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LEGAL ASPECTS OF DIGITALISATION IN EU COMPANY LAW

Abstract. *The article presents legal solutions of the European Union (EU) and Member States (MS) with respect to the digitalisation of company law. We analyse and evaluate the EU's efforts to overcome the backlog of legislation concerning technological development, with legal solutions in the field of the electronic formation and registration of companies and in shareholders' communication with company board members. The analysis shows that company law in the EU is lagging behind technological development. Despite ongoing dynamic efforts to modernise it on the EU level, the MS reveal differences in their speed of implementing the EU's directives. The case of Slovenia shows that while digital tools are in wide use for ensuring transparent data disclosure and publication, along with the realisation of basic corporate governance functions, big differences remain between the minority of companies traded on the regulated market and the majority of companies for which such regulation is deficient.*

Keywords: *digitalisation, electronic means, block chain technology, company registration, shareholders' general meeting (SGM), COVID-19 pandemic*

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Introduction

The research question considered in this article is: are the changes made to EU and national corporate law sufficiently fast, even and coordinated to catch up with the new information and telecommunication (ICT) possibilities in the relationships between shareholders and company bodies and the public that are facilitated by the rapid development of technology, especially digitisation?

We understand digitisation as electronic communication and electronic (not written) data transmission and storage, as well as electronic disclosure

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and publication and access to data. Digitalisation is most often conceived of as electronic computer language in binary code; earlier forms – the telephone, telegraph, radio and television broadcasts, and movie reels – have these days often been substituted by digitalisation (ICLEG, 2016).

Advanced digital technologies enable the permanent transformation of existing business and corporate governance models and the creation of new ones, add to the economy's efficiency and competitiveness and contribute to wider social and economic development.

The digitalisation of business processes, also in the area of company law, is an unstoppable ongoing process which, while the development of law can never catch up, it can more or less successfully pursue it. In the EU, efforts to modernise company law are ongoing and dynamic yet the division of responsibilities between the EU and the MS means that it does not provide uniform, up-to-date solutions or equitable development in all areas of company law. On the contrary, solutions in different areas vary considerably from country to country. There is also a difference in the speed at which the MS implement the EU's binding guidelines and in overcoming the backlog of legislation concerned with technological development.

The COVID-19 pandemic has encouraged the faster and wider use of digital tools in company law in most countries, including Slovenia. Along with bans and restrictions on physical communication and meetings, where shareholders' meetings were no exception, legislators introduced a temporary option for an electronic SGM even if one was not provided for in a company's bylaws. This has stimulated companies to adopt electronic means of organising shareholder communication to such an extent that the knowledge and experience acquired will certainly be useful to support the widespread use of digitalisation even in the post-pandemic period.

The presented study is methodologically based on a legal, comparative and developmental analysis of the constantly changing corporate law of the EU and MS and a case study of the codification of digitisation in Slovenia. We also use the method of theoretical analysis of the modest literature concerning the digitisation of company law.

General on digitalisation in the economy

Responsible business conduct and digitalisation

Digitalisation facilitates new ways of creative business operations like online platforms, social media, distributed ledger (i.e. block chain) technology, Big Data and online service providers. It has a significant impact on the economy (jobs, investments, international trade, production, distribution). Although the impact is positive, there are also some negative side effects.

Digitalisation has driven innovation and technological development, but also contributed to the restructuring of traditional industries, making it imperative for employees to acquire new knowledge and skills in the direction of digital competencies.

Digitalisation can also *harm* human rights and other social and environmental aspects (e.g. with the use of artificial intelligence, risks associated with surveillance technology and the misuse of online content platforms to spread disinformation and empower the black market). At the same time, the *positive* implications of digitalisation for responsible business conduct are substantial. New digital tools can accelerate development and enable businesses to strengthen their efforts to act responsibly, in particular as that relates to employees, the environment and responsible supply chain management. Progress in digitalisation mostly *depends on a supportive legal framework*.

Theoretical aspects of digital communication in company law

There is not much theorisation when it comes to the digitisation of company law. Rare articles analyse the background to EU proposals (Omlor, 2018; Koulu, Kallio and Hakkarainen, 2017; Cauffman, 2018), address issues related to aspects of personal data protection (Czwalina, Kurfels and Strube, 2021) and the need to develop on the international level a unified legal strategy for civil and intellectual law regarding digital technologies (Sidorenko, 2020). A study conducted for the EC by Ernst & Young in 2018 concluded that the legal environment for the use of digital tools in corporate governance *does not correlate to the actual use of such tools*. Even if sometimes they can require significant investment, digital solutions overall allow for faster, cheaper, more convenient, more effective and safer interactions.

