

European Company Law's Digital Transformation: A Roadmap

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INSTITUT FÜR DAS RECHT
DER DIGITALISIERUNG

Core questions for today's lesson

- What does “digital” mean?
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- What does “company” / “company law” mean?
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 -
- Which implications of digitalization for (European) company law?
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A Roadmap to European Company Law's Digital Transformation



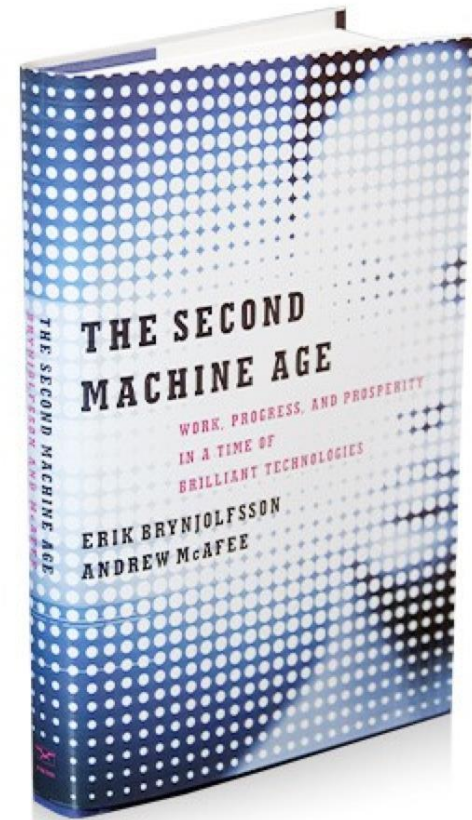
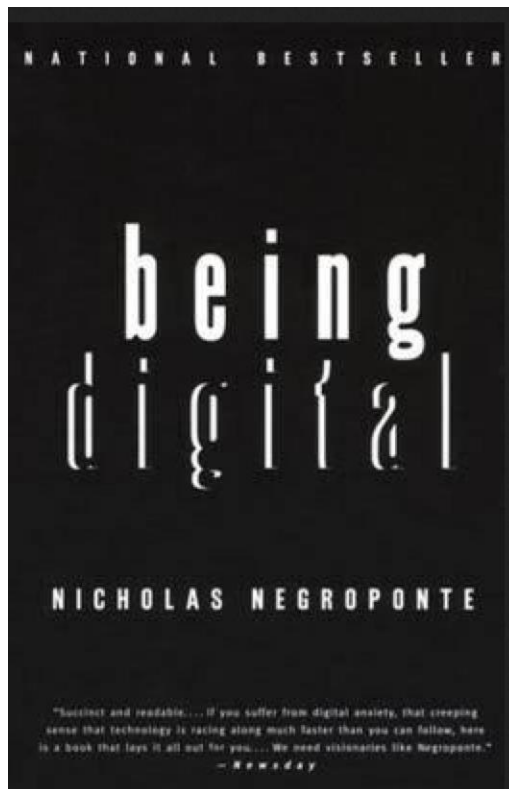
A Roadmap to European Company Law's Digital Transformation: Agenda



- Where the road trip once started...
- Distance already travelled
 - European Data Law
 - Directive on the use of digital tools in Company Law: Electronic communication
- Towards new territories
 - Unexplored territory: Digital platforms
 - No man's land: Artificial intelligence
 - Lawless jungle: Blockchain and distributed ledger technologies

Where the road trip once started: „Anything that can be digitized will be digitized.“

