the board⁵¹. Moreover, in many listed companies, shareholders decide on their voting behaviour long before the meeting anyway, for example by using the services of proxy advisors⁵². Hence, in some countries the focus seems to shift towards information provided before the meeting, in most cases in writing. However, for non-professional shareholders⁵³ the GMs continue to play a central role.

Some stakeholders (lawyers’ association) have stressed that possible or potential issues related to virtual GMs relate mostly to data protection or technical problems arising during the meeting, such as: the quorum to hold a meeting or the need to postpone or pause the meeting; the validity of the GM or the exercise of shareholders’ participation rights due to technical failure; the legal basis or grounds to claim damages or declaring null and void the GM resolutions in case these technical issues occur⁵⁴; possible different consequences of these technical issues as regards liability if they happen on the side of the company or on the side of the shareholders; who bears the burden of proof of having suffered technical problems; the identification of votes cast by shareholders if there are mistakes in their email address; the risk of potential differences of treatment of participation rights for shareholders depending on whether they are present or connected remotely in case of hybrid meetings.

In line with the SRD, the current legal framework in most Member States seems to leave great flexibility for companies to organise or regulate this kind of GMs through their articles of association or by-laws but without the legal framework addressing the practical implications

⁵⁰ E.g. the Netherlands, Ireland (see CLEG minutes). However, Proxy Insight (2020) surveyed investors and found that 58.4% of them stated that they support the use of virtual meetings, and if shareholder rights are protected, 82.2% support virtual meetings, and 81% support hybrid meetings (see Schwartz-Ziv, Miriam, ‘How Shifting from In-Person to Virtual-Only Shareholder Meetings Affects Shareholders’ Voice’, *Finance Working Paper no 748/2021*, ECGI, April 2021, p. 38). In some jurisdictions, remote meetings continue to have positive outcomes in terms of engagement. In others, after an initial surge in virtual meetings and increased shareholder participation during the pandemic, the trend has changed in the sense that virtual or hybrid meetings are not always the preferred option for investors and do not always translate into enhanced shareholder participation (see Carl Magnus Magnusson and Daniel Blume, ‘Digitalisation and corporate governance’, in OECD Corporate Governance Working Paper Series, No 26, OECD 2022: [296d219f-en.pdf \(oecd-ilibrary.org\)](https://oecd-ilibrary.org/publications/296d219f-en)).

⁵¹ <https://betterfinance.eu/wp-content/uploads/Virtual-AGMs-in-the-EU-FINAL-2.pdf>, p. 15, 18, 30-31.

⁵² See ICLEG Report point 23.

⁵³ E.g., <https://betterfinance.eu/wp-content/uploads/Virtual-AGMs-in-the-EU-FINAL-2.pdf>, p. 12.

⁵⁴ In Austria, these GMs resolutions can be challenged when communication disruptions during a virtual meeting are attributable to the companies fault (p. 102(5) AktG). The company is only responsible for technical issues in its own technical sphere. In FI, to the extent that the disruptions are the responsibility of the company, they must be treated in the same way as any problem that prevents participation in the GM. In ES it is considered that the company cannot be held liable nor the validity of the GM be challenged if the digital connection issues are not related to the digital systems or platform set up by the company to hold the GM but to default tools used by the shareholder (see I. Sancho Gargallo, ‘Artículo 182 bis. Junta exclusivamente telemática’, in *Comentario de la Ley de Sociedades de Capital, Tomo III, La junta general. La administración de la sociedad*, Tirant lo Blanch, Valencia 2021, page 2600. See also ICLEG Report point 35.

of the use of digital tools for this purpose. In practice, this has to be addressed by the articles of association or by-laws or solved by way of interpretation.

Some investor stakeholders are asking for laws regulating hybrid or purely virtual GMs to ensure that shareholders can put questions, speak and vote in purely virtual, live meetings, raise questions via email, or continue the discussions after the GM is over, after having heard views of others. According to an institutional investors' association, it should be required that the possibility to hold purely virtual GMs is established in the articles of association or by-laws of the company so that shareholders can really be the ones deciding whether this GM format is appropriate and introduced as an option. Whereas some stakeholders are of the opinion that hybrid meetings are likely to be more easily accepted than purely virtual meetings⁵⁵, others (companies' associations) refer to the higher costs of organising hybrid meetings.

The experience gained during the application of the Covid-19 emergency legislation on the matter can help to address the practical challenges that have been encountered and identified in the organisation and holding of hybrid and purely virtual GMs and to develop the best solutions for the electronic participation and exercise of shareholders' rights. All these questions are currently being looked at in several Member States that are considering adopting permanent changes to company law for these purposes, or have already done so, like Spain⁵⁶ or Germany⁵⁷.

At EU level, company law experts have suggested that even if Member States have introduced the possibility for companies to allow the electronic participation in GMs in line with Article 8 of the SRD, electronic participation in GMs could be enhanced further. This would be especially useful for cross-border investors. Possible solutions include requiring (in particular large) listed companies to always provide for the possibility of electronic participation in the GM to all shareholders, irrespective of whether the articles of association or by-laws of the company specifically allow for such a possibility or whether the board of directors or the shareholders are in favour of this type of participation, and thus supplementing the

⁵⁵ See CLEG minutes.

