

Follow-up Report

to the fast-track peer review on the application of the guidelines on the enforcement of financial information by BaFin and FREP in the context of Wirecard (ESMA42-111-5349)

List of Acronyms and Terms Used

AOB	Audit Oversight Body
BaFin	Bundesanstalt für Finanzdienstleistungsaufsicht
BilKo	BaFin's new directorate "financial reporting enforcement"
EC	European Commission
ECEP	European Common Enforcement Priorities
EECS	European Enforcers Coordination Session
EFI	Enforcement of Financial Information
FinDAG	Finanzdienstleistungsaufsichtsgesetzes (Act Establishing the Federal Financial Supervisory Authority)
FISG	Finanzmarktintegritätsstärkungsgesetz (German Act to Strengthen Financial Market Integrity)
FTPR	Fast Track Peer Review
FREP	Financial Reporting Enforcement Panel
GL	Guideline
GLEFI	Guidelines on the Enforcement of Financial Information
MAR	Market Abuse Regulation
MoF	Ministry of Finance
NCA	National Competent Authority
PRC	Peer Review Committee
TD	Transparency Directive 2004/109/EC
WpHG	Wertpapierhandelsgesetz (Securities Trading Law)

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1 Executive Summary

In November 2020, following a request from the European Commission, ESMA published a Fast Track Peer Review (FTPR) Report¹ which examined how BaFin (Bundesanstalt für Finanzdienstleistungsaufsicht) and FREP (Financial Reporting Enforcement Panel)² had supervised the financial information of Wirecard, a fintech company included in the German DAX 30 index, which collapsed in June 2020.

As enforcement of financial information (EFI) in the European Union has to be carried out in accordance with ESMA's Guidelines (GL) on Enforcement of Financial Information (GLEFI)³, the FTPR assessed BaFin and FREP's supervisory activities of Wirecard with respect to the following aspects of the GLEFI: resources (GL2), independence from issuers and government (GL3), selection of issuers (GL5), examination procedures (GL6), materiality (GL8), follow up actions acted upon (GL9), emerging issues (GL12). The FTPR also considered the set-up of the supervisory system in a more holistic way and assessed its effectiveness.

The FTPR identified deficiencies in the application of the GLEFI mainly with regard to:

- The independence of BaFin from issuers and government,
- The market monitoring by both BaFin and FREP,
- The FREP's examination procedures, and
- The analyses performed and their documentation.

The FTPR also identified issues in relation to the effectiveness of the supervisory system in the area of financial reporting mainly regarding:

- The interaction between BaFin and FREP,
- The exchange of information between BaFin/FREP and other relevant bodies such as the Audit Supervisory Body (AOB); and
- The lack of coordination and inefficiency in the exchange of information between relevant teams within BaFin.

The FTPR formulated recommendations to both BaFin and FREP to address the deficiencies identified.

The Peer Review Committee (PRC) followed up on the recommendations and presents its conclusions in this follow up report. After a general introduction in Section 2 and a description of the follow-up process in Section 3, Section 4 delves into the findings of the follow-up for each of the areas recalled above. Each area starts with a reminder of the

recommendations formulated by the FTPR and analyses the related actions undertaken to assess whether these actions indeed are remedial in a satisfactory manner.

Since 2020, Germany's supervisory system in the area of financial reporting was completely revamped with the two-tier enforcement system discontinued and all financial information supervisory activities and powers entrusted to BaFin. Therefore, whilst this new set up entails that recommendations pertaining to the interactions between BaFin and FREP are no longer relevant, the follow-up assessment considered how recommendations made to FREP were taken into account by BaFin in its new set up. In addition, the follow-up also took into account the GLEFI as they currently stand in their 2020 version applicable since 1 January 2022⁴, acknowledging that the changes implemented in the 2020 version of the GLEFI do not materially impact the areas for assessment under this follow-up. With regards to the topic of independence from issuers and government, the assessment was also mindful of consistency with the Joint European Supervisory Authorities' criteria on the independence of supervisory authorities⁵.

Since 2020, BaFin has reorganised its EFI division incorporating FREP