In this article, we limit ourselves to the effects of digitalisation on company law, which are *generally positive* for social development because they increase the speed, accuracy, traceability, transparency and thus overall efficiency of communication processes between shareholders and company bodies. *The side effects of digitalisation* can also be detrimental to those who do not keep up with the rapid development of technology, especially when the *acquis communautaire* lags behind technological capabilities. According to Knapp (2016), such side effects can be that recording and transmission involve identifiable individuals who may not have given their consent to the proceedings being recorded and transmitted and may refuse to do so.

The company and the shareholder especially communicate in connection with the preparation, participation in, and voting at the *Shareholders' General Meeting (SGM)* and with respect to the exercise of the shareholders' rights exercised outside of the SGM. The digital communication types

seeing the most use are: emails, websites of companies or public information portals and online business registers. Various electronic voting systems and live webcasts of SGMs are used in the conduct of SGMs. Increasingly, the implementation of a virtual and hybrid SGM and the use of data blockchain technology are also being considered.

This technology could be used to provide the basic functions of an SGM. In particular, technology could make it cheaper and faster to convene an assembly, provide materials, communicate with shareholders, identify shareholders, grant voting rights, vote, and verify the voting. In the second step, Slovenia could follow certain other jurisdictions (e.g. US, Delaware) and enable the use of *blockchain technology* in the issuing of equity securities (Jadek and Pensa, 2019).

Areas encompassed by company law digitalisation

It is beyond doubt that digitalisation contributes *to more efficient corporate governance*. It covers several areas such as: online company formation and registration, the electronic submission of documents, electronic voting systems for company stakeholders, notably the possibility of participating in SGMs via electronic means and, of course, digital solutions to allow access to information about companies and their structures.

Voting without attending the SGM in person, whether by correspondence or using electronic means, should according to EU law not be subject to constraints other than those necessary for the verification of identity and the security of the electronic communications. Under EU law, companies should face no legal obstacles when offering their shareholders any means of electronic participation in the SGM. Certain information also *must be made available to shareholders on the company's website*. In addition, shareholders have the right to put items on the agenda of the SGM, to submit draft resolutions by electronic means, and to appoint/revoke a proxy by such means. Companies may offer shareholders *any form of participation at the SGM by electronic means*, including: by real-time transmission of the SGM, real-time two-way communication enabling shareholders to address the meeting from a remote location and a mechanism for casting votes before or during the SGM without the need to appoint a proxy to be physically present.

Still, there is *a number of other areas* and necessary legislative changes that are required to be addressed with regard to the digitalisation of company law and corporate governance. Above all, *technology use could lower the costs and accelerate the convocation of an SGM* with the forwarding of material, communication with the shareholders, shareholder identification, granting of voting rights, vote verification and the voting. Digitalisation undoubtedly

also contributes to more efficient corporate governance *in the international business context*; digital technology is supporting the basic functions of the general meeting, no matter where the shareholders are located.

EU legal framework for the digitalisation of company law

Legal framework is lagging behind the needs

However, there are so many more focused EU communications and recommendations based on comprehensive expert analyses of the digitisation of company law. There is *no uniform approach across the EU* to enable persons to set up a company online, or to enable companies to use digital technology to communicate with shareholders or provide information to others. The development of law in support of the digitalisation of company law within the EU and across the MS is *very uneven*, making cross-border business difficult and seeing it *lag behind* ever-new technological solutions.

Impediments to the use of digital solutions have been identified: bias in favour of the traditional solutions; ineffectiveness of the legal framework; the extra burden of using digital solutions; blocking points along the chain of intermediaries; risks related to the chosen technology; and the lack of harmonious legislation across the MS (Ernst & Young, 2018).

The *legal framework's inefficiency* with regard to the digitisation of company law is certainly linked to the inconsistent legislation among the MS and the backlog of legal solutions to technological challenges. This development gap can be addressed through a number of EU initiatives and also by taking account of the circumstances in which we find ourselves in the fight against the pandemic. The same applies to *favouring traditional solutions* and the reluctance to use more sophisticated digital solutions, which require more research and development, education and training, as well as greater promotion of emerging technological solutions; more knowledge reduces the risks associated with new technology. This is especially true with the use of blockchain technology.

The final purpose of digital solutions is *to make interactions simpler, less expensive, more efficient and safer*. In the EU, digital solutions have been used for certain types of communication for quite some time in the preparation of the SGM, participating and voting in such a meeting, as well as relative to the exercise of shareholder rights outside the SGM.

