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The Use of ICT in Company Law Matters

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The Use of ICT in Company Law Matters

Eddy WYMEERSCH

Abstract

The use of ICT in company law deserves ample attention. Several states are planning regulation in this field.
In some states remote registration of company charter and other disclosure documents will be made possible. Disclosure websites instead of the disclosure at the business registry should be considered.
With respect to listed companies, filing and disclosure of financial documents has already been put in place in some states. More difficult are the issues raised by the use of ICT in the general meeting: in this field several issues are analysed: notices, questions, or motions by shareholders proxies, and so on. Remote voting is still the most difficult problem: apart from authentication of the shareholder company, pre-meeting voting can be solved. Distance voting during the meeting seems technically very hard to achieve.
The long term effects of ICT can be seen as relating to agency issues, to the role of disclosure as a creditor protection device, effecting the role of the legal capital, and the definition of a shareholder in light of the very active trading on the stock exchanges.

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Capital Markets in the Age of the Euro

The Use of ICT in Company Law Matters

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1. The introduction of ICT or "Information and Communication Technology" affects all parts of our society: medical surgery, book publishing and distribution, distance education, are a few of the familiar fields in which relatively spectacular developments are taking place right under our eyes. It would be astonishing that the functioning of companies, and hence company law, would not be affected in one way or another. The purpose of this paper is to try to identify and analyse the segments of company law and practice that will most heavily be affected, and inform on other fields in which developments are already being prepared, or may probably occur.

The paper will be divided in three parts. The first part deals with general company law, while the second part is more directly addressed to companies that have securities traded on the public securities markets. These two parts refer to practices that have been put into place or will very soon be introduced. The last part then deals with more speculative developments.

The analysis will mainly be limited to developments in European Union jurisdictions.

Part I. - The Use of ICT in General Company Law

2. In the field of general company law, several member states of the European Union have taken initiatives to make a more intensive use of ICT.

The most conspicuous initiatives relate to the registration of new companies and the disclosure of the company charter and other initial - continuous - disclosure documents by means of an electronic registry.

Several states have put into place systems - some still on an experimental basis - whereby the company's charter could be filed electronically at the registrar's office, and would from there on be disclosed to all parties willing to retrieve that information from the registrar's office[1]. Developing this technique presupposes that the law allows documents to be electronically signed, a matter on which legislation is pending in most European states[2].

There are several variations on this procedure, also depending on the national traditions: in some states, registration is a condition to obtaining legal personality, in others it is not; in some states, registration is effectuated at a central registrar's office (UK, e.g.) while in others, the procedure is decentralised at local registries. The familiarity of the local administrations with electronic data processing varies considerably: northern Europe is very advanced in this field.

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1 This is the case in Denmark, and in Finland; in Italy, registration of an electronic document is allowed, while dissemination takes place through the Infocamere system, a link between the Chambers of Commerce.

2 Implementing the European Directive on the Electronic Signature, Directive 1999/93/EG of December 13 1999 concerning a Community framework for electronic signatures, Pub. 2000, 13, 12°.

3 One of these vendors, the European Business Registry (EBR or www.ebr.org) links most national European registries and offers, against payment, data available on most (12 out of 15) of the national company registries, allowing for some information to be regrouped. So e.g. it would be possible to research all the directorships held by one person, not only within a given state, but throughout the Union. In order to research personal links between companies, and resulting conflicts of interest, this is a tool not to be neglected. But one can easily see the privacy issues involved.

Electronic procedures also vary: in some states the filing takes places at distance, where in others the documents are transmitted on disk, sometimes after having been scanned at the notary's office. What seems important is that the document in one stage of its existence circulates in electronic form and can be broadcasted to all interested parties. Data transmission can then take place either over a dedicated network, or as seems more simple today, over the Internet. In fact, parallel information vendors are already active in this market, and research and regroup information data according to the demands of the subscribers to their service[3]. Efficiency of the availability of this type of information depends on competition between these vendors being ensured.

3. Several steps should be distinguished in the automation of the formation process: at least filing and dissemination of information may be subject to different rules.

Depending on the national rules on formation of companies, the company will be formed upon a private or a public deed. These initially written or printed documents may also be drawn up in electronic form: it seems that in Finland, this is already the practice, presupposing a reliable system of electronic signature. In most other states, the original document is drafted by notaries, or by solicitors, and after having been signed by the parties, possibly also by their witnesses, will be processed by the registry: here the electronic form intervenes in the transmission to the registry. The electronic signature serves to testify as to the reliability of the original, hand-written signatures of the parties.

The legislation of some EU member states allows for this type of procedure.

The UK recently proposed to follow this path: in a Draft Statutory Instrument [4] the requirement for the signature to be apposed in the presence of witnesses will be waived, while the registrar may accept electronic communications and documents, accompanied by statement delivered by solicitors engaged in the formation of companies, or by the person named as director or secretary of the companies, as evidence of compliance. This procedure will be made available for the deed of formation, and for all later publications at the registrar' s office. At the same time, but then within the framework of the Company Law Review, it was proposed that the incorporation process be streamlined and simplified[5].

In Germany, the Code of Commerce allows the regional governments to enact regulations according to which the Commercial register would be kept in "machine form as an automated file"[6] while under certain restrictions the on-line retrieval of the data that have been filed in the automated commercial register may be allowed by the State authorities.[7] Private parties should have a "justified professional and commercial interest" to obtain electronic access, which is considered an undue restriction[8] There

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4 The Companies Act 1985 (Electronic Communications) Order 2000, to be approved by Parliament in 2000, see www.dti.gov.uk/CLD/condocs.htm. For the preliminary consultations leading to the said Order, see DTI, Electronic Communication: Change to the Companies Act 1985, 5 march 1999 and Summary of Responses to the Consultative letter, July 1999 (http://www.DTI. gov.uk./ cld/elecsumm.html). This order will be enacted on the basis of the Electronic Communications Act 2000.

5 See Company Law Review, Company Formation and Capital maintenance, volume 3, Oct. 1999, 5 e.s.

6 § 8 a, HGB, for comments see HOPT, in Baumbach - Hopt, Handelsgesetzbuch, 30th. Ed 2000.

7 § 9 a, HGB

8 See NOACK, U., Modern Communication Methods and Company Law, www.jura.uni-duesseldorf.de/dozenten/noack/eblr.htm, who considers this restriction inconsistent with the first directive. However, traditional access remains general. See also Noack, U Modern Kommunikationsformen vor den Toren des Unternehmensrechts, ZGR, 1998, 592-616.

is no right to full access of all documents that have been filed, as this would lead to copying the entire Commercial register. This also has been criticised[9]

4. The 1968 First Harmonisation Directive deals with disclosure of company documents, both at formation and during the existence of the company. Therefore it seems quite natural that the European Union should also investigate the feasibility of updating its general disclosure rules.

The present directive does not clearly allow in general for electronic processing and dissemination: company documents must be kept in a file and published, whether in full, by excerpt or by reference in a official "national gazette"[10]. Procedures are manual, or on paper.

In 1998, the European Commission decided to extend the SLIM (**S**impler **L**egislation for the **I**nternal **M**arket) programme to the first two company law directives. This programme aims at identifying fields in which the existing directives could be simplified or regulatory burdens reduced. Taking into account the development that had occurred since the directive was enacted, the so-called SLIM working party proposed that the process of registration and disclosure of company documents should be automated, at least after a transitional period of five years[11]. The policy idea underlying this proposal was that the Internal market would be served by enhancing the accessibility to business information all over the Union. In addition, as business information most of the time is only available in the national language, more multilingual information should be made available. Finally - and here the 12th directive comes into play - the continuing de facto restrictions on cross border establishment should be removed, by allowing for home state disclosure, with access from abroad.

Underlying these recommendation is not only the idea that the information should be processed and made available and accessible in electronic form, but that this should be achieved in a decentralised manner. Subsidiarity is highly recommended in this field, as the national traditions of company data processing are very different: while the UK is relying on a highly centralised system, most continental states have local business registries. Taking into account the considerable progress that has been made in the use of the communication systems, especially the Internet, the basic idea should be that each company should set up its own disclosure website, while the role of the authorities would be limited to supervising and policing the disclosures made by the companies. In an alternative idea one could make this system optional, companies setting up their own website would be exempted - at least during a transition period - from taking part in the registry's disclosure system.

The SLIM party also paid attention to the issue of the Europe wide consultation of the business registry. Today effective consultation is very often prevented as a consequence of language barriers. It was proposed that companies planning to engage in interstate trade could set up a website with translations of their charter and other company related information, in the language they wanted, provided the information so disclosed was reliable. The liability of the company would be engaged for unreliable translations.

