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The virtual general meetings of shareholders in times of crisis - legal aspects

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Abstract
The Company Law universally requires shareholders to participate in meetings in order to formulate a set of corporate acts. Although provisions allowing the possibility for virtual shareholder meetings have already been implemented in many legislations, the COVID-19 crisis has given this relative legal novelty a status of paramount regulatory importance. The post-crisis regulatory development of the field in light of the process of digitalisation is the subject of this paper. The paper firstly gives an overview of the academic debate on the subject with a focus on the pandemic. Then, it continues to produce a comparative overview of virtual general meetings regulations in selected jurisdictions, namely Switzerland, Italy, Germany, U.S. state of Delaware and the European Union Company Law. Prior to the pandemic, the Croatian Company Law encompassed the possibility for hybrid virtual general meetings of shareholders if stipulated in company bylaws. The aforementioned possibility was used in Croatia for the first time during the outbreak of the COVID-19 crisis. The conclusions of the paper produce general recommendations for regulatory policy in this field with an emphasis on the European and the Croatian Company Law de lege ferenda.

Keywords: virtual general meetings of shareholders, Company Law, Corporate Governance, COVID-19, digitalisation

Introduction

The outbreak of the COVID-19 crisis in 2020 has imposed global regulatory challenges in various areas. Digitalisation has become a priority of regulatory development in the majority of legal fields. Company Law was considered one of the areas where digitalisation was expected to leave a significant developmental influence (Armour et al., 2016; Pinior, 2022; Spindler, 2019) even before the virus outbreak. The organisation of modern companies requires shareholders to participate in meetings to formulate a number of corporate acts and actively participate in the decision-making process regarding the company's most important decisions. Traditionally, the general meetings of shareholders were considered in-vivo

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meetings, which means that the shareholders were supposed to be physically present at the meeting. Thus, the legal rules regulating the general meetings of shareholders were and very much still are primarily tailored for in-vivo in-person interactions.

For the purposes of this paper, virtual-only general shareholder meetings are considered such meetings where all shareholders or their authorised legal representatives participate in a meeting from a distance by digital means or by remote voting. Hybrid general shareholder meetings, as we see them, are general shareholder meetings where some shareholders or their legal representatives participate in person at the meeting location while others participate by digital means from a distance or by remote voting.

Virtual and hybrid general meetings naturally need to adhere to the traditional regulatory framework and legal requirements. Traditionally, a tailored corporate regulatory framework is somewhat constrictive to the virtual general meetings of shareholders. Thus, functionality is opposed to formal requirements, including statutory provisions and company bylaws. Although provisions allowing the possibility for virtual shareholder meetings have been previously implemented in some legislations for several decades, e.g. in the United States, the COVID-19 crisis has given this relative legal novelty a status of paramount regulatory importance.

This paper will produce a framework for academic debate on the subject and research on the COVID-19 impact and give a comparative overview of rules on virtual shareholder meetings in selected jurisdictions: European Union Company Law, Switzerland, Italy, Germany, US state of Delaware and France. Normative analysis will elaborate on how regulatory approaches differ and what is similar in the aforementioned jurisdictions.

The paper is structured in six parts; following introduction, it continues with an elaboration of the European Union's context for shareholder rights. The second part is followed by an elaboration on the academic debate and the impact of the COVID-19 outbreak. In the fourth part a comparative analysis of the selected jurisdiction has been performed, and the fifth part of the paper will analyse the current Croatian Company Law rules on hybrid general meetings of shareholders. Recent national corporate experiences during the COVID-19 crisis will also be elaborated in light of the existing regulatory framework. The final part of the paper will elaborate on the lessons learned during the crisis and produce general policy recommendations for general meetings of shareholders.

1. Shareholders' rights in the European Union context

The shareholder's right to participate and vote in the shareholder's meeting is recognised as one of the "fundamental" shareholder rights. In the framework of the European Union Company law regulation, this right is set in 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, which was amended by Directive (EU) 2017/828, also known as the Shareholder Rights Directive (SDR).

Directive 2007/36/EC establishes the rules promoting the exercise of shareholder rights at general meetings of companies with registered offices in the EU and the shares of which are admitted to trading on a regulated market in the EU. The companies must provide shareholders with information on general meetings, including 21 days' notice on the date, location, agenda, voting, and participation procedures, which must be listed on its website. Shareholders have the right to put items on the agenda of general meetings and to propose resolutions (if they have a 5% holding in the company's capital), ask questions related to items on the agenda that the company is obliged to answer, and participate and vote without limitations other than the qualifying date set by a company for owning shares. According to these provisions, it is clear that the shareholders are expected to be physically present at the general meeting since the shareholders' meeting is the only place where directors must report to shareholders on their management and performance and answer questions. It is also a body where shareholders can exchange directly with each other and board members, form an opinion on all matters to be decided upon, give feedback on key business decisions, and hold board members accountable.