⁵⁶Article 182 of the Spanish Ley de Sociedades de Capital (LSC), as amended by Ley 5/2021, of 12 April, provides for the possibility to attend hybrid GMs electronically if envisaged in the articles of association, and art. 182 bis, introduced by the same law, regulates purely virtual GMs, which require amending company statutes by two thirds. Audio, video and written messages are allowed in virtual meetings if envisaged in the articles of association or statutes. In case of purely virtual GM of listed companies, notarial electronic intervention is required as a safeguard (art. 521.3 LSC).

In Finland, on 22 November 2021 the Government presented a law allowing companies to provide in their by-laws for the possibility of purely virtual GMs and proposing a definition for the terms 'hybrid meeting' and 'virtual meeting'. In the Netherlands, the Minister of Legal Protection has made the commitment to investigate the possibility to create a permanent legal framework for purely virtual meetings. It is up to a next Government to decide whether to proceed with this topic and submit a future bill to the Parliament. Ireland is also considering making hybrid and purely virtual GMs possible on a permanent basis after the temporary Covid-19 legislation. Austria is now discussing the introduction of permanent legislation with possible necessary safeguards to ensure the possibility of direct intervention of shareholders. France is assessing the application of the pandemic rules to the GMs and how to reduce the possible cases of invalidity or nullity of these GMs.

⁵⁷ Gesetz zur Einführung virtueller Hauptversammlungen von Aktiengesellschaften und Änderung genossenschafts- sowie insolvenz- und restrukturierungsrechtlicher Vorschriften v. 20.7.2022, BGBl. I, 1166.

shareholders' physical participation right (i.e. providing always for the possibility of hybrid meetings)⁵⁸.

Therefore, it can be concluded that, the mere option of companies to allow for electronic participation of shareholders in line with the SRD⁵⁹ does not amount to a right for the shareholders to individually require the company to allow them to participate electronically in a GM if this kind of participation is not envisaged by the company itself (e.g. in its articles of association, bylaws) or in national law (e.g. national legislation adopted during or after the pandemic). The question whether companies should be mandated by legislation to grant a right to shareholders to participate electronically either in hybrid or purely GMs would require establishing necessary safeguards for the protection of shareholders and the exercise of their participation rights, including the right to ask questions and receive an answer in an electronic context also, as well as considering the potential burden for companies if obliged to organise hybrid or purely virtual GMs.

IV. CONCLUSION

Based on the evidence collected and assessed in the previous sections, no specific national regulatory barriers in the field of company law have been identified as concerns the use of new digital technologies for communication and transmission of information between issuers and shareholders, for the identification of shareholders by the issuers and for the participation and voting by shareholders in GMs. Nevertheless, several specific practical or operational problems have been observed that may indirectly hinder the use of new digital technologies in this field. In addition, some issues have also been identified where further work and assessment is warranted.

Despite the recent transposition of the Shareholder Rights Directive II, some challenges seem to persist, mostly related to the lack of harmonisation of certain aspects (e.g. shareholder definition, national thresholds for allowing companies to request the identification of shareholders, and the record date). Progress on these issues could also facilitate shareholder engagement.

Furthermore, the potential developments on standardisation of technologies and automated processes used through the chain of intermediaries in order to improve the transmission of information and the identification of shareholders in practice should be monitored. The practical uses of DLT and blockchain and the need to comply with existing European Union law in areas such as data protection and capital markets or securities law also have to be taken into account when drawing conclusions on the DLT pilot regime for market infrastructures under Regulation (EU) 2022/858⁶⁰.

⁵⁸ See ICLEG Report points 16 and 56. However, in spite of technological advances which have the potential to improve shareholder engagement by facilitating remote voting, to a certain extent the current 'deficiency' in shareholder engagement is due to investor business models rather than technological or even regulatory barriers (see Carl Magnus Magnusson and Daniel Blume, 'Digitalisation and corporate governance', in OECD Corporate Governance Working Paper Series, No 26, OECD 2022: [296d219f-en.pdf](https://doi.org/10.1787/296d219f-en) (oecd-ilibrary.org)).

⁵⁹ See Article 8 of the SRD.

⁶⁰ In the same line, the practical implications and consequences of the uses of electronic identification and e-signatures could be also looked at once the Proposal for a Regulation of the European Parliament and of the

As regards the organisation and holding of hybrid and purely virtual GMs and the electronic participation of shareholders in such meetings, the emergency national legislation adopted during the pandemic, its practical implementation and application as well as the permanent legislation adopted since then in various Member States as regards either hybrid or purely virtual GMs could not yet been fully observed and analysed.

Therefore, the Commission services will keep monitoring the development of practices and rules on GMs, both hybrid and purely virtual, and on specific use cases of DLT technologies, at national level. Future data collection and study to follow-up Action 12 of the 2020 CMU Action Plan will give an opportunity to also assess more concretely the advantages and the potential risks stemming from the use of modern technologies⁶¹ to facilitate shareholder engagement. This will also provide an opportunity to further assess other possible remaining barriers to shareholder engagement.

Council amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity (COM(2021) 281) is adopted and entered into application. See ICLEG Report point 29.

⁶¹ BETTER FINANCE and DSW call on the EU Commission to further encourage the use of modern technologies, including blockchain technology to foster a real-time transmission of information and direct communication between issuers and shareholders while taking into account potential risks for investor protection stemming from the use of modern technologies (see <https://betterfinance.eu/wp-content/uploads/Barriers-to-Shareholder-Engagement-2.0-SRD2-Implementation-Study-20220106.pdf>, p. 27).