

## WIRECARD and EY:

**How do the legal proceedings move forward?**

**What new evidence do we have?**

**What is EY's line of defense?**

**Webinar, March 18th, 2021**

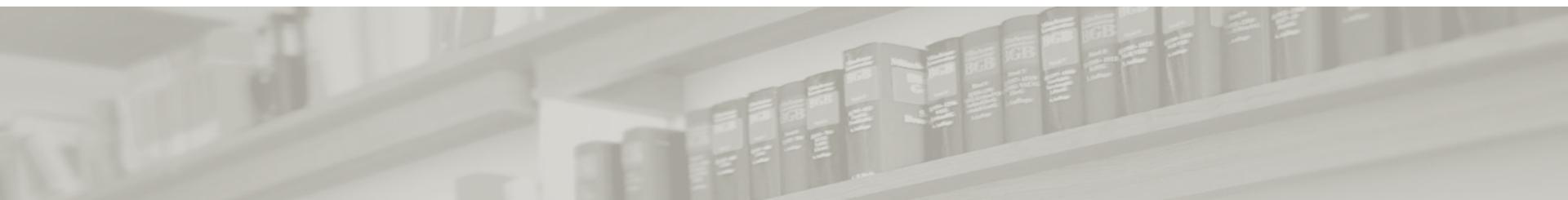
**Dr. Susanne Schmidt-Morsbach  
and Dr. Wolfgang Schirp, Berlin**

**Attorneys-at-Law Dr. Susanne Schmidt-Morsbach  
and Dr. Wolfgang Schirp, Berlin**

- How are the legal proceedings moving forward?
- What new evidence do we have?
- What is EY's line of defense?

**Attorney-at-Law Dr. Marc Liebscher, LL.M., Berlin**

- What new evidence is there?
- What results did the Parliamentary Committee obtain?



# **Ernst & Young GmbH Wirtschaftsprüfungsgesellschaft**

**Seat of the Company: Stuttgart**

**Annual Turnover: > 2 Billion EURO, profitable**

**Part of the global EY Network, 284.000 Employees,  
36 Billion USD Annual Turnover**

**„Big Four“-Auditing Company**

- WIRECARD was listed on stock exchange: Obligation to prepare financial statements and have them audited
- Responsible Auditor since 2008/2009: EY
- Audit is strictly regulated.
- Especially IdW-Prüfstandard 302: Bank confirmations must be obtained for external bank balances!
- **For years, EY has not complied with this. WHY??**

- For years, EY has confirmed the existence of „cash“ and „cash equivalents“
- In the end (annual statement for 2018) allegedly > 2,7 billion EURO
- allegedly „*solid financial situation*“ at WIRECARD
- The truth is: At least 1,9 billion EURO were missing!

- Indications of irregularities arose when Indian group of companies was acquired in 2016
- forensic investigation was initiated („*project ring*“)
- On March 29th, 2017, EY threatened to withhold audit
- Investigation was terminated. On April 5th, 2017, financial statements were audited without reservations
- **Again, the question is: WHY?**

- The German auditor supervisory authority APAS has (finally) taken action
- APAS has filed a detailed complaint to the prosecutor's office
- Criminal investigations against EY representatives: Indications of accounting offenses, §§ 331 f. HGB
- APAS is under pressure itself (illicit share transactions by former Chief Officer Ralf Bose)

- We constantly monitor the parliamentary committee investigating WIRECARD
- Testimony by KPMG partner Alexander Geschonneck (responsible for April 27th, 2020 report):

„Using common auditing standards, these trust accounts could not have been audited. ... We have worked with methods that any other auditor would work with. Using these usual methods, no evidence could be found for the trust accounts that were on WIRECARD's balance sheet.“

→ James Freis:

- US citizen
- last CEO of WIRECARD before insolvency proceedings

→ Statement in „Handelsblatt“ interview, January 22nd:

„After only one hour, I knew it was a scam.“

Upon inquiry by the reporters: „It took WIRECARD auditors months to determine that the money was not there. You one hour?“

- Answer: „I do not comment on that.“

EY refers to secret documents, which they do not want to provide:

- Contracts with third-party acquirer firms
- Trust agreements
- Account statements and confirmations
- Expert opinions
- Meaning: "*We have it, but we don't show it.*"

Our procedural response:

- Request for judicial submission instruction!
- § 423 ZPO

## EY's assertion:

*"It is okay if no bank statements or bank confirmations were provided for the trust accounts. We did not have to ask for that."*

## Our procedural response:

*This statement by EY is wrong!*

*IdW audit standard 302: "Bank confirmations are dispensable only if risks are low or internal controls at WIRECARD are sufficient."*

*These exceptions were not present here - so bank confirmations were required!*

EY's assertion:

*"We only did a "normal" annual audit. It was not possible to detect the deception. This would only have been possible with a special forensic examination."*

Our procedural answer:

*This statement of EY is wrong!*

*Also in the "normal" annual audit, data analyses are made that would have revealed the deception.*

*For example "Journal Entry Testing" (JET)*

EY assertion:

*"The deception was too sophisticated. We could not have found the errors."*

Our procedural response:

*This statement by EY is false!*

*Industry standard: "Global Analytics" software.*

*EY's own investigation software "EY EAGLe" and "General Ledger Analyser" / "Subledger Analyser" are always applied and uncover false entries.*

→ Why not here??