According to the literature (Hopt, 2016) and to the analysis performed in the ten years of the Directive, it was concluded that most shareholders do not actively participate in the shareholder's meetings. The Directive passed through main criticism among different authors (Belcredi & Ferrarini, 2013; Masouros, 2010;), and the revision of the Directive that followed was not just a legal formality but a proactive step to encourage long-term shareholder engagement and ensured that the decisions were made for a company's long-term stability in 2017 (Directive 2017/828). The revised directive facilitates shareholder identification and information flows between the shareholders and the company, inspiring shareholders to take a more active role in the company's affairs.

According to the directive, Member States must permit listed companies (whose shares are admitted to trading on a regulated market) to offer their shareholders any or all of the following forms of participation in the general meeting electronically. The company has to comply with the requirements of the real-time transmission of the general meeting; real-time, two-way communication enabling shareholders to address the general meeting from a remote location; providing a mechanism for casting votes, whether before or during the general meeting, without the need to appoint a proxy holder who is physically present at the meeting. This ensures that shareholders can exercise their rights conveniently and flexibly without the constraints of physical presence.

First, the idea was to enable online cross-border participation, facilitating shareholders' participation in general meetings and voting in another EU country. For long, shareholders' active role has been restricted to rights exercised in the general assembly. However, the modern trend allows virtual assemblies in addition

to the traditional general assembly, where the shareholders are physically present (Hopt, 2022a). Based on the practical experience gained during the pandemic, certain Member States (e.g. Germany) started to adopt new virtual general meeting laws (Hopt, 2022b, p.8).

Implementing Regulation (EU) 2018/1212 lays down minimum requirements for identifying shareholders, transmitting information and facilitating the exercise of shareholders' rights.

The use of electronic means to enable shareholders to participate in the general meeting may be subject only to such requirements and constraints as are necessary to ensure the identification of shareholders and the security of electronic communication (van der Krans, 2006) and only to the extent that they are proportionate to achieving those objectives.

Other relevant legal sources must be analysed when discussing the right to virtual participation in the general meeting. The most suitable legal source of secondary European Union Law for digitalisation in Company Law, in general, would probably be Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive (EU) 2017/1132 in terms of use of digital tools and processes in company law, also known as Directive on Digital Tools and Processes in Company Law, which was transposed in the national legislation of the Member States after the pandemic. However, in its current form, this Directive does not cover virtual general meetings of shareholders. Although for the time being the Further revisions to the Directive on Digital Tools and Processes in Company Law do not predict the expansion of the scope of regulation to virtual general meetings of shareholders, we see this document as a potential basis for the further regulation of the virtual participation in the activities that do not necessary include the obligation for the on-site participation.

The existing EU rules were deemed as sufficient to enable Member States to respond individually to the pandemic. To a certain extent, the lack of a unified response at the EU company law level can also be explained by the legal nature of the European Union law-making process. The only EU legislative response in the area of general meetings of shareholders was related to the rules governing European Companies (Societas Europaea, SE) and the European Cooperative Society (Societas Cooperativa Europaea, SCE). The Council Regulation (EU) 2020/699 of 25 May 2020 on temporary measures concerning the general meetings of European companies (SEs) and of European Cooperative Societies (SCEs) allow for these transnational types of companies to hold their general meetings within 12 months of the end of the financial year, but no later than 31 December 2020.

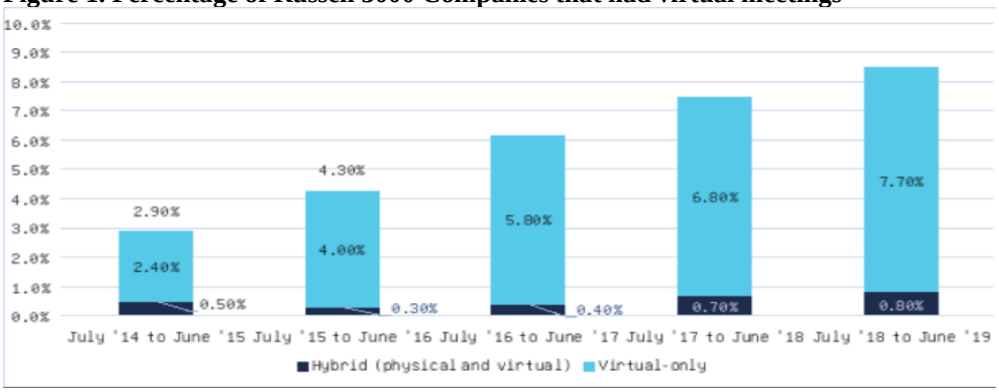
However, a minimal harmonisation approach of the European Union Company Law in areas of the virtual general meetings of shareholders lacked for crisis conditions. European Union Member States resorted to emergency national legislative solutions that inevitably produced divergence in regulation. In the future development of the European Company Law, most likely in revisions of the

Shareholder Rights Directive and Directive on Digital Tools and Processes in Company Law, stronger harmonisation measures for virtual-only and hybrid general meetings of shareholders should be considered.