EU Commission initiatives

In the two following papers, the EU Commission (EC) pushed for digitalisation in the broader sense in the EU, stressing the role of public

administrations in helping businesses to easily start their activities and operate online:

- Communication, *A Digital Single Market Strategy for Europe*: the strategy contains a coherent vision with the aim and ambition for Europe to move to the forefront of the world's digital economy, acknowledging that Europe has fallen behind other regions in this field.
- Communication, *EU e-Government Action Plan 2016–2020: Accelerating the digital transformation of government* specifically recognises the importance of improving the use of digital tools to ensure compliance with company law-related requirements.

Today, all listed companies have *Internet sites and communications* and hence numerous possibilities can be explored as concerns what modern digital technologies can offer to make information instantly accessible. The purpose of the EU's rules in this area is to *establish an effective legal framework for digitisation* in order to enable businesses to be established and to perform operations anywhere in the EU and to provide efficient communication for their shareholders and other stakeholders (employees and creditors) and to make corporate governance *more efficient and competitive*.

Under EU and MS company law, companies should therefore face *no legal obstacles* in offering to their shareholders any means of electronic participation in communications and publications. For instance, voting without attending the SGM in person, whether *by correspondence or by electronic means*, should not be subject to constraints other than those needed for the verification of identity and the security of the electronic communications. The EU law has for example also established rules promoting the exercise of shareholder rights at the SGM of companies with registered offices in the EU and whose the shares are admitted to trading on a regulated market in the EU.

EU Directives on the exercise of shareholder rights

In 2003, the EU Commission took the initiative to enhance shareholders' rights in *listed companies* to solve problems relating to cross-border voting (Communication, May 2003). The main objective of this initiative was to *strengthen shareholders' rights*, especially through the possibility of participating in the SGM *via electronic means* and ensuring that cross-border voting rights can be exercised (Resolution EP, April 2004). Each company has to ensure the *equal treatment of all shareholders* who must be *in the same position* with regard to participation and the exercise of voting rights at the SGM.

Directive 2007/36/EC, 2007 on the exercise of certain rights of shareholders in listed companies sets out requirements associated with *certain shareholder rights* attaching to voting shares in relation to the SGM. It refers

to companies which have their registered office in a MS and whose shares are admitted to trading on a regulated market situated or operating within a MS (*listed companies*). Directive 2007/36 imposes an obligation on the MS to make certain information available to shareholders on a company's website (like publishing the results of voting). The MS must:

- ensure that shareholders have the right to *put items on the agenda* of the SGM and to table draft resolutions in writing, which may be submitted by post or electronic means;
- permit companies to offer shareholders any form of *participation in the SGM by electronic means*, including by real-time transmission of the SGM, real-time two-way communication enabling shareholders to address the meeting from a remote location and a mechanism for casting votes before or during the SGM without the need to appoint a proxy to be physically present; and
- allow shareholders to *appoint a proxy and revoke an appointment by electronic means* and permit companies to accept the notification and revocation of the appointment by electronic means and must ensure that every company offers at least one effective method of notification and revocation by electronic means.

Non-resident shareholders

According to Directive 2007/36, non-resident shareholders should be able to exercise their rights in relation to the SGM *as easily as shareholders who reside* in the MS in which the company has its registered office. This requires that any obstacles hindering the access of non-resident shareholders to information relevant to the SGM and the exercise of their voting rights without physically attending the SGM be removed. The removal of these obstacles should also benefit resident shareholders who do not or cannot attend the SGM.

Shareholders should, under Directive 2007/36, be able to cast informed votes *at, or in advance of, the SGM*, no matter where they reside. All shareholders should have sufficient time to consider the documents intended to be submitted to the SGM and determine how they will vote according to their shares. To this end, timely notice of the SGM should be given and shareholders should be provided with all of the information intended to be submitted to the SGM.

Information about the SGM on the company's website

The revision of Directive 2007/36 made by *Directive 2017/828* encouraged long-term shareholder engagement to ensure that decisions are made

for the long-term stability of a company and take environmental and social issues into account. The revised directive facilitates shareholder *identification and information flows* between shareholders and the company. Pursuant to the revised Directive EU 2017, a company must give shareholders *information on its website about the SGM*, including 21 days' notice, the date, location, agenda, voting and participation procedures.

Companies must also provide other information like the total number of shares and voting rights, documents to be submitted, a draft resolution for each agenda item of the meeting and forms to be used for voting by proxy (when a shareholder authorises another person or firm to represent them). EU countries had to abolish any restrictions on shareholders participating at meetings through electronic means, and to accept proxy appointments via electronic means.

