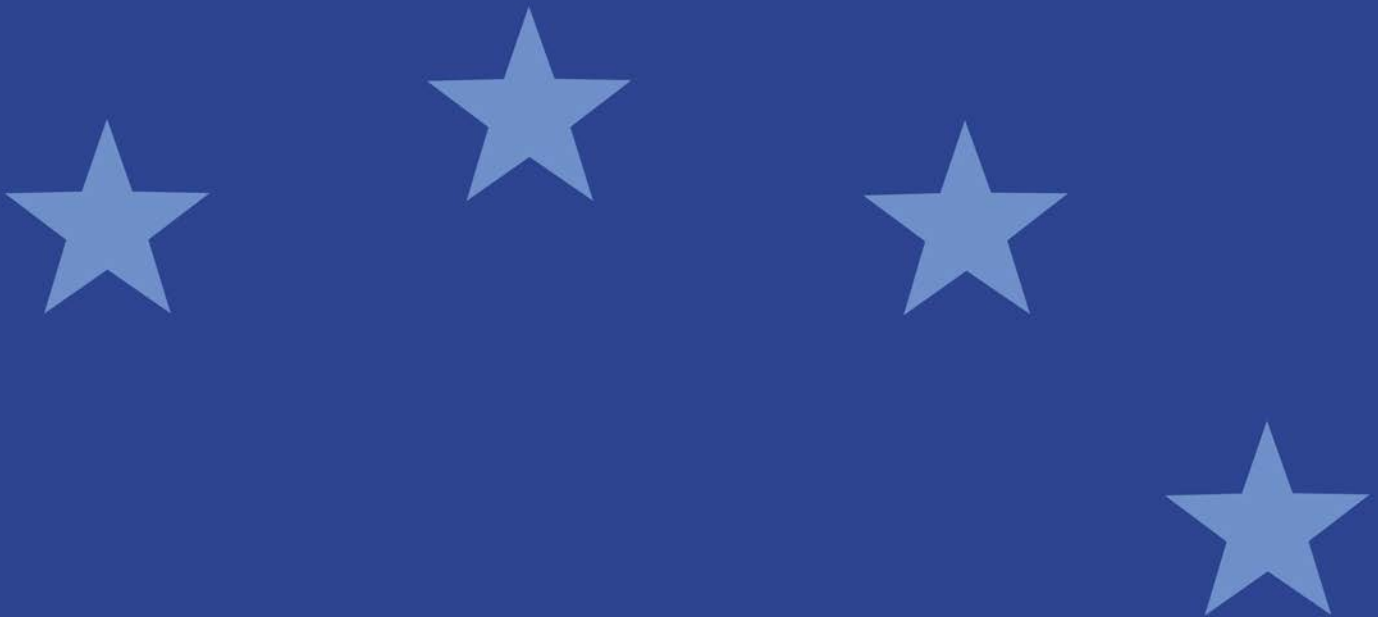




European Securities and  
Markets Authority

# **FAST TRACK PEER REVIEW ON THE APPLICATION OF THE GUIDELINES ON THE ENFORCEMENT OF FINANCIAL INFORMATION (ESMA/2014/1293) BY BAFIN AND FREP IN THE CONTEXT OF WIRECARD**

Peer Review Report



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## List of acronyms used

AOB	Audit Oversight Body
BaFin	Bundesanstalt für Finanzdienstleistungsaufsicht
BBG	Bundesbeamtengesetz (Federal Civil Service Act)
BoS	Board of Supervisors
CESR	Committee of European Securities Regulators
CRSC	Corporate Reporting Standing Committee
EC	European Commission
ECEP	European Common Enforcement Priorities
EECS	European Enforcers Coordination Session
EFI	Enforcement of Financial Information
ESMAR	ESMA Regulation
FTPR	Fast Track Peer Review
FREP	Financial Reporting Enforcement Panel
FS	Financial statements
FT	Financial Times
FTE	Full Time Equivalent
GLEFI	<a href="#">Guidelines</a> on the Enforcement of Financial Information
GOBaFin	Geschäftsordnung der BaFin (BaFin's Rules of Procedure)
HGB	Handelsgesetzbuch (Commercial Code)
IFRS	International Financial Reporting Standards
KYC	Know-Your-Customer
MAR	Market Abuse Regulation
MB	Management Board
MoF	Ministry of Finance



MoJ	Ministry of Justice
MS	Member State
NCA	National Competent Authority
PRC	Peer Review Committee
PRM	Peer Review Methodology
SIRF	Southern Investigative Reporting Foundation
TD	Transparency Directive 2004/109/EC as amended
TPA	Third-Party Acquiring
WpHG	Wertpapierhandelsgesetz (Securities Trading Law)

## 1 – Executive summary

1. On 22 June 2020, Wirecard, a fintech company included in the German DAX 30 index, announced that €1.9bn it had claimed to hold in escrow accounts were missing. As the problems at Wirecard became more evident, and in view of allegations of fraud published in the media, questions were raised about BaFin (Bundesanstalt für Finanzdienstleistungsaufsicht) and FREP's (Financial Reporting Enforcement Panel) role in taking timely action in this case.
2. Within that context, on 25 June 2020, the European Commission (EC) sent a letter to ESMA, inviting ESMA to carry out a fact-finding analysis of the events leading to the collapse of Wirecard and of the supervisory response of the German authorities in the area of financial reporting.
3. Against that background, ESMA focused its fact-finding work on the supervision of financial information pursuant to the **Transparency Directive (TD)**. ESMA notes however that issues related to other areas of supervision may also be relevant in the context of the collapse of Wirecard, such as market abuse (e.g. timely sharing of information with the market, dissemination of misleading information), short-selling, auditing and corporate governance.
4. In Germany, the enforcement of financial information (EFI) is performed in a two-tier system. FREP is responsible for examining in the first tier whether the information referred to in the TD is drawn up in accordance with the relevant reporting framework; BaFin is the central competent authority responsible for examinations in the second tier and for taking appropriate measures in case of infringements.
5. In view of the tools available to ESMA, the need to address the situation rapidly and considering that ESMA developed in 2014 the **Guidelines on the Enforcement of Financial Information (GLEFI)** in relation to the TD and conducted a **Peer Review** covering the German competent authorities regarding some of these guidelines in 2017, ESMA decided to launch a Fast Track Peer Review (FTPR). The FTPR aimed at assessing the supervisory response of FREP and BaFin to Wirecard's financial reporting based on the application of the GLEFI, and the effectiveness of the supervisory system within that context. The period covered by the review is 1 January 2015 to 25 August 2020.
6. The FTPR is a new supervisory convergence tool introduced in 2020 through the Peer Review Methodology<sup>1</sup> (PRM) following the revised ESMA Regulation (ESMAR). It builds on the existing experience with Peer Reviews and allows to limit the focus on a specific issue and specific jurisdiction, and to compress the timeframe of the different steps to deliver the Peer Review report in a shorter period of time.
7. The Peer Review was conducted by a Peer Review Committee (PRC) composed of experts from National Competent Authorities (NCAs) and from ESMA staff and chaired by a senior ESMA staff member. The PRC sent a questionnaire to both BaFin and FREP, engaged with them through additional questions and through on-site visits, which took place remotely by way of video

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<sup>1</sup> The Peer Review Methodology was approved on 28 May 2020.

conference due to the COVID-19 restrictions. The PRC also engaged with the German Audit Oversight Body and with academics. Based on information gathered from BaFin and FREP, the PRC prepared a Peer Review report. Facts and analyses were checked for accuracy with BaFin and FREP. Both ESMA's Corporate Reporting Standing Committee (CRSC) and the Management Board (MB) were subsequently consulted on the draft report. In view of comments received, the PRC reviewed the draft Peer Review report as it deemed appropriate and submitted it to the Board of Supervisors (BoS) for approval. The BoS took the decision to adopt the Peer Review report on 2 November 2020.

8. Being conscious of the risk of hindsight bias, members of the PRC have tried to the best of their professional abilities to make an assessment of facts and actions of BaFin and FREP in the context of the Guidelines, disregarding as far as possible the information that is currently available regarding Wirecard. PRC members have specifically challenged each other on this risk during the assessment process.

*Overview of the main findings of the FTFR in relation to the specific guidelines (GLEFI)*

9. **Resources** at both BaFin and FREP are adequate for the regular functioning of enforcement of financial information. Staff at both organisations is highly professionally skilled and has received sufficient training in the period under review. Adequate resources were allocated to the Wirecard case by both BaFin and FREP, given the respective responsibilities in the two-tier system.
10. Regarding the required **independence** of supervisory authorities from the government, no particular independence issues from the German Government were identified for FREP in the context of the Wirecard examinations. For BaFin, instead, there is a heightened risk of influence by the Ministry of Finance (MoF) given the frequency and detail of reporting to the MoF in the Wirecard case, in some cases before actions were taken.
11. FREP's independence procedures in relation to holding and trading of shares in issuers were effective in the context of Wirecard's examinations. BaFin, on the other hand, lacks information about its employees' share holdings. This raises doubts on the robustness of BaFin's internal control system regarding conflicts of interest of its employees vis-à-vis issuers. Trading in Wirecard shares by some of BaFin's MAR (Market Abuse Regulation) team members is also concerning, given the MAR team's role in supplying information needed for financial reporting supervision.
12. FREP did not pick up signals in the international media and failed to **select Wirecard for examination** in the period between 2016 to 2018 (financial reports 2015, 2016 or 2017), despite specific risks on Wirecard reporting, which were left unaddressed. FREP also did not recognise the related impact on Wirecard's risk profile, which, according to FREP's selection model, should have increased the likelihood of Wirecard being selected for examination. Although in a different position compared to FREP in the German two-tier system, BaFin also did not request that FREP examine Wirecard reporting during that same period.
13. FREP and BaFin appropriately selected Wirecard for examination based on risk with regards to the 2018 half year financial report (BaFin), the 2018 annual financial report (FREP and BaFin), the 2019 half year financial report (FREP and BaFin) and the 2017 annual financial report (BaFin).
14. In performing the examination of the 2014 financial report of Wirecard, in the original scoping of the examination, FREP should have focused more on elements material to the business of Wirecard, such as trade receivables and the useful lives of customer relationships. Also, FREP



should have been more thorough in examining whistle-blowers' and media allegations when these occurred during the examination. To adequately dispel allegations regarding the lack of clarity of related disclosures, FREP should have performed (and properly documented) additional procedures on the areas highlighted by the allegations and in doing so should have exercised more professional scepticism.

15. With regards to the examinations of the 2018 half year financial report of Wirecard, although the initial scope of BaFin's request to FREP for a focused examination was appropriate, FREP and BaFin should have expanded the scope of the examination to the Third Party Acquiring (TPA) business earlier than October 2019, as serious allegations on the existence and volume of the TPA revenues, as well as on the lack of related disclosures were brought up by the media in early 2019. In addition, FREP's examination procedures were sometimes not sufficient or timely when it comes to requesting contact with relevant parties or acting on information received, therefore missing the opportunity of possibly being provided with useful and timely information.

*Overview of the main findings in the context of the Wirecard case regarding impediments to the effectiveness of the German supervisory system for financial reporting.*

16. Regarding the respective roles of BaFin and FREP in the case of (indications of) **fraud** in financial reporting, BaFin and FREP are not aligned in the perception of each other's role and the limitations and possibilities that both have in the context of the two-tier system.
17. In the context of fraud, BaFin and FREP have an obligation by law to notify the public prosecutor in case the examination procedures give rise to the suspicion of a criminal activity relating to an entity's financial reporting. Given the high hurdle perceived by BaFin and FREP to notify the public prosecutor, it was assessed that BaFin and FREP may not have the powers necessary when it comes to being able to request information (from auditors and other relevant parties) in order to effectively substantiate suspicions of a criminal activity so as to enable them to notify the public prosecutor.
18. BaFin was not put in the position to thoroughly assess FREP's examinations of Wirecard, which would have enabled BaFin to determine whether it should take over the examinations from FREP. This was due to lack of precise and substantive information on the Wirecard examinations requested by BaFin and provided to them by FREP, and the requirement to meet the hurdle of **substantial doubts** before an examination can be taken over.
19. Confidentiality requirements in some circumstances in the Wirecard case have prevented an **efficient exchange of information** between BaFin and FREP.
20. Instances of lack of coordination and/or procedural inefficiencies were detected within BaFin in the context of the Wirecard case, leading to the EFI team not being aware of relevant media articles, even if these publications were followed by a significant drop of Wirecard's share price, or not being timely informed of complaints, which should have raised red flags about Wirecard's accounting.
21. Finally, BaFin has reported the inability to comply with the **GLEFI Guidelines 7 and 17** due to legal impediments (lack of enforcement powers and the confidentiality regime).

## 2 – Overview of the Peer Review findings

22. The following sections contain a summary of the PRC's assessment per Guideline (Section 2.1) and considerations on the Effectiveness of the Supervisory System (Section 2.2). An overview of the PRC recommendations is included in Section 2.3.

### 2.1 Assessment per Guideline

#### Guideline 2 – Sufficiency and adequacy of human and financial resources

23. Based on Guideline 2 it was assessed whether, in the context of the Wirecard case, sufficient human resources were allocated by BaFin and FREP, as well as the adequacy of their professional experience and background. The PRC assessed that BaFin and FREP fully met expectations.
24. Resources at both BaFin and FREP are adequate for the regular functioning of enforcement of financial information and sufficient resources were allocated to Wirecard, given the respective responsibility in the two-tier system and the unfolding of events that preceded the collapse of Wirecard.
25. Staff at both organisations is highly professionally skilled, with significant experience in the relevant financial reporting framework and received sufficient training in the period under review. Specifically, the relevant experience of the persons assigned by FREP to the examination of Wirecard's 2014 annual financial report and 2018 half year financial report is deemed sufficient.

#### Guideline 3 – Independence from government, issuers and auditors

26. Based on Guideline 3, it was assessed whether BaFin and FREP are independent from government, issuers and auditors when taking decisions as part of the enforcement process and specifically in the Wirecard case. The PRC assessed that FREP fully met expectations and BaFin partially met expectations.
27. The PRC considers that FREP was independent from government as it did not identify any evidence, which would suggest that FREP unduly shared case-specific findings on Wirecard with the German Government. The PRC also saw evidence that FREP was independent from the issuer and its auditor EY, and that FREP's internal control system was effective in the context of the Wirecard case.
28. With regards to BaFin, the PRC considers that there was a heightened risk of influence by the Ministry of Finance (MoF) over BaFin's handling of the Wirecard examination given the frequency and detail of reporting to the MoF, in some cases before actions were taken – which the PRC deems inappropriate. Although the PRC has not seen concrete evidence of MoF influence on BaFin's actions in the context of Wirecard, the risk was present because at any moment the MoF had the possibility to influence BaFin in case of disagreement with the actions BaFin undertook or intended to undertake.

29. In addition, the PRC considers that a conflict of interest could exist given that some staff members of the Market Abuse (MAR) team, who have a pivotal role in gathering market intelligence on the identification of risks, traded securities related to Wirecard. While no members of the enforcement of financial information (EFI) team traded any shares of Wirecard in the period under review, BaFin lacks information about its employees' share holdings. This raises doubts on the robustness of BaFin's internal control system regarding conflicts of interest of its employees, which should therefore be strengthened.

### **Guideline 5 – Selection methods of issuers**

30. Based on Guideline 5, it was assessed whether the selection methods for review of issuers in place within FREP and BaFin combine a risk-based approach with a sampling and/or rotation approach and how the risk-based approach was applied in the context of Wirecard. In this context, both authorities have a role in monitoring the market to select issuers for examination, even if BaFin's role is more limited than FREP's. The PRC assessed that FREP partially met expectations in the 2015-2018 period and fully met expectations in the 2019-2020 period. BaFin largely met expectations in the 2015-2018 period and fully met expectations in the 2019-2020 period.
31. The PRC considers that the selection model in the German system of EFI is in line with the GLEFI, since it includes a combination of a risk-based approach and both random sampling and rotation. The PRC notes that such model includes an element of judgement in establishing whether there is an indication of accounting infringement, which may lead to the selection of an issuer on the basis of risk (by both FREP and BaFin), or its inclusion in the abstract risk pool<sup>2</sup> (FREP only). Whilst the PRC considers that the selection model was effectively followed by both FREP and BaFin, the PRC disagrees with the judgement made regarding the indication of concrete risks and of abstract risk in the period between 2015 and 2018.
32. The PRC deems that FREP partially met expectations with regards to Guideline 5 because it did not sufficiently take into consideration the allegations against Wirecard contained in the media. FREP did not identify such allegations as a concrete risk, which would have led to selection for examination of Wirecard in the period between 2015 and 2018 (financial reports of 2015, 2016, 2017) based on "concrete risk", nor did it select Wirecard based on an increased risk profile of the issuer ("abstract risk").
33. In light of the different responsibilities and roles assigned to FREP and BaFin within the two-tier system, the PRC deems for the same reason that BaFin largely, but not fully, met expectations with regards to Guideline 5, because it did not request that FREP examine Wirecard in that same period (2015-2018).
34. FREP and BaFin fully met the expectations regarding Guideline 5 in 2019 and 2020 when selecting the 2018 half year financial report (BaFin), the 2018 annual financial report (FREP and BaFin), the 2019 half year financial report (FREP and BaFin) and the 2017 annual financial report (BaFin) of Wirecard based on risk.

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<sup>2</sup> Inclusion in the abstract risk pool happens when an issuer's risk profile increases in a number of aspects, however without, at that stage, any concrete indication of potential infringements.

## **Guideline 6 – Examination procedures**

35. Based on Guideline 6, it was assessed whether the scope and procedures of examinations (including documentation) undertaken by FREP and BaFin in the context of Wirecard were sufficient in order to achieve an effective enforcement process. The PRC assessed that FREP partially met expectations in the 2015-2018 period and largely met expectations in the 2019-2020 period; BaFin largely met expectations in the 2019-2020 period whilst this Guideline was not applicable to BaFin in the 2015-2018 period.
36. The examinations carried out over the period under review in the context of Wirecard illustrate two different types of examinations foreseen by the German two-tier system. Over 2015-2016, FREP carried out an unlimited scope examination of the 2014 annual financial report, which was selected according to FREP's sample and rotation-based model. In such examinations, the scope of the examination was set by FREP and BaFin played no role. Over 2019-2020, the examinations of the 2018 half year and annual financial reports were carried out by FREP with a specific scope set by BaFin based on an indication of accounting infringements, following a risk-based assessment. BaFin's role was therefore limited to setting the scope of the examination. In both periods, whilst the examination was ongoing at FREP's level, BaFin played no role in the examination as such.
37. As regards the examination of the 2014 annual financial report, the PRC assessed FREP to partially have met the supervisory expectations. The main reason for this assessment relates to deficiencies identified in the initial scoping of the examination as well as in the handling of the allegations that had arisen during the examination and which, according to the PRC, should have led FREP to perform more work to determine whether the scope of the examination should have been expanded. This, together with deficiencies in other aspects, such as professional scepticism, documentation and extent of procedures, were insufficient to ensure that material risks were not left unaddressed.
38. In the context of the BaFin-requested examinations of the 2018 half year and annual financial reports, the PRC assessed FREP to have largely met the supervisory expectations. Whilst the PRC considers that scoping, examination procedures and documentation may have been deficient in some way, in these examinations, these aspects led to delays but did not leave material risks unaddressed. The assessment is similar regarding BaFin's role in terms of scoping the examination it had requested.

## **Guideline 8 – Materiality**

39. Based on Guideline 8, it was assessed whether the materiality used for the purpose of the enforcement process of the Wirecard case was determined in accordance with International Financial Reporting Standards (IFRS). The PRC assessed that FREP partially met expectations in the 2015-2018 period and largely met expectations in the 2019-2020 period; BaFin largely met expectations in the 2019-2020 period whilst this Guideline was not applicable to BaFin in the 2015-2018 period.
40. The PRC considered that materiality (i.e. the relevance to influence economic decisions of users of financial statements (FS)) comes into consideration at two moments of the examination: when scoping the examination and when deciding on the outcome of the examination.

41. Referring to the different examinations above, and in view of considerations related to materiality in terms of scoping, the PRC assessed that the conclusions for FREP and BaFin should follow the respective assessment made under Guideline 6.

### **Guideline 9 – Follow-up on actions acted upon**

42. Based on Guideline 9 it was assessed whether actions taken by BaFin and/or FREP in relation to Wirecard were acted upon on a timely basis, and in case of misstatement, investors were not only informed that there was a misstatement but were also provided with the corrected information.
43. As no error was identified in the context of the examination of the 2014 annual financial report and that the examinations related to the 2018 financial reports are still ongoing at BaFin's level, the PRC considered that this Guideline was not applicable to BaFin and FREP in the Wirecard case at this stage.

### **Guideline 12 – Emerging issues**

44. Based on Guideline 12 it was assessed whether in the context of Wirecard, BaFin and/or FREP should have submitted any of the financial reporting issues identified for discussion at European level with ESMA in the interest of supervisory convergence (i.e. within the European Enforcers Coordination Sessions (EECS)). The PRC assessed that BaFin and FREP fully met expectations.
45. In the specific cases of the examinations carried out on Wirecard's financial statements, the PRC did not identify any topics that would have fulfilled the criteria mentioned in Guideline 12 for submitting financial reporting issues for discussion at European level and therefore assessed that both FREP and BaFin fully complied with this Guideline.

## **2.2 Considerations on the effectiveness of the supervisory system**

46. In accordance with the mandate of the FTPR, the PRC analysed the effectiveness of the supervisory system of BaFin and FREP in the context of the Wirecard case.

### **Legal and procedural impediments to timely detection of issues and taking of measures**

#### *Financial reporting issues involving fraud*

47. Both BaFin and FREP have indicated that they lack the powers to perform or order a forensic examination into (top management) fraud involving financial reporting. However, in the context of fraud, BaFin and FREP have an obligation by law to notify the public prosecutor in case the examination procedures give rise to the suspicion of a criminal activity relating to an entity's financial reporting. The role of the public prosecutor is relevant in such a case, as it does have full forensic capabilities to examine a potential fraud. To enable it to effectively examine cases of potential fraud involving financial reporting, the public prosecutor is also dependent on both BaFin and FREP notifying it of information giving rise to the suspicion of a criminal activity.

48. This does not mean that the PRC expects supervisors of financial reporting to actively search for fraud with an issuer, in case there are no such indications of fraud. There is also not the expectation that supervisors of financial reporting would start a full forensic examination when there are indications of a fraud, unless this is specifically foreseen by national law implementing the TD.
49. The PRC notes that BaFin notified the public prosecutor on 18 June 2020, after EY informed BaFin about the falsified balance confirmations regarding funds held in trust accounts in the amount of €1.9bn, i.e. a week before Wirecard filed for insolvency. It is important to note that the PRC did not perform any legal analysis confirming or refuting the reading of the (local) law by BaFin and FREP, which leads them to consider that the hurdle is high when it comes to notifying the public prosecutor.
50. Given this high hurdle for BaFin and FREP to notify the public prosecutor, the PRC is of the opinion that FREP and BaFin may not have the powers necessary when it comes to being able to request information from relevant parties (like auditors and other relevant parties) in order to effectively substantiate suspicions of a criminal activity so as to enable them to notify the public prosecutor.
51. Regarding the respective roles of BaFin and FREP in the case of (indications of) fraud in financial reporting, the PRC is of the view that BaFin and FREP are not aligned in the perception of each other's role and the limitations and the possibilities they both have in the context of the two-tier system.

#### *Assessment by BaFin of substantial doubt on FREP's examinations*

52. In the German two-tier system, as an independent body, FREP examines the financial statements in the first tier. Only in specific cases may BaFin intervene in the second tier, usually at the end of the examination by FREP. However, BaFin may take over the examination at an earlier stage in case of substantial doubts about the proper conduct of FREP's examination or on the outcome of the examination.
53. The PRC is of the view that BaFin could not thoroughly assess substantial doubts during FREP's examinations of Wirecard, due to lack of precise and substantive information on the Wirecard examinations requested by BaFin and provided to them by FREP.

### **Legal or procedural impediments preventing cooperation and exchange of information**

#### *Cooperation with the Audit Oversight Body (AOB)*

54. During the Wirecard examinations, FREP and (in particular) BaFin have exchanged some information with the AOB regarding their examinations. However, the PRC believes that the confidentiality regime in Germany may negatively affect the detection and investigation of accounting infringements, as the AOB cannot exchange information with BaFin or FREP if they conclude that the auditor of issuers under their supervision failed to comply with the audit regulations.

#### *Exchange of information between BaFin and FREP*

55. Limitations due to confidentiality play an important role in the interactions and exchange of information between BaFin and FREP, which may impact the effective enforcement of financial reporting requirements. In the context of the Wirecard examinations, the PRC finds that

confidentiality requirements in some circumstances prevented an efficient exchange of information between BaFin and FREP. This finding was already highlighted in the 2017 Peer Review.

### **Legal or procedural impediments preventing an efficient and effective flow of information within BaFin**

56. The PRC observed instances of lack of coordination and/or procedural inefficiencies within BaFin in the context of the Wirecard case. In particular, the EFI team was not aware of relevant media articles, sometimes even if these publications were followed by a significant drop of Wirecard's share price. In one case, even if other teams within BaFin had knowledge of a complaint which should have raised red flags around Wirecard's accounting, such information was not transmitted to the EFI team as deemed only of relevance to other teams.
57. This suggests that no discussion took place between the EFI, the MAR and other teams within BaFin regarding these articles, even if they contained allegations or red flags on fraudulent accounting. Therefore, impediments may have existed in internal communication at BaFin with regards to Wirecard.

### **Legal or procedural impediments preventing compliance in full with the GLEFI**

58. According to Article 16(3) of the ESMAR, competent authorities and financial market participants shall make every effort to comply with ESMA's Guidelines and recommendations. BaFin has reported inability to comply with the GLEFI Guidelines 7 and 17 due respectively to the lack of enforcement powers and to the confidentiality regime since the GLEFI were effective in 2014.
59. BaFin neither has the possibility to require reissuance of financial statements nor to require a correction in the future financial statements (Guideline 7). Furthermore, due to the confidentiality regime in Germany, ESMA's extracts of EECs decisions cannot contain decisions taken in Germany (Guideline 17), and therefore not contribute to a consistent application of IFRS in Europe.

## **2.3 Assessment and recommendations tables**

### **Assessment related to the Guidelines and the Effectiveness of the Supervisory System**

60. The two tables below summarise the PRC's assessment of (1) the selected Guidelines and (2) the Effectiveness of the Supervisory System as set in the Peer Review mandate. The assessment is reflected in two different tables because in the first table related to the selected Guidelines the PRC used the benchmark set in the Peer Review methodology<sup>3</sup> whilst in the second table related to the Effectiveness of the supervisory system the PRC made a qualitative assessment without referring to these benchmarks.
61. In the first table, a distinction is made between the two authorities (i.e. BaFin and FREP) and each relevant period i.e. (i) 2015 to 2018, during which the examination by FREP of Wirecard 2014

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<sup>3</sup> See Paragraph 55 of the peer review methodology

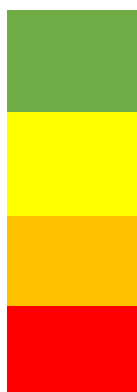


annual financial report took place and there was no selection for examination of Wirecard 2015, 2016 and 2017 financial report and (ii) 2019 to 2020, during which Wirecard was selected for examination and the examination of the 2018 annual and half year financial report was performed by FREP on request of BaFin. The distinction between these two periods is particularly relevant in relation to Guideline 5 on Selection Methods, Guideline 6 on Examination Procedures and Guideline 8 on Materiality.

Table 1: Assessment of the selected Guidelines

		BaFin		FREP	
		2015-2018	2019-2020	2015-2018	2019-2020
<b>Guideline 2</b>	Sufficiency of human resources Adequacy of professional experience and background				
<b>Guideline 3</b>	Conflict of interest with issuer and auditor Independence from government				
<b>Guideline 5</b>	Combination of selection methods Application of risk-based approach				
<b>Guideline 6</b>	Effective examination procedures to ensure material errors are likely to be identified Sufficiency of examination procedures to achieve an effective enforcement process	N/A			
<b>Guideline 8</b>	Determination of materiality in accordance with the relevant reporting framework (1)	N/A			
<b>Guideline 9</b>	Timeliness of acting upon actions taken Timeliness of information of misstatement and of corrected information to investors	N/A		N/A	
<b>Guideline 12</b>	Submission of emerging issues and/or decisions to EECS				

(1) The conclusion on Guideline 8 on materiality is linked with that on Guideline 6 on examination procedures



**Fully meeting expectations:** when all supervisory expectations are met without any significant deficiencies. There may be instances where an NCA can demonstrate that the supervisory expectations have been fulfilled by other means.

**Largely meeting expectations:** whenever only minor deficiencies are observed which do not raise any concerns about the overall effectiveness of the NCA. The assessment “largely meeting expectations” can be used when the NCA does not meet all supervisory expectations, but the overall effectiveness is sufficiently good, and no material risks are left unaddressed.

**Partially meeting expectations:** whenever there are severe deficiencies affecting the effectiveness of the NCA, and some material risks are left unaddressed.

**Not meeting expectations:** whenever supervisory expectations are not met at all or to an important degree, resulting in a significant deficiency in the overall effectiveness of the NCA, and material risks are left unaddressed.



Table 2: Assessment of the effectiveness of the supervisory system

Areas assessed	PRC finding
Legal or procedural impediments that prevented BaFin and/or FREP from, on a timely basis, detecting, supervising/examining financial information published	Weaknesses in relation to: <ul style="list-style-type: none"> <li>- Financial reporting issues involving fraud,</li> <li>- The assessment by BaFin of substantial doubt regarding FREP's examinations</li> </ul>
Legal or procedural impediments that prevented BaFin and/or FREP from cooperating and exchanging information between themselves and other relevant authorities (e.g. Audit Oversight Body)	Weaknesses in relation to: <ul style="list-style-type: none"> <li>- The cooperation with the Audit Oversight Body,</li> <li>- The exchange of information between BaFin and FREP</li> </ul>
Legal or procedural impediments that prevented an efficient and effective flow of information within BaFin	Weaknesses in relation to: <ul style="list-style-type: none"> <li>- The flow of information within BaFin</li> </ul>
Legal or procedural impediments that prevented BaFin and/or FREP from complying in full with GLEFI	Weaknesses in relation to: <ul style="list-style-type: none"> <li>- Non-compliance by BaFin with Guidelines 7 and 17<sup>4</sup></li> </ul>

62. It is important to note that this Peer Review covers one jurisdiction in the context of one specific case i.e. Wirecard. As a result, although some of the analysis and assessments cover the supervisory approach of the NCA in general, its main focus is the supervisory approach in relation to this specific case. This is clarified in the analysis performed in this report.

### Recommendations related to the Guidelines and the Effectiveness of the Supervisory System

63. The table below includes recommendations made by the PRC in order to address weaknesses identified during the Peer Review assessment. These recommendations are based on the assumption that the two-tier system is carried forward, although the PRC is aware of discussions in this regard. Recommendations made by the PRC are mostly directed to FREP and BaFin, however some recommendations would require to be addressed through changes of the legal framework.

64. With this in mind, all of these recommendations will, if still relevant in Germany's future supervisory set up, be covered in the follow-up Peer Review to be performed two years following the publication of this report. The table represents an overview of all recommendations. More details on the recommendations can be found in the remainder of the report.

<sup>4</sup> Non-compliance with Guidelines 7 and 17 is reported in ESMA's [compliance table with the Guidelines on enforcement of financial information](#) (ESMA 32-67-142) and was identified in the 2017 peer review.

65. As the deficiencies leading to the PRC's assessment under Guidelines 6 and 8 were very examination-specific, conjunctural and self-explanatory, and the PRC has not looked at files related to other issuers, the PRC did not formulate specific recommendations related to these two guidelines other than those of a more wider reaching nature (general organisation of work – see under Guideline 2 - and interaction with whistle-blowers – see below under Guideline 6).

Table 3: Recommendations

<b>Guideline 2 Resources</b>	
	The PRC recommends that FREP reviews the characteristics of its four-year employment contracts for Panel Members to minimise the disruption to examinations (as already recommended in the 2017 Peer Review).
	The PRC recommends that FREP introduces a prioritisation among examinations taking place at the same time in order to ensure timely completion of the most urgent examinations (also in scope of Guideline 6).
<b>Guideline 3 Independence</b>	
	The PRC recommends that FREP restricts access to the database of enforcement cases (which contains information relating to issuers under examination) to those Chamber and Panel Members involved in the ongoing examination. Alternatively, FREP should consider prohibiting the trading of shares of companies under examination for all those having access to the database. Such restrictions / prohibition should not end immediately after the end of the examination: sufficient time should pass to ensure that information acquired in the course of the examination is not misused.
	The PRC recommends that in the case of FREP the validity of the declarations of independence should not end immediately after the end of a given examination in order to ensure that information acquired in the course of the examination is not misused.
	The PRC recommends that FREP's Presidential Board (President and Vice-President) should not be allowed to exercise any mandate as Supervisory Board members of issuers because enforcers should not have any existing relationships with entities subject to enforcement in order not to undermine independence, neither in substance nor in appearance. This was already recommended in the 2017 Peer Review.
	The PRC recommends that BaFin introduces a robust control framework (e.g. relevant rules on holding and trading of shares) to address those circumstances where a conflict of interest could arise. In particular, BaFin should comprehensively address the following weaknesses: <ul style="list-style-type: none"> <li>- The lack of regularly (i.e. at least annually) updated information on the portfolios of financial instruments holdings of all members of BaFin's staff (regardless of whether recruited before or after 2016). This will also need to be addressed within the legal framework;</li> </ul>

	<ul style="list-style-type: none"> <li>- The possible conflict of interest of EFI team members towards issuers under BaFin's direct supervision in view of (i) their involvement in the ongoing monitoring of issuers which may lead to requesting that FREP carries out examinations, (ii) the possibility they might engage in discussions involving examination-related information with FREP, (iii) BaFin's own second tier examinations;</li> <li>- The possible conflict of interest of MAR team members towards issuers under BaFin's direct supervision in view of their pivotal role for the supply of unbiased market intelligence needed for the purpose of EFI.</li> </ul>
	The PRC recommends that BaFin extends the existing requirements for staff joining from supervised entities also to staff joining from issuers with securities admitted to trading on regulated markets (or who audited or counselled issuers as part of their previous employment) with regards to (i) cooling-off periods and (ii) the additional notice about staff obligations to disclose any conflict of interest.
	The PRC recommends that BaFin introduces stricter limitations to the detail and frequency of reporting to the Ministry of Finance (MoF) in the context of ongoing examinations.
	The PRC recommends that, even if this has not been an issue in the context of Wirecard, both FREP and BaFin instate post-employment cooling-off periods for staff employed in supervision activities. This may need to be addressed in the legal framework.
<b>Guideline 5 Selection Methods</b>	
	The PRC recommends that BaFin does not solely rely on FREP's review of media in order to assess if an examination should be initiated and that BaFin performs its own assessments of the available information, especially when allegations included in the media point to potential accounting infringements.
	The PRC recommends that FREP and BaFin review articles in international newspapers (including online newspapers) with widespread acceptance in the sphere of international finance in the area of financial and economic matters in order to add these elements when selecting issuers for examination or when performing examinations.
	The PRC recommends that FREP enhances its analysis of press articles where they appear to be reliable and relevant sources for the purpose of selecting issuers for examination (either abstract risk or concrete risk); such analyses and the related conclusions should be duly documented, in particular when press articles are deemed not relevant for selection.
	The PRC recommends that from 2021, in the context of its abstract risk-based selection, FREP adds, to the maximum extent possible, data to identify trends in the accounting figures such as for instance significant variations in turnover, equity or intangible assets. For this purpose, machine-readable data made

	available by issuers in compliance with the ESEF Delegated Regulation will be relevant to use when implemented.
	The PRC recommends that, when establishing the risk factors to be considered to identify abstract risks, FREP considers more prominently indicators of the potential impact of an infringement on financial markets (such as the size of the company, the inclusion of an issuer in the main index, the number of investors or free-float of a specific company, etc.).
	The PRC recommends that issuers in the risk abstract pool are not all weighted in the same way so as to increase the probability of selection for the riskier issuers. As an alternative, as risk is a key element of the selection model, the PRC recommends that FREP consider increasing the percentage of issuers selected based on abstract risks.
<b>Guideline 6 Examination procedures</b>	
	If there are indeed any legal impediments to FREP interacting with a whistleblower, the PRC recommends that this be reconsidered from a legal point of view as this bears the risk that the validity of the submission may not be appropriately assessed even in cases where the submitters offer such interaction.
<b>Legal or procedural impediments that prevented BaFin and/or FREP from, on a timely basis, detecting, supervising/examining financial information published</b>	
	The PRC recommends that BaFin and/or FREP are able to use general powers as described in Sections 6(2), (3), (11), (12) WpHG (WertpapierHandelsgesetz) in the context of supervision of financial reporting. This would need to be addressed in the legal framework.
	The PRC recommends that BaFin and FREP discuss and clarify any misunderstandings relating to their respective roles in the case of (indications of) fraud in financial reporting.
	The PRC recommends that the content and timing of FREP's progress report to BaFin be carefully assessed as to ensure that it provides an adequate basis for BaFin to assess the existence of any substantial doubt in the manner in which FREP conducts a specific examination. This may need to be addressed in the legal framework.
	The PRC recommends that BaFin is allowed to access, on a sampling basis, the files of issuers that agreed with the examination after it is finalised in order to understand if the procedures undertaken and conclusions drawn by FREP were adequate. This may need to be addressed in the legal framework.
<b>Legal or procedural impediments that prevented BaFin and/or FREP from cooperating and exchange information between themselves and other relevant authorities (e.g. Audit Oversight Body)</b>	

	The PRC finds that the supervision reform underway should consider potential changes to the confidentiality regime regarding the exchange of information between the AOB, and BaFin/FREP. The PRC recommends that the AOB can inform BaFin/FREP about violations of audit regulations, including their nature and severity, in order to enable an assessment regarding the risk that the financial statements of a given issuer might be erroneous.
	The PRC recommends clarifying, within the legal framework, current restrictions and relaxing confidentiality rules governing the exchange of information between BaFin and FREP to ensure that the information necessary to conduct effective enforcement is available to both authorities e.g. regarding anonymised whistle-blowers' complaints.
	As also pointed out in the 2017 onsite report, the PRC recommends reinforcing the interaction between BaFin and FREP when selecting issuers for examination and during an examination e.g. exchanging relevant information regarding MAR supervision for the purpose of selecting issuers based on abstract risk. This may need to be addressed within the legal framework.
<b>Legal or procedural impediments that prevented an efficient and effective flow of information within BaFin</b>	
	The PRC recommends improving internal communication at BaFin, especially with regards to complaints and media articles dealing with allegations about companies' accounts.
<b>Legal or procedural impediments that prevented BaFin and/or FREP from complying in full with GLEFI</b>	
	The PRC recommends analysing whether the issue that causes the non-compliance of BaFin with GLEFI is due to an incorrect transposition of the TD into national legislation. Given the EFI reform underway and the importance of GLEFI to enhance convergence in the area of enforcement of financial information, the PRC recommends that BaFin engages into discussions with the relevant ministries in order to remedy the issues that prompt non-compliance of BaFin in full with GLEFI. This may need to be addressed in the legal framework.

### 3 – Background

66. In the months preceding ESMA's decision to launch this FTPR, several articles were published in the media, in particular in the Financial Times (FT), addressing an accumulation of questions and stressing accounting inconsistencies at Wirecard AG (Wirecard), a fintech company included in the German DAX 30 index since September 2018. Allegations of accounting inconsistencies and other types of irregularities were expressed a number of times over the years in the context of the company's rapid growth all the way to the top of the DAX 30 index and were systematically rejected by the company. On 22 June 2020, Wirecard announced that €1.9bn it had claimed to hold in escrow accounts in the Philippines did not actually exist and its auditors did not finalise their audit report before the deadline set out in the Transparency Directive<sup>5</sup> (TD) for the annual financial report. Wirecard filed for insolvency in the following week. As the problems at Wirecard became more evident, some articles have questioned the role of the German supervisory authorities in detecting and taking timely action against Wirecard. Some have also called for ESMA to address the potential failures in the supervision of Wirecard.
67. Within that context, on 25 June 2020, the EC sent a letter to ESMA, inviting ESMA to carry out a fact-finding analysis of the events leading to the collapse of Wirecard and of the supervisory response of the German authorities. The Wirecard situation raises serious concerns as high quality financial reporting is core to investor trust in capital markets and Wirecard's collapse has undermined this trust.
68. Against that background, ESMA decided to launch a FTPR as the PRM<sup>6</sup> revised following the new ESMAR<sup>7</sup> allows in case of urgency or unforeseen events.

#### Peer Review Process

69. This FTPR applies to supervisory authorities responsible for the enforcement of financial information in one country, Germany, and with regard to a specific case, the Wirecard case, which makes it specific compared with other Peer Reviews.
70. The FTPR built on the work performed for the Peer Review on the Guidelines on Enforcement of Financial Information (GLEFI) whose report was published on 18 July 2017. That Peer Review already covered both BaFin and FREP and included an on-site visit to both entities. On 15 July 2020, in view of the overriding public interest in this particular case and in the enforcement of financial information in Germany, ESMA made available the confidential country report on Germany<sup>8</sup>.
71. The FTPR was performed to assess, in the context of Wirecard, the supervisory response in the area of financial reporting by BaFin, the central competent authority responsible for examination in the second tier and for taking the appropriate measures in case of infringements, and by FREP, the entity responsible in the first tier for examining whether information referred to in the TD is

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<sup>5</sup> Directive 2004/109/EC

<sup>6</sup> See Title V of the Peer Review Methodology

<sup>7</sup> See article 30.8 of Regulation (EU) N. 1095/2010 as revised on 18 December 2019.

<sup>8</sup> ESMA42-111-4128 Peer Review on Guidelines on Enforcement of Financial Information, Annex 4F: Onsite visit report - Germany 26 June 2017, available [on ESMA's website](#)

drawn up in accordance with the relevant reporting framework. The assessment focused on the application of the GLEFI, issued by ESMA in 2014, by BaFin and FREP to Wirecard's financial information and on the efficiency of the supervisory system in that context. The assessment was performed in application of the ESMA PRM, using an FTPR process i.e. focused on BaFin and FREP, the case of Wirecard and performed in a limited period of time.

72. On 6 August 2020, ESMA's BoS appointed a Peer Review Committee (PRC), comprising experts from NCAs and ESMA and chaired by an ESMA senior staff member to conduct the Peer Review. On 25 August 2020, the BoS approved a mandate for the FTPR as prepared by the PRC following consultation of the MB and the CRSC. Building on information gathered from BaFin and FREP following letters sent to each of them by ESMA under Article 35 of the ESMAR, the PRC developed questionnaires respectively for BaFin and for FREP. The mandate and questionnaires are in the Annexes to this report (respectively Annexes 1 and 2).
73. The period under review covers enforcement activity under the GLEFI from 1 January 2015 to the date the mandate of the FTPR was approved, i.e. 25 August 2020..
74. The questionnaires were followed by on-site visits to BaFin and FREP by the PRC. The on-site visits took place during the week of 7 September 2020. However, given the COVID-19 situation and resulting travel restrictions, the on-site visits could not take place physically. Instead, the on-site visits took place through video conference. This situation imposed some limitations such as the impossibility for the PRC to access physical files and documents on-site. Instead, the PRC relied on documents that BaFin and FREP sent them via electronic means and also, in the case of BaFin, on documents for which access was provided via 'read-only' screen viewing sessions. In addition, BaFin requested that ESMA sign a confidentiality agreement to access some documents. PRC members relied on those documents and information provided by BaFin and FREP as well as on discussions with their representatives in order to prepare this report.
75. The PRC met with stakeholders i.e. the Audit Oversight Body (AOB) and academics between 18 and 23 September, via video conference. The AOB stressed the confidentiality rules it is subject to. As a result, the discussion was of a general nature and did not address the case of Wirecard. This outreach exercise was a complement to the engagement with BaFin and FREP, to better understand the surroundings of the Wirecard case, as foreseen under the PRM.

## **Assessment Criteria**

76. The mandate sets out expectations under the different areas of assessment, which were based on the Guidelines selected for review, the PRM as well as PRC members' knowledge, expertise and practical experience. The expectations were also consulted upon with NCAs as part of the process i.e. consultation of the CRSC and the MB and approved by ESMA's BoS. Each area of assessment contains a number of supervisory expectations and for each area, BaFin and FREP are each respectively assessed in accordance with the following scale: (i) Fully meeting expectations; (ii) Largely meeting expectations; (iii) Partially meeting expectations; or (iv) not meeting expectations. In addition, based on the mandate, an assessment of the effectiveness of the supervisory system is provided. The overall assessment tables, including recommendations of the PRC are set out in Section 2.3. The areas for improvement for any of the supervisory expectations and for the effectiveness of the supervisory system are outlined in the Main Findings of the Peer Review in Sections 2.1 and 2.2. Section 5 of this Report sets out the Main Findings of the PRC in more detail.



## Assessment in the context of Wirecard

77. Given the specific nature of the FTPR being focused on one case (Wirecard), and the knowledge about the existence and extent of fraud in this case – which prompted the FTPR, the PRC has been very much aware of the risk of making assessments having the benefit of hindsight.
78. It is obvious that, with the information that is available now regarding the Wirecard case, there is a risk that this knowledge can play a role in the assessment of facts at the time, sometimes dating back to five years ago. It should also be acknowledged that the public profile of Wirecard has increased at a very fast pace over the years, which is relevant from the perspective of assessing facts and actions at the time (e.g. Wirecard entered the DAX in 2018).
79. Being conscious of the risk of hindsight bias, members of the PRC have tried to the best of their professional abilities to make an assessment of facts and actions of BaFin and FREP in the context of the Guidelines, disregarding as far as possible the information that is available now regarding Wirecard. PRC members have specifically challenged each other on this risk during the assessment process. However, despite the PRC's best efforts, the risk of hindsight cannot be fully mitigated, as members of the PRC are aware of the most recent public information about Wirecard.
80. In addition, given the focus on one case, the PRC based its analysis on facts and circumstances which were specific to the Wirecard case. Accordingly, some emphasis may have been accorded in the analysis to specific facts or procedures which would not necessarily be relevant to a similar extent in the context of other examinations. Similarly, as shown in the PRC's analysis of the effectiveness of the supervisory system in the context of the Wirecard case, the Wirecard case significantly stressed the system and revealed weaknesses and deficiencies which the PRC considers should be addressed. However, as the PRC did not look at other cases as that was not foreseen in the FTPR mandate, those weaknesses and deficiencies may not be construed as necessarily having similar relevance in the context of other examinations and of the general effectiveness of the supervisory system.
81. The PRC would like to stress the good cooperation of both BaFin and FREP during this fast track peer review and thank them for that. An on-site visited NCA may submit a written statement to be annexed to the peer review report before its publication. The statements of FREP and BaFin have been inserted in Annex 4 of the report.



## 4 – General Information

### 4.1 Structure of the enforcement of financial information in Germany

#### Market characteristics

82. As of 1 January 2020, 548 issuers were subject to German accounting enforcement (i.e. issuers for which Germany was the Home Member State (MS) as defined by the TD).
83. Seventy German companies were included in the EUROSTOXX 600, which represents approximately 14% of the EUROSTOXX 600 by market capitalisation.

#### Legal and organisational aspects of the two-tier system of EFI in Germany

84. In Germany, enforcement of financial information (EFI) is organised in a two-tier system.
85. The first tier, FREP, is a private body designated under German law and in accordance with Article 24(1) of the TD as a competent authority for examining whether the financial statements of issuers comply with the relevant accounting framework (but not as the competent authority for taking the appropriate measures in case of discovered infringements).
86. BaFin is a public authority and is the second tier of the EFI. As such, it carries out reviews only when issuers do not cooperate with FREP, or do not accept FREP's findings, or when BaFin has substantial doubts about the accuracy of the examination result or the proper conduct of an examination by FREP. BaFin was designated in Germany as the central competent administrative authority under the TD and is the competent authority for taking the appropriate measures in case infringements are discovered.

#### *First tier: FREP*

87. FREP is a private body (an Association, "Verein") that was established in 2005. The Articles of Association indicate that FREP's Governing Bodies are:
  - a. the Governing Board, which sets out the principles for FREP's work;
  - b. the Nomination Committee, which is responsible for electing the President and Vice-President and for the recruitment and discharge of the Enforcement Panel;
  - c. the Enforcement Panel, which is all staff responsible for examination of financial information;
  - d. the Membership meeting, which is the meeting of all members of the association.Of these bodies, only the Enforcement Panel is directly responsible for enforcement of financial information.
88. FREP's goals of enforcement are specifically to:
  - a. enhance the quality of financial reporting of listed companies,
  - b. strengthen the capital market's trust in the accuracy of financial reporting, and

c. avoid future accounting errors.

These goals are included in the basis of conclusions to the relevant German law (Gesetzesbegründung).

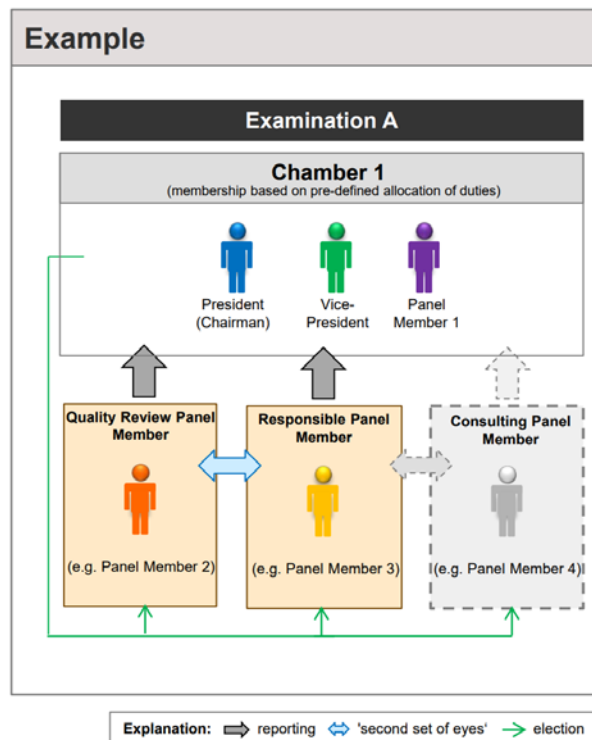
89. FREP conducts enforcement examinations in order to identify material misstatements of financial statements and relies on the cooperation of the companies when doing so. Issuer's participation to the first tier of the examination is voluntary, which, according to FREP, means that issuers will more willingly cooperate. FREP considers that this feature is very important as issuers feel that they can discuss their issues with FREP as equals due to (1) a comparable level of extensive practical, professional experience and (2) the fact that FREP is not an administrative sanctioning authority. As a result, FREP considers that issues can be resolved more quickly. At the conclusion of FREP's work, including when an issuer accepts the conclusions and the consequences of FREP's findings, the case is transferred to BaFin for BaFin to require the publication of the error from the issuer. Only in cases where the issuer does not accept the FREP examination, the whole file is transferred to BaFin. In all other cases, only the result of FREP's examination is transferred.
90. FREP reported that, since its foundation 15 years ago, issuers have refused to cooperate only in 33 cases out of a total of 1,537 examinations. Approximately 50% of these cases were from small non-German issuers (in many cases these companies are defunct but still within the selection sample. This also included German holding companies for which all operations are located in China). The remaining approximately 50% of the cases were from small German issuers. Where issuers 'do not cooperate', FREP declares these issuers non-cooperative and hands the file over to BaFin. No domestic-based issuer had refused to acknowledge the jurisdiction of FREP.
91. In the cases where FREP reached a conclusion but this conclusion was not accepted by the issuer, the file was transmitted to BaFin for an examination. There were 68 such cases over the past 15 years, of which four cases were still ongoing at BaFin's level at the time of drafting this report based on information provided by FREP. In approximately 80% of these cases, the outcome of the examination by BaFin was also an erroneous accounting on which BaFin took action as necessary.
92. In terms of organisation of the enforcement activities, following the selection of issuers' accounts, there is a systematic assignment within FREP of the examinations to what are known as "Chambers". There are as many Chambers as there are Panel Members (i.e. around 13-15). When an examination is assigned to a specific Chamber, a different Panel Member is designated based on workload and appropriate expertise and becomes the "Responsible Panel Member" for the examination of the financial statements of that issuer. A "Quality Review Panel Member" is also designated to support the Responsible Panel Member in its examination and to provide a Quality Review role. A "Consulting Panel Member" is sometimes brought in to support the Responsible Panel Member in their work.
93. The Responsible Panel Member is, in effect, responsible for the review of financial statements of an issuer, and other relevant documents. From the initial review of the financial information received from the company, the Responsible Panel Member identifies several issues for focus and on which FREP will engage in further investigation and assessment (on average five to six issues).
94. The examination team is therefore generally made up of five persons in total. Three are voting members of a Chamber, being the Panel Member assigned to the Chamber (not responsible for the examination nor for the Quality Review), the President and Vice-President, and two others (the Responsible Panel Member and the Quality Review Panel Member) who do most of the

examination work and are non-voting. The President and Vice-President of FREP are voting members of all Chambers, under the condition that they are independent with respect to the issuer and its auditor. The third voting member of a Chamber is always the Panel Member assigned to that Chamber (who is not carrying out the work on that particular issuer). The Chair of each Chamber will always be either the FREP President or Vice President, and this alternates from Chamber to Chamber. The Chair does not have any additional voting entitlement, and all decisions of the Chamber are made by the majority of votes. As the President and Vice-President are members of all Chambers, they can effectively decide on all cases if they are of the same view. This, according to FREP, provides consistency. If there was ever a perceived difficulty with the way in which decisions were being made, Panel Members could, FREP says, approach the external compliance manager.

