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'Recht – Finanzen – Digitalisierung' Philipps-Universität Marburg, 6 July 2018

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On 6 July 2018, Prof. Dr Florian Möslein, Dipl. Kfm. LL.M. (London), and Prof. Dr Sebastian Omlor LL.M. (NYU) LL.M. Eur. hosted the conference *Recht – Finanzen – Digitalisierung* (Law – Finance – Digitalization) to celebrate the foundation of the *Institut für das Recht der Digitalisierung* (Institute for the Law of Digitalization – IRDi) at Philipps-Universität Marburg. IRDi aims to facilitate the academic discourse on legal challenges of digitalization. More than sixty participants followed their invitation to discuss the legal implications of increasingly digitized financial markets and services.

Amidst bright sunshine Möslein welcomed the participants to Marburg and officially announced the foundation of IRDi. Additionally, he gave notice of the upcoming publication of a predominantly legal-themed FinTech handbook which analyses digitized financial services in depth (Möslein/Omlor (eds), FinTech-Handbuch, Munich: C.H. Beck, in print). Möslein underlined that the reason for the conference's emphasis on intersections between law, finance, and digitalization was the vibrantly expanding digitalization in financial markets and services which calls for an interdisciplinary exchange between legal scholars and economics. He encouraged all participants to use the conference as a starting point for such an exchange.

The series of lectures started with Prof. Dr Jürgen Ellenberger (vice president of the Bundesgerichtshof (Federal Court of Justice of Germany) and chief judge of the XI. Civil Panel) who illustrated the effects of digitalization on banking law by presenting a decision concerning online-banking, issued by the XI. Civil Panel in 2016 (Az. XI ZR 91/14). Central problems of the case's legal assesment were the authentication of payment transactions, the requirements for the applicability of *prima facie* evidence to such authentication instruments, and the challenge of an existing evidence. Ellenberger demonstrated how the appellate court had applied inaccurate requirements for the applicability of a *prima facie* evidence to the use of a payment authentication instrument in terms of para. 675j (1) 4 BGB. Furthermore, in the Panel's opinion the court went too far with regard to the requirements for the challenge of existing *prima facie* evidence. Ellenberger pointed out that this decision had been issued under the legal framework of PSD

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I. On 13 January 2018, section 675 sen. 4 BGB was added to implement the guidelines of PSD II. According to Ellenberger, this new provision further supports the decision of the XI. Civil Panel.

In his presentation on the FinTech market in Germany, Prof. Dr Lars Hornuf (Universität Bremen) defined FinTech in accordance with the Financial Stability Board (FSB) as a technology-enabled innovation in financial services that could result in new business models, applications, processes or products with an associated material effect on the provision of financial services. Although venture capital numbers show a relatively low relevance of FinTech in Germany compared to areas such as the United States of America or Asia, Hornuf underlined the existence of several FinTech sectors in Germany. He identified the funding and payment sectors as the most relevant sectors based on the quantity of business models and market volume they entail. Hornuf estimated the current volume of the German FinTech market to around €7 billion, but argued that the worldwide FinTech movement is currently at the peak of inflated expectations, whereas the terms of the so-called 'hype cycle' would seem to predict an upcoming consolidation period. This might lead to a decrease in operating FinTech businesses while traditional banks could also get further involved in FinTech innovations e.g. by developing applications for voice-controlled speakers such as Amazon Echo or Apple's HomePod. At last, Hornuf added some considerable insights of data security among the FinTech market. His findings suggest that even though FinTech companies collect a great amount of data, they surprisingly do not use this data to create and develop even more innovative business models.

One of the most prominent topics of the conference were blockchain technologies and their potential benefits and risks. As a leading expert in German blockchain law Mr. Florian Glatz, president of the *Bundesverband Blockchain e.V.*, reported that the political engagement of the *Bundesverband* had recently achieved promising successes such as multiple references to blockchain technology in the German coalition agreement. He therefore considers Germany to be a rising landscape for blockchain business models illustrated by the fact that nearly one-fifth of all Bitcoin nodes are operating there. For the future, he thinks that blockchain solutions have the potential to initiate decentralized processes in the 'Crypto Economy' and thus to prevent the current concentration of profits in the hands of only a few intermediaries such as Google. However, to unlock this potential a new form of funding would be necessary which in his opinion might already exist in form of Initial Coin Offerings (ICOs). ICOs could have the ability to combine benefits of debt and equity financing within two premises: if at first the value of offered tokens is bound to the business' revenue, and not its profit, and second if the blockchain makes the accounting of the tokens transparent and reliable.