The use of digital tools to form and register a company

On 31 July 2019, the 'Digitalisation Directive' of the EU as regards the use of digital tools and processes in company law entered into force. This Directive follows the Commission's Digital Single Market Strategy (from May 2015) in which it promised to put forward simpler and less burdensome rules for companies, including providing for making digital solutions available especially *in relation to the registration of a company*. The proposal concerning the digitalisation of company law requires the MS to ensure that the registration of companies can be carried out fully online.

Directive 2019/1151 *facilitates the formation of companies* and the *registration* of branches while also reducing the costs, time and administrative burdens associated with these processes, in particular by micro, small and medium-sized enterprises (SMEs) as defined in Commission Recommendation 2003/361/EC.

General rules for the online provision of information, procedures and assistance services relevant for the functioning of the internal market are found in Regulation (EU) 2018/1724 of the EP and of the Council, which established the *Single Digital Gateway*.

Directive 2019/1151 of 20 June 2019 includes provisions on the *use of digital tools and processes in company law*. The MS had to transpose this Directive by August 2021 (with a longer deadline for certain provisions)¹. *The use of digital tools and processes* more easily, rapidly and time- and cost-effectively initiates economic activity by the setting up of a company or

¹ 16 MS (Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Finland, France, Hungary, Luxembourg, Netherlands, Poland, Romania, Slovenia, Slovakia, Sweden) have availed of the possibility provided by the Directive to have an extension of the transposition period by one year, i.e. by August 2022.

opening of a branch of a company in another MS, and to provide comprehensive and accessible information about companies².

The EU passed legislation (EU Directive 019/1151) to ensure that after August 2021 while setting up a company or registering a new branch it is possible *to register* certain types of (limited liability) *company and branches online*. It should be possible to form companies fully online. However, the MS should be allowed to limit online formation to *certain types of limited liability companies*. The new legislation obliges the MS to make procedures speedy: 5 days to set up a company online or 10 days *to register a branch online*; applicants should be informed whether it is going to take longer. Interconnected registers will enable information to be circulated among the MS. The result should be a more modern business environment, helping companies to thrive and prosper across the EU's internal market. The MS should lay down detailed rules for *online formation*. It should be possible to form a company online upon the *submission of documents or information in electronic form*.

Requirements for electronic reporting of securities information

Directive 2004/109 as amended by Directive 2013/50 prescribes transparency requirements with respect to *information about issuers whose securities* have been admitted to trading on a regulated market. It contains information requirements for issuers and requires the MS to allow issuers to use electronic means provided that a decision is taken at the SGM and meets certain conditions.

The use of electronic means shall in no way depend on the location of the seat or residence of the shareholder. Currently, *significant differences exist between the MS* when it comes to the *availability of online tools* enabling entrepreneurs and companies to communicate with authorities on matters of company law. E-government services vary among the MS. Some MS provide comprehensive and user-friendly services entirely online, while others are unable to provide online solutions at certain major stages.

Shareholders *must be contacted in writing to be asked for their consent* for the use of electronic means to convey information. If they do not object within a reasonable period of time, their *consent is deemed given* subject to their right to request, at any time in the future, that information be conveyed in writing.

The Amended Transparency Directive requires issuers to prepare the annual financial report in the *European Single Electronic Format* (ESEF) with

² See also: Directive (EU) 2017/1132 of the EP and of the Council of 14 June 2017 relating to certain aspects of company law (OJ L 169, 30. 6. 2017, p. 46).

effect from 1 January 2020. The European Securities and Markets Authority (ESMA) had to develop draft regulatory technical standards to specify the electronic reporting format, with due reference to current and future technological options (Final Report, EU, 2019/815). The ESEF Regulation introduces a single electronic reporting format for the annual accounts of issuers' securities that are listed on regulated EU markets. It lays down general rules on the format of annual accounts reports as defined in Article 4 (2) of the Transparency Directive 5, and more detailed rules on the use of codes in the financial statements included in these reports. The Regulation does not apply to semi-annual financial reports as defined in Article 5 of the Transparency Directive.

Digitalisation of company law in an MS: the case of Slovenia

Recent developments with the digitalisation of company law in Slovenia

As an example of the regulation and operation of the digitalisation of company law in the EU, we now present in some detail how the legal conditions for digital corporate governance are established in the Slovenian Companies Act (CA-1). The new rules regulate the digital communication of shareholders with the company and members of supervisory and management boards, as well as in the chain of financial intermediaries and proxies.