95. As Panel Members can occupy three different roles in different Chambers, they each have different responsibilities in different Chambers, and these are generally distributed evenly. So, typically, a Panel Member will be the Responsible Panel Member for some Chambers, the Quality Review Panel Member for an equal number of other Chambers, and the voting Panel Member for another equal number of Chambers. Therefore each Panel Member, in addition to the role of Chamber member, is generally involved in six to seven examinations in both roles of Responsible Panel Member and Quality Reviewer and could be involved in examinations also in the role of Consulting Panel Member, although this does not happen often (on average less than four times a year). With the Panel Member's rotating roles, FREP says that each member has the opportunity to view the different cases from various perspectives.

96. The functioning and composition of a Chamber is illustrated in the figure below:

Figure 1: Example of functioning and composition of FREP's Chambers (source: FREP)



97. Panel Members have four-year term renewable contracts. Before Panel Members' contracts are about to terminate, they are asked whether they want to renew. If so, Panel Members whose terms are proposed for renewal have to be re-confirmed by the Nominations Committee. The contracts are often extended. This allows for a mixed composition among Panel Members: a revolving basis with current "direct-from-the-field" experience and, for continuity purposes, long-standing Panel Members with extensive enforcement experience. As of the date of the FTFR, [REDACTED] Panel Members were in their first term and (.....) Panel Members were in extended terms.
98. FREP sees several advantages to the mixed composition among the Panel Members described above, including:
- a. up-to-the-minute practical knowledge from professional practitioners and avoiding the perception of FREP being an authority consisting of intellectuals/academics without first-hand practical experience. Instead, according to FREP, this rotation enables it to be perceived as a competent authority at eye-level with issuers, thereby promoting a high acceptance rate of FREP decisions;
  - b. prevention of an overly trusting relationship between the Panel Members and the issuers under examination; in the case of a constant set of Panel Members with long-term contracts, the same FREP members would be involved in examinations of any particular company several times over many years, especially if special expertise (bank, insurance, real estate, etc.) is needed;
  - c. ability to bring enforcement knowledge back to capital market issuers and audit firms as measure to prevent errors in future financial statements;
  - d. increased attractiveness of FREP as employer: FREP as a private sector body could only offer limited career opportunities within the organisation and only give the Panel Members the opportunity to gather rewarding experiences in enforcement for a limited time period. This was communicated by the Nomination Committee in each interview with new candidates; nevertheless, FREP has been able to obtain highly qualified candidates over time. The main reason for accounting experts to join FREP was the possibility to attain this enforcement experience for a limited time which can be marketed on their resume.
99. In addition, FREP explained that practical industry knowledge of a variety of sectors must be at hand for effective enforcement examinations since FREP has to be able to examine issuers in all industries to ensure that all companies are reviewed. FREP cannot focus only on specialised accounting areas, as it is the case at large accounting firms.
100. As further discussed in the Section on Guideline 3 below, there is no cooling-off period when Panel Members decide to leave FREP. FREP explained that intensive cooling-off clauses would make the recruitment of highly qualified experts nearly impossible.
101. FREP reported that they had no difficulties in recruitment and that there were always sufficient, and sufficiently experienced candidates, when a competition is launched. Salaries in FREP were reported as being equivalent to those in the private sector.
102. Many Panel Members are recruited directly from audit firms and issuers. FREP does not directly recruit from graduate programmes. The panel candidates must normally have approximately ten years of experience. In practice, the level of experience tends however to be higher than ten years.
103. FREP conducts approximately 80 to 100 unlimited scope examinations per year and as many focused examinations as needed.

### *Second tier: BaFin*

104. Although FREP is the primary institution in Germany for carrying out examinations of financial statements of issuers, there are five cases in which BaFin gets involved with an examination:

- a. Case 1: The company accepts the error findings by FREP;
- b. Case 2: The company does not accept the error findings by FREP;
- c. Case 3: The company refuses or fails to cooperate with FREP;
- d. Case 4: BaFin has substantial doubts about the accuracy of the examination result or the proper conduct of the examination by FREP;
- e. Case 5: BaFin takes over the examination if it is itself conducting a special examination with the same subject (for banks, insurance companies and, since 1 January 2016, for investment companies).

105. In Cases 2 to 5, BaFin conducts its own examinations ("error identification procedures"), and any subsequent error publication is within BaFin's remit as well. In all cases, including case 1, when an error is identified, the subsequent error publication procedure is in BaFin's remit.

106. As a rule, BaFin starts its own examinations taking into account the outcome of FREP's examinations (if any).

107. BaFin's staff set-up is fixed and is based on the separate enforcement budget. It is not possible to exceed the number of full time equivalents (FTEs) set in this division without a formal change of the separate enforcement budget which in turn would require the prior consent of BaFin's Administrative Council (Verwaltungsrat). BaFin indicated that there is no possibility, should the need arise, to allocate resources from BaFin's non-EFI divisions to the EFI division without the prior consent of BaFin's Administrative Council. However, BaFin confirmed that the EFI team was appropriately staffed for all its tasks, which included on average BaFin taking over seven to eight examinations from FREP (see cases 2 to 5 as described in Paragraph 104). In such case, BaFin's examination cost is then charged to the issuer when the error is confirmed.

108. BaFin is also responsible for international cooperation.

### *Cooperation with the Audit Oversight Body*

109. FREP and BaFin can exchange information with the Auditor Oversight Body in Germany (until May 2016 the Audit Oversight Commission (Chamber of Accountants – since June 2016 the Audit Oversight Body (AOB)). There is a well-established flow of information from FREP to this body, with about 245 cases referred by FREP in over 15 years.

110. Whenever an error is discovered by FREP/BaFin, but the auditor had not qualified its opinion, FREP/BaFin will refer the case and the auditor to the Auditor Oversight Body. In 2016 it was made clear that the AOB can provide information to FREP or to BaFin about any infringements encountered by it when examining auditors under its control. According to FREP, up to 31 July 2020, FREP received [REDACTED] indications from the AOB.

### **Process for selection of financial reports for examination**

111. The process for the selection of issuers for examination is generally wholly done by FREP as, within the two-tier system, BaFin only has the power to request, on its own initiative, an examination

report (request-based examination). For example, the prudential supervision department within BaFin may report findings where there may be potential accounting infringements to the EFI team who subsequently may instruct FREP to carry out a review. Other times, it may be market abuse colleagues who raise issues to the EFI team. These types of referral happen about four-five times per year and are subject to the legal requirement that BaFin has specific indication of material infringements of accounting requirements.

112. BaFin can also identify companies that it regards as risky and request that they be included by FREP in the abstract risk-based pool for assessment by FREP. Such request would usually occur during the regular meetings with FREP.
113. Before FREP initiates an examination, it will communicate the individual selection to BaFin. BaFin may request that certain issuers are not examined for specific reasons e.g. BaFin is undertaking its own examination of that entity and this examination has the same scope as the examination that would be carried out by FREP (only applies to banks, insurance companies and investment companies) or where a “special auditor” was appointed by the Court to examine the financial statements of an issuer (e.g. the shareholders requested under German law an independent auditor to undertake such examination).
114. FREP has a written selection procedure which is publicly available (see [http://www.frep.info/pruefverfahren/verfahrensregelungen\\_en.php](http://www.frep.info/pruefverfahren/verfahrensregelungen_en.php)).
115. The model for sampling selected by FREP takes into consideration in particular the dual approach of a risk-based “with-cause” selection and a random sampling as well as the principle that all companies should be reviewed within a defined period (aiming for full-coverage rotation). The risk-based selection first focuses on the probability of a material error in the financial reporting. The possible impact of the error on the market is taken into account in the stratification of the general population for rotation and random sampling.
116. FREP currently seeks to select approximately 95 issuers per year for examination, planning/expecting to carry out about 80 of those due to the attrition of issuers from the selection (e.g. due to de-listing, insolvency, merger etc.).<sup>9</sup>
117. FREP first identifies its capacity for a given year before making a selection. Then it starts the process of identifying the list of issuers to be examined, starting with the issuers not examined in the previous year and carried over. If a selected issuer is not examined during a year, then that issuer is automatically included in the selection for the following year.
118. The examinations in a year are made up of issuers carried over, then those based on risk, then those randomly selected from two separate pools, and finally a random selection from the whole population.
119. The risk-based selection accounts for 21% of the total examinations selected from 2017 to 2020. This might be higher in years where numerous problems are reported or where there are sufficiently numerous concrete risk factors.
120. The first portion of issuers is identified on the basis of concrete indications of erroneous financial reporting (i.e. qualified audited opinion, concrete issues identified etc.) by a so-called “Pre-Review

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<sup>9</sup> See FREP’s 2019 Activity Report, page 4

Committee”, which acts on input of the “Media Analysis Committee” and other sources of information. In these cases, an “examination with cause or concrete risk” is initiated. These are focused reviews and are the only focused reviews that are carried out by FREP. All these issuers are selected by FREP for examination. Issuers selected on the basis of cause or concrete risk are not de-selected from the general population and will therefore potentially be selected for unlimited scope examination through the other parts of the selection model.

121. FREP next identifies a pool of issuers based on abstract risk conditions, e.g. industry-based risk factors, enforcement priorities. The list of risk factors maintained by FREP for consideration of the abstract risk conditions is as follows:

- a. IPO
- b. Exceptional transactions (business acquisitions and sales, transactions with related parties)
- c. Special facts and circumstances
- d. Economic situation of the company
- e. Loss situations
- f. Change of CFO/CEO/Supervisory Board
- g. Specific industry risks
- h. Pressure due to high expectations
- i. Delayed preparation/publication of the annual financial report
- j. Risks identified in the European Common Enforcement Priorities (ECEP) or FREP’s annual priorities (since May 2015)
- k. Companies that have not been examined for a long time (since December 2016)
- l. Companies that stood out in the last enforcement examination (since December 2016)
- m. Deficient corporate governance (since January 2018)
- n. Slow implementation of new accounting standards (since January 2018)

122. When this pool of issuers is identified, a purely random selection of 40% of this pool is made. An unlimited scope examination is carried out on these selected issuers.

123. As most of the abstract risk assessment is made through the review of media (e.g. German newspapers, ad hoc releases, Google alerts), FREP reported a limitation on the information gathered on these risk factors, i.e. it is more likely that information on risks will be more visible on larger companies than on smaller issuers. But FREP was confident that, through various information sources, they would identify all the necessary information.

124. The random-sampling amounts to 79% of the total examinations selected from 2017 to 2020.

125. FREP makes a stratification of the sample selection considering the impact of a material error in financial reporting to market confidence and investor protection.

126. Random sampling is taken separately from two categories, or “strata” of companies. The remaining population of issuers (having taken out those carried forward and those selected from the risk-based pool) is in fact divided into two strata. The first is made up of those issuers who comprise the three stock indices in Germany: DAX, MDAX and SDAX. This pool comprises around 146 members of the index, excluding those that have been already selected in previous years within the rotation period. The second stratum is made up of all other issuers. The rotation system in place (not the risk-based approach) ensures that issuers with high potential impact of an



infringement on the financial markets are examined within four to five years as these belong to stratum 1 of the rotation.

127. It is relevant to note in these regards that FREP has revised its principles for unlimited scope examinations since November 2018 following the reform of the stock indexes of Deutsche Börse AG, which became effective on 24 September 2018. FREP's selection principles were in fact amended to remove the TecDAX from the list of index companies; as a result, the examination cycle of four to five years became only applicable to the DAX, MDAX, and SDAX indexes. Firstly, the change was designed to reflect the fact that the relatively short sampling interval was inappropriate for TecDAX companies that are no longer included in the SDAX due to their low significance to the capital markets. Secondly, it was intended to prevent the potential misunderstanding that TecDAX companies also included in one of the DAX, MDAX, or SDAX indexes (normally the case) are twice more likely to be selected. The number of index companies remained unchanged with 160 issuers, of which only 146 form part of FREP's population as of 10 January 2020. Fourteen index companies are not in the population due to the application of the home country principle.
128. Issuers are selected so that those in the first stratum are examined by rotation every four to five years. Issuers in the second stratum (which are all other issuers) are examined by rotation every eight to ten years. So, a random selection is made of approximately one fifth of the issuers in the first stratum, and approximately one tenth of the issuers in the second stratum. The examination order of the rotation cycle is not renewed automatically, e.g. companies under stratum 1, which are examined in year one of the rotation cycle, will not automatically be examined in year six.
129. The final stage of selection is a purely random selection from all issuers (not yet selected). Ten issuers are selected randomly. From those ten, three issuers are added to the yearly planned examinations. The three are selected based on FREP staff's judgement. So, for example, if any of the ten issuers had been included in the pool of issuers identified by risk factors, then FREP staff would put that issuer into the selection for examination. FREP specifically added this final element to ensure that there is no comfort given to any issuers that they would not be selected in any given year.
130. FREP looks at the make-up of the market indices each year to try and capture changes to the indices, and to identify any companies falling out of consideration (but these issuers will be identified for the risk-pool).
131. In a stratified sample selection, all companies within a stratum have the same probability of being examined. This should ensure that all companies are subject to examination within a specific timeframe. As such, each selected company will be removed from the stratum until when all companies in that stratum have been subject to examination. If new risk factors are identified with respect to a selected company, that company is returned to the sampling population. So, the first stratum of companies totals approximately 130 in year two, 100 in year three, etc.
132. If asked by BaFin to do an examination, FREP will carry out that examination in addition to the issuers already selected. This may occur for example due to complaints received by BaFin.
133. Both FREP's indication-based examinations and BaFin-requested examinations take precedence over the unlimited scope examinations. This means that, should there be more indication-based or request-based examinations than expected, FREP would carry out less of the planned unlimited scope examinations and postpone them to following years. Doing this may also mean that,



depending on the time of initiation of the examination and given that FREP always selects the most recent financial statements, the scope would rather be on subsequent financial statements than the ones the issuer was originally selected for.

134. FREP has a committee (Sample Selection Committee) that reviews, at least annually, whether modifications to the principles for a random-sample examination are necessary or appropriate. Changes to the examination principles will be agreed with the Federal Ministries of Justice and Consumer Protection and Finance. Risk identification is performed by the Media Analysis Committee that brings its findings to the Sample Selection Committee.
135. The annual selection is considered confidential and is not made public. It is not possible to change the selection once it is made. However, additional issuers can be chosen for a focused examination performed whenever necessary if specific indications of a potential error are identified.
136. Random-sampling selection made each year is not specific to a particular financial statement period. Since FREP only examines the last approved consolidated financial statements, for example a selection in 2020 may lead to an unlimited scope examination of the 2019 financial statements, if the 2019 financial statements are the last approved set of financial statements available. Likewise, if an issuer publishes 2021 financial statements before the 2020 examination has been initiated, then the 2021 financial statement will be examined. The issuer will still be examined even if the subsequent financial statements have been issued; only the financial statement year may vary. Nevertheless, the majority of the examinations selected in a particular year N will lead to examinations of the accounts of year N-1 in that same year N. A selected issuer will not be examined only if the issuer merges, delists from the regulated market or no longer is subject to EFI in Germany.

## **4.2 Description of the Wirecard case**

137. The following section contains a summary of the information available to provide readers with background information regarding the Wirecard case. Please note that all information presented below is based on publicly available documents from Wirecard and information received by the PRC from BaFin and/or FREP.

### **4.2.1 Wirecard's business model according to the company's representations**

138. Wirecard described itself as a global technology group that supported its customers and partners in accepting electronic payments from all sales channels and in issuing payment instruments. Its business model was to enable transactions to be completed between customers and retailers by means of secure payment processes.

139. Wirecard provided both issuing and acquiring services. An issuer is a financial institution which issues payment cards (credit, debit and prepaid cards) as a member bank of the card organisations and receives transactions from its cardholders from other member banks or merchants. An acquirer is a financial institution which concludes an agreement with merchants for the acceptance of credit cards as a means of payment for goods and services, and which settles card payments for merchants. Wirecard issued its own payment instruments (cards or mobile payments solutions), but also processed transactions via card networks and distributed money to the merchants' accounts. Wirecard combined all these services in an integrated payment solution.

140. Normally an acquirer enters into a card acceptance agreement with a merchant and processes credit card payments for the merchant on that basis. The acquiring bank has contractual relations with one or more card network organisations (such as VISA or MasterCard). Payment Service Providers (PSP), such as the Wirecard Group entities, establish and direct the (technical) links necessary for the settlement of card payments between a merchant and other settlement partners, in particular with acquirers, and transfer payments from acquiring banks to merchants when relevant.

141. Wirecard described its business model via the following figure:

Figure 2: Wirecard's business model (source: Wirecard AG 2018 Annual Financial Report)



142. The Group reported on its performance in three segments:

- a. Payment Processing & Risk Management, which included products and services that were involved with acceptance or transactions, and the processing of electronic payments and associated processes;
- b. Acquiring & Issuing, which included settlement services for credit card sales for online and terminal payments, and activities linked to the processing of payment transactions via the accounts kept by Wirecard Bank;
- c. Call Centre & Communication Services, which included call centre activities.

## 4.2.2 Wirecard's third-party acquiring business

143. Only licensed financial service companies are permitted to offer issuing or acquiring services and to carry out the associated transfers of funds. Wirecard Bank, in which Wirecard holds 100% of the

shares, was active primarily in the acquiring business in Germany and is licensed in Europe by Visa and Mastercard to act as a so-called “acquirer”. However, according to Wirecard, neither Wirecard Bank AG nor any other company in the Wirecard group in other countries outside the EU had the necessary own licence to operate the acquiring business, which therefore relied on a number of partners based in third countries, called ‘acquiring partners’ or ‘TPA partners’.

144. According to the FT reporting in 2019, Wirecard’s largest three TPA partners in 2018 were:

- a. Al Alam Solution Provider FZ LLC, Dubai;
- b. Senjo Payment Asia Pte Ltd, Singapore;
- c. PayEasy Solution Inc., Paysay, Philippines.

145. The Wirecard subsidiaries which, according to the FT allegations, funnelled TPA revenues to Wirecard were the following:

- a. Cardsystems Middle East FZ LLC, Dubai, United Arab Emirates;
- b. Wirecard UK & Ireland Ltd., Dublin, Ireland;
- c. Wirecard Technologies GmbH, Aschheim, Germany.

146. According to the information contained in the KPMG Report<sup>10</sup>, there was no direct contractual relation between Wirecard and its ultimate clients, even if the latter were regarded as customers in Wirecard’s accounts. Some of the underlying clients were grouped into “aggregator merchants” or “payment facilitators”, which were responsible for groups of merchants. In such cases, the ultimate clients only had direct contractual relationships with the aggregator merchants.

147. Wirecard considered itself the principal for all such service obligations because it reportedly had control over the transactions and was ultimately responsible for the fulfilment of the contract. Therefore, in the consolidated profit or loss, all transaction fees paid by the merchants to the TPA partners were recognised as Wirecard’s revenue. The share of the transaction fee attributable to TPA partners was recorded as cost of material.

148. The KPMG Report indicates that the Wirecard subsidiaries undertook to indemnify the TPA partners for any financial loss incurred as a result of transactions carried out for the intermediated customers. Such guarantees were intended to cover any damages incurred by the TPA partners from rescinding payment transactions as well as any penalties possibly imposed by card network organisations. These liabilities were secured either by withholding payments from the TPA partners to the subsidiaries, or through payments of cash collateral to escrow accounts managed by trustees (the “fiduciary account”).

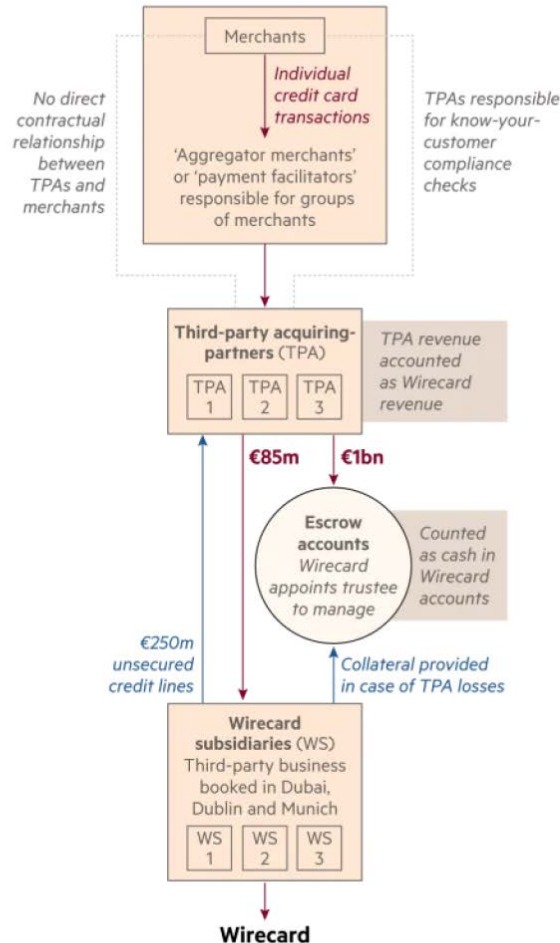
149. KPMG could verify that two TPAs made total payments of €85m into bank accounts held at Wirecard Bank for Wirecard Technologies and Cardsystem Middle East. However, as part of the preparation of the financial statements, Wirecard should also have had access to the bank statements from the trustees to verify the €1bn final balance of the account. In the context of the KPMG investigation, Wirecard was unable to show such bank statements from the trustees. KPMG also reported that funds moved in the opposite direction in the form of unsecured credits lines of €250m.

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<sup>10</sup> KPMG, Report concerning the independent special investigation Wirecard, Munich, 27 April 2020

150. The graph below, drawn up by the FT, summarises Wirecard’s third party structure as described by the KPMG Report.

Figure 3. A graphic representation of Wirecard’s third-party structure (source FT 5 May 2020)



Source: KPMG  
© FT

### 4.2.3. Wirecard in figures since 2010

151. This section presents Wirecard’s key figures as represented in the company’s accounts since 2010. Please note that figures relating to 2017 were adjusted by Wirecard retrospectively in 2018. The figure reported below for 2017 corresponds to the adjusted figure reported in the 2018 accounts.

152. In addition, please note that prior to 2015 (with comparatives for 2014 as reported below), the company did not provide a split between “trade and other receivables” and the “receivables of the acquiring business” nor between “trade payables” and “payables of the acquiring business”.

Year end	2010	2011	2012	2013	2014	2015	2016	2017	2018
Revenue (m €)	272	325	395	482	601	771	1,028	1,489	2,016
EBITDA (m €)	73	84	109	126	173	227	307	410	561
EBIT (m €)	67	76	94	98.5	133	173	235	312	438
Net profit after tax (m €)	54	61	73	83	108	143	267	256	347
Total Assets (m €)	550	707	1,127	1,430	1,995	2,935	3,482	4,533	5,855
Trade and other receivables	119	182	215	279	70.7	113	190	275	357
Receivables of the acquiring business					284	334	402	442	685
Trade payables	98	135	187	259	15.5	25.9	23.3	66.1	63.4
Liabilities of the acquiring business					283	334	405	423	652
Cash & cash equivalents	185	213	358	479	695	1,063	1,333	1,901	2,720
EPS (undiluted)	0.53	0.6	0.67	0.74	0.89	1.16	2.16	2.07	2.81
Employees (average)	500	498	674	1,025	1,750	2,300	3,766	4,449	5,154

#### 4.2.4 Timeline of key events and supervisory actions

153. This section presents a summary of the key events and supervisory actions which are relevant to an understanding of the issues discussed in the rest of this Report in the period covered by the FTPR mandate.

154. It is relevant to note that such list of elements, including the press articles, is not exhaustive but represent just a selection of the key ones according to the PRC. A more detailed timeline is also available in Annex 3. It is worth noting that in the timeline, and throughout the report, (1) “half year financial report” refers to half-year financial report as defined by Article 5 of the TD, including the condensed set of financial statements and the interim management report, and that (2) “annual financial report” refers to annual financial report as defined by Article 4 of the TD, including the audited financial statements and the management report.

- December 2014** FREP selects Wirecard's 2014 annual financial report for examination on the basis of rotation.
- April 2015** The FT begins its House of Wirecard series<sup>11</sup> on the FT Alphaville blog raising a number of questions about the company's accounting.
- October 2015** Wirecard announces the takeover of Indian payments businesses in a €340m deal. The following month, an FT Alphaville blog article<sup>12</sup> questions the true worth of this acquisition in light of discrepancies with the latest available Indian corporate filings.
- February 2016** Zatarra Research and Investigations releases a report containing allegations of potential infringements ranging from corruption, fraud and money laundering to Wirecard's involvement in illegal gambling.
- On 25 February the FT publishes an article on the Zatarra reports' allegations against Wirecard<sup>13</sup>.
- March 2016** BaFin launches an investigation against market participants suspected of market manipulation using short positions in connection with the Zatarra report.
- May 2016** Following the publication of an article in Der Spiegel<sup>14</sup>, BaFin sends this article to FREP so that it can take the allegations from the Zatarra report into consideration in its ongoing examination of Wirecard.
- September 2016** FREP receives allegations against Wirecard from a whistle-blower mainly with respect to the receivables and payables related to the acquiring business. The whistle-blower also refers to the 2015 articles of the House of Wirecard series and provided a link to these.
- December 2016** FREP concludes its examination of Wirecard 2014 annual financial report. FREP concludes there are no indications that the accounting is incorrect.
- February 2017** Manager Magazin<sup>15</sup> publishes allegations against Wirecard for doubtful accounting practices and lack of transparency in the financial statements, also making reference to the FT articles and the Zatarra report.
- One day after its publication, Bafin informs FREP of the article in Manager Magazin and asks whether the content of the article would impact FREP's assessment of the examination it just closed.
- March 2017** FREP informs BaFin that all information at its disposal with regards to Wirecard 2014 annual financial report, including the series of articles published by the FT also

<sup>11</sup> FT Alphaville, House of Wirecard series <https://ftalphaville.ft.com/series/House%20of%20Wirecard>

<sup>12</sup> FT Alphaville, *Rupee do what is Wirecard buying*, 12 November 2015 <https://ftalphaville.ft.com/2015/11/12/2144182/rupee-do-what-is-wirecard-buying/>

<sup>13</sup> FT, *Shares in fintech darling plunge on critical report*, 25 February 2016 <https://ftalphaville.ft.com/2016/02/25/2155726/shares-in-fintech-darling-plunge-on-critical-report/>

<sup>14</sup> Der Spiegel, *Wette auf den Absturz*, 30 April 2014 <https://www.spiegel.de/spiegel/print/d-144545911.html>

<sup>15</sup> Manager Magazin, *Das 250-Millionen-Euro-Rätsel des Börsenwunders Wirecard*, 23 February 2017 <https://www.manager-magazin.de/digitales/it/wirecard-das-250-millionen-euro-raetsel-des-zahlungsdienstleisters-a-1135587.html>

referred to in the article in Manager Magazin, had been taken into consideration in its deliberation regarding Wirecard's 2014 financial report, and that there were no indications that the accounting was incorrect.

**September 2018** Wirecard enters the DAX index.

**30 January 2019** The FT publishes an article including new allegations against Wirecard<sup>16</sup> raising concerns about fictitious and backdated contracts in Singapore and “round-trip transactions” involving external companies. The FT also reports that the Singapore-based law firm Rajah & Tann is running an investigation on fictitious contracts within Asian subsidiaries of Wirecard.

Two further FT articles are published on 1 February<sup>17</sup> and 7 February.<sup>18</sup>

**1 February 2019** BaFin launches an investigation regarding market manipulation through a short attack against Wirecard in connection with the FT reports.

**11 February 2019** Wirecard's 2018 annual financial report is selected by FREP for examination (selection based on risk) for an unlimited scope examination intended to address the allegations raised.

**15 February 2019** BaFin requests from FREP a focused examination of the 2018 half year financial report. This is due to accusations raised in the FT in January and February in connection with subsidiaries of Wirecard AG in Singapore, among others. This examination (request-based examination) takes precedence over that already planned by FREP on the 2018 annual financial report.

**18 February 2019** BaFin issues a short-selling ban of Wirecard's shares for two months. A notification is sent to ESMA. ESMA issues a positive opinion on the ban.

**26 March 2019** Wirecard issues an ad hoc notification announcing that Singapore-based Rajah & Tann has completed an investigation commissioned by Wirecard itself into allegations against Wirecard's subsidiaries in Asia. The accounting errors identified by the investigation will be incorporated into Wirecard's annual financial report (€1.5m impact on the turnover for 2017, in light of a Group turnover of €1.5bn).

**29 March 2019** The FT publishes new allegations<sup>19</sup> against Wirecard with regards to TPAs questioning the existence and volume of TPA revenues and clients.

**10 April 2019** BaFin files a criminal complaint with the Public Prosecutor's Office in Munich against market participants and two ■■■■ journalists on suspicion of market manipulation in connection with reports on Wirecard.

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<sup>16</sup> FT, *Executive at Wirecard suspected of using forged contracts*, 30 January 2019 <https://www.ft.com/content/03a5e318-2479-11e9-8ce6-5db4543da632>

<sup>17</sup> FT, *Wirecard's law firm found evidence of forgery and false accounts*, 1 February 2019 <https://www.ft.com/content/79f23db0-260d-11e9-8ce6-5db4543da632>

<sup>18</sup> FT, *Wirecard: inside an accounting scandal*, 7 February 2019 <https://www.ft.com/content/d51a012e-1d6f-11e9-b126-46fc3ad87c65>

<sup>19</sup> FT, *Wirecard's problem partners*, 29 March 2019 <https://www.ft.com/content/cd12395e-4fb7-11e9-b401-8d9ef1626294>



- 24 April 2019** The FT published further articles<sup>20</sup> raising questions about the amount and existence of revenues in the TPA business. Internal Wirecard documents reportedly show that the three TPA partners contributed 95% of EBITDA and over half of revenues for 2016.
- 25 April 2019** Wirecard publishes its 2018 consolidated annual financial report, including the unqualified audit opinion of EY, the company's auditor.
- 15 October 2019** The FT makes further allegations concerning Wirecard's TPA business in Dubai and Ireland,<sup>21</sup> accused of reporting inflated sales and profits.
- BaFin requests that FREP takes these allegations into consideration as part of its ongoing examination.
- Two weeks later, FREP agrees that these allegations will be taken into account in the ongoing examinations of Wirecard's 2018 half year financial report.
- 21 October 2019** Wirecard's Supervisory Board and MB appoint KPMG to conduct a special forensic investigation to look into the allegations concerning accounting fraud.
- A few days later, FREP decides to wait for the results of the forensic audit by KPMG to finalise its examination.
- 30 October 2019** FREP, in coordination with BaFin, decides to extend the scope of the focused examinations to include new indications of erroneous accounting, stemming from the FT reporting on Wirecard's TPA business.
- 17 December 2019** FREP requests from Wirecard the KPMG engagement letter. Wirecard provides it on 21 January 2020.
- 12 March 2020** Wirecard published an ad hoc release stating that KPMG has largely completed its special investigation and has so far not found any indications of financial statement manipulation to date as the independent analysis is still ongoing.
- 28 April 2020** The KPMG report is published on Wirecard's website. FREP receives the public report from Wirecard and informs BaFin that it will assess its findings in the context of its examination.
- Wirecard publishes an ad hoc release stating that the 2019 annual financial report is not going to be published by the due date on 30 April 2020. The CEO states that this is due to the Coronavirus pandemic. Wirecard also asserts that KPMG did not find incriminating evidence for the public allegations of balance sheet forgery.

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<sup>20</sup> FT, *Wirecard relied on three opaque partners for almost all its profit*, 24 April 2019 <https://www.ft.com/content/a7b43142-6675-11e9-9adc-98bf1d35a056>

<sup>21</sup> FT, *Wirecard's suspect accounting practices revealed*, 15 October 2019 <https://www.ft.com/content/19c6be2a-ee67-11e9-bfa4-b25f11f42901>



- 29 April 2020** BaFin launches a market manipulation probe against Wirecard's communication to investors saying that KPMG had found nothing substantial.
- 30 April 2020** BaFin requests from FREP a focused examination of the 2018 annual financial report.
- 7 May 2020** Following BaFin's request to FREP to provide a progress report on the enforcement examination regarding the 2018 half year financial report, BaFin concludes that there are no substantial doubts about the examination procedure conducted by FREP.
- 14 May 2020** FREP provides an update to BaFin on the status of the Wirecard examination. BaFin maintains that there are no substantial doubts about the conduct of the examination by FREP.
- 2 June 2020** BaFin files a criminal complaint against Wirecard with the Public Prosecutor's Office in Munich due to market manipulation as a result of misleading ad hoc notifications on the interim results of KPMG's special audit. Wirecard's offices are searched three days later by Munich's public prosecutor.
- 3 June 2020** BaFin launches a market abuse investigation relating to transactions involving Wirecard's shares made by the CEO of Wirecard (suspicion of insider trading).
- 16 June 2020** EY informs Wirecard that, in the context of the 2019 audit of the consolidated accounts, according to the banks allegedly holding the accounts, Wirecard had submitted forged confirmations of holdings on trust amounting to €1.9bn.
- 18 June 2020** Wirecard issues an ad hoc notification, stating that the dates for the publication of the annual consolidated financial statements for 2019 have been postponed due to "indications of presentation of spurious balances".
- 22 June 2020** Wirecard issues an ad hoc notification stating that, upon further review, Wirecard's MB assumes that there is a prevailing likelihood that the bank balances on fiduciary accounts totalling €1.9bn previously reported by Wirecard do not exist and that it is possible that the way in which the TPA business has been described up to this point is inaccurate.
- BaFin asks FREP to take this new information into account in its ongoing examination.
- BaFin places Wirecard Bank under special observation and requests assistance of foreign supervisory authorities.
- 23 June 2020** Wirecard's ██████████ is arrested.
- 24 June 2020** FREP selects Wirecard's 2019 half year financial report for examination.
- On the same day, BaFin requests that FREP initiate a focused examination of the 2019 half year financial report.

- 25 June 2020** Wirecard files for insolvency.
- BaFin requests that FREP initiate a focused examination of the 2017 annual financial report.
- 26 June 2020** FREP informs Wirecard of its preliminary findings of error in the 2018 half year financial report.
- FREP sends to Wirecard the request to participate to the examinations of the 2019 half year financial report and 2017 annual financial report.
- 29 June 2020** FREP and BaFin receive from Wirecard the information that the reliability of the information previously provided to FREP is 'in doubt', in particular as regards the third-party transactions, and that it cannot indicate which of the 'information provided is still sufficiently reliable'.
- 6 July 2020** FREP finalises the results of the examination of the 2018 half year financial report and of the 2018 annual financial report, which are found to be erroneous.
- 15 July 2020** Wirecard informs FREP that due to the current circumstances, it is unable to make any observations on the result of the examination. FREP considered this as a non-acceptance by Wirecard of the results of examinations.
- 20 July 2020** FREP informs BaFin that Wirecard does not agree with the error findings for the 2018 half year financial report and the 2018 annual financial report and refuses to participate in the examination of the 2017 annual financial report and the 2019 half year financial report.
- FREP ceases its examinations and sends the corresponding notification to BaFin.
- FREP notifies the AOB of possible violations of professional requirements by group auditors.
- 24 July 2020** BaFin starts an examination of the 2018 half year financial report, the 2018 annual financial report, the 2019 half year financial report and the 2017 annual financial report at Tier 2 level.

#### **4.2.5 Main allegations against Wirecard**

155. This section aims at presenting the main allegations against Wirecard between 2014 and 2019. These are described in order of decreasing importance in the context of the Group's demise and are the following:

- a. TPA partners revenues & assets and liabilities in the acquiring business
- b. Acquisition of Indian businesses & round-tripping of payments
- c. Singapore's fictitious contracts & round-tripping of payments
- d. Money laundering and poor Know-your-customer (KYC) procedures

## TPA partners revenue & assets and liabilities in the acquiring business

156. The first doubts on the way Wirecard accounted for its TPA partners were raised in a series of blog articles in the FT Alphaville House of Wirecard series in 2015.<sup>22</sup> Such allegations were also brought to FREP's attention by a whistle-blower, who in 2016 expressed concerns with Wirecard's accounting with respect to the receivables and payables related to Wirecard's acquiring business. These allegations regarded the way in which the acquiring receivables and the acquiring payables were accounted for at subsidiary level, since they appeared to be approximately equal at Group levels. This seemed particularly problematic with regards to subsidiaries based in jurisdictions where Wirecard did not have a licence and used acquiring parties (e.g. Dubai, Ireland). Allegedly, inconsistencies arose from the fact that no such balance seemed to exist at subsidiary level and therefore the corresponding liabilities were missing.
157. Three articles published in the FT newspaper (dated 29 March 2019<sup>23</sup>, 24 April 2019<sup>24</sup> and 20 May 2019<sup>25</sup>) denounced that half of the worldwide revenues and almost all of the reported profits of Wirecard came from three opaque partner companies, which in 2016 contributed to 95% of the EBITDA and over half of revenues of the Wirecard group. Much of these profits were booked through Wirecard's largest business (CardSystems Middle East, Dubai), but no disclosures on the importance of these partners or on the nature / structure of the business were provided in the company accounts. The FT claimed that the books of these partners had not been subject to an audit for years, pointing to very low levels of oversight from Wirecard.
158. The FT furthermore reported that the substantial business recorded for CardSystems in Wirecard's books was not matched by flows of cash and that substantial sales and profits were fake. Such suspicions arose from whistle-blowers, from internal correspondence within Wirecard's internal financial reports the FT gained access to, and from the FT's own investigations, including visits paid to the TPAs' offices in the Philippines and in Dubai (which revealed that such offices either did not exist or were extremely small in size).
159. In particular, the internal Wirecard financial reports published by the FT in October 2019<sup>26</sup>, indicated that Wirecard routed billions of euros in payments for 34 clients through Al Alam Solutions in 2016 and 2017 but according to the FT's investigation, of the 34 client names listed in the documents, eight had ceased trading at the time business was attributed to them and a further 15 told the FT they had never heard of Al Alam. The FT therefore put into question the authenticity of revenue generated from these customer relations.
160. In addition, in a further article published on 9 December 2019<sup>27</sup>, the FT argued that the €334m associated with Al Alam and held in trustee accounts in 2017, were misclassified by Wirecard as

<sup>22</sup> FT Alphaville, *Wirecard adjust your perspective (part 1)*, 27 April 2015 <https://ftalphaville-ft.com.libezproxy.open.ac.uk/2015/07/23/2131270/wirecard-adjust-your-perspective-part-1/>; *Wirecard adjust your perspective (part 2)*, 27 July 2015 <https://ftalphaville-ft.com/2015/07/23/2134015/wirecard-adjust-your-perspective-part-2/>; *Wirecard – calculating the adjustments*, 27 July 2015 <https://ftalphaville-ft.com/2015/07/27/2135267/wirecard-calculating-the-adjustments/>; *Wirecard a rolling processor gathers no loss*, 17 August 2015 <https://ftalphaville-ft.com/2015/08/17/2137497/wirecard-a-rolling-processor-gathers-no-loss/>

<sup>23</sup> FT, *Wirecard's problem partners*, 29 March 2019 <https://www.ft.com/content/cd12395e-4fb7-11e9-b401-8d9ef1626294>

<sup>24</sup> FT, *Wirecard relied on three opaque partners for almost all its profit*, 24 April 2019 <https://www.ft.com/content/a7b43142-6675-11e9-9adc-98bf1d35a056>

<sup>25</sup> FT, *Wirecard document points to reliance on 3 partners*, 20 May 2019 <https://www.ft.com/content/7d394c4e-77c4-11e9-be7d-6d846537acab>

<sup>26</sup> FT, *Wirecard's suspect accounting practices revealed*, 15 October 2019 <https://www.ft.com/content/19c6be2a-ee67-11e9-bfa4-b25f11f42901>

<sup>27</sup> FT, *Wirecard's singular approach to counting cash*, 9 December 2019 <https://www.ft.com/content/845b0dce-1836-11ea-9ee4-11f260415385>

cash and cash equivalents and operating cash flow in an attempt to boost Wirecard's cash reserve and offer reassurance to investors. In addition, the FT questioned whether it was appropriate for Wirecard to account for the revenues from TPA transactions on a gross basis.

### **Acquisition of Indian businesses and “round-tripping” of payments**

161. In 2015 the FT reported in its FT Alphaville blog that Wirecard had agreed to pay €330m for a collection of Indian payment businesses (out of which Hermes I Tickets private limited, hereafter Hermes, was the key company), although only one year earlier the key assets were valued at just €46m<sup>28</sup>. Furthermore, accounts for Hermes showed qualified audit opinions due to concerns about revenue recognition and an inability to verify key financial totals. The FT therefore questioned how to reconcile the price paid for the assets to the outflow of cash. The huge jump in the value of the businesses raised doubts about the value and nature of the businesses acquired by Wirecard.
162. In January 2018, the FT further reported in the House of Wirecard series that a Mauritius fund (called Emerging Markets Investment Fund 1A, or EMIF1A) had acted as intermediary in this transaction. EMIF1A had bundled Hermes (for which it had paid \$37m only six weeks before the transaction with Wirecard) together with an unrelated chain of currency exchange kiosks in Bangalore called Star Global (whose value was not known, but was unlikely to be high given that its operations were lossmaking) . EMIF1A then sold the package on to Wirecard for \$326m. The FT also claimed that EMIF1A's ultimate beneficial ownership was opaque. An article on this issue is also published by the FT on 19 December 2019<sup>29</sup>.
163. The suspicion raised by the FT on Wirecard was that of “round-tripping of payments”, meaning that Wirecard had routed company money to a third party (EMIF1A) who then used it to buy goods and services from the sender in a pretence of real commerce to give auditors and investors the impression of healthy cash flow.

### **Singapore's fictitious contracts & round-tripping of payments**

164. In late January and early February 2019, the FT reported through three articles in the press (dated 30 January<sup>30</sup>, 1 February<sup>31</sup> and 7 February<sup>32</sup>) that a senior Wirecard executive in the Singapore subsidiary was suspected of using forged and backdated contracts. Revelations stemmed from a number of documents of which the FT had become aware through a whistle-blower, including a preliminary report by the renowned Singaporean law firm Rajah & Tann which indicated that “serious offences of forgery and/or of falsification of accounts/documents under Singapore's Penal Code had been carried out”. The lawyers – the FT reported – uncovered evidence that backdated invoices had been falsified in order to support agreements for millions of euros.
165. In addition, the FT reported that \$37m appeared to have been moved in and out of Wirecard subsidiaries and external business across seven sets of complex transactions, flagged as

<sup>28</sup> FT Alphaville blog, *Rupee Do what is Wirecard buying*, 12 November 2015

<https://ftalphaville.ft.com/2015/11/12/2144182/rupee-do-what-is-wirecard-buying/>

<sup>29</sup> FT, *Middleman's profits draw India deal into Wirecard scandal*, 19 December 2019 <https://www.ft.com/content/b3672388-200a-11ea-b8a1-584213ee7b2b>

<sup>30</sup> FT, *Executive at Wirecard suspected of using forged contracts*, 30 January 2019 <https://www.ft.com/content/03a5e318-2479-11e9-8ce6-5db4543da632>

<sup>31</sup> FT, *Wirecard's law firm found evidence of forgery and false accounts*, 1 February 2019 <https://www.ft.com/content/79f23db0-260d-11e9-8ce6-5db4543da632>

<sup>32</sup> FT, *Wirecard: inside an accounting scandal*, 7 February 2019 <https://www.ft.com/content/d51a012e-1d6f-11e9-b126-46fc3ad87c65>

suspicious. The FT alleged that money seemed to have been routed from Wirecard businesses in Hong Kong and Singapore to business Wirecard owned in India via external companies – a fraudulent accounting technique known as “round-tripping”, designed to look as legitimate business transactions to local auditors.

### **Money laundering and poor KYC procedures**

166. In early 2016, Zatarra Research and Investigations, a firm of investment professionals with no prior history of publishing research, raised a series of allegations against Wirecard giving rise to suspicion of money laundering based on information relating mainly to years from 2006 to 2010. The Report accused Wirecard of wide scale corruption and corporate fraud. In particular, it claimed that Wirecard Senior Officers and Board Members committed money laundering and facilitated the evasion of US restrictions on internet gambling. In addition, it accused Wirecard’s Asia Pacific business of undertaking deliberate schemes to defraud Visa and Mastercard, by circumventing the requirements of the Visa and MasterCard network to perform “Know Your Client” (KYC) due diligence. Finally, it denounced the fact that Wirecard had consistently acquired businesses for significantly greater than apparent value, by purchasing from former employees and other questionable individuals involved in fraud, allegations of fraud, and ties to money laundering.
167. Allegations of poor anti-money laundering procedures at Wirecard also surfaced in following years. On 7 June 2019 the FT reported that a longstanding client of Wirecard had settled US charges that it had defrauded clients of more than \$110m from scam, pyramid schemes and unlawful debt collection operations.<sup>33</sup>

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<sup>33</sup> FT, *Wirecard client settled US charges of helping fraudsters*, 7 June 2019 <https://www.ft.com/content/71ed1086-887d-11e9-a028-86cea8523dc2>

## 5 – Peer Review Assessment

### 5.1 Guideline 2 – Resources

#### Background – Supervisory expectations

168. In accordance with the mandate of the FTPR on GLEFI in the context of Wirecard, the PRC analysed the application by BaFin and FREP of Guideline 2 related to resources, in particular (i) the sufficiency of human resources of BaFin and FREP allocated to the examinations of Wirecard as well as (ii) the adequacy of their professional experience and background.

169. It is expected that, in the specific context of Wirecard, the manpower:

- a. is professionally skilled, experienced with the relevant financial reporting frameworks;
- b. is sufficient taking into account the complexity of the financial information concerned and the issues at stake and ability of those who prepare the financial information and of the auditors to ensure the relevant financial reporting framework is complied with by the issuers.

#### 5.1.1 Summary of facts

##### FREP

###### *Sufficiency of resources*

170. As of 30 July 2020, FREP's staff dedicated to EFI was of 14.7 Full Time Equivalents (FTE) (13 Panel Members and the two members of the Presidential Board<sup>34</sup>) plus one legal advisor (1 FTE)<sup>35</sup>. In the period under review, there were normally between 13 and 15 Chambers. Each Chamber is in charge of four to six examinations at any point in time. As mentioned in Paragraphs 94 and 95, each Panel Member in addition to the role of Chamber Member is generally involved in six to seven examinations in both roles of Responsible Panel Member and Quality Reviewer and could be involved in an examination in the role of Consulting Panel Member, but this does not occur often (on average less than four per year).

171. FREP's yearly budget amounts to €6.2m approximately. The budget comes from BaFin's collection of fees by German issuers (as detailed below). The budget allocated to undertake special examinations was €700,000 in 2015 and 2016 and was reduced to €400,000 as of 2018. FREP explained the decrease was due to the combination of (i) that budget having never been fully used

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<sup>34</sup> FREP's President and Vice-President

<sup>35</sup> One Full Time Equivalent (FTE) is equivalent to one employee working full-time per week in accordance with each organisation's contractual obligations (e.g. anywhere between 35 to 40 hours per week). For example, (based on a 40-hour working hour week) three employees working respectively 50 hours, 40 hours and 10 hours amount to 100 hours per week. The FTE is 2.5 (100/40).

and (ii) the fact that, whilst the overall budget was not increased over the years, FREP's costs increased and the special examinations part of the budget was used as the adjusting variable. This has so far enabled FREP to never go over the budget it obtained from BaFin. Any surplus is paid back to BaFin.

*Professional skills and experience*

172. FREP staff have different professional backgrounds (i.e. former auditors, CFOs, academics, preparers) and this, according to FREP, allows them to analyse accounting issues encountered from different perspectives and thus enables them to discuss issues with issuers more openly and to understand their points of view.

173. FREP reported the following average years of experience for its EFI staff since the last Peer Review, showing a good level of seniority:

	Panel Members and Presidential board	Average years of experience
<b>30 September 2016</b>	16	23
<b>31 December 2017</b>	17	22
<b>31 December 2018</b>	17	23
<b>31 December 2019</b>	16	24
<b>31 July 2020</b>	15	26

174. All staff of FREP hold third-level qualifications, with 13 (see table hereafter) of the EFI staff holding relevant professional qualifications as an accountant or auditor for the past four years. The others have extensive accounting backgrounds, e.g. being former chiefs of group accounting in listed index companies or holding a PhD in accountancy with numerous publications in IFRS issues.

	Panel Members, Presidential Board and Managing Director	Professional qualifications as an accountant or auditor
<b>30 September 2016</b>	17	13
<b>31 December 2017</b>	18	13
<b>31 December 2018</b>	18	13
<b>31 December 2019</b>	17	13
<b>31 July 2020</b>	16	13

175. FREP reported the average hours of training per each Panel Member and of IFRS training in particular as set in the table hereafter. The majority of the IFRS courses are updates, both general as well as focused primarily on banks.

	Average hours of training	Of which IFRS training
<b>2015</b>	36	22
<b>2016</b>	43	31
<b>2017</b>	35	28
<b>2018</b>	37	33
<b>2019</b>	41	33
<b>31 July 2020</b>	14	12
<b>Planned 2020</b>	19	17

176. FREP indicated that three Panel Members attended over the last years a two-day fraud awareness raising training course, of which two were on the examination team of the 2014 and half-year 2018 financial report examinations of Wirecard.

177. In the context of the Wirecard unlimited-scope examination of the full year 2014 financial report, which was initiated in 2015, the examination team consisted of a [REDACTED] Panel Member and a [REDACTED] Panel Member over the whole duration of the examination. The [REDACTED]  
[REDACTED] The [REDACTED] Panel Member had more than [REDACTED] years of experience. All examination team members were experienced in financial institutions. On average, FREP stated the number of years of experience of the team examining the 2014 financial report was around 26.5 years and the tenure at FREP was 6.5 years. FREP considered all had sufficient training.

178. As regards the BaFin-requested examination of 2018 half year financial report initiated in February 2019, the initial team included, in accordance with the Code of Procedures [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] No [REDACTED] Panel Member was added until a year after, in June 2020.

179. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] On average, FREP stated that the number of years of experience of the team examining the 2018 half year financial report was around 24 years and the tenure at FREP was 6.5 years. FREP considered that all had sufficient training.

180. According to FREP, the decision to not appoint a [REDACTED] Panel Member before June 2020 was based on the assessment that the team was appropriately calibrated at the time and throughout the examination; additionally, forensic-type examinations by external firms engaged by Wirecard were both finalised and ongoing.



181. No external compliance manager was appointed either in the 2014 nor in the 2018 examination.

## **BaFin**

### *Sufficiency of resources*

182. BaFin and FREP's EFI teams are funded through an annual fee charged on all companies which are subject to the TD requirements. BaFin collects these fees. The basis for the fee is the domestic volume of stocks traded and varies between €250 and €40,000 per annum. This funding is separate from BaFin's general budget and is provided for under a specific law.

183. For 2020, BaFin's enforcement budget in total amounts to almost €8.7m of collected fees, of which €6.18m are contributed to FREP's budget. Therefore, BaFin's own EFI budget is €2.52m (for the EFI team and the team responsible for transparency requirements of issuers).

184. As regards Wirecard, until July 2020, the examinations were taking place at the level of FREP i.e. at the level of Tier 1. The involvement of BaFin's EFI team during that period was therefore limited compared to that of FREP, although the EFI team was in relation with BaFin's other departments and surveying the issuer through the press – as demonstrated by the articles examined and handed over to FREP and the request to FREP to launch the 2018 half year financial report examination.

### *Professional skills and experience*

185. BaFin's MB members are highly experienced and qualified individuals as can be seen from their CV on BaFin's website.

186. BaFin's EFI team comprises ten FTEs of which nine are senior advisors, four policy advisors and two administrative officers. Of the nine FTEs acting as senior advisor, six perform reviews of financial statements and related enforcement actions. The composition of the team was relatively stable over time. The EFI team is part of the BaFin division responsible for the Financial Reporting Enforcement and several Transparency Requirements of Issuers (TD) which comprises 15 FTE.

187. Of the six FTE in the EFI team performing the review of financial statements and related enforcement actions, three have between five and 15 years of relevant experience (on average 12) and three have more than 15 years' experience (on average 20). All of them hold university degrees or similar level of education, and two hold professional qualifications as an accountant or an auditor. Three are lawyers.

188. Four of the EFI staff are not civil servants but contractual staff on undefined term contracts.

189. BaFin indicated that, in case BaFin gets a complaint or public information from outside or inside BaFin (e.g. the Banking Supervision Directorate within BaFin), usually two members of the EFI staff examine this information to determine whether there is specific indications of material infringements of accounting requirements (four eyes principle). If they conclude that there are specific indications, they request that FREP start an examination of the respective financial statements of the issuer ("examination on request of BaFin" or "BaFin-requested examination").

190. Similarly, BaFin indicated that enforcement cases taken over from FREP are usually assigned to two people, one of them being a lawyer.

191. BaFin reported that each EFI staff member received on average 36 hours of training per year. Of this, approximately 24 hours on average relate to IFRS. In addition, BaFin staff also received on average 12 hours of training on legal issues, in particular on different aspects of securities law.

## 5.1.2 Analysis in relation to supervisory expectations

### Sufficiency of resources

192. The PRC considers that both FREP and BaFin are well staffed and have the appropriate level of resources in normal circumstances. The PRC notes however that there is very limited capacity for either FREP or BaFin to scale up their resources if the need arises (please refer to Section 5.8.1 *Legal and procedural impediments to timely detection of issues and taking of measures* for further discussion on resources in case of fraud).

193. Having in mind FREP and BaFin's respective roles in the two-tier system and the stages of the examinations of Wirecard for the period under review, the PRC considers that sufficient resources were allocated to the Wirecard examinations.

194. However, the PRC noted that as described in Paragraph 95, FREP's Responsible Panel Members may hold several roles at the same time (as Panel Member, as Quality Review Panel Member and as Consulting Panel Member in several Chambers).