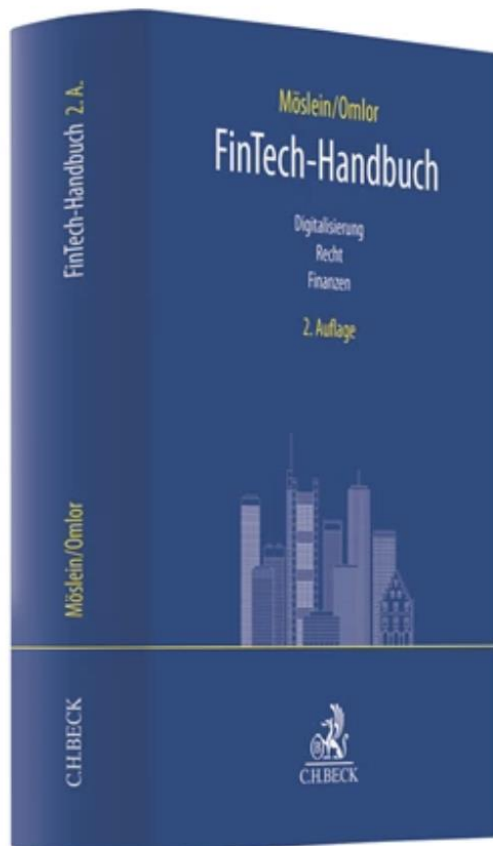
1995



2014

Distance already travelled

- Digitalisation and (private and commercial) law



Distance already travelled

- Digitalisation and (private and commercial) law
- European Data Law
 - Digital Single Market Strategy (2015)
 - Directive on certain aspects concerning contracts for the supply of digital content and digital services (2019)
 - Regulation on promoting fairness and transparency for business users of online intermediation services (2019)
 - Commission proposals for Digital Markets Act, Digital Services Act and Data Governance Act (2020)



Distance already travelled

- Digitalisation and (private and commercial) law
- European Data Law
- European Company Law
 - Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law
 - Roots of that directive:
 - In-Depth Analysis for EP Juri Committee: „What are the issues relating to digitalisation in company law?“ (V. Knapp, 2016)
 - ICLEG-Report on digitalisation in company law (2016):
„By digitalisation, we mean the representation of communication in writing or sound by electronic means, and the concept thus concerns electronic communication“.
- Is Digital Transformation in European Company Law all about e-mails?



Towards new territories

Digital transformation goes much beyond electronic communication:

- Digital platforms
- Artificial intelligence
- Blockchain and distributed ledger technologies



Digital platforms



The world's largest taxi company owns no vehicles



The largest accommodation provider owns no real estate



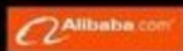
The most popular media provider creates no content



The most valuable photo company sells no cameras



The fastest growing television network lays no cables



The most valuable retailer has no inventory

None of these six companies existed twenty years ago

Digital platforms: Which (European) Company Law Implications?

- Particularity of the platform economy: Disintermediation
- Conflicts with conventional regulation (f. ex. Uber)
- Competition law problems: Gatekeeper regulation
- From “Corporate Governance” to “Platform Governance”?
- New forms of entrepreneurial cooperation
- Platforms have (almost) not received significant attention in the company law debate
- ... largely an **unexplored territory**



Artificial Intelligence

- Technology of Artificial Intelligence
 - Big Data
 - Algorithms
 - Self-learning systems
- Artificial Intelligence and Company Law
 - Technological tool to take entrepreneurial decisions
 - Focus of Corporate Law on such decisions: Shareholders / directors
- Need to adopt the corporate governance framework? (“self-driving companies”)

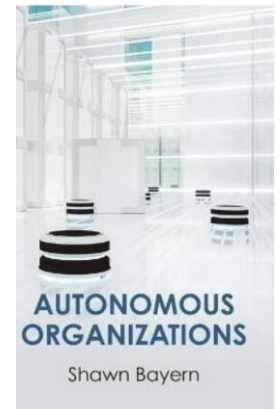
AI & CG: A case in point



- VITAL („Validating Investment Tool for Advancing Life Sciences“)
 - company decisions on investment opportunities
 - „the world’s first artificial intelligence company director“
 - no real voting right, but observer status
- Importance of this technological development:
 - supremacy of AI with respect to (certain) company decisions
 - need for reform in company law?
- Legal question not so much: Can robos replace human directors? But:
 - Can human directors delegate decisions to AI - or are they even required to do so?
 - Directors’ duties in case of delegation to AI? In particular: Duty to monitor
 - Which standards of care and loyalty apply? (P) no case law yet

Artificial Intelligence: Which (European) Company Law Implications?