EY's assertion:

*"We could not possibly have detected the fraudulent dealings with related third parties (e.g. Marsalek)."*

*Our procedural response:*

*This statement by EY is false!*

*Records of this are required by law (Section 90 (3) of the German Fiscal Code).*

*Audit of these records required (IdW audit standard 255).*

→ *Why not complied with?*

Claim EY:

*"We trusted our client WIRECARD and were allowed to do so."*

Our procedural response:

*This statement by EY is false!*

*"Professional skepticism" required when performing the audit.*

*So explicitly EY's own "Audit Performance Handbook."*

→ *Why not complied with?*

EY claim:

*"Significant transactions were outsourced to Ireland or Dubai. We could not audit these transactions."*

Our procedural response:

*This statement by EY is false!*

*"Full Scope Reporting" was also carried out with regard to the WIRECARD subsidiaries in Ireland and Dubai.*

*In other words, transactions were identified as material and all audit procedures were also carried out there!*

## Claim EY:

*"WIRECARD has provided collateral for chargebacks on the escrow accounts (so-called "chargebacks/fines". This is normal and unremarkable."*

## Our procedural response:

*This statement by EY is false!*

*Such cash collateral is completely uncommon.*

*Alleged disbursements to WIRECARD in the amount of EUR 203.3 million in 2015-2018 were never questioned or verified by EY.*

*Absolute amount of cash collateral never questioned (over 2 billion EURO!).*

EY claim:

*"WIRECARD had a functioning "Internal Control System" (ICS). We relied on this."*

Our procedural response:

*This statement by EY is wrong!*

*There was no resilient ICS at WIRECARD.*

*IdW audit standard 340 and usual audit matrix not complied with.*

→ Why??

*We asked long-time EY employees what they thought of EY's defense.*

*Their conclusion: stunned shaking of the head.*

- *There is no way that EY's trial arguments can be true.*
- *EY did not comply with its own audit manual and did not use its own audit software.*
- *Violation of all rules customary in the industry and all relevant auditing standards.*
- *Why??*

- important document: "*Information volume on the independent special investigation*" by KPMG dated April 27<sup>th</sup> 2020
- EY-internal whistleblower with warnings already in 2016
- Special investigation "Project Ring"
- Aborted without results. Why?
- WIRECARD Board meets March 1<sup>st</sup>, 2019: Emergency meeting without results.
- Why??

## Why only EY?

→ EY is „*the last man standing*“, the only solvent opponent

## Why directly file a lawsuit, and not wait for sample proceedings?

→ Sample proceedings last too long (> 8 years, rather 12 years)  
→ Question: Will EY still be solvent 8 (or more) years from now?

**So: We want to obtain judgments within two years!**

## Bundesgerichtshof (Federal Court of Justice)

**Lead Judgment dd. March 12th, 2020 – VII ZR 236/19**

**Auditor to be held liable if**

- testified opinion is incorrect**
- auditor acts „nachlässig“ (carelessly)**
- auditor hereby displays „Rücksichtslosigkeit“ (ruthlessness)**
- which, given the significance of the audit for third parties, appears to be „gewissenlos“ (unconscionable)**



- We form groups of plaintiffs and file class actions on an ongoing basis („Subjektive Klagehäufungen“, § 59 ZPO)
- Action for more than 550 plaintiffs already filed, for more than 750 within the next weeks
- First oral hearings before the court begin in autumn
- EY's defence statement is lame and unconvincing
- We continuously bring further evidence

- We have extensive experience with large-scale litigation
- Real-Estate Funds founded by Bankgesellschaft Berlin:  
over 8.000 plaintiffs → we won the lead proceedings  
→ our clients were compensated by the state of Berlin
- Media Funds founded by German Landesbanken:  
over 4.500 plaintiffs → we won the lead proceedings  
→ our clients were compensated by the Landesbanken
- More large-scale investor litigation in the past

→ Three components:

- my own attorney
- court fees
- only in case of defeat: cost of opposing counsel

→ Rule of thumb: 5-10 % of damages is my stake

- How to calculate your damages: price paid for your shares
- minus sales proceeds, if any
- plus interest

- Litigation funder with commitment for all proceedings? Not available.
- There is individual financing for larger cases available
- There is financing for sample procedures (KapMuG)
  - But disadvantage no. 1): duration of sample procedures is > 8 years, rather 12 years
  - Disadvantage no. 2): financing for sample procedures inadequately expensive
- Our opinion: Do not wait for litigation funder!

- Germany head Hubert Barth "promoted away" to post in EY's European organization.
- EY consultants in parliament investigative committee on March 19th
- ex-Federal Minister Theo Waigel and Brigitte Zypries on newly appointed "expert commission"
- major clients leave EY: Commerzbank; Deutsche Telekom; DWS; Kreditanstalt für Wiederaufbau
- Overall rebuild of EY? Stay close!

→ According to present knowledge: „YES“

- EY is „Big Four“-accounting firm
- EY is economically strong
- EY is profitable
- EY wants to survive

→ Should I rather wait for sample proceedings (KapMuG)?

- Some investors do.
- passive role of „Anmelder“ who cannot influence the outcome
- Long duration of proceedings, 8-12 years
- Even then, additional action may be required to obtain an enforceable judgment!
- „Anmelder“ may still have to bring their own case in the end

→ **Move now!**

- Further waiting brings no advantages
- EY's solvency may decline over the years

**Thank you for your attention!**

If you have questions:

Please e-mail us at [wirecard@schirp.com](mailto:wirecard@schirp.com)

or call us: 0049-30-3276170