195. The PRC considers that in the context of the Wirecard case some delays in the examination were incurred due to other examinations the examination team were also working on at the same time (as communicated by FREP to Wirecard on 3 June 2016, please see Guideline 6 and detailed timeline in Annex 3). Whilst acknowledging that an examination team may legitimately be involved in several examinations at the same time, the PRC recommends that an assessment of which examinations should take precedence over others is made at regular intervals. Beyond the fact that indication- and request-based examinations take precedence over sample-based examinations, it may be that an examination team works on a number of sample-based examinations at the same time and for which the level of priority may be difficult to determine. In this context, if not already in place, the PRC suggests that FREP introduces a prioritisation among examinations taking place at the same time in order to ensure timely completion of the most urgent examinations.

196. Notwithstanding that, the PRC acknowledges that the delay incurred in 2016 due to other concurring examinations most likely did not have a significant impact on FREP's findings and on subsequent developments.

197. As in the 2017 Peer Review, the PRC also notes that the four-year renewable employment contract of Panel Members in FREP is unusual among enforcers. In the context of Wirecard, the PRC highlights that in the examination of the 2018 half year financial report [REDACTED]

[REDACTED] The PRC notes that the involvement of [REDACTED] Panel Member, although in line with FREP's Code of Procedures, may have given rise to some delay in the examination, given that the full onboarding of the changed

examination team is likely to have required some time. In this case too, however, the PRC acknowledges that such inefficiencies are not likely to have had a significant impact on FREP's findings and on subsequent developments.

### **Professional skills and experience**

198. As in the 2017 Peer Review, the PRC considers that FREP and BaFin staff, including the Board and Directors, are highly professionally skilled in the relevant financial reporting frameworks used by issuers, including Wirecard specifically.

199. The average relevant experience in the EFI function was high (26 and 15 years of professional experience on average for FREP and BaFin respectively) and the relevant experience of the examination teams to which the examination of Wirecard 2014 annual financial report and 2018 half year financial report was allocated, was deemed sufficient.

### **5.1.3 Findings – Conclusion**

200. Both BaFin and FREP fully meet expectations with regard to Guideline 2 on resources in the context of the Wirecard case.

201. Whilst this did not have a significant impact in the specific context of Wirecard, similarly to the 2017 Peer Review recommendation, the PRC recommends that FREP review the characteristics of its employment contracts. In addition, the PRC suggests that FREP defines criteria to prioritise examinations which take place at the same time in order to ensure timely completion of the most urgent examinations.

## **5.2 Guideline 3 – Independence**

### **Background – Supervisory expectations**

202. In accordance with the mandate of the FTPR on GLEFI in the context of Wirecard, the PRC analysed the application by BaFin and FREP of Guideline 3 related to independence and conflict of interests

203. It is expected, in the specific context of Wirecard, that:

- a. BaFin and FREP are not unduly influenced by government, when taking decisions as part of the enforcement process, and it would not be possible to change the composition of the Board or other decision making bodies of BaFin and FREP through government intervention before the end of the period for which its members have been appointed, unless there are exceptional circumstances which require such actions; and
- b. BaFin and FREP are independent from issuers and auditors through the composition of the Board as well as at staff level, for instance (a) representatives of issuers and auditors

would not be able, together or individually, to have a majority of votes in the decision making bodies of BaFin and FREP, (b) codes of ethics are established for those involved in the enforcement process, as well as cooling-off periods, (c) staff involved in the EFI do not breach any independence requirements because of relationships with either the issuer or the audit firm involved.

## 5.2.1 Summary of facts

### Independence from government

#### *FREP*

204. FREP's recognition as the competent body to examine infringements of financial reporting requirements is formalised by an Acknowledgement Agreement signed on 30 March 2005 by FREP, the German Federal Ministry of Justice and Consumer Protection (MoJ) and by the German Federal MoF. The Acknowledgement Agreement was terminated shortly after Wirecard's declaration of insolvency, with an effective date of 31 December 2021.

205. The Acknowledgement Agreement articulates the terms of cooperation between FREP, the MoJ and the MoF. These relate to:

- a. agreeing to the following as well as to any changes thereto:
  - The Articles and Rules of Procedure for the Enforcement Panel
  - The Principles for sampling examinations
  - The Rules of Procedure for the Nomination Committee
- b. FREP informing the MoJ and the MoF on request about national and international enforcement activities in a general way and being available for consultations in the area of enforcement. Emphasis is put on FREP's obligations to maintain confidentiality in accordance with Section 342c HGB (Handelsgesetzbuch, the German Commercial Code), which shall remain unaffected by such exchanges.

206. The Acknowledgement Agreement also refers in general terms to the cooperation between FREP and BaFin by stating that FREP shall consult with BaFin on all organisational and substantive questions in order to ensure smooth and effective cooperation within the framework of the two-tiered enforcement structure provided for by law and that such cooperation is formalised through a Memorandum of Understanding between the two entities as described below under Paragraph 209.

207. In addition, Paragraph 11 of FREP's Code of Procedure states that "Except where there is a statutory duty to report, all company and business secrets of the entity being examined and any information about that entity which has become known during enforcement examination activities shall be subject to the duty of confidentiality. This duty of confidentiality shall also apply in particular to the Federal MoJ, Federal MoF and the members of the Association's Executive Board".

208. FREP indicated that it holds two to three meetings a year with the MoJ and one meeting with the MoF and stated that such meetings are of a general procedural and organisational nature as per the terms of the Acknowledgement Agreement.

209. The Memorandum of Understanding with BaFin sets out the principles for cooperation regarding, amongst other aspects, mutual exchange of information, reporting to one another for coordination purposes. BaFin and FREP hold quarterly working meetings during which they update each other on the status of various examinations. The exchanges of information are subject to confidentiality requirements inherent to a public-sector and private-sector relationship.

210. Both BaFin and FREP explained that BaFin could not possibly influence FREP. In addition, in view of the specific files related to Wirecard examinations, the PRC considered that this was indeed the case. For further discussion on the effectiveness of coordination between FREP and BaFin, please refer to Section 5.8.2. Legal or procedural impediments preventing cooperation and exchange of information.

#### *BaFin*

211. BaFin is a legally independent institution governed by public law. As part of the federal administration, it is subject to the legal and technical supervision from the MoF, which bears the political responsibility for BaFin's activities. This, in practice, means a duty for BaFin to provide the MoF with information which are then the basis on which the supervision is exercised. Such information takes the form, amongst others, of reports on aspects of material importance, such as significant events occurring in the exercise of its financial services supervision, on supervisory measures that are of material importance, if it becomes aware of possible threats to systemically important institutions, of impending disruptions on regulated exchanges and securities markets or other financial difficulties looming in the financial services field.

212. BaFin indicated that it usually acts on its own initiative when preparing reports and providing them to the MoF. Only in some cases the MoF requests such reports by BaFin.

213. In the context of Wirecard, as the developments around Wirecard were deemed to be of material importance, reports were prepared and provided to the MoF.

214. A timeline on BaFin's reporting to and correspondence with the MoF was provided to the PRC. However, for confidentiality reasons, the reports included in the EFI team files were only made available to the PRC during a read-only screen viewing session (see Paragraph 7). BaFin indicated that these reports could not be shared in electronic format with the PRC as, in many cases, even though they are summaries, they contain sensitive supervisory information and thus cannot be shared with third parties.

215. The timeline of BaFin's reporting to the MoF illustrates the high frequency of reporting on all types of actions or issues addressed within the EFI team. BaFin informed the PRC that this was due to the exceptional circumstances of the case. In fact, BaFin provided at least 17 reports to the MoF between 2016 and 2020 with regards to Wirecard (e.g. in relation to BaFin's supervisory actions in terms of both its examinations on market abuse and in relation to BaFin and FREP's proceedings regarding the issuer's transparency obligations). Of these reports, three were provided in 2016 and the remaining 14 were provided in 2019 and 2020.

216. The communications between BaFin and the MoF regarding financial reporting of Wirecard that the PRC has seen concern those that are part of the files of the EFI team. Some of the reports the PRC was able to view contained a great level of details and annexed documents contained in the EFI's supervisory file on Wirecard. BaFin confirmed that all relevant correspondence between

BaFin, including the MB, and the MoF, in relation to the EFI supervision is included in the files of the EFI team that were disclosed to the PRC.

217. During the onsite visit, the PRC was made aware that, unlike BaFin staff, the members of BaFin's MB, i.e. including the Chief Executive Director in charge of the Securities Supervision and Asset Management Division and therefore of the EFI team, are not civil servants but rather hold defined terms contract of eight years with the MoF. These contracts are renewable on the basis of mutual agreement of the individual member of the MB and the MoF. BaFin indicated that all members of BaFin's Executive Board have appropriate cooling-off periods as well as confidentiality terms included in their individual contracts. The PRC was not able to ascertain the exact details regarding those cooling-off periods and confidentiality terms but understands that those are not standardised but rather established on an *ad personam* basis.

## **Independence from issuers and auditors**

### *FREP*

#### *Presidential Board*

218. Since the recommendations formulated following the 2017 Peer Review, FREP has changed the contracts for the Presidential Board. These contracts no longer permit the participation in a Supervisory Board except for grandfathering up to three Supervisory Board mandates upon joining FREP. This applies to both the President and the Vice-President (current and future). FREP stated never having encountered conflicts of interest in its 15 years of existence and doubts it would be able to attract relevant candidates in terms of high reputation and qualification for the position of President if such grandfathering clause were not in place.

219. FREP also indicated that if a member of the Presidential Board is in any way connected with the issuer or the related audit firm, that member may not participate in any way in an examination of that issuer.

#### *Examination Panel Members*

220. FREP's Code of Procedures includes sections related to integrity and independence requirements. The section on integrity refers to general legal requirements as well as requirements provided for in the employment contracts. The independence section specifies, in relation to an examined entity and its examination process, the basis for a Panel Member to be excluded from that examination (Paragraph 14), the obligation to sign a declaration of independence in respect of each examination the Panel Member is assigned to and the consequences of not doing so or of independence issues, when not intentionally caused by the Panel Member, arising during the course of the examination. Further developments related to business and financial relationships and personal relationships are provided in a specific independence requirement document.

221. Similar provisions are applicable in the context of Enforcement Panel Pre-Review and Complaints Committees: in cases where a committee member does not fulfil the independence requirements, that committee member will be replaced in the committee session by a deputy member (Paragraph 3(3) of the Code of Procedures). During the onsite visit, FREP explained that, in order to determine the need for deputies to intervene, the legal assistant informs members of the committee about the issuers on the agenda before the meeting takes place.

222. Paragraph 14(2) of the Code of Procedures specifies the cooling-off period of Panel Members in relation to the examined issuer (three years when joining FREP) and Paragraph 14(3) in relation to the external auditors of the examined issuer (also three years). The latter specifically refers to Panel Members who have agreed to the temporary suspension of a contract of employment, although FREP explained during the onsite visit that such suspensions no longer exist and no current Panel Member has a suspended contract from an audit firm.
223. No cooling-off period is required post-employment by FREP. As a follow-up to a recommendation for consideration formulated following the 2017 Peer Review, FREP indicated that no changes were made and justified this by reference to Article 12(1) of the Basic Law of the Federal Republic of Germany which states that “all Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law”, as well as by the defined term nature of Panel Members’ contracts. FREP further indicated the obligation for Panel Members to declare their lack of independence in case they start employment negotiations with an issuer subject to examination and/or its auditor.
224. In respect of recording what is done on examinations, FREP organises an electronic information system in the form of a database of enforcement cases, that records the progress of all cases and acts as a management information system. All Panel Members have unrestricted access to all examinations recorded for supervisory convergence reasons.
225. According to FREP’s independence requirements as documented to the PRC, all persons that participate in an examination are not allowed to have any type of ownership of shares (including employee shares) in the company under examination, nor other instruments, stock options, convertible debt or financial instruments of any type whose value corresponds to the development of the share price of the company under examination. Panel Members can buy and sell shares or other instruments of a company only when they are not involved in an examination of that company.

#### *Membership of the Association*

226. According to Article 4 of the Articles of Association of FREP, FREP’s members may be members of any professional organisation or group representing the interests of accounting professionals and users of financial reporting whose purposes are closely aligned with the purposes of the Association and who represent more than a minor number of members. The members are represented by accounting professionals who, possessing the proper qualifications, maintain and/or prepare the commercial books and records either as employees or as independent professionals and/or act in an audit, consulting, teaching, or supervisory capacity or as analysts (e.g. German public auditors, university faculty members, sworn financial auditors, tax advisers, German attorneys at law). Companies, audit firms and individuals are not eligible for membership.
227. The Membership meeting is one of FREP’s governing bodies. Article 12 of the Articles of Association defines the powers, roles and responsibilities of the Membership Meeting which relate to the overall functioning of the association: election and removal of the Chairman and Vice Chairman, election of the members of the Nominating Committee, discharge of the previous, adoption of the financial plan and of changes to the Articles of Association, dissolution of the association and election of the auditor of the financial statements.





*BaFin*

228. BaFin staff is obliged to perform its duties impartially and to avoid any conflict of interest by national law (§§ 20, 21 Administrative Procedure Act, *Verwaltungsverfahrensgesetz*, §§ 61, 62 Federal Civil Service Act, *Bundesbeamtengesetz*) and European Regulation (Guideline (EU) 2015/856 of the European Central Bank). In addition, German Labour Law and German Civil Service Law stipulate general provisions on rights and obligations of employers and employees.
229. BaFin's newly hired staff is instated in compliance with German administrative law and the ECB's ethics framework. BaFin informed the PRC that since 2016 "applicants are obliged to provide a detailed list of former employers/clients, financial investments and standing business relations to identify any conflict of interest with respect to their future occupation". In addition, since 2016, new joiners are required to provide a declaration of holdings in supervised entities. The same rules apply to members of staff who are civil servants and those who are not.
230. After recruitment, BaFin does not update nor gathers further information on portfolios of financial instrument holdings of its staff since it considers that such information is not relevant for its mandate to monitor market abuse/insider trading. BaFin also informed the PRC that BaFin is not allowed by law to gather such information. BaFin monitors trading activity of staff by ensuring that each purchase or sale of financial instruments is reviewed by a direct superior in order to confirm that no insider information was used. BaFin indicated that its internal control mechanisms are adequate and are capable of preventing any infringement to the prohibition of insider dealing and to unlawful disclosure of inside information by persons employed by BaFin.
231. The cooling-off period upon joining BaFin from a supervised entity is of two years. During that time period, measures are taken so that staff members are not involved in matters directly related to their previous occupation at a supervised institution. Furthermore, employees who have worked for a supervised institution receive an additional notice about their obligation to disclose any conflict of interest when they start working for BaFin.
232. It is relevant to note in these regards that BaFin defines "supervised institutions" as credit institutions, financial services institutions, payment services and electronic money institutions, insurance undertakings and asset management companies. These do not therefore include companies with securities admitted to trading on regulated markets, unless specifically supervised from a prudential standpoint.
233. Other regulations on cooling-off periods (applicable to all BaFin staff, including EFI staff) stem from national law (§ 105 of the *Bundesbeamtengesetz*, or *BBG* - Federal Civil Service Act) for staff and from employment contract for Board Members. As also indicated by FREP (see Paragraph 223), further regulations on cooling-off periods after leaving BaFin are limited by occupational freedom (Art. 12 para. 1, Basic Law for the Federal Republic of Germany, *Grundgesetz/GG*). For public servants (i.e. the majority of staff), the PRC understands that an amendment to the Federal Civil Service Act by the German Parliament would be required to impose post-employment cooling-off periods, as the general assumption is that civil servants leave public service to retire and that cooling-off periods are therefore not relevant.



## 5.2.2 Analysis in relation with supervisory expectations

### Independence from government

#### *FREP*

234. Due to legal confidentiality requirements, FREP confirmed not being able to discuss any business or trade secrets of individual examinations in the two to three meetings a year with the MoJ and in the annual meeting with the MoF. Therefore, according to FREP, there was never any governmental or other German authorities' intervention in its examinations regarding Wirecard.

235. In addition, FREP stated not having shared any conclusions or findings, including preliminary ones, with the German Government or other governmental authorities, except for when it was made public at end of June 2020 that FREP was investigating Wirecard, in which case FREP informed the MoJ of the timeline of the examination and the procedures taken. FREP highlighted that these discussions did not reveal any business or trade secrets regarding the company which FREP obtained in performing the examinations.

236. The PRC did not identify anything from FREP's files and its discussions with FREP that would suggest otherwise.

#### *BaFin*

237. The PRC acknowledges that Wirecard, being the top DAX 30 company in the months leading up to its demise, was of material importance and that reporting to the MoF was warranted. The PRC also notes that the majority of the reporting seemed to be at BaFin's own initiative, although some reports were provided upon specific requests from the MoF.

238. In this context, BaFin acknowledged that this level of reporting and exchange of information in the context of supervision/EFI with the MoF was unprecedented. BaFin confirmed that all relevant correspondence between BaFin, including the MB, and the MoF, in relation to the EFI supervision was included in the files of the EFI team that were disclosed to the PRC. It is relevant to note however that since communications do not necessarily require a formalisation, the PRC did not receive a comprehensive list or records of telephone calls between MoF and BaFin (whether at senior or at staff levels) nor information concerning the content of such telephone calls, which constitutes a relevant limitation to the PRC's analysis and assessment.

239. The PRC did not identify any evidence of the MoF trying to influence BaFin on the actions to take in the Wirecard case. However, (i) the PRC limitations as indicated above, (ii) the frequency and level of detail of reporting, (iii) the fact that the MoF has made requests regarding a specific file, and (iv) BaFin's related report to the MoF and the actions undertaken by BaFin, give rise to doubt: even if the MoF did not influence BaFin's actions, the MoF potentially could have influenced BaFin's actions if it had opposed to them when BaFin communicated those before they were taken.

### Independence from issuers and auditors

#### *FREP*

#### *Presidential Board*

240. As in the 2017 Peer Review, the PRC considers that it is paramount that the market acknowledges, recognises and perceives the enforcer as an independent organisation. FREP should be independent in appearance as well as in substance.
241. For this purpose, the enforcer should not be unduly influenced by issuers, auditors, the government or other market participants. In accordance with Paragraph 39 of the Guidelines, the independence from issuers and auditors should, amongst other things, be achieved through codes of ethics and through the composition of the Board of the enforcer. Therefore, in the opinion of the PRC, Board Members should not have any existing relationships (including non-monetary) with entities subject to enforcement or with auditors responsible for issuing opinions on issuers' financial statements while they are responsible for enforcement, as such relationship serves to undermine the necessary independence.
242. According to information provided by FREP, neither member of the Presidential Board sat at any time on the Supervisory Board of Wirecard. The PRC notes the changes brought by FREP to its policy as described above in Paragraph 218. However, even if this did not have an impact in the context of Wirecard, the PRC reiterates its recommendation that FREP should not allow the President and Vice-President of FREP to hold Supervisory Board memberships in any issuer with securities admitted to trading on regulated markets.
243. The PRC in fact notes that the members of the Presidential Board are *de facto* Chamber members and alternatively chair them as per Article 4(4) of the Code of Procedures and that they also sign the declaration of independence forms in the context of individual examinations assigned to the Chambers.
244. The PRC saw evidence that the members of the Presidential Board timely signed the declaration of independence forms in the context of FREP's examinations of Wirecard, which means that neither the President nor the Vice-President of FREP held or traded in Wirecard shares (including employee shares) or any type of ownership of other instruments, stock options, convertible debt or financial instruments of any type whose value corresponded to the development of the share price of Wirecard during the examinations or the risk-based selection process of Wirecard. The PRC did not identify anything in the course of the FTPR that would suggest otherwise.
245. The PRC is therefore satisfied that there was no issue relating to independence with regards to the members of the Presidential Board in the context of the Wirecard case.

#### *Examination Panel Members*

246. Having reviewed the Code of Procedures and FREP's independence requirements, the PRC replicates the 2017 Peer Review assessment that FREP has in place a sufficient policy of conflict of interests ensuring the independence of Panel Members involved in a given examination.
247. For all examinations related to Wirecard, all Chamber and Panel Members timely signed the declaration of independence, which, as indicated above, means that none of the persons involved in any of the examinations related to Wirecard (including those involved in the assessment of concrete risk in the selection process) held or traded in Wirecard shares (including employee shares) or any type of ownership of other instruments, stock options, convertible debt or financial instruments of any type whose value corresponded to the development of the share price of Wirecard. Where there were instances related to independence, these were appropriately dealt with in compliance with FREP's Code of Procedures by either not assigning the foreseen Panel

Member to the examination, or by removing the [REDACTED] Panel Member after [REDACTED].

248. FREP stated during the onsite visit that no Panel Members involved in any Wirecard examinations or related committees left to work for Wirecard. Whilst this has not been an issue in the context of Wirecard, the PRC however recommends that, as a matter of principle, post-employment cooling-off periods be instated for staff employed in supervision activities as it is the case in various other jurisdictions. The PRC recognises that this may need to be addressed in the legal framework.
249. The PRC is therefore satisfied with the independence of FREP's examination team involved in the examination of Wirecard vis-à-vis Wirecard.
250. In relation to the unrestricted access by all Panel Members to the database of enforcement cases, whilst the PRC understands the benefits in terms of supervisory convergence and knowledge sharing of such broad access, such unrestricted access may create a risk of insider information for Panel Members not involved in an ongoing examination. To avoid any such risk as well as to limit any extensive parametering of the database, the PRC recommends that access to ongoing examinations be restricted to the relevant Chamber and Panel Members.
251. This is because, whilst Panel Members involved in a given examination are not allowed to hold and trade instruments of the company under examination, other Panel Members not directly involved in that specific examination may still have access to the information contained in the database of enforcement cases, possibly including sensitive information.
252. As an alternative to restricting access to the database, the PRC thinks that FREP could prohibit the trading of shares of companies under examination for all Panel Members. However, given the fact that the main allegations with regards to Wirecard were made in the press, the PRC is not aware that this was an issue in the context of the Wirecard examinations.

#### *Members of the Association*

253. On the basis of FREP's Articles of Association, the PRC understands that the membership of the association may in no way intervene in the day to day management of the association nor in the context of any specific examination carried out by any of its Chambers. During the FTPR, the PRC was not made aware that this may have been otherwise in the context of the Wirecard examinations FREP carried out during the period under review.

#### *BaFin*

254. BaFin stated that there are no known issues of conflict of interest among BaFin staff pertaining to Wirecard: 'no BaFin staff directly responsible for supervision of Wirecard or involved in the decision-making process concerning Wirecard traded Wirecard stocks or derivatives directly giving exposure to Wirecard financial instruments in 2018, 2019 and in the first half of 2020' and 'no staff of the EFI team traded Wirecard shares or derivatives in the period under review'.
255. BaFin informed the PRC that a very small proportion of staff with designated access to insider information within BaFin's MAR team traded Wirecard shares or derivatives in 2018, 2019 or in the first half of 2020. BaFin argued that, given that at BaFin each purchase or sale of financial instruments is reviewed by the direct superior in order to confirm that no insider information was used, all trades in Wirecard shares or derivatives were not instances of market abuse/insider

trading. However, BaFin also indicated to the PRC that further examinations are currently being conducted in this context.

256. The PRC notes that BaFin requires since 2016 new joiners to provide a declaration of holdings in supervised entities (which, per BaFin's definition, do not comprise issuers with securities admitted to trading on a regulated market) and that there is a generally applicable rule to disclose any transfer of holdings in supervised entities. BaFin is aware of financial investments by staff at the time of recruitment, but does not further update this information. Therefore, BaFin is not aware of the holdings by staff in shares or other financial instruments of issuers with securities admitted to trading on a regulated market.
257. The PRC also notes that a cooling-off period is required upon joining BaFin from a supervised entity and that employees who have worked for a supervised institution receive an additional notice about their obligation to disclose any conflict of interest when they start working for BaFin. However, the notion of "supervised entity" does not include issuers with securities admitted to trading on regulated markets for BaFin.
258. BaFin informed the PRC that in its view the existing procedure mechanisms (both internal and enshrined in national laws) in the context of EFI staff would also prevent conflict of interests, since new BaFin staff members are required to disclose their prior employers in their CV and if this is not possible due to confidentiality reasons regarding clients (e.g. in case of lawyers and auditors/persons working for auditors), new staff members are nevertheless required to comply with the statutory requirements and to perform duties impartially and to avoid any conflict of interest as required by national law<sup>36</sup> and European regulations<sup>37</sup> like all BaFin employees.
259. The PRC believes however that it is not appropriate for BaFin to have a different regime for staff joining from issuers with securities admitted to trading on regulated markets (or auditing / consulting firms dealing with those) and all other supervised entities with regards to the cooling-off period and the additional notice about the obligation to disclose any conflict of interest when they start working for BaFin. This is because the resulting control mechanisms in place for the former are weaker, thus increasing the risk that potentially a BaFin staff member whose previous employer or client was an issuer with securities admitted to trading on a regulated market could become involved in an examination regarding that issuer straight after joining BaFin. The PRC would deem it relevant that the applicable regime for staff joining BaFin from issuers with securities admitted to trading on a regulated market or consulting / audit firms whose clients include such issuers is aligned with that for staff joining from supervised entities.
260. Similarly to FREP, and whilst it understands that this has not been an issue in the context of Wirecard, the PRC recommends, as a matter of principle, that post-employment cooling-off periods be instated for staff employed in supervision activities as it is the case in other jurisdictions. The PRC recognises that this may need to be addressed in the legal framework.

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<sup>36</sup> §§ 20, 21 Administrative Procedure Act, Verwaltungsverfahrensgesetz/VwVfG, §§ 61, 62 Federal Civil Service Act, Bundesbeamtengesetz/BBG)

<sup>37</sup> Guideline (EU) 2015/856 of the European Central Bank

### 5.2.3 Findings – Conclusion

#### FREP

261. Based on FREP's responses to the questionnaire and the other documentation provided, the PRC did not identify any independence issues as regards FREP from the German Government or other German governmental authorities in the context of the Wirecard examinations.
262. In relation to independence from issuers and auditors, the PRC is of the view that ideally employees at public institutions (or organisations with a public mission), independently of whether they are involved in a given examination, should not be allowed to hold securities of an issuer under their direct supervision. However, the PRC considers that the procedures in place in FREP ensured that in the specific context of Wirecard's examinations independence was effective, even though it recommends that post-employment cooling-off periods be instated for staff employed in supervision activities as it is the case in other jurisdictions and that this may need to be addressed in the legal framework. Furthermore, FREP's Presidential Board did not hold Supervisory Board mandates in Wirecard during the entire period under review.
263. Therefore, the PRC assesses that FREP fully meets expectations set by Guideline 3 in the context of Wirecard.
264. The PRC did not identify issues concerning holding or trading securities related to Wirecard in the examinations or selection of Wirecard. However, the PRC considers that in a small organisation like FREP, it is difficult to restrict or control at all times the sharing of information regarding an examination, which may easily take place even informally. As such there is a risk of misuse of privileged information which becomes available in the context of enforcement work by those not directly involved in the examination and therefore not required to sign an independence declaration.
265. Whilst acknowledging the value of information sharing among Panel Members, the PRC recommends that FREP considers restricting access to information relating to issuers under examination in the database of enforcement cases to staff involved in the ongoing examination; alternatively, FREP should consider prohibiting the trading of shares of companies under examination for all those having access to the database.
266. The PRC considers that such restrictions / prohibition should not end immediately after the end of the examination and that sufficient time should pass to ensure that information acquired in the course of the examination is not misused. The same consideration applies for the existing declarations of independence, whose validity should not end immediately after the end of a given examination.
267. Finally, the PRC, in line with the recommendation made in the 2017 Peer Review, continues to recommend that FREP's Presidential Board should not be allowed to exercise any mandate as Supervisory Board member of issuers because enforcers should not have any existing relationships with entities subject to enforcement in order not to undermine independence, neither in substance nor in appearance.

## BaFin

268. Given the frequency and level of detail of the reporting to the MoF and the fact that the MoF requested reports from BaFin specifically regarding Wirecard, the PRC sees an increased risk of influence by the MoF over BaFin's handling of the Wirecard examination. The PRC does not have concrete evidence that this played a role in BaFin's actions in the context of Wirecard but notes that these circumstances could have opened the possibility for the MoF to influence BaFin had they disagreed with the actions BaFin undertook in the context of Wirecard.
269. The fact that a proportion of staff, even a "very small portion", traded shares of Wirecard is concerning and certainly warrants further investigation, which the PRC understands is currently ongoing within BaFin. Given the pivotal role that market intelligence has on identification of risks in the selection of issuers for EFI (for example in determining the need for a request-based examination or the need to refer documents to FREP), a lack of independence or the existence of a conflict of interest of staff in the MAR team or in the complaints department could potentially jeopardise the independence from issuers of the institution as a whole.
270. The PRC understands that 'no staff of the EFI team traded Wirecard shares or derivatives in 2018, 2019 or first half of 2020, nor held employment in the past with Wirecard. However, BaFin was not able to confirm whether EFI team members held shares or other financial instruments giving exposure to Wirecard in the period under review since BaFin lacks information about staff holdings in shares and other financial instruments of issuers with securities admitted to trading on regulated markets and does not have in place a declaration of holdings in issuers. The PRC finds that the lack of information about staff holdings in issuers raises doubts on whether BaFin's internal control system is fully equipped to monitor market abuse / insider trading and conflict of interest with regards to issuers and should be addressed.
271. With this in mind, the PRC thinks that BaFin partially meets the expectations set by Guideline 3 on independence in view of the severe deficiencies in BaFin's internal control system and of the material risks of government influence identified which were left unaddressed.
272. The PRC finds that BaFin's independence procedures with respect to staff holdings and trading of financial instruments giving direct exposure to supervised entities need to be strengthened. As mentioned with regards to FREP, the PRC is of the view that ideally employees at public institutions (or organisations with a public mission), independently of whether they are involved in a given examination, should not be allowed to hold securities of an issuer under their direct supervision. However, the PRC also acknowledges that there are other ways (for example, freezing of holdings, declarations of independence etc.) in which BaFin may adequately address the existing risks of independence.
273. The PRC therefore recommends that BaFin introduces a robust control framework (e.g. relevant rules on holding and trading of shares) to address those circumstances where a conflict of interest could arise. In particular BaFin should comprehensively address the following weaknesses:
- a. The lack of regularly (i.e. at least annually) updated information on the portfolios of financial instruments holdings of all members of BaFin's staff (regardless of whether recruited before or after 2016). This might also need to be addressed within the legal framework;
  - b. The possible conflict of interest of EFI team members towards issuers under BaFin's direct supervision in view of (i) their involvement in the ongoing monitoring of issuers which may



lead to requesting that FREP carries out examinations, (ii) the possibility they might engage in discussions involving examination-related information with FREP, (iii) BaFin's own Tier 2 examinations;

- c. The possible conflict of interest of MAR team members towards issuers under BaFin's direct supervision despite their pivotal role for the supply of unbiased market intelligence needed for the purpose of EFI.

274. In addition, the PRC recommends that, even if this was not relevant in the case of Wirecard specifically, BaFin extends the existing requirements for staff joining from supervised entities also to staff joining from issuers with securities admitted to trading on regulated markets (or issuers that were audited or counselled by the new joiner as part of its previous employment as auditor or consulting firm) with regards to (i) cooling-off periods and (ii) the additional notice about staff obligation to disclose any conflict of interest. In addition, and conversely, the PRC recommends that post-employment cooling-off periods be instated for staff employed in supervision activities as it is the case in other jurisdictions and that this may need to be addressed in the legal framework.

275. Last, but not least, the PRC recommends that, in order to mitigate the risk of influence of the government on BaFin's activities, BaFin introduces stricter limitations to the detail and frequency of reporting to the MoF in the context of ongoing examinations.

## 5.3 Guideline 5 – Selection Methods

### Background – Supervisory expectations

276. In accordance with the mandate of the FTPR on GLEFI in the context of Wirecard, the PRC analysed the application of BaFin and FREP of Guideline 5 related to selection methods, in particular how the selection methods in place applied in the context of Wirecard:

- a. to assess whether selection methods in place within FREP and BaFin are based on a mixed approach whereby a risk-based approach is combined with a sampling and/or rotation approach;
- b. to assess how the risk-based approach was considered in the context of Wirecard. Notably, to assess (i) if the risk-based approach took into account the combination of the probability of infringements by an issuer and its potential impact on the financial markets (ii) the risk-based approach took into consideration all the relevant criteria as defined in Paragraphs 49 to 51 of GLEFI;<sup>38</sup>

277. It is expected, in the specific context of Wirecard, that:

- a. the selection should be based on a combination of a risk-based approach and either random sampling or rotation or both;
- b. the risk assessment takes into account (i) the indications from the auditors of misstatements, whether in their reports or otherwise, (ii) indications of misstatements provided by regulatory bodies, including the Audit Oversight Body and prudential

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<sup>38</sup> GLEFI as issued in 2014

- regulators, (iii) grounded complaints, i.e. complaints received which appear to be reliable and relevant for a possible enforcement examination; and
- c. the determination of risk should be based on the combination of the probability of infringements and the potential impact of an infringement on the financial markets, the risk based assessment takes into account as far as possible the characteristics such as the risk profile of the issuer and its management, ethical standards and experience of the management and their ability or willingness to apply the relevant financial reporting framework correctly;
  - d. selection models designed were effectively followed by BaFin and/or FREP.

### **5.3.1 Summary of facts**

278. Since the entering into force of ESMA's GLEFI, Wirecard was selected for examination by FREP with regards to the following periods:

- a. 2014 annual financial report (based on random selection/rotation);
- b. 2018 annual financial report (based on risk).

279. From 2015 to 2018, Wirecard was not selected for an examination based on concrete risk nor included in abstract risk-based selection for the 2015, 2016 and 2017 annual financial reports.

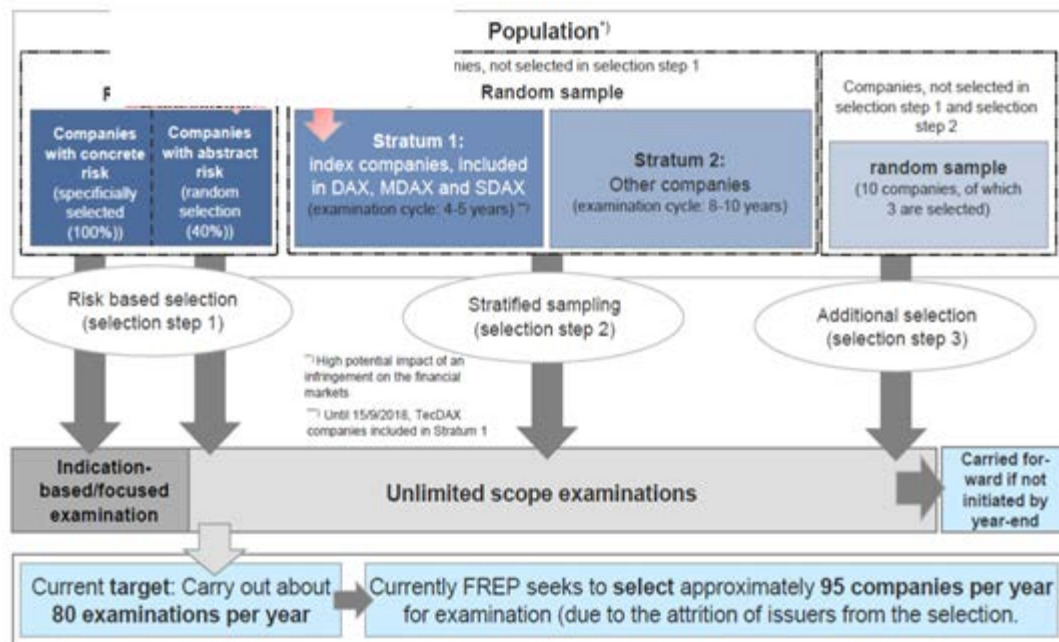
280. In February 2019, BaFin also requested a focused examination of the 2018 half year financial report. In April 2020, BaFin requested that FREP carry out a focused examination of the 2018 annual financial report. This request was followed by two more requests in June 2020 that FREP carry out a focused examination of the 2019 half year financial report and of the 2017 annual financial report.

#### **Short description of FREP's selection methods**

281. The figure below provided to the PRC by FREP illustrates the selection methods in accordance with FREP's Principles for Unlimited Scope Examinations in accordance with Section 342b (2) Sentence 3 no. 3 HGB, from December 2016 onwards.



Figure 4: FREP's selection method (source: FREP)



282. The risk-based approach in Germany is composed of two main components:

- Selection based on concrete risk (selection with cause/ grounded complaints) – designed to select issuers for which a concrete risk of accounting infringement was identified based on the media review, auditors' reports, whistle-blowers, communication from external parties and other public information;
- Selection based on abstract risk – designed to identify issuers for whom, despite the fact that no concrete risk was identified, the risk profile is increased due to the events having occurred in the sphere of an issuer during the previous year.

283. The selection of issuers based on concrete risk is the responsibility of both enforcement authorities (BaFin and FREP). When FREP was set up, the legislator considered that BaFin should have the power to request an examination from FREP if specific or concrete indications of material infringements of accounting were identified. In addition, FREP may also start an indication-based examination if FREP identifies specific indications of an accounting infringement during their review of (for example) the press. Both BaFin and FREP confirmed that there are no differences in the legal basis, which empowers BaFin to request an examination from FREP, and the legal basis, which enables FREP to start an indication-based examination, i.e. the understanding of the notion as to whether specific indications of an accounting infringement exist is similar for both FREP and BaFin.

284. However, BaFin noted that even if the legal basis is similar, FREP has at its disposal more information regarding issuers due to its experience when dealing directly with issuers on an ongoing basis or from past examinations. This asymmetry of information helps explain why the two authorities may come to different conclusions on the existence of "specific indications".

285. In order to select issuers for examination in terms of a risk-based approach, both authorities stated that they regularly review articles published in the press. For this purpose, FREP has in place a

Media Analysis Committee which reviews the German newspapers (Börsen-Zeitung, Wirtschaftswoche, Frankfurter Allgemeine Zeitung, Manager magazine, Handelsblatt).

286. On the other hand, BaFin's EFI team does not have in place a dedicated accounting/enforcement of financial information Media Analysis Committee. However, BaFin's Communication Department monitors the press with regards to recent media coverage of BaFin and of the financial markets. Twice a day the Communication Department prepares a "clipping" which includes the most relevant articles published in newspapers (print media) with a focus on national newspapers. International media is only considered in exceptional cases. BaFin also noted that the briefing covers topics of relevance for financial markets in general (which also includes news regarding issuers with securities admitted to trading on regulated markets if of relevance for supervision) but does not have a dedicated section on accounting topics. This clipping is available to all BaFin employees (including the EFI team). The MAR team, especially the division responsible for ad hoc disclosures, reviews the relevant media. According to the information provided by BaFin, BaFin may request an indication-based examination to FREP on the basis of articles in the press but also on the basis of information received from MAR and prudential supervision.

287. The following section summarises the main articles and events which were considered relevant by the PRC in the context of the selection (or non-selection) of Wirecard.

#### *Key events*

288. During 2015 and 2016, the FT Alphaville blog published a series of online articles denominated "House of Wirecard Series" denouncing potential failures in the reporting of financial information by Wirecard. Based on ESMA's review, from April 2015 to November 2016, the FT published 12 articles in the FT Alphaville blog (ten in 2015 and two in 2016). In 2016, two additional articles were also published in the main FT newspaper.

289. In February 2016, just after its publication, BaFin became aware of the Zatarra report which included allegations regarding potential money laundering, fraud and malpractices in Wirecard.

290. On 27 April 2016, during a BaFin-FREP working meeting, BaFin asked FREP to include in the risk group for sample selection purposes companies with existing allegations whose verification was in the public interest, including Wirecard.

291. On 9 May 2016 BaFin sent to FREP an article from Der Spiegel dated 30 April 2016 ('*Wette auf den Absturz*' – '*Bets on the downfall*') to FREP. This article referred to the 2015 FT articles as well as to the publication of the Zatarra report on 24 February 2016.

292. On 29 September 2016, FREP received an email from a whistle-blower which included allegations regarding the financial reporting of Wirecard.

293. On 11 October 2016, other allegations made in the Zatarra reports were discussed in a working meeting with the company and its auditor. FREP was informed by Wirecard that the company had engaged an external third party to carry out an investigation and it was agreed that FREP would be provided with such report. An interim report was provided to FREP on 1 December 2016 in which it was stated that, as of that date, there was no evidence of Wirecard staff conspiring to unlawful transactions or to errors in the 2014 annual financial report. The final report was addressed to FREP on 6 March 2017.

294. On 1 December 2016, FREP concluded its examination of the 2014 annual financial report with no error findings and communicated this outcome to BaFin on 5 December 2016 (see Guideline 6).
295. On 23 February 2017, FREP took notice of an article regarding Wirecard on the website of Manager Magazin. During a quarterly working meeting taking place on that same day, BaFin handed over to FREP that same article dated 22 February 2017 (*'Wirecard: Das 250 Millionen Euro Rätsel des Zahlungsdienstleisters' – Wirecard: the 250 million Euro puzzle of the payment provider*). BaFin requested that FREP explain whether the allegations were addressed in the recently closed examination, indicating that it may be considering requesting an examination if that were not the case.
296. The article was similar to the submission made by the whistle-blower who had contacted FREP on 29 September 2016 and built on documentation similar to that provided to FREP in the whistle-blower's submission regarding the receivables and payables from the acquiring business (see Guideline 6).
297. To address the article, on 24 February 2017 FREP's ██████████ Committee requested that a submission be made to it in connection with the recently closed examination. FREP requested some information from Wirecard via telephone and email communication. The requested information was received on 24 February (press release by Wirecard on the Manager Magazin article, short studies by two analysts) and 27 February 2017 (breakdown of the receivables and the payables of the acquiring business by Group entity). Wirecard also reminded FREP that the article was issued in the context of short-selling attacks on Wirecard.
298. On 28 February 2017 FREP's ██████████ Committee discussed the requested submission and decided that there were no sufficiently concrete indications of the existence of accounting infringements (negative assurance). In addition, it was decided that this conclusion and its rationale would be provided to BaFin in writing.
299. The PRC notes that, in addition to what FREP had done to assess the whistle-blower's submission in 2016 (see Paragraphs 428 to 433 regarding the 2014 examination), in February 2017, FREP requested from Wirecard (i) the breakdown of the receivables and the payables of the acquiring business by group entity and (ii) the external party's final report. The report dating 27 February 2017 to the ██████████ Committee provided detailed information as regards the procedures undertaken, the explanations obtained from the company and the assessment made. However, this report also stated that the amount and nature of the rolling security reserve receivables (€250m) mentioned in the article published in February 2017 were not explained.
300. In response to an email request, on 6 March 2017 Wirecard sent a two-page executive summary dated 3 March 2017 of the final results of the investigation into the allegations performed by the external third party commissioned by Wirecard. This was to follow-up on the interim report sent by Wirecard to FREP on 1 December 2016.
301. On 9 March 2017 FREP ██████████ sent a letter to BaFin explaining the procedures performed by FREP and their outcome regarding the 2016 allegations as well as regarding the press article (Manager Magazin) handed over to FREP on 23 February 2017.
302. This letter indicated that the allegations regarding the receivables and payables of the acquiring business were not directly part of the examination of the 2014 annual financial report even though FREP had made some assessment about whether there were sufficiently concrete grounds for

potential infringements. The assessment made by FREP for the purpose of the [REDACTED] Committee in February 2017 was based on a comparison of the EBITDA to the operating cash flows. In that context, the February 2017 article was not considered by FREP as providing indications of accounting infringements.

303. On 15 March 2017, BaFin analysed the letter received from FREP regarding their work concerning the allegations included in the Manager Magazin article and also concluded that there was no concrete indication of a material breach of accounting rules within the meaning of the 31 sentence of Section 37o(1) of the WpHG in Wirecard's 2015 annual financial report. In an internal memo prepared on that occasion, Bafin noted that "the fact that the consolidated financial statements would not communicate the business of Wirecard in an intelligible manner does not constitute an accounting infringement in the absence of any relevant legal standard."
304. At the end of January 2019 and in the beginning of February 2019, the FT published three articles with allegations on operations of Wirecard concerning, among other issues, suspicion of fictitious and backdated contracts in Singapore and forwarding of funds without economic substance ('round-trip transactions') involving external companies.
305. On 11 February 2019, FREP selected Wirecard's 2018 annual financial statements based on abstract risk. On 15 February 2019, BaFin requested that FREP perform an examination of the 2018 half year financial report. This "request-based examination" takes precedence over FREP's own examination.
306. On 15 October 2019, the FT released new allegations questioning the amount and existence of revenues in particular with reference to fictitious customer relationships in the TPA business. On 25 October 2019, the PRC understands that the Supervisory Board and MB of Wirecard mandated KPMG to conduct an independent special investigation to address these topics.
307. On 28 April 2020, FREP received from Wirecard the KPMG special investigation report (hereafter the "KPMG report") dated 27 April 2020.
308. On 30 April 2020, BaFin requested that FREP undertake a focused examination of the 2018 annual financial report of Wirecard.
309. On 24 July 2020, BaFin ordered the examination at Tier 2 level of the following financial reports of Wirecard: the 2018 half year financial report, the 2018 annual financial report, the 2019 half year financial report and the 2017 annual financial report.
310. As part of the FTPR, the PRC asked FREP why, taking into account the public allegations concerning potential accounting infringements, Wirecard's financial reports between 2015 to 2017 were not selected for an examination.
311. According to FREP, Wirecard was intensively covered by FREP: Wirecard was selected for an unlimited scope examination four times within 15 years; once it was selected in the risk-based selection (2018); three times it was selected in the stratified sampling (2005, 2011 and 2014). In addition, FREP initiated one indication-based examination in 2008.
312. In response to ESMA's remark that there was a long history of allegations with Wirecard, even before 2014, FREP noted that it had identified an error in the 2005 annual financial report and initiated an indication-based examination of the 2007 annual financial report.

313. During the examination of the 2007 annual financial report, a lawsuit was filed for annulment of the financial statements of Wirecard as of 31 December 2007. Therefore, FREP had to discontinue its activities in the examination (§ 342 b (3) HGB). In May 2012 Wirecard eventually informed FREP that the Court (Landgericht München I) declared the action for annulment of the 2007 financial statements of Wirecard to be unfounded. As far as can be seen in the press releases in the context of the 2007 financial statements, some market participants were convicted for insider trading/market abuse. In June 2012 FREP – in agreement with BaFin, although there is no legal requirement for BaFin’s agreement – terminated this examination because of a lack of public interest and immediately started an unlimited scope examination of the 2011 financial statements. FREP did not identify an error in the accounting in that examination and finished the examination in December 2012 (negative assurance).<sup>39</sup>
314. The Zatarra reports in 2016 were mainly about money laundering and allegations that had already been made in earlier years. There was an investigation about market abuse and BaFin notified the prosecutor about a market abuse case. FREP analysed the allegations of Zatarra and of the whistle-blower who had contacted FREP but did not identify an error in the accounting and closed this examination in December 2016 (negative assurance). In addition, according to FREP, the allegations in the press reported in Manager Magazin in 2017 did not reveal new information, so FREP did not initiate a new examination.
315. Wirecard was not selected for examination based on risk regarding the 2015 annual financial report since at the time of the selection there was an ongoing examination of Wirecard’s 2014 annual financial report, which addressed the allegations.
316. Due to the described history of allegations against Wirecard and because no new allegations after February 2017 were known to FREP, Wirecard was not included in the risk group for sample selection by the Media Analysis Committee regarding the 2016 and the 2017 financial reports.
317. When the FT issued new allegations in January 2019, Wirecard was assigned to the abstract risk group by the ██████████ Committee and selected during sample selection. In February 2019 BaFin requested the examination of the 2018 half year financial report and filed a criminal complaint with the public prosecutor’s office against market participants and two ██████ journalists on suspicion of market abuse manipulation in connection with reports on Wirecard.
318. On 30 April 2020, after receiving the KPMG report, BaFin requested an examination based on risk of the 2018 annual financial report.
319. On 24 June 2020 FREP’s ██████████ Committee decided to initiate a focused examination of the 2019 half year financial report and informs BaFin. At the same time, BaFin also requested that FREP initiates a focused examination of the same 2019 half year financial report. On 25 June 2020 BaFin requests that FREP initiate an examination of the 2017 annual financial report.

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<sup>39</sup> According to Paragraph 64 of the GLEFI Guidelines as amended in 2020, “assessing whether financial information is in accordance with the relevant financial reporting framework does not require enforcers to give a positive assurance that the financial information complies with the relevant financial reporting framework. However, if, in the course of its examination, the enforcer concludes that it has encountered a material misstatement or an immaterial departure as set out in Paragraph 70 of Guideline 7, the enforcer should apply the enforcement actions set out in Paragraph 69 of Guideline 7.” Enforcers are not required to provide an opinion that financial statements are materially free of errors (this is Auditors work).

320. In addition, FREP noted that BaFin did not provide FREP with information about BaFin's findings and insights in their monitoring of Wirecard concerning market abuse, market manipulation, insider trading, ad hoc disclosures, short-selling, money laundering or the supervision of the Wirecard Bank. In Section 5.8.3 Legal or procedural impediments preventing an efficient and effective flow of information within BaFin, the PRC addresses BaFin's limitations regarding exchanging information and how this impacts an effective enforcement of financial information.

### **5.3.2 Analysis in relation to supervisory expectations**

#### **General model**

321. The selection model from 2014 to December 2016 was similar to the selection methods currently in place. The main differences related to: (i) the percentage of issuers selected based on abstract risk (which was 30% until 2016 compared to 40% after 2017); (ii) the random selection element, which was only introduced in the selection model starting from December 2016, i.e. until December 2016, the selection model comprised only a risk-based approach (concrete and abstract risk) and rotation (two strata see above); (iii) the list of risk factors, which was also increased (in May 2015 "Risks identified in the ECEP or FREP annual priorities", and in December 2016 "Companies that have not been examined for a long time and companies that stood out in the last enforcement examination").

322. The selection model followed by FREP from 2017 onwards includes a risk-based approach with rotation and random selection. The risk-based approach includes a concrete component (examination with cause) and an abstract risk component (examination without specific cause).

323. Wirecard was selected for an examination in 2014 based on rotation/randomised sample. The five-year rotation cycle started again in 2018.

324. The PRC considers that the general model is in line with the principles included in Paragraph 47 of GLEFI, because the selection methods in place are based on a combination of a risk-based approach and both random sampling and rotation.

#### **Risk-Based Approach - Concrete Risk or risk with cause**

325. Paragraph 50 of the GLEFI states that 'indications from the auditors of misstatements, whether in their reports or otherwise, will normally trigger a selection of the financial information in question for examination. Indications of misstatements provided by auditors or regulatory bodies as well as grounded complaints should be considered for enforcement examinations. On the other hand, an unqualified opinion from an auditor should not be considered as proving the absence of risk of a misstatement. Enforcement examinations should be considered where, after preliminary scrutiny, a complaint received appears reliable and relevant for a possible enforcement examination'.



*Articles published in FT*

326. Despite the allegations published in the FT in 2015 and 2016 (as mentioned above, mainly in the online-only Alphaville blog but in at least two cases also in the main FT newspaper), based on the examination files of both FREP and BaFin, there is no evidence that FREP and/or BaFin analysed such articles when assessing if the issuer should be selected for an examination with cause (BaFin and FREP) or be included in the abstract risk (FREP). The PRC thinks that the articles included in the FT appeared to be reliable and relevant for a possible enforcement examination as prescribed in Guideline 5 because (i) they were published by a credible newspaper which specialises in financial and economic matters, (ii) they referred specifically to the financial statements of Wirecard, including analyses of the amounts included therein (e.g. non-explained mismatches between trade payables and receivables) and to events with a material impact on the financial statements of Wirecard (such as acquisitions, measurement of intangible assets recognised) and (iii) they raised relevant questions regarding the financial information provided by Wirecard in relation to disclosures, presentation, recognition and measurement of assets, liabilities, profit or loss or cash-flows.
327. BaFin informed the PRC that in its view BaFin is not in the position to analyse the media because the focus of BaFin's press briefing is not on every issuer and particularly not on accounting issues whereas FREP's media analysis is purely focused on such topics. For that reason, BaFin informed the PRC that it relies on the analysis by FREP. The PRC thinks that this contrasts with the fact that BaFin may request FREP to open an examination based on risk for which the PRC assumes that an analysis of the media and of the financial environment is necessary, given that no feedback mechanism exists between FREP's Media Analysis Committee and BaFin. The PRC also notes that the clippings prepared by BaFin's Communication department, although not specific to accounting, should have covered the FT newspaper and website as a source and that the MAR and the EFI team should have discussed some of the articles by the FT and blog in light of the corresponding share price change observed on the day of their publication (for more discussion on cooperation within BaFin, please see Section 5.8.3 *Legal or procedural impediments preventing an efficient and effective flow of information within BaFin*).
328. During the onsite visit and in the responses to the questionnaire, FREP noted that they were only made aware of the articles in the FT (including the articles in the blog) denouncing alleged accounting infringements in Wirecard in February 2017 when the article in Manager Magazin was published containing roughly the same allegations provided by email to FREP in September 2016. On the other hand, from the examination of its files related to the 2014 financial report, the PRC understands that FREP was informed of the existence of the articles published by the FT blog concerning accounting infringements in Wirecard already in September 2016 when the whistleblower approached FREP by email to discuss some of the alleged accounting infringements, referring to the FT blog articles. In addition, the FT blog articles were also referred to in the Der Spiegel article dated 30 April 2016 ('*Wette auf den Absturz*' – '*Bets on the downfall*') which was sent by BaFin to FREP in May 2016.
329. Taking into account that FREP became aware of the FT articles during the examination of the 2014 annual financial report, the PRC would have expected that FREP documented its analysis of the FT articles as to support (or not) the decision regarding the non-selection of the issuer for examination based on concrete risk regarding the 2015, 2016 or 2017 financial reports or the inclusion of the issuer in the abstract risk-based pool either in the examination files of the 2014

financial report or in the discussions of the ██████████ Committee. In addition, taking into account that FT blog articles were referred to in two German press articles which were forwarded by BaFin to FREP, the PRC would have also expected that BaFin's EFI team document their analysis of the content of the FT blog articles with the objective of assessing if an examination of the 2015 or 2016 financial reports should have been requested on the basis of those articles.