- Interaction between AI-related regulation and Company Law
 - Emergence of soft law: High-level expert group on Artificial Intelligence (2018) => Ethic guidelines on Artificial Intelligence (final version April 2019): Requirements for trustworthy AI as standards of care for corporate directors?
 - Proposal for an AI Act (2021): Which intra-organisational effects?
- Free movement of Algorithms (T. Burri)?
 - Member States (or US states) may grant legal personality to AI-driven (“autonomous”) companies
 - Free movement requires recognition
 - Autonomous Companies may conquer the EU



Blockchain and Distributed Ledger Technologies

- Smart Contracts: self-executing agreements, incorporated into the code of the blockchain
- Manifold applications in company law
 - Corporation as a “nexus of contracts”
 - “traceable shares” (George S. Geis, 2018)
- Possibility to create digital assets (tokens)
 - Corporate bonds ... and shares?
 - Law reform in various Member States: National Blockchain Laws as a Threat to Capital Markets Integration (M. Lehmann)?
 - European Commission: Proposal for a Regulation on markets in crypto-assets (2019) – but market-based approach

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Articles

TRACEABLE SHARES AND CORPORATE LAW

George S. Geis

ABSTRACT—A healthy system of shareholder voting is crucial for any regime of corporate law. The proper allocation of governance power is subject to debate, of course, but the fitness of the underlying mechanism used to stuff the ballot boxes should concern everyone. Proponents of shareholder power, for instance, cannot argue for greater control if the legitimacy of the resulting tallies is suspect. And those who advocate for board deference do so on the bedrock of authority that reliable shareholder elections supposedly confer.

Unfortunately, our trust in the corporate franchise was forged during an era that predates modern complexities in the way that stock ownership is now tracked and traded. We do not trace shares, and any clear-eyed look at the conferral of voting rights via back-end stock clearing practices is unsettling. Evidence of the various entanglements crops up from time to time—in the form of questionable voting outcomes or disputes about standing for shareholder lawsuits—but the underlying problems are systemic, not episodic. Our stock clearing system is a kludge.

This is an important moment for corporate law, however, because new technology is approaching a state where clearing and settlement systems may soon support traceable shares. The rise of distributed ledgers and blockchain technology is poised to allow for specific share identification and precise records of share provenance. This may sound like an uninteresting technical sideshow, but as this Article will argue, the impact of traceable shares on corporate law will be profound. It will change the structure of shareholder lawsuits, alter the allocation of corporate governance rights, and require lawmakers to rethink fundamental principles of shareholder responsibility for corporate misdeeds.

Blockchain and Distributed Ledger Technologies

Which (European) Company Law Implications?

- New possibilities in Corporate Law: Decentralized Autonomous Organisations (DAOs) = Nexus of Smart Contracts
- Debate on the legal qualification of DAOs
 - Which corporate form? Functionally comparable to plcs, but lack of formal conditions (registrations)
 - Are DAOs partnerships? Legal framework does not fit because it builds on close personal relations between members

Blockchain and Distributed Ledger Technologies

Which (European) Company Law Implications?

- New possibilities in Corporate Law: Decentralized Autonomous Organisations (DAOs) = Nexus of Smart Contracts
- Debate on the legal qualification of DAOs
- More fundamentally: DAOs as an alternative to the traditional (legal) forms of company law?
 - Marketing of blockchain platforms like Aragon
 - US debate on LAOs (Limited Liability Autonomous Organization)
 - Free movement of companies



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Blockchain and Distributed Ledger Technologies

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- More fundamentally: DAOs as an alternative to the traditional (legal) forms of company law?

Thanks for your attention!



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