

Wirecard: German Federal Court Rules Shareholder Damages Claims Are Subordinated in an Insolvency of the Issuer

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At a Glance

Germany's highest regular court, the German Federal Court, has issued a final¹ ruling in the *Wirecard* insolvency,² confirming that shareholder damages claims – even those arising from capital markets fraud – are subordinated to (and as a result do not rank *pari passu* with) general unsecured creditor claims. The decision overturns a judgment from the Higher Regional Court of Munich in September 2024³ treating such claims as general unsecured claims and reinstates the Munich District Court's November 2022 first instance ruling,⁴ bringing the highly controversial legal saga to a close.

The effect of the judgment is to protect the *Wirecard* estate from dilution by approximately €8.5 billion in claims asserted by about 50,000 shareholders of the former DAX 30 company, who argued that Wirecard had intentionally violated capital markets laws and that they purchased shares in Wirecard based on false and misleading information. More importantly, it solidifies the broader insolvency law principle of “debt before equity” and removes the uncertainty surrounding the treatment of shareholder damages claims in German insolvency that has persisted since *Wirecard*'s insolvency filing in 2020.

Judgment

The German Federal Court gave four principal reasons for the subordination of shareholder damages claims.

1. Statutory distinction between regular creditors and equity-tainted creditors

- The German Insolvency Code sets out a defined distribution hierarchy distinguishing secured creditors, general unsecured creditors, subordinated creditors and equity holders, drawing a clear line between creditors without an equity participation and those holding one.
- Under this scheme, claims that are sufficiently connected to a creditor's equity participation are mandatorily subordinated, giving effect to the assumption of equity-level risk prior to insolvency.

2. Inseparable connection between the claims and the equity participation

- The asserted claims arise solely from the act of investing in equity; the capital markets claims exists only because the claimants acquired shareholder status.
- The shareholders seek compensation for losses resulting from that investment, in amounts reflecting the value attributed to their shares. The alleged harm cannot exist independently of their shareholder status. Their claims are therefore sufficiently connected to the equity participation.

3. Failure to meet the criteria for an unconnected third-party creditor claim

- Shareholders can, in principle, hold claims that are unconnected to their equity participation and that rank *pari passu* with general unsecured claims, e.g. claims from ordinary trading with the company.
- Fraud-based investment claims are not such unconnected claims. The fact that they may also be asserted under capital markets statutes – and are in this respect formally distinct from corporate law membership rights – does not sever their substantive connection to the equity participation, which is decisive for insolvency ranking.
- There is no functional equivalence between the capital maintenance regime that applies outside insolvency and the distribution scheme that applies within insolvency. The court has previously held that, outside insolvency, shareholder damages claims may be enforced without regard to capital maintenance rules that restrict payments to shareholders. The underlying distribution conflicts differ fundamentally: outside insolvency, the regime reallocates value between existing and new shareholders; in insolvency, the claims generate a distribution conflict between regular creditors and equity-tainted creditors. The insolvency code resolves this conflict by subordinating equity tainted claims.
- Fraud as such does not require a different treatment of the claims. Shareholders, who stand to benefit from successful equity investments, must

also bear the associated risks, including the risk of being misled about the company's affairs when making the investment decision.

4. Distinction from fraud-related claims of debt investors

- The court has previously held that investors misled into subscribing to hybrid capital in the form of subordinated profit participation rights may assert general unsecured claims in the insolvency of the issuer.
- Those cases differ from fraud induced equity investments: contractual subordination does not create an equity participation, and the existence of an equity participation is the decisive criterion for classifying damages claims as subordinated or nonsubordinated.

The court further rejected arguments that the ranking of shareholder damages claims required legislative intervention, that the capital markets regime or EU law mandated *pari* treatment, or that subordination would conflict with other areas of German insolvency law.

- The insolvency code itself establishes the distribution scheme, and it is for the courts to ensure coherence with adjacent legal regimes. The court's longstanding case law consistently subordinates claims arising from a creditor's equity participation or whose value depends on the company's economic success or failure, which aligns with the spirit of the statutory distribution framework.
- The capital markets regime pursues an ex-ante behavioral objective. Once insolvency has commenced, that objective cannot be furthered through the satisfaction of damages claims for past violations. Subordination therefore does not undermine the regulatory purpose of capital markets law.
- Subordination of shareholder damages claims does not conflict with other provisions of the insolvency code. In particular: (i) it does not impede claw-back actions targeting preinsolvency payments made on shareholder damages claims; and (ii) it does not affect the enforceability of such claims outside insolvency, meaning they still need to be considered in the company's over-indebtedness test.
- A referral to the European Court of Justice (ECJ) is not required. There is no doubt that the Market Abuse Regulation does not mandate *pari* ranking of shareholder damages claims with general unsecured claims in an insolvency. The ECJ has held – under the Market Abuse Directive and the Transparency Directive – that member states are free to determine the appropriate civil liability regime for issuer misconduct.

Consequences

The decision brings long-awaited clarity for insolvency practice. By firmly reasserting the “debt before equity” principle and confirming that shareholder damages claims are relevant for the over-indebtedness test, the court has strengthened predictability for both going-concern assessments and insolvency distributions and avoided significantly diluting creditors’ returns with shareholder damages claims. Shareholders remain able to claim damages (e.g., to compensate them in respect of a failed investment, following fraud), but will necessarily rank behind other creditors’ claims, given shareholders’ claims are fundamentally different from ordinary creditors’ claims.

This enhanced clarity is likely to improve Germany’s standing as a market for distressed credit investment, reduce litigation risk and stabilize expectations in future large-scale insolvencies.

1. Plaintiffs are entitled to file a complaint with the German Constitutional Court within one month from the date the written judgment has been served. Statistically, complaints against Federal Court decisions have a (near) zero success rate. [↩](#)

2. BGH, judgment dated 13 November 2025 – IX ZR 127/24; [press release](#). [↩](#)

3. OLG München, judgment dated 17 September 2024 – 5 U 7318/22 e. [↩](#)

4. LG München I, judgment dated 22 November 2022 – 29 O 7754/21. This judgment was obtained by a then-affiliate of Kirkland & Ellis, acting as common representative of all holders of the €500 million bond issued by Wirecard AG. [↩](#)

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- 23 September 2024 Kirkland Alert *Wirecard*: German Appeal Court Rules Shareholder Damages Claims Rank *Pari* to General Unsecured Claims
- 28 November 2022 Kirkland Alert *Wirecard*: German District Court Rules Shareholder Damages Claims Are Effectively Subordinated in an Insolvency of the Issuer

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