This line of reasoning was further pursued for the cross border establishment of companies. Although the 12th company law directive has streamlined disclosures that are imposed on branches that are established themselves in other member states, the number of impediments these companies are exposed to are still considerable. In some

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9 On the same basis by Noack, footnote 8.

10 art. 3(4) First Directive 68/151 of 9 March 1968.

11 For this final SLIM report see http://www.law.rug.ac.be/fli/WP/SLIM.pdf; a comment is to be published in a Nordic Journal: WYMEERSCH, E., Elements of Comparative Corporate Governance in Western Europe, Juristförlaget.

member states, it still takes several months, even more than half a year to have a branch established in another jurisdiction. The requirement to have all documents translated, and to have these translations effectuated by an official, court appointed translator burdens this process considerably. Moreover, one could wonder what is the added value of having disclosures made at the local business registry when the same information is available at the registry of the company's main seat of business.

Therefore the SLIM party developed the truly European idea that companies that set up branches in other member states would not have to disclose additional information in that other member state, but would simply have to add at the registry - or in the website - of their home state, the necessary information translated in the language of the host state. For cost and expediency reasons, the translation would not necessarily have to be prepared by an official translator at the host state: it would suffice that some form of supervision on the translation, e.g. by the tribunal, be exercised in the host state. Companies operating branches all over Europe would have to disclose only one set of documents in a given language. As the business registry in the home state would be accessible to all trading partners throughout the Union, the effectiveness of the dissemination of information would be far superior to what is known today.

The content of the information could be defined on the basis of the said 12th directive, but one sees easily that many companies would be interested in organising a website on which more ample information would be available in order to attract the interest of clients, financiers and investors, and the public at large.

5. Other uses of ICT in the field of unlisted companies are less innovative: board meetings are already held by way of teleconferencing, although in several jurisdictions they pose a question as to their compatibility with present regulations. In some these could be assimilated to board meetings in which a written procedure has been followed.

In closely held companies there usually will be less need for voting mechanisms using electronic communication devices. As shares normally will be nominative, the same rules that apply to listed companies could also be followed here.

The French law is planned to be adapted to expressly allow for charter provisions that would allow boards to be held by videoconferencing: the new rule would provide that for all decisions, a few excepted, the requirement of quorum and majority would be satisfied if the board meeting takes place by means of 'visioconférence" as determined by a decree to be enacted later[12]. To be excluded from this procedure are the proposals to appoint a chairman of the board, of the directors-general, the approval of the annual and of the consolidated accounts.

Some scholars have proposed that electronic voting procedures would be especially useful in closely held companies: difficult problems arise mainly with the listed companies with widely dispersed ownership. It will therefore be dealt with under that heading. However it is useful to mention that the same French bill proposes to allow in very general terms that " the company's charter may provide that the shareholders that take part in the general meeting by means of telecommunication, as determined by decree, will be considered present for the calculation of the quorum and the majority"[13]. The rule would be introduced in the article dealing with the vote by mail. It would apply to the sociétés anonymes only.

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[12] See art. 59 of the proposed law on "nouvelles régulations économiques", modifying art. 100 and 139 of the L. 1966.

[13] Art 63 of the Bill, modifying art. 161-1 of the L. 1966.

Part II. The Use of ICT in Listed Companies

6. There are two fields in which listed companies are already intensely using ICT techniques in their company affairs. In this field, many initiatives have been taken and experiments are under way, while legislators are in the process of or have taken measures to introduce adequate rules and procedures for allowing for electronic filing and/or dissemination.

The subject of financial information can usefully be subdivided in two sections: the first dealing with general financial information, which is not directly part of the company law mechanism. The second section is the company law related information, especially the information that is presented to the shareholders in the framework of the corporate voting mechanisms. Although as to context both are closely interrelated, the techniques of drafting and dissemination are substantially different.

More controversial and difficult to organise is electronic voting: much change can be expected over the next few years. Here a whole list of issues has to be dealt with.

§ 1. Financial Information

7. ICT techniques are particularly important for listed companies, which address themselves to a vast number of investors and are legally obliged to disseminate numerous data about the company, its business, and its shareholders. One can identify two separate issues that are not met in identical terms in all jurisdictions: the first relates to filing, or communication of the information to the authorities, whether for further disclosure, or for supervision as to the form and content of the information. The second relates more generally to techniques of dissemination of the same or other information to the markets at large.

a - the electronic filing of information

8. The rules on filing of financial information are dissimilar both within the states of the European Union and from state to state. Listed companies are bound by law to publish a considerable number of documents: elaborate annual reports and accounts, interim (whether on a six or on a three monthly basis) reports, "ad hoc" information, reports on substantial holdings of shares, often also reports on share transactions by corporate insiders, all that on top of the general company information which all companies are held to disclose[14], issue or listing prospectuses. For each type of document other rules or practices apply: filing at the local registry, filing with the market supervisor, publication in the general newspapers, circulation in separate brochure. All this confers a very scattered image of the company, where bits of information, and data collected at different dates, are to be found in different documents, located at different places. There are good arguments for regrouping these different types of information into one single set of data, and make them as a whole, accessible to all interested parties. The present status is moreover quite expensive and for the purposes of the financial markets not very well adapted.

The annual information in most states is filed at the local company registry, but more important also has to be filed with the market supervisor, and with the stock exchange. Up to now, filing takes place in a hard copy form. In some jurisdictions

[14] For a full - and impressive - list of mandated disclosures by French listed companies, see ANSA, L'utilisation des moyens de télétransmission et les assemblées générales d'actionnaires, Rapport d'un groupe de travail de l'ANSA, January 2000 (http://www.ansa.asso.fr/site/rap1.htm).

these documents have to be transmitted in advance of publication, allowing the supervisor to criticise the content of the information. Technically, the information is made available to the public at the offices of the supervisor, or of the stock exchange, but in practice, investors are invited to address themselves directly to the issuer.

The interim and the" ad hoc" information most of the time have to be filed at the supervisor's office, whether before or after publication in the press. These items of information are not deposited at the official registry. In most states, there is no systematic data base where the public at large can retrieve the information. More specifically with respect to "ad hoc" information dissemination is mainly taken care of by the private information processing firms, according to good practice after the market close. Although inclusion in the market prices is often achieved immediately upon the reopening of the markets, there is from time to time a question of equal distribution of the said information.

The data on substantial holdings of shares, as have to be disclosed pursuant to the 1988 directive on disclosure of major holdings in listed companies[15], are normally filed with the market supervisor; publication happens in different forms and the overall transparency of these data, also on a cross border basis, is problematic. The most effective way would be to invite the companies themselves to provide for clear and transparent charts of their share ownership, at least at the first level of direct ownership[16].

Most if not all of these filings today are effectuated in a manual procedure, whereby written, printed documents are handed over or faxed. Immediacy is not ensured, while there might arise questions of precise identification of the content of the document filed and of its hour of filing. This was one of the reasons why the "admission prospectus directive" requires the prospectus to be signed, taking up liability for the content of the prospectus[17]. Stricter measures have been taken by the national authorities to avoid apocryphal documents being circulated[18].

9. In the United States, where filings are more numerous and subject to more strict supervision, the SEC itself has organised a central data base where all financial disclosure must be filed and may be retrieved, in electronic form[19]. The data base known as EDGAR (Electronic data gathering, access and retrieval) is open to the public at large. Filing with Edgar is equivalent to filing with the agency.

The question arises to what extent a similar initiative would not be appropriate for European companies and markets as well.[20] There have been several national initiatives, both from market supervisors and from private firms. National company registries have been proposing techniques of linking electronically for filing company charters[21]. In the United Kingdom, the proposed amendements to the Companies Act would allow documents to be filed electronically with the registrar, including the

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15 Directive 88/627 of 12 December 1988, OJEC, L. 348, 17 December 1988, 62-65.

16 Some legal writers have called for disclosure of the indirect ownership, through holding companies (Noack in Modern Communications Methods, see footnote 8). 17 § 1.1. of the Schedule A of the directive 80/390 of 17 March 1980.

18 See the mention of the Cob's visa on the prospectuses.

19 See Regulation § 232.100, CCH, F.S.L.R., 1999, § 67.011.

20 Noack, in Modern Communications Methods, footnote 8, makes no direct proposal in that sense, but points to the restrictions in the Edgar system whereby no full annual reports are available, only the filings with the SEC.

21 See the abovementioned European Business Register

charter, and several other mandatory filings, boith by listed and unlisted companies. In France, the Cob has organised a data base, containing the interim and ad hoc information[22] while another system contains the prospectuses and all other documents that are submitted to the Cob's approval [23] Both databases are accessible electronically.

