

# Back to the Digital Future? On the EU Company Law Package's Approach to Digitalization\*

FLORIAN MÖSLEIN: DIPL.-KFM., LL.M. (LONDON), DR IUR., PROFESSOR OF LAW AND DIRECTOR OF THE INSTITUTE FOR LAW AND REGULATION OF DIGITALIZATION, MARBURG UNIVERSITY, GERMANY.\*\*

## 1. DIGITALIZATION AND EUROPEAN INTEGRATION



Digitalization and European integration are closely intertwined. Their mutual interaction has been firmly stressed by the European Commission in its recent 'Proposal for a directive amending Directive (EU) 2017/1132 regarding the use of digital tools and processes in company law' which has been published as part of the so-called 'Company Law Package' on 25 April 2018.<sup>1</sup> With its aim to align existing European company law<sup>2</sup> to the challenges of digitalization the proposal is not only based on a general motivation to modernize company law in order to adapt it to current

technological developments. In its second recital, the Draft Directive rather emphasizes that 'the use of digital tools and processes to more easily, rapidly and cost-effectively initiate economic activity by setting up a company or by opening a branch of that company in another Member State is one of the prerequisites for the effective functioning of a competitive Single Market and for ensuring the competitiveness of companies'.

In this manner, the ability of companies to use of digital technologies is set in relation to the very core of European integration, namely to the Single Market and its well-functioning (along with more general arguments of economic competitiveness). Digitalization is thus considered as a key driver of European integration; conversely, the Single Market provides an argument to legitimize the adaption of European company law to the digital age. At a more general level, the same line of argument forms the backbone of the European Commission's Digital Single Market strategy.<sup>3</sup> Yet it has never before been so rigorously applied to companies and to company law. Against this backdrop, the future of European company law promises to be digital.

## 2. THE SCOPE OF DIGITALIZATION

If we want to grasp the impact of that future development, the key question relates to the very notion of digitalization: What do we understand by 'digital'?<sup>4</sup> In general, one might think of self-driving cars and their technology, i.e. algorithms, artificial intelligence and machine learning. One might also think of bitcoins and the related technologies of blockchain and distributed ledgers which in turn

\* Note from the Editor: The contributions to this edition of European Company Law were written before the Presidency compromise proposal of 18 December 2018, ST 15678 2018 INIT, <http://eur-lex.europa.eu> (23 December 2018) to the Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions became available.

\*\* Email: [florian.moeslein@jura.uni-marburg.de](mailto:florian.moeslein@jura.uni-marburg.de).

1 Commission, *Proposal for a Directive of the European Parliament and of the Council Amending Directive (EU) 2017/1132 as Regards the Use of Digital Tools and Processes in Company Law*, COM(2018) 239 final.

2 Namely the Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law [2017] OJ L169, at 46.

3 See European Commission, *A Digital Single Market Strategy for Europe – Communication*, COM (2015) 192 final; see also Priority No. 2 among the current Commission's political guidelines: Juncker, A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change (15 July 2014), [https://ec.europa.eu/commission/sites/beta-political/files/juncker-political-guidelines-speech\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/juncker-political-guidelines-speech_en.pdf).

4 For a very recent account of different digital technologies, cf. Möslin/Omlor, *Grundlagen*, in *FinTech-Handbuch: Digitalisierung, Recht, Finanzen* 1, 3 et seqs (2019).

reach much beyond cryptocurrencies. Online platforms such as AirBnB and UBER might also come to the mind, largely replacing traditional intermediaries and firms. Moreover, one might think of cloud services, big data or the internet of things. Some might even still rank emails, fax messages and instant messengers among the achievements of digitalization. Yet only very few will still confine digitalization to electronic communication since the current technological development simply reaches so much further.

### 3. THE PROPOSAL'S NARROW (IF NOT SOMEWHAT OUTDATED) CONCEPT OF DIGITALIZATION

Anachronistically, however, the current proposal is based precisely on such narrow (if not somewhat outdated) understanding of digitalization. Even though the proposal 'principally aims at introducing new provisions [...] to achieve the use of digital tools and processes throughout a company's lifecycle',<sup>5</sup> it does not explicitly define that term 'digital tools and processes'. But both due to its regulatory content and its legislative history, the proposal's approach to digitalization is very obvious.