#### *Zatarra report*

330. The PRC concurs with FREP that the allegations contained in the Zatarra report were, in most cases, related to aspects outside the scope of FREP's work such as money laundering, fraud or malpractices. However, the PRC also considers that these allegations should have increased the risk profile of the issuer and should have led to the inclusion of Wirecard in the abstract risk pool due to a potential lack of controls or to weak corporate governance (please refer below for further discussion about inclusion in abstract risk).

#### *Manager Magazin article*

##### *- FREP*

331. In February 2017, after the examination of the 2014 annual financial report by FREP was closed, BaFin forwarded an article published in Manager Magazin that (i) makes further allegations (compared to the allegations included in the FT), (ii) summarises some of the allegations already included in the FT regarding accounting infringements by Wirecard (iii) refers to the FT articles. Taking into account that some allegations in the Manager Magazin article repeated the facts received by FREP by email in September 2016, FREP analysed its content based on the information collected from Wirecard during the 2014 examination. It is important, however, to highlight that FREP's ability to investigate the allegations forwarded by BaFin in the Manager Magazin in February 2017 was limited because (i) the examination of 2014 had finished in December 2016, and no error was found and (ii) no examination of the 2015 had started, i.e. there was no legal basis to require further information from Wirecard regarding the 2015 annual financial report and FREP could not conclude that Wirecard did not cooperate based on a request regarding the 2015 financial statements and could not transfer the file to BaFin (which would only have been possible had the issuer not cooperated with FREP).

332. In order to assess if Wirecard should have been selected for an examination during the period of 2015 to 2018 based on concrete indications of a potential accounting infringement on the basis of the article included in Manager Magazin, the PRC considered: (i) FREP's analysis of the allegations provided by email on 29 September 2016 which were roughly the same as the allegations included in Manager Magazin as part of reviewing FREP's files for the assessment of Guideline 6 (please refer to the sections on Guideline 6 with regards to the examination of the 2014 annual financial report), (ii) the additional documentation requested by FREP from Wirecard in February and March 2017 (see Paragraph 299) and (iii) the conclusion taken by FREP's ██████████ ██████████ Committee as to whether specific indications existed that could prompt an examination with cause.

333. In this analysis, the PRC focused on two main topics:

- a. whether the information received as part of the 2014 examination and the additional breakdown received concerning the receivables and the payables of the acquiring business by group entity were sufficient to understand the underlying transactions and



dismiss the allegations regarding the opacity of the information included in Wirecard's financial statements; and

- b. whether the work performed by FREP during the 2014 examination had been sufficient to mitigate or to eliminate the risks identified in the Manager Magazin article concerning potential accounting infringements related to the acquiring businesses in India by Wirecard in 2015.

334. Regarding point a. above, in light of the information contained in the Manager Magazin article, the PRC considers it was relevant to ask Wirecard in February 2017 for a breakdown of its subsidiaries holding the acquiring receivables and payables towards the acquiring partners to confirm the allegations' understanding of where these are located and better understand how the business is organised within the Group. However, as further discussed in the assessment of Guideline 6, taking into account the issues that were still open following the email received on the 29 September 2016, the PRC considers that the breakdown of the acquiring receivables and payables was not sufficient to dismiss the allegations included in Manager Magazin as regards the mismatch related to receivables and payables. Taking into account that the 2014 examination was closed and that FREP could also not ascertain whether the allegations included in the Manager Magazin were founded or not (i.e. whether the €250m mentioned in the article was problematic), the PRC thinks that, since at that point the examination of the 2014 financial report was closed, FREP should have opened a focused examination of the 2015, 2016 or 2017 annual financial reports in order to get a better understanding of the effects of transactions related to the acquiring businesses and ascertain if these transactions had been accounted for and presented in line with IFRS<sup>40</sup> for the financial statements and the Accounting directive (Directive 83/349/EEC and Directive 2013/34/EU)<sup>41</sup> in relation to the management report or the TD.<sup>42</sup>

335. Regarding point b. above, the PRC considers that FREP did not perform sufficient work to completely dismiss the risks that financial statements were incorrect as pointed out in Manager Magazin. Indeed, according to the article included in Manager Magazin, Wirecard had taken over the Indian GI retail company for up to €340m, which is 49 times the earnings before tax and 280 times the annual profit in 2015. The blog articles published on 12 November 2016 in FT Alphaville "*Rupee do: what is Wirecard buying?*" questioned Wirecard's EBITDA growth potential and thus the rationale for the transaction. On 6 April 2016 "*Debate swirls around German group Wirecard*" in the FT also challenged the purchase price of the Indian businesses observing that short sellers had started betting against Wirecard after that acquisition.

336. Considering that the acquisition of the Indian business only occurred in 2015, it would not have been appropriate for FREP to specifically cover it in the 2014 examination. At the time FREP received the Manager Magazin article from BaFin (February 2017), the 2015 annual financial report had been published and the 2016 annual financial report was about to be published (in April 2016, one month after FREP's letter to BaFin).

337. According to the 2015 annual financial report, the purchase price for the Indian businesses represented around 11% of the total assets of Wirecard, the related goodwill and customers

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<sup>40</sup> Paragraphs 15-17 of IAS 1 *Presentation of financial statements*.

<sup>41</sup> Article 4(5) of the Transparency Directive states that "The management report shall be drawn up in accordance with Article 46 of Directive 78/660/EEC and, if the issuer is required to prepare consolidated accounts, in accordance with Article 36 of Directive 83/349/EEC." Since July 2015, Directives 78/660/EEC and 83/349/EEC were replaced by Directive 2013/34/EU, as such references to the former directives shall be construed as references to Directive 2013/34/EU and shall be read in accordance with the correlation table in Annex VII.

<sup>42</sup> Article 4 (2) c) and Article 24 (1) of the Transparency Directive.

relations represented 11% (almost than 90% of the assets recognised in the India business were Goodwill and customer relations).<sup>43</sup> The Indian acquisition was also addressed in the Zatarra report, where some allegations referred to potential collusion between Wirecard and the sellers of the Indian business in order to inflate the acquisition price of the transaction.

338. While the PRC considers that FREP addressed the fraud allegations contained in the Zatarra report regarding the Indian Business as part of the discussion held with Wirecard's auditors (please refer to Paragraphs 418 and 419 concerning the analysis of the examination of the 2014 financial report), it did not address the risk that the assets recognised as a result of the Indian acquisition could have been impaired. FREP argued in exchanges with the PRC that the purchase price mentioned (€340m) includes a €110m earn-out component (as all other acquisitions in 2014). In a fast-growing new industry (such as the payment industry), high purchase prices (valuations) in relation to the current business volume and profits (even in many cases losses) are not unusual. FREP also noted that at the time the market capitalisation also did not give any indication that goodwill could be impaired.
339. However, the PRC is of the view that the allegations regarding a potential overprice paid for the Indian acquisition should have raised red flags regarding the subsequent measurement of goodwill and customer relationships which represented a material amount in the 2015 annual financial report and represented more than 90% of the price paid for the Indian businesses. Taking into account that the 2016 annual financial report was about to be released, FREP should have taken into due consideration the allegations included in Manager Magazin, FT and Zatarra, and should have selected the 2016, 2017 or 2018 financial reports for examination on the basis of concrete risk in order to assess if the goodwill and customer relationships of Wirecard were impaired.
340. During the onsite visit, FREP noted that it had engaged with Wirecard's auditor (EY) in a working meeting with Wirecard and its auditor on 11 October 2016, and obtained a confirmation from the auditor that they had looked into the fraud allegations included in the Zatarra Report and addressed the related allegations included in the FT. As the 2015 financial statements had been published with a clean audit opinion, FREP considered that the issue was solved, and no further investigation was necessary. The PRC notes that Guideline 5 is very explicit when stating that "an unqualified opinion from an auditor should not be considered as proving the absence of risk of a misstatement". Therefore, FREP should not have solely relied on the auditor's work in order to address the allegations included in the several articles published.
341. While the PRC acknowledges that it is not part of FREP's work to give positive assurance regarding the amounts that are included in the financial statements, it also believes that if doubts arise regarding such material amounts (in particular concerning their existence) or regarding the transparency of the information included in financial statements, FREP should investigate further to understand whether those doubts are substantiated or not and to ensure that investors obtain transparent and understandable information regarding the underlying transactions. Otherwise, if the allegations are not duly investigated and the information is not sufficient to enable an understanding of the transactions, questions regarding transparency of the business model continue to rise again (as happened regularly since 2008).

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<sup>43</sup> Page 165 and 166 of the 2015 annual financial statements, regarding the acquisition of the Hermes I Tickets Pte. Ltd., Chennai (India), GI Philippines Corp., Manila (Philippines), and Star Global Currency Exchange Pte. Ltd., Bangalore (India).

342. The PRC acknowledges that BaFin requested that FREP confirm that it took into consideration the allegations contained in the Manager Magazin when it examined the 2014 annual financial report. However, it is the PRC's view that before sending the Manager Magazin article to FREP, BaFin should also have assessed the content of this article against the scope and the timing of the examination of FREP.
343. Taking into account that some of the allegations in that article referred to events having occurred in 2015 (such as the acquisition in India), BaFin should have assessed whether all the potential infringements flagged in the Manager Magazin article could have been properly investigated by FREP in the context of an examination of the 2014 annual financial report. In this assessment, BaFin should also have considered if FREP could have made an in-depth investigation into these allegations considering that:
- a. the examination that FREP undertook of the 2014 annual financial report was closed in December 2016 before BaFin sent the Manager Magazin article to FREP; and
  - b. FREP could not require further information from Wirecard regarding the 2015 financial statements without opening another examination.
344. FREP's responded to BaFin on 9 March 2017 regarding the allegations in Manager Magazin. BaFin was therefore aware that the receivables and payables of the acquiring business were not directly addressed in the context of the 2014 examination, and that the work performed by FREP to assess whether, in its view, there were sufficiently concrete grounds for potential infringements was limited. BaFin should have assessed if the procedures described in FREP's letter to BaFin provided sufficient assurance as to whether the allegations included in the Manager Magazin article were sufficiently addressed. BaFin instead considered that, taking the article in Manager Magazin as well as FREP's assessment into account, no specific indications for an accounting infringement existed.
345. The PRC understands that BaFin could not have performed its own detailed examination at this stage. However, the PRC believes that, before concluding that no concrete indication of a breach of accounting existed and that no request for a focused examination was therefore required, BaFin should have looked at the published accounts of Wirecard from an investors' point of view, so as to get to (and document) its own assessment of whether the information in the published financial statements and management report was sufficient for users to understand the impact of the transactions connected to the acquiring business in Wirecard's financial position and financial performance. In addition, also in light of the allegations included in Manager Magazin as well in the FT articles pointing to a potential overprice regarding the Indian acquisition and considering that the Indian business was only acquired in 2015, BaFin should have requested a focused examination of the 2016 financial statements in order to address the risk that goodwill and customer relationships related to the business were potentially impaired.
346. In this respect, BaFin noted, within the realms of the statutory framework, it had taken into account not only the content of the Manager Magazine article but also FREP's preceding assessment when performing its own assessment as to whether concrete indication of an accounting infringement existed. BaFin argued that, in order to conclude on concrete indication of a breach of accounting rules, BaFin has to clear a high hurdle, per Paragraph 108 para 2 of the German Securities Trading Act and - by law - BaFin is not allowed to undertake its own examinations as long as a case can

be conducted by FREP, and this fact does not depend on the source of data BaFin examines. This general principle applies with regards to the examination of published accounts, as well. BaFin also argued that it would not be proportionate to require an examination to the 2015/2016 financial reports of Wirecard from FREP when the 2014 examination had just been concluded.

347. However, the PRC also notes that in February 2017 FREP's examination was already finalised, and the arguments used by BaFin to explain why they could not have performed their own analysis of the 2015 published financial reports (and not rely solely on FREP's analysis) and request an examination of the 2015 or 2016 financial reports seem to contradict its actions and requests during the period between 2019 and 2020. Indeed, in February 2019, BaFin requested a focused examination from FREP on the basis of an article published in the FT denouncing alleged accounting infringements in Singapore. In October 2019, BaFin, in coordination with FREP, agreed with the expansion of scope of the examination carried out by FREP. In April and June 2020 when an examination of the 2018 half year financial reports by FREP was ongoing, BaFin requested that FREP carry out three concurrent examinations regarding the 2018 and 2017 annual financial reports and the 2019 half year financial reports. In the latter cases, the basis for those three concurrent examination requests was BaFin's analysis of the content of the KPMG report and its potential impact in Wirecard's 2017, 2018, 2019 published financial reports. In summary, the actions undertaken by BaFin in the period between 2019-2020 demonstrated that not only BaFin was able to examine published financial reports and other information but also to use such information to require (i) several concurrent examinations to be undertaken by FREP and (ii) agree with FREP on a scope expansion of current ongoing examinations.

348. With respect to the allegations regarding the opacity of financial information contained in the financial statements of Wirecard, the PRC notes that in its internal memo dated 15 March 2017 BaFin concluded that "the fact that the consolidated financial statements would not communicate the business of Wirecard in an intelligible manner does not constitute an accounting infringement in the absence of any relevant legal standard." The PRC strongly disagrees with this assessment.

349. The PRC in fact notes that Paragraph 15 of IAS 1 *Presentation of Financial Statements* requires that "fair presentation requires the faithful representation of the effects of transactions, other events and conditions in accordance with the [...] Conceptual Framework". In addition, Paragraph 17 b) and c) of IAS 1 also require "an entity to present information [...] in a manner that provides [...] understandable information" and to "provide additional disclosures when compliance with the specific requirements in IFRS is insufficient to enable users to understand the impact of particular transactions, other events and conditions on the entity's financial position and financial performance." In addition, the PRC highlights that the objective of enforcement as included in Paragraph 17 of the GLEFI is to contribute to a consistent application of the relevant financial reporting framework and, thereby, to the transparency of financial information relevant to the decision-making process of investors and other users of harmonised documents. Finally, beyond the financial statements per se, the TD Article 24 (1), Article 4(2)(c) and Article 4 (5) sets the expectation that the management report "shall include a fair review of the development and performance of the business and the position of the issuer and the undertakings included in the consolidation taken as a whole, together with a description of the principal risks and uncertainties they face".

350. On 15 February 2019, BaFin requested that FREP carry out an examination of the 2018 half year financial report in the light of the allegations included in the FT regarding potential fraud in Singapore. As discussed further below, shortly before that, on 11 February 2019, FREP had selected the 2018 annual financial statements based on abstract risk.
351. FREP decided to include the issuer in the abstract risk-based pool which led to the selection of the issuer via abstract risk. FREP indicated that they did so not because they did not identify a concrete risk, but rather because the full year financial statements were not available at the time. In parallel, BaFin considered that the allegations included in the FT were sufficiently specific to require a request-based examination from FREP.
352. The PRC is of the view that the allegations included in the article in FT were indeed sufficiently specific to prompt a request-based examination. Whenever there are credible suspicions of accounting infringements including fraud, these should be investigated or monitored closely by enforcers by asking questions to issuers and auditors regarding accounting infringements and fraud regardless of their materiality as these increase the risk of other material infringements in other areas (please refer to Section 5.8.1 Legal and procedural impediments to timely detection of issues and taking of measures - Financial reporting issues involving fraud).
353. The PRC notes that BaFin could have requested an examination of the 2018 annual financial report already in October 2019 when it became aware of the FT article discussing the fraudulent nature of Wirecard's TPA partner business, especially since annual financial reports contain more information than the half year financial reports. Notwithstanding this, the PRC considers that this would have most likely not changed the final outcome of the examination.

### **Risk-Based Approach – Abstract Risk**

354. The determination of risk should (i) be based on the combination of the probability of infringements and the potential impact of an infringement on the financial markets, (ii) take into account as far as possible the characteristics such as the risk profile of the issuer.

#### *Characteristics of the issuer such as its risk profile*

355. The PRC notes that the characteristics of an issuer is an important aspect to be considered in the selection for examination and they are explicitly referred to in Paragraph 49 of the GLEFI. As reaffirmed in 2017 in the onsite Peer Review report, the PRC continues to believe that FREP's risk-based approach does not sufficiently take into consideration the intrinsic risk profile of an issuer.
356. Based on the information obtained, FREP confirmed that most of the risk factors identified for the abstract risk assessment are based on the information extracted from the media. The PRC is of the view that, although sources of external factors should always be taken into account, specific factors relating to the intrinsic risk profile of an issuer should also be considered.

357. In 2017, FREP was asked to consider enhancing the procedure leading to the identification of abstract risks. For this purpose ESMA suggested that FREP obtain specific financial information of issuers available at the time of the selection such as financial indicators extracted from databases such as Bloomberg, or by analysing equity research reports where trends or significant deviations of market expectations from reality may be identified.

358. The PRC takes note of the fact that the list of risk factors used by FREP has increased over the years, in particular in 2018 to include deficiencies in corporate governance, slow implementation of new standards or peculiarities noted in completed examinations following ESMA's recommendations. FREP also committed to use in the future the machine-readable data expected to become available starting in 2021 with the European Single Electronic Format (ESEF) in order to perform an analytical review of accounting data.

#### *2015 to 2017 financial reports*

359. Wirecard was not included in the abstract risk pool regarding the financial reports of 2015, 2016 and 2017. However, over the years, Wirecard was exposed to significant public attention by the media. The articles included in the FT concerning potential accounting infringements (even if only known to FREP in May or September 2016) raised relevant doubts regarding the recognition and measurement of intangible assets resulting from business combinations, opacity in the information disclosed regarding the business model of Wirecard, non-explained mismatches between trade receivables and trade payables from the acquiring business, discrepancies regarding the presentation of EBITDA and operating cash-flow. The PRC considers that the information included in these articles should have raised the risk profile of the issuer (for example due to risk factors such as exceptional transactions, special facts and circumstances or economic situation of the company).

360. The PRC also considers that FREP should have followed BaFin's recommendation in April 2016 to include Wirecard in the abstract risk pool for sample selection purposes due to the known allegations – whose verification is in the public interest. If indications existed from market surveillance, FREP should have considered these elements when deciding if Wirecard should be included in the abstract risk pool.

361. In line with the assessment of the 2017 Peer Review, the PRC also believes that if financial indicators had been collected as part of the selection model (for instance using Bloomberg databases), Wirecard could have been subject to an examination earlier. Indeed, the significant growth of revenues throughout the years, the margins not duly justified or explained, the increase of goodwill, could have raised red flags that should have led to an earlier selection of Wirecard during the 2015 to 2018 period (financial reports regarding 2015 to 2017 reporting periods).

362. Finally, while the PRC believes that Wirecard should have been included in the abstract-risk pool between 2015 and 2017, it also highlights that, according to FREP's model, this inclusion would not in itself lead to selection of the issuer for examination. This is due to the fact that only 40% of the issuers included in the abstract-risk based pool are randomly selected for an examination, i.e. there is a 60% probability that the issuer would not have been selected based on risk even if it had been included in the abstract-risk based pool. The PRC also acknowledges that Wirecard could have been selected via rotation or random sampling.



363. In 2019, the 2018 annual financial report was selected based on abstract risk. FREP indicated that the risk factors that led Wirecard to be included in the abstract risk-based approach were:

- a. unusual transactions (such as business combinations),
- b. economic situation of the company (outperformer),
- c. special industry risks and
- d. poor corporate governance.

364. While the PRC concurs that Wirecard should have been selected based on risk, it is also of the view that the risk factors that led FREP to include Wirecard in the risk-based abstract pool in 2019 could have been already observed in previous years because of the following:

- a. Wirecard's strategy was to grow through acquisitions: over the years Wirecard acquired several businesses, most of them in Asia in order to develop their business in that region (e.g. Indian acquisition in 2015, Citi's payment processing operations across 11 countries in Asia in 2017);
- b. It was public knowledge that Wirecard was an outperformer for several reporting periods, with revenues increasing at a 30% growth rate every year and constantly growing margins;
- c. The business model of Wirecard was known for being complex and not transparent.<sup>44</sup> Several doubts surfaced over the years about whether Wirecard should have been classified as a financial institution or a fin-tech company (which signals special industry risks).
- d. Articles in the press and the Zatarra report regarding money laundering, round-tripping revenues and the lack of transparency of financial information pointed to a lack of internal controls and weak corporate governance structure (poor corporate governance, or special facts and circumstances).<sup>45</sup>

### Application of the selection models

365. The PRC considers that in the context of Wirecard, FREP's selection model was effectively followed when selecting Wirecard for unlimited scope examination based on rotation in 2014 and when selecting Wirecard for an examination of the 2018 annual financial report and the 2019 half-year financial report based on risk in 2019 and 2020.

366. The PRC considers that the selection model was also effectively followed by FREP and BaFin between 2015 and 2018. However, the PRC notes that a degree of judgement is implicit when selecting issuers based on concrete risk or when including issuers in the abstract risk pool. In these regards, the PRC disagrees with the judgement made by FREP leading to the conclusion that the financial reports of Wirecard for the periods between 2015 to 2017 were neither selected based on risk nor included in the abstract risk selection pool.

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<sup>44</sup> Manager Magazin, on 26 February 2016 titled "*Black Box Wirecard - das Geschäftsmodell, das keiner versteht*" (i.e. *Wirecard - the business model nobody understands*).

<sup>45</sup> The risk factor related to poor corporate governance was included in the FREP's risk factors list only in 2018.



### 5.3.3 Findings – Conclusion

367. FREP partially met the expectations regarding Guideline 5 Selection methods between 2015 and 2018 in the context of Wirecard due to the fact that it did not take into due consideration the allegations in the FT and in Manager Magazin and thus neither selected Wirecard's financial reports of 2015, 2016 or 2017 based on concrete risk, nor included Wirecard in the abstract risk-pool during these years.
368. BaFin largely met the expectations regarding Guideline 5 Selection methods between 2015 to 2018. BaFin did not fully meet expectations because, despite the allegations included in Manager Magazin in 2017 and in the FT (which were referred to in the Manager Magazin article), it did not request an examination from FREP regarding the 2015, 2016 or 2017 annual financial reports.
369. FREP and BaFin fully met the expectations regarding Guideline 5 in 2019 and 2020 when selecting the 2018 half year financial report (BaFin), the 2018 annual financial report (FREP and BaFin), the 2019 half year financial report (FREP and BaFin) and the 2017 annual financial report (BaFin) of Wirecard based on risk.
370. In addition, while the PRC is of the view that FREP's risk-based approach as it is designed generally fulfils the principles included in Guideline 5, it also recommends that FREP considers the following improvements<sup>46</sup>:
- a. reviewing articles in international newspapers (including online newspapers) with widespread acceptance in the sphere of international finance in the area of financial and economic matters in order to add these elements to its selection criteria for examination or when performing examinations;
  - b. enhancing its analysis of press articles which appear to be reliable and relevant sources for the purpose of selecting issuers for examination (either abstract risk or concrete risk); such analyses and the related conclusions should be duly documented in particular when press articles are not taken into account in the selection model;
  - c. using, from 2021, in the context of its abstract risk-based selection, to the maximum extent possible, data to identify trends in the accounting figures such as for instance significant variations in turnover, equity or intangible assets. For this purpose, machine-readable data made available by issuers in compliance with the ESEF Delegated Regulation will be relevant to use when implemented.
  - d. more prominently considering indicators of the potential impact of an infringement on financial markets (such as the size of the company, the inclusion of an issuer in the main index, the number of investors or free-float of a specific company, etc.) when establishing the risk factors to identify abstract risks. Currently, the risk of potential impact on financial markets is mainly captured in FREP's selection model (1) indirectly because larger issuers and issuers included in the main indexes are subject to increased scrutiny from investors, analysts and press and thus it is more probable that these issuers are addressed more frequently in the press or (2) in the rotation/random stratified sample, whereby companies

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<sup>46</sup> As detailed in this paragraph, sources of information available to enforcers for their selection of issuers are diverse. In the case of Wirecard, a particular focus is given to the review of the press given the significant public attention the media was giving to the company and the detailed level of information provided therein. Such focus may not necessarily be as relevant for all issuers.

included in the main German indexes are reviewed more regularly than companies outside those indexes.

In the ESMA Supervisory Briefing on Selection Methods, issued in 2020, ESMA highlights that the risk-based approach should consider risk factors linked to the potential impact on the market;<sup>47</sup>

- e. considering to weigh issuers differently in the risk abstract pool so as to increase the probability of selection for the riskier issuers. As an alternative, as risk is a key element of the selection model, the PRC recommends that FREP consider increasing the percentage of issuers selected based on abstract risks.

The PRC notes that the abstract risk component in FREP's model does not assign a grade or rank to issuers within the risk pool. This means that an issuer which was included in the risk pool based on just one risk factor has the same probability (40%) of being selected compared to an issuer which was selected based on two or more (or all) risk factors in FREP's list. This means that the risk-based abstract pool includes issuers with different risk profiles and because there is no grading system of issuers based on risk or no analysis made regarding the intrinsic risk of an issuer, the riskier issuers may not be selected based on abstract risk because they fall within the 60% of the pool which is not selected for examination.

Although the PRC acknowledges that when issuers are included in the risk-based abstract pool there is no concrete indication that a misstatement exists, the risk profile of the issuer should be increased compared to other issuers selected based on random selection (rotation and/or random) and thus the probability of being selected due to the risk-based approach should also reflect this increase in risk in particular when several risks are identified for the same issuer. Taking into account that there is no grading system (and it is not required under the GLEFI nor in the supervisory briefing), the PRC is of the view that a 40% probability of being selected based on abstract risk may not be sufficient to capture the increment in risk profile of issuers if indications exist in the press, public information or in accounting data. This may explain why the selection of issuers based on risk in Germany only represented in 2014/2015 around 15% of the total of issuers compared to around 64% on average in other jurisdictions.<sup>48</sup> While the PRC takes note that issuers selected based on the risk-based approach between 2017-2020 on average increased to 21%, it is far from the 64% on average in other countries or the 50% threshold referred to in the ESMA Supervisory Briefing as benchmark for issuers selected via risk.

371. Finally, the PRC recommends that BaFin does not solely rely on FREP's review of media in order to assess if an examination should be initiated and that BaFin performs and documents its own assessments of the available information, especially when allegations included in the media point to potential accounting infringements including, but not limited, to potential shortcomings in recognition, measurement, presentation or disclosure of assets, liabilities, profit or loss or cash-flows in financial reports. To that effect and similarly to FREP, the PRC recommends that BaFin considers improving its monitoring of the press by reviewing articles in international newspapers (including online newspapers) with widespread acceptance in the sphere of international finance in the area of financial and economic matters in order to add these elements to its assessment of indications of material infringements on which it bases its requests for FREP to examine issuers financial reports.

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<sup>47</sup> As mentioned in Paragraph 29-30 of the ESMA Supervisory Briefing on Selection Methods.

<sup>48</sup> According to the Peer-review carried out in 2017, Peer Review on Guidelines on Enforcement of financial information, ESMA 18 July 2017 | ESMA42-111-413

## 5.4 Guideline 6 – Examination Methods

### Background – Supervisory expectations

372. In accordance with the mandate of the FTPR on GLEFI in the context of Wirecard, the PRC analysed the application of BaFin and FREP of Guideline 6 related to the examination procedures, in particular:

- a. to assess whether the examination procedures in place ensure that the enforcement of financial information performed either by unlimited scope examinations, or a combination of unlimited scope and focussed examinations, is effective; notably, whether the examinations carried out by FREP and BaFin ensured that material errors were likely to be identified;
- b. given the perceived risks of misstatements, to assess whether and how the examination procedures undertaken by FREP and BaFin regarding the Wirecard case were sufficient in order to achieve an effective enforcement process.

373. It is expected, in the specific context of Wirecard, that:

- a. FREP and/or BaFin ensure that, given the perceived risks of misstatements, the appropriate type of examinations was selected, and the scope of such examinations should at least cover such risks of misstatements;
- b. FREP and/or BaFin ensure that examination procedures undertaken and examination techniques applied were sufficient in order to achieve an effective enforcement process and that the related conclusions of the review of the financial information regarding Wirecard are documented appropriately;
- c. examination procedures of the issuer's financial information include the examples provided in the Guideline 6;
- d. the conclusions of the examination taken follow Paragraph 56 of the Guideline 6.

### 5.4.1 Summary of facts – Examination of the 2014 accounts

#### General examination process

374. As mentioned under Guideline 5, Wirecard's 2014 consolidated annual financial report was selected on 15 December 2014 on the basis of stratum 1 in the random sampling. These were therefore subject to an unlimited scope review. According to FREP, no allegations were known at the time of the sampling process.

375. Wirecard issued its 2014 annual financial statements with an unqualified audit opinion on 7 April 2015.

376. On 13 April 2015, FREP informed BaFin of its selection of Wirecard asking BaFin whether there were any impediments to such examination. BaFin responded on 15 April 2015 stating there were none.
377. FREP immediately launched the examination on 15 April 2015 by sending a letter to Wirecard asking whether they would cooperate and, if that was the case, for the following documents: the 2014 consolidated annual financial statements and management report as well as the related parent financial statements and management report, the related long-form audit opinions, the breakdown of the audit differences and errors identified, as well as the subsequent interim financial statements. FREP received on 27 April 2015 Wirecard's confirmation dated 23 April 2015 together with the requested documents.
378. FREP confirmed the examination team after signing of the independence form on 27 April 2015.
379. According to FREP, the focus areas were defined according to its usual procedures as previously described.
380. Regarding the 2014 examination, FREP indicated that the scope of the examination was defined having regard to (i) ESMA's Common Enforcement Priorities for the examination of 2014 annual financial statements (which focused on better disclosure, initial application of the new consolidation standards (IFRS 10, *Consolidation of financial statements*; IFRS 11, *Joint Arrangements*; IFRS 12, *Disclosure of interests in other entities*) and recognition and measurement of deferred tax assets), (ii) FREP's own enforcement priorities as regards the management report with the presentation of risk in particular, as well as (iii) other areas which are usually risky and error-prone (e.g. capital increases, in this case significant), unclear from the reading of financial statements and management report (e.g. cash flow statement), incorrect (e.g. measurement of compounded financial instruments at cost instead of fair value, items included in long term financial assets) or inconsistent based on reading the financial statements and the management report.
381. Consequently, the first set of questions sent to Wirecard on 28 July 2015 covered the following topics in five main sections: (i) long and short-term financial assets, (ii) income taxes, (iii) depiction of litigation and related litigation risks, (iv) group management report as well as (v) other topics (initial application of IFRS 10-11-12, capital increase in 2014, cash flow statement, income realisation (Percentage of Completion orders), segment reporting (allocation of holding, etc.), development of interest expense, goodwill impairment testing (IAS 36), intangible assets (reclassifications in 2013) and IFRS 7 Disclosures).
382. During the examination, FREP sent three sets of questions on 28 July 2015 (deadline for response: 2 September 2015), 17 November 2015 (deadline for response agreed by telephone) and 10 March 2016 (deadline for response on 1 April 2016), all of which Wirecard responded to in writing. It also held a working meeting with Wirecard and its auditor on 11 October 2016 for which the agenda, including the fourth and final set of questions, was sent on 18 August 2016.
383. The PRC understands from FREP that the sending of the first set of questions to Wirecard, initially planned for end of May 2015, was delayed due to unforeseen circumstances.
384. In the context of the different sets of questions, the examination procedures carried out consisted in reading the financial statements and management report, performing some analytical review and a desk review of documents supplied by the company explaining the breakdown of balance sheet amounts, their bridging from one period end to the next, their measurement basis as well as,

where relevant, the related disclosures or further explanations to specific disclosures. As mentioned above in Paragraph 382, these were supplemented by a physical working meeting with the company and its auditor.

385. The other three sets of questions primarily consisted in a follow up of the issues included in the first set of questions. The agenda for the working meeting, after the detailed still open questions FREP was requesting Wirecard to address, included an agenda item to discuss the short selling attacks and allegations of fraud the company faced in February-April 2016 following the publication of the Zatarra reports (see Paragraph 402 below).

386. Wirecard responded to the second set of questions (sent on 17 November 2015) in two batches on 15 January 2016 and 26 January 2016. The response to the third set of questions was provided on 20 April 2016, after an agreed extension of the initially set deadline of 1 April 2016. The PRC understands that this extension was due to the finalisation, in the context of allegations, of Wirecard's 2015 financial statements, which were published with an unqualified audit opinion on 6 April 2016.

387. The table below summarises the different informational exchanges between FREP and Wirecard;

	Date sent/ requested	Deadline	Date response received
<b>Cooperation and initial documents</b>	15/04/2015	2 weeks	23/04/2015
<b>1st set of questions</b>	28/07/2015	2/09/2015	1/09/2015
<b>2nd set of questions</b>	17/11/2015	by telephone	15/01/2016 (batch 1) 26/01/2016 (batch 2)
<b>3rd set of questions</b>	10/03/2016	1/04/2016	20/04/2016
<b>4th set of questions</b>	18/08/2016	11/10/2016	6/10/16 11/10/16 (meeting)
<b>Additional documents from meeting</b>	6/10/2016	-	22/11/2016 (auditor) 1/12/2016 (external third party)

388. The examination, including the handling of allegations against Wirecard during the examination process (see Paragraphs 389 – 409 hereafter), was concluded by the Chamber meeting on 1 December 2016.

### Handling of allegations against Wirecard during the examination process

389. On 27 April 2015, the FT launched the 'House of Wirecard' series on the FT Alphaville blog. As already mentioned, ten blog articles were published in 2015 including links to documents and raising questions about the value of intangibles and customer lists, the company's acquisition practices (upfront cash payments, measurement of the end of 2015 Indian acquisition – see more details on the latter in Paragraph 338), the reality and/or level of the company's operations in the Middle East and in Asia, the account of receivables and payables from Wirecard's acquiring business and the related adjustments made by management to Wirecard's cash-flow statement.

390. As discussed under Guideline 5, FREP stated it was not aware of these articles at the time they were published as it did not have a subscription at the time to the FT (see Paragraph 285) and they were not covered in the German press/media. The PRC did a perfunctory check of the titles of three of the German media FREP indicated it was following to confirm that, in 2015, those media did not indeed cover those allegations.
391. A further four articles were published by the FT in 2016 of which only the last two are part of the 'House of Wirecard' series. The first article in that year, which was published on 25 February 2016 (*'Shares in fintech darling plunge on critical report'*), refers to a 'highly critical report' by Zatarra Research and Investigations on Wirecard's 'oversight and controls designed to prevent money laundering'. The article ends by stating that 23% of the entity's shares were out on loan as a consequence. The Zatarra report is about potential infringements ranging from corruption, fraud and money laundering to Wirecard's involvement in illegal gambling. The only allegation mentioned in the Zatarra report(s)<sup>49</sup> and directly related to possible accounting issues concern whether the Indian acquisition in the last quarter of 2015, GI Retail, was worth what Wirecard acquired it for (€340m, i.e. 280 times its annual profit) and, in that context, whether Wirecard had performed proper due diligence for this acquisition.
392. The second article of the year was published on 6 April 2016, just before the expected publication of Wirecard's financial statements, referring to the Indian acquisition and a March 2014 qualification of related subsidiary accounts regarding most of the displayed revenue amount. The article also mentioned the divergent analyst positions on what position to hold vis-à-vis Wirecard holdings.
393. In their 27 April 2016 quarterly working meeting, BaFin asked FREP to include four to five companies, amongst which Wirecard, in the abstract-risk bucket of the sampling selection process due to the public interest in obtaining explanations regarding existing allegations (in the case of Wirecard) or on the basis of evidence of certain risk factors such as bad quality of the accounting (see Paragraph 290 under Guideline 5).
394. According to BaFin, BaFin forwarded on 9 May 2016 an article from Der Spiegel dated 30 April 2016 (*'Wette auf den Absturz' – 'Bets on the downfall'*) to FREP so that FREP can take the allegations from the Zatarra report into consideration in its ongoing assessment of Wirecard. This article referred to the 2015 FT articles and the company's dismissal of the allegations, the short-selling attacks against Wirecard but also mentioned that a list of other companies 'who are up to no good' exists.
395. According to FREP, the assessment it made in the context of these allegations took into consideration the fact that (i) the Zatarra report was published at the same time as increases in short-selling positions, (ii) BaFin was investigating for market abuse and had notified the prosecutor in that context, (iii) the market said the content was repeating old allegations, mainly on money laundering and (iv) the auditor had signed off an unqualified opinion on the 2015 financial statements. FREP however decided that this issue should be addressed in the working meeting with the company.

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<sup>49</sup> There is unclarity as to how many reports were published by Zatarra on Wirecard (3 or 4). Only the main and first one (101 pages) is easily accessible on the internet.



396. On 3 June 2016, FREP provided Wirecard with a short update of the examination process on their side, indicating the need to work on two other examinations in order of arrival of responses and that therefore the analysis of Wirecard's responses would take another three weeks. Regarding the allegations of fraud against the company from the Zatarra reports, FREP also indicated that, whilst it did not intend to make these a subject of the examination, they could not be neglected and requested that Wirecard prepare something on this, in particular in explaining why these were unfounded and related to previous similar allegations, to be addressed in the upcoming working meeting. In response, Wirecard indicated the allegations were investigated during the audit of the 2015 annual financial statements by their auditor.

397. On 18 August 2016, FREP sent its fourth set of questions in the form of an agenda for the working meeting, including an agenda point to discuss the allegations of fraud.

398. On 29 September 2016, FREP received allegations from a whistle-blower mainly with respect to the receivables and payables related to the acquiring business, according to which the related 2015 balance sheet numbers, for the first time identified separately, were questionable. The allegations were forwarded to the examination team on 4 October 2016. The whistle-blower also referred to the 2015 articles of the House of Wirecard series and provided a link to these. Whilst the whistle-blower stated they did not themselves possess the required accounting knowledge, they supplied FREP with context to explain why they thought those were credible areas of concern: checking analysts' understanding of Wirecard's business model, analysis by people who, although described by the whistle-blower as 'hobby-readers' of financial statements, in real life are knowledgeable in the area of controlling, checking their understanding and the analysis with a manager in the payment industry. The whistle-blower's submission, through various accompanying documents, questioned the following areas:

- a. The acquiring receivables amount was approximately equal that of the acquiring payables, which may have been plausible at group level given the general dynamics of the acquiring business model: when a customer pays their purchase with a credit card, the acquiring bank (Wirecard Bank in Germany where it had a licence, and acquiring partners where Wirecard did not have a licence) records an acquiring receivable against the credit card company and an acquiring payable to an equal amount less its commission towards the merchant. The submission raised questions as to how these were accounted for at subsidiary levels, especially those transactions in jurisdictions where Wirecard did not have a licence and uses acquiring parties (e.g. Dubai, Ireland) and found there to be inconsistencies because no such balance seemed to exist at subsidiary level and that therefore corresponding liabilities were missing. This main allegation drew upon the first-time separate presentation on the balance sheet of the receivables and the payables from the acquiring business from respectively the trade and other receivables and payables in the 2015 financial statements, with 2014 comparative figures. Included in that allegation was also some questioning on Wirecard's reference to these assets and liabilities as having a 'transitional character'.
- b. The operating cash flows were strongly correlated with the investment activity, which appeared to mainly take place in the last quarters in order to be able to account for the acquisition for the full year. This was questioned in the submission although it was acknowledged that there was management discretion on when acquisitions take place.
- c. EBITDA and operating cash flow did not show any correlation from quarter to quarter, whereas EBITDA was a rather constant function. Here too the submission noted that some



management discretion was possible regarding the timing of payment by Wirecard of its acquiring payables, i.e. in deferring them.

- d. Further, Wirecard's figures also showed anomalies in other areas (e.g. mainly erratic cash flow fluctuations) which may have been linked to the questions above.
- e. Finally, given the above, the submission questioned whether Wirecard's accounting was opaque because of it depicting many complex business models or because of deliberate misleading presentation.

399. As the whistle-blower introduced the allegations by referring to a previous occasion when they tipped FREP successfully, the PRC asked FREP to provide explanations relating to that case to gauge the whistle-blower's credibility in the eyes of FREP. According to FREP, whilst the examination in question did lead to an error, the information provided by the whistle-blower related to the ultimate unlisted parent company of the company under examination. Therefore, the tipping by the whistle-blower had no impact on the outcome of the enforcement case, partly because the allegations related to the issuers' ultimate parent company was not subject to enforcement in Germany.

400. Although the whistle-blower had indicated in their submission their availability to further discuss, FREP indicated it did not contact the whistle-blower as it is restricted from discussing with whistle-blowers for confidentiality reasons. According to FREP, the whistle-blower's allegations also referred to the Zatarra reports.

401. A [REDACTED] Committee meeting was held on 6 October 2016 where, amongst other topics related to other cases, the allegations made by the whistle-blower were, according to the minutes of that meeting, extensively discussed and found to be obviously unfounded. It was decided not to launch an indication-based examination but to address selected issues as part of the ongoing examination. The PRC understands that those procedures related to analysing whether there was a correlation between EBITDA and operating cash flow over the previous three years.

402. The working meeting with Wirecard and its auditor was held on 11 October 2016 after having been postponed from early September as Wirecard's senior management could not attend. Allegations raised against Wirecard were one of the topics discussed at this meeting, after having discussed the outstanding points in the fourth set of questions sent. According to FREP, the auditor informed FREP that they brought in their own forensic team to address the Zatarra accusations before signing the audit opinion. It was agreed that FREP would be provided with additional documents relating to the procedures performed by the auditor concerning the allegations before signing the audit opinion of the 2015 financial statements as well as a report on the investigation into the allegations raised in the research reports performed by an external third party commissioned by Wirecard. The PRC notes that the allegations discussed, referred to and addressed after the meeting are those made in the context of the Zatarra reports and did not relate to the allegations made by the whistle-blower who contacted FREP.

403. The examination team discussed the five main allegations contained in the Zatarra reports and how they were assessed during the examination on 28 November 2016. The five main allegations related to (i) business performed with falsely coded nature of business (suspicions of money laundering), (ii) inclusion of short-lived companies in the Wirecard group and nature of their business, (iii) inclusion of previously employed staff and managers to Wirecard group, (iv) Indian acquisition and pre-existing links with Wirecard group and (v) *ad nominem* denigrations against the CFO, in relation to one of his previous employment positions.

404. The document included an assessment of all the points addressed in the four sets of questions previously mentioned, the five main allegations in the Zatarra reports and the analysis of the correlation between EBITDA and operating cash flow. On this latter point, the objective of which was to assess the plausibility of the issue of receivables and payables of the acquiring business in Paragraph 398 a. above, the comparison of the EBITDA to the IFRS operating cash-flows, i.e. which include the amounts due from credit card companies and acquiring partners and the amounts due to merchants, over the previous three years revealed that there was indeed no positive correlation between the two but that this was justified by the change in working capital which was influenced by end-of-year date-related effects, particularly in relation to the positions at Wirecard Bank and its settlements with credit card companies. If the allegations about non-existence of receivables were true, the EBITDA would have to be persistently above the operating cash flow due to the (fraudulent) recording of receivables against revenue, which was not the case.
405. As regards the whistle-blower's submission, the PRC notes that this analysis by FREP of the relationship between EBITDA and operating cash flow is not evidenced in the examination files. The other four issues submitted in Paragraph 398 above are also not specifically documented indicated in the files. Following questioning by the PRC, FREP indicated that:
- a. FREP had found the allegations to be unfounded and that, not only in FREP's view, but also in the opinion in the public (newspapers, analysts), the whistle-blower did not consider the mixed business model in the acquiring business in their analysis and therefore the analysis was based on incorrect assumptions (e.g. the notion of transitional character of these balance sheet items). In that sense FREP considered the accounting to be clear;
  - b. It is not unusual for acquisitions to be performed at year-end, often to be able to show the related balance sheet effects in the balance sheet and obviously not the full year profit or loss (which is not allowed according to IFRS if control is only obtained on the acquisition date), as erroneously claimed in the submission;
  - c. As mentioned in the document addressed to the Chamber, cash flows were heavily influenced by end-of-year date-related effects.
406. The 28 November 2016 Chamber meeting decided on that date not to finalise the examination until FREP received (i) the auditor's documents relating to procedures its forensic team performed, in the context of their audit of 2015 financial statements, on the three Zatarra reports dated 24 February 2016, 8 March 2016 and 16 March 2016 as well as (ii) the status report on the investigation into the allegations raised in the research reports performed by an external third party commissioned by Wirecard, expected and received on 1 December 2016. The PRC notes that the documents referred to in (i) had already been received but that, whilst there seems to be a contradiction in terms of timing between the actual date of receipt of these documents and their mention in the Chamber's meeting minutes as still being outstanding, this has no impact on the Chamber's decision as the second document was still outstanding.
407. The two documents received on 22 November 2016 by FREP concerning the auditor's examination first include the list of 51 questions asked by the auditor to Wirecard referring to the three above-mentioned Zatarra reports and dealing primarily with understanding the relationship of the individuals and companies mentioned in these reports with Wirecard as well as questions on the Indian acquisition. The PRC was not able to determine whether that document was complete or not, as it did not include any introductory letter, date, nor page numbers. The PRC notes that there were no questions related to the allegations on the acquiring receivables and payables. The second document is Wirecard's response to the auditor regarding the questions raised by the

auditor in their 29 February 2016 letter. The PRC notes that this response refers to 53 points, the last two being referred to as 'additional questions'. FREP stated that it did not have access to the long-form audit report for the financial statements 2015 and did not request such access either.

408. On 1 December 2016, Wirecard provided FREP with the status report from the external third party it had commissioned. This document is one page, on the external third party's letterhead but is unaddressed, unsigned and annexed to an email of the chief accounting officer of Wirecard. It only concluded that whilst a number of issues were still being investigated, there was no evidence at that stage of Wirecard conspiring to unlawful transactions or to errors in the balance sheet.

409. Upon receipt of that document, FREP closed the examination with no error finding on the same day, but with a reminder regarding future measurement of specific financial assets and some recommendation on separately presenting the items included in long term financial assets (liquidity reserves, standard bonds, strategic investments in start-up companies) as their risk profile differs. FREP subsequently checked that this was implemented in the 2016 annual financial report. Regarding the allegations against Wirecard, the examination report to the Chamber noted that:

- a. There were no concrete indications of a financial reporting fraud
- b. This view was shared by the market (analysts, etc.)
- c. The external third party's investigations are still ongoing, as of 1 December 2016
- d. However, according to their status report there were no indications that the allegations against Wirecard were correct and that the financial statements were erroneous.

410. BaFin and Wirecard were informed of the outcome of the examination by letter (as is customary) on 5 December 2016.

## 5.4.2 Analysis – Examination of the 2014 accounts

### The type and scope of the examinations

411. The PRC notes that the initial scope of examination set by FREP as mentioned in Paragraph 380 considered European and FREP's common enforcement priorities, inconsistencies and risk or error-prone areas, all of which are generally appropriate. In particular, common enforcement priorities aim at increasing supervisory convergence on areas identified by enforcers as problematic or that are topical for that year (e.g. deferred tax assets for the 2014 financial statements because of the financial crisis and its impacts on assets and the business) or setting out some supervisory expectations from the start when new standards are implemented as regards areas enforcers consider may be problematic (e.g. implementation of the new consolidation standards for the 2014 financial statements).

412. At the same time, regarding the following aspects covered by the 2014 ECEP, the PRC notes their limited impact in the context of Wirecard:

- a. IFRS 10, *Consolidation of financial statements* (application of the control principle, disclosure of non-controlling interests, significant changes resulting from first time

adoption): according to Wirecard's 2014 financial statements (p.152), Wirecard consolidated 33 companies in which it had 100% of shareholdings, so that the ECEP would not have been applicable;

- b. IFRS 11, *Joint arrangements* (classification of and disclosures related to joint arrangements, significant changes resulting from first time adoption): Wirecard was not engaged in any joint arrangements as per its financial statements;
- c. IFRS 12, *Disclosure of interests in other entities* (nature of risks associated with an entity's interests in structured entities): Wirecard reported no structured entities;
- d. Recognition and measurement of deferred tax assets: deferred tax assets represented less than 0.05% of the balance sheet.

413. The PRC understands from FREP that FREP was not expecting many issues as regards IFRS 10, IFRS 11 and IFRS 12 as the Group only operated with subsidiaries.

414. In terms of effectiveness of examination, the PRC notes that ECEP should generally be enforced on issuers for whom the related items are material. Therefore, the PRC would have expected that, in view of the above, these issues would not have been further examined to the benefit of examining other, in the PRC's view, more relevant and material areas of focus, such as, for instance, trade receivables which represented 18% of the balance sheet and had increased by 27% and which, given the group's business, may have warranted a look into, at least from a disclosure perspective.

415. In addition, and for similar reasons as above, the PRC considers that FREP could have considered expanding the scope to the expected useful lives of customer relationships, given Wirecard's business model of acquisition of customers and their materiality (50% of intangible assets and 17% of total assets). According to the financial statements, useful lives of customer relations are 20 years for 95% of the customer relationships and ten years for the remaining 5%.

416. FREP indicated that this topic had been dealt with in the context of a previous examination in 2007 where FREP identified an error on this topic and that, at the time, the length of these useful lives were supported by an expert opinion arguing that customer relationship can be expected to be stable and long-lasting. In this respect, the PRC notes that FREP's Panel Members examining Wirecard's financial statements had access, through FREP's database of enforcement cases, to all documents regarding previous examinations. The PRC understands from FREP that this was not an area of focus of the examination and that the amortisation period was considered to not be unusual.

417. Nonetheless, given the materiality of this item to Wirecard's balance sheet and the rapidly changing settlements landscape over the years, the PRC would have expected that, with seven years' experience, FREP would have assessed whether the attrition rates justified the applied amortisation rate of 5% a year. In this respect the PRC considers the risk of an accounting error on this balance sheet item higher than for example in relation to the deferred tax assets which represented less than 0.05% of total assets.

418. In the context of the Zatarra reports, the PRC notes that, from an enforcer's point of view, the only accounting-related point regarding the Indian acquisition relates to the value of the goodwill recognised for that acquisition as the role of the enforcer is not formally to challenge a price if this is contractual, nor to verify the existence of the acquiree or the integrity of the seller, nor the proper conduct of the pre-acquisition due diligence by the issuer. The PRC asked FREP whether, given

the Zatarra report, FREP had looked into acquisitions. According to FREP, this area was not considered as an area for examination for the 2014 annual financial report as FREP had looked into the topic in its three previous examinations of the company and had never found any issue in relation to acquisitions since the error identified in the context of the examination of the 2005 annual financial report regarding Wirecard's reverse Initial Public Offering. In addition, FREP considers it should not subject issuers repeatedly to the same areas of examination, if only to avoid the issuers being able to prepare for the examinations.

419. The PRC notes that the purchase referred to in the Zatarra report occurred at the end of 2015 and therefore related to the 2015 financial period and not the period under examination by FREP. However, even if the acquisition had occurred in 2014, given the role of the enforcer in such context as described above, the PRC acknowledges that it would have been near to impossible to obtain sufficient evidence to justify the impairment of goodwill immediately after the acquisition. As such, the PRC considers that the Zatarra report had little relevance for FREP in the context of its examination of the 2014 annual financial report of Wirecard and therefore that no extension of the scope of the ongoing examination was warranted in relation to acquisitions. Regarding the relevance of this topic in the context of examinations of subsequent financial reports, see Paragraphs 330 in Guideline 5 on selection methods.

420. As regards the whistle-blower's submission dated 29 September 2016 and the related allegations, the PRC notes that FREP did undertake some work, although limited, to justify not adding this area to the scope of the ongoing examination. As indicated below, under the assessment of the procedures performed, the PRC is unconvinced that these were sufficient to support FREP's assessment and the decision it took.

421. The PRC notes that, following the factual accuracy check<sup>50</sup> of this report, FREP provided further information related to the determination of the scope of the examination. Having assessed this information, the PRC notes that such information is not documented in the files it was provided by FREP. Moreover, this does not change the PRC's analysis.

### **The examinations procedures and techniques**

422. FREP's public procedure in place describes the examination process, which was specifically applied by FREP to the review undertaken in 2015-2016 on the 2014 annual financial report. These entailed, as outlined from the examples in GLEFI Paragraph 54:

- a. Scrutinising the annual and interim (consolidated) financial reports, including any financial report published subsequently (GLEFI Paragraph 54 a)): as part of the request to the company to cooperate dated 15 April 2015, in order to assess what questions should be asked. In this context, the PRC refers to its analysis regarding the scope of the examination in Paragraphs 411-420 above.
- b. Asking questions in writing to the issuer to better understand the significant areas of risks and accounting issues. This is one of the key examination procedures to be performed by an enforcer (GLEFI Paragraph 54 b)): FREP sent four sets of questions in writing and obtained responses in writing for the first three and to some questions in the fourth, whilst others were discussed in a working meeting with the company. In this respect, the PRC highlights the level of depth with which the issues were analysed and subsequently as

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<sup>50</sup> As per ESMA's Peer Review methodology ([ESMA42-111-4966](#)) Paragraph 51.

regards the initial scope of the examination, by contrast to the lack of documentation of analysis regarding the allegations.

- c. Asking questions to or having meetings with the auditors of the issuer to discuss complex issues or issues of interest, depending on the needs of the examination process (GLEFI Paragraph 54 c)): this happened in the context of the working meeting on 11 October 2016 which included the auditor.

The PRC notes that FREP indicated that the legal representatives decide independently which other persons are named to provide requested information. Normally this is the head of accounting and/or the head of group accounting. According to FREP, it is desirable to name the group auditor also as a contact person to facilitate an efficient and appropriate performance of the examination. Therefore, during examinations where information by the auditor is considered necessary, FREP asks the issuer to name the auditor as a contact person and to release the auditor from his obligation of professional secrecy. The PRC understands from FREP that FREP did request from Wirecard that the auditors be released from their confidentiality obligation in respect to the unlimited scope examination, but that access to the auditors was not granted beyond the 11 October 2016 meeting as even the documents provided on 22 November 2016 transited via Wirecard.