2. Academic debate and research of the COVID-19 impact

The academic debate emphasising positive (Price, 2019, pp. 457-458; Ferrazzi & Zapp, 2020) and negative (Boros, 2004; Markman, 2009; Mittleman et al., 2020) aspects of the virtual-only general shareholder meetings, has developed simultaneously. As positive aspects, authors (Bilić & Tepeš, 2023) point out that a virtual form of communication is practical and can connect people from different parts of the world without requiring a physical meeting, more financially acceptable communication. Even when the video conference is held using a high-quality programme that is not free, on average, it will be about costs that are less than the costs of renting a meeting space, which provide all the necessary equipment, etc. The negative aspects include limited accountability compared to *in-vivo* meetings, difficulties in managing communication, restricted feedback, increased barriers to involvement and other communication challenges intrinsically linked with virtual communication. Technical difficulties should also be emphasised as more likely in virtual general shareholder meetings. Positive aspects of virtual-only general shareholder meetings include lower costs of conducting and preparing the meeting, swiftness in decision-making, and efficient deliberations.

Figure 1. Percentage of Russell 3000 Companies that had virtual meetings



Source: Marcogliese et al., 2020

The existing corpus of academic debate on the subject in ordinary conditions has, however, de facto been marginalised mainly by the sheer impact of the outbreak of the COVID-19 crisis and the magnitude of the needs emerging from the crisis management. Therefore, we should categorise academic literature on the subject as pre-COVID-19 literature and COVID-19 literature. Pre-COVID-19 literature is

understandably more numerous and detailed, but it seems almost historical in the light of present circumstances. However, less consistent COVID-19 literature is the most relevant for this paper. A comparison between COVID-19 literature and pre-COVID-19 literature shows a shift toward acceptance of the necessity of virtualising general meetings of shareholders with greater emphasis on practical regulatory and policy recommendations.

The latest study by Miriam Schwartz-Ziv (2021) comparing in-person shareholder meetings with virtual meetings from 125 companies in the US stock market S&P 500 index has demonstrated various challenges linked with the virtualisation of meetings. The study covers the general meetings held during the period July 1, 2018, and June - 30, July, 2020. Preliminary results of the aforementioned Schwartz-Ziv study demonstrate that the move to virtual meetings in 2020 shortened the average meeting by 17% (39.4 versus 32.7 minutes, respectively), allocate 16% less time to answering questions (10.7 versus 9 minutes, respectively), and allocate 23% less time to answering each question: 2.6 versus 2 minutes, respectively (Schwartz-Ziv, 2021, pp. 2-3).

The Schwartz-Ziv study conducted in cooperation with two shareholders in cooperation with John Chevedden and James McRitchie, came to a staggering result: more than half of the shareholder questions were not answered by the companies during the 2020 proxy season (Schwartz-Ziv, 2021, p.4). Presumably, that result represents a substantial defect compared to regular non-virtual general shareholder meetings.

Schwartz-Ziv identifies five tactics used by companies to evade shareholder questions. The first tactic is companies presenting an incorrect claim of a lack of additional questions (a tactic documented in 10% of cases). The second tactic is when companies announce only at a certain point in the meeting that only proposal questions will be addressed (tactic documented in 18.3% of cases). The third tactic is to promise to get back to shareholders on unanswered questions but not to follow through. The fourth tactic is the imposition of an early deadline for submitting questions, which is quite unusual. Thus, shareholders will likely discover this only when it is too late to submit questions. The fifth tactic consists of companies stating that they have allotted time for questions but then using only a very small amount of the allotted time, thereby creating the impression that all questions have been addressed but ignoring questions submitted by shareholders. Additionally, it appears that shareholders may face severe difficulties in actually submitting questions at virtual shareholder meetings. In this respect, the digital platform Broadridge Financial Solutions, which is predominant in US corporate practice, has demonstrated better results than other digital platforms. German legal commentators express concern about the tactic of predatory shareholders not only in the virtual form of the meeting (Hopt, 2022b).

The Schwartz-Ziv study produces the following policy recommendations about virtual-only and hybrid shareholder meetings in the U.S: make recordings

public; make submitted questions public; require companies to disclose the number of attending shareholders; ease the submission of questions on non-Broadridge platforms (Schwartz-Ziv, 2021, pp. 38-40). All these recommendations promote transparency and protection of shareholders' rights, guaranteeing that all shareholders' rights will be protected and that active shareholders' participation will be enabled.

3. Comparative overview

The methodology applied in our research comprises traditional methods of comparative law (Husa, 2023). Functional and structural methods were used primarily. The case of the United States Delaware was selected as *tertium comparationis* due to the federal nature of the legal framework of the national Company law. The comparative overview is summarised in two tables produced by the authors for research purposes. The first Table represents the regulatory status in selected jurisdictions before COVID-19 pandemic. The second Table represents post-COVID-19 regulatory status.