10. At the European level, the question could be discussed whether it would be desirable to advocate the organisation of an Edgar-type database, covering all of Europe's listed companies, and allowing for electronic filing with the market organisers or the supervisory agencies. In this development due account is to be taken of the changes in the market structure, due to the predictable mergers of the stock exchanges, or other changes in the market structure.

The question is a complex one, as for efficiency reasons, filing and dissemination should be directly linked. It also involves, apart from technical and operational issues, fundamental questions as subsidiarity, use of language, etc. Finally issues of liability, e.g. of the agencies offering this type of service, should not be lost out of sight.

The first principle should be that filing of data, of whatever nature, could be effectuated in an electronic form. For some items of disclosure, essentially the more price sensitive types of information, transmission for supervisory purposes might precede exposure on the website, while for the other types supervision can be exercised on ex post basis. For the first type, the information should be first channelled to the supervisor, and once it has obtained its approval, can be posted on the electronic dissemination system, with an appropriate mention referring to the approval.

Several questions may call for action by the supervisors. Approved information should be clearly identified and distinguished from information originating from the company without such approval, or information originating from their parties, which should be clearly identified. The information should be disclosed in a format that neither the issuer, nor any user can tamper with. It should bear a precise date and hour. Updating should be insured and followed up by the supervisor. The supervisor should check whether the information is effectively disclosed according to the time schedule, as mandated by the regulation, and if disclosure is late action should be undertaken, possible by publicly exposing the name of the deficient issuer[24]. New types of sanctioning could be devised if the supervisor deems the information untrue, incomplete or misleading, whereby the supervisor could suppress some items of information, or even put an appropriate legend in place.

The issuer should assume full responsibility for the information filed. Therefore, electronic filing requires the legislation on electronic signature to be implemented[25]. Disclaimers would be inadmissible, except when the information is clearly originating from a third party. In this case, his approval should be obtained.[26]

11. The second principle would be that rather than having one single European supervisor, the national supervisors should be acting, in their own jurisdictions,

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22 Rapport annuel 1995, 102 called "Ecofil".

23 Rapport annuel 1998, 51 called "Sophie".

24 This is comparable to a remedy which is often found in financial regulation, i.e. the public censure of the deficient or unwilling issuers.

25 See EU Directive, footnote 2.

26 See French ANSA recommendation, Association Nationale des Sociétés par Actions, L'utilisation des moyens de télétransmission et les assemblées générales d'actionnaires, Rapport d'un groupe de travail de l'ANSA, January 2000 (http://www.ansa.asso.fr/site/rap1.htm)

according to identical or largely comparable guidelines. The diversity of the European scene pleads for having a flexible decentralised supervisory scheme that takes into account the diversity of the national systems of supervision, information gathering and dissemination.

This feature would solve the difficult question of having supervision, and eventually inspections undertaken by a foreign body: companies would be supervised by the body in charge of the market in the jurisdiction of their registered office, or of their principal office, applying the legislation in place in that jurisdiction. This would also avoid regulatory arbitrage, which - although useful in other fields - would only lead to having the rule of the market organiser applicable, paradoxically leading to the reduction of the level of competition between the regulators.

With respect to language questions - always a sensitive issue in Europe - filing could take place in the language that is admissible in the jurisdiction where the company is located. In many states, the supervisors even now already accept documents to be drafted in a language as is generally acceptable in international financial matters: the discussion can thus at least be avoided. But nothing would prevent issuers to translate some of their documents in several other languages to offer better access to investors in other language regions. The role of the supervisor should be limited to checking whether these translations are not misleading. With respect to securities listed on markets in several states, the market supervisors might require a translation of at least the more sensitive disclosure documents - especially the ad hoc information - the translation being effectuated by the issuer, under the overall supervision of the agency.

b - Dissemination of information

12. The information that is made available to the markets today is disseminated in different forms and by different means. Before the introduction of electronic media, the information was made available in traditional printed form, whether in booklet, press statement and the like. It was difficult to obtain a comprehensive view of the information available on one single issuer, also because other sources of information were needed. Today, all these different types and sources can be bundled in an electronic data base, with links to outside sources of information that the company considers meaningful, e.g. analysts reports.

Originating from the traditional printed format, based on an idea of collecting all information in one single medium, there have been several central databases announced or effective. Most of these are the result of private sector initiatives, and are offered for subscription as part of the data stream on price formation. In some states the public authorities decided to regroup financial information on listed companies and make it available in electronic form[27]. This is the formula followed in France, where before the introduction of the Internet, the Commission opérations de bourse (COB) started in 1993 already its electronic database Ecofil, especially aimed at making "ad hoc" information available to the public on the minitel. [28]. The introduction in the database is equivalent to filing with the COB. In 1998, the Cob announced the development of the section of its Internet site called SOPHIE (Site Ouvert des Publications Historiques des Entreprises) containing all prospectuses and similar documents that are subject to the Commission's vetting.

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[27] Especially newspaper editors offer a service including historical and general data on the issuers.

[28] See COB, Bulletin, n° 267 of March 1993 and the Récommendation 93-01 relative à la diffusion par minitel d'informations financières par les sociétés cotées, May 3 1999, www.cob.fr/frset.asp?rbrq=inet, also: COB, Rapport annuel 1995, 102.

In Germany, ad hoc information is distributed by the Stock Exchange immediately on reception from the issuer to all market participants. Similar systems exist in most other member states.

However these initiatives are disparate and relate only to part of the information that should be available on public issuers of securities. So e.g. there are no links to the general company information that is available at the company's registry. The question is even more important with respect to annual accounts, that might be available only at the company's registry, or to information on major shareholders, that is available in another section of the supervisors' database. Therefore it seems preferable that both data bases be integrated, and recomposed, not at the level of the supervisory body, but at the level of the issuer. This approach has several advantages: flexibility, putting in charge the beneficiary of the burden, especially of updating, integrating information originating from different sources, such as ecological reporting, social reporting, etc. It does not prevent the supervisor to exercise adequate supervision, as mentioned above. It also will contribute to avoiding conflicts between public administrations in charge of different segments of the information.

Modern technology might even allow integration at the level of dissemination only and without centralising, by electronically linking data available at different data bases, such as the commercial registry, with data destined to the financial markets.

13. In the hypothesis and to the extent that the basic information would not be centralised, dissemination would take place by way of opening for consultation the individual websites as arranged by listed companies. The role of the stock exchange, of the supervisor, or of any other body involved in the market organisation would be to facilitate access to these companies' websites: one could call this a "website of websites", allowing direct access to the company's website. Several schemes could be considered: a Europe wide website, on which all listed companies are referred to, allowing consultation of each company's website by a mere click. An alternative would be to organise national websites, which would be easier to supervise by the national supervisors, and linked, whether by passing through a European website, or by first calling the national website, and then click the link to the company's website. In fact both approaches are perfectly compatible. As markets will be European, it is likely that a pattern based on a subdivision by states would not respond to the needs of the markets, but may be needed for supervisory purposes. As companies have a prime interest in having their information disseminated as widely as possible, the practical organisation can better be left to the markets, where information vendors will easily see the profits that can be made from collecting and regrouping data in the most efficient communication system.

14. Access should be insured to all interested parties and without preferential treatment. Privileged access to users or to other "sweethearts" infringes basic rules of market organisation. It would be the role of the supervisor to check whether equal access is effectively insured.

The scheme would insure that filing of the information on the website would be equivalent to public disclosure to the markets. This feature is of special importance to the timely dissemination of "ad hoc" information, or information about significant transactions in the company's shares. Timeliness is of critical importance to the issuer, its directors and officers, and to all other parties directly related to the issuer, that might otherwise be accused of dealing as insiders.

However, as it is largely theoretical that by putting information on the website, the market will be informed, and that the information will have been absorbed by the market, additional safeguards will have to be taken into consideration. One safeguard should be that price sensitive information - whether vetted by the supervisor or not - should be automatically transmitted to the main news agencies. In addition, investors or analysts that are particularly interested in the information about certain shares, could apply for being put in the company's alert list, in which case they would receive, at the same time as the news agencies, the information which the company would deem price sensitive. If these techniques have been put in place, and are effectively applied the legislator should be satisfied that posting on the website is sufficient publication for supervisory and insider dealing purposes.