- d. Reviewing recent press articles and accounting commentaries concerning the issuer and its industry (GLEFI Paragraph 54 b) under further examples of procedures): FREP requested to discuss with Wirecard the allegations made in the Zatarra reports in February/March 2016 when these were covered by the German press. The PRC notes, however, that there is unclarity as to whether and when FREP accessed the FT articles. For further discussion on these, see Paragraphs 326-341 under Guideline 5. As the whistle-blower's submission included references to those allegations and to issues raised by the FT blog articles as regards the receivables and payables from the acquiring business, according to FREP, they took these into account in the examination of the financial statements 2014 to the extent described and documented above in Paragraphs 389-409.
- e. Comparing key financial relationships and trends within the issuer's financial reports, both in the year under review and for prior periods (GLEFI Paragraph 54 d) under further examples of procedures): This was performed and presented in the analysis put forward to the Chamber on 22 November 2016. Additionally, in the context of the whistle-blower's allegations, FREP indicated having carried out an analysis of the correlation of EBITDA to operating cash flows and reported on it in that same document. However, such analysis was not materialised in the files submitted to the PRC in the context of the FTPR.

423. Other examples of examination procedures included in GLEFI Paragraph 54 were not implemented either because they were not necessary (e.g. on-site inspections, engagement of external experts) or not applicable in the case of FREP (e.g. exchange of information with market abuse of BaFin, due to confidentiality reasons). The PRC notes that a meeting on-site did take place with the management of the company (CFO) and the company's auditors (EY) on 11 October 2016.

424. As regards the topics included in the initial scope of the examination and subject to the PRC's assessment of that scope, the PRC is of the opinion that FREP was thorough in obtaining relevant information and asking relevant questions.

425. The PRC notes that whilst FREP did not engage external parties in the context of the allegations formulated in the Zatarra reports, FREP did take the work of the external parties engaged by Wirecard into account, even though, as indicated above in Paragraph 419, the Zatarra allegations



did not warrant an extension of the scope of the ongoing examination. In the context of the response to a question regarding the BaFin-requested examination of the 2018 half year financial report (see Paragraph 576 below), FREP stated that if FREP had not waited for the results of a special investigation commissioned by the company in such a case, it would run the risk that its evaluation of the issue examined was incomplete or incorrect. This is not in the interest of capital market participants and, above all, it contravenes FREP's legal mandate to conscientiously examine whether the financial reports and the underlying accounting records comply with legal requirements. In the examination of the 2014 annual financial report however, the PRC notes that FREP did not wait for the final report of the external third party commissioned by the company but closed the examination after receiving an interim status report. The PRC understood from FREP that this needs to be considered also in the light of the fact that Wirecard's auditors had, on their own initiative, brought in a forensic team to assess the allegations as part of their audit work on the 2015 annual financial statements and that they had signed off an unqualified opinion on those accounts in April 2016. In addition, FREP was provided by the company with evidence of this work as it had requested and had been able to meet the auditor on 11 October 2016 in the working meeting with the company. According to FREP, the combination of all these aspects provided sufficient assurance to refute the allegations made in the Zatarra reports and to close the examination.

426. However, having looked at the evidence provided, the PRC noted the following:

- a. Wirecard's response was dated 30 March 2016 referring to a letter from the auditor dated 29 February 2016. The response related to topics which also included references to Zatarra reports published on 8 and 16 March 2016. The document provided to FREP as coming from the auditor and presented as being the list of questions also referred to Zatarra reports published on 8 and 16 March 2016. This document was not dated. Because of the reference to Zatarra's March reports in that document, the PRC questioned whether this list was indeed part of the auditor's letter to Wirecard dated 29 February 2016 which FREP was not provided with. The PRC did not identify in FREP's files any such questioning.
- b. The status report by the external third party commissioned by Wirecard and which it provided to FREP is a one page document on company letter head but it is neither addressed (not even containing a 'to whom it may concern'), nor signed. Similarly to the above, the PRC notes FREP's acceptance of this evidence with no additional questioning.

427. In light of the above and whilst recognising that the auditors provided an unqualified opinion on the 2015 financial statements, the PRC would have expected FREP to examine the documents more critically before concluding the examination. In relation to the auditor, this may have entailed requesting the related long-form audit report to review the auditor's account of their work regarding the allegations against Wirecard, if it could have been expected that detail on the additional forensic audit would have been provided in it.

428. As regards the whistle-blower's submission dated 29 September 2016 and the related allegations, FREP undertook limited work in the form of (i) checking its understanding of the business model and the related accounting for the acquiring business in both cases where Wirecard has a licence and where it does not, (ii) performing a plausibility check on the level of EBITDA versus that of the operating cash flows to determine whether some inconsistencies may be evidenced, and (iii) assessing the plausibility of the points made in the submission to support the questions raised



against FREP's general knowledge of how businesses operate (e.g. timing of acquisitions, year-end settlement timing effects).

429. Especially on the topic of the receivables and payables related to the acquiring business for which FREP told the PRC that the accounting was clear and that it had looked into the alleged mismatch between the assets and liabilities from the acquiring business at subsidiary level, the PRC however notes that such work should have been documented, even if only in the documents sent to the Chamber in November and December 2016 in the context of finalising the examination, as the level of documentation on the allegations, limited to a couple of sentences on the EBITDA vs. operating cash flow comparison, significantly contrasts with that regarding the topics included in the initial scope of examination. The PRC acknowledges that more documentation was subsequently provided in the context of a discussion of the 27 February 2017 ██████████ Committee meeting regarding the publication of the 22 February 2017 Manager Magazin article on the same topic (see Paragraphs 297-300 above), although the PRC questions why FREP requested this given it closed the examination without having needed such information in December 2016. The PRC also considers that, whilst it is indeed appropriate to consider external sources to gauge whether there are issues with understanding the business model, it is the enforcer's duty to also form its own opinion and document it, all the more in the context of allegations which are detailed and of high level quality.
430. As regards the Zatarra reports, this would have entailed to look back to the allegations made in 2008, for which the PRC understands there was a Court decision to check that these were indeed repeated allegations from 2008, which only related to money laundering.
431. In particular, to support its opinion, the PRC would have expected FREP to have, in the context of the whistle-blower's submission which provided information relevant to the 2014 financial report on items the PRC considers should have been included in the initial scope of the examination (as explained in Paragraph 414):
- a. asked the company for a breakdown of its subsidiaries holding the acquiring receivables and payables towards the acquiring partners (which, as mentioned above, it asked in 2017 in the context of the publication of the Manager Magazin and BaFin's request to FREP – see Paragraph 299 above) to confirm the allegations' understanding of where these are located and better understand how the business is organised within the Group;
  - b. asked for confirmation of what the acquiring receivables correspond to, to understand how much of these correspond to rolling reserves;
  - c. asked for more details regarding the acquiring partners it was involved with, to obtain an understanding of where these partners were located, how many there were and whether the group has any significant exposure in relation to any of them in order to substantiate the limited disclosures, especially quantitative, provided in respect of debtors' risk;
  - d. Asked for a breakdown of the amounts recorded at Wirecard bank relating to the acquiring business (not only the receivables and payables but also the acquiring deposits held which were separately identified in the 2014 financial statements (€240m) but no longer in the 2015 financial statements and other related amounts such as those resulting from maturity transformation (i.e. investing of cash amounts) performed within Wirecard Bank);
  - e. Performed a plausibility check based on the level of revenues recorded on a geographical basis and the related transaction volumes.

432. In the PRC's view, the above steps would have put FREP in a capacity to explain whether the assertion that, at consolidated level, the receivables and payables from the acquiring business amounting to quasi the same at both 31 December 2014 and 2015 was indeed plausible, especially given the explanations regarding the relative discretion of management in terms of cash flows, or just mere coincidence.
433. Finally, even though the separate presentation of receivables and payables from the acquiring business was only made in the 2015 financial statements, which the whistle-blower's submission drew upon, the work done above could have been an occasion to formulate recommendations, if any, in the interest of transparency, as regards the related disclosures for the 2016 financial statements which were still in the making.
434. The PRC notes that, following the factual accuracy check<sup>51</sup> of this report, FREP provided further information related to the examination procedures it performed. Having assessed this information, the PRC notes that such examination procedures are not documented in the files it was provided by FREP. Moreover, these do not change the PRC's analysis.
435. In terms of efficiency, as regards the timeliness of the examination, the PRC notes that this examination lasted much longer (19.5 months) than the average unlimited scope examinations (8 months, including examinations leading to errors which usually take longer). The PRC understands that this was attributable in part to FREP (unforeseeable circumstances delaying the first set of questions, more urgent examinations in handling responses) but also to Wirecard (delays in responding and postponement of the working meeting) as well as to the allegations (delay in obtaining documents agreed to after the working meeting of 11 October 2016).
436. Focusing on those reasons attributable to FREP, and whilst these most likely have not had a significant impact on FREP's findings and on subsequent developments, the PRC highlights that FREP is a small organisation and that its Panel Members intervene on quite a large number of issuers at any point in time, albeit in different capacities, resulting in a significant workload (see Paragraph 94). In addition, beyond the fact that indication- and request-based examinations take precedence over sample-based examinations, it may be that an examination team works on a number of sample-based examinations at the same time and for which the level of priority may be difficult to determine. In this context, if not already in place, the PRC would recommend that FREP define criteria to help assess the level of priority with one of the criteria being in relation to the length of the examination so as to minimise it to the extent possible.

### **Analysis of supervisory expectations related to the conclusions taken**

437. The PRC notes that FREP's conclusion was a combination, depending on the topics reviewed, of (a) no further action necessary because no error was identified (most points for the initial scope of examination) or because the allegations were assessed to be unfounded (Zatarra report and the submission by the whistle-blower) and (c) making a reminder and a recommendation for future financial statements (measurement and presentation of financial assets) (references (a) and (c) are the related subparagraphs of Paragraph 56 of the GLEFI).

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<sup>51</sup> As per ESMA's peer review methodology ([ESMA42-111-4966](#)) Paragraph 51.

438. The examination was a sample selection by FREP with unlimited scope. In addition, no error was identified. Accordingly, the PRC considers that Guideline 6 is not applicable to BaFin regarding the examination of Wirecard's 2014 annual financial reports.

### **5.4.3 Findings and conclusion – Examination of the 2014 annual financial report**

439. Based on the analysis above of the supervisory expectations on the type and scope of the examinations, on the examinations procedures and techniques undertaken, and on the conclusions taken, the PRC assesses FREP to have partially met the supervisory expectations in the context of Guideline 6 as relates to its examination of Wirecard's 2014 annual financial report in that there were some severe deficiencies and some material risks were left unaddressed. These risks relate in particular to the scope of the examination as explained below.

440. The following main elements relating to the processes applied and their effectiveness are key to the PRC's assessment:

- a. The scope of examination: FREP should have had regard to the Group's business model and the related significant balance sheet items to determine the scope of the examination as well as to the articles and allegations from the FT. This would have enabled FREP to address areas of significant risk instead of lesser to non-material areas, including in terms of presentation and disclosure. At the very least, the allegations should have prompted FREP, during the examination, to look into those areas in more depth, thus expanding the scope of examination.
- b. The procedures undertaken: whilst the examination procedures performed on the initial scope of examination – and without taking into account the PRC's comments on this – seemed appropriate, on the areas related to the allegations, and specifically to dispel those, FREP should have performed additional procedures. In this regard, the PRC considers FREP lacked sufficient professional scepticism in the context of the allegations made.
- c. The documentation: similarly, the detailed level of documentation between that related to the original scope of examination contrasts with the limited level of documentation regarding the allegations. Although this may appear logical given the fact that no in-depth procedure was carried out on these, the PRC considers that even in this case, more documentation could have been maintained.

441. As regards the timeliness of the examination, as part of the delays in the examination are due to FREP and more specifically one due to competing examinations, the PRC suggests that FREP introduces a prioritisation among examinations taking place at the same time in order to ensure timely completion of the most urgent examinations (refer also to Guideline 2 Paragraph 201 where this recommendation is also formulated).

442. Finally, the PRC is not sure to understand why the confidentiality regime would have prevented FREP from engaging into a discussion with the whistle-blower. If there are indeed any legal

impediments to such interaction, the PRC would recommend that this be reconsidered from a legal point of view as this bears the risk that the validity of the submission may not be appropriately assessed even in cases such as in this case where the submitters offer such interaction.

443. As previously mentioned, as the examination was a sample selection by FREP with unlimited scope for which no error was identified, Guideline 6 is not applicable to BaFin regarding the examination of Wirecard's 2014 annual financial reports.

#### **5.4.4 Summary of facts – Examination of the 2018 financial reports**

##### **Examination by FREP of the 2018 half year financial report**

444. On 30 January 2019, 1 February 2019 and 7 February 2019, the FT published a series of articles with allegations on operations of Wirecard, which caused a sharp decline in share price of the issuer. These allegations concerned, among other issues suspicion of fictitious and backdated contracts in Singapore and forwarding of funds without economic substance ('round-trip transactions') involving external companies.

445. On 15 February 2019, BaFin requested that FREP perform an examination of the 2018 half year financial report of Wirecard (a "request-based examination"), focused on the allegations of the FT about revenue recognition in Singapore. The 2018 half-year financial statements of Wirecard were not audited.

446. BaFin can require FREP to initiate an examination subject to some conditions among which the fact that there are indications of material infringement of accounting requirements and the indications are sufficiently specific. Examinations requested by BaFin are therefore always focused examinations, given that BaFin must provide grounds for the indications of potential errors.

447. BaFin considered that the conditions above were met based on the information provided by three articles published in the FT on January and February 2019. The possible infringements identified related to the revenues of Wirecard which could be too high and inaccurate, as falsified and backdated documents were possibly used in Singapore as evidence of revenues for which the company had not provided the respective services. In addition, revenues from transactions between subsidiaries were possibly recorded in the Group's revenues. BaFin considered the accusations were sufficiently specific due to the details with which the suspicious business practices were described in these articles from the FT – a "source perceived to be trustworthy", according to BaFin.

448. As already discussed, a fundamental principle of the enforcement by FREP is that issuers can decide whether they cooperate in an enforcement examination by FREP, including where such examinations are requested by BaFin. FREP sent a request for participation to Wirecard on 18 February 2019, to which Wirecard responded positively on 27 February 2019.

449. On 1 April 2019, FREP sent its first set of questions to Wirecard. These questions included requests for numerous supporting documents, and general questions for understanding the structure and organisation of the business in Asia. FREP received the responses to this first set of questions in three batches, respectively on 23 April 2019, on 23 May 2019 and in 11 June 2019

(extension of the 23 April initial delay was granted to Wirecard for it to respond in May and June 2019).

450. A second set of questions was sent to Wirecard on 18 June 2019, requesting further documentations (that were received, with delay, on 12 July 2019). Two weeks later, the change of the examination team took place.
451. On 15 October 2019, the FT released new allegations questioning the amount and existence of revenues in particular with reference to fictitious customer relationships in the TPA business. On 25 October 2019, the Supervisory Board and MB of Wirecard mandated KPMG to conduct an independent special investigation to address these topics.
452. In reaction to these allegations, FREP, in coordination with BaFin, decided on 30 October 2019 to extend the scope of the focused examinations to include new indications of erroneous accounting, stemming from the FT reporting on Wirecard's TPA business, as well as from the information forwarded to it by BaFin about India acquisitions and round tripping. The new areas of focus were:
- a. The amount and existence of revenue in the TPA business;
  - b. The classification of the escrow accounts as cash and cash equivalents;
  - c. Reporting over possible "Indian Round Trip".
453. Given the ongoing special investigation by KPMG, FREP decided also to await the results of KPMG's investigation before performing further examination procedures. The KPMG engagement was requested by FREP in mid-December 2019 and provided by Wirecard in late January 2020.
454. On 28 April 2020, FREP received from Wirecard the KPMG special investigation report (hereafter the "KPMG report") dated 27 April 2020 (publicly available portion).
455. On 11 May 2020, BaFin requested that FREP report in writing on the status of the ongoing examinations, to which FREP responded on 14 May 2020. In this report, FREP informed BaFin of the areas examined, the timeline of the examinations, the list of documents received, and that the analysis of the KPMG report by FREP was in progress. FREP indicated its intention to send a provisional finding of an error to Wirecard in July 2020.
456. A third set of questions, building on KPMG's findings and conclusions, was sent to Wirecard on 22 May 2020, for which responses were received by FREP in three batches respectively on 4 June 2020, 10 June 2020 and 12 June 2020. The first batch received on 4 June 2020 included the non-public Appendices 1 and 2 of the KPMG report dated 27 June 2020.
457. On 17 June 2020, FREP received from BaFin a statement of Wirecard's auditor (Information pursuant to Article 12 of EU Regulation No 537/2014) where the Statutory auditor points to possible incorrect balance confirmations of some fiduciary accounts in relation to the TPA business.
458. On 22 June 2020, the Wirecard's MB announced publicly that, on the basis of further examination, there was a prevailing likelihood that the bank trust account balances in the amount of €1.9bn do not exist.
459. On 24 June 2020, FREP provided BaFin with a second written report on the status of the ongoing examinations, as requested by the latter on 10 June 2020. FREP explained its planned finding of an error following the recent events and documentation received.

460. On 26 June 2020, FREP transmitted to Wirecard its preliminary finding of errors in the 2018 half year financial report.

461. On 29 June 2020, the Wirecard's MB informed FREP that the reliability of the information previously provided to it would be 'in doubt', in particular as regards the so-called 'third-party transactions', and that it could not indicate which of the 'information provided is still sufficiently reliable'. This therefore also concerns the accounting documents made available to FREP.

462. FREP completed its focused examination of the 2018 half year financial report of Wirecard on 9 July 2020 and concluded that the overall financial reporting was erroneous.

463. On 15 July 2020, Wirecard responded to FREP that, due to the current circumstances, it was unable to make any observations on the result of the examination. FREP considered this as a non-acceptance by Wirecard of the results of examinations completed, and therefore ceased the examinations and handed them over to BaFin on 21 July 2020 as per the applicable procedures in the two-tier system.

464. The table below summarises the different informational exchanges between FREP and Wirecard;

	Date sent/ requested	[Deadline]	Date response received
<b>Cooperation and initial documents</b>	18/02/2019	[2 weeks]	27/02/2019
<b>1st set of questions</b>	01/04/2019	[23/04/2019, extended 23/05/2019]	23/04/2019 (batch 1) 23/05/2019 (batch 2) 11/06/2019 (batch 3)
<b>2nd set of questions</b>	18/06/2019	[28/06/2019]	12/07/2019
<b>Request KPMG's engagement letter</b>	17/12/2019	[By telephone]	21/01/2020
<b>KPMG report</b>			28/04/2020
<b>3rd set of questions</b>	22/05/2020	[12/06/2020]	04/06/2020 (batch 1) 10/06/2020 (batch 2) 12/06/2020 (batch 3)
<b>Information by Wirecard's MB on doubts on reliability of information previously provided to FREP</b>			29/06/2020

465. In fact, BaFin may exercise the powers<sup>52</sup> to take over an examination from FREP, if FREP reports that a company refuses to cooperate in an examination or does not agree with the results of FREP's examination. According to the wording of the provision, BaFin says the decisive factor is the report presented by FREP and not whether the company has actually refused to cooperate in

<sup>52</sup> Stipulated Under Section 108 (1) sentence 2 no. 1 of the WpHG, and in Section 107 of the WpHG



an examination or does not agree with the finding of errors by FREP. Therefore, BaFin opened, at its level, the examination of the 2018 half year financial report of Wirecard.

466. On 4 August 2020, BaFin published an announcement of examinations of Wirecard's 2018 half-year and annual financial reports, 2019 half year financial report and 2017 annual financial report in the Federal Gazette (Bundesanzeiger) following prior hearing of Wirecard. This was the first time ever that, in view of the public interest in the case, BaFin made public the fact that it launched the examination of an issuer's financial report.

### **Examination by FREP of the 2018 annual financial report**

467. Following the publication of the KPMG report on 27 April 2020, BaFin requested that FREP undertake a focused examination of Wirecard's 2018 annual financial report. The 2018 annual financial statements were audited by EY. The audit opinions issued on 24 April 2019 contained an emphasis of matter paragraph relating to the accounting treatment of allegations of a whistleblower in Singapore.

468. BaFin considered that the findings in this report were sufficiently specific to initiate an examination – having been issued by an audit firm commissioned by the entity itself and casting doubt on the entity's accounting for the consolidated financial statements as at 31 December 2018 with regard to specific matters.

469. More specifically, in its request dated 30 April 2020, BaFin explicitly referred to the KPMG report to indicate that there were specific indications of material infringements of accounting requirements with respect to revenues recognised with TPA partners, the presentation of escrow accounts related to the TPA business and the way the risks arising from this business is reflected in the management report. FREP decided to entrust this examination to the same examination team as the one in charge of the examination of the 2018 half year financial report.

470. In May 2020, Wirecard was informed by FREP of this focused examination and agreed to cooperate. FREP then sent Wirecard the first set of questions for this examination on 5 June 2020 with a response deadline of 27 June 2020.

471. Further to the announcement by Wirecard of spurious bank confirmations for €1,9bn on escrow accounts and the denial of opinion by EY on the consolidated and annual financial statements as at 31 December 2019, a meeting of the Chamber was held on 6 July 2020 during which it was decided that Wirecard's consolidated financial statements as at 31 December 2018 were assessed as erroneous. Wirecard was then informed of the conclusion of the 31 December 2018 examination and was requested to confirm its approval of these results. This communication was forwarded to BaFin.

472. Following letters sent by Wirecard to FREP on 15 and 17 July 2020 respectively, according to which, due to its current situation, the company was unable to take position on FREP's conclusions, FREP considered that Wirecard did not agree with the results of the examination and informed BaFin accordingly on 20 July 2020.



473. On 24 July 2020, BaFin informed Wirecard that it had initiated its own examination of the 2018 annual financial report, in accordance with applicable regulation.

## 5.4.5 Analysis – Examination of the 2018 financial reports

### The type and scope of the examinations

474. In reaction to the allegations made by the FT in January and February 2019 on Wirecard's accounting, the PRC considers that the scope of the initial request of BaFin to FREP for a focused examination of Wirecard's 2018 half year financial report was appropriate and commensurate to the perceived risks of misstatements stemming from these articles.

475. Similarly, the PRC considers that the expansion of scope to include the allegations related to the TPA business was relevant in view of the risks of misstatements conveyed by the FT in its article on 15 October 2019. The PRC understands that this expansion of the scope of the ongoing examination was made in cooperation between FREP and BaFin. BaFin did not ask FREP for a formal expansion of scope (which could have been possible through an administrative act, BaFin says), given that the common understanding of the file by the two authorities did not require such formal request.

476. At the same time, the PRC doubts the timeliness of the scope expansion of the examination on October 2019 in relation to the TPA business. The PRC notes, as explained further in the following paragraphs, that red flags already existed on the TPA business well before October 2019, which could have prompted an earlier expansion of the scope of the examination. This could have been possible either by decision of FREP (who is free to expand the scope of the examination if other infringements of financial reporting standards are identified during the examination), by request of BaFin (through an administrative act) or through coordination between the two authorities (as this was the case in October 2019).

477. These red flags consist notably of other FT reporting<sup>53</sup> in the first half of 2019, which raised concerns on the TPA business, and addressed already the same issues as those that were depicted later, with more detail, in the FT in October 2019. These articles namely state that half of Wirecard's revenues and 95% of its 2016 EBITDA relied on three of its partners, whereas the investigations in the field by the FT showed "modest reality on the ground" of some partners – questioning therefore the existence of underlying significant transactions between these partners and Wirecard. The articles also mentioned weaknesses in Wirecard's financial reporting which did not mention the outsized revenue contribution of referring partnerships / TPAs.

478. FREP says it was aware of these new allegations in the FT reporting but also observed divergent signals in the media and by BaFin at that time. Therefore, the issues and the possible related actions were not discussed internally. The divergent signals included the fact i) that German newspapers did not extensively cover this FT reporting at that time, ii) the market price of Wirecard's shares did not react significantly to the release of these articles, iii) a cooperation between Wirecard and the Japanese Softbank was announced (intended investment of €900m in

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<sup>53</sup> FT 29 March 2019 – "Wirecard's problem partners" ; FT 24 April 2019 "Wirecard relied on three opaque partners for almost all its profit" ; FT 20 May 2019 "Wirecard document points to reliance on 3 partners".

Wirecard's bonds), which, according to FREP, is usually preceded by a comprehensive assessment of the investee, and iv) BaFin filed charges against the ■■■ journalists. The PRC did a perfunctory check of ten articles of the German media dated March to April 2019 that FREP indicated it was following, but noted that these media made reference to allegations (including "new" allegations in March 2019) raised by the FT although not in detail. The PRC understands that, for FREP, all these elements cast doubts on the credibility of the allegations raised in the FT articles. The PRC emphasizes here that the notification of the Prosecutor's Office by BaFin was about the suspicion of market manipulations, and did not relate to the veracity of the allegations by the FT.

479. The PRC considers that more attention should have been paid to the FT reporting during the first half of 2019, even if not covered by German newspapers, given:

- a. the commotion surrounding Wirecard's accounting practices on different issues such as those depicted earlier,
- b. the materiality of the issues as per the alleged amounts at stake emphasised by the articles (sales and EBITDA achieved with the questionable TPA partners were said to be equivalent to 95% of the EBITDA, and just over half the revenues reported by the Group for 2016), and
- c. that an examination was already ongoing.

480. Therefore, it could have been expected that FREP would initiate an earlier (and easy) scope expansion on the TPA business or, at least, perform a thorough assessment of these allegations to increase FREP's awareness of the issues at stake. This could have therefore triggered questions to the issuer (and answers) on the new topics, and enabled FREP to react accordingly upon receipt of the first documentation from Wirecard – whose contents were not limited to Singapore-related issues, but also touched upon other numerous topics including the TPA business.

481. BaFin says that the teams in charge of both Market Abuse and EFI were not aware of these FT articles at that time, even though BaFin has access to press reports including international ones, and to the FT.

482. On BaFin's side, the lack of awareness of these elements in the first half of 2019 raises other issues such as the level of monitoring of a DAX-company environment by BaFin – when it did have access to these materials.

483. A last point of attention about the scope covered by FREP's examinations is the relevance and completeness of disclosures provided by Wirecard and the need for FREP to address these issues. Indeed, as specified in the GLEFI, the objective of the EFI included in harmonised documents is to contribute to a consistent application of the relevant financial reporting framework and, thereby, to the transparency of financial information relevant to the decision making process of investors and other users of harmonised documents.

484. The PRC notes that neither FREP (in the course of its examination) nor BaFin (for the purpose of expanding the scope of the examination of Wirecard's 2018 half year financial report it had requested) considered to question the disclosures provided – or, more precisely, the lack of disclosures related to the areas examined, in the financial statements and in the management report under review. The PRC notes that there were indications from the market of the users' need for more information, including allegations on opaque disclosures from Wirecard's reporting. Examples of allegations stem from FT articles such as on 20 May 2019 (*'Wirecard's document*

*points to reliance on 3 partners*): “Wirecard has not disclosed a material relationship with these payments companies (partner companies), nor that it had concentrated financial exposure to such businesses”, or on 14 November 2018 (*Wirecard, Poker faced*): “the group’s disclosures are thin” (relating to the geographical breakdown of sales).

485. Thus, in the context of Wirecard's 2018 half year financial report, the comments made in certain press articles should have raised questions about the adequacy of the information disclosed by Wirecard. Identified insufficient disclosures include for example lack of transparency on the drivers of the activity and growth of Wirecard's performance over the years, lack of granular information or detailed breakdowns on business units, of transactions volumes, thin disclosures on the TPA business, related revenues and risks (dependency to customers/partners, debtor risk) and related accounting treatment (gross or net accounting taking into account the specificities of the activity), information on availability of cash in trust accounts, etc. The PRC considers that areas of disclosures should have been considered during the examination, at least when the scope of the examination was expanded to issues related to the TPA business in October 2019.
486. Indeed, the first questions raised by FREP in the course of the examination of Wirecard's 2018 half year financial report covered the initial areas of focus required by BaFin, but they were concentrated on recognition and existence issues and did not specifically deal with the adequacy and the transparency of the information disclosed in the relevant financial statements and the related management commentary. The PRC understands the amounts mentioned in the press articles (up to €37m) triggering the focused examination at BaFin's request were not considered to be material by FREP, and this assessment was therefore similar for the related disclosures. However, the PRC thinks that the expansion of the scope of the examination should have been the occasion for FREP to raise questions on disclosures during the examination to ensure that all relevant issues were identified and acted upon accordingly by Wirecard in the context of the preparation of its financial information in the future. This could have been done by FREP independently of the decision to wait for the results of KPMG's investigation with regards namely to the question of the existence of the TPA business as further described below (see from Paragraph 509).
487. On FREP's side, assessing the issue and the materiality of disclosure aspects may have prompted further questions or comments to the issuer, and eventually further (immediate?) disclosures from Wirecard.
488. For instance, Wirecard published on 10 December 2019 a statement explaining the functioning and accounting for the processing of payment transactions via routing partners. The PRC thinks that exchanges between FREP and Wirecard in October or November 2019 could have triggered more detailed and transparent information on such elements both in the statement of 10 December 2019 and in Wirecard's subsequent financial reports.
489. On BaFin's side, the consideration of the issue and the materiality of disclosures may have prompted (for example) a request for an expansion of scope, with the objective to provide the market with information that is sufficient to enable users to understand the impact of transactions, events and conditions on the entity's financial position and financial performance.
490. Finally, the PRC considers that the areas of focus of BaFin's request-based examination to FREP concerning the 2018 annual financial report were appropriate, being based on KPMG's investigation report.

## The examinations procedures and techniques

### *FREP's examination procedures*

491. The public procedure FREP has in place describing the examination process was specifically applied by FREP to the reviews undertaken in 2019 and 2020 at BaFin's request.
492. Based on the information provided by FREP in the context of this FTPR, the PRC highlights in the following section its analysis of the main examinations procedures and techniques used in the Wirecard enforcement examinations performed by FREP. The PRC observed both good practices and areas of concerns with regards to these.

### *The work of the Chamber*

493. With respect to its involvement in the examination process, the Chamber usually meets at the end of the examination, for the presentation of the outcome of the review. In the case of the Wirecard-related examinations, the Chamber met no less than five times between June 2019 and June 2020, sign of the importance given to this review and to the follow-up that needed to be done. During the examination, a meeting of the Chamber was thus held in June 2019 for a progress report in the context of the transmission of the file in relation to the change of the examination team. Another meeting took place to discuss, amongst other topics, the direction to be given to the review following the new allegations revealed by the FT in October 2019 on the TPA partners. An additional progress meeting took place in March 2020 where the topics covered by KPMG's special investigations were outlined as well as the aspects to be followed-up. The last meetings were held in June and July 2020 to discuss the finalisation of the examinations.
494. In addition to these formal meetings of the Chamber, FREP informed the PRC that information, documents and advice were exchanged between the members of the examination team throughout the whole process.

### *Obtaining relevant information from the issuer*

495. Asking questions to the issuer to better understand the significant areas and accounting issues is one of the key examination procedures to be performed by an enforcer. In 2019 and 2020, with respect to both reviews requested by BaFin, FREP sent four sets of detailed questions to Wirecard's management, requesting qualitative and quantitative information as well as numerous supporting documents. For the focused examination of the 2018 half year financial report, three rounds of questions were addressed by FREP to Wirecard's management. The objective of the first set of questions sent in April 2019 was to cover the issues raised in the January and February 2019 FT articles referred to in BaFin's request for the focused examination around possible irregularities related to revenue recognition in Asia. The final investigation reports commissioned in 2018 by Wirecard from Rajah & Tann and another external law firm were notably requested. The second request sent in June 2019 covered additional documents necessary to complete the first set of information received. A last round of questions was finally sent to Wirecard in late May 2020 specifically addressing the issues raised in the KPMG report.
496. In response to these questions, Wirecard provided FREP with dozens of documents and data including the long-form report issued by its auditor and the forensic reports prepared by Rajah & Tann, the other external law firm and KPMG, which provided some insight into the topics within the

scope of the examination and increased the chance of possible error findings in Wirecard's financial reporting.

#### *Undertaking different examinations procedures*

497. The PRC did not find evidence that further examination procedures, such as comparing key financial relationships and trends within the issuer's financial reports both for the year under review and prior periods and scrutinising the financial reports, including any financial report published subsequently (as set out in examples of procedures listed in the ESMA guidelines), were performed by FREP. These could have helped to increase FREP's understanding of the fundamentals of the business of the issuer and its evolution over the years, as well as its awareness on the lack of disclosures or explanations with regards to these trends (in relation to the Payment processing & Risk Management segment) in the financial reports.

498. Although the PRC is of the opinion that FREP was thorough in obtaining relevant information and asking adequate questions based on the initial scope of the examination requested by BaFin, it however also believes that, based on the information available to FREP at that time (i.e. content of financial reports of Wirecard to compare to the criticism on the accounting practices and opacity of disclosures) such additional procedures, together with the coverage of disclosure-related issues as discussed in the paragraphs above, could have enabled FREP to better address and to focus on certain relevant issues in a more timely manner.

#### *Timeliness and documentation of the procedures performed*

499. During the period from 2012 to 2020, FREP declares that the average length of its examination in which errors were eventually found was 12 months. FREP began its examination of the 30 June 2018 financial report at BaFin's request in mid-February 2019 and sent its final conclusions in July 2020, some 17 months later. Such a long duration for Wirecard-related examinations could be explained mainly by the specificity of the case and FREP's decision to wait for the results of the KPMG report. However, the planned change of examination team, which required a transfer of knowledge and an increased investment to thoroughly review and analyse the file, may have also caused certain delays in the process.

500. Before the change in examination team in June 2019, FREP sent to Wirecard two sets of detailed questions in April and June 2019 requesting information and documents mainly in relation to revenue recognition in Asia as well as the results of the examinations initiated by Wirecard on the allegations reported in the press. However, there is no formal documented analysis of all the documents and information received since April 2019, which could have helped the new examination team in taking over the file. In addition to the status of the ongoing analysis presented at the June meeting of the Chamber, FREP indicates that bilateral working meetings were held between the outgoing and incoming examination teams to facilitate the transition.

501. Additionally, if FREP partially concluded on some topics discussed during the two first set of questions, some issues dealt with would have required additional procedures as can be inferred from the discussions at certain Chamber meetings. The PRC notes from the conclusions of the Chamber's meeting of 24 October 2019 that FREP decided to conclude on some issues raised in the first two sets of questions based on their non-materiality. However, additional questions in relation to revenue recognition in Singapore should have been asked in the third set of questions in order to be able to conclude on those. In addition, there were still doubts as to whether the accounting treatment and the associated income realisation were appropriate in some cases. The

PRC could not conclude if those highlighted topics were adequately dealt with by FREP as the documentation provided did not present nor analyse the areas that were in doubt and the third round of questions would finally not include such follow-up questions.

502. Moreover, FREP did not provide the PRC with any evidence of a formal follow-up, or final analysis and conclusions, on the information received on revenues in Asia and on the analysis of EY's conclusions on the allegations investigated by Rajah & Tann and the other external law firm, for which inconsistencies were sometimes noted (Appendix 8 of the EY long form audit report dated 24 April 2019) and clarifications needed. KPMG's report, which does not conclude that the Singapore revenues were a major issue, was used as follow up documentation by FREP.

*Seeking to obtain relevant information from the auditor*

503. FREP emphasizes that cooperation with the issuer's auditor may be relevant in the context of its examination and, since such cooperation is not *per se* provided for in German law, the issuer should be invited to designate also the auditor as a contact person and to release him from his confidentiality obligation. If they do not agree to do so, this generally cannot be interpreted as a refusal to cooperate, as the law does not oblige issuers to do so.

504. In the context of the Wirecard examinations, the PRC has noted that while such a request was included in the first set of questions on 1 April 2019, no formal approval of this request was received from Wirecard's management. No follow-up was made by FREP on this issue until the last set of questions sent on 22 May 2020 (when the request was reiterated). Therefore, FREP was not able to access and had no contact with EY during the whole examination. This is in contrast with the 2014 review, when FREP had met with the issuer, in the presence of its auditor EY.

505. The PRC thinks that it may have been relevant to obtain direct information from, and discuss specific issues with, Wirecard's auditor. The PRC thinks that the aim would not have been to inspect the auditors' work which is in the remit of the AOB, but rather to exchange with the auditor to get a better understanding of their analysis. For instance, the following could have deserved thorough discussions with the auditor: the conclusions drawn and inconsistencies highlighted by EY on the Rajah & Tann and the other external law firm reports disclosed in EY's 2018 long-form report in April 2019, EY's approach to the various allegations raised in the press (notably on the TPA business issues published by FT in October 2019) and the findings of the KPMG report in April 2020.

*Cooperation with other stakeholders*

506. The PRC also notes that FREP did not ask for a direct meeting with Wirecard's management and Supervisory Board. While a meeting with Wirecard's top management took place in the context of the 2014 examination, no such meeting was requested during the 17 months of the 2018 review. Although Wirecard seems to have proposed such a meeting (on 21 January 2020), FREP did not organise it. The PRC considers however that direct discussion on issues and allegations with Wirecard's management may have provided relevant elements in the context of the examination performed by FREP.

507. FREP did not request access to Wirecard's Supervisory Board. Similarly to the auditor, the PRC understands that, if FREP wanted to contact the Supervisory Board of an issuer, it should have



beforehand requested Wirecard's legal representatives' approval. FREP did not request such approval during the examinations carried out in 2019-2020.<sup>54</sup>

508. Because of the Supervisory Board's independent position, the PRC thinks that it would have been useful to exchange with it directly on the numerous allegations and the related proposed actions (e.g. on KPMG's assignment).

*Focusing on efficient approach*

509. Confronted with new allegations in the FT in October 2019 on the TPA business and informed of the decision of both Wirecard's Management and Supervisory Boards to engage KPMG to perform an independent special investigation concerning those allegations, FREP took the decision to suspend its own examination and wait for the outcome of KPMG's investigation. The reasons behind FREP's decision to rely on this report, which the PRC understands is common practice in the German enforcement system, were mainly the following:

- a. the adequacy of KPMG's examination scope to cover the potential issues identified in the October 2019 FT article;
- b. the independence of KPMG in reporting directly to Wirecard's Supervisory Board;
- c. the means and resources expected to be deployed by KPMG to perform this forensic investigation.

510. Although there is no legal requirement to obtain BaFin's agreement since FREP is independent, the PRC understands that, informed of FREP's decision, BaFin did not disagree with this approach.

511. The PRC acknowledges that this approach may be an efficient way to address FREP's concerns, in particular in view of the limited resources and means of FREP and BaFin when forensic audit is concerned.

*KPMG report*

512. The KPMG special investigation report dated 27 April 2020 appears to be the decisive element triggering the discovery of the fraud. As already mentioned, FREP chose to rely on the KPMG investigation in its examination process. Even if the PRC can see the relevance in FREP's decision, notably the resources at KPMG's disposal, some aspects however raise questions.

513. In October 2019, when informed of the new FT allegations on the TPA business and of KPMG's engagement by Wirecard's Supervisory and Management Boards, FREP agreed to suspend work to await the results of the investigation, provided that its scope covered all the relevant aspects of the allegations. The KPMG engagement letter allowing this scope analysis was only requested by FREP in mid-December 2019 and provided by Wirecard in late January 2020.

514. The PRC is of the view that, although KPMG's assignment was public knowledge at that time, only a formal review of the engagement letter could have enabled FREP to assess the necessary independence of the assignment and the adequacy of its scope to FREP's specific needs. Such review was carried out three months after KPMG's engagement.

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<sup>54</sup> Please note that FREP did not request access to the Supervisory Board in the context of the 2014 examinations either, but the PRC deems that was less relevant given the meeting with management and the company's auditor.



515. In addition to that, FREP only requested that Wirecard release KPMG from its duty of confidentiality in late May 2020 in its last set of questions on the examination of the 2018 half year financial report. The PRC understands that this request was not granted by Wirecard. However, if such a request had been made earlier, FREP may have had the opportunity to understand beforehand the scope and procedures applied by KPMG (as the engagement letter was obtained only in January 2020). It may also have obtained relevant information on the results (or preliminary results) of its work in a timely manner and enabled it to be ready to react as soon as the report was issued in late April 2020.
516. Finally, regarding its response to the KPMG report dated 27 April 2020, FREP decided to analyse in depth the public version of this report before sending detailed questions and requesting supporting documents to Wirecard on 22 May 2020 on many issues raised therein (amount and existence of revenues in the TPA business, presentation of escrow accounts as cash and cash equivalents and interim management report as at 30 June 2018).
517. Although the PRC understands the need to analyse all the issues raised in the KPMG report and to obtain detailed information from the issuer, it also thinks that some specific issues raised in this 59 page-long report might have deserved a more prompt and significant reaction from FREP, notably in view of the detailed information supplied in the report (short public version received at that time, as the full version was only requested afterwards and received in June 2020), combined with the knowledge of the time and resources invested by KPMG (six months, 40 people, €10m budget based on public available information). The PRC considers that priority should have been assessed and key issues should have been dealt with as a matter of urgency, given the critical situation and the market's attention at that time. In the KPMG report, the PRC believes there are clear indications, such as highlighted in the extracts below, that revenues and cash for €1bn may not exist, which should have led to more timely work from FREP.
518. Indeed, regarding the existence of the revenues from the TPA business and the related escrow accounts, the KPMG report states:
- a. (regarding the existence of revenues) This is due to deficiencies in the internal organisation and, in particular to the unwillingness of the Third Party Acquirers to participate in this special investigation in a comprehensive and transparent manner. (...) it was not sufficiently possible for KPMG to forensically trace the existence of the transactions volumes during the investigation period 2016 to 2018.
  - b. (...) account statements and bank confirmations for trust accounts (so-called escrow accounts) could so far not be provided for the investigation period for the purposes of the forensic investigation conducted by KPMG. The evidence provided in this respect (...) did not constitute sufficient evidence for our forensic investigation (...).
  - c. (...) In this respect, KPMG has not yet been able to conclusively assess the reliability of the bank confirmations.
  - d. Bank confirmations and accounts statements from the Bank managing the trust accounts were not submitted to us, as Trustee 1 (...) has terminated the contractual relationship with the Wirecard companies and no longer responds to inquiries from Wirecard.
  - e. (...) to that extent, it could not be sufficiently demonstrated, either that the payments into the accounts had actually been made by the TPA partners (...). In addition to these insufficiently documented payments into trust accounts amounting to around €1bn(...)

519. These elements alone lead the PRC to believe that requesting to access the Supervisory Board, the auditor and KPMG might have enabled FREP to have a direct and rapid contact with them to directly address these two salient issues, namely the existence of revenue related to the TPA business and of the cash in escrow accounts, than to wait almost a month to issue a third set of questions covering all the other topics, some of which seem less material. As part of the accuracy check of the facts disclosed in this report, FREP informed the PRC that a meeting was planned with all parties after FREP's last set of questions was answered (FREP had to obtain all documents and related information first). This request for a meeting is not documented in the files provided to the PRC. The PRC is also not aware that this meeting finally took place. The PRC believes that a more timely and focused response from FREP would have sent a strong signal about the importance the enforcer places on these issues and the urgency for Wirecard and its auditor to resolve these uncertainties and adopt a more appropriate and timely communication to the market.

#### *Analysis related to the conclusion taken*

520. Consequently to the statement received from Wirecard on 29 June 2020 (see Paragraph 461 in the "summary of facts" section), FREP concluded that the accounts for material assets and for income and expenses for the 2018 half year financial report were not properly maintained. The same conclusion was reached for the 2018 annual financial report. This constitutes a contravention of Section 238 (1) of the HGB. In addition, the deficiencies in the accounting were so serious that the half year financial statements of Wirecard failed to present fairly the financial position, financial performance and cash flows of the group. This constitutes a contravention of IAS 1.15.

521. FREP reported to BaFin that Wirecard had stated by letter of 15 July 2020 that it did not agree with the results of the examination. The PRC understands from the files that Wirecard informed FREP that given the current situation Wirecard was not in a position to comment on the finding of FREP. This was legally interpreted by FREP as Wirecard not agreeing to its findings.

522. Therefore, BaFin opened, at its level, the examination of Wirecard's 2018 half year financial report.

523. The PRC considers that the conclusion taken by FREP (on Tier 1) based on the information received during its examinations is appropriate with regards the ESMA's GLEFI, Paragraph 56. With regards the examination by BaFin (on Tier 2) which is ongoing, no conclusion has been taken yet. Hence, the PRC cannot assess this aspect of the Guideline in relation to BaFin.

### **5.4.6 Findings and conclusion – Examination of the 2018 financial reports**

524. Based on the above analysis of the supervisory expectations on the type and scope of the examinations, on the examinations procedures and techniques undertaken, and the conclusion taken, the PRC considers that FREP largely met the expectations in the context of Guideline 6 on examination methods for the reviews of Wirecard's 2018 half year and annual financial reports. Indeed, whilst the PRC identified a series of elements as mentioned hereafter, given the developments in, and the outcome of the examination, these elements *in fine* neither substantially impaired the overall effectiveness, nor did they leave material risks unaddressed as these were addressed, albeit at a later stage.

525. The following elements are key to the PRC's assessment:

- a. the timeliness of the scope expansion to the TPA business for the examination of the 2018 half year financial report: FREP should have paid more attention to the red flags that existed months before, and BaFin should have been aware of those in its monitoring of the issuer's environment, given that it had full access to the materials. This impaired the effective enforcement process as expected from the Guidelines.
- b. the overlooking of disclosure issues related to the examined areas in the course of the examination of the 2018 half year financial report: FREP should have looked at the information disclosed by Wirecard in relation to the TPA business, and taken into account allegations made by the press with regards to the lack of disclosures in its examination. BaFin should have requested a formal expansion of scope in relation to these disclosure issues. Scrutinising the financial reports, including any financial report published subsequently – as well as asking questions in order to better understand the areas of the issuer involving significant risks, etc. are part of the examination procedures set out in the Guideline. These procedures should be sufficient to achieve an effective enforcement process.
- c. The timeliness of both FREP's request of KPMG's engagement letter (obtained three months after KPMG was commissioned) and FREP's reaction following the receipt of the KPMG report as well as FREP's approach towards stakeholders: FREP did not seek, or did not timely seek to request contact with Wirecard's Management and Supervisory Boards, nor the auditors, nor KPMG, and waited a month to send a third set of questions following the receipt of the KPMG report (public version). Asking questions to, or having meetings with, the issuer's auditors to discuss complex issues or issues of interest, and engaging external experts (in this case, contacting KPMG as the company's external experts) to assist in providing knowledge, are also part of the examination procedures set out in the Guideline. The timeliness of the procedures is key to ensure effectiveness of enforcement.
- d. The lack of documentation on the follow-up of the different topics and the analysis made on the documentation received by FREP, namely from the first and second set of questions. As per the guideline, enforcers should ensure that the examination techniques used and the related conclusions of the financial information of issuers are documented appropriately.

526. Even if it is impossible to assess with certainty, the PRC tends to believe that additional examination procedures, as described in the previous section, might have contributed to an earlier revelation of the information of fraud.

527. As regards BaFin's role in the context of the examination of the 2018 half year and annual financial reports, which is limited to scoping the examination, the PRC considers that, given the concern on the possibility to have earlier expanded the scope of the 2018 half year examination and having also in mind the related disclosures, BaFin largely met the expectations in the context of Guideline 6 on examination methods for the examination of Wirecard's 2018 half year and annual financial reports as the overall effectiveness was sufficiently good and no material risks were left unaddressed.

## 5.5 Guideline 8 – Materiality

### Background – Supervisory expectations

528. In accordance with the mandate of the FTPR on GLEFI in the context of Wirecard, the PRC analysed the application of FREP of Guideline 8 related to Materiality, in particular to assess whether the materiality used for the purpose of the enforcement process of the Wirecard case was determined in accordance with the relevant financial reporting framework.

529. It is expected, in the specific context of Wirecard, that the materiality assessment made by BaFin and/FREP is aligned with the concept of materiality in the relevant financial reporting framework.

#### 5.5.1 Summary of facts

530. The IFRS are the relevant financial reporting framework for Wirecard. IFRS provides for a definition of the concept of materiality in IAS 1 § 7<sup>55</sup>, as follows: “Omissions or misstatements of items are material if they could, individually or collectively, influence the economic decisions that users make on the basis of the financial statements. Materiality depends on the size and nature of the omission or misstatement judged in the surrounding circumstances. The size or nature of the item, or a combination of both, could be the determining factor”.

531. FREP considers materiality aspects relevant for the selection of the areas addressed in an examination (as well as a risk assessment) and when deciding whether the financial statements are erroneous. FREP also considers the materiality threshold of the auditors as well as the list of uncorrected audit differences. FREP does not have a predefined materiality level; instead, materiality depends on the specific circumstances.

532. The PRC considered that materiality aspects are relevant for the selection of the areas addressed in the examination and when deciding whether the financial statements are erroneous. However, the PRC also highlights that materiality is generally a difficult and judgemental area, as evidenced by the IASB’s long-lasting project on materiality which began well before 2015 and was finalised only recently.

#### 2014 annual financial report

533. The examination of the 2014 annual financial report was a sample unlimited scope examination launched on the basis of a random selection.

534. As mentioned above, FREP does not have a predefined materiality level; instead, materiality depends on the specific circumstances. The PRC understands that there were no uncorrected audit differences in the context of the sample examination of the 2014 annual financial report.

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<sup>55</sup> IAS 1 §7 as applicable during the Review period, as a new definition of materiality was introduced, amending IAS 1 §7, with mandatory application from 1 January 2020.

535. As described above in Paragraph 380, the scope of the examination was not determined on the basis of materiality considerations. For the PRC's analysis of the scope of the examination, which included the consideration of materiality, please refer to Paragraphs 411-420.

536. Based on the scope of the examination as determined by FREP, the 2014 financial statements were found to not be erroneous by FREP. In that respect, there was no involvement of BaFin at any stage of this examination.

### **2018 half year financial report**

537. The examination of the 2018 half year financial report was a focused examination at BaFin's request. BaFin does not define materiality in advance of assigning examinations to FREP. When BaFin analyses if allegations regarding an accounting infringement lead to specific indications for a breach of accounting rules, materiality is defined taking into account the specific circumstances as well as the quantitative and qualitative impacts of a potential error.

538. When requesting FREP to examine the 2018 half year financial report, BaFin referred to the potential impacts on revenues to determine materiality: "If we assume that the specific indications of the possible infringements specified above (falsified and backdated contracts, implying inaccurate revenue recognition, etc.) will prove to be correct, it can be expected that there will be significant effects on revenues for the Asia-Pacific region, which is where the aforementioned newspaper articles say the events took place. (...) Since the revenue of the Asia-Pacific region constitutes 45% of the Group's revenue, it cannot not be assumed – at least for the Group's half year financial statements – that the potential errors are evidently insignificant."

539. As already mentioned, for FREP, materiality depends on the specific circumstances. FREP also considers the materiality threshold of the auditors as well as the list of uncorrected audit differences. The auditor of Wirecard had set the materiality limit for their audit at €20m in 2018 and €28.7m in 2019, based on information from FREP.

540. No materiality consideration enters into play on FREP's side when it comes to the areas that BaFin requires it to examine. Indeed, on a request-based examination from BaFin, FREP has no choice than to look at the predefined areas, despite its own assessment of materiality. In the case of BaFin's initial request, according to the FT article from 31 January 2019 (one of the articles which triggered the examination), the volume of the transactions affected by the allegations in Singapore totalled to €37m and related to the years 2015 to 2018. The retrospective adjustments made in the 2018 financial statements because of these allegations affected the net assets of Wirecard as of 1 January 2017 by €8.5m, the net assets as of 31 December 2017 by €4.8m and the net result for 2017 by €3.6m<sup>56</sup>. FREP says "Neither the amounts mentioned in the press article nor the retrospective adjustment were considered material compared to Wirecard's total assets, total equity and net result reported in 2017 and 2018".

541. When FREP (in coordination with BaFin) extended the areas of examinations under this focused review in October 2019, the materiality threshold was evidently considered met by both FREP and BaFin. The amounts at stake referred to by the FT article are indeed obviously material, as one of the TPA partners referred to in the article is said to have contributed to respectively 25% and 50% of Wirecard's sales and EBITDA in 2016.

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<sup>56</sup> Annual report 2018 of Wirecard, page 164

542. Finally, concerning the materiality consideration when deciding whether the financial statements are erroneous, FREP took the same conclusion: elements were material. According to the company's declaration, all information in connection with the "third-party business" is questionable. A very considerable amount (€1,9bn) of the balances in trust accounts could not be verified as of 31 December 2019 and are most likely unavailable. As of the examination date of 30 June 2018, the balances in question amounted to trustee accounts of €849m. The sales achieved with those questionable partners amounted to around €460m in the first half of 2018 (51% of total sales of €898m). The gross profit margin achieved with the questionable TPA partners of approx. €250m contributes significantly to the €245m EBITDA of the first half year of 2018.

### **5.5.2 Analysis**

543. As mentioned in the context of the examination of the 2014 annual financial report by FREP under Guideline 6, the PRC takes issue with the consideration of materiality regarding the determination of the scope of the examination. Within FREP's initially defined scope of examination, the PRC considers that the judgements made by FREP as regards the outcome of the examination were appropriate. Finally, within the examination of the 2014 annual financial report, considerations of materiality by BaFin are not applicable.