Most specifically, the report of the Informal Company Law Expert Group (ICLEG) which served as the main basis for the current proposal starts out with a respective definition in its introductory part: 'By "digitalization" we mean the representation of communication in writing or sound by electronic means and the concept thus concerns electronic communication including the transmission of information and the storage of such communication electronically and electronic access and retrieval from such storage'.<sup>6</sup> In contrast, all other, more modern digital technologies receive no consideration in the ICLEG report. An In-Depth-Analysis which has been delivered by Vanessa Knapp for the JURI Committee on the question 'What are the issues relating to digitalization in company law' takes a very similar, equally narrow approach.<sup>7</sup>

### 4. THE WAY FORWARD

In comparison, other proposals of the Commission contain much broader, more modern definitions (or at least

enumerations) of digital tools. The recent FinTech Action Plan, for instance, enumerates 'digital identification, mobile applications, cloud computing, big data analytics, artificial intelligence, blockchain and distributed ledger technologies'.<sup>8</sup> It thereby covers most of the technologies that are usually associated with digitalization.

Why is it that the Draft Directive – as well as current company law discussion in general – takes a so much narrower focus by restricting digitalization to electronic communication? Such focus would only be appropriate if all other phenomena of digitalization had no impact on (European) company law. Algorithms, artificial intelligence and machine learning, however, beg the company law question of whether directors can – or need to – delegate decisions to robos, and how such delegation interacts with their duties.<sup>9</sup> Platform technologies reduce the transaction costs that are triggered by market transactions; if these costs fall below the agency costs that arise within companies, the key economic motive for their formation will eventually lapse.<sup>10</sup> Last but not least, blockchain and distributed ledger technologies enable smart contracts, the nexus of which has the potential to replace State company law from the outset.<sup>11</sup> In fact, some providers already offer 'to act as a digital jurisdiction' and to provide tools for the creation of 'global, bureaucracy-free organizations, companies, and communities [...] without borders or intermediaries'.<sup>12</sup>

Against this background, the current company law debate considerably underestimates the impact of digitalization. The present proposal falls short of responding to these enormous and indeed fundamental regulatory challenges of digitalization. Instead of building on an outdated concept of digitalization, European company law will have to broaden its digital focus considerably. Otherwise, it risks to lose much of its present significance: As digitalization transforms our economy, European company law's best days might soon be over.

5 Proposal, at 8.

6 Informal Company law Expert Group, Report on digitalization in company law (Mar. 2016), [https://ec.europa.eu/info/sites/info/files/icleg-report-on-digitalisation-24-march-2016\\_en.pdf](https://ec.europa.eu/info/sites/info/files/icleg-report-on-digitalisation-24-march-2016_en.pdf), at 6, para. 1.1.

7 Vanessa Knapp, *What Are the Issues Relating to Digitalisation in Company Law?*, In-Depth Analysis, 2016, [http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/556961/IPOL\\_IDA\(2016\)556961\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/556961/IPOL_IDA(2016)556961_EN.pdf), in particular at 7 ('increasingly, individuals, companies and regulatory bodies communicate with each other digitally').

8 European Commission, *FinTech Action plan: For a More Competitive and Innovative European Financial Sector – Communication*, COM (2018) 109 final, at 2.

9 In more detail, for instance: F. Möslin, *Robots in the Boardroom: Artificial Intelligence and Corporate Law*, in *Research Handbook on the Law of Artificial Intelligence* 649–669 (Barfield & Pagallo eds, forthcoming 2019).

10 Cf., for instance: J. Tomassetti, *Does Uber Redefine the Firm? The Postindustrial Corporation and Advanced Information Technology*, 34 Hofstra Lab. & Emp. L.J. 1 (2016).

11 F. Möslin, *Conflicts of Laws and Codes: Defining the Boundaries of Digital Jurisdictions*, in *Regulating Blockchain. Techno-Social and Legal Challenges* (P. Hacker, I. Lianos, G. Dimitropoulos & S. Eich eds, forthcoming 2019), sub I.B.

12 Cf. <https://aragon.org/> (accessed 12 Dec. 2018).