Slovenia has taken decisive steps towards digitalisation by making amendments to the Companies Act after the entry into force of Directive EU 2007/36 and, finally, with the extensive amendment to the Companies Act (CA-1 K) which translates Directive EU 2017/828 into Slovenian law. Nowadays, digital tools are in wide used in Slovenia for transparent data disclosure and publication purposes, as well as for the implementation of basic corporate governance functions.

The Slovenian Directors' Association has set up an expert team aimed at reviewing possible corporate governance development trends as a result of the impact of digitalisation and new technologies. The team has observed that blockchain technology could have a certain impact on corporate governance. For the time being, any broader use of such technology is somewhat limited by the current regulatory restrictions. Nevertheless, the technology could be used to assure a more efficient and direct impact of economic owners on the structure of the indirect ownership of shares. With certain legal adjustments, this technology could be used to support the basic functions of the SGM (Digitalna preobrazba slovenskega gospodarstva, 2022).

Convening the SGM: EU law requirements

According to Directive EU 2007/36, national corporate legislation must ensure that a *company issues the electronic convocation* of the SGM no later than on the 21st day before the date of the meeting. The company has to be required to issue the electronic convocation in a manner which assures *fast access* to it on a *non-discriminatory* basis. National legislation must require the company to use such *media as may reasonably be relied upon* for the effective dissemination of information to the public throughout the Community.

The MS *may not impose an obligation to use only media* whose operators are established in its territory. In either case, the company may *not charge any specific cost* for issuing the convocation in the prescribed manner (Directive 2007/36).

The electronic convocation must at a minimum indicate precisely *when and where* the SGM is to take place and the meeting's proposed *agenda* and contain a clear and precise description of the *procedures* that shareholders must comply with in order to be able to participate and cast their vote at the SGM. This includes *information concerning* (Directive EU 2007/36):

- the *rights available to shareholders* to the extent that these rights can be exercised after the issue of the convocation;
- the *procedure for voting by proxy*, notably the forms to be used to vote by proxy and the means by which the company is prepared to accept electronic notifications of the appointment of proxy holders; and
- the *procedures for casting votes* by correspondence or by electronic means.

Where applicable, the electronic convocation must under EU law state the *record date* and explain that only those *who are shareholders on that date* have the right to participate and vote at the SGM and indicate where and how the full, unabridged text of the documents and draft resolutions may be obtained. The electronic convocation of the SGM must also indicate *the address of the Internet site* at which the information has been made available.

Publication of company data and messages under CA-1

CA-1 generally stipulates that a company is required by law to publish all information and notices that a company is required to publish *on the web-site* of the Agency of the Republic of Slovenia for Public Legal Records and Related Services (AJPES) for publications under the Companies Act (AJPES website; Article 11 of CA-1). It provides that if the articles of incorporation

(also known as articles) stipulate that individual *data or messages* of the company must be published, they shall be *published on the AJPES website* or in a daily newspaper published across the entire territory of the Republic of Slovenia, or as provided by CA-1. These data or company messages are also published in the company's newsletter or its *electronic media* if the company has such.

The website shall be *managed by AJPES*. It must be designed in such a way that everyone has free access to the published data. Publications required by law are free of charge, except for those required under the founding act for which AJPES may charge a fee to compensate for its costs according to the tariff adopted in agreement with the minister responsible for the economy.

The above stated applies *to all companies* established under CA-1, while for companies *whose shares are traded on the regulated market* the law imposes additional requirements and significantly more detailed regulation of the use of electronic means. While this is somewhat explained by the necessary protection of shareholders and transparency and publicity of operations, there is no reason why the majority of these provisions should not apply to all the other companies.

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According to CA-1, a company whose securities are traded on a regulated market must issue *a notice convening the SGM on the company's website* in which all relevant information (see below) is available. The company also states the method of sending any *additional agenda items* using electronic means (second paragraph of Article 298 of CA-1) and the *method of sending proposals* using electronic means (second paragraph of Article 300 of CA-1). Moreover, information must be stated concerning the *procedure for exercising the right to vote by proxy*, especially the forms to be used and the method for informing the company about the appointment of a proxy using electronic means (seventh paragraph of Article 308 of CA-1).

On a *company website*, for a company whose securities are traded on a regulated market, the following data must at least be available from announcement of convening up to and including the day of the SGM: convening of the SGM; the total number of shares and voting rights as at the date of the SGM being convened, including separate data for each share class; complete wording of documents and proposals (second paragraph of Article 297a); forms used for voting by proxy or by post; comprehensive information on the rights of shareholders (Articles 298/1, 300/1, 301 and 305 of CA-1); proposals of shareholders (Articles 298/1, Article 300/1 and 301 of CA-1).