544. The PRC considers that the judgements made by BaFin and FREP, as depicted in the summary of facts above, are appropriate in relation to the materiality assessment when both selecting the initial areas that were examined in the case of BaFin for the examination of both the 2018 half year and the annual financial reports and on the scope expansion of the 2018 half year financial report for both FREP and BaFin. However, the PRC refers to its analysis under Guideline 6 (Paragraphs 476-489) regarding the timeliness of the scope expansion and the overlooking of disclosure issues in the areas examined, which are material to the PRC's eyes in the context of the examination of the 2018 half year financial report. In deciding whether the financial statements are erroneous, the PRC considers FREP's consideration of materiality as being appropriate for both the examination of the 2018 half year and annual financial reports. The PRC notes that, as the examinations are still ongoing in the context of BaFin, the assessment regarding the outcome of the examinations is not applicable to BaFin.

### **5.5.3 Findings – Conclusion**

545. Based on the analysis above, the PRC considers that FREP partially met the supervisory expectations in relation to Guideline 8 on materiality for the reviews of Wirecard's 2014 annual financial report. For BaFin, the assessment is not applicable as relates to this examination.

546. Based on the analysis above, the PRC considers that FREP and BaFin largely met the supervisory expectations in relation to Guideline 8 on materiality for the reviews of Wirecard's 2018 half year and annual financial reports.

## 5.6 Guideline 9 – Follow up on decisions

### Background – Supervisory expectations

547. In accordance with the mandate of the FTPR, the PRC analysed the application of BaFin and FREP of Guideline 9 related to the Follow-up on decisions, in particular to assess whether:

- a. the actions taken in relation to Wirecard were acted upon on a timely basis;
- b. in case of misstatement, investors were not only informed that there was a misstatement but were also provided with the corrected information.

548. It is expected in the specific context of Wirecard, that:

- a. BaFin and/or FREP ensure that the issuers appropriately acted on the supervisory, regulatory, enforcement actions taken, for those enforcement actions available to them<sup>57</sup>; and
- b. material misstatements and the corrected information be communicated to investors and other users of harmonised documents on a timely basis.

### 5.6.1 Summary of facts

#### Examination of the 2014 annual financial report (period covered 2015 - 2018)

549. In the 2014 examination no infringement was identified by FREP. A reminder regarding future measurement of specific financial assets was formulated to the company as well as a recommendation on separately presenting the items included in long term financial assets (liquidity reserves, standard bonds, strategic investments in start-up companies) as their risk profile differs. FREP subsequently checked that this was implemented in the 2016 annual financial report. However, recommendations by FREP are not considered decisions under the meaning of the GLEFI in the German two-tier system.

550. The examination was not taken over by BaFin as there was no significant doubts on the outcome of the examination or proper conduct by FREP. As the issuer was only given a recommendation about measurement and disclosure of financial instruments, this was not considered as an infringement. Therefore, no action within the meaning of the GLEFI was taken.

#### Examination of the 2018 financial reports (period covered 2019 - 2020)

551. As discussed, BaFin took over the examinations from FREP following declaration from FREP that Wirecard did not agree with the findings of error. On 24 July 2020, BaFin ordered the examination of the Wirecard's financial report at Tier 2 level of the 2018 half year and annual financial reports, the 2019 half year financial report and the 2017 annual financial report. On 4 August 2020, BaFin

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<sup>57</sup> According to the GLEFI compliance table ([https://www.esma.europa.eu/sites/default/files/library/esma\\_32-67-142\\_compliance\\_table\\_-\\_guidelines\\_on\\_the\\_enforcement\\_of\\_financial\\_information.pdf](https://www.esma.europa.eu/sites/default/files/library/esma_32-67-142_compliance_table_-_guidelines_on_the_enforcement_of_financial_information.pdf)), BaFin does not comply with Guideline 7 'due to its inability, for legal reasons, to request some enforcement actions'.



published all examination orders in the Federal Gazette (Bundesanzeiger) following prior hearing of Wirecard.

552. Therefore, as of the date of publication of this Report, the examinations are ongoing, and no action has been taken with regards to the 2018 and 2019 financial reports.

### **5.6.2 Analysis in relation to supervisory expectations**

553. With regards to the examination of the 2014 annual financial report, since no decision was taken by BaFin, the PRC thinks that the assessment of Guideline 9 is not applicable.

554. With regards to the examinations relating to the 2017, 2018 and 2019 financial reports, the examination is still ongoing at the level of BaFin and no decision has been taken yet by BaFin at the date of publishing this Report. Therefore, the assessment of this Guideline is not relevant.

### **5.6.3 Findings – Conclusion**

555. The assessment of Guideline 9 is not applicable to the 2014 examination and not relevant to the 2018/2019 examination.

## **5.7 Guideline 12 – Submission of emerging issues**

### **Background – Supervisory expectations**

556. In accordance with the mandate of the FTPR, the PRC analysed the application by BaFin and FREP of Guideline 12 to assess if, through the examination of Wirecard's financial reports for the period under review, BaFin and/or FREP should have submitted emerging issues and/or decisions to the EECS in accordance with the criteria set out in Guideline 12.

557. It is expected, in the specific context of Wirecard, that BaFin and/or FREP should have submitted emerging issues and/or decisions at the EECS if the situations described in Guideline 12 are encountered.

## **5.7.1 Summary of facts**

### **Examination of the 2014 annual financial report (period covered 2015 - 2016)**

558. In the examination of the 2014 annual financial report, no material error was identified by FREP.

559. Among the examination of the files and the areas analysed by FREP during its examination which lasted from April 2015 to December 2016, the PRC did not identify issues which should have prompted a submission to the EECS as set out in Guideline 12.

### **Examination of the 2018 financial reports (period covered 2019 - June 2020)**

560. The PRC identified accounting issues from FREP's examination in 2020 that may potentially have been relevant as emerging issue: distinction agent/ principal in the context of revenue recognition, disclosures of restricted cash, presentation of escrow accounts as cash and cash equivalents or financial assets.

561. However, although related to some extent to the issues at stake, none of these subjects were finally relevant in the context of the conclusion drawn by FREP of erroneous accounts.

562. In addition, to present Emerging Issues to the EECS, the enforcer should be able to clearly present the accounting issue, the rationale for the treatment applied by the issuer, the views of the enforcer and the potential impact on the issuer's financial statements.

563. Therefore, for the potential issues identified, the PRC concludes that FREP was not in a position to adequately present the case as Emerging Issues to the EECS, in accordance with Guideline 12. Indeed, no clear information and detailed analysis were available to FREP on these issues, allowing it to discuss them at EECS, at the time FREP took its decisions on Wirecard's 2018 financial reports.

564. BaFin's examinations are still ongoing and at a very early stage. On the basis of available documents, the PRC did not identify issues which should have prompted a submission to the EECS as set out in Guideline 12.

## **5.7.2 Findings – Conclusion**

565. The PRC considers that, on the basis of the documents and of the information received by the PRC, both BaFin and FREP fully meet expectations with regards to Guideline 12.

## 5.8 Effectiveness of the supervisory system

### Background – Supervisory expectations

566. In accordance with the mandate of the FTPR on GLEFI in the context of Wirecard, the PRC analysed the effectiveness of the supervisory system of BaFin and FREP.

567. In the context of the PRM, the Peer Review should cover the effectiveness of the supervisory system, the degree of convergence in application of law and the capacity of BaFin and/ or FREP to respond to market developments. Therefore, this FTPR will also identify:

- a. legal or procedural impediments that prevented BaFin and/or FREP from complying in full with GLEFI;
- b. legal or procedural impediments that prevented BaFin and/or FREP from cooperating and exchanging information between themselves and other relevant authorities (e.g. AOB);
- c. legal or procedural impediments that prevented an efficient and effective flow of information within BaFin;
- d. the existence of any legal or procedural impediments that prevented BaFin and/or FREP from, on timely basis, detecting, supervising/examining financial information published by issuers in accordance with the TD and from taking appropriate measures in case of discovered infringements.

568. It is expected, in the specific context of Wirecard, that BaFin and/or FREP have all the powers necessary for the performance of their functions. In case there are any legal or procedural impediments that affect the effectiveness and timeliness of the EFI, it should also be highlighted. It is expected that relevant information is shared amongst relevant parties and acted upon adequately (such as information between the two authorities (FREP and BaFin) and between BaFin's different departments (including, but not limited to, MAR supervision departments, EFI team/department, complaints management department / prudential supervision).

569. It is expected that the Peer Review indicates if the modifications made to the GLEFI and the new supervisory briefings would have an impact on the assessment made in this FTPR.

570. The PRC presents the above topics by order of potential impact in the context of the Wirecard case, starting with (1) the existence of any legal or procedural impediments that prevented BaFin and/or FREP from detecting on a timely basis issues and taking appropriate measures, continuing with (2) legal and procedural impediments that prevented BaFin and/or FREP from cooperating and exchanging information between themselves and other relevant authorities, (3) legal and procedural impediments that prevented an efficient and effective flow of information within BaFin and/or FREP, and (4) legal or procedural impediments that prevented BaFin and/or FREP from complying in full with GLEFI.

## 5.8.1 Legal and procedural impediments to timely detection of issues and taking of measures

### Financial reporting issues involving fraud

#### *Summary of facts*

571. One of the transversal topics to be discussed in the context of the effectiveness of the supervisory system is FREP and BaFin's approach to financial reporting issues involving fraud.
572. EY's communication in mid-June 2020 that Wirecard allegedly had presented falsified balance confirmations regarding funds held in trust accounts in the amount of €1.9bn, was the last building block in revealing that the Wirecard case involves large scale fraud. In 2019 there was also a confirmed case of fraud committed in a subsidiary of Wirecard in Singapore.
573. For fraud cases involving issuers under supervision, in its description of approach and limitations, FREP makes a distinction between i) accounting fraud in a subsidiary or by single employees ('type 1') and ii) top management fraud ('type 2'), both being 'a deliberate action to misrepresent that status of the issuer' (FREP). 'Top management fraud is perpetrated with the involvement of the highest management levels of an issuer'.
574. FREP does 'not assume there may be top management fraud, if it is the MB who commissions a special investigation'. 'If the Supervisory Board commissions a special investigation, FREP assumes that the investigation also covers top management fraud'. In the Wirecard case, the PRC understands that the KPMG report was commissioned by the Supervisory Board and MB of Wirecard.
575. In case of accounting fraud in a subsidiary or by single employees (either within or outside an examination by FREP on the reporting of the issues), it is FREP's experience 'that in case an issuer has detected fraud or has indications of fraud, the issuer – together with an audit firm – generally tries to find out the scale of the fraudulent actions and discloses the correction of the resulting errors in the relevant financial statements in accordance with IAS 8 *Accounting Policies, Changes in Accounting Estimates and Errors*.
576. As indicated by FREP, after examining the engagement letter, FREP 'awaits the outcome of the auditors' report, checks the plausibility of the proceedings and examines whether the error resulting from the fraud detected has been presented appropriately in the financial reports'. 'If material, this error finding is then officially recognised by FREP and, provided the company accepts the finding, published in the Federal Gazette by the company'.
577. According to FREP, in such cases of suspicion of accounting fraud (type 1), it notifies the public prosecutor, but only after having also identified an accounting error. The reason for this is that FREP 'doesn't want to run the risk of falsely accusing an issuer'. Therefore, FREP 'only submits a case to the public prosecutor when FREP can at least define what the potential misrepresentation in the financial statements is'. It is the PRC's understanding that 'in case the examination procedure gives rise to the suspicion of criminal activity relating to an issuer's financial reporting', both FREP and BaFin are obliged by law to notify the public prosecutor.

578. According to FREP, 'the rationale of the law is that FREP notifies the public prosecutor in cases it had additional insights that are not already public information'. In type 1 fraud cases, the 'prosecutor normally is already informed by company management'. FREP has indicated that in the period of 2006-2018, it has referred eight issuers in total for such accounting fraud to the public prosecutor. In all of these cases FREP 'had identified an accounting error and had finished the examination'. During the on-site visit, FREP indicated that it could deal with a type 1 case involving the suspicion of accounting fraud, assuming management takes adequate action (together with the auditor, possibly ordering a forensic examination).
579. However, in case of top management fraud (type 2), FREP indicates that 'FREP reaches its limits' of being able to investigate financial reporting in such cases. These limitations relate to the lack of powers and relevant resources.
580. The examinations of FREP depend on the consent of the issuer. In relation to this, FREP can only ask the assigned legal representative of the issuer and other parties named as contact partners for information and documents. Furthermore, FREP can perform onsite visits and contact the auditor in the context of examinations, but again only with the consent of the issuer.
581. As FREP states, 'there is a high probability that FREP will receive incorrect information and falsified documents if top management itself is involved in the fraud. FREP cannot verify whether a contract or accounting evidence is genuine, since FREP is not authorised to contact third parties with such a request due to FREP's confidentiality requirements (§ 342 c HGB, § 11 Code of Procedures) and, likewise, third parties could be restricted to support FREP with confidential information (depending on the business relationship between the issuer and the third party)'.
582. Furthermore, FREP indicates that it does not have the resources to do the kind of forensic examination required to investigate top management fraud, even if it does have some budget for special examinations (€400,000 in 2018). In this context FREP makes reference to resources KPMG allegedly has used for their forensic examination into Wirecard (€10m, 40 persons, 6 months duration according to public information) which would be 'beyond the capacity of FREP and the total financial budget of FREP'. Besides that, according to FREP, FREP does not employ experts who have the skills for a forensic audit, especially in countries overseas'. Finally, FREP mentions that it cannot quickly scale-up the examination activities in a particular year, as 'there is no possibility to make additional financial resources available during a year'.
583. FREP stresses that 'an examination by FREP is not designed to investigate issues raising suspicions of a criminal offense'. According to FREP, 'the topic of fraud was discussed during a working meeting between BaFin and FREP on 1 October 2015'. FREP mentions that as was reflected in the minutes of this meeting, BaFin and FREP 'are in agreement that the German enforcement process is not designed to investigate issues raising suspicions of a criminal offence'.
584. BaFin has a different understanding of the outcome of that meeting of 1 October 2015: 'it is BaFin's understanding that in the meeting an agreement between BaFin and FREP was reached in relation to the aspect that: '(...) the enforcement procedure is not aimed at *fully* investigating facts (Ausermittlung von Sachverhalten) that give rise to the suspicion of a criminal offense' (emphasis added). 'The statement simply reflects that BaFin and FREP agreed that neither BaFin's nor FREP's powers vis-à-vis the issuers are designed to *fully* investigate the relevant facts in such fraud cases'. 'However, no agreement was reached between BaFin and FREP that FREP is not responsible for investigating also cases of fraud (...)'

585. In this context, BaFin also refers to the legislative background and the legislator's aim regarding fraud: 'reference is made to the fact that the Bilanzkontrollgesetz (BilKoG) was created under the influence of accounting scandals caused by manipulation of financial statements in the past (Explanatory memorandum of the BilKoG, BT-Drs. 15/3421, p. 11 ff)'. Therefore, BaFin concludes 'FREP is responsible for carrying out examinations on Tier 1 also in cases where there are indications of accounting fraud or manipulations. If the examination procedure gives rise to the suspicion of criminal activity relating to an issuer's financial reporting, both FREP and BaFin are obliged by law to notify the public prosecutor without undue delay'.
586. Furthermore, FREP is of the opinion that 'if BaFin expected fraud in the Wirecard case, it could have taken over the examination from FREP'. For this, FREP refers to a reading of § 108 (I) Sentence 2 No. 2 WpHG, on which basis BaFin could take over an examination from FREP in case there are substantial doubts about the accuracy of the results of the enforcement panel's examination or about the proper conduct of the examination by the enforcement panel. The PRC's understanding of the reasoning is that, given BaFin's awareness of FREP's limitations in resources and powers to investigate suspicions of fraud, BaFin could have had substantial doubt during the ongoing examination about FREP's ability to properly conduct the examination.
587. According to FREP, the reading of art § 108 (I) Sentence 2 No. 2 WpHG was also stated in a publication "Preventing irregularities in accounting, including fraud" of the Working Group of German Accounting and Auditing Law Professors, published in July 2020, page 16 (unofficial English translation): 'if circumstances exist which give rise to suspicion of balance sheet manipulation by the management of the company to be audited, then an examination by FREP, whose powers under Section 342 b (4) HGB are limited to communication with this very management, makes little sense in the first instance. If, in particular, powers are required against the legal representatives of the company to be examined, which FREP does not have under the law, involving FREP as an auditor in the first tier only delays the examination. A "proper conduct of the examination by the Panel" can then only be expected formally, in accordance with the protocol, but not substantively. In such cases in which state powers of investigation are necessary, § 108 (I) Sentence 2 No. 2 WpHG can, therefore, be interpreted as allowing direct action by BaFin'.
588. According to BaFin, during the Wirecard examination, FREP never discussed this topic, or the possibility to transfer the examination of Wirecard to BaFin. According to FREP, this was because BaFin is well aware of what the powers of FREP are.
589. BaFin sees no basis for this reading of art § 108 (I) Sentence 2 by FREP and as mentioned in the publication of the Working Group of German Accounting and Auditing Law Professors FREP is referring to: 'there is no legal possibility for BaFin to take over an examination from FREP because there are allegations of manipulation of financial statements. FREP, as part of the two-tier enforcement system, was explicitly established in order to also deal with cases involving suspicions of accounting fraud (BT-Drs. 15/3421, pp. 1, 11, 13)'. 'If FREP detects indications for a possible accounting fraud, FREP remains responsible for the examination'.
590. Regarding the relevant question of whether and when FREP realised that top management fraud was involved (and hence that would go beyond both their capabilities), the PRC understands that the KPMG report was commissioned by the Supervisory Board and MB of Wirecard. According to § 574, FREP had therefore assumed from that date that there might be top management fraud. With regards to the notification of the public prospector, it should be highlighted that according to FREP, the KPMG report published in April 2020 'did not conclude that the financial statements do

not present fairly the financial position and performance of the issuer'. Indications of an incorrect presentation of the financial position in the financial statements of Wirecard as of 31 December 2019 was ultimately revealed by EY after further investigations in June 2020. BaFin immediately informed the prosecutor', hence 'a notification by FREP was no longer necessary'.

591. BaFin seems to have a similar understanding as FREP when it comes to investigating top management fraud in case BaFin is responsible for the examination (Tier 2 examination): 'criminal acts like in the Wirecard case relating to a systematic fraud involving collusive interaction of many perpetrators and being of an international dimension can never be completely prevented, particularly not by a supervisory authority. BaFin is not a criminal prosecution authority with forensic investigation powers.' 'BaFin may be able to detect something is wrong in the accounts but will not be able to come to a conclusion on what has happened (such as in the Wirecard case): that is for the prosecutor'.
592. BaFin has more powers than FREP when it comes to enforcement of financial reporting: e.g. BaFin has the right to require any information and documentation from issuers (e.g. members of the MB, members of the Supervisory Board, staff members), auditors and employees of subsidiaries and their auditors (§ 107 (5) WpHG), it has the ability to carry out on-site inspections (§ 107 (5) WpHG); all without the consent of the issuer and has the power to ensure that investors are informed of material infringements discovered and are provided with timely corrected information.
593. But BaFin is of the opinion that these powers are not enough to perform a forensic examination, as it would e.g. not be able to require account information from banks. For forensic examination work in the context of enforcement of financial reporting, BaFin would depend on the public prosecutor. BaFin also mentions the complexity in the Wirecard case given the international nature of the Wirecard fraud.
594. BaFin also stresses that, from a legal perspective, it is unable to use any of the general powers that BaFin has, for example regarding the enforcement of MAR. This is related to the fact that § 106 et seq. of the Wertpapierhandelsgesetz (WpHG) containing the powers relating to the EFI override the general provisions containing BaFin's general powers (Sections 6(2), (3), (11), (12) WpHG) because they are considered "*lex specialis*". These general powers therefore cannot be applied concurrently to the specific provisions in that § 106 et seq. of the WpHG.
595. Based on information received from BaFin this legal perspective is confirmed by a legal expert opinion provided by Prof. Dr. Dr. h.c. Uwe H. Schneider (September 2020) who carried out an in-depth analysis regarding the relationship between the BaFin investigation powers in case of enforcement of financial information according to § 106 et seq. WpHG and the BaFin general power under § 6 WpHG. The legal expert opinion concludes that indeed if there is a case of enforcement of financial information this is subject to BaFin's powers under §106 ff WpHG only. This is due to the conclusive nature of the enforcement of financial information procedure. Therefore, § 106 et seq. WpHG are *lex specialis* compared to §6 WpHG.
596. Furthermore, BaFin indicates that it lacks the resources to do a forensic examination to discover fraud as KPMG has done in the Wirecard case. Here the arguments are similar to FREP's, however noting that BaFin has less resources available for the EFI compared to FREP, reflecting its role and responsibilities as Tier 2 in the two-tier system. This would make the possibility for BaFin to conduct a forensic examination even more limited.



597. BaFin also mentions that it lacks the budgetary flexibility to shift the level of resources from within the organisation that would be required to do a forensic examination, assuming this would be possible given other priorities and obligations and assuming these resources would possess the required skillset for doing forensic examinations.

598. Regarding the relevant question of whether and when BaFin realised that top management fraud was involved (and hence that would go beyond their capabilities), it should be highlighted that according to BaFin, the KPMG report published in April 2020 'contained red flags', but it could still be a case of 'bad bookkeeping'. 'KPMG did a forensic investigation but didn't find there was fraud'. The realisation of top management fraud came after EY informed BaFin on 16 June 2020 about the falsified balance confirmations regarding funds held in trust accounts in the amount of €1.9bn. BaFin notified the public prosecutor on 18 June 2020.

#### *Analysis*

599. The PRC is of the opinion that it cannot be assessed from the TD or the GLEFI what the supervisory expectations regarding the detection and examination of (indications of) fraud by supervisors of financial reporting are: fraud is not mentioned in either the TD or GLEFI. Still regarding powers, it cannot be distilled from the TD/GLEFI what the expectations are either, as both refer to the requirement to have minimum powers, but a national jurisdiction could decide on much broader powers. At the same time, it can also be argued that the TD or the GLEFI do not rule out a role for supervisors in case of (indications of) fraud in the context of examining the compliance of financial information with the relevant reporting framework.

600. The PRC does however note that both BaFin and FREP have an obligation by law to notify the public prosecutor in case the examination procedures give rise to the suspicion of a criminal activity relating to an entity's financial reporting. The role of the public prosecutor is relevant in such a case, as it has full forensic capabilities to examine a potential fraud.

601. To enable the public prosecutor to effectively examine cases of potential fraud involving financial reporting using its forensic power, it is also dependent on both BaFin and FREP notifying the prosecutor of information giving rise to the suspicion of a criminal activity on a timely basis.

602. In that perspective, the PRC is of the opinion that supervisors of financial reporting also have a role to play to be alert with regards to signs of fraud and thus facilitate the detection of fraud, by asking questions e.g. to the issuer and auditor in case there are signs that could point to the potential existence of fraud and on a timely basis notify the public prosecutor. The answers received by these supervisors could increase the possibility that the public prosecutor can be supplied with relevant concrete information to sufficiently substantiate the suspicion of a criminal offence.

603. This does not mean that the PRC expects supervisors of financial reporting to actively search for fraud with an issuer, in case there are no such signs of fraud. There is also not the expectation that a supervisor of financial reporting would start a full forensic examination when there are suspicions of a fraud, unless this is specifically foreseen by national law implementing the TD.

604. The PRC notes that BaFin notified the public prosecutor of suspicions of a criminal activity relating to an Wirecard's financial reporting on 18 June 2020, after EY informed BaFin about the falsified balance confirmations regarding funds held in trust accounts in the amount of €1.9bn, a week before Wirecard filed for insolvency. It is important to note that the PRC did not perform any legal

analysis confirming or refuting the reading of the (local) law by BaFin and FREP, which leads them to consider that the hurdle is high when it comes to notifying the public prosecutor. This is indeed out of scope of PRC's mandate.

605. Given this high hurdle for BaFin and FREP to notify the public prosecutor, the PRC is of the view that FREP and BaFin may not have the powers necessary when it comes to being able to request information from relevant parties (like auditors and other relevant parties) in order to effectively substantiate suspicions of a criminal activity to enable them to notify the public prosecutor.
606. Especially in case of top management fraud, information received from the issuer can be deemed unreliable, and therefore there may be a need to obtain information from third parties outside the realm of the issuer, in order to make the suspicion of a criminal activity sufficiently concrete to notify the public prosecutor.
607. According to the PRC, BaFin and FREP could therefore benefit from the general powers of the WpHG, as it would increase the chance of BaFin and/or FREP to be able to notify the public prosecutor. These general powers relate to being able to require any person to provide information, submit documents or other data, provide copies, and summon and question persons, be permitted to enter the property and business premises of persons mentioned above, or search business and residential premises to the extent necessary to investigate infringements.
608. According to the powers resulting from the transposition of the TD in Germany and in accordance with the Paragraph 33 of the GLEFI, in the current situation, e.g. BaFin's EFI team can only require (and without permission of) the issuer, the members of its governing bodies, its employees and its auditors to provide information and submit documentation on request.
609. Furthermore, the persons obliged to provide information and submit documentation as mentioned in the paragraph above are required to grant BaFin's staff and persons authorised by it access to their property and business premises during normal business hours, to the extent that this is necessary for the performance of their functions (§ 107(6) WpHG). The auditors' obligation to provide information is restricted to facts of which they became aware in the course of the audit. As for FREP, as indicated in Paragraph 580 above, its powers are even more limited.
610. The PRC is conscious of the fact that if BaFin and/or FREP would have had any of these broader powers (and the resources to operate them), there still would not have been any certainty of being able to notify the public prosecutor before June 2020 (given the high hurdle as indicated in Paragraph 604 in a complex fraud case, possibly involving top management). But at the same time, it would have allowed to ask questions and obtain evidence outside of the issuer, therefore possibly increasing the chance for BaFin and/or FREP to notify the public prosecutor.
611. The PRC is also conscious that, if these powers were provided to BaFin (and not FREP), BaFin would only be able to use these general powers and ask the relevant questions when the examination becomes a Tier 2. In that situation, as FREP does not have the sovereign powers to require information outside of the issuer, it is very unlikely that FREP could find facts giving rise to suspicion of a criminal offence in case of a top management fraud. Given the tiering system it should therefore be possible for an examination to be transferred to in case there are suspicions of possible fraud, or that adequate sovereign powers should (also) be available in a Tier 1 examination or with a single enforcer doing the examination.

612. Finally, the Wirecard case has shown that a complex fraud with the involvement of top management and in an international setting is very hard to uncover, and certainly by a single organisation. It can however be stated that the events that have led to the revelations of the non-existing cash in the Wirecard case, have been the result of various individuals (■■■ journalists) being persistent in asking questions and raising doubts about (apparent) inconsistencies or unclarities in the financial reporting of Wirecard.

613. Regarding the respective roles of BaFin and FREP in the case of (indications of) fraud in financial reporting, it appears to the PRC that BaFin and FREP are not aligned in the perception of each other's role and the limitations and possibilities both have in the context of the two-tier system. The PRC notes on this subject the applicable Memorandum of Understanding regarding the cooperation between BaFin and FREP with respect to supervision of corporate financial reporting. It sets out that BaFin and FREP "consult with one another on an ongoing basis in order to arrive at common responses to significant issues affecting both parties" (§ 2) and with regards to uniform interpretation of legal requirements, "consult with one another to ensure that legal requirements are interpreted as uniformly as possible" (§ 3.1). The PRC would encourage BaFin and FREP to discuss and clarify any possible misunderstandings relating to their respective roles and responsibilities in cases involving (indications of) fraud in financial reporting.

#### *Findings – Conclusion*

614. The PRC recommends that BaFin and/or FREP can use general powers as described in (Sections 6(2), (3), (11), (12) WpHG) in the context of supervision of financial reporting. This would need to be addressed in the legal framework.

615. The PRC would encourage BaFin and FREP to discuss and clarify any possible misunderstandings relating to their respective roles and responsibilities in cases involving (indications of) fraud in financial reporting.

### **Assessment by BaFin of substantial doubt**

#### *Summary of facts*

616. According to the Financial Reporting Compliance Act (Bilanzkontrollgesetz – BilKoG) dated 15 December 2004, BaFin and the Enforcement Panel are responsible for supervising corporate financial reporting and enforcing financial reporting standards in a two-tier process. FREP's purpose encompasses therefore a "public interest mission" which is ensuring transparency in the financial market.

617. German law has explicitly designated FREP as an independent private body under private law. FREP is neither acting on an official mandate nor on behalf of an administrative authority (BT-Drs. 15/3421, p. 12; Article 1 of the Recognition Agreement). FREP itself is not an administrative sanctioning authority.

618. As a reminder, on the first tier, FREP as an independent body examines the financial statements on a voluntary basis (i.e. with reliance on cooperation of issuers to be able to perform an examination). Only if problems arise on the first tier, BaFin should intervene in the second tier, and, if necessary, enforce the examination with sovereign powers as set forth in the applicable rules (§ 106 ff. WpHG).

619. Due to the status of FREP as an independent private-sector entity, BaFin is not in a position to issue any instructions to FREP regarding the examination procedures and therefore cannot set any deadlines or stipulate any specifications with regard to the resources to be used. Even for (superordinate) organisational and substantive questions, FREP does not need to reach an agreement with BaFin; according to the Recognition Agreement, it is sufficient for FREP to consult with BaFin (Article 3 of the Recognition Agreement). In accordance with § 342b (1) of the HGB, FREP acts on the basis of its Code of Procedures. This Code of Procedures was approved by mutual agreement with both the MoF and the MoJ.
620. The PRC understands that FREP is not supervised nor formally controlled by any authority. In addition, FREP does not have any internal audit function.
621. However, BaFin is competent to intervene and perform examinations (instead of FREP) if problems arise, as described in Paragraphs 104-105 (under Section 4 – General Information).
622. With regards to the case where BaFin may take over investigations in case of substantial doubts<sup>58</sup>, BaFin says that the legislature sets out strict requirements for establishing whether there are substantial doubts. Quoting different legal sources, BaFin says substantial doubts can only be raised “in exceptional cases” (Research Services of the German Bundestag, WD 4 – 3000 – 070/20, p. 5), “in the event of obvious and gross errors” (loc. cit.), or if FREP failed to investigate circumstances that were of significance to the accounting methods (Assmann/Schneider/Mülbert, § 108 of the WpHG margin no. 12). BaFin also says that for it to have “substantial doubts”, it may need first to have “initial doubts”.
623. BaFin indicates that it used this option several times in the past. The PRC notes that in only one case, the substantial doubts concerned both the proper conduct of FREP’s examination and its outcome, whereas the remaining cases related to the outcome of FREP’s examination. In addition, in all those cases, BaFin had assessed and identified the substantial doubts after FREP finished its examinations (i.e. a posteriori), and not when FREP was still conducting the examinations.
624. The PRC therefore sought to understand how BaFin, in the context of Wirecard, assessed whether “initial” or “substantial” doubts may have arisen in relation to the proper conduct of FREP’s examination (as opposed to the outcome of FREP’s examinations). BaFin indicated that:
- a. It kept itself informed about the progress and implementation of the examination at regular working sessions. It did not gain the impression that FREP was failing to act, which might have raised substantial doubts about the examination procedure.
  - b. Given that the estimated average length of a FREP examination that results in error findings is approximately 13 months, the enforcement procedure was also not unduly long.
  - c. The fact that essentially one FREP examiner was responsible for supervising the procedure is explicitly in line with FREP’s Code of Procedures and could probably not have been managed in any other way for capacity reasons.
  - d. FREP’s examination reports of 14 May 2020 and 24 June 2020 gave no cause to justify substantial doubts about FREP’s examination procedure. In its examination reports, FREP discussed its examination areas and explained its examination activities in chronological order. It also stated which documents FREP had requested and analysed.
  - e. After Wirecard’s Supervisory Board ordered the special investigation to be carried out by KPMG in October 2019, FREP’s decision to wait for KPMG’s results in the ongoing

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<sup>58</sup> § 108 (1) no. 2 of the WpHG (previous § 37p (1) no. 2 WpHG)

examination did not raise substantial doubts. This is due to the expected outcome of the KPMG forensic investigation, being based on the huge resources invested (€10m budget, up to 40 staff members according to public information).

625. Against this background, BaFin considered that it was not possible to take over the examination based on substantial doubts.

626. The PRC notes it was the first time since the creation of FREP that BaFin had required it to report during an ongoing examination. BaFin made this first request in the context of Wirecard, after KPMG released its report on its investigation at the end of April 2020, whereas it requested the examination by FREP in February 2019.

#### *Analysis*

627. The PRC understands that BaFin and FREP had two different readings of the law, which may have prevented BaFin in the past from requesting any report from FREP during an ongoing examination. In BaFin's view, the reporting obligations of FREP (to explain its examinations to BaFin) exists during FREP's ongoing examination, and not only at the end of the examination. However, doubts have been raised by FREP in the past on that matter. FREP's Code of Procedures only foresees that "FREP shall inform the BaFin of the results of the examination" (excluding therefore any obligations to report during the examinations). The PRC understands that the Research Service of the German Parliament clarified this issue on 2 July 2020, supporting BaFin's view.

628. In addition, it is the PRC's view that precise and substantive information on what is currently done on the examinations would be needed to assess the existence of substantial doubts. In the context of Wirecard, the PRC therefore questions whether BaFin could thoroughly assess "substantial doubts" during the examination period, based on the level of information exchanged during the regular quarterly working meetings, or based on the content of the report requested by BaFin and provided by FREP in May and June 2020.

629. The PRC understands that both authorities are bound by strict confidentiality regimes when it comes to exchanges of information in relation to issuers. FREP's Code of Procedures foresees that "Except where there is a statutory duty to report, all company and business secrets of the entity being examined and any information about that entity which has become known during enforcement examination activities shall be subject to the duty of confidentiality." On BaFin's side, within the existing legal framework, it is not allowed to exchange supervisory information, e.g. from the area of market abuse or the prudential supervision, with FREP being an institution organised under private law.

630. The MoU between BaFin and FREP provides that "at the regular working meetings, the BaFin and the Enforcement Panel update one another on the status of the various examinations".

631. The PRC understands that FREP holds to strictly comply with its confidentiality obligation, as set out in its Code of Procedures, and therefore does not usually share any element or information stemming from its examinations with BaFin (until the file is reviewed on Tier-2 by BaFin, if applicable). In practice, FREP says "FREP and BaFin briefly share information about ongoing request-based examinations and examinations on the second tier of enforcement during these working meetings".

632. Based on the above, the PRC identified possible weaknesses in the set-up of the system which may impair the effectiveness and timeliness of the supervisory enforcement practices.
633. FREP as a private independent authority is not controlled nor supervised by any authority.
634. Although a possibility is given by the law to BaFin to take over an examination from FREP, in case of substantial doubts on the proper conduct by FREP of such examination or on the outcome of FREP's examination, BaFin has to assess whether substantial doubts exist both during the examination ("proper conduct") and after the examination is finalised ("proper conduct" and "outcome"). However, In the PRC's view, such assessment of substantial doubts by BaFin requires a precise and substantive understanding (as opposed to an overview) of the examination procedures performed by FREP (elements considered in the examinations, analysis of the responses received, etc.).
635. In practice, the ex-post assessment is not completely possible in all cases after FREP had finalised its examination namely because BaFin cannot get access to FREP's files if the issuer agrees with FREP's conclusions (no systematic assessment nor even sampling assessment). This is valid irrespective of whether FREP concludes if there is an error or not. Because BaFin does not have information regarding the procedures undertaken, areas covered, issues identified when the issuer agrees with the outcome of the examination, BaFin may only challenge the conclusion of an examination from FREP if public information is available such as articles in the press, based on internal information arising from Market Abuse surveillance or when the procedures raise obvious doubts (for instance when it takes much longer than a "normal" examination).
636. During ongoing examinations, the assessment of substantial doubts by BaFin is difficult in practice mainly due to the limitations on exchanges of information between the two organisations, for confidentiality reasons. BaFin may request a formal report from FREP during an ongoing examination, however, until recently, such possibility was subject to legal doubt and different readings from both institutions, and therefore not used. However, the PRC believes that the content and timing of such progress report should be carefully assessed by BaFin to ensure that it provides an adequate basis for assessing the existence of any substantial doubt in the manner in which FREP conducts a specific examination.

#### *Findings – Conclusion*

637. Based on the above and considering the supervision reform underway, the PRC believes that the content and timing of such progress report should be carefully assessed and may need to be addressed in the legislative framework as to ensure that it provides an adequate basis for BaFin to assess the existence of any substantial doubt in the manner in which FREP conducts a specific examination.
638. In addition, the PRC considers that it may be relevant that BaFin is allowed on a sampling basis to access the files of issuers that agreed with the examination after it is finalised in order to understand if the procedures taken by FREP which led to the conclusion of "error finding" or "no error finding" were adequate. This may need to be addressed in the legal framework.



## 5.8.2. Legal or procedural impediments preventing cooperation and exchange of information

### Cooperation with the Audit Oversight Body

639. In 2016 the Auditor Oversight Body (AOB) was first established in June 2016. Prior to 2016 its predecessor, the Auditor Oversight Commission (Chamber of Accountants), performed this function.

640. According to the AOB, the AOB is subject to strict rules with respect to confidentiality.<sup>59</sup> The basic legal principle is that the AOB must be silent towards every third party with respect to specific cases. The AOB can neither state whether an investigation is opened nor provide information as to the outcome of an investigation. However, the AOB is allowed to share information with other authorities, among them BaFin and FREP, but only if there is concrete indication for misstatement in financial reporting on a specific file. The rationale for this is that non-compliance of an auditor with the audit regulations does not necessarily entail that the financial statements are erroneous.

641. The AOB indicated that, when FREP or BaFin identifies a material misstatement but the auditor had not qualified its opinion, it provides that information to the AOB. Erroneous financial statements are indicators for breach of professional duties by auditors for the AOB. The AOB starts an investigation process on the auditors and/or the audit firm. No feedback information is given to FREP or BaFin in relation to any further action taken by the AOB (and outcome of such action), or to the absence of action, with respect to notifications sent by FREP or BaFin. Furthermore, the publication of sanctions on the AOB's website is anonymised (no name of audited firm or auditor), only the nature of the sanction is indicated including abstract details on the specific trespassing. Further information is presented in the AOB's annual report, e.g. on the outcome of inspections, but that information is aggregated and also anonymised.

642. According to FREP and BaFin there is a well-established flow of information from FREP to this body (about 200 cases over 11 years were sent by FREP to the AOC, the AOB's predecessor body). Since the setup of the AOB, in the beginning of 2017, FREP has referred 43 cases to them. As of 31 July 2020, FREP has received [REDACTED] indications from the AOB.

643. According to BaFin, on 12 May 2020, BaFin sent the publicly available KPMG special examination report dated 27 April 2020 to the AOB so that the AOB could check to what extent this information was relevant for the AOB's oversight work.

644. On 18 May 2020, according to BaFin, BaFin informed the AOB about the restructuring of a Wirecard subsidiary and a TPA business partner (Al Alam), both located in Dubai, United Arab Emirates.

645. On 20 May 2020, BaFin stated that a discussion took place between BaFin and the AOB [REDACTED]  
[REDACTED]  
[REDACTED]. In

<sup>59</sup> See Article 66b of the public accountant act (Wirtschaftsprüferordnung)



addition, BaFin informed the AOB for the first time about FREP's examinations on request of BaFin with regard to the financial statements of Wirecard AG as of 30 June 2018 and 31 December 2018.

646. On 9 June 2020, BaFin indicated that the AOB answered BaFin's writing regarding the KPMG report which was sent on 12 May 2020 and stated that the report was already known to them and that they had evaluated the report.

647. On 13 July 2020, BaFin stated it forwarded to the AOB the error notifications that FREP has sent to Wirecard AG for the financial reports as of 30 June 2018 and 31 December 2018.

648. According to FREP, on 20 July 2020 when FREP concluded that the 2018 accounts were erroneous, FREP notified the AOB of a possible violation of professional requirements by Wirecard's group auditor EY.

649. On 21 July 2020, according to BaFin, the AOB asked BaFin for parts of the KPMG special investigation report that were not publicly available.

650. Upon request of the AOB, according to FREP, on 22 July 2020, FREP sent the full, i.e. including the non-publicly available parts, KPMG special investigation report to the AOB.

651. On 24 July 2020, according to BaFin, BaFin also forwarded the non-publicly available parts of the KPMG special investigation report to the AOB.

652. On 14 August 2020, BaFin stated that it had asked the AOB about the results of their examination or the current status of the ongoing examination indicating that this might be relevant for BaFin as a whole.

653. On 25 August 2020, according to BaFin, the AOB answered BaFin's letter dated 14 August 2020

[REDACTED]. The AOB also asked [REDACTED].

654. On 1 September 2020, BaFin answered the AOB's question of 21 July 2020 that different supervision laws expect BaFin to use the results of a statutory auditor for its work and that, in specific circumstances, BaFin itself can mandate an auditor with a special investigation or can reject a company's choice of auditor. This means that, if there are doubts about the suitability of an auditor, BaFin must be aware of it to be able to take this into account for the respective decisions.

#### *Analysis*

655. Taking into account that, on the one hand and according to the AOB, the AOB cannot share information with the PRC regarding the ongoing investigation on Wirecard, and that, on the other hand, the facts listed above regarding the Wirecard case were supplied by FREP and BaFin, the following analysis was made based solely on the above, [REDACTED] which the PRC is therefore not in a position to resolve (see Paragraphs 641, 645 and 653-654).

656. In the 2017 Peer Review Report the importance of an efficient communication between enforcers and the audit oversight bodies was stressed, in particular when material infringements are encountered.<sup>60</sup>

657. The PRC notes that this coordination was effective in relation to FREP's examination regarding the 2018 accounts. During the examination of Wirecard, FREP and BaFin [REDACTED]

658. The PRC believes that while some exchange of information has occurred between FREP and the AOB throughout the years, the confidentiality regime in Germany may affect negatively the detection and investigation of accounting infringements. Indeed, the fact that the AOB cannot exchange information with BaFin or FREP if they conclude that the auditor failed to comply with the audit regulations prevents FREP and BaFin from factoring this element in their risk selection of issuers.

#### *Findings – Conclusion*

659. The PRC believes that strengthening the exchange of information between FREP/BaFin and the AOB is paramount, therefore, the PRC considers that the supervision reform underway should consider, within the legal framework, potential changes to the confidentiality regime in Germany that prevents an effective exchange of information between the AOB and FREP/BaFin. In this respect, the PRC considers key that the AOB shares information with BaFin and FREP when it concludes that the auditor failed to perform its duties in relation to inspections carried out on issuers under BaFin or FREP's supervision. In this respect, the PRC would also recommend that the AOB informs BaFin/FREP on the nature of the failure as well as its severity according to the AOB in order to enable an assessment regarding the risk that the financial statements of a given issuer might be erroneous.

#### **Exchange of information between BaFin and FREP**

660. The obligation of confidentiality is an argument that has often been put forward by FREP and BaFin when it came to present the possible exchanges of information between these two entities.

661. On FREP's side, due to the confidentiality rules as required by § 342c HGB, business or trade secrets of individual examinations cannot be discussed with BaFin.

662. According to BaFin, recently an interpretation proposed by the Research Service of the German Parliament indicated that information on specific examination can be exchanged between FREP and BaFin (please see also the PRC comments above in Section 5.8.1 *Legal and procedural impediments to timely detection of issues and taking of measures* with regards to FREP and BaFin's assessment of substantial doubt), providing some relief on these concerns by allowing BaFin to obtain more accurate and detailed information of FREP's ongoing examinations. However, such interpretation should certainly be validated in order to ensure future effective exchanges of information between both entities.

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<sup>60</sup>ESMA42-111-4138 Peer Review Report on Guidelines on Enforcement Information 18 July 2017, available [here](#)

663. On BaFin's side, within the existing legal framework, BaFin is not allowed to exchange supervisory information, e.g. from the area of market abuse or the prudential supervision, with FREP due to it being an institution organised under private law, as this is prohibited by the confidentiality regulations BaFin is subjected to. In addition to that, the protection of whistle-blowers granted by BaFin limits the transmission of information coming from this channel to the only cases where the concerned whistle-blowers have formally given their agreement for such a transmission to FREP.

664. In addition, the PRC noted that a misunderstanding occurred between BaFin and FREP with regards to BaFin's temporary general administrative act prohibiting the establishment and increase in net short positions in Wirecard's shares (short-selling ban) of February 2019. In the course of the examination related to the 2018 half year financial report, initiated at BaFin's request, as part of the assessment made in the context of these allegations, FREP considered that the fact that BaFin was investigating for market abuse and had notified the prosecutor could be an indication that BaFin had no indications of wrongdoings by Wirecard. According to BaFin, this was a misunderstanding by FREP.

#### *Analysis*

665. It is the PRC's view that the confidentiality regime that prevents BaFin from sharing information with FREP has a relevant impact on EFI in general but also in the context of the Wirecard examination in that such regime could have delayed or prevented BaFin from forwarding relevant material and information to FREP as part of its examinations.

666. Indeed, the procedures in place to transfer files and analyse the information received from whistle-blowers and the need to maintain confidentiality of the source, including regarding anonymised complaints may have impaired the timeliness of the supervisory response. For instance, on 30 June 2020 BaFin's MAR team forwarded an anonymous complaint received by BaFin on 8 June 2020 concerning Wirecard as well as its preliminary evaluation to the EFI team. The EFI team was further informed about the final results of the MAR's evaluation on 4 July 2020 and about the consent given by the whistle-blower to forward the complaint to FREP (received by BaFin on 9 July 2020, when asked a few days before). The relevant information was finally forwarded to FREP on 10 July 2020 (nearly one month later), after its relevant examination had been finalised. BaFin considered that the delay in the forwarding of this complaint to the EFI team, and then to FREP, was due to the scope and complexity of the complaint, which required some time to analyse its content.

667. More broadly, the confidentiality regime imposed to BaFin impacted its cooperation with FREP, in some circumstances preventing an efficient exchange of information in the context of examinations performed by FREP. For instance, BaFin can only transmit information from whistle-blowers to FREP if it receives a formal approval to do so: in case whistle-blowers do not respond to BaFin's request or are anonymous, information is not provided to FREP. This has been the case for specific information related to FREP's examination of the 2018 financial reports. For example, in early 2019, the preliminary Rajah & Tann report and additional information were received by BaFin as part of an anonymous whistle-blower complaint. This information could not be submitted to FREP without the consent of the complainant due to BaFin's statutory duty of confidentiality. The PRC questions whether such information, as it is from an anonymous person, could not have been forwarded to FREP nonetheless, in light of FREP's own confidentiality regime. The PRC notes however that eventually FREP received the report directly from Wirecard in mid-2019 in the context of the first set of documents requested.

668. With regards to the short-selling ban, the PRC was informed that FREP was not aware of the reason behind it and considered that it could be an indication that BaFin had information pointing to the non-veracity of the allegations against Wirecard. The PRC notes that this lack of communication between BaFin and FREP is problematic and that it would have been relevant for BaFin to ensure that information regarding proceedings about an issuer which FREP was examining were discussed and clearly explained.

669. The 2017 Peer Review Assessment Group recommended that BaFin and FREP enhance their coordination by, for instance, sharing information regarding BaFin's work when supervising financial markets for the purpose of the market abuse Directive (now Regulation). While particular investigations should be kept confidential, sharing information regarding volatility in the market, or if a specific issuer is being subject to short attacks for no apparent reasons, could lead to an increase in the risk profile of the issuer and in an enhanced representation about the potential impact that an infringement may have on financial markets.

#### *Findings – Conclusion*

670. The PRC recommends clarifying, within the legal framework, current restrictions or relaxing confidentiality rules to ensure that the information necessary to conduct effective enforcement is available to both entities involved. For instance, taking into account that a confidentiality agreement between BaFin and FREP is in place, whistle-blowers' complaints which are anonymised could be shared between the two organisations as soon as they are received because the risk that the other entity is able to identify the source of the complaint should be very low.

671. As also pointed out in the 2017 onsite report, the PRC considers that the interaction between BaFin and FREP when selecting issuers for examination and during an examination should be reinforced. For example, BaFin should share information with FREP concerning its work when monitoring the market for the purposes of the market abuse regulation and on grounded complaints received by them on issuers. According to the answers provided by FREP to the questionnaire, no information was shared with them concerning BaFin's work concerning market abuse surveillance and prudential supervision on Wirecard. As a result, the short-selling ban was interpreted by FREP as a sign that BaFin had good reasons to believe the allegations against Wirecard were unfounded. This may need to be addressed within the legal framework.

### **5.8.3 Legal or procedural impediments preventing an efficient and effective flow of information within BaFin**

672. BaFin is an integrated regulatory authority responsible for the supervision of banks and financial services providers, insurance undertakings and securities trading. Therefore, according to BaFin, there are no procedural or legal impediments for the transmission of information within BaFin and most notably no impediment regarding the flow of information between the EFI, MAR, Banking Supervision, Anti Money Laundering and Legal departments. BaFin's Rules of Procedure (Geschäftsordnung der BaFin, or GOBaFin in its abbreviated form) provide that the files of the entire BaFin are available to all staff from all supervisory areas if the information is required for other supervisory tasks (§ 28 GOBaFin). BaFin also has a whistle-blower unit that forwards information with regards to possibly incorrect accounting to the EFI team.

673. GOBaFin § 13 establishes an institutionalised exchange of information among the organisational units. § 13 GOBaFin states the principle of “Cooperation within BaFin” and Paragraph 2 of this rule states that: “(...) a BaFin staff member engaged in processing of a supervisory matter must personally contact the other BaFin staff members whose participation is determined by the business distribution plan or by the nature of the matter”. The exchange of information required by this rule is ensured by appropriate procedures such as weekly meetings of the members of all organisational units (divisions and teams) as well as meetings of Heads of Departments and meetings of the Executives.
674. Therefore, the units responsible for the MAR team would either directly forward relevant information and documents to the Division in BaFin responsible for EFI or would inform the Head of Department in order to ensure that such information is provided across Departments through the regular meetings of Heads of Department. In practice, the EFI team therefore communicates relevant information to other supervisory areas within securities supervision and receives information from them. The EFI team regularly informs the MAR team about accounting violations that have occurred and gets information from them. The Banking Supervision Directorate as well as the Insurance Supervision Directorate are also informed when supervised institutions are under examination in the enforcement process. The EFI team also receives information from those Directorates that could be relevant for monitoring the financial statements.
675. If BaFin’s EFI team informs the MAR team responsible for market analysis and ad-hoc-disclosure about actual or potential findings from accounting examinations, the unit analyses whether these findings could also constitute a case of market manipulation or an infringement of ad hoc disclosure requirements. However, specific rules apply to the examination of financial information and the MAR team steps in only in case the examination’s findings have revealed precise indications for the dissemination of false or misleading information in financial statements hinting to a possible case of market manipulation. Therefore, the MAR team has to rely on findings put forward by FREP or the EFI team. Upon receipt of such precise indications, the MAR team is able to proceed with the market manipulation or the ad hoc disclosure infringement investigation, e. g. by establishing if the precise information was price relevant and actually exerted an influence on the stock exchange price (§ 119 WpHG). BaFin’s MAR team would not be able to request financial reporting documents from an issuer in order to have them scrutinised by BaFin’s EFI team. As discussed in previous sections, BaFin is bound by the *lex specialis* with regards to the enforcement of financial information procedures (§§ 106 et seqq. WpHG).
676. Within the MAR team, the Division responsible for ad hoc disclosures is responsible for monitoring the publication of inside information in accordance with Article 17 MAR (so-called ad hoc publicity). In addition to the determination of issuers subject to notification requirements and ongoing market monitoring to identify omitted publications, incoming notifications pursuant to Article 17 MAR are examined on a random basis. Within the framework of ongoing investigations, information is provided to other divisions of the MAR team, at the latest when the final decision is made. Moreover, the Division in BaFin responsible for market analysis which is also part of the MAR team analyses conspicuous trading behaviour. The Division responsible for market analysis also informs the Division responsible for ad hoc disclosure when detecting suspicious trading in connection with media reports publishing inside information which are not preceded by any disclosure of inside information according to Article 17 of MAR.
677. As already mentioned in Paragraph 286, BaFin’s Communication Department prepares twice a day a document/pdf file “clipping” which includes a significant number of relevant articles published

in newspapers (national and, to a lesser extent, international) or on the internet such as financial blogs.

678. In the context of the Wirecard case specifically, the PRC notes that in 2015 in two instances an FT online article in the Alphaville blog coincided with a relevant drop in share price of Wirecard. For instance, on 5 May 2015 the FT published “The strange case of Ashazi Wirecard in Bahrain via Singapore”; the share price of Wirecard dropped by 4%. On 26 May 2015, the FT published “Wirecard Gibraltar and an asset rich wind-up”; the share price dropped by 3%. The MAR and EFI teams were not aware of the Alphaville blog and hence did not discuss these articles and the allegations contained therein.

679. The first Zatarra report was published on 24 February 2016. On the same day, Wirecard's share price dropped by 22%. The second Zatarra report was published on 7 March. Wirecard's share price dropped by 4% on the same date. As a consequence, on 21 March 2016, BaFin launched a market manipulation investigation against market participants in connection with the Zatarra report. On 27 April May 2016, BaFin's EFI team (which is the only one with direct contacts with FREP) requests FREP to include certain companies, including Wirecard, in the abstract-risk bucket of the sampling selection process.

680. The FT articles published on 29 March, 24 April and 20 May 2019, questioning the amounts and existence of TPA partners' revenues, saw mixed reactions from the market. On 29 March, Wirecard's share price fell by 9%. The 24 April and 20 May articles instead were followed by an increase of share price of 9% and 3% respectively. This might have been a reaction to the announcement on 24 April that Softbank agreed to invest further € 900m in Wirecard by buying five-year Wirecard bonds that it could convert into an equity stake.

681. Both the MAR and the EFI team told the PRC they were not aware of these FT articles at the time of publication. BaFin however informed the PRC that the 29 March article was linked in the complaint of a whistle-blower of 3 April 2019, and it was forwarded to BaFin's division responsible for banking supervision and the division responsible for prevention of money laundering. The EFI team became aware of this article and of the other two only in October 2019, in light of which, on 30 October 2019, it requested an expansion of scope of the ongoing examination by FREP into Wirecard's 2018 half year financial report.