Table 1. Possibility for a virtual and hybrid general meeting of shareholders pre-COVID-19

	Allowed	**Allowed only if stipulated in company bylaws**	**Not allowed**
U.S. state of Delaware	Yes	x	x
Italy	x	Yes (only hybrid)	x
Germany	x	Yes (only hybrid)	x
Switzerland	x	x	Yes
France	x	Yes	x
Croatia	x	Yes (only hybrid)	x

Source: authors' representation

Temporary measures allowing virtual or hybrid general meetings of shareholders in some later revoked jurisdictions are not represented. A comparison of the two tables leads to the conclusion that only Switzerland changed its substantive regulatory choice on virtual and hybrid general meetings of shareholders.

Table 2. Possibility for the virtual and hybrid general meeting of shareholders post-COVID-19

	Allowed	Allowed only if stipulated in company bylaws	Not allowed
U.S. state of Delaware	Yes	x	x
Italy	x	Yes (virtual and hybrid)	x
Germany	x	Yes (virtual and hybrid)	x

Switzerland	x	Yes (virtual and hybrid)	x
France	x	Yes (virtual and hybrid)	x
Croatia	x	Yes (only hybrid)	x

Source: authors' representation

In the United States, virtual meetings are governed by state law, and each state may have different rules and requirements. Delaware General Corporation Law allows for virtual-only general annual meetings of shareholders (stockholders): the board of directors may, in its sole discretion, determine that the meeting shall not be held at any place but may instead be held solely by using remote communication (8 DE Code § 211, 2023). Delaware General Corporation Law allows both hybrid and virtual-only general meetings. Legal conditions for such virtual participation are:

- implementing reasonable measures to verify that each person deemed present and permitted to vote at the meeting using remote communication is a stockholder or proxy holder,
- implementing reasonable measures to provide such stockholders and proxy holders a reasonable opportunity to participate in the meeting and to vote on matters submitted to the stockholders, including an opportunity to read or hear the proceedings of the meeting substantially concurrently with such proceedings,
- record of such vote or other action must be maintained by the corporation.

Even though Delaware had allowed virtual general meetings pre-COVID-19 crisis, after the pandemic broke out, an additional legislative adjustment in this area was required. In response to the crisis, the U.S. Securities and Exchange Commission issued guidance to all public companies (Staff Guidance for Conducting Shareholder Meetings in Light of COVID-19 Concerns) while recognising the ability to conduct a "virtual" meeting is governed by state law, where permitted (….) issuers that have already filed and mailed their definitive proxy materials would not need to mail additional soliciting materials (including new proxy cards) solely to switch to a "virtual" or "hybrid" meeting (United States Securities and Exchange Commission, 2022).

In light of the Securities and Exchange Commission guidance, the Delaware Governor issued an order permitting public companies that had already provided notice of in-person shareholder meetings prior to April 7th 2020, to switch to virtual meetings. Thus, changes were implemented in Delaware General Corporation Law, effective retroactively to January 1st 2020, to permit the board of directors of a Delaware public company, during an emergency, to notify shareholders of any postponement or change in the place of a shareholder meeting including to hold the virtual meeting solely by a document that is publicly filed with the Securities and Exchange Commission.

The Delaware regulatory approach is undoubtedly liberal. In times of emergency, simply notifying the board of directors of a switch to virtual or hybrid general meetings of shareholders is a functional solution. Delaware corporate legal

solutions regarding virtual and hybrid general meeting of shareholders were transplanted to other U.S. states, e.g. in State of New York in 2021 (Hopt, 2022b).

Italy, the country that suffered the most serious impact of the first wave of COVID-19 in Europe, implemented strict restrictions on personal movement by Decree of the Prime Minister of the Republic on 8 March 2020.

Italian Company Law, contained primarily in Italian Civil Code (*Codice Civile Italiano*) since 2001, allowed for hybrid general meetings of shareholders only for companies that had included such possibility in company by-laws. This possibility is proscribed in the Art. 2370 of the Italian Civil Code (Pinior, 2022, p. 106). The majority of Italian companies had such a provision in their company bylaws before the outbreak of the COVID-19 crisis. However, Italian law did require the chairperson and secretary of the general meeting to be in the exact physical location. Thus, virtual-only general meetings of shareholders were not allowed. This functionally stopped all general meetings of shareholders in the country during the peak of their annual season after the end of the fiscal year. Thus, an emergency legislative response was necessary.

The new legislative decree *Decreto Legge 17 marzo 2020, n. 18 - Misure di potenziamento del Servizio sanitario nazionale e di sostegno economico per famiglie, lavoratori e imprese connesse all'emergenza epidemiologica da COVID-19* (Italian Government, 2020), popularly known as *Cura Italia* was adopted on the 17th March 2020 to that purpose. The *Cura Italia* introduced virtual annual general meetings of shareholders during the crisis: all companies (as well as certain partnerships and cooperatives) are allowed to provide, in the notice of call for a shareholders' meeting, for attendance and voting by remote telecommunication technology, regardless of specific provisions for such purpose in the by-laws, provided that the identification of participants, their attendance and the exercise of voting rights comply with certain specific requirements.