The convening of the SGM *for all companies is to be published on the AJPES website* or in a daily newspaper published across the entire territory of the Republic of Slovenia. The convening of the SGM is also to be

published in the company's newsletter or electronic media if the company has such. If the company has its own website or other information system that allows for publications to be easily readable, the convening of the SGM is also published on this website or other information system.

Even before Directive 2017/828 was introduced, it was considered that the articles of association could give shareholders the opportunity to send a request for convocation of the meeting also using electronic means. Many corporations have provided for this option in their articles and begun to implement it.

Participation and voting at the SGM by electronic means

Under Directive 2007/36, the MS, must permit companies to offer to their shareholders any form of participation at the SGM by electronic means; *any or all of the following forms* of participation: real-time *transmission* of the SGM; real-time *two-way communication* enabling shareholders to address the SGM from a remote location; a mechanism for *casting votes* whether before or during the SGM, *without the need to appoint a proxy* holder to be physically present at the meeting.

The use of electronic means for the purpose of enabling shareholders to participate at the SGM may, according to Directive EU 2007/36, only be subject to such requirements and constraints as needed to *ensure the identification* of the shareholders and the *security* of the electronic communication, and only to the extent that they are proportionate to achieving those objectives.

Where the company offers the possibility that shareholders can *vote by electronic means*, pursuant to Directive EU 2007/36 the following rules apply:

- national corporate legislation may provide that the general meeting of shareholders may decide that it issues *the convocation of an SGM by electronic means* that must be accessible to all shareholders;
- the decision on electronic convocation of an SGM is to be taken by a *majority of no less than two-thirds* of the votes attached to the shares or the subscribed capital represented and for a duration of no later than the next annual SGM; and
- the minimum periods *need not apply for the second or subsequent convocation* of an SGM issued due to the lack of a quorum required for the meeting convened by the first convocation.

According to amended Article 297/4 of CA-1 (based on Directive 2017/828), a company's articles of association may stipulate that *shareholders may attend the SGM or vote before or at the SGM by electronic means*

without needing to be physically present. Such participation and voting may only depend on *requirements and restrictions* essential for identifying the shareholders and securing the electronic communication. When exercising the right to vote using electronic means, a *company must confirm the acceptance of the casting in electronic form* to the person who has exercised the right to vote.

Only companies *whose securities are traded* on a regulated market must in addition offer shareholders at least one way:

- *to send additional agenda items* by electronic means (Article 299/2 of CA-1);
- *to submit proposals for resolutions* and for shareholders' *election proposals*, using electronic means (Articles 300/2 and 300 of CA-1).

A company whose securities are traded on a regulated market must *publish the result of the voting* on its website within 2 days of the SGM (Article 304/2 of CA-1). For *all companies* there is an obligation, that within 24 hours of the end of the SGM, the management must send a notarised copy of the *minutes and annexes to the register* (Article 304/5 of CA-1). If a company has *shareholder notices* published on its website, it is sufficient to indicate in the notice only the website where this information is available (Article 299/6 of CA-1).

Directive 2007/36 states that every shareholder has the right to ask *questions related to items on the agenda* of the SGM. The company must answer the questions put to it by shareholders. The MS may provide that an answer is deemed to be given if the relevant information is available *on the company's Internet site* in a question-and-answer format.

Appointment of a proxy holder by electronic means

The MS must under EU law permit shareholders to *appoint a proxy holder* and to *accept the notification of the appointment* by electronic means, and ensure that every company offers its shareholders at least one effective notification method by electronic means.

It is left to the MS to ensure that proxy holders may be appointed, and that such appointment be notified to the company, *only in writing*. Beyond this basic formal requirement, the appointment of a proxy holder, the notification of that appointment to the company and the issuance of voting instructions, if any, to the proxy holder may solely be made subject to prescribed strict rules. The requirements should be needed to ensure the *identification* of the shareholder and of the proxy holder, or to ensure the possibility of *verifying the content* of the voting instructions, respectively, and only to the extent that they are proportionate to achieving those objectives.

Shareholders of a *company whose securities are traded* on a regulated market may according to CA-1 (Article 308/7) appoint a proxy using electronic means. The articles must provide for at least one method of using such proof of appointment of the proxy by electronic means.