15. In 1999 the COB issued a renewed recommendation on the use of the Internet for the dissemination of financial information. Some of the rules formulated may usefully inspire other regulators and are therefore summarised[29]:
- In principle, the company is responsible for the information that it makes available on its site; the information should be precise, true and sincere[30].
- If disclaimers are introduced, referring to information made available on other sites, it should carefully analyse the legal effects of such a disclaimer. Also disclaimers relating to specific foreign addressees, should clearly mention its purport in light of the applicable foreign regulation.
- Language: the texts using different languages should have the same content and meaning.
- All information should be clearly bear a mention of date and hour of its public distribution. Updates should be clearly mentioned, and announced.
- When only part of a document is made available, this should be clearly mentioned indicating where the full document can be obtained
- Mention should be made of the status of the information, indicating whether - and which part of - the information has been approved by the auditors; in order to incite auditors to take responsibility, it might be considered to have their signature - electronically - apposed to those sections of the documentation that they approved.
- If documents or statements originate from third parties, these are supposed to have explicitly accepted such distribution
- Dissemination through the Internet does not exempt companies from distributing the information through other channels.
- Documents approved by the supervisors should mention this expressly; including the address where the document can be obtained
- These documents should be made available on the company's site as soon as approved by the supervisor.

16. The format of distribution is not without importance: in some websites only the full document can be retrieved, while in others the information has been subdivided in segments, making consultation easier, but leading to fragmentation and partial insights[31]. Also, the way the information is structured often constitutes a burden on easy access: annual accounts are not always identified under that heading. In other cases the members of the board of directors were not mentioned. Therefore there might be some need to define the minimum information that should be made available in any website and that should be updated strictly. There is some discussion

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[29] For the full final text, see COB, Rapport annuel 1999, 42

[30] COB, Rapport annuel, 1998, 50; this rule was formulated in the proposal for a recommendation, but obviously not maintained in the final text as published in the 1999 annual report, 42.

[31] For a comparative studies of these two techniques see: SIBILLE, C, La communication financière des entreprises sur Internet, Revue de la banque, 1999, 272-281

as to whether the supervisor should also prescribe rules as to the minimum format of the website, including its minimum content.

17. In addition to the traditional financial disclosure, much of which has been defined by law, companies are also introducing some other types of information on their websites.

Financial information should be clearly distinguished from other information, especially commercial information. This obviously is not always the case.

Secondly companies sometimes include reports drafted by financial analysts: here the source should be clearly mentioned, and dated, indicating by whom the report has been commissioned.

More controversial are the so-called "conference calls": in this section of the website investors can retrieve discussions that the management has held with financial analysts. Although accessible to all investors, often without fee, the question arises to what extent all parties can be considered to have equal access to this information. One could argue that this type of disclosure would be no protection against an insider trading incrimination. The recent SEC rule on selective disclosure has also taken restrictive position[32].

Even more difficult are the issues raised by "chat corners" that are opened on the company's site: even though the company could stipulate a general disclaimer for any information that is distributed in this section of its website, there remains the misleading impression that it is part of the company sponsored information. Should the company supervise what is being discussed, and eventually correct if untrue information has been divulged? The answer is clearly no. Also the company cannot supervise all possible chatcorners on which information would be divulged outside its view. Therefore it seems advisable that companies do no themselves organise these techniques.

The security issue has already been touched upon: the information disclosed should be protected against any falsification by third parties. [33] And the company must make appropriate measures to achieve maximum security.

18. In practise many large companies have already organised websites on which information - but not only financial information - is being made accessible to anyone. The differences between these websites are very substantial, in terms of content, reliability, structure, and accessibility. From the angle of financial disclosure, not all of them contain the most significant financial information - e.g. no annual accounts, no board composition - and often this information is scattered over different pages and difficult to consult or to rearrange. No mention is made of any form of external supervision, which therefore can be deemed to be absent.

. Several surveys have been published comparing website of large companies. A 1999 survey indicated that 67% of the top 1000 European companies have websites of which 80% used their website for financial reporting.[34] But the content of the financial information so disclosed remains very variable. Some companies merely put their annual report on the web, which can then be consulted on the site, or can be

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[32] See SEC Release August 15 2000 Regulation Selective Disclosure and Insider Trading, Release Nos. 33-7881; 34-43154; IC-24599, CCH, September 18, 2000, 3. Regulation fair disclosure: Release 34-43154, 2000, CCH, December § 86316; also S.E. EISMA, *Investors relations*, Den Haag 1998, 40 p.

[33] This issue should be certified by the auditors according to the Rule AU 550 of the AICPA.

[34] Cook, J., Information and Communication Technology: The Internet and Company Law, in 'Literature Survey on Factual, Empirical and Legal Issues - The ERSC centre for Business Research', University of Cambridge, July 1999, 1-39, see also http://www.dti.gov.uk.cld.review.htm

retrieved in one block. Other subdivide in smaller sections, some of which apparently are not retrievable.

§ 2. The role of ICT in Company Law matters

19. This second paragraph will attempt to give of overview of the developments in some of the European states on the use of ICT in company law matters., especially relating to the internal company life, and the functioning of the company organs more specifically of the general meeting. As ICT techniques could significantly contribute to solve collective action issues, most of the following developments will be related to companies the securities of which are traded on the markets. But the issue may be broadened to all companies.

In several EU states, legislative work is underway to adapt present procedures and rules of company law to ICT developments. Some of these have been mentioned before, as they would be applicable to all companies. Legal writing is starting to analyse the issues, but these are still early days in the analysis of the subject.

The items that most often are mentioned as likely to be affected by the use of ICT are the following :

1. The impact of the use of different types of shares.
2. The use of ICT in shareholder relations

a - information previous to the general meeting
b - notices and requests for information by a shareholder from the company
c - notifications and communications by a company to a shahrehodler
d - the list of shareholders
e - participation in the general meeting held in several places
f - shareholder proposals
g- shareholder questions
h - electronic proxies
i - electronic voting procedures
j- take-overs

1. The use of different types of shares

20. As a preliminary to the use of modern communication technology in the relationship between the company and its shareholders, some attention should be paid to the position of the shareholder according to the legal status of the share he owns.

In some European states, shares are mainly/ exclusively available in registered form (UK), while in other states, the bearer form is still widely used (N, F, D, B). In practice however, bearer shares usually are deposited with a central depository and circulate without physical transmission, but by way of bookkeeping entries. This bookkeeping system is largely computerised these days. Rights of shareholders are evidenced by inscription in their share account, held by a credit institution. This does not mean that the company itself has direct access to data relating to these share account. Banks often are prevented, for different reasons (privacy, competition, security, etc.) to communicate the list of account holders to the company.

The use of bearer shares in live form is not favoured by the markets: its use was abolished as a consequence of foreign control measures in Italy and in France, but still continues to exist in Germany, the Netherlands and Belgium, to name but a few. In practice however, different measures are taken to reduce the circulation of bearer certificates, whether by imposing taxes on delivery (Belgium), or by reducing the relative burdens on the use of registered or nominative shares (Germany, with the recent NaStraG[35]). Deposit of bearer shares ina central depository insures of paperless circulation of these shares. Technically the identity of the holder of bearer shares is known, in practice it is kept secret. Se e.g. in France, where "bearer" shares cannot be traded except through share accounts, as all listed bearer shares have to be deposited in a share account[36].

A specific type of security has recently emerged: the "dematerialised" security. For the present purposes, it can be identified as a specific regime of registered shares, the difference being that it only exists in paperless form, by way of electronic data. There is some discussion whether these securities are a species different from the nominative or registered shares.

21. When the company has issued nominative shares, with the share register held by itself or by a service company, the company has direct information on the identity of the shareholder. Hence it can organise the bilateral stream of information between itself and the shareholders. It also means that the company will have to take care of the identification and authentication procedures, any time the quality of shareholder has an influence on the exercise of certain rights, most clearly in the case of the exercise of voting rights.

This case will be different with bearer shares, or with "registered shares" that are transferable with a blank endorsement. Here only the bank, with whom the shares have been deposited holds information on the identity of the shareholder, but not the company. Also it appears that the shares registers, especially those held in the name of third parties (including registration in "street name") are not always up to date. The identity of the shareholder may remain unknown. As banks are unwilling to transmit the identity of the shareholder to the company, this information has to flow, often in several layers, through the bank's hands. This rather inefficient procedure could be greatly simplified and facilitated by the use of ICT. But it also means that the banks will have to play an active role in the identification and authentication procedures of the shareholder. In most states the bank will have to deliver a document stating the number of shares that are owned by the shareholder. Only on the basis of this document will the shareholder be entitled to exercise his rights. In a few states - especially Germany, but also Austria and Switzerland - it is traditional that shareholders give a proxy to the banks, with whom shares have been deposited. This feature will simplify the identification procedure, as hown further.

The foregoing short overview illustrates that to organise communication procedures between a listed company and its shareholders, full account is to be taken of the intervention of these financial intermediaries. Further this intervention has a direct impact on the way states are dealing with the issue of the use of ICT in company matters.