682. Since 18 May 2020 the MAR team has conducted an investigation on whether the liquidation of the subsidiary (CardSystems Middle-EastFZ-LLC) and Al Alam Solutions FZ LLC constituted inside information pursuant to Article 7 of MAR. It was analysed whether Wirecard failed to disclose inside information pursuant to Article 17 MAR regarding these facts. A request for administrative assistance to a third country regulator was also prepared and questions to Al Alam submitted<sup>61</sup>. In that process, the EFI team was also involved. The Division responsible for ad hoc disclosures submitted the draft of the request to EFI team with the option to add further questions according to the ad-hoc-publicity theme.

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<sup>61</sup> Please note that BaFin received documents regarding Al Alam by the third country regulator on 22 September 2020. The investigation is still pending.



683. In addition, BaFin told the PRC that the Division responsible for ad hoc disclosures involved the EFI team in an investigation regarding EY's denial of opinion of June 2020 to determine whether it constituted inside information.

#### *Analysis*

684. BaFin informed the PRC that BaFin operates a market abuse alarm system which is based on flexible price and volume indicators. A share price drop causes an alert if it is significant compared to the development of the share price and the traded volume in a certain time period prior to the event.

685. The PRC notes that despite the fact that the Communication Department prepares twice a day clippings which are made available to all BaFin's staff, none of the articles published in the FT in the Alphaville blog in 2015 and 2016 nor the articles published in FT main paper in 2016 were identified by either the MAR nor the EFI team. BaFin could not confirm whether these articles (online and on paper print hard copy) were included in the clippings. These articles were not identified even if in some cases they were followed by relevant drops in the share price of Wirecard (up to 4%). The PRC notes that both the articles and the share price are publicly available information and that therefore both the EFI and the MAR team could have identified those warning signs also independently from each other. However, given the nature of the press allegations, some discussion between the MAR and the EFI team would have been warranted.

686. The PRC cannot assess on the basis of available information if the failure to share information about these blog articles is an indication of shortcomings in MAR supervision or rather in coordination between the MAR and the EFI (other than, as discussed in Paragraphs 326 and 327, a shortcoming in the EFI team's monitoring of relevant press information). However, the EFI team reportedly only became aware of these articles in 2017, which means that press material (mostly online but also in print) that would have been relevant in the context of the EFI went unnoticed within BaFin for two years.

687. The PRC commends the fact that action from the MAR and the EFI team was in concert in terms of reactions to the Zatarra reports in early 2016. In fact, on the MAR side, BaFin launched an investigation on market manipulation; and in parallel, the EFI team asked FREP to take the allegations from the Zatarra report into consideration in its ongoing assessment of Wirecard. The PRC observes that whilst the MAR team was able to take action in mid-March 2016 by launching a market manipulation investigation, the EFI team took action in these regards at the end of April by asking FREP to include Wirecard in the abstract-risk bucket of the sampling selection process. The PRC notes therefore that there was a delay of around one month and a half between the follow-up of the Zatarra reports' allegations in the two teams. Since BaFin informed the PRC that the EFI team transmitted information to FREP at its own initiative, this inefficiency arose within the EFI team in acting upon the information received.

688. With regards to the FT articles dating 30 January, 1 February and 7 February 2019, the PRC also notes that BaFin's MAR and EFI team acted in a coordinated manner: on the one hand, the MAR team launched an investigation into market manipulation; on the other hand, the EFI team requested that FREP initiate an examination of the 2018 half year financial report.

689. As further discussed in previous sections, BaFin stated to the PRC that the MAR and the EFI team were not aware of the articles published by the FT in March, April and May 2019 with regards to the TPA partners at the time of publication. However, BaFin became aware of the first one in



connection with a whistle-blower submission in April 2019. This complaint was forwarded by BaFin's whistle-blower unit to the teams responsible for ad hoc publicity, banking supervision and anti-money laundering, as it was considered by BaFin as being originally about disclosure of inside information.

690. The PRC finds it surprising that the MAR and the EFI teams were not aware of these articles at the time of publication, although it is not clear if this is because these articles were not included in the clippings prepared by the Communications Department (BaFin could not confirm this) or because the MAR and the EFI teams did not perceive them as relevant. In addition, it is surprising that the teams responsible for ad hoc publicity, banking supervision and anti-money laundering investigated the allegations brought forward by the whistle-blower, which included a link to the FT article of March 2019, but did not refer that article to the EFI and MAR team despite the fact that the article contained red flags also in relation to the financial information published by Wirecard in its accounts.

691. The fact that these articles went unnoticed by the EFI team raises questions about the effectiveness of BaFin's monitoring of issuers' environment and of the international press, all the more so considering that Wirecard was included in the DAX since September 2018. Had the articles been brought to the EFI team's attention in early 2019, this could have prompted an earlier request to FREP for the scope expansion of the examination which was at the time ongoing at Tier 1 level, and which instead only intervened in October 2019.

692. Finally, the PRC commends the fact that the EFI team was involved in investigations regarding Al Alam solutions and in the investigation of the Division responsible for ad hoc disclosures with regards to EY's denial of opinion.

#### *Findings – Conclusion*

693. The PRC observed instances of lack of coordination and/or procedural inefficiencies within BaFin in the context of the Wirecard case. In particular, the EFI team was not aware of relevant articles which the PRC thinks should have been included in the media clippings. The PRC formulated a recommendation to this effect under Guideline 5.

694. The EFI team was not aware of relevant articles even if these publications were followed by a significant drop of Wirecard's share price. In one case, even if other teams within BaFin had knowledge of an article which should have raised red flags around Wirecard's accounting, such information was not transmitted to the EFI team as deemed only of relevance to other teams. This suggests that no discussion took place between the EFI, the MAR and other teams within BaFin regarding these articles, even if they contained allegations or red flags on fraudulent accounting.

695. The PRC is of the view that some improvements in internal communication at BaFin are warranted. In particular, internal coordination needs to be improved when it comes to complaints and press articles dealing with allegations about companies' accounts.

## 5.8.4 Legal or procedural impediments preventing compliance in full with GLEFI

### Summary of facts

696. While the TD has been in place in most countries since 2006, the discussions on EFI in EECS started in 2005 based on the Committee of European Securities Regulators (CESR) Standards No. 1 and 2 on Enforcement of Financial Information (EFI) developed in 2004. The Guidelines on enforcement which substituted these two standards became effective in December 2014. Some NCAs still have not declared to ESMA that they fully comply with the Guidelines, one of which is BaFin.

697. In 2017 ESMA conducted a Peer Review on the application of certain guidelines of GLEFI, BaFin and FREP were subjected to an onsite visit and an onsite report which included recommendations for BaFin and FREP was prepared. Two of these recommendations related to the legal issues that prevent BaFin from fully complying with the GLEFI.

698. Considering the importance of the GLEFI in contributing to a harmonised and converged approach in relation to enforcement of financial information, the PRC considers it is key that NCAs make every effort possible to comply with the Guidelines, even if these efforts require discussions with their respective government so as to ascertain whether it is necessary to change legislation or to obtain more resources.

699. The PRC also assessed how ESMA's recommendations were taken into account by FREP and BaFin. In this respect, the PRC reaffirms the recommendations included in the 2017 onsite report and calls for action in relation to the issues below.

#### *Non-compliance with Guideline 7: Actions*

700. Guideline 7 sets out the possible actions that enforcers may use when detecting material accounting misstatements in order to inform the market about the issues found. To this end, enforcers may use, at their discretion, one of the following actions: i) require a reissuance of the financial statements, ii) require a corrective note, or iii) require a correction in future financial statements with restatement of comparatives, where relevant. The purpose of this Guideline is to reinforce the convergence of the actions taken by enforcers when confronted with similar accounting infringements but, at the same time, ensuring that the market is timely informed.

701. BaFin explained in its official comply-or-explain notification that it does not comply with Guideline 7 because:

- a. There is neither the possibility to require reissuance of financial statements nor to require a correction in the future financial statements;
- b. The German system can only provide capital market participants with the corrected information where an infringement can be determined according to available accounting records. In all other cases, the publication of errors is restricted to the statement of the error without any corrective information.

### *Non-compliance with Guideline 17: Publication*

702. BaFin explained in its official comply-or-explain notification that it does not comply with Guideline 17 because the German Law does not contain the legal basis to authorise the publication of decisions from the EECS database on an anonymous basis.

## **Analysis**

### *Guideline 7*

703. While the PRC acknowledges that the powers to enforce financial information conferred on national competent authorities by the national law are not fully harmonised, the TD set outs the minimum powers that all competent authorities should have to ensure that the financial information published by issuers is in accordance with the relevant reporting framework.

704. Notably, article 24 (3) states that “Each competent authority shall have all the powers necessary for the performance of its functions. It shall at least be empowered to (a) require auditors, issuers, holders of shares or other financial instruments, or persons or entities referred to in Articles 10 or 13, and the persons that control them or are controlled by them, to provide information and documents; (b) require the issuer to disclose the information required under point (a) to the public by the means and within the time limits the authority considers necessary. It may publish such information on its own initiative in the event that the issuer, or the persons that control it or are controlled by it, fail to do so and after having heard the issuer; (c) examine that information referred to in this Directive is drawn up in accordance with the relevant reporting framework and take appropriate measures in case of discovered infringements.”

705. Overall, although all NCAs had to transpose the TD into their domestic legislation, only BaFin reported inability to comply with the Guidelines due to lack of enforcement powers.

### *Guideline 17*

706. As noted in the 2017 Peer Review Report, the PRC believes that the confidentiality regime in Germany also affects a consistent application of IFRS in Europe. As the legal framework in Germany prevents FREP and BaFin from fully complying with ESMA's GLEFI (i.e. notably with Guideline 17), European issuers cannot fully benefit from the knowledge gathered by these two authorities when enforcing IFRS. Regardless of its technical merit, whether divergent application is identified or the complexity of the accounting issue, ESMA's extracts of EECS decisions cannot contain decisions taken in Germany (even if these decisions are published on an anonymous basis). Consequently, European issuers cannot take into account the infringements made by other issuers and the rationale supporting the decisions taken by German enforcers when preparing their financial statements. This approach deprives the market of useful information that could prevent the occurrence of similar errors.

707. In addition, the PRC notes that the contents of the publications of errors in Germany are often limited in terms of information disclosed (e.g. about the rationale of the decision or the details of the errors) because of the confidentiality regime in Germany. This makes it difficult for investors to understand the implication of the misstatement. It would help investors if the issuer could be requested to issue a corrective note with the corrective information. In addition, publications of error findings on the German Federal Gazette are often only in German. The PRC believes that this procedure also does not ensure all investors are treated on an equal footing. Although the TD

does not require that issuers disclose information in a language other than the language(s) accepted by the Home Member State, the PRC believes that where errors are detected, issuers should be required to publish corrective notes in all the languages used by the issuer when publishing and disseminating its annual/interim financial reports to the market (i.e. if the issuer published the annual financial report in English and German, then this issuer should also publish corrective notes in both languages). This would ensure a non-discriminatory publication/dissemination of information to all investors regardless of their nationality or knowledge of the German language.

708. According to FREP, in 2018 a working group was set up together with BaFin to discuss the possible changes to the publicised enforcement decisions as recommended by ESMA's Peer Review (including requiring the publication of errors findings in another language than German). After an analysis of the potential considerations, it was concluded that no change was possible without a change to the current legislation. However, in September 2018 BaFin and FREP jointly decided not to approach the relevant Ministries in that regard.

#### *Findings – Conclusion*

709. Considering the importance of the Guidelines for ensuring the common, uniform and consistent application of Union law, which was confirmed by the European Parliament declaring that it “welcomes the fact that the Commission is encouraging Member States to follow the ESMA GLEFI (...); deplores that several Member States do not comply and do not intend to comply with the ESMA GLEFI and calls on these Member States to work towards compliance (...);” the PRC believes that it is important that the EC together with BaFin and the respective Ministries analyse whether the issue that prompts the non-compliance of BaFin is due to an incorrect transposition of the TD into the national legislation.

710. In this respect, the PRC reminds that in accordance with Article 16 (3) of the ESMAR, competent authorities and financial market participants shall make every effort to comply with ESMA's GLEFI and recommendations. The PRC acknowledges that changing the legislation is an act beyond BaFin's powers because it requires legislative action. However, it also believes that, like in other jurisdictions, BaFin should have proactively engaged in discussions with the relevant Ministries in 2018 on the basis of the recommendations included in the onsite Peer Review Report.

711. Finally, taking into account the reform regarding the EFI which was recently announced, the PRC considers that it is key that BaFin's non-compliance with the Guidelines due to legal reasons is discussed with the relevant parties responsible for the reform of the system in order to overcome any obstacle to compliance.

## Annex 1 – Mandate

### **MANDATE FOR A FAST TRACK PEER REVIEW ON THE APPLICATION OF THE GUIDELINES ON THE ENFORCEMENT OF FINANCIAL INFORMATION (ESMA/2014/1293) BY BAFIN AND FREP IN THE CONTEXT OF WIRECARD**

#### **I. Background**

1. The Wirecard situation has raised serious concerns as high quality financial reporting is core to investor trust in capital markets and Wirecard's collapse has undermined this trust.
2. Within that context, on 25 June 2020, the EC sent a letter to ESMA, inviting ESMA to carry out a fact-finding analysis of the events leading to the collapse of Wirecard AG and of the supervisory response of the German authorities by 15 July 2020.
3. Against that background, ESMA has decided to launch a Fast Track Peer Review to assess the supervisory response in the financial reporting area by BaFin, the central competent authority, and by the Financial Reporting Enforcement Panel (FREP), designated under German law and in accordance with Article 24 (1) of the Transparency Directive (TD) as the authority responsible for examining whether information referred to in the TD is drawn up in accordance with the relevant reporting framework, in the context of Wirecard AG. The assessment will focus on the application of the Guidelines on the Enforcement of Financial Information (GLEFI), issued by ESMA in 2014, by BaFin and FREP to the Wirecard case and will be performed in application of the ESMA Peer Review Methodology, using a Fast Track Peer Review process.
4. The Fast Track Peer Review will build on the findings identified in the ESMA Peer Review of the ESMA Guidelines on the Enforcement of Financial Information (ESMA/2014/1293) ("Guidelines") performed in 2017. The report was published on 18 July 2017 and was related to the assessment of the implementation of the Guidelines 2 (resources), 5 (selection method) and 6 (examination procedure) by NCAs, including BaFin and FREP. An on-site visit took place at BaFin and FREP and a confidential report was prepared with some recommendations not included in the published Peer Review report as they related to guidelines not covered in the scope of that Peer Review. In view of the overriding public interest in the current circumstances, that on-site visit report was made public on 15 July 2020.
5. Based on the above and taking into account that the scope of the 2017 peer-review was limited to three guidelines of GLEFI, the Fast Track Peer Review will focus on all or part of the Guidelines considered most relevant in the context of enforcement of financial information applicable to the Wirecard case i.e.
  - i. Guideline 2 related to the sufficiency and adequacy of human and financial resources,
  - ii. Guideline 3 related to independence,
  - iii. Guideline 5 related to the selection methods,
  - iv. Guideline 6 related to the examination procedures,

- v. Guideline 8 related to materiality,
- vi. Guideline 9 related to the follow-up on actions acted upon, and
- vii. Guideline 12 related to emerging issues.

## **II. Legal basis**

- 6. This fast track peer review will be conducted in accordance with Article 30 of Regulation (EU) No. 1095/2010 of the European Parliament and of the Council of 24 November 2010 (ESMAR).
- 7. The fast track peer review will be governed by the Peer Review Methodology (ESMA42-111-4966) (**Methodology**).

## **III. Purpose**

- 8. The purpose of this fast track peer review is to carry an assessment of the effectiveness of the supervisory response in the financial reporting area by BaFin and FREP in the context of Wirecard AG, in the light of the ESMA Guidelines on Enforcement of Financial Information as described in section IV., including considerations relating to the supervisory designation model set-up.

## **IV. Scope and supervisory expectations**

- 9. The fast track peer review will include a description of the enforcement supervisory set-up and governance arrangements including independence aspects, market characteristics and organisational resources of FREP and BaFin, the general process to select financial statements for examination and general procedures followed when examining financial information, based on updated information resulting from the 2017 peer review report. In addition, the fast track peer review will include a timeline and a description of key events and supervisory response based on the information received from BaFin and/FREP and available public information. This timeline and description of key events should enable the PRC to assess the supervisory response of FREP and BaFin to market developments and its timeliness.
- 10. In the context of the Wirecard case, the objectives of this fast track peer review will be to assess the compliance of BaFin and FREP with specific guidelines of GLEFI in light of the objective and concept of enforcement of financial information as defined in the GLEFI. In this respect, this peer-review will focus on:

*In the context of Guideline 2:*

### *Scope*

- 11. to assess (i) the sufficiency of human resources of BaFin and FREP allocated to the examinations of Wirecard as well as (ii) the adequacy of their professional experience and background.

*Supervisory expectations*

12. It is expected that, in the specific context of Wirecard, the manpower:
- i. is professionally skilled, experienced with the relevant financial reporting frameworks;
  - ii. is sufficient taking into account the complexity of the financial information concerned and the issues at stake and ability of those who prepare the financial information and of the auditors to ensure the relevant financial reporting framework is complied with by the issuers.

*In the context of Guideline 3:*

*Scope*

13. To assess the independence and whether there are conflict of interests of FREP and Bafin in the context of Wirecard.

*Supervisory expectations*

14. It is expected, in the specific context of Wirecard, that
- i. BaFin and FREP are not unduly influenced by government, when taking decisions as part of the enforcement process, and it would not be possible to change the composition of the board or other decision making bodies of the BaFin and FREP through government intervention before the end of the period for which its members have been appointed, unless there are exceptional circumstances which require such actions; and
  - ii. BaFin and FREP are independent from issuers and auditors through the composition of the Board as well as at staff level, for instance (a) representatives of issuers and auditors would not be able, together or individually, to have a majority of votes in the decision making bodies of BaFin and FREP, (b) codes of ethics are established for those involved in the enforcement process, as well as cooling-off periods, (c) staff involved in the enforcement of financial information do not breach any independence requirements because of relationships with either the issuer or the audit firm involved.

*In the context of Guideline 5:*

*Scope*

15. To assess how the selection methods in place applied in the context of Wirecard. In particular:
- a. to assess whether selection methods in place within FREP and BaFin are based on a mixed approach whereby a risk-based approach is combined with a sampling and/or rotation approach;
  - b. to assess how the risk-based approach was considered in the context of Wirecard. Notably, to assess (i) if the risk-based approach took into account the combination of the probability of infringements by an issuer and its potential impact on the financial



markets (ii) the risk-based approach took into consideration all the relevant criteria as defined in Paragraphs 49 to 51 of GLEFI;<sup>62</sup>

*Supervisory expectations*

16. It is expected, in the specific context of Wirecard, that
- i. selection should be based on a combination of a risk-based approach and either random sampling or rotation or both;
  - ii. the determination of risk should be based on the combination of the probability of infringements and the potential impact of an infringement on the financial markets, the risk based assessment takes into account as far as possible the characteristics such as the risk profile of the issuer and its management, ethical standards and experience of the management and their ability or willingness to apply the relevant financial reporting framework correctly;
  - iii. the risk assessment takes into account (i) the indications from the auditors of misstatements, whether in their reports or otherwise, (ii) indications of misstatements provided by regulatory bodies, including the audit oversight bodies and prudential regulators, (iii) grounded complaints, i.e. complaints received which appear to be reliable and relevant for a possible enforcement examination; and
  - iv. selection models designed were effectively followed by the BaFin and/or FREP.

*In the context of Guideline 6:*

*Scope*

17. To assess whether the examination procedures undertaken by FREP and BaFin in the examinations carried out with regards to Wirecard ensured that the enforcement of financial information over the review period performed either by unlimited scope examinations, or a combination of unlimited scope and focussed examinations, was effective; notably, whether the examinations carried out by FREP and BaFin ensured that material errors were likely identified;
18. Given the perceived risks of misstatements, to assess whether and how the examination procedures undertaken by FREP and BaFin regarding the Wirecard case were sufficient in order to achieve an effective enforcement process.

*Supervisory expectations*

19. It is expected in the specific context of Wirecard, that:
- i. FREP and/or BaFin ensure that, given the perceived risks of misstatements, the appropriate type of examinations was selected, and the scope of such examinations should at least cover such risks of misstatements identified.

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<sup>62</sup> GLEFI as issued in 2014

- ii. FREP and/or BaFin ensure that examination procedures undertaken and examination techniques applied were sufficient in order to achieve an effective enforcement process and that the related conclusions of the review of the financial information regarding Wirecard are documented appropriately;
- iii. examination procedures of the issuer's financial information include the examples provided in the Guideline 6;
- iv. the conclusions of the examination taken follow Paragraph 56 of the Guideline 6.<sup>63</sup>

*In the context of Guideline 8:*

*Scope*

20. To assess whether the materiality used for the purpose of the enforcement process of the Wirecard case was determined in accordance with the relevant financial reporting framework.

*Supervisory expectations*

21. It is expected, in the specific context of Wirecard, that the materiality assessment made by BaFin and/FREP is aligned with the concept of materiality in the relevant financial reporting framework.

*In the context of Guideline 9:*

*Scope*

22. To assess whether (i) the actions taken in relation to Wirecard were acted upon on a timely basis, (ii) in case of misstatement, investors were not only informed that there was a misstatement but were also provided with the corrected information.

*Supervisory expectations*

23. It is expected in the specific context of Wirecard, that:
  - i. Bafin and/or FREP ensure that the issuers appropriately acted on the supervisory, regulatory, enforcement actions taken, for those enforcement actions available to them<sup>64</sup>; and
  - ii. material misstatements and the corrected information be communicated to investors and other users of harmonised documents on a timely basis.

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<sup>63</sup> Guidelines on Enforcement of Financial information as issued in 2014.

<sup>64</sup>According to the GLEFI compliance table ([https://www.esma.europa.eu/sites/default/files/library/esma\\_32-67-142\\_compliance\\_table\\_-\\_guidelines\\_on\\_the\\_enforcement\\_of\\_financial\\_information.pdf](https://www.esma.europa.eu/sites/default/files/library/esma_32-67-142_compliance_table_-_guidelines_on_the_enforcement_of_financial_information.pdf)), BaFin does not comply with Guideline 7 'due to its inability, for legal reasons, to request some enforcement actions'.

*In the context of Guideline 12:*

*Scope*

24. To assess if, through the examination of files of Wirecard, Bafin and/or FREP should have submitted emerging issues and/or decisions to the EECS in accordance with the criteria set out in Guideline 12.

*Supervisory expectations*

25. It is expected, in the specific context of Wirecard, that Bafin and/or FREP should have submitted emerging issues and/or decisions at the EECS if the situations described in Guideline 12 are encountered.

**V. Effectiveness of the supervisory practices**

26. In the context of the peer review methodology,<sup>65</sup> the peer review should cover the effectiveness of supervisory practices, the degree of convergence in application of law and the capacity of BaFin and/ or FREP to respond to market developments. Therefore, this fast track peer review will also identify:
- a. legal or procedural impediments that prevented BaFin and/or FREP from complying in full with GLEFI;
  - b. legal or procedural impediments that prevented BaFin and/or FREP from cooperating and exchange information between themselves and other relevant authorities (e.g. Audit Oversight Body);
  - c. legal or procedural impediments that prevented an efficient and effective flow of information within BaFin and/or FREP.
  - d. the existence of any legal or procedural impediments that prevented BaFin and/or FREP from, on timely basis, detecting, supervising/examining financial information published by issuers in accordance with the Transparency Directive and from taking appropriate measures in case of discovered infringements.

*Supervisory expectations*

27. It is expected, in the specific context of Wirecard, that Bafin and/or FREP have all the powers necessary for the performance of their functions. In case there are any legal or procedural impediments that affect the effectiveness and timeliness of the enforcement of financial information, it should also be highlighted. It is expected that relevant information is shared amongst relevant parties and acted upon adequately (such as information between the two authorities (FREP and BaFin) and between the different departments (including, but not limited to, MAR supervision departments, enforcement of financial information team/department, complaints management department / prudential supervision).

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<sup>65</sup> Please refer Article 30 (2) of ESMAR

28. Finally, taking into account the revision of GLEFI in 2020, as well as the Supervisory Briefing on selection methods (ESMA32-67-509) and the Supervisory Briefing on examination procedures (ESMA32-67-569), the peer-review should also indicate if the modifications made to the GLEFI and the new supervisory briefings would have an impact on the assessment made in this fast track peer review.

## **VI. The peer-review process**

29. The review should be targeted:
- i. the 2017 onsite peer-review report will be circulated to FREP and BaFin in order to determine whether the supervisory set-up in Germany and the enforcement procedures described in that report have changed since the 2017 peer-review. Considering that this document was agreed by FREP and BaFin and that it was approved by the BoS in July 2017, the description included in the peer-review report should only be changed if (i) the information included in the report needs to be updated/supplemented to take into account new developments/new information, (ii) the procedures described in the report have changed and/or (iii) the information included in the report is substantially incorrect.
  - ii. in addition, a questionnaire will be developed by the PRC and circulated to BaFin and FREP focusing on the following matters to the extent that they are relevant to the enforcement of financial information: (i) descriptions of changes to the supervisory set-up in Germany compared to the description made in 2017, (ii) information which was not required during the 2017 peer-review report but is necessary to assess the application of selected guidelines in the scope of the 2020 fast track peer review, (iii) information to enable the assessment of the application of GLEFI in the context of the Wirecard case, and/or (iv) information which is necessary in order to assess the effectiveness of the supervisory practices in the context of enforcement of financial information.
  - iii. the PRC will perform a desk-based analysis and an on-site visit to BaFin and FREP in order to complement the findings with the detailed information that will be needed to gain a thorough understanding of the events and of supervisory practices applied, and for BaFin and FREP to demonstrate their activities and compliance. Meetings will be arranged between the PRC members and the national experts in the field, including their management. The on-site visit shall last for one to three days for each authority.
30. The PRC will, in the context of the desk-based analysis and on-site visit, perform the review of (i) appropriate use of the selection methods in the context of the Wirecard case and (ii) enforcement<sup>66</sup> files examined by BaFin and FREP regarding Wirecard in order to assess the application of Guideline 6 Examination procedures, Guideline 8 Materiality, Guideline 9 Follow-up on actions acted upon and Guideline 12 Submission of emerging issues and decisions. This analysis should allow an understanding of the adequacy of the supervisory response of BaFin and FREP to the Wirecard case.
31. The PRC may also gather other publicly available information.

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<sup>66</sup> In the context of this fast track peer review the word enforcement can mean both the effective implementation of the financial information rules, as well as the more traditional concept of the imposition of administrative or criminal measures or sanctions.

32. The desk-based analysis shall consist of the review of Wirecard enforcement/ examination files since 2015 to date.
33. BaFin and FREP will be requested to provide working documents, which the PRC may request to be translated into English, detailing comments that were provided during the enforcement process.

## **VII. Seeking input from stakeholders**

34. Given the context and scope of the peer review and in line with the Methodology, the PRC may seek input from external auditors, the audit oversight body, other public authorities such as the prudential regulators, as well as from those analysts and academics who publicly took positions with regard to Wirecard.

## **VIII. Review approach**

35. In accordance with the Methodology, the peer review will be carried out by a PRC. The PRC will be composed of the following persons, with members having extensive knowledge and experience in the enforcement of financial reporting standards and in the conduct of reviews:
36. The PRC shall be chaired by [REDACTED] at ESMA.
37. The members of the PRC will be:
  - [REDACTED] (AFM, NL)
  - [REDACTED] (NFSA, NO)
  - [REDACTED] (AMF, FR)
  - [REDACTED] (CSSF, LU)
  - [REDACTED] (ESMA),
  - [REDACTED] (ESMA)
38. [REDACTED] will act as Rapporteur of the PRC.
39. A reserve list is established which includes:
  - [REDACTED] (CONSOB, IT), and
  - [REDACTED] (ESMA).
40. In line with the Methodology, the PRC will report its findings to the Board of Supervisors, for its approval, after having consulted the relevant Standing Committee and the Management Board.

## **IX. Review Period**

41. The period under review covers enforcement activity under the Guidelines, where relevant, from 1 January 2015 to date.

## **X. Access to information and confidentiality**

42. As well as reviewing extant policies and procedures, such as sampling procedures, some of the tools that can be used by the PRC include, but are not limited to, interviews with BaFin and FREP's staff, access to enforcement files and demonstration of the work carried out. As far as the access to files is concerned, at least the following documents will be requested on a name-basis: the financial statements subject to examination, documentation of the initial analysis of the financial statements, all correspondence with the issuer and/or auditors involved in the Wirecard case, any documents received from the issuer and/or auditors supporting the accounting treatments of Wirecard (for relevant areas) as well as documentation describing results of such analyses, documentation from meetings with the issuer, auditor or other relevant parties (such as agenda, minutes, powerpoint slides etc.), final report of the examination detailing the findings and any action taken (including any communication of the results or recommendations to the issuer).
43. The obligations on professional secrecy as stipulated by Article 70 of the ESMA Regulation and subsequently implemented by the ESMA Management Board Decision on Professional Secrecy and Confidentiality (ESMA/2011/MB/4) will apply to all members of the PRC through their explicit consent to comply with those obligations. A confidentiality agreement will be signed by all members of the PRC.
44. As a matter of principle, all PRC members should commit to actively participate to the review, including through the on-site visits. Furthermore, to perform this review within the deadline and deliver the peer review report to the Board of Supervisors by October 2020, BaFin and FREP must commit to cooperating with the PRC and facilitating the work of the PRC within the timelines set out.
45. The work of this peer review will mean the PRC contacting FREP who is not normally represented at ESMA meetings, except for EECS meetings. BaFin is reminded of its obligation to encourage and facilitate (direct) cooperation and communication between ESMA and FREP.

## **XI. Evidence**

46. BaFin and FREP will be asked to support their replies to the questions (written or oral) with examples from their supervisory actions, practices and procedures, in the form of supervisory files, and samples, and their supervisory handbooks, instruction manuals and similar material. The evidence shall demonstrate their supervisory actions in relation to the application of the Guidelines and in the context of Wirecard. The evidence will have to be provided in English if available. When an English version of the evidence is not available, the answer has to describe - to the extent practicable - the relevant evidence in English as stated by the ESMA Peer Review Methodology.

## **XII. Publication**

47. The findings of the PRC shall be submitted for decision to the Board of Supervisors, after consultation of the relevant Standing Committee and the Management Board. The Report shall be made public.

## **XIII. Timeline expected for the work**

<b><i>Task/Event</i></b>	<b><i>Dates (tentative)</i></b>
<i>Approval of the mandate by the Board of Supervisors</i>	<i>August 2020</i>
<i>Discussion and questionnaire</i>	<i>August 2020</i>
<i>Analysis of replies, and preparation of on-site visits</i>	<i>September 2020</i>
<i>On-site visits to BaFin and FREP and analysis of files</i>	<i>September 2020</i>
<i>Accuracy check with BaFin and FREP</i>	<i>September 2020</i>
<i>Finalisation of the Report following consultation of the Standing Committee and the Management Board</i>	<i>October 2020</i>
<i>Submission of the Report to the Board of Supervisors</i>	<i>October 2020</i>



## Annex 2 – Questionnaires

### Questionnaire to BaFin

Fast track peer review on the application of the guidelines on the enforcement of financial information (ESMA/2014/1293) by BAFIN and FREP in the context of Wirecard

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### Acronyms and abbreviations used in this questionnaire

BoS	Board of Supervisors
ESMA Regulation	Regulation (EU) No. 1095 /2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC
Mandate	Mandate for this peer review as approved by the BoS on 25 August 2020
Methodology	ESMA Peer Review Methodology (ESMA42-111-4966)
PRC	Peer Review Committee

## A. Introduction

1. The Wirecard situation has raised serious concerns as high quality financial reporting is core to investor trust in capital markets and Wirecard's collapse has undermined this trust.
2. Within that context, on 25 June 2020, the European Commission (EC) sent a letter to ESMA, inviting ESMA to carry out a fact-finding analysis of the events leading to the collapse of Wirecard AG and of the supervisory response of the German authorities by 15 July 2020.
3. Against that background, the BoS has decided to launch a fast track peer review to assess the supervisory response in the financial reporting area by BaFin, the central competent authority, and by the Financial Reporting Enforcement Panel (FREP), designated under German law and in accordance with Article 24 (1) of the Transparency Directive (TD) as the authority responsible for examining whether information referred to in the TD is drawn up in accordance with the relevant reporting framework, in the context of Wirecard AG. The assessment will focus on the application of the Guidelines on the Enforcement of Financial Information (GLEFI), issued by ESMA in 2014, by BaFin and FREP to the Wirecard case and will be performed in application of the ESMA Peer Review Methodology, using a fast track peer review process.
4. The peer review will be conducted in accordance with Article 30 of the ESMA Regulation and the Methodology.
5. In accordance with the Methodology, the peer review will be carried out by the PRC on the basis of the Mandate approved by the BoS on 25 August 2020.
6. In accordance with the Mandate, the fast track peer review will build on the findings identified in the ESMA peer review of the ESMA Guidelines on the Enforcement of Financial Information (ESMA/2014/1293) ("Guidelines") performed in 2017.
7. Based on the above and taking into account that the scope of the 2017 peer-review was limited to three guidelines of GLEFI, the fast track peer review will focus on all or part of the Guidelines considered most relevant in the context of enforcement of financial information applicable to the Wirecard case i.e. Guidelines 2, 3, 5, 6, 8, 9 and 12. In addition, in accordance with the mandate approved by the ESMA BoS, the peer-review committee should also reflect on the effectiveness of the supervisory practices, the degree of convergence in application of law and the capacity of BaFin and/or FREP to respond to market developments.
8. The fast track peer review will include a description of the enforcement supervisory set-up and governance arrangements including independence aspects, market characteristics and organisational resources of FREP and BaFin, the general process to select financial statements for examination and general procedures followed when examining financial information, based on updated information resulting from the 2017 peer review report. In addition, the fast track peer review will include a timeline and a description of key events and supervisory response based on the information received from BaFin and/FREP and available public information. This timeline and description of key events should enable the PRC to assess the supervisory response of FREP and BaFin to market developments and its timeliness.

9. The period under review covers the review of Wirecard enforcement/examination files since 2015 to date.
10. The PRC may seek input from stakeholders and in accordance with the Stakeholder Engagement in Peer Reviews (ESMA/2016/632).
11. In order to assess the effectiveness of BaFin and FREP supervisory approaches in this peer review, the resources, set-up, internal processes of, and actions taken by, them will be considered and relevant information gathered. The PRC needs to understand each approach to supervision of the relevant requirements to be able to present a view on the capacity of BaFin and FREP to achieve high quality supervisory outcomes, in line with the Methodology. This Questionnaire develops the areas set out in the Mandate, and with a view to assessing BaFin and FREP, seeks information in these areas.

## **B. Instructions to fill in the questionnaire by BaFin**

12. This questionnaire will be issued via a secure email to BaFin. Responses are required **by 18.00 CET on 1 September 2020**.
13. BaFin is required to complete the whole questionnaire. FREP will also receive a questionnaire. Following a review of responses, as set out in the Mandate, on-site visits will take place the week of 7 September 2020. Taking into account that FREP and BaFin have already shared documentation and have provided some clarifications regarding BaFin and FREP's supervisory response to the Wirecard case, where some questions have been already answered or some documentation has been already provided, BaFin may refer to previous documents or information already sent to ESMA provided that BaFin indicates, in the answer to the respective question, the name of the document(s) and the page(s) where this information can be found. This should help the PRC to focus their attention in the respective documents/pages and eventually translate the relevant parts.
14. As noted in the Introduction, the period of this review covers the review of Wirecard enforcement/examination files since 2015 to date.
15. Please provide the name and contact details of the person(s) who is/(are) responsible in BaFin for the completion of this questionnaire, and who can be contacted for clarifications, further information etc. by members of the PRC.
16. If a clarification is required with regard to any particular question, please contact the Rapporteur, [REDACTED] at ESMA.

## C. Questionnaire for BaFin

Number	Questions
<b>General questions</b>	
1	Having regard to the enforcement of financial information, from the list of powers indicated in Article 24 (4) of the TD which ones are available to BaFin and/or FREP? Which other powers, if any, are at the disposal of BaFin and/or FREP to examine financial information/ request documentation?
2	Which rules or procedures must be adjusted and which supervisory powers does BaFin consider it is lacking which could have prevented the Wirecard collapse or could have helped detecting the fraud at Wirecard?
3	In which situations may BaFin step in and request the examination to be carried out by BaFin? Has BaFin ever contemplated to step in regarding a Wirecard investigation from FREP since 2015? If not, why? In particular, please describe the situations provided for in §37p (1) sentence 4 WpHG, and any other situations that allow BaFin to take over an examination made by FREP? Did BaFin use such possibility in the past, please provide examples?
4	How and when does BaFin assess whether FREP's procedures (e.g. FREP's code of / rules of procedures as well as any other more specific procedures in relation to the work of FREP) including sampling and examination are appropriate (what are the criteria used)? Were there any cases where BaFin believed that FREP's procedures were considered not adequate? What actions did BaFin take in such context? Please provide examples.
5	Did BaFin ever disagree with the findings of FREP in a given examination? Which criteria did BaFin use to depart from the findings of FREP? Please provide examples. How were these criteria assessed concerning FREP's findings from its examinations of Wirecard since 2015?
6	Is Bafin aware of any legal or procedural impediments that prevented BaFin and/or FREP from fully cooperating and/or exchanging information between themselves and other relevant authorities regarding the Wirecard case; Is BaFin aware of any legal or procedural impediments that prevented an efficient and effective flow of information within BaFin (for instance between the different departments/teams of Bafin – E.g. prudential and EFI team; MAR and EFI team; Complaints /Whistle-blowers department and EFI team)? If yes, please provide a description of such legal or procedural impediments, its legal basis and how these impediments affected BaFin's supervision of the Wirecard case.

Number	Questions
7	Since 2015, did BaFin's MAR team interact with BaFin's EFI team in relation to the Wirecard case? If so, when? What information was shared? If applicable, please provide evidence of such interactions? How did BaFin's EFI team act upon this information?
8	Since 2015, did BaFin share any information it had with FREP concerning Wirecard based on BaFin's supervisory activities on this issuer in relation to other aspects than financial reporting, such as information from the investigation which led to the short-selling ban or arising from other supervisory and market monitoring activities? If so, what was the content of information shared and when were they shared? If not, why? Please provide the related documentation.
9	Please describe the flow of information and the nature and timeline of the interactions, if any, between BaFin and FREP, regarding Wirecard since 2015, whether such interactions took place in the context of examinations or outside any examination (i.e. including the quarterly meetings between BaFin and FREP) by FREP. Please provide the related documentation (reports sent, minutes of meeting, etc.)
10	In the description of Overview on key Events prepared by the German Ministry of Finance for the purpose of "record for finance committee of the German Bundestag", it is referred to several reports being provided by Bafin to the German Ministry of Finance since 2016, could you send us copies of those reports if they relate to actions taken by BaFin or FREP in the context of financial reporting? Were these reports specifically requested by MoF/MoJ, or requested by law to be provided, or sent voluntary by BaFin and in the latter case, why?
11	In the description of Overview on key Events prepared by the German Ministry of Finance "record for finance committee of the German Bundestag", it is referred to "critical reporting" from external parties. Could you provide us with a copy of those articles/critical reporting, in particular, in relation to 2016 (Zatarra report and Der Spiegel report), 2017 (Manager Magazin report) and 2018 and 2019 (report by the Southern Investigation and Reporting Foundation)? What were the analysis / assessment made by BaFin of these elements at their time of issuance, with regards to BaFin's market monitoring and Wirecard's financial information supervision?
12	In the description of Overview on key Events prepared by the German Ministry of Finance for the purpose of "record for finance committee of the German Bundestag", it is referred that "on several occasions BaFin also requested FREP to include in its ongoing examination new information in the form of press-reports or research analysis". Could you send us a copy of those press-reports and research analysis? Could you identify the dates when that information was shared with FREP and any relevant details about FREP's reactions to these requests? Did BaFin itself make any (risk) analysis or assessments regarding financial reporting of Wirecard, based on these press-reports or research analysis? If not, why? If so, what was the outcome and please provide us with the relevant documentation.

Number	Questions
13	In the description of Overview on key Events prepared by the German Ministry of Finance for the purpose of “record for finance committee of the German Bundestag”, it is referred to an Autonomous Research analyses (18 November 2019), and subsequent BaFin examination of such report, could you please send us this Autonomous Research analyses and BaFin’s report/examination? Did BaFin send such Autonomous Research analyses and BaFin’s report to FREP and if so, when, and if not, why?
14	In the description of Overview on key Events prepared by the German Ministry of Finance for the purpose of “record for finance committee of the German Bundestag”, it is referred to a report on the contents of the KPMG report (29 April 2020) and another one sent on 12 May 2020, could you please send us these reports prepared by BaFin? Did BaFin send such report to FREP and if so, when and if not, why?
15	In the description of Overview on key Events prepared by the German Ministry of Finance for the purpose of “record for finance committee of the German Bundestag”, it is referred to a report on the contents of the KPMG report (22 June 2020), could you please send us this report prepared by BaFin? Did BaFin send such report to FREP and if so, when and if not, why?
16	The report, published by Zatarra Research and Investigations, raises a series of questions about oversight and controls designed to prevent money laundering at Wirecard. What was BaFin’s assessment of the report in general and for financial reporting in particular? What supervisory actions did BaFin take in relation to financial information?
<b>Guideline 2 Resources</b>	
17	Please provide information on how the EFI team at BaFin is organised: how are accounting issues and issuers identified when FREP is required to intervene? Who are the persons “in charge” of the follow up of Wirecard’s financial information and years of experience/background? Please provide us with a copy of their CVs.
18	May BaFin intervene or influence FREP’s allocation of human and financial resources to specific examinations? Since 2015, did BaFin ever discuss with FREP/ or challenge the sufficiency and adequacy of the resources allocated by FREP to the Wirecard case? If yes, when, which considerations were discussed and what was FREP’s reaction to these observations? Please provide any relevant documentation.
<b>Guideline 3 Independence</b>	
19	Does BaFin staff have any conflict of interests/independence issues pertaining to Wirecard? In particular, did BaFin staff involved in supervision of financial reporting and market abuse – and especially those involved in the Wirecard case – invest in Wirecard financial instruments, either directly or indirectly via other financial instruments giving exposures to Wirecard financial instruments? If so, how were these issues solved? Please provide any related documentation.

Number	Questions
20	Since 2015, did BaFin share any conclusions/findings (including but not limited to preliminary conclusions from FREP) / information regarding Wirecard examinations with members of the German Government or other governmental authorities in Germany (e.g. BMJ, BMF or others)? If so, when and in which circumstances (what was the trigger of sharing information, etc.). Please provide any related documentation.
21	<p>Could you provide us with</p> <p>a) The composition of the Board of BaFin between 2015 - 2020, including the CV and changes in the composition, including the reasons for such changes;</p> <p>b) The code of ethics for those involved in the Wirecard enforcement process as well as potential cooling-off periods.</p>
<b>Guideline 5 Selection Methods / Effectiveness of the supervisory system</b>	
22	Did BaFin carry out any prudential examinations in the last six years of Wirecard bank which have also (partly) addressed the application of the financial reporting framework? If so, what were the main the specific themes, issues, areas and operations of the FS that were reviewed and the results/conclusions? On the basis of these results/conclusions, did BaFin initiate an examination of financial information? Were these results/conclusions shared with FREP?
23	Did BaFin receive complaints from whistle-blowers regarding Wirecard from 2015 to 2020? If so, what were the main contents (with a focus on financial reporting)? Has BaFin contacted/met the whistle-blowers and/or any other parties who have conducted investigations/research on Wirecard? Please provide the related documentation.
24	If Q23 is yes, how did BaFin address such complaints? Were these complaints discussed amongst the EFI team? When? Were these complaints shared by/with FREP? When? Please provide the related documentation.
25	Did BaFin intervene in the selection of Wirecard for examination throughout the years since 2015 (e.g. either to include or to remove Wirecard from the issuers' selection of FREP)? Please provide the related documentation and rationale for such intervention.
<b>Guideline 6 Examination procedures / Effectiveness of the supervisory system</b>	
26	When did BaFin become aware of the articles in the FT published since 2015? If this was before 14 February 2019, why did BaFin not request FREP to examine the financial statements of Wirecard prior to its request (i) on 15 February 2019 to examine the interim condensed FS of Wirecard as of 30 June 2018 and (ii) on 29 April 2020 to examine the consolidated financial statement of Wirecard as of 31 December 2018?
27	May BaFin contact the Supervisory Board / Audit Committee / external auditors of issuers when FREP is undertaking an examination? Or outside the context of any examination by FREP? If yes, did BaFin contact these stakeholders in the Wirecard case, at which point in time and for what purpose? If not, why not?



Number	Questions
28	Does Bafin have MoUs signed with the NCAs where fraud was reported (e.g. Philippines, Singapore)? Do these MoUs cover financial reporting? Whether or not MoUs existed, did BaFin ask these authorities for assistance regarding the jurisdictions where fraud was reported? If not, why not? If yes, please provide details regarding such request and the outcomes.
29	<p>Several accounting issues relating to Wirecard were reported in the press: (1) Consolidation of sales and profits from a third-party business partner (2) Accounting treatment of escrow accounts (3) Business acquisitions (4) Recognition of goodwill (5) Impairment of goodwill (6) Segment reporting: (i) Lack of granular information about individual business units, (ii) It's hard to understand what precisely the sources of Wirecard's growth are (from FT).</p> <p>What was BaFin's assessment of these indications? Did BaFin assess any of these issues? If so, when and what was the technical analysis of BaFin? If not, did BaFin ask FREP to specifically examine any of these issues, if so when and if not, why not?</p>
30	Since 2015, did BaFin exchange information regarding Wirecard with the German Audit Oversight Body (AOB)? If so, when? What was generally the content of such exchanges of information?
31	If there are accounting fraud allegations or if an accounting fraud is discovered, during an examination of BaFin, are there different procedures to be undertaken compared to a regular examination and errors' findings? If so, could you provide details regarding such procedures or steps?
32	To what extent and following which timeline was BaFin aware of press articles, reports, etc. raising financial reporting or accounting issues on Wirecard from 2015 onwards? In consideration of (i) the financial reporting/accounting issues raised from the above, and (ii) of other issues (such as corruption, fraud, money laundering, market manipulation, etc.) raised by external parties on Wirecard.
33	In the case where Wirecard's auditor included in the "key audit matters" / audit opinion since 2014 interim and annual FS any references to the reporting/press-news/complaints received concerning accounting infringements or malpractices carried out by Wirecard, how did BaFin take these elements into account both in its consideration of FREP's selection process and in its own, if any, examinations of Wirecard since 2015 ? Please provide the related documentation.
34	In the case where BaFin requested examinations of Wirecard to be made by FREP since 2015, what was the exact scope of the examinations requested by BaFin? What was the reason for BaFin to request examinations and based on what information? What analysis/assessment did BaFin do on the information that triggered the request and what was the outcome? Are you aware if FREP extended the scope of the examination requested by BaFin? Why/ Why not? Please provide relevant documentation.

Number	Questions
35	Since 2015, did FREP inform BaFin of any lack of cooperation of Wirecard with its examinations either because Wirecard did not respect agreed deadlines or because the information received was not complete? Did FREP ever request BaFin's assistance to compel Wirecard to cooperate? When, in relation to which examination? Please provide the related documentation.
36	In May 2020, we understand that BaFin informs FREP about specific indications of an infringement of financial reporting requirements in connection with Wirecard's third-party acquiring business and offers its support in gathering data. Please provide related documentation including description of identified infringement, technical analysis made, information/request to FREP, etc.
37	We understand from FREP that it waits for the results of any independent special investigations; and as BaFin is aware, this is common practice in comparable cases. Thus we understand that FREP waited for the results of KPMG's investigations. Was this decision taken in coordination with BaFin or the German Government? What was the rationale of this decision given the specific sensitivity of this case? What elements did BaFin dispose of relating to the scope of investigation of KPMG bringing BaFin/FREP to consider that KPMG's work will overlap with FREP's ongoing examinations?
<b>Guideline 8 Materiality</b>	
38	How does BaFin define materiality when assigning examinations to FREP, and more specifically in the Wirecard case? How does BaFin take into account investor perspective in the assessment of materiality?
<b>Guideline 12 Submission of Emerging issues/decisions</b>	
39	Did BaFin assess whether to send any emerging issues to EECS in relation to Wirecard? If not, why not?

## Questionnaire to FREP

Fast track peer review on the application of the guidelines on the enforcement of financial information (ESMA/2014/1293) by BAFIN and FREP in the context of Wirecard

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#### Acronyms and abbreviations used in this questionnaire

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<b>Methodology</b>	ESMA Peer Review Methodology (ESMA42-111-4966)
<b>PRC</b>	Peer Review Committee

## **A. Introduction**

1. The Wirecard situation has raised serious concerns as high quality financial reporting is core to investor trust in capital markets and Wirecard's collapse has undermined this trust.
2. Within that context, on 25 June 2020, the European Commission (EC) sent a letter to ESMA, inviting ESMA to carry out a fact-finding analysis of the events leading to the collapse of Wirecard AG and of the supervisory response of the German authorities by 15 July 2020.
3. Against that background, the BoS has decided to launch a fast track peer review to assess the supervisory response in the financial reporting area by BaFin, the central competent authority, and by the Financial Reporting Enforcement Panel (FREP), designated under German law and in accordance with Article 24 (1) of the Transparency Directive (TD) as the authority responsible for examining whether information referred to in the TD is drawn up in accordance with the relevant reporting framework, in the context of Wirecard AG. The assessment will focus on the application of the Guidelines on the Enforcement of Financial Information (GLEFI), issued by ESMA in 2014, by BaFin and FREP to the Wirecard case and will be performed in application of the ESMA Peer Review Methodology, using a fast track peer review process.
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9. The period under review covers the review of Wirecard enforcement/ examination files since 2015 to date.

10. The PRC may seek input from stakeholders and in accordance with the Stakeholder Engagement in Peer Reviews (ESMA/2016/632).
11. In order to assess the effectiveness of BaFin and FREP supervisory approaches in this peer review, the resources, set-up, internal processes of, and actions taken by, them will be considered and relevant information gathered. The PRC needs to understand each approach to supervision of the relevant requirements to be able to present a view on the capacity of NCAs to achieve high quality supervisory outcomes, in line with the Methodology. This Questionnaire develops the areas set out in the Mandate, and with a view to assessing BaFin and FREP, seeks information in these areas.

## **B. Instructions to fill in the questionnaire by FREP**

12. This questionnaire will be issued via a secure email to FREP. Responses are required **by 18.00 CET on 1 September 2020**.
13. FREP is required to complete the whole questionnaire. Following a review of responses, as set out in the Mandate, on-site visits will take place the week of 7 September 2020. Taking into account that FREP and BaFin have already shared documentation and have provided some clarifications regarding BaFin and FREP's supervisory response to the Wirecard case, where some questions have been already answered or some documentation has been already provided, FREP may refer to previous documents or information already sent to ESMA provided that, FREP indicates in the answer to the respective question, the name of the document(s) and the page(s) where this information can be found. This should help the PRC to focus their attention in the respective documents/pages and eventually translate the relevant parts.
14. As noted in the Introduction, the period of this review covers the review of Wirecard enforcement/examination files since 2015 to date.
15. Please provide the name and contact details of the person(s) who is/(are) responsible in FREP for the completion of this questionnaire, and who can be contacted for clarifications, further information etc. by members of the PRC.
16. If a clarification is required with regard to any particular question, please contact the Rapporteur, [REDACTED] at ESMA.

## C. Questionnaire for FREP

Number	Questions
<b>General questions</b>	
1	Having regard to the enforcement of financial information, from the list of powers indicated in Article 24 (4) of the TD, which ones are available to FREP? Which other powers, if any, are at the disposal of FREP to examine financial information/ request documentation?
2	Which rules or procedures must be adjusted and which supervisory powers does FREP consider it is lacking which could have prevented the Wirecard collapse or could have helped detecting the fraud at Wirecard?
3	May FREP refuse to carry out an examination requested by BaFin? If yes, in which cases? Were there any examples of such situations?
4	Did FREP discover other fraud cases in the past? Which ones? Please provide: <ul style="list-style-type: none"> <li>a) a summary of such findings and how FREP concluded that fraud existed;</li> <li>b) the selection basis for the specific related examination and related explanations (especially if based on risk).</li> </ul>
5	Since 2015, did FREP discuss with or report to BaFin on the progress of its examinations carried out on Wirecard? If so, when/at which point in time and what were the main contents of such discussions/reports? If not, why? Please provide the related documentation.
6	How long did the Wirecard examinations (since 2015 to date) take as compared to the average length of 8 to 12 months indicated in FREP's press release? Please explain why the Wirecard examinations (in particular the examination to the FS 2014) were so lengthy and how the Wirecard examinations differed from other examinations.
<b>Guideline 2 Resources</b>	
7	What was the yearly budget allocated by FREP to undertake special examinations (e.g. independent/outsourced examinations) since 2015? Are there any variations during the years?
8	How many members of FREP were involved in the technical examinations of Wirecard, for each examination performed since 2015? How many years of experience/background? Please provide us with their CV and explain their respective role during these examinations (examiner-in-charge, reviewer, specialist, etc). In case of changes in the persons involved in the examinations or follow up of Wirecard since 2015, please describe the background of the changes, if any, of each of the persons assigned to examinations of Wirecard FS.