Important forbears of reform in Italy were professional associations of notary publics. The Notarial Council of Milan, in the application of the *Cura Italia* decree, adopted a recommendation (no. 200/2021), which allows Italian companies to hold shareholders' general meetings exclusively through a full audio/video conference, without the meeting even having been convened to be held in a physical location. The previous requirement of the Civil Code for the chairperson and secretary to be in the same location was therefore bypassed. Italian emergency legislation also extended the deadline for approval of financial statements (for 180 days). It allowed limited liability companies to proceed with shareholders' voting by using written consultation or by written consent, regardless of previous restrictions (set in law or by-laws).

Italian legislators did not use the crisis incentive for permanent changes in the Civil Code regarding virtual general meetings of shareholders. However, due to the legal activism of notary public associations, some of the measures remained effectively in force. Italy, formally in post-pandemic conditions, resorted back to its

previous state. Nevertheless, business practice influenced by professional associations of notary publics that have an essential place in Italian legal tradition is moving towards more frequent self-regulation for virtual-only and hybrid general meetings in companies' by-laws.

The Company Law in Germany, similar to the Italian approach, in its Joint-Stock Corporation Act (*Aktiengesetz*, AktG) before the COVID-19 crisis did not allow for virtual-only general meetings of shareholders. Hybrid general meetings were allowed only if they were expressly stipulated in company by-laws. Provision of the § 118 (1) AktG, the by-laws may provide or may grant authority to the management board to provide that shareholders may participate in the general meeting without physical presence and exercise all or some rights by electronic communication means. Pursuant to provision of the § 118 (2) AktG, it is also admissible to vote in writing or using electronic communication facilities without participation in the meeting (Pinior, 2022, p.104). German legal commentators (Gehrlein et al., 2021) have concluded that such a normative framework also relates to private limited liability companies - GmbH.

The legislative response to the crisis in this area was encompassed in the Mitigation Act enacted by the German Federal Parliament (*Bundestag*) and the Federal Council (*Bundesrat*) in March 2020 (German Federal Parliament & Federal Council, 2020). Regarding general meetings, the Shareholder Mitigation Act introduced amendments to German legislation that enabled for a limited period within the year 2020 for companies to conduct virtual general meetings even if it is not proscribed in the company bylaws and even exclude the physical presence of the shareholders. The Mitigation Act also extends the statutory period within which ordinary general meetings must be held from 8 to 12 months and the right to issue a prepayment of dividends towards the net profits even if the company's by-laws do not grant such authorisation.

Under the Mitigation Act, the company's supervisory board must give all management board decisions regarding virtual general meetings. The German legislative response requires that during virtual general meetings, shareholders must encompass the following: live transmission of the meeting; online voting; possibility to partake in questions in answers; the opportunity to express dissent (Zetzsche et al., 2020).

The temporary nature of the German legislative response can hardly be interpreted as a functional normative solution. The idea that emergency legislation is necessary to adjust Company Law structure every time crisis situations like pandemics arise is obviously defective. Thus, it was criticized by German legal commentators as dysfunctional as no longer capable of assuring good corporate governance (Hopt, 2022b). Solutions entailed in the Mitigation Act served also as a motivation for further revisions of national legal corporate framework. Hence, the German Federal Government proposed Draft Act on the Introduction of Virtual General Meetings in Stock Corporations, which has just been finalized as new law

by the Parliament in July 2022 (Hopt, 2022b, p. 2). The new German legislative solution implies the following requirements for virtual general meetings of shareholders:

- transmission of the entire meeting by video and audio;
- exercise of the shareholders' voting rights by means of electronic communication as well as by proxy;
- right to submit motions and voting proposals by video communication;
- electronic right to information;
- making the report of the board of directors or its main contents available no later than seven days before the meeting, but only if the managing board decides that the questions of shareholders must be asked electronically before the virtual general meeting;
- electronic right to comment;
- possibility to speak at the meeting by means of video communication;
- electronic possibility to object to a resolution of the general meeting (Hopt, 2022b, p. 4).

Switzerland is an example of the regulatory shift in virtual general meetings of shareholders instigated by the COVID-19 pandemic. In its pre-crisis legislation, Switzerland did not allow virtual-only general shareholders meetings. The primary source of Company Law in the country is the Swiss Civil Code (*Schweizerisches Zivilgesetzbuch, Code civil Suisse, Codice civile Svizzero, Cudesch civil Svizzer*), more specifically, its fifth book is called Code of Obligations. The Code of Obligations, even though part of the Civil Code, has an independent numbering of provisions. The Company Law section was a later and somewhat unconventional addition to the Code of Obligations. Shareholders had an exclusive right to attend the meeting in person, as regulated by Art. 700, para 1 of the Code of Obligations (Swiss Federal Assembly, 2024). As usual, annual general shareholder meetings in Switzerland must be held within six months following the end of the fiscal year.