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[35] Gesetz zur Namensaktie und zur Erleichterung des Stimmrechstausübung, (Namensaktiengesesetz - NaStraG), retrievable from Bundesjustizministerium, http://dip.bundestag.de/cgi-bin/dipwww_nofr/continue

[36] Except shares traded outside France, as these can circulate as physically deliverable documents.

2. The use of ICT in shareholder relations

22. There are mainly two aspects that should be dealt with under this heading: pre-decision information and decision making at the general meeting, the latter containing the crucial issue of remote access voting procedures.

Both subjects will be dealt with without giving a full overview of the present states of development in all European states. Only the situation in the UK, Germany, France, and some developments in other states will be mentioned. In each of these states legislative or selfregulatory intervention are being considered. As a consequence, for these states there has been some information available on recent developments. This does not mean that very interesting development are not under way e.g. in the Scandinavian countries.

a - Information previous to the general meeting

23. According to present practices, information inviting the shareholders to the general meeting is transmitted in printed form. Investors, especially institutional investors often complain about late transmission of this information, especially when the information has to transit through the different layers of banks in which accounts the shares are registered. Further complaints are heard about translations: if the information arrives late to very late at the shareholders' desk, and has to be translated, there is a practical impediment for taking part in the general meeting As a consequence shareholders are de facto prevented from taking part in the meeting. This is an awkward problem at the level of the correct functioning of the European capital market as it deprives institutionals from other members states from effectively exercising their voting rights and other shareholder privileges. The use of ICT would therefore constitute a logical answer to this question.

24. The information referred to relates to the general annual information[37], but also includes the notices and agenda for the meeting and the proxy forms.

According to the French ANSA Report[38], the principle should be that all investors should have equal access to the relevant information. Therefore the information should be exposed on the company's Internet site, along with the traditional forms of dissemination, at least until further change of the law. In order to avoid the risk of overinformation, only those documents that must be published should be put on the Net:

- notice, with date and place of the general meeting
- agenda
- draft resolutions, with motives
- summary of the status of the company for the year under review
- financial statements with the results over the last five years
- financial communiqués
- instruction relating to a shareholder taking part in the general meeting
- data on the members of the board[39]
- the report of the board of directors
- annual accounts of the company and of the group on a consolidated basis
- social account, with the opinion of the enterprise council[40].

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[37] Depending on the jurisdictions compared: annual reports, annual accounts, consolidated accounts, list of subsidiaries, and many other items.

[38] See footnote 26.

[39] Age, number of shares held, other directorships, in or outside the group; in case of re-appointment, data about the professional references and activities of the candidate for the last 5 years.

[40] Art 438-7 Code du travail.

It was further discussed whether this form of distribution of the information could replace the traditional publication in paper form. The paper publications were considered obsolete. Investors need to obtain the information in a centralised, easily accessible way: therefore the COB's central data base, and the financial press were considered adequate means of distribution of this information. The regulation should include company websites as legally adequate means of dissemination.

25. In the UK the DTI proposed legislation on the basis of the Telecommunications Act 2000[41]. The proposed order, providing for a change of the Companies Act 1985, provides that certain information about matters to be decided in general meeting could be sent by using electronic communication, provided the shareholder has agreed with that procedure by notifying the company his electronic address, as defined[42]. It would also be allowed for certain information that the shareholder be electronically informed of the posting of this information on the website where it can be retrieved by him[43]. The number of matters where the electronic form of communication can be used for is described restictively, while this mode of communication is not exclusive of the traditional paper forms. In each case the shareholder must agree.

According to the DTI's draft order, electronic communication would be allowed for certain communications by the company to the shareholder as well as for communications by the shareholder to the company

- transmission of annual accounts and annual reports
- notices of the general meeting[44]

In the other sense:
- appointments of proxies[45]
- requirement that an annual general meeting be held[46]
- requirement that accounts and reports be laid before the general meeting.

However, in a first stage, this way of communication would not be compulsory.
The DTI preparatory document called attention to restrictions flowing from EU directives requiring written communication.[47]

The Company Law Review Steering Group also favoured improved communication with shareholders. Websites were described as more effective and economical than additional meetings. Regulatory guidance was considered premature: self regulation is to be preferred, with some basic rules laid down by the Secretary of State.[48]

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41 See supra footnote 4.
42 The definition of address, in relation to electronic communications, includes "any number or address used for the purposes of such communications".
43 e.g. s. 369, Companies Act 1985, as to be amended on annual accounts and annual reports.
44 s. 369 and s. 379 A Companies Act 1985 (meetings to pass elective resolutions).
45 s. 372, Companies Act 1985.
46 s. 366A, Companies Act 1985.
47 Art. 29, Second directive, calls for a written notice of pre-emption rights.
48 Company Law Review vol. 5, § 4.60.

26. In German legislation, the first steps are being considered to allow some use of ICT in shareholder relations. The proposed system is however very much embedded in the German system of the banks exercising the voting rights.

A first point concerns the use of ICT in calling the general meeting. The rule according to which the management board must inform the banks and the associations of shareholders of the notice for a general meeting including the agenda and shareholder proposals and this within 12 days of the publication of the convocation in the Official Journal, was already applicable to registered shares[49]. The difference resides in the communication technique: henceforth, documents could be transmitted by any technique available, including fax or e-mail, obviously also if the shareholder has not applied for such communication. The mere posting of the information on the company's homepage would not suffice[50].

A different regime applies to the decisions of the general meeting: according to the present regime, any registered shareholder could request the communication in writing of any decision of the general meeting: henceforth any form of communication would suffice. The draft bill considers that if the resolution is made generally accessible, there will be few shareholders that will apply for a written communication. Some legal scholars have extended the rule by stating that it would suffice that the decision would be made accessible referring to posting on the homepage[51].

b - Notices and request for information by a shareholder to the company

27. According to the legislation in some member states shareholders may apply for information or for documents from the company, such as :

- sample forms for mail vote, or for proxies
- drafts resolutions of the general meeting
- particulars of shareholders
- written questions.

In each case the questions are not admissible unless originating from a shareholder. This raises the issue of adequate identification of the shareholder and authentication of his request.

The French ANSA document advises not to intervene in this matter as the right of the shareholder is subject to the proof of his quality as a shareholder. This matter should therefore better be left to the general rules of evidence, as adapted for electronic proof. The company can always voluntarily accept requests. For practical purposes it is recommended to open a specific mailbox for this type of requests.

As mentioned, the UK rule would allow electronic notifications in a limited number of subject matters, provided the shareholder has accepted the electronic way of communication.

c - Notifications and communications by the company addressed to a shareholder

28. The question arises to what extent the company can make use of electronic means of communication to answer diverse requests from a shareholder.

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[49] § 125 (2) AktG.

[50] SPINDLER, Internet und Corporate Governance - ein neuer vitueller (T)Raum, Zum Entwurf des NaStraG, ZGR, 2000, 420-445, at 429.

[51] SPINDLER, nt. 51, at 429.

If the shareholder has used himself electronic means of communication, one could readily admit that the same communication channel be used for the company's reply. However, the French position is somewhat more cautious: the law should be adapted, and in general terms allow for electronic communication, unless the shareholder has expressly requested a reply by registered mail.

In the UK too, there is no general rule on electronic communication between a shareholder and the company[52]. The DTI proposals relate only to annual accounts, the directors' report and the auditors' report, notices of meeting and appointment of proxies. The DTI consultation paper stated that it was preferable to leave this point to further developments, and that it could most usefully be covered within a code of practice. One of issues raised was the informational asymmetry that may result from the use of electronic communication. To that, the DTI replied that today there are differences in speed of postal delivery. "The difference between speed of electronic and paper delivery would not add appreciably to any existing disparity"[53].

d - The list of shareholders

29. A much debated issue concerns the possibility for shareholders to contact each other: if this could be achieved by electronic means, shareholder activism might increase considerably. At present, most legal systems seem to be hesitant about this type of communication: if bearer shares are used, it is prevented in any case, if nominative shares are used, there would be objections based on the applicable privacy legislation. The issue has been discussed in some jurisdictions in terms of the use of electronic identification means, or of communication of the shareholder register by electronic devices.

So in France, where the attention is drawn to the impact of the privacy legislation: if the company would transmit electronically the list of shareholders, this would be considered as the automated treatment of nominative data, and hence be governed by the privacy legislation. Electronic transmission would be excluded.

According to the UK Act, the share register contains the address of each member. There was agreement that this should remain the postal address. The fact that the company may use the electronic address with shareholders did obviously not impact on this question.

The German law allows the register of shareholder to be drawn up in electronic form: the "sharebook" would be replaced by the "share register" allowing for electronic treatment of the data. But these remain in the exclusive possession of the company.