Messages for shareholders and members of the Supervisory Board

Article 299 of CA (Directive 2017/828) stipulates that the management must *notify the intermediaries and shareholders' associations* that exercised voting rights at the last SGM of the convocation of the SGM and shareholders' proposals. Each member of the Supervisory Board may request that the management send them the same.

However, if a company has the required data published *on its company website* or other information system, which enables publications to be easily read, *it is sufficient to only indicate the website*. This means that if the information to be provided to financial institutions and shareholders' associations has already been published on the company's website, the Management Board is not obliged to specifically (additionally) communicate it to financial institutions and shareholders' associations. In this case, the company fulfils its obligation by *stating in the communication the website* at which this information is available.

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Public announcement of related party transactions

According to Article 281d of CA, a *company whose securities are traded* on a regulated market must publish a transaction for which the Supervisory Board's consent is required (Article 281c of CA) immediately after its conclusion in a way that allows quick access to this information on a non-discriminatory basis. The company is to use a medium that is reasonably reliable in disseminating information to the public across the EU.

This publication must provide all of the information needed to assess whether *the transaction is appropriate from the points of view of the company and shareholders that are not related parties*. This should include at least information on the nature of the company's relationship with the related party, the name of the related party, and the date and value of the transaction.

The data must also be published by the company on its website (or other information system) and access to it provided ensured for at least 5 years from the date of publication of the transaction on the company's website.

Provision of information for the exercise of shareholder rights, cooperation policy

Information on the exercise of shareholder rights may be provided by electronic means. Under Article 235c of CA (Directive 2017/828), intermediaries shall without delay provide shareholders with the information for the exercise of shareholders' rights that the company must provide to the shareholders; if such information is available on the *company's website*, mere notice of the company's new information and an *indication of the website address is sufficient*.

According to Article 317b of CA-1, institutional investors and asset managers shall prepare and publish a cooperation policy, a report on implementation of the cooperation policy in the report, and reveal how they voted at the SGMs of the companies in which they invest (Article 3g/2/2 of Directive (EU) 2017/828). This information must be publicly available *without cost for at least 3 years on the website* and should be updated annually. If an asset manager implements a cooperation policy, including voting, on behalf of an institutional investor, the latter may refer to the asset manager's website or other information system.

Electronic SGM during the pandemic

General meetings amid the pandemic

During the pandemic, for some time the holding of SGMs was practically prevented, except where companies could carry it out remotely in line with their statutory provisions. The Securities Market Agency found that before the COVID-19 epidemic, just 5 of the 37 public companies had the possibility of holding an electronic SGMs included in the articles (Circular Ljubljana Stock Exchange/265138). During the COVID-19 epidemic, the holding of SGMs proved to be a serious problem due to the prohibited gathering of people. In the period of the said prohibition, the holding of face-to-face SGMs was rendered almost impossible (Securities Market Agency, 4020-2 / 2020-29).

The pandemic has *greatly accelerated shareholders' meetings without a physical presence*, i.e. remotely, meaning that this method is already becoming prevalent. The possibility of holding an electronic SGM is not only suitable for periods of crisis, but also otherwise since it allows the possibility of shareholders participating in SGMs at a distance. In the age of digitalisation, it can be expected that in the future companies will use this way of assembling the shareholders more often.

A virtual or hybrid SGM

General meetings using remote voting options are more likely to continue to occur as shareholders' meetings that permit the possibility of involving shareholders remotely (i.e. as hybrid SGMs). In practice, several methods of remote shareholder meetings have been developed.

The digital SGM of a joint stock company can be conducted as a *completely virtual* (without the physical presence of shareholders) or as *hybrid meeting*. The latter takes place in physical form, where shareholders from a remote location have the opportunity to participate in it without them being physically present.

CA-1, regulating the possibility of holding an SGM of shareholders using electronic means without the physical presence of shareholders, allows for both *fully virtual or hybrid SGMs*.

Article 297/4 of CA-1 stipulates that some conditions must be met in order to hold a digital SGM of shareholders (without the physical presence of shareholders). First, the possibility of holding SGMs in electronic form must be provided for in the company's articles of association. Further, the rules or another act adopted by the company's management board must regulate in greater detail the procedure for holding an SGM using electronic means. Finally, publicity must be ensured regarding the possibility of holding an electronic SGM with appropriate notice, which is included in the announcement convening the SGM. The central issue relates to the identification of the shareholders and the issue of secure electronic communication. Participation and voting at the SGM namely may only depend on the requirements and restrictions that are essential for establishing the identity of the shareholders and securing the electronic communication, and only to the extent that is in proportion to the accomplishment of this goal (i.e. establishing identities, securing the electronic communication).

