Report on the Seminar Series – Current Problems of Private Commercial Law: Prof. Dr. Katja Langenbucher, Goethe University Frankfurt am Main with the lecture "Wirecard"

On Monday, January 24, 2022, the sixth and last 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 hosted and moderated by **Univ.-Prof. Dr. Susanne Augenhofer**, LL.M. (Yale) and **Univ.-Prof. Dr. Alexander Schopper**. The speaker **Prof. Dr. Katja Langenbucher**, Goethe University Frankfurt am Main gave a presentation on the topic "Wirecard". The main focus of the lecture was on the role of the German corporate governance architecture in the context of the Wirecard scandal as well as on the (legal) consequences of this largest economic scandal in recent German history. In the subsequent discussion with **Dr. Ulla Reisch**, attorney at-law she shed light in particular on the Austrian control architecture with a view to the preventive avoidance of such economic scandals.

After a brief history of the rise and fall of Wirecard, Prof. Langenbucher began by stating that the enactment of any legal norm logically (implicitly) presupposes the existence of a decision theory. Especially in the (legislative) prevention of economic scandals, jurisprudence cannot and should not limit itself to purely rational decision theories. In this context, she noted that in the Wirecard case (as in the Enron scandal) almost all control institutions had failed. She described the reasons for this failure in particular in terms of three psychological phenomena that are problematic for control institutions: "charismatic leadership", "rationalizing" and "overconfidence".

Prof. Langenbucher then provided an overview of the most important changes in the area of corporate governance introduced by the German legislature as a direct reaction to the Wirecard scandal through the Financial Market Integrity Strengthening Act (FISG), which came into force in principle on July 1, 2021. Basically, she held that with a view to the perpetrator side, not so much at all had been amended in the German control architecture, as this problem will always exist by its very nature. Rather, the FISG places greater responsibility on the "*colleagues of the perpetrators*" (in particular management boards and supervisory boards).

In this sense, for example, it is now mandatory for the management boards of listed stock corporations to establish an appropriate internal control and risk management system (Section 91 (3) AktG New). With regard to the internal organization of the Supervisory Board, the FISG

now also stipulates that the establishment of an audit committee is mandatory for companies that are deemed to be public interest entities (Section 107 (4) first sentence AktG New). Such an audit committee had never been established for the Supervisory Board of Wirecard. With regard to audit control, the FISG also significantly increased the maximum liability limits, in particular with regard to auditors (depending on the size of the specific auditing firm), as well as tougher threats of punishment and an extension of duties (under civil law) in the sense of a legally required "*critical basic attitude*" on the part of the commissioned auditors.

In the subsequent discussion with Dr. Reisch, she contributed in particular her expertise as insolvency administrator of a subsidiary of Wirecard. In her remarks, she explicitly dealt with the corporate governance architecture established in Austria and presented the most important players in this context (in particular the supervisory boards, auditors and the Financial Market Authority) in more detail. She also began by stating that, in her personal experience as a supervisory board member, one is often confronted with an asymmetry of information and often makes oneself unpopular with the management board if one asks "*unpleasant*" questions.

She also explained that the Supreme Court had ruled in a recent decision (15.9.2020, 6 Ob 58/20b) that auditors are also liable to third parties under civil law. It is therefore now in any case clear that they are also liable to creditors in the event of errors. Moreover, a limitation of liability only applies in cases of slight negligence; in the case of gross negligence, the auditors are liable without limitation. In this context, she also took a closer look at the Austrian Auditor Oversight Act (APAG), which provides for quality assurance audits and inspections by the Auditor Oversight Board (APAB). Finally, she pointed out that the Financial Market Authority (FMA) is not subject to official liability vis-à-vis third parties (e.g. injured creditors) pursuant to section 3 of the FMABG, and that the Constitutional Court had recently deemed this provision to be in conformity with the Constitution following a party application for a review of the law (VfGH 16.12.2021, G 224/2021).

Following these exciting and highly practical presentations, the participants, who were connected online, took the opportunity to engage in a lively exchange with the two speakers. In particular, the consideration of psychological aspects in the setting of standards in the field of corporate governance as well as the scope and standard of care in the liability of supervisory boards and auditors were intensively discussed.

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