9	Taking into account the seriousness of the allegations and the requests from BaFin, did FREP consider reinforcing the resources allocated to the Wirecard examinations since 2015, either by adding another Panel Member for the examinations, or by using external specialist examiners? If so, for which specific topics were such new resources allocated in the examinations of Wirecard? If not, why?
10	How does FREP budget or anticipate in its resource allocation (workload of Panel Members and Chambers) for BaFin's special examination requests and what consequences may such requests have on FREP's work programme? How did this apply in the context of Wirecard?
11	The timeline from FREP dated as of 5/08/20 indicates a change in assignment [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
<b>Guideline 3 Independence</b>	
12	Did, at any point in time, the German Government or other German authorities intervene (require/ or suggest specific actions from FREP for example, but not limited, to which areas should FREP analyse or not, selection of Wirecard) or inform FREP about any planned actions/ internal discussions which had or could have an impact on FREP's examinations of Wirecard? If so, which members or sections (e.g. MoJ MoF or others) and when? In which circumstances? Please provide any related documentation.
13	Since 2015, did FREP share any conclusions/findings (including preliminary conclusions) / information regarding Wirecard examinations with members of the German Government or other governmental authorities in Germany other than BaFin (e.g. MoJ, MoF or others)? If so, when and in which circumstances (what was the trigger of sharing information, etc.). Please provide any related documentation.
14	In 2017, the onsite report mentioned that one member of FREP's Board had non-remunerated functions in at least one issuer. In the update to this report, it was mentioned that this situation has changed. Since when did this situation change? Which issuers and which functions did the Board of FREP have non-remunerated activities?
15	Does FREP Board or staff have any conflict of interests/independence issues pertaining to Wirecard? If so, how were these issues solved? In particular, in responding to this question, please consider the following aspects: <ul style="list-style-type: none"> <li>a) Was the Plenum of FREP (as a group) involved in discussions or decision making with regards to Wirecard?</li> <li>b) Which specific committees (among the seven existing committees as per FREP's code of procedures) were involved in discussions / identification / examinations process / decision making related to Wirecard?</li> <li>c) Does any member of the Plenum and/or these committee involved in Wirecard, if any, have any conflict of interests/independence issues pertaining to</li> </ul>



	<p>Wirecard? If so, how were these issues solved? Please provide any related documentation.</p> <p>d) With regards to the technical aspects of examinations of Wirecard, please provide the declarations of independence (§ 13 of code of procedure) of each person involved in the examinations, including but not limited to, members of the chambers in charge of Wirecard, Responsible Panel Members/examiners in charge, specialist or consulting examiners if any, Quality Control Panel Members, etc.</p> <p>Please provide any related documentation having regard to the following aspects.</p>
<b>16</b>	<p>Could you provide us with:</p> <p>a) The composition of the Board of FREP between 2015 - 2020, including the CV and changes in the composition, including the reasons for such changes;  b) The code of ethics for those involved in the Wirecard enforcement process as well as potential cooling-off periods.</p>
<b>Guideline 5 Selection Methods</b>	
<b>17</b>	<p>Since 2014 (2015 calendar year), was Wirecard ever selected for examination based on risk (e.g. based on any input of the Media Analysis Committee)? If so, for which years? If not, why was Wirecard not selected for examination based on risk regarding the 2015 FS, 2016 FS and 2017 FS despite all the allegations in the press? What specific considerations were taken into account? Please provide the related documentation.</p>
<b>18</b>	<p>Since 2014 (2015 calendar year), was Wirecard ever selected for examination based on random or rotation selection methods? When? Please provide the related documentation.</p>
<b>19</b>	<p>Did FREP receive complaints from whistle-blowers regarding Wirecard between 2015-2020? If so, when and what were the main contents? Has FREP contacted/met the whistle-blowers and/or other parties that have carried out investigations/research on the Wirecard case? What consequential actions did FREP take and when? Please provide the related documentation.</p>
<b>20</b>	<p>Since 2015, did FREP receive information from Bafin on issues concerning Wirecard (e.g. complaints received, alerts etc.) and Bafin's work when monitoring Wirecard issues (market manipulation, market abuse, or other topics)? If so, what was the content of information shared and when were they shared? Please provide the related documentation.</p>
<b>21</b>	<p>Did, at any point in time, FREP identify issues or was made aware of issues related to Wirecard as part of its "programme of error prevention activities" (public relations activities, communications with stakeholders, investors, audit firms, issuers, etc.)?</p>

22	If yes to questions 19 to 21, which and to what extent did FREP take into account the specific elements from the above in its selection methods for examinations of FS of Wirecard for each year since 2015? On the contrary, are there any elements that FREP did not consider relevant and if so, what was the rationale for considering some information/articles/reports and not considering others in this selection process? Please provide the related documentation (analysis and/or decision by the media analysis committee, by the sampling committee, pre-review committee).
23	Which and to what extent did FREP take into account market and/or financial indicators, as well as other factors relating to the FREP's risk factors (such as special fact and circumstances and change of CFO) in its selection methods for examinations of FS of Wirecard since 2015, for example: significant variations in market capitalisation/share price of the issuer? Please provide the related documentation.
24	Did BaFin intervene in the selection of Wirecard for examination throughout the years since 2015 (e.g. either to include or to remove Wirecard from the issuers' selection of FREP) either formally or informally? Where applicable, please provide the related documentation and rationale for such intervention.
<b>Guideline 6 Examination Procedures</b>	
25	When an examination is requested by BaFin, may the issuer refuse to collaborate with FREP? If so, what are the consequential actions by FREP/BaFin?
26	May FREP contact the Supervisory Board / Audit Committees / external auditors of the issuer? If yes, did FREP contact these stakeholders in the Wirecard case, at which point in time and for what purpose? If not, why not?
27	What was the exact scope of the examinations carried out by FREP as regards Wirecard since 2015 and what are the specific themes, issues, areas, and operations of the FS that were reviewed? Were these reviews focused or unlimited? What was the rationale for this type of review and the risk analysis made by FREP leading to look at each of these specific items? Who was responsible for defining the scope of the examination? Please provide the related documentation.
28	Did Wirecard cooperate with FREP's examinations made since 2015? Did Wirecard respect all agreed deadlines? Did Wirecard provide all relevant information requested? Please provide the related documentation.
29	If Question 28 is no (i.e. if at any stage Wirecard did not cooperate with FREP's examinations), did FREP request BaFin's assistance to compel Wirecard to cooperate? Please provide the related documentation.
30	During its examinations, since 2015, did FREP examine the accounting issues raised in the press articles, different public reports in relation to Wirecard (e.g revenue recognition, accounting for operations from/with third party business partner/acquirer, escrow accounts, consolidation, acquisition and recognition of goodwill, impairment of goodwill and other intangible, segment reporting)? If not, why? If materiality issues led FREP not to look at these issues, how was such materiality assessed in the context of

	the file? Please provide the related documentation. If so, what was the technical analysis of these issues made by FREP, and please provide the related documentation.
<b>31</b>	If there are accounting fraud allegations or if an accounting fraud is discovered, also having regard to Paragraph 19 of the Code of Procedures of FREP, during an examination of FREP, are there different procedures to be undertaken compared to a regular examination and errors' findings? If so, could you provide details regarding such procedures or steps?
<b>32</b>	For both the 2014 and 2018/2019 examinations, what were the conclusions of FREP and actions taken concerning these reviews of Wirecard and what are the follow-up actions realised by FREP? Please provide the related documentation supporting the conclusions (preliminary if applicable) that the FS reviewed were free of errors, or contained errors, after having considered all information at its disposal (including articles published in the Financial Times, and elements provided by BaFin to take into consideration).
<b>33</b>	Please describe the internal FREP flow of information and the nature and timeline of the internal interactions between the different staff involved in discussions or examinations of Wirecard since 2015 such as, but not limited to, Panel Member in charge of examination, Quality Review Panel Member, the Chamber, external compliance manager, Consulting Panel Member, the Plenum of FREP, any of the permanent committees within FREP such as Media Analysis Committee, Pre-Review Committee, etc. Please provide the related documentation.
<b>34</b>	Does FREP database include all documents considered by examiners in all examinations of the same issuer? Does the FREP database restricts access to Panel Members which may have independence or conflict or interests in relation to certain files or is it accessible to all Panel Members regarding of any independence or conflict of interest issues? Did the Wirecard FS examiners have access to all documents regarding previous examinations (e.g. Did the Panel Members in charge of the Wirecard examinations regarding the 2014 FS or 2018/2019 FS had access to all examination files regarding previous examinations (e.g. all press-releases considered in the examination of 2011 and onwards).
<b>35</b>	Did FREP in the course of its investigations of Wirecard have at any point in time any suspicions of fraud? If so, what factors were considered as indicators of fraud and when? What further actions were taken as a consequence of that assessment?
<b>36</b>	According to the 'Timeline of Events by the Enforcement Panel' dated 5 August 2020, the ██████████ Committee of FREP discusses the allegations raised by the Financial Times on 30/1/2019 against Wirecard AG. It is decided that immediately after the publication of the financial statements as at 31/12/2018 and the accompanying group management report, the unlimited scope examination will be initiated and will address the allegations raised. FREP selected the 2018 financial statements for unlimited scope examination. As this seems to be an indication-based examination the document called 'Information on the examination process of the Financial Reporting Enforcement Panel (FREP)' suggests it should be a 'focused examination' rather than an unlimited scope

	examination. Why did FREP decide to select Wirecard 2018 for ‘an unlimited scope examination’ rather than a focussed examination?
<b>37</b>	FREP indicates in its timeline of events dated as of 5/08/20 that Wirecard has made numerous corrections, albeit immaterial, in the consolidated financial statements as at 31/12/2018 (published in April 2019) as a result of special investigations performed in connection with the Financial Times allegations (see Wirecard AG annual report 2018, pp. 163 et seq.). The auditors have issued an unqualified audit opinion on the consolidated financial statements. How did these elements impact the ongoing review / technical analysis / preliminary conclusion of 2018 half year FS by FREP?
<b>38</b>	FREP indicates in its timeline of events dated as of 5/08/20 that it normally does not initiate several concurrent examinations regarding various different reporting dates. In April 2019, “Given the ongoing examination of the condensed financial statements as at 30/6/2018 and the accompanying interim management report being conducted at the request of the BaFin, the planned unlimited scope examination will not be initiated for the time being”. Could you please indicate the legal reason preventing the FREP from initiating several concurrent examinations for the same issuer? If there is no legal impediment for such multiple reviews, what was the rationale for the decision taken by FREP not to initiate review of full year 2018 FS of Wirecard despite its work-programme?
<b>39</b>	In the case where Wirecard’s auditor included in the “key audit matters”/ audit opinion since 2014 interim and annual FS any references to the reporting/press-news/complaints received concerning accounting infringements or malpractices carried out by Wirecard (or Wirecard representatives), how did FREP take these elements into account both in its selection process and in its examinations of Wirecard since 2015 ? Please provide the related documentation.
<b>40</b>	In the case where BaFin requested examinations of Wirecard to be made by FREP since 2015, what was the exact scope of the examinations requested by BaFin? Did FREP extend it? Why/ Why not? Please provide the related documentation.
<b>41</b>	Since 2015, did FREP inform BaFin of any lack of cooperation of Wirecard with its examinations either because Wirecard did not respect agreed deadlines or because the information received was not complete? Did FREP ever request BaFin’s assistance to compel Wirecard to cooperate? When, in relation to which examination? Please provide the related documentation.
<b>42</b>	In May 2020, we understand that FREP indicated to BaFin its intention to send a provisional finding of an error to Wirecard with regards to 2018 FS. Please provide related documentation including description of the identified errors, technical analysis made, report to BaFin in May and June 2020, etc.
<b>43</b>	FREP indicates in its timeline of events dated as of 5/08/20 that in October 2019, “the FREP waits for the results of any independent special investigations; as the BaFin is aware, this is common practice in comparable cases”. Was this decision to wait for results of KPMGs investigations taken in coordination with BaFin or German Government? What was the rationale of this decision given the specific sensitivity of

	<p>this case? What elements did FREP dispose of relating to the scope of investigation of KPMG bringing FREP to consider that KPMG's work will overlap with FREP ongoing examinations?</p>
44	<p>Since 2015, did FREP exchange information regarding Wirecard with the German Audit Oversight Body (APAS)? If so, when? What was generally the content of such exchanges of information?</p>
<p><b>Guideline 8 Materiality</b></p>	
45	<p>How does FREP define the materiality threshold in its examination process, and more specifically in the Wirecard case? How does FREP take into account investors' perspective in the assessment of materiality?</p>
<p><b>Guideline 12 Submission of Emerging Issues</b></p>	
46	<p>Did FREP assess whether to send any emerging issues to EECS in relation to Wirecard? If not, why not?</p>

## Annex 3 – Detailed Timeline

- 1999** Wirecard is founded.
- 2005** Wirecard enters the German stock market, via a reverse acquisition of InfoGenie AG, an information service provider offering telephone hotlines.
- 2006** Wirecard purchases XCOM, which is renamed Wirecard Bank, and thus obtains a license by Visa and Mastercard to issue credit cards and handle money on behalf of merchants. In the same year, Wirecard is included in the TecDAX index.
- 2008** The Head of a German Shareholder Association publishes an attack on Wirecard denouncing irregularities in the accounts.
- FREP launches an indication-based examination of Wirecard's 2007 financial statements. The examination is eventually discontinued due to a lawsuit regarding Wirecard's financial statements, deemed to be unfounded in 2012 and then terminated due to lack of public interest in agreement with BaFin.
- 2012** FREP carries out an unlimited scope examination of Wirecard's 2011 annual financial report. FREP does not identify any errors.
- 15 December 2014** FREP selects Wirecard based on rotation for an unlimited scope examination.
- 7 April 2015** Wirecard publishes its 2014 accounts, including EY's unqualified audit opinion.
- 13 April 2015** FREP informed BaFin of its selection of Wirecard asking BaFin whether there were any impediments to such examination.
- 15 April 2015** BaFin responded on 15 April 2015 stating there were no impediments to an examination of Wirecard's 2014 annual financial report.
- FREP starts the examination of Wirecard's 2014 annual financial report and sends to Wirecard a request to participate in the examination.
- 16 and 21 April 2015** FREP's examination team sign the independence form.
- 27 April 2015** FREP receives confirmation dated 23 April 2015 from Wirecard of its participation to the examination, together with the requested documents.
- The examination team is confirmed.
- The FT launches its [House of Wirecard](#) series on FT Alphaville blog. Ten blog articles were published in 2015 and two in 2016, including links to documents and raising questions about the value of intangibles and customer lists, the company's acquisition practices, the reality and/or level of the company's operations in the Middle East and in Asia, the account of

receivables and payables from Wirecard's acquiring business and the related adjustments made by management to Wirecard's cash-flow statement.

- 28 July 2015** FREP sends a first set of questions to Wirecard (deadline for response 2 September 2015).
- 1 September 2015** Wirecard responds to the first set of questions from FREP.
- 12 November 2015** The FT publishes in the FT Alphaville [an article](#) expressing doubts regarding the true worth of Wirecard's 2015 Indian acquisition.
- 17 November 2015** FREP sends a second set of questions to Wirecard (deadline for response agreed by telephone).
- 15 January 2016** Wirecard provides a first batch of responses to FREP's second set of questions.
- 26 January 2016** Wirecard provides the second batch of responses to FREP's second set of questions.
- 24 February 2016** Zatarra Research releases [a report](#) on potential incidents ranging from corruption, fraud and money laundering to Wirecard's involvement in illegal gambling. BaFin becomes aware of the Zatarra report just after its publication.  
  
Following the publication, Wirecard's share price fell by around 25%.
- 25 February 2016** The FT publishes [an article](#) referring to a 'highly critical report by Zatarra Research and Investigations' on Wirecard's 'oversight and controls designed to prevent money laundering'.
- 15 April 2016** FREP sends a third set of questions to Wirecard (initial deadline for response 1 April 2016, then extended due to the finalisation of Wirecard's 2015 accounts).
- 16 March 2016** A third report from Zatarra is published.<sup>67</sup>
- 21 March 2016** Wirecard published [a reaction statement](#) in response to the Zatarra research publication.  
  
BaFin launches an investigation against market participants suspected of market manipulation using short positions in connection with the Zatarra report.
- 6 April 2016** Wirecard publishes its 2015 accounts, including EY's unqualified audit opinion.

[Another article](#) is published in the FT referring to the Indian acquisition and a March qualification of related subsidiary accounts regarding most of the revenue displayed amounts.

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<sup>67</sup> Please note that this report is not retrievable from the internet.



- 15 April 2016** Wirecard 2015 annual financial report are published, including the unqualified audit opinion of EY, the company's auditor.
- 20 April 2016** Wirecard responds to the third set of questions from FREP.
- 27 April 2016** During the quarterly working meeting between FREP and BaFin, BaFin asks FREP to include in the risk group for sample selection purposes companies with existing allegations whose verification was in the public interest, including Wirecard.
- 30 April 2016** Der Spiegel publishes [an article](#) referring to the 2015 FT articles as well as to the publication of Zatarra reports on 24 February 2016.
- 3 May 2016** The MoF asks BaFin to report on the situation and on the measures that BaFin could take following the article in Der Spiegel dated 30 April 2016.
- 9 May 2016** BaFin forwards the article in Der Spiegel to FREP and requests that FREP take the allegations from the Zatarra report into consideration in its ongoing assessment of Wirecard 2014 annual financial report. This article referred to the 2015 FT articles as well as to the publication of the Zatarra report on 24 February 2016.
- 11 May 2016** Wirecard responds to FREP's fourth set of questions.
- A FREP ██████████ Committee meeting is held where, amongst other topics, the allegations from the whistle-blower are extensively discussed. It is decided not to launch an indication-based examination but to address selected issues as part of the ongoing examination.
- 12 May 2016** BaFin reports possible market manipulation by market participants to the Public Prosecutor's Office in Munich.
- 3 June 2016** FREP provides Wirecard with a short update of the examination process on its side, indicating the need to work on two other examinations in order of arrival of responses and that therefore the analysis of Wirecard's responses from April would take another three weeks. FREP also requests that Wirecard prepare a response to the allegations of fraud raised by the media, to be addressed in the upcoming working meeting.
- 18 August 2016** FREP sends a fourth set of questions to Wirecard (to be discussed in a meeting which ultimately took place on 11 October 2016).
- 29 September 2016** FREP receives allegations against Wirecard from a whistle-blower mainly with respect to the receivables and payables related to the acquiring business, according to which the related 2015 balance sheet numbers, for the first time identified separately, were questionable. The whistle-blower also refers to the 2015 articles of the House of Wirecard series and provided a link to these.

- 4 October 2016** FREP's examination team is informed of the allegations from the whistleblower.
- 6 October 2016** Wirecard responds to FREP's fourth set of questions.
- A FREP ██████████ Committee meeting is held where, amongst other topics, the allegations from the whistle-blower are extensively discussed. It is decided not to launch an indication-based examination but to address selected issues as part of the ongoing examination.
- 11 October 2016** FREP holds a working meeting with Wirecard and its auditors.
- FREP requests further documents from Wirecard on the same date relating to (i) procedures performed by EY's forensic team in the context of their audit of 2015 financial statements, on the three Zatarra reports dated 24 February 2016, 8 March 2016 and 16 March 2016 as well as (ii) the interim report on the investigation into the allegations raised in the research reports performed by an external third party commissioned by Wirecard.
- 22 November 2016** Wirecard provides further documents as per FREP's request of 11 October concerning the EY examination referring to the three Zatarra reports. This includes questions asked by EY to Wirecard dated 29 February 2016 and Wirecard's response to EY dated 30 March 2016.
- 28 November 2016** The examination team discusses the five main allegations contained in the Zatarra reports and how they were addressed during the examination. FREP decides not to finalise the examination until FREP received (i) the auditor's documents relating to procedures its forensic team performed in the context of their audit of 2015 financial statements on the three Zatarra reports dated 24 February 2016, 8 March 2016 and 16 March 2016 as well as (ii) the status report on the investigation into the allegations raised in the research reports performed by an external third party commissioned by Wirecard.
- 1 December 2016** Wirecard provides the further documents requested from FREP on 11 October (i.e. the interim status report from the external third party it had commissioned).
- FREP concludes the examination of Wirecard's 2014 annual financial report: there are no indications that the accounting is incorrect. FREP makes some recommendation on separately presenting the items included in long term financial assets (liquidity reserves, standard bonds, strategic investments in start-up companies) as their risk profile differs.
- 5 December 2016** BaFin is informed of the outcome of the examination of Wirecard 2014 annual financial report. It concludes that there is no substantial doubt about FREP's work in these regards.
- 1 February 2017** Together with the Deutsche Bundesbank, BaFin's Banking Supervision Sector examines whether Wirecard should be classified as a financial holding company under EU law. They come to the conclusion that it is not to be classified as a financial holding company and thus do not have intervention

powers for the Group as a whole. The ECB later on concurred with this assessment.

**22 February 2017** [Manager Magazin](#) publishes allegations against Wirecard for doubtful accounting practices and lack of transparency in the accounts, also making reference to the FT articles and the Zatarra report. The article was similar to the submission made by the whistle-blower who had contacted FREP on 29 September 2016.

BaFin initiates an analysis due to possible market manipulation by market participants following the above-mentioned article.

**23 February 2017** BaFin informs FREP of the article in Manager Magazin and asks whether the content of the article was taken into account in the examination of the 2014 annual financial report and would impact FREP's assessment of that examination which it had just closed.

Wirecard publishes [a reaction statement](#) saying that the article is false and completely meaningless.

**24 February 2017** FREP's ██████████ Committee requests that a submission be made to the Committee to address the article in Manager Magazin in the context of the recently closed examination.

FREP requests some information from Wirecard via telephone and email communication. The first part of the requested information is received on the same day (press release by Wirecard on the Manager Magazin article, short studies by two analysts).

**27 February 2017** FREP receives from Wirecard the second part of the information requested (breakdown of the receivables and the payables of the acquiring business by group entity).

The submission to the ██████████ Committee is finalised providing detailed information as regards the procedures undertaken, the explanations obtained from the company and the assessment made. This report also states that the amount and nature of the rolling security reserve receivables (€250m) mentioned in the Manager Magazine article were not explained.

**28 February 2017** FREP's ██████████ Committee discusses the submission and decides that there is not sufficiently concrete evidence that indicates accounting infringements.

**6 March 2017** In response to an email request by FREP, Wirecard sends a report (executive summary) dated 3 March 2017 of the final results of the investigation into the allegations performed by the external third party commissioned by Wirecard. This was to follow-up on the interim report sent by Wirecard to FREP on 1 December 2016.

- 9 March 2017** FREP sends a letter to BaFin explaining the procedures performed by FREP and their outcome regarding the press article (Manager Magazin) handed over to FREP on 23 February 2017, i.e. that there is not sufficient concrete evidence that indicates accounting infringements. BaFin concludes on this basis that there is no need for a request-based examination from FREP.
- 15 March 2017** BaFin analyses the letter received from FREP regarding their work concerning the allegations included in the Manager Magazin article and also concluded that there was no concrete indication of a material breach of accounting rules. In an internal memo dated 15 March 2017, BaFin concludes that “the fact that the consolidated financial statements would not communicate the business of Wirecard in an intelligible manner does not constitute an accounting infringement in the absence of any relevant legal standard.”
- 5 April 2017** Wirecard 2016 annual financial report are published, including the unqualified audit opinion of EY, the company’s auditor.
- 18 February 2018** BaFin launches an investigation into market manipulation via short-selling on the basis, among other things, of a report by the SIRF and information provided by a foreign supervisory authority. The investigation will then be discontinued on 24 May 2018.
- 25 April 2018** Wirecard’s 2017 annual financial report are published together with EY’s unqualified auditor’s report.
- 8 May 2018** Wirecard Bank AG submits an application to BaFin for the approval of a restructuring with regard to the bank (to make the bank a direct subsidiary of Wirecard). A qualifying holding procedure is initiated together with the Bundesbank and the ECB. The application will ultimately be approved in January 2019.
- September 2018** Following a doubling of its share price in a year and a fivefold increase since its 2016 low, Wirecard enters the DAX index.
- September to December 2018** The FT publishes several further articles (13) on Wirecard, reporting on the doubling of its share price in a year and fivefold increase after a 2016 low and its entrance into the DAX index, but also [reiterating questions](#) on the inconsistencies of Wirecard’s accounts, doubts about its Asian business acquisitions and raising concerns over Wirecard’s opaque financial reporting (lack of granular information about individual business units making it hard to understand precisely the sources of Wirecard’s growth).
- The FT also reports that [REDACTED] owning 7% of the company (valued at €1.6bn) pledged almost half of his stake for a loan from an undisclosed lender, to be able to make other investments without touching his Wirecard stake.
- 3 December 2018** Within the context of the joint qualifying holding procedure, BaFin submits a decision proposal to the ECB in which it states that it is in favour of Wirecard’s

restructuring but does not consider that Wirecard qualifies as a financial holding company.

- 28 January 2019** The Preliminary Report on Corporate Governance of the Singapore-based law firm Rajah & Tann is sent to BaFin by an anonymous whistle-blower. The Report cannot be transmitted to FREP due to BaFin's legal duty of confidentiality in absence the consent of the whistle-blower.
- 30 January 2019** The FT makes new allegations against Wirecard raising concerns about [fictitious and backdated contracts in Singapore](#) and the forwarding of funds without economic substance ("via round-tripping transactions") involving external companies.
- 31 January 2019** Wirecard publishes a [reaction statement](#) to the FT article of 30 January 2019 qualifying the FT allegations as inaccurate, misleading and defamatory.
- 1 February 2019** Another article is published by the FT [on 1 February](#) claiming that an external law firm commissioned by Wirecard to investigate the payment company's Singapore office found evidence indicating "serious offences of forgery and / or falsification of accounts".

Wirecard publishes [another reaction statement](#) saying that Rajah & Tann Singapore is one of Wirecard's many legal advisers and regularly conducts compliance and governance related advisory work but has not uncovered any findings of material misconduct of any Wirecard employee in matters of accounting practices.

BaFin launches investigations into market manipulation. The case will be eventually reported to the Public Prosecutor's Office in Munich. BaFin starts exchanging with Singapore's supervisory authorities to share information on the status of the market manipulation investigations and requests their assistance to further investigate the suspicious transactions and fictitious contracts.

- 4 February 2019** Prosecutors in Munich do not start a criminal investigation into Wirecard as the potential misconduct did not happen inside Germany's jurisdiction.
- 7 February 2019** The FT publishes a third [article](#) accusing Wirecard of "round-tripping" of payments between Wirecard bank and Wirecard's subsidiaries in Hong-Kong and India.

The three FT articles of 30 January, 1 February and 7 February cause a sharp decline in Wirecard's share price.

- 8 February 2019** Wirecard publishes a [reaction statement](#) to the FT article of 7 February, stating that an internal investigation had started in 2018 due to allegations of one employee against another, but since then neither the internal investigation nor the external investigation by Rajah & Tann have found any conclusive material

wrongdoing. The investigation by Rajah & Tann is still ongoing and will be completed shortly.

- 11 February 2019** Wirecard 2018 annual financial report are selected by FREP for examination following assignment (risk-based sections) by the ██████████ Committee.
- 13 February 2019** In light of the FT allegations, FREP decides that an unlimited scope examination will be initiated immediately after the publication of Wirecard's 2018 annual report and will address the allegations raised.
- 15 February 2019** BaFin requests from FREP a focused examination of the 2018 half year financial report focused on the allegations of the FT regarding revenue recognition in Singapore. This request-based examination takes precedence over an unlimited scope examination, and specifically that from the selection on 11 February, and therefore FREP launches an examination on Wirecard's 2018 half year financial report.
- 18 February 2019** BaFin issues a temporary general administrative act prohibiting the establishment and increase in net short positions in Wirecard's shares (short-selling ban) for two months. A notification is sent to ESMA. ESMA issues a positive opinion on the ban.
- FREP sends to Wirecard a request for participation in the examination of the 2018 half year financial report.
- 19 February 2019** The MoF is informed by BaFin of the short-selling ban on Wirecard shares, of the request to FREP to examine Wirecard's 2018 half year financial report and of the investigations into a suspected violation of the prohibition of market manipulation.
- 20 February 2019** FREP obtains the independence declaration from the planned examination team ██████████ ██████████.
- 27 February 2019** FREP received confirmation of Wirecard's participation in the examination of the 2018 half year financial report.
- 4 March 2019** FREP establishes the staffing of the examination team ██████████ ██████████ ██████████.
- 8 March 2019** Government representative ██████████ and BaFin ██████████ discuss in a telephone conversation the current events, including the measures taken by BaFin with regards to Wirecard.
- 21 March 2019** BaFin provides information to the MoF about the current situation, including information regarding new findings on suspected market manipulation in connection with Wirecard and BaFin's plans to request assistance from a

foreign supervisory authority due to the FT's allegations against Wirecard subsidiaries in Asia.

- 26 March 2019** Wirecard issues an ad hoc notification announcing that [Singapore-based Rajah & Tann has completed an investigation](#) commissioned by Wirecard itself into allegations against Wirecard's subsidiaries in Asia which revealed no material impact on financial reports by Wirecard.

Wirecard announces that publication of 2018 accounts is delayed to April to take into account the findings of the report.

- 29 March 2019** The FT publishes an article containing new allegations against Wirecard with regards to TPA [questioning the existence and volume of TPA revenues and clients](#).

Wirecard publishes a [reaction statement](#) to the FT article indicating that it commenced legal proceedings against the FT for "repeated and continuing disclosure and false representation of confidential information and/or company secret as well as misquoting documents." Wirecard explains that 50% of transactions are coming from partners (local financial institutions, service providers) and that it cannot disclose information about its key clients.

- 1 April 2019** FREP sends to Wirecard a first set of questions. These questions included request of numerous supporting documents, and general questions for understanding the structure and organisation of the business in Asia.

BaFin submits a status report on Wirecard to the MoF.

- 3 April 2019** BaFin ██████████ takes part in a meeting of the Finance Committee of the German Bundestag as part of the cum/ex proceedings and answers, among others, a question on the ban on short-selling Wirecard shares.

BaFin receives whistle-blower complaint linked to FT article of 29 March.

- 8 April 2019** BaFin submits a status report on Wirecard to the MoF.

- 10 April 2019** BaFin files a criminal complaint with the Public Prosecutor's Office in Munich against market participants and two ████████ journalists on suspicion of market manipulation in connection with reports on Wirecard.

- 15 April 2019** BaFin imposes an administrative fine on Wirecard in the amount of €1.52m due to the delayed publication of the half-year financial report for the 2018 and previous financial years and delayed publication of the announcement about the reports' release.

BaFin submits a report to the MoF about the criminal complaint that was filed in relation to suspected market manipulation by market participants establishing short positions.



- 23 April 2019** FREP receives the first part of responses from Wirecard and grants an extension for the remaining part of responses.
- 24 April 2019** Softbank agrees to invest further €900m in Wirecard by buying five-year Wirecard bonds that can convert into an equity stake.
- The FT [publishes internal Wirecard documents](#) which show that the three TPA partners contributed half the revenue and more than 95% of the EBITDA of Wirecard. The FT also questioned the amount and existence of revenues in the third party acquiring business.
- 25 April 2019** Wirecard publishes its 2018 annual financial report, including EY's unqualified audit opinion.
- The company made numerous (immaterial) corrections as a result of special investigations performed in connection with the FT allegations (€1.5m impact on the turnover for 2017, when the turnover of the Wirecard Group for the financial year 2017 of €1.5bn). In the audit report, EY had 'no objections' to these corrections. The auditors issue an unqualified audit opinion on the consolidated financial statements.
- 23 May 2019** FREP receives the second part of responses from Wirecard.
- 29 May 2019** Quarterly meeting between BaFin and the FREP, during which the Wirecard investigation and the short-selling restrictions were also addressed.
- 3 June 2019** Following a press report that Wirecard Bank AG was processing payments for providers operating fraudulent trading websites, BaFin discusses the Wirecard case with the Public Prosecutor's Office and the Financial Intelligence Unit.
- 11 June 2019** FREP receives the third part of the responses from Wirecard.
- 18 June 2019** FREP sends a second set of questions to Wirecard, requesting further documentation.
- 1 July 2019** FREP's Chamber assigns a new [REDACTED] [REDACTED] to Wirecard's examination due to [REDACTED] [REDACTED]. The independence declarations are already in place.
- 2 to 4 July 2019** BaFin conducts an anti-money laundering on-site inspection at Wirecard Bank.
- 12 July 2019** FREP receives the response to its second set of questions from Wirecard.

- 21 September 2019** Wirecard's shareholders approve of €900m convertible bond with Softbank and to signing a strategic cooperation agreement.
- Next day Credit Suisse sold a €900m Wirecard bond that is exchangeable for stock to a broad group of investors. The move is qualified by Softbank as a 'return optimisation measure'.
- 15 October 2019** The FT releases further allegations concerning Wirecard, questioning the amount and existence of revenues in particular with reference to [fictitious customer relationships](#) in the third party acquiring business.
- BaFin informs FREP and requests that FREP takes this into consideration as part of its ongoing examination.
- Wirecard shares fall by 13% and bond value drops.
- Wirecard publishes a [reaction statement](#) categorically rejecting all allegations.
- 21 October 2019** Wirecard's Supervisory Board and Management Board appoint KPMG to conduct a special forensic investigation to look into the allegations concerning accounting fraud by Wirecard. According to press reports, up to 40 staff members worked on this case at times with a budget of around €10m.
- BaFin receives from whistle-blowers reference to nine publicly available internet sites relating allegations against Wirecard, including four references to SIRF. BaFin forwards these references to FREP.
- 24 October 2019** FREP's examination team provides its interim report [REDACTED] regarding the new allegations.
- FREP decides to wait for the results of the independent special investigation by KPMG.
- BaFin receives further allegations from Autonomous Research.
- Quarterly meeting between BaFin and FREP, during which the Wirecard investigation was also addressed.
- 30 October 2019** FREP, in coordination with BaFin, decides on 30 October 2019 to extend the scope of the focused examinations to include new indications of erroneous accounting, stemming from the FT reporting on Wirecard's TPA business, as well as from the information forwarded to it by BaFin about India acquisitions and round tripping.
- 2 December 2019** The MoF requests a status report from BaFin, also in connection with the FT's reports on the new allegations. The report is provided the following day.

- 5 November 2019** Discussion between government representative [REDACTED] and the CEO of Wirecard [REDACTED]. The discussion also covered the suspected market manipulation and the special investigation initiated by KPMG.
- 6 November 2019** The MoF asks BaFin for an assessment on Autonomous Research's analyses, including allegations of fake revenues at Asian subsidiaries.
- 18 November 2019** BaFin submits a report to the MoF on the status of the Wirecard investigations where it concludes that the Autonomous Research analyses did not result in new specific indications or findings regarding potential violations of accounting rules and regulations; this was also true in matters related to Singapore and Dubai.
- BaFin forwards these references to FREP.
- 2 December 2019** Quarterly meeting between BaFin and FREP, during which the Wirecard investigation was also addressed. FREP informs BaFin that it is waiting for the result of KPMG's independent investigation and hence for receipt of KPMG's report.
- 9 December 2019** FT reports [doubts on the way Wirecard accounts for the trust account](#), accusing it of illegitimately boosting its cash balance.
- 11 December 2019** BaFin submits a report to the MoF on the status of the Wirecard investigations.
- 17 December 2019** FREP requests from Wirecard the KPMG engagement letter covering the independent special investigation.
- Wirecard publishes [a reaction statement](#) to media allegations against its TPA partners reiterating the fact that media assertion are wrong.
- 01 January 2020** Wirecard misses the deadline that had been set for the restructuring. A new application need to be sent to the supervisory authorities concerned (BaFin and the ECB) for a new qualifying holding procedure.
- 11 January 2020** Wirecard [REDACTED] resigns.
- 16 January 2020** A planned meeting between BaFin and the Management Board of Wirecard Bank AG is cancelled by Wirecard Bank AG for health reasons.
- 21 January 2020** FREP receives KPMG's engagement letter covering the independent special investigation.
- 13 February 2020** During a phone call, BaFin informs FREP of further articles published by the FT in January 2020.

- 14 February 2020** Wirecard ad hoc release: the company's annual financial report are expected on 8 April and the KPMG audit is expected to be completed by the end of March.
- 25 February 2020** The District Government of Lower Bavaria (Bezirksregierung Niederbayern) contacts BaFin, stating that it considers itself the competent anti-money laundering supervisory authority for Wirecard and requesting BaFin's conclusive assessment on this matter.
- 10 March 2020** The planned meeting between BaFin, Wirecard's [REDACTED], and the Management Board of Wirecard Bank AG is cancelled by Wirecard Bank AG due to the Coronavirus outbreak.
- 11 March 2020** BaFin submits a report to the MoF on the status of the Wirecard investigations.
- 12 March 2020** Wirecard publishes an [ad hoc release](#) stating that KPMG has largely completed its special investigation and so far has not found any indications of financial statement manipulation to date as the independent analysis is still ongoing.
- 1 April 2020** BaFin submits a report to the MoF on various Wirecard-related issues.
- 22 April 2020** Wirecard [informs the market](#) that the KPMG special investigation will last until 27 April but that KPMG has made no substantial findings so far. Financial results will be published on April 27 (second delay of publication).
- 27 April 2020** KPMG finalises its special investigation.
- 28 April 2020** KPMG's special audit report is published on Wirecard's website. KPMG's report [...] states that "the evidence provided is not sufficient to state either that the revenues from the TPA business exist and are accurate nor state that the revenues do not exist."
- On the same day, Wirecard publishes [an ad hoc release](#): it asserts that KPMG did not find incriminating evidence for the public allegations of balance sheet forgery and that the consolidated financial statements for 2019 are not going to be published by the due date on 30 April 2020.
- Government representative [REDACTED] asks BaFin [REDACTED] to give an assessment of KPMG's report.
- Quarterly meeting between BaFin and the FREP, during which the Wirecard investigation was also addressed.
- FREP has received from Wirecard the KPMG report and informs BaFin that it will evaluate the report.
- 29 April 2020** BaFin reports to the MoF on the contents of the KPMG report and announces that it will ask FREP to examine Wirecard's 2018 annual financial report.

BaFin launches a market manipulation probe with regards to Wirecard's communications with investors saying that KPMG found nothing substantial.

**30 April 2020** BaFin requests from FREP a focused examination of Wirecard's 2018 annual financial report (request-based examination).

**5 May 2020** BaFin sends to FREP allegations by a third party against Wirecard.

FREP sends to Wirecard a request for participation on the examination of the 2018 annual financial report.

**9 May 2020** Government representative ██████ asks BaFin ██████ for a report on Wirecard, also with regard to the measures to be taken.

**11 May 2020** BaFin requests that FREP report in writing on the status of the ongoing examinations.

**14 May 2020** In response to BaFin's request, FREP informs BaFin of the areas examined, the timeline of the examinations, the list of documents received, and that the analysis of the KPMG report by FREP was in progress. FREP indicated its intention to send a provisional finding of an error to Wirecard in July 2020.

On this basis and after a further review, BaFin maintains its position that there are no substantial doubts about the proper conduct of the examination by FREP.

**15 May 2020** Wirecard's Dubai partner Al Alam (TPA) enters liquidation.

BaFin submits a report to the MoF on the progress made in FREP's examination of the 2018 half year financial report.

**18 May 2020** FREP's examination team ██████ ██████ sign the independence declaration. FREP receives confirmation of Wirecard's participation to the examination of Wirecard's 2018 annual financial report.

BaFin offers to support FREP in obtaining information and documentation from the Dubai supervisory authorities (in a telephone conversation).

BaFin informed the AOB about the restructuring of a Wirecard subsidiary and a TPA business partner (Al Alam), both located in Dubai, United Arab Emirates.

**22 May 2020** FREP decides on the staffing of the examination team of Wirecard's 2018 annual financial report.

FREP sends a set of questions to Wirecard building on KPMG's findings and conclusions.

**26 May 2020** Wirecard further announces a postponement of the issuance of the 2019 annual results.

- 27 May 2020** BaFin and the District Government of Lower Bavaria have further discussions on who is the competent anti-money laundering supervisory authority.
- 28 May 2020** BaFin informs the MoF of the phone call with the District Government of Lower Bavaria, indicating that, in the context of anti-money laundering supervision, Wirecard defines itself as a financial company within the meaning of the German Money Laundering Act (Geldwäschegesetz – GwG) and thus as an obliged entity under anti-money laundering law under the supervision of the Federal State of Bavaria.
- Government Representative [REDACTED] is informed of the current situation; Government Representative [REDACTED] sends a letter to BaFin [REDACTED] confirming that BaFin has his support for all measures necessary in order to fully clarify the matter.
- 29 May 2020** BaFin submits a report to the MoF regarding transactions involving Wirecard shares made by [REDACTED] of Wirecard (suspicion of insider trading rules).
- FREP responds in a telephone conversation to BaFin's offer for assistance in obtaining information and documentation from Dubai of 19 May: it is not clear what information might be available from Dubai. Ultimately no information is asked to Dubai.
- 2 June 2020** BaFin files a criminal complaint against Wirecard with the Public Prosecutor's office in Munich due to market manipulation as a result of misleading ad hoc notifications on the interim results of KPMG's special audit.
- 3 June 2020** BaFin launches a market abuse analysis relating to the purchase of Wirecard shares by Wirecard [REDACTED].
- 4 June 2020** FREP receives the first part of responses from Wirecard, including non-public Appendices 1 and 2 of the KPMG report.
- 5 June 2020** The Public Prosecutor's Office in Munich carries out a search at Wirecard on the basis of BaFin's criminal complaint filed on 2 June 2020. BaFin informs the MoF of this.
- FREP reports to BaFin on the state of play.
- 8 June 2020** FREP receives allegations from a third party regarding Wirecard.
- 10 June 2020** FREP receives a request from BaFin for a written report on the examination of Wirecard's 2018 half-year accounts.
- FREP receives the second part of responses from Wirecard.
- 12 June 2020** FREP receives the third part of responses from Wirecard.
- 15 June 2020** FREP decides to appoint [REDACTED].

**16 June 2020** FREP's [REDACTED] signs the declaration of independence.

EY informs Wirecard that, according to the banks allegedly holding the account, Wirecard had submitted forged confirmations of holdings on trust accounts in the context of the 2019 audit of the annual financial report amounting to €1.9bn.

**17 June 2020** FREP receives from BaFin a statement of Wirecard's auditor where the Statutory auditor points to possible incorrect balance confirmations of some fiduciary accounts in relation to the TPA business.

**18 June 2020** Wirecard issues an [ad hoc notification](#), stating that the dates for the publication of the annual consolidated financial statements for 2019 have been postponed due to "indications of presentation of spurious balance confirmations". Wirecard's shares crash by 60%.

BaFin files a complaint with the Public Prosecutor's Office as the company is suspected of having incorrectly presented its financial situation under Section 331 of the German Commercial Code ("accounting fraud") and is thus suspected of market manipulation due to inaccurate information in the 2016 - 2018 annual financial statements.

During a telephone conversation, BaFin informs FREP of the ad hoc notification by Wirecard.

**19 June 2020** BaFin informs the MoF about Wirecard's ad hoc notification of 18 June 2020 and that it filed a complaint with the Public Prosecutor's Office on 18 June 2020.

**20 June 2020** BaFin launches market abuse analyses regarding Wirecard's ad hoc notifications in previous months.

**22 June 2020** Wirecard issues an [ad hoc notification](#) stating that upon further review, Wirecard's Management Board assumes that there is a prevailing likelihood that the bank balances on trust accounts totalling €1.9bn previously reported by Wirecard do not exist and that it is possible that the way in which the third-party acquiring business has been described up to this point is inaccurate.

During a telephone conversation, BaFin informs FREP of the ad hoc notification by Wirecard.

In addition, BaFin:

- a) orders daily reports on Wirecard Bank AG's liquidity situation;
- b) appoints a special representative for Wirecard Bank AG in order to monitor and report on all of the bank's key payment transactions with Group companies in addition to compliance with the orders concerning the liquidity situation;
- c) requests the assistance of a foreign supervisory authority.

The MoF is informed of the current situation surrounding Wirecard and is provided with further details on Wirecard's business model, current



developments, supervisory competences, credit risks and possible courses of action.

- 23 June 2020** FREP finalises its decision regarding the appointment of a [REDACTED].  
The independence declaration of the [REDACTED] is in place.

FREP is informed by Wirecard that the reliability of the information previously provided to FREP is 'in doubt', in particular as regards the third-party transactions, and that it cannot indicate which of the 'information provided is still sufficiently reliable'.

Wirecard [REDACTED] is arrested.

- 24 June 2020** The [REDACTED] Committee of FREP decides to initiate a focused examination by FREP of the 2019 half year financial report.

FREP informs BaFin of its intention to initiate a focused examination of the 2019 half year financial report. Request for participation is sent to Wirecard. Subsequently, BaFin requests a focused examination of the 2019 half year financial report.

FREP provides to BaFin a second written report on the status of the ongoing examinations, as requested by the latter on 10 June 2020. FREP explained its planned finding of an error following the recent events and documentation received.

- 25 June 2020** Wirecard files for insolvency.

BaFin also requests from FREP a focused examination of the 2017 annual financial report.

In a telephone conversation at staff level, the Bavarian State Ministry of the Interior, for Sport and Integration (Bayerische Staatsministerium des Innern, für Sport und Integration) informs the MoF and BaFin that the question surrounding the classification of Wirecard remains unresolved. However the Bavarian State Government does not consider that the District Government of Lower Bavaria is the competent supervisory authority.

EC requests ESMA to assess the German authorities' supervisory response to the Wirecard fraud.

- 26 June 2020** FREP transmits preliminary findings to Wirecard with regards to Wirecard's 2018 half year financial report.

FREP sends request for participation to the examination of the 2017 annual financial report.

- 30 June 2020** FREP's interim report of the examination team is submitted [REDACTED] regarding the examination of the 2018 annual financial report.

- 1 July 2020** An extended request for participation is sent to Wirecard by FREP to include BaFin's request.
- 6 July 2020** FREP finalises the result of the examination of the 2018 half-year and annual financial reports, which are found to be erroneous.
- 9 July 2020** The results of FREP's examination are sent to Wirecard: errors are found in the 2018 half year financial report and in the 2018 annual financial report.
- Wirecard has until 15 July 2020 to agree to the error findings.
- The result of the examination are sent to BaFin.
- A further working meeting between BaFin and FREP takes place, during which the state of the proceedings on Wirecard was discussed.
- 10 July 2020** BaFin forwards a third party's notice to FREP following the third party's written agreement.
- 15 July 2020** Wirecard responded to FREP that due to the current circumstances, it was unable to make any observations on the result of the examination.
- FREP considered this as a non-acceptance by Wirecard of the results of examinations completed.
- ESMA responds to EC request to assess the German authorities' supervisory response to the Wirecard fraud saying that it would launch a FTPR.
- 20 July 2020** FREP informs BaFin that Wirecard does not agree with its error findings for the 2018 half year financial report and the 2018 annual financial report, and refuses to participate in the examination of the 2017 annual financial report and 2019 half year financial report. FREP's examination terminates.
- FREP notifies the AOB of possible violation of professional requirements by group auditors.
- 22 July 2020** The AOB requests further documents on Wirecard, which FREP transmits.
- 24 July 2020** Since Wirecard did not agree with FREP's error finding, an examination of Wirecard's 2018 half-year accounts, 2018 annual financial report, 2019 half-year accounts and 2017 annual financial report is launched at second tier by BaFin.
- BaFin also sends hearing notices to Wirecard AG regarding all examination orders for the purpose of their publication in the Federal Gazette.
- 4 August 2020** The Federal Gazette publishes the four examination orders on behalf of BaFin.

## Annex 4 – Statements of FREP and BaFin

### **FREP's statement in response to the fast track peer review report**

FREP welcomes the objective of the peer review to promote best practice across NCAs and ESMA with a view of harmonising enforcement activities and enhancing the effectiveness of the financial reporting supervisory system. However, FREP does not agree with the ratings given to FREP by the PRC. The findings do not adequately reflect or correspond to the tasks and responsibilities under the legal framework for financial reporting enforcement applicable to FREP, are not supported by the evidence and explanations provided during the review process and are distorted by hindsight bias.

The European examination framework was designed to identify errors in financial reporting, not sophisticated fraud schemes initiated and maintained by the management board. In fact, neither the Transparency Directive nor the GLEFI address or require fraud examinations. On the contrary, the statutory framework in which FREP operates relies explicitly on the examined company's cooperation, which includes providing truthful and accurate information and statements. Accordingly, FREP, as a private entity designated under the Transparency Directive, is not vested with the same powers and resources as a public authority and is neither equipped nor mandated to detect fraud schemes, in particular when conducted with such a high degree of criminal energy as in the case of Wirecard.

First, FREP does not agree with the PRC's assessment of FREP's selection methods with respect to the allegations against Wirecard in the media between 2015 and 2018. In FREP's view this does not fairly reflect the predominant picture of the company during that period. In fact, when exercising our professional judgement, we addressed potential risks in connection with the allegations and considered Wirecard's overall coverage in the media. At the time, the company was widely regarded a flagship of the German Fintech innovation and the predominant view in the media was very positive.

Second, FREP does not agree with the PRC's assessment relating to the examination practices concerning the 2014 financial report. The scoping and procedures of examinations including the handling of allegations that arose during the examination and documentation were appropriate and based on the assumption that the documentation provided by the company was accurate and not intentionally forged and that Wirecard's management and staff were cooperating truthfully with FREP. This assumption was and is in line with the statutory framework and expectations applying to FREP when conducting an examination. In this context it appears important to note that the German prosecutor, citing a crown witness, found that Wirecard's management decided in late 2015 to implement the fraud scheme.

Finally, FREP notes that despite the PRC's intention and measures to avoid hindsight bias, the assessment is tainted by the distortions that arise from it and does not fairly account for the information that was available and reasonably obtainable to FREP within its legal powers and resources during the 2015-2018 period.

FREP believes that it has been conducting the examinations appropriately and the approach as to scoping and conducting its examination has been in line and complied with the expectations reflected in the Guidelines on the Enforcement of Financial Information.

## **BaFin's statement in response to the fast track peer review report**

The PRC correctly notes that both national competent authorities in the German two-tier system of enforcement of financial information, the Financial Reporting Enforcement Panel (FREP) on tier 1 and thereafter BaFin on tier 2, have a role in monitoring the market while BaFin's role is more limited than FREP's (para. 30). FREP is an independent institution and BaFin is not in the position to supervise FREP or to intervene in the procedures of FREP. Considering the explicitly shared powers and tasks between FREP and BaFin as well as the need to avoid an inefficient duplication of work, it is appropriate for BaFin to rely on work conducted by FREP, e.g. the review of relevant press articles by FREP's dedicated Media Analysis Committee. Only then BaFin performs its tasks efficiently, given BaFin's significantly lower personnel and financial budget for enforcement compared to FREP. Against this background, BaFin disagrees with the PRC's recommendation that BaFin should perform its own assessments of available information under the current legislative regime (recommendation, page 19).

BaFin acknowledges the efforts to avoid the hindsight bias by the PRC. However, it is noted that hindsight cannot be completely excluded as e.g. press coverage in Germany and analyst reports were much more heterogeneous and also included positive aspects which is not adequately reflected in the FTFR report.

BaFin disagrees with the PRC's finding that BaFin should have demanded a further examination of Wirecard AG's financial statements, e.g. for the key financial figures of the years 2015 and 2016 (para. 347). BaFin made FREP aware of negative press articles relating to Wirecard AG shortly after completion of the examination of the 2014 financial statements which did not reveal any objections by FREP. FREP explicitly confirmed in writing that it was aware of the accusations in the article in the manager magazin 2017 and considered these in its assessment. Therefore, neither could BaFin substantiate – legally required – specific indications for requesting a new examination by FREP nor would such a further request have been proportionate given FREP's assessment. Furthermore, the situation in 2020 – after the publication of the KPMG report in April and the notifications by EY in June – is not comparable to the situation in 2017. In addition, it was the first time BaFin requested multiple examinations in relation to the same issuer.

In response to the PRC's finding regarding BaFin's notification of the public prosecutor on 18 June 2020 (para. 49), it is clarified that according to the legal requirements BaFin must report facts giving rise to the suspicion of a criminal offence. As long as BaFin has no specific indications that go beyond only public publications like press articles, BaFin cannot issue a report to the Public Prosecutor's Office. This is all the more true since the necessary fact base could not be investigated as also pointed out by KPMG in its special investigation report at the end of April 2020. In addition, the on-going tier 1 examination of FREP did not reveal facts giving rise to the suspicion of a criminal offence prior to BaFin's report to the public prosecutor. Having said this, BaFin points out that this is not an issue of missing powers or high hurdles for a criminal complaint (para. 50), but rather relating to the requirement of having sufficient and specific indications in any given individual case. Nevertheless, BaFin also informed the Public Prosecutor's Office about information received pointing in the direction of Wirecard, e.g. the FT article of January/February 2019 and of October 2019.

In BaFin's view the PRC's observation of instances of a lack of coordination and/or procedural inefficiencies within BaFin mainly because the EFI team was not aware of certain press articles that, according to the PRC, were followed by a significant drop of the share price (para. 56) is not proportionate. As the share price of Wirecard AG has always been very volatile, it seems, this finding of the PRC is not sufficiently reasoned and partially taken out of context.

As the PRC raises doubts on the robustness of BaFin's internal control system regarding conflicts of interest (para. 29), BaFin refers to the recent amendment of its binding internal instruction on employee transactions in financial instruments by BaFin staff. This happened in advance of an upcoming change of the legal framework in order to provide further procedural assurance that BaFin employees comply with the set requirements by performing duties impartially and avoiding any conflict of interest.

Finally, within the given two-tier system of enforcement of financial information FREP on tier 1 and BaFin on tier 2 are responsible for examinations also in cases of alleged fraudulent accounting. Nevertheless, to better deal with criminal acts like in the Wirecard case, the Ministry of Finance and the Ministry of Justice and Consumer Protection have initiated a legislative process and taken steps towards potential amendments of the enforcement system, including adjustments of BaFin's supervisory powers (recommendation, page 20).