Confederate measures combating the spread of COVID-19 imposed a ban on all public and private manifestations, including in-person general meetings of shareholders, starting from 17 March 2020. Therefore, by pure necessity, the Swiss legislative response was stipulated in the COVID-19 ordinances. Ordinances temporarily enabled virtual and hybrid general meetings of shareholders in deviation from the legal requirements under the Swiss Civil Code / Code of Obligations. Swiss regulation entitles companies to the requirement that shareholders exercise their rights exclusively in writing, electronically, or using independent representation. Implementing Swiss COVID-19 ordinances in 2020 demonstrated that most companies used electronic or electronic votes while public companies used voting by proxy. The most frequently used electronic platforms were Zoom and Teams.

The Swiss parliament passed the COVID-19 Act in September 2020, creating the legal basis for the Swiss Federal Council to maintain measures introduced by the ordinances until revisions of the Company Law materialise. Following the positive

experience with virtual general meetings of shareholders during the pandemic, revisions of the Code of Obligations ensued.

The amendments of the Code of Obligations entered into legal force on 1st January 2023. However, there is a substantial divergence between solutions of the ordinances and the Code of Obligations. The main division point is that general meetings may be held with no venue by electronic means only if the articles of association so permit and the board of directors designate an independent voting representative in the notice convening the meeting (Swiss Federal Assembly, 2024, Article 701d). In conclusion, the Swiss Law, influenced by the crisis, introduced permanent measures allowing for shareholder virtual and hybrid general meetings. However, permanent revisions took a regulatory step back compared to emergency measures, allowing for virtual and hybrid general meetings only if they are stipulated in company bylaws. In light of positive experiences during the pandemic, when virtual-only or hybrid general meetings could be conveyed solely on the board's decision, an increase of self-regulating practices in by-laws of companies in Switzerland can also be expected.

Like previously reviewed European jurisdictions (that excludes the U.S. State of Delaware), France has the possibility of virtual participation of shareholders in general meetings if such possibility was allowed explicitly in company bylaws. Provisions of the French Commercial Code (*Code de Commerce*) applicable are contained in Art. 225-103 (Raworth, 2023). However, France has interesting limitations for virtual general meetings of shareholders. In cases of extraordinary general meetings, protected minority shareholders (shareholders representing 5% of the share capital) can object to meetings conducted by virtual participation.

4. Virtual general meetings of shareholders in Croatian law

4.1. Developments in Croatian company law before COVID-19

The National Companies Act regulates the general meetings of shareholders in Croatia (*Zakon o trgovačkim društvima,* ZTD). It was enacted by the Parliament (Sabor) in 1993 and has been in legal force since January 1st 1995 (Croatian Parliament, 1993). Prior to this, Croatia was in transition from a socialist economy to a market economy, and the usual corporate normative framework present in capitalist societies was underdeveloped despite the existence of a Company Law tradition dating back to pre-socialist times.

The first provision in the National Companies Act allowing for the possibility in the company bylaws for general meetings of shareholders to be transmitted by sound and in motion pictures (video) was enacted in 2003[1]. However, this possibility

[1] This possibility is enacted in Article 274 of the national Companies Act by the revisions from 24th of July 2003.

did not pertain to exercising shareholder rights, such as the right to vote or initiate proposal/contra proposal, but only to mere transition or publication of the general meeting, including transmission via internet. This legal opinion regarding the *ratio* of the aforementioned provision was confirmed by the national legal commenters (Gorenc et al., 2008) and in corresponding comparative legal scholarship relating to similar provisions in other jurisdictions (Gorenc et al., 2008, pp. 21, 583 about the commentary of the German *Aktiengesetz*) that were viewed as normative role models for the Croatian Company Law.

The harmonisation process with the EU *acquis communautaire* required Croatia, the EU candidate country, to transpose provisions of the Shareholder Rights Directive in its Company Law. As previously explained in this paper, certain conditions entailed the obligation to permit listed companies to offer their shareholders forms of participation in the general meeting by electronic means. Revisions of the National Companies Act were enacted in 2009 in order to harmonise with the Shareholder Rights Directive fully. However, Croatian legislators went beyond the minimum requirements of the Directive. They applied the possibility for participation by electronic means to all general meetings of shareholders, not only for meetings of listed companies.

The Parliament enacted the revisions of the Companies Act on April 15th, 2019, requiring the company to confirm the votes received. This regulatory framework was in legal force when the crisis broke out in 2020.

In its current version, the Croatian Companies Act allows for a hybrid virtual general meeting of shareholders, either as allowed by the Articles of Association or as authorisation transferred to the Management Board/Board of Directors. Thus, Croatian law, like most other European jurisdictions, allows for hybrid virtual general meetings only if this possibility is included in company bylaws. The only virtual general meetings of shareholders are not allowed due to the need for *in situ* participation of notary public (e.g. minutes of the general meeting are notarial deed).