Just as Glatz, Dr Angela Loff (*Bundesanstalt für Finanzdienstleistungsaufsicht* – German Federal Financial Supervisory Authority – BaFin) addressed ICOs in her presentation outlining BaFin's views on regulatory issues regarding this innovative financing form. BaFin defines ICOs as

an offering of a virtual value (token) in exchange for real money or cryptocurrencies. Loff pointed out that tokens can be categorized as investment, utility and currency tokens based on their functionality. In practice, however, issued tokens often feature multiple of these functions as hybrid forms. Therefore, a token's regulatory treatment must be assessed on a case-by-case basis. For example, BaFin classifies investment tokens as securities in terms of the MiFID II, while currency tokens are classified as 'Rechnungseinheiten' (units of account) in terms of the KWG. Further respective regulations include the ZAG, KAGB, WpHG, WpPG, VermAnlG, GwG, and the EU Market Abuse Regulation. In conclusion, Loff questioned the widespread assumption of ICOs being detached from supervisory requirements.

The presentations on blockchain technologies and ICOs caused vivid discussions among the audience and the speakers. Especially the proposition of Mr Glatz which examined the possibility of ICOs as a third form of funding was called into question by several practitioners. In the course of the discussion, member of the audience Mr Oliver Fußwinkel (BaFin, department of financial innovation) emphasized that the BaFin exclusively would have to ensure that FinTech businesses observe statutory provisions. Beyond that, BaFin would not consider and is not responsible to advise these businesses on how to deal with supervisory law or even circumvent its provisions. He also excluded the establishment of a regulatory sandbox in Germany as BaFin regards such sandboxes as a violation of the *Rechtsstaatsprinzip* (rule of law).

The subject of Prof. Dr Gerald Spindler's (Universität Göttingen) presentation were crowdfunding business models and their legal challenges. While he identified several different business models, the presentation concentrated on investment-based crowdfunding platforms also known as crowdinvesting. After describing the typical sequence of investments using such a platform Spindler presented his recent findings stating that *partiarische Darlehen* (profit participation loans) are currently the prevailing form of investment involvement. Whereas such profit participation loans were initially unregulated, the *Kleinanlegerschutzgesetz* of 2015 (Retail Investors Protection Act) subjected them into the scope of the prospectus requirements of the *Vermögensanlagegesetz* (Capital Investment Act – VermAnlG). However, Spindler criticized that profit participation loans are still privileged in the VermAnlG in contrast to other possible forms of investment involvement, e.g. silent partnerships. In addition to a possible prospectus liability, Prof. Dr Spindler considers platforms to be subjected to precontractual liability if they conduct pre-screenings of investment projects. According to the rules of private international law, rules of different EU Member States could apply to single investment projects, at least in certain constellations. With that in mind, Spindler concluded that even the recent European 'Proposal for a Regulation of Crowdfunding Services Providers' (COM(2018)113) will not achieve the hoped for European harmonization of crowdfunding regulation.

Dr Alexis Darányi (CLO, Scalable Capital) reported on the digital capital investment market. He differentiated four segments: information services which can help users to prepare an investment, in addition to brokering, investment advice, and portfolio management services. As the German market for these services is growing, Darányi attributed this growth to several aspects including economic factors as well as a decreased trust of consumers in traditional banks and investment advisers in the aftermath of the financial crisis. He acknowledged that innovative business models had to follow the same legal rules as these traditional investment services in this sector. Due to the fact that underlying algorithms are still programmed by humans and conflicts of interest cannot be completely excluded, Darányi did not advocate the need for a special regulatory regime for digital capital investment services.

Prof. Dr Christian Armbrüster (FU Berlin) spoke about the digital conclusion of insurance contracts. He demonstrated that not only financial services are affected by digitalization, but insurance services as well. According to him, the major challenge of digitized insurance services is the applicability of existing laws, e.g. the *Versicherungsvertragsgesetz* (Insurance Contract Act – VVG) or the *Bürgerliches Gesetzbuch* (German Civil Code – BGB), because those laws have still been established in an analogue environment. Nevertheless, Armbrüster suggested that it is possible to comply with these long-standing requirements in a digitized way. For instance, if information about insurance products had to be provided in text form (section 126b BGB), obligatory downloads or personalized storage areas would meet the same requirements as well. Armbrüster argued that some obligations of insurers or insurance brokers could be performed even better in a digital environment compared to traditional analogue forms, for instance standardized applications like pop-up windows, digital questionnaires, instant-chat-functions or telephone hotlines. For the future, he sees the potential of so-called InsurTechs of not only enhancing the already developed insurance services market, but also acquiring a younger generation as new customers. Therefore, the digital provision of insurance services might contribute to a better insurance coverage in society as a whole.

Finally, the second founding member of IRDi, Prof. Dr Sebastian Omlor, thanked each speaker as well as the participants for their insightful presentations and engagement in discussions and announced the foundation of a sponsoring association for IRDi. He informed the audience of IRDi's plans to hold annual conferences in Marburg, focussing on ongoing legal challenges of digitalization. Next year's conference is planned to focus on respective topics in business and corporate law, i.e. on 'digital companies'.