As mentioned, a record of the SGM must be drawn up in notarial form (Article 304 of ZGD-1), with a high level of formality in the process. With regard to the use of electronic means when implementing an electronic SGM, it is important to point out that only an approved digital signature can be used instead of a handwritten signature.

Pandemic exemption for an electronic SGM

This issue became especially relevant during the pandemic, which saw the legislation referring to shareholders' meetings being adjusted. Namely, with the enactment of intervention rules companies may hold a shareholders' meeting by electronic means, even if there is no basis for this step in their articles.

According to the Sixth Anti-Corona Package (Articles 71–81), which entered into force on 28 November 2020, a digital SGM is also permitted for *those companies that do not have this option included in their articles*. In order to facilitate and safely hold assemblies during the epidemic, the law amends the provisions of LCC-1 for the duration of the epidemic. *A virtual assembly* is possible if the transmission of the image and tone of the whole assembly in real time is ensured and that the conditions for establishing the identity of the shareholders or their proxies are provided. The voting of the shareholders or their proxies at a virtual SGM is possible if conditions for secure electronic communication are provided. Shareholders may exercise their right to information by using electronic means (where some special rules apply). In order to conduct a virtual or electronic SGM, the *management must determine the rules of procedure and publish* them. This must be done no later than the day of convening the SGM.

Draft bill on amendments to the Companies Act (ZGD-1L)

Upcoming amendments to LCC-1 L (under public discussion until the end of July 2022), the ‘Digitalisation Directive’ (Directive (EU) 2019/1151 of the EP and of the Council of 20 June 2019 amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law) will be implemented.

The proposal for LCC-1 L aims to support the fully online establishment of capital companies, online registration of branches of foreign companies, and online entry of documents and information in the court register.

The rules for the exchange of data on the ban on the performance of the function of director between the competent authorities of EU MS and the European Economic Area will be regulated.

A permanent basis for holding virtual meetings of shareholders in joint-stock companies, which could already have been held during the COVID-19 epidemic as a temporary measure, will be stipulated.

Conclusion

Based on the discussion presented below, we summarise the findings of the scientific analysis and answer the research question.

Digitalisation is facilitating new business operations such as online platforms, social media, distributed ledger (i.e. block chain) technology, Big Data and online service providers. In company law, digitalisation covers a number of areas, such as: online formation and registration of companies, electronic submission of documents, electronic voting systems for companies’ stakeholders, especially the possibility of participating at SGMs via

electronic means and, of course, digital solutions to allow access to information about companies and their structures. Digitalisation covers electronic communication and electronic (not written) data transmission and storage as well as electronic disclosure and publication and access to data. It permits new ways of creative business operations; it has a significant impact on the economy. Its progress largely depends on a supportive legal framework. The effects of digitalisation on company law are generally positive for social development because they increase the speed, accuracy, traceability, transparency and thus overall efficiency of communication. Still, risks of side effects are emerging that must be taken care of. Specifically, in the article we discovered the following:

1. *Company law in the EU is lagging behind technological development* in all fields where electronic means are applied (e.g. a single electronic register, formation of companies, and shareholders' communication with the company or board members).
2. *Efforts to modernise company law in the EU are ongoing and dynamic*, yet they do not provide uniform solutions or equitable development in all areas of company law. On the contrary, solutions in different areas vary considerably from country to country; there are differences in the speed at which the MS are implementing the EU's directives in these fields.
3. *Slovenia has taken decisive steps towards digitalisation* with by amending its Companies Act after Directive EU 2007/36 and Directive EU 2017/828 entered into force. In Slovenia, digital tools are widely used for transparent data disclosure and publication purposes, as well as for the realisation of the basic corporate governance functions. However, there are big differences in regulation between the minority of companies traded on the regulated market and the majority of other companies, for which such regulation is deficient.
4. *Under CA-1, for companies whose shares are traded on the regulated market the law imposes several additional requirements* and significantly more detailed regulation of the use of electronic means. While this is somewhat explained by the need to protect shareholders and the transparency and publicity of operations, there is no reason why the majority of these provisions should not apply to all the other companies.
5. *Such electronic communication has substantially helped in overcoming the problems related to shareholders' communications following the restrictions on physical contacts between people during the COVID-19 pandemic.* The pandemic crisis has encouraged the faster and wider use of digital tools in company law in most countries, including Slovenia; the knowledge and experience acquired during the pandemic period is available and useful for the widespread use of digitalisation even in the period following the pandemic.

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