Every shareholder has the right to consult the list of the participants in the general meeting within 2 years of the meeting. For reasons of privacy protection, a shareholder can only obtain information about his own registration, but has no right to consult the register as a whole [54]

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[52] However, shareholder or more precisely "a member" or an auditor may require accounts and reports to be presented at the general meeting. This request may be made in electronic form.

[53] See Summary of responses, footnote 4.

[54] As was the case under the former legislation.

e - Taking part in the general meeting held in several places

30. With today's technology, a general meeting can be held simultaneously in several places, while shareholders can follow the debates of the meeting even without being present. Some companies already have put into place this type of enhanced shareholder communication. The additional gathering is however legally not part of the general meeting

According to another scheme, shareholders can directly intervene in a meeting that takes places in another place, the debates of which are transmitted by means of telecommunication. At the end of these debates, the shareholder can be invited to take part in the vote: the situation will be different if the shareholder is present in one of the meeting rooms where the transmission took place, or is simply voting at distance. In the latter case, one should refer to the issues discussed hereafter by distance voting.

31. French practice, stimulated by recommendations from the COB[55], has for several years steered a very open course towards attendance by non shareholders of the general meeting of listed companies: as a rule, the admission is decided by the chairperson, or by the meeting itself. Therefore there can be no objection against transmission of the proceedings on a website, or by any other means of communication. It is recommended however, that the company's charter contain an express provision allowing such transmission. It is further recommended that the full debates be retransmitted[56].

Restrictions might flow from the public character of the meeting: shareholders should be aware that their statements may constitute libel or slander. Also, attendants have the right to privacy as far as their identity or their physical appearance is concerned. Here, it is recommended to warn the attendants of the public character of their presence. A charter provision might allow public transmission. It seems questionable however whether such a provision could also affect non shareholders.

As to actively taking part in the meeting, there is no particular rule in French law that would prevent such participation, save the proof of the quality of shareholder. However, the intervention will be limited to taking part in the oral debate, as regulation limits the rights to present motions or move amendments to persons that are physically present.[57] If the number of distance interventions would be very high, the chairperson and his assistants will have to police the debates. Therefore restrictive procedures might be introduced, referring to the procedure allowing for questions to be submitted in writing.

32. The German position is much stricter.

It seems questionable whether the general meeting can be organised simultaneously in several places: although not strictly forbidden, it creates a risk as to the validity of the meeting and of the decisions taken [58]. The new law contains no rules as to the virtual participation of shareholders in the general meeting.

The live transmission of the proceedings raises severe problems of privacy. The transmission of the picture of an individual shareholder, or of excerpts of his oral intervention, would be contrary to privacy legislation[59], as violating the individual's

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55 See COB, annual report, 1982, 21.

56 According to the ANSA footnote 14.

57 Whose names have been mentioned on the attendants list.

58 § 121(3)(2) refers to the "place of the general meeting" which is usually interpreted as implying a place of physical meeting.

59 According to this opinion, it would be a violation of the shareholders personal rights ("Personlichkeitsrechte") to have his picture and voice registered and transmitted.

personality rights. In Germany too it has been discussed whether a warning statement of the chairperson would suffice. This would depend on the mode of transmission. It would be objectionable if the information would be put on the Internet, where anybody can retrieve and especially copy the information. Transmission under the company's guidance, and better even, accessible to shareholders only, would not raise the same objection, at least if the shareholder has been warned[60].

If shareholders taking part through means of communication in the general meeting would like to actively intervene in the discussion, and address the meeting, pose questions or engage in the debate, the question arises whether these privileges can be exercised without being related to the voting process. As at present distance voting is not allowed, it would seem that these ancillary privileges would have to be denied to the shareholder attending the meeting in another meeting room.

According to German tradition, the address of the chairman of the management board is considered very important: its teletransmission would raise questions under article 15 WpHG, the "ad hoc" information provision, which is directly related to the use of inside information.

33. In the United Kingdom, the Company Law Review took a more open attitude to the use of telecommunication devices in the organisation of the general meeting.

First, it seems significant to call attention to the proposition, submitted by a "significant minority" of respondents that the general meeting might as well be abolished, as technological innovation would fundamentally change the necessity of holding a meeting.

The Steering group took a more moderate attitude and proposed rather to reform the functioning of the AGM, at least for the publicly traded companies.

There was a favourable opinion that AGM could be held in "dispersed meetings" with two way real time communication between participants. The rule might usefully be introduced in the company's charter provisions, supplemented by regulatory provisions or Best practice rules as to the specific conditions of the organisation of these meetings.[61] One could assume that shareholders taking part in these meetings would be fully entitle to vote.

f - Shareholder proposals

34. In most jurisdictions shareholders, holding a certain percentage of the shares, can request to board to include certain proposals in the agenda for a general meeting. Apart form discussions about the thresholds, and who is going to bear the expenses of circulating the proposals, the use of electronic communication devices is likely to activate this form of shareholder participation in the decision making process.

According to the French position, there is no difference between present and electronic procedures: one should only insure that the proposing shareholder be adequately identified, and his holding checked. The request should bear an electronic signature.

It is unclear to what extent the German law would need to be adapted, as the present law only requires shareholder proposals to be sent[62] within one week of the publication of the notice. But proposals received by the management could be

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60 See for a discussion of this topic: HASSELBACH, K. and SCHUMACHER, S., Hauptversammlung in Internet, ZGR 2000/2, 258-286, at 263.

61 Company Law Review, Developing the Framework, vol. 5, March 2000, § 4.34 and 4. 35.

62 "übersand", according to § 126 (1) AktG. This section will not be modified by the NaStraG.

transmitted to the nominative shareholders according to the generally applicable procedures[63].

In the UK Review, these issues were mentioned without attention being paid to the specifics of the use of telecommunication.

In Germany it has been proposed to post shareholder motions on the company's website and to invite other shareholders to support the motion.[64] Whether the outcome would than be binding - as in a political referendum -, or merely has to be submitted to the general meeting remains unclear. In the first case, the rule would modify the fundamental equilibrium on which the large public companies are based.

g - Shareholder questions

35. There can be little doubt that shareholders could be entitled the submit questions to the company, whether with a view of obtaining an answer at the general meeting, or otherwise.

The French position seems logical: the company is free to accept this type of communication. French law provides for any shareholder to pose questions relating to the general meeting which the board is obliged to answer during the general meeting[65]. When the company prefers to add an electronic facility, this should be permitted without changing the law.

A similar attitude was taken by the DTI: there should be no compulsion on companies to communicate electronically, but they should be encouraged as offering cost and efficiency gains.

There also should not be a compulsory use of the electronic address: therefore, it was decided that the address in the share register remains the only valid one.

In Germany, questions can only be addresed during the meeting: it was proposed to extend this right to question posed by on-line participants, provided these do not upset the meeting[66]. It was also proposed that the question should not be answered if the answer can be retrieved by all shareholders from the company's website, where it was posted after the notice for the gereral meeting has been given.

h - Electronic proxies

36. One of the main applications of telecommunication relates to the use of proxies. Several hypotheses should be distinguished.

There can be little objection against the retrieval of the proxy from the company's website. The proxy itself is then sent to the company signed by the shareholder.

The appointment of a proxy by electronic communication assumes that the signature can be apposed electronically. Not all EU member states have yet implemented the EU directive. In the UK, the Companies Act would be amended to allow for the appointment of a proxy in "an electronic communication to be sent to

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63 Referred to above, see § 125 AktG.

64 NOACK, U. Stellungnahme zu II.4 des Fragenkatalogs der Regierungskommission Corporate Governance - Modernisierung des Aktienrechts, www.jura.uni-duesseldorf.de/service/hv/presse/htm. Whether it would than be obligatory, or merely has to be submitted to the general meeting remains unclear.

65 Art. 162, L. 1966

66 HIRTE, H., Der Einfluß neuer Informationstechniken auf das Gesellschaftsrecht und die corporate governance Debatte, Fs. Buxbaum, 283, 293 puts this restriction in a wider context; Noack, U. Stellungnahme zu II.4 des Fragenkatalogs der Regierungskommission Corporate Governance - Modernisierung des Aktienrechts, footnote 62.

such address as may be notified by or on behalf of the company for that purpose". It was considered that more detailed rules on issues involving voting by electronic proxy should be dealt with by the company, such as the case in which a company received from the same shareholder paper and electronic votes.: only the most recent vote would count. Standard practices may be developed by the industry, not by the DTI.[67]

In France, electronic proxies would be dealt with along with direct electronic votes and subject to verifications before being admitted to the electronic ballot box. According to the recommended procedure, there would be a "protective lock"[68] where all votes would be scrutinised before they are admitted to the electronic ballot box. According to French law, the proxy holder must vote in person: hence, electronic voting by proxy holders is not allowed under present French law.