The articles of association may provide for or authorise the Management Board/Board of Directors to enable shareholders to exercise all or only some of their rights by electronic communication in whole or in part and when they do not participate in person or through a proxy at the venue. If the right to vote is exercised by electronic communication, the company must electronically confirm to the person who gave the vote that the given vote has arrived.

The articles of association may provide for or authorise the Management Board/Board of Directors to enable shareholders to vote in writing or by electronic communication when not participating in the general meeting (Companies Act, Art. 274). The use of electronic communication for general meetings of shareholders is permitted under the following conditions:

- that communication enables shareholders to address the general meeting in real-time from a distance;
- that mutual communication is provided;

- that shareholders are allowed to vote during or before the general meeting without the need for their participation;
- that the identification of shareholders, the security of electronic communication and the invariability of the expression of the will expressed by electronic communication is ensured.

Although Croatia has implemented the Directive on Shareholders' Rights, the provisions relating to the virtual holding of the General Assembly have remained undefined. Still, there are rules for the retention of the physical venue of the general meeting. Also, the use of electronic communication must be provided by statute or articles of association. There is no need for this regulatory restraint if all the rules that protect the shareholders' rights exist.

4.2. Developments during and after the crisis

Most registered companies in Croatia did not include the possibility of a virtual or hybrid general meeting of shareholders in their articles of association. When the COVID-19 crisis broke out, strict measures on personal gathering and movement of persons were implemented in March 2020. The annual general meeting season had already started during the strictest restrictions. Most companies decided to schedule or reschedule regular annual general meetings of shareholders at the latest possible dates around May 2020, hoping that restrictions will be lifted in the meantime.

To adapt to the epidemiological situation, a group of distinguished Croatian legal scholars from the area of Company Law, affiliated with the University of Zagreb, the Faculty of Law, drafted a special legislative proposal[2]. The proposal entails the inter alia possibility of the virtual general meeting of shareholders even if the Articles of Association do not predict it. The proposal also entails the possibility that the Management Board/ Board of Directors can nominate one proxy holder who can represent all shareholders if the proxy holder is independent of the company. Independently from company bylaws, sessions of the boards (including the supervisory board) can be held virtually.

The Croatian Bar Association supported the proposal, which was delivered to the Ministry of Justice on April 27, 2020. The government regrettably decided not to adopt the aforementioned proposal or any other specific legislative measures, broadening the possibility of having virtual or hybrid general meetings with shareholders.

The Croatian Financial Services Supervisory Agency (HANFA), faced with several questions regarding the regular annual general meeting of shareholders,

[2] The proposal is named Act on measures mitigating effects of the COVID-19 pandemic on the company organs (in Croatian original: *Zakon o mjerama kojima se umanjuju posljedice pandemije virusa COVID-19 na djelovanje organa trgovačkih društava*).

released a public notice in April 2020 reminding of the 'theoretical' possibility of virtual meetings but emphasising that implementation of the Companies Act is not within the Agency's jurisdiction.

To the best of our knowledge, the first hybrid virtual general meeting of shareholders in Croatia was held by Mon Perin d.d., a tourist company with corporate headquarters in the picturesque town of Bale, on 27 May 2020. The Mon Perin general meeting was successfully held with the help of outsourced IT experts. The digital software platform used was Zoom, and the outsourced IT experts were from the domestic Codex Sortium company. The Mon Perin case is isolated, so we can hardly speak of the existing corporate practice of virtual general meetings of shareholders in Croatia. The persistence of the COVID-19 crisis will very likely influence Croatian companies toward virtual or hybrid general meetings of shareholders to a larger extent than the present situation.

The latest amendments to the Companies Act were enacted in November 2023 (NN 130/2023) including changes to Art. 274 ZTD. They are related to the introduction of the obligation to confirm receipt of votes cast electronically in accordance with the Commission Implementing Regulation (EU) 2018/1212. Croatian legal commentators noticed that although the provisions of ZTD were harmonised nominally with the Shareholder Rights Directive in regulating hybrid virtual general meetings of shareholders, they were stipulated in such manner to actually restrict and invert the aim of the European harmonization endeavour (Bilić & Tepeš, 2023, p. 530). Unsurprisingly, from all reviewed jurisdictions, Croatia is the most conservative one in the field of virtual general meetings of shareholders.

Conclusion and general policy recommendations

Deciding between mandatory and/or default is a fundamental choice for the law (Hopt, 2016). In the European Union, corporate law and capital market law differ in this respect, but the free choice between more or less regulated corporate forms gives enterprises flexibility.

