

Report on the Seminar Series – Current Problems of Private Commercial Law: Prof. Dr. Andreas Engert, LL.M. (Univ. Chicago), Free University of Berlin with the lecture: “Review of the Exchange Ratio and Severance Pay – Mobility Directive as an Impetus for Reform”

On Monday, 22 November 2021, the third event of the seminar series “Current Problems of Private Commercial Law” (also known as “Monday Seminar”) took place in the winter semester 2021/2022. The online event was organised and moderated by **Prof. Dr. Susanne Augenhofer, LL.M. (Yale)** and **Prof. Dr. Alexander Schopper**. The speaker **Prof. Dr. Andreas Engert, LL.M. (Chicago)** from the Free University of Berlin gave a lecture on the topic “Review of the exchange ratio and severance payments – Mobility Directive as an impetus for reform”. In the subsequent discussion **Mag. Slavica Vanovac**, an Austrian lawyer, shed light on the effects of the Mobility Directive concerning Austrian corporate law.

Prof. Engert first presented the most important contents of the Mobility Directive (EU) 2019/2121, through which the European legislator reformed the legal framework for cross-border mergers between corporations and extended it to cross-border reform changes and demergers. In particular, the Directive harmonises the substantive protection of minorities, taking the previous Austrian and German regulations (appraisal proceedings, review proceedings) as a point of reference, which is why Prof. Engert called the Directive an “*Austrian-German export*” with great appreciation.

The appraisal procedure provided for in the Directive for the review of the exchange ratio and of compensation guaranteed a decoupling of the transaction decision from the distribution of value. Conceptually, the new European regulatory regime is thus based on a liability rule instead of a property rule (“*tolerate and liquidate*”), which in principle is to be welcomed. However, Prof. Engert also pointed out that this could lead to a “*distribution conflict in its purest form*”, which could certainly have a disruptive effect on the previously taken transaction decision.

The Directive now also allows “other settlements” and a right of withdrawal for all shareholders involved, in addition to the additional cash payments already known to German law. Under these circumstances, it would be a good opportunity for German law to introduce the appraisal procedure for all companies involved and to allow, for example, the granting of shares as settlement in addition to the additional cash payment. However, a general right of withdrawal – even without a change of the applicable company law – wasn’t recommended by Prof. Engert.

Following Prof. Engert's lecture, Ms Slavica Vanovac used the upcoming discussion to work out ideas for changes in national Austrian company law based on the Mobility Directive. In this context, she referred in particular to two recent decisions on review proceedings by the Austrian Supreme Court (OGH).

In 6 Ob 246/20z, the OGH had ruled that the decision in the review procedure only had a declaratory and formative effect, but did not contain an award of benefits. According to Ms Vanovac, an explicit legal provision would be desirable. In 6 Ob 113/21f the OGH had also ruled that the examination of the adequacy of a cash settlement was only subject to a plausibility check. In practice, it is yet unclear what is to be understood as a "plausibility check". In this respect, the Austrian Jurisprudence tends to move away from the protection of minorities.

Ms Vanovac then pointed out that for actions concerning such settlements there was no place of jurisdiction in Austria, a circumstance that urgently needed to be regulated. She also pleaded for the concentration of such review proceedings at one court, which should have jurisdiction for the whole of Austria.

Finally, there was a lively discussion between the two speakers and the participants who were attending the lecture online, in the course of which an exciting exchange took place between scholars and practitioners, some of which already dealt very concretely with practical questions of application and reform for the national legal systems in Austria and Germany.

(Julian Nigg)