In Germany, the subject is clearly linked to the prevalent pattern of exercise of voting rights: usually the credit institutions vote as proxies for their clients who have deposited the shares with the bank. In the relationship between the client and the bank, according to the present requirement the bank should inform the client in writing about the vote he can exercise on each of the items on the agenda. In the future this would be left to the parties' freedom: any form of communication can be used, including electronic communication. The proxy to the bank itself should not further be in writing: here again parties may freely decide, and electronic signatures may be used. Proxies to private persons however would continue to be in written form, except if the charter provides otherwise[69]

The German proposal also contains a simplification for shareholder associations: information about the way the association intends to vote should not be communicated in writing, but can be made available on the association's website. [70]

i - Electronic voting

37. One of the central issues in the use of ICT in company law matters relates to the admissibility of electronic voting, being the shareholder directly casting his vote with the company[71]. Although this type of voting will be considered very desirable by most listed companies, it is not without consequences. At present, the general meeting is still an assembly of shareholders, few or many, gathering in a specific place and expressing their opinion on the future of the company in light of the statements made by the board and questions posed by shareholders and of an exchange of ideas between these, leading to a vote by the shareholders. By allowing for electronic voting there is a danger that the mechanism of the general meeting might be reduced to a mere voting devise, without any discussion and little possibility for shareholders to have any impact on the decision. The general meeting will end up in a system of adding up the votes cast. As these mainly originate from the

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67 See for comments: DTI, Summary of responses, footnote 4.

68 "un sas protecteur". During this verification procedure, the company will check the identity of the signing party as a shareholder, the number of shares for which he is registered, whether he votes for all or only part of his holding, and whether his is not voting by mail, or in person.

69 § 134(4) AktG, as modified by NaStraG; for critical comments see SPINDLER, Internet und Corporate Governance-ein neuer virtueller (T)Raum, ZGR 2000/3 at 432.

70 § 128 (5) (3) AktG as modified by NaStraG.

71 See for some information on the US in this respect :KLAUSNER, M. and ELFENBEIN, J., Report in Baums, Th. and Wymeersch, E.(Ed), Shareholder Voting Rights and Practices in Europe and the United States, Kluwer, 1999, at 362.

institutional investors this procedure will increase their impact on the company's management.

It is useful to distinguish between electronic voting during the meeting and distance electronic voting. The former does not raises specific problems, as it merely is an alternative technique for counting the votes[72]. The second is much more controversial: here voting may occur while the meeting is taking place, or before the meeting, the votes having been cast and stored in the electronic ballot box.

38. In the jurisdictions compared, although electronic voting is considered necessary, the positions are not yet clearly determined.

In the UK, the Company law Review Steering Group stated that there was wide agreement that electronic voting should be introduced but that further work was necessary as to practical provisions: provisions on authentication, security, precedence as between votes received electronically and by post[73]. The planned amendments to the Companies do not contain a section on electronic voting.

In France, the subject has received ample attention. On the one hand the bill that was laid before parliament in March 2000 contains the general principle that the shareholders that take part in the meeting by telecommunication devices (electronic, telephone, fax, or similar) would be considered present for the purposes of calculating quorum and majority. The rule is subject to a provision in the companies charter, to be introduced with a 2/3 rds supermajority.

The subject has been discussed in detail in the ANSA recommendation. Several hypotheses should be distinguished: are the votes cast during the general meeting, alongside the votes cast by the members present or represented? Or have the votes been cast previously to the meeting? Is there only electronic voting, or would there be personal voting as well?

39. Electronic voting requires detailed verification mechanisms: the identity of the shareholder, the number of shares for which he wants to take part in the vote, but more complex whether the same shareholder has not cast his vote according to another procedure, e.g. by mail vote, or by proxy. Signatures have to be apposed to regulated electronic form. If the shares are registered in an account, the bank will have to confirm the shareholder's ownership of the shares: here again the bank's electronic signature should be permissible.

French law has some expertise in mail voting, which was introduced in 1983, but reportedly is not very successful: a standard bulletin has been enacted by regulation[74], containing details about the proposals to be voted on, the different ways the shareholder can cast his vote, etc. It is proposed to develop a similar scheme for electronic voting, which is but a variety of distance voting. This model type of voting bulletin would be made available by the company, on its web site, and would identify the name of the shareholder and number of shares registered in his name[75], unless the

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[72] In that sense also: ANSA, footnote 15.

[73] Company Law Review, Developing the Framework, vol. 5, March 2000, § 4.49.

[74] art. 161-1 of L 1966 and art 131-1 e.s. Décret 1967.

[75] This items would be filled in by the company itself, on the basis of the information available in the share register; however, the shareholder could modify the figure if he wants to participate with only part of his shares.

shares are registered in the bank account in which case the bank would fill in the number of shares.[76]

On the basis of these data the company would be able to determine the number of votes that the shareholder is entitled to cast: this further analysis is necessary to determine the shares for which double votes may be attributed[77], or where the voting rights of individual shares holder would be restricted or suspended. Votes cast should be irrevocable. Also, measures should be taken to avoid shareholders voting twice with the same shares: the "protective lock" mentioned above would filter out all dubious cases.

The next step consists of drawing up the list of shareholders attending: if electronic voting would take place during the meeting, the list of participants should be drawn up continuously, during the meeting, as the underlying data on quorum and majority will depend on the incoming bulletins, and may be changing. The process should be repeated for each motion on the agenda.

The votes may then be counted during the meeting, and this for each motion. The votes should be each time checked against the information on the actual ownership, as delivered by the banks. As the procedure seems very diffcult to control, it was considered preferable to limit the procedure to the owners of nominative shares. Here one check would suffice.

The entire process risks to be so cumbersome and fraught with incident during the meeting that the French associations recommended not to organise electronic voting simultaneously with the physical meeting. The procedure may be more convenient for closely held companies.

There was a strong preference for having the electronic votes cast before the meeting, and the ballot box closed the day before the meeting and opened and processed during, or just before the meeting. In order to avoid any suspicion of manipulation or irregularity, specific procedures should be introduced, involving i.a. the presence of a third party that will certify the regularity of the proceedings.

Finally, all proceedings should put in the company's archives for at least three years in case the outcome would be challenged in court.

40. According to the German proposal, there would be no electronic voting: the argument being that a "meeting" necessarily implies the physical presence of persons. Therefore proxies have to be introduced. Noack[78] has argued that there are no objections against electronic voting, especially as proxyholders have less and less leeway to vote otherwise than ordered by the shareholder. Considering that in the large publicly held companies full electronic general meetings are still far away, in closely held companies it should be rendered possible to organise electronic general meetings, provided all shareholders agree.

j - Take-overs

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[76] Providing for flexibility in case the shareholder should like to take part with less than all his shares.

[77] On the basis of art. 175, L. 1966, double voting rights may be attributed to shareholders that have nominative shares that have been registered in their name for at least two years. The charter provision, whereby double voting rights is attributed, can restrict this privilege to French shareholders or resident in the EU.

[78] See NOACK, U. Stellungnahme zu II.4 des Fragenkatalogs der Regieriungskommission Corporate Governance - Modernisierung des Aktienrechts, http://www.jura.uni-duesseldorf.de/service/hv/presse.htm. For the discussion: see also Hasselbach, K. and Schumacher, S., Hauptversammlung im Internet, ZGR, 2000, 258-286.

41. One legal writer has mentioned[79] that the use of ICT might render the take-over procedure more transparent: by placing a "counter" the market could be informed about the number of shareholders that have tendered their shares. Whether this rule would avoid the prisoner's dilemma that frequently occurs in a take-over is doubtful: most investors and certainly the institutionals tender their shares only the last day, and even then as late as possible. Moreover this technique may work as a powerful bullying system for hesitating shareholders.

§ 3. Perspectives for further action

42. In the preceding section, an overview has been given as to the present state of developments on the regulatory and legal environment of the use of ICT in company matters.

It is striking that in the largest European states, attention is being paid essentially to the same questions. In many other states, these issues are not yet on the table, at least on the table of the regulators[80].

In the field of general company matter, the use of electronic communication devices in the initial registration and disclosure process is well under way, with some member states already displaying considerable achievements, while others are lagging behind. It seems sensible for the EU to support and if necessarily streamline these initiatives, in order to build a more performing information exchange system all over Europe.