Virtual-only and hybrid general meetings of shareholders were well-known and scholarly elaborated but little-used regulatory solutions in most jurisdictions before the outbreak of the COVID-19 crisis. Our comparative overview shows that jurisdictions that did not allow for such a possibility reacted promptly and introduced this option in their legislation. The most notable example is Switzerland, which went from the total absence of any possibility for a virtual general meeting of shareholders to the company law reform that allowed such a permanent possibility (post-crisis). Our normative analysis has shown that obstacles shareholders face with the virtualisation of general meetings during the COVID-19, such as the ones elaborated in a study conducted by Schwartz-Ziv (2021, p. 5), are not of such great magnitude to facilitate the stop of the digitalisation and virtualisation process.

The typical preconditions used in most jurisdictions refer to the capacity of mutual communication between participants in real-time from a distance, identification preconditions and the possibility to vote in real-time. We have seen, as previous elaborations demonstrated, that software platforms like Zoom and Teams are popular mainly due to their availability and simplicity. However, in some jurisdictions, like in the United States, more advanced platforms like those offered by Broadridge are preferred.

A comparative analysis demonstrates that liberal jurisdictions in virtual general meetings of shareholders were better prepared to facilitate crisis conditions. The U.S. State of Delaware is a notable example supporting such a conclusion. However, even in Delaware, one of the most liberal jurisdictions in the world, some legislative adjustment was required when the COVID-19 crisis broke out. Retroactively allowing for all companies that started procedures for in-person general meetings to switch to virtual general meetings was introduced in Delaware within the formal narrative of compliance with the U.S. Securities and Exchange Commission federal guidelines.

The regulation of virtual and hybrid general meetings of shareholders in the European Union member countries had a moderately conservative approach. The European Union Company Law with minimum harmonisation rules enabled such a regulatory state. Hybrid virtual general meetings of shareholders were allowed under certain preconditions only if such possibility was stipulated in company bylaws. Many European companies did not have such provisions in their bylaws. The COVID-19 crisis demonstrated that the described regulatory approach was suboptimal, and the emergency legislative response was required to facilitate crisis conditions. As we have seen from the examples of Germany and Italy, the European legislative response allowed *ex-lege* for virtual general meetings of shareholders even without this possibility being directly stipulated in company bylaws.

Independently of the crisis conditions, we can conclude that the process of digitalisation of Company Law has put the virtualisation of general meetings of shareholders at the front of the process. The EU Informal Company Law Expert Group (ICLEG) Report on virtual shareholder meetings and efficient shareholder communication from August 2022 detects possible (not mutually exclusive) purposes for a European regulatory intervention of the issue with the following general consequences:

- first, the European legislator could enhance capital markets by improving cross-border participation in general meetings. This would imply amending the SRD to make its provisions more effective.
- second, the legislator could take a broader approach and try to make electronic participation and virtual meetings available to all limited liability companies, including non-listed and private companies. There is some justification for such an approach because more and more SMEs have cross-border membership. This

would need a new instrument or an introduction to the pertinent Directive (EU) 2017/1132 rules.

- third, the legislator could try to achieve a higher level of resilience for European companies by introducing mandatory rules on virtual meetings for times of crisis, however, defined (Aheren et al., 2022, pp. 27-28).

Like the German and Italian examples, Croatian regulation of virtual general meetings of shareholders demonstrated its inadequacy for crisis conditions. However, the Croatian Government did not initiate a legislative response in this area despite the initiative of distinguished national legal scholars from the field of Company Law supported by the Croatian Bar Association. The main reason for the absence of legislative response is the fact that strict limitations on personal movement and gathering were lifted relatively early in preparation for tourist season, enabling regular annual general meetings of shareholders to take place traditionally.

The comparative analysis has enabled us to formulate the following policy recommendations in the field of virtual and hybrid general meetings of shareholders:

A. national/federal regulatory framework should aim to enable both virtual-only and hybrid general meetings of shareholder's *ex lege* independent of stipulation in company bylaws (not excluding contractual freedom of shareholders to expressly exclude such option provided by legislation);
B. the national/federal regulatory framework should aim to give companies in crisis conditions the opportunity to switch from in-person general meetings of shareholders to virtual or hybrid meetings after the procedure for general meeting was initiated;
C. in the future development of the European Company Law, stronger harmonisation measures for virtual-only and hybrid general meetings of shareholders should be considered.

The Croatian Company Law, as the most conservative among the reviewed jurisdictions should, in particular, be revised in the future based on the aforementioned policy recommendations. This would enhance the resilience of the corporate legislative framework in crises like pandemics or epidemics and further improve a general path toward digitalisation. The simplest normative way to achieve this revision is the appropriate changes in Article 274 of the Companies Act. Regulatory safeguards such as the right to objection on the decision to convene a virtual general meeting of shareholders of any particular shareholder or veto right for protected minority shareholders can be implemented. The virtual participation of the notary public can also be provided, in a similar way to the Italian solution (notarial deed can be, in that case, formed via online participation). Alternatively, considering that Croatian Company Law is greatly influenced by the German Company Law (Barbić, 2007), minimum modernisation should be modelled in accordance to the German reform form 2022. That would be to enable virtual-only general meetings of shareholders in Croatia (*de lege ferenda*) under similar requirements as in German Law.

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