The use of ICT is equally important, if not more critical in the sector of the publicly traded companies. In a first stage, ICT is mainly being used for the dissemination of information, mostly financial information, and due to legal restrictions, more hesitantly also for information preceding the company decision making processes, such as the information addressed to the shareholders meeting in the general assembly. In the general financial disclosure field, considerable progress has been made, whether voluntarily, by the companies themselves, and in some members states, also in terms of regulation. Here, supporting action by the EU could be necessary, to stimulate the use of ICT for supporting the financial disclosures and to abolish still existing impediments on the use of ICT, e.g. as to the format in which prospectuses or other mandatory information must be published. Ample transitory rules will however be necessary.

Much less has been achieved in the field of the use of ICT in connection with the functioning of the company organs, essentially the general meeting. Two issues should be distinguished: information dissemination preceding general meeting could relatively easily, and on an optional basis, be included in the system of general information mentioned in the preceding paragraph. Here the EU could usefully intervene to facilitate, and in a later stage to mandate dissemination of this type of information through ICT systems. Adequate provisions should be made for accessibility and translation, also taking into account the need of institutional investors that are operating on a world-wide basis.

43. Much more difficult is the use of ICT in the decision making processes, particularly at the general meeting. Although it is widely accepted that the ICT could solve most of the collective action problems that have characterised the relationship between the shareholder and the company, or its management, time seems not yet ripe

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79 NOACK, U, Modern Communications Methods, see footnote 8.

80 Some other OECD states have enacted or are preparing legislation on electronic voting: Denmark, Japan, Portugal, US, depending on state law. No mention was found of regulatory initiatives in the following states: Austria, Belgium, Luxembourg, Finland, Greece, Spain, Portugal, Italy, Turkey.

to mandate action for the use of ICT in the corporate voting process. Objections are based on practical, organisational arguments: it is extremely difficult to let shareholders vote electronically during the actual meeting, casting their votes while the meeting is taking place. Casting votes before the meeting, as some recommended, would at least in some cases render the meeting superfluous. Therefore, electronic distance voting would be nothing more than a specific form of mail voting.

Other objections are based on the concept that the general meeting decides on the basis of a discussion between management and shareholders, and that the "feeling of togetherness" is an important element in the decision making process[81]. For that reason, it would not be advisable to introduce systems whereby votes are taken outside of the context of a general meeting. A system of mere distance voting, without actual physical meeting would falsify the original concept of the general meeting.

The argument is not very convincing: on the one hand, individual shareholders play only an increasingly minor role in the general meeting, as this is often dominated by the large shareholders, by credit institutions voting as proxy holders, or by institutional investors. These parties are unlikely to have their decision changed in the light of some -often loose- discussion at the general meeting. Discussions with or between shareholders could be more efficiently structured on a website discussion platform, than in a meeting where discussions are monologues, or heated debates, while often a majority of shareholders will be prevented from attending, for reasons of distance, cost, or convenience. As the further dispersion of shares is likely even in European companies, the number of parties attending a general meeting is likely to increase. There are limits to the physical facilities that can be put to work to house several thousands shareholders. Even today some companies are experiencing difficulties to efficiently organise large gatherings of their members. Finally, the function of the general meeting is essentially to serve as the ultimate decision making devise: it suffices that the decisions are supported by a majority of members, whether expressed as a meeting or through a distance voting system.

In terms of harmonisation of the law, it would seem that technological and factual developments have not identified the way in which this debate will or might develop. In the meantime, some companies will experiment with electronic voting. A recommendation could be addressed to the member states to remove impediments to distance voting by electronic means, whether before or during the general meeting.

Part III. Looking into the Future

44. In the last part of this paper, it will be attempted to outline some of the developments that in the longer term, might occur as a consequence of the more intense use of ICT. This part of the paper is based on speculative grounds, some more speculative than others. Therefore, some will designate the following analysis as futuristic. The intention is not to dream aloud, but to indicate some of the further and longer term implications of the developments that have been sketched before.

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[81] HIRTE, H., Der Einfluß neuer Informationstechniken auf das Gesellschaftsrecht und die corporate governance Debatte, Fs. Buxbaum, 283, 290 "Festzelt-Atmosphäre; also SPINDLER, footnote 69, 438.

1. A first, likely development is a change in the disclosure apparatus that at present is applicable: if all company related information is available in one single website, does one still have to publish prospectuses, where the same information is rearranged according to a uniform regulatory scheme?

There might still be a need to have the information verified by the supervisor, especially on an IPO, but this objective might be achieved by earmarking some of the documents disclosed as being part of "the disclosure document".

2. Liability flowing from the disclosure of untrue, incomplete or misleading information might have to be revised as the causal relationship between the said information, being accessible on he company's website, and the damage caused to individual investors will be absent and even more difficult to prove.

3. Companies should have a precise list of their shareholders, making sure that two directional communication can be maintained. This communication would support the distance voting mechanism and increase the feeling of "appurtenance" to the company. In case the secrecy about the identity of the shareholders should be maintained, the banks could usefully offer an interface, as is illustrated in the Dutch case[82].

Therefore considerable efforts have to be made to establish direct links between companies and their shareholders, whether these are directly registered in the company's books, or are holding their shares indirectly through accounts held by credit institutions.

4. Distance voting will become increasingly necessary. As simultaneous voting will not be feasible, the decision making process will be fundamentally changed. This is the more so as the number of shareholders and also their geographical distribution is likely to increase considerably. Decisions would be taken on the basis of a proposal, exposed by the board of directors to the approval of the shareholders. Once a sufficient number of shareholders have approved, the decision will be deemed accepted. The majority is to be determined in the charter, but could be fixed at less than 50%, the remaining shares being considered as "absent shareholders". This process could be engaged whether on an annual basis, or continuously, or both. For regular matters, a lowel level should be allowed, to take account of shareholders' apathy.

5. If this type of decision making would be adopted, boards would be able to consult more frequently their shareholders. The definition of the function of the board and of the shareholder would have to be rethought. A new agency paradigm would arise.

6. As a consequence of point 5, the liability of the directors would also have to be rethought. If directors have given adequate information to shareholders, the unfavourable consequences of decisions approved by shareholders should not - or not exclusively - be attributed to the directors. In the hypothesis that shareholders would be less risk averse than directors, being better able to diversify their risk, this might result in more risk prone decisions. On the other hand directors would probably request better protection against decisions approved by the shareholders if these turn out to be fatal for the company.

7. If shareholders could easily communicate with follow shareholders, there would be a definite risks of these shareholders determining the actual management of

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[82] See WINTER, J., Grensoverschrijdende stemmen, Kluwer, 2000, 59 p, also available in English.

the company. There should be limits set to the respective spheres of competence of management and shareholders. Only very important decisions, presently submitted to supermajority decisions, would qualify for direct decision making.

The same rationale would lead to limiting the ambit of shareholder proposals, as these could be very easily introduced into the decision making process. Unfortunately, not all shareholders pursue bona fide objectives: competitors may try to damage the company, action groups may impose unjustified burdens on the company leading ultimately to its ruin. Therefore, shareholder proposals should be limited.

8. As one sees already today, trading in listed securities has intensified considerably. In many companies all shares change hands once or even several times a year. As velocity of trading increases, one will sooner or later be confronted with shareholders that have been owning shares for not more than a couple of days, or even hours. This raises the fundamental question whether the legal system will still recognise these "owners" as entitled to exercise the privileges of the shareholder, especially the voting rights, based on the idea that the shareholder is the residual risk bearer? Or should one not distinguish between "stable" shareholders" staying at least for a limited period of time in the company, and the mere "investors" by giving some incentives to the first group, such as increased voting rights, higher dividends, etc. ? Objections will be numerous, among others based on the absence of a clear dividing line between the two classes.

9. The use of ICT will also affect the position of the creditors. Here the assumption is that companies will more readily disclose figures about their financial situation, and made these figures accessible on their website. In the hypothesis that companies would quite frequently publish reliable figures on their financial situation - and they would have a clear incentive to do so - creditor would be better informed and better able to judge their risk. Companies with better results would be more creditworthy and creditors would offer more favourable financial conditions. Hence these companies would see their credit standing based on the financial ratios that can be derived from their published financial statement. Hence creditors would require less guarantees, or would be willing to extend more or longer credit, or better terms translated into legal terms, companies would need less capital, as capital is to be a general, all-round instrument to protect creditors. Here one sees that legal capital is a shorthand expression of the information that otherwise is conveyed to the creditor on the basis of his analysis of the financial statements.

10. Some scholars have even started to think about the virtual company, where all relations would be in cyberspace[83]. The consequence would be that it would be impossible to determine the real seat of the company. Hence the "siège réel " doctrine would be seriously undermined. The idea however is not new: in multinational groups, where central management is overwhelming there have been questions posed as to the location of the seat of the regional subsidiaries, and hence as to the legal regime applicable. But the real seat doctrine may be objected to for several other reasons.

[83] NOACK, U., in Modern Communications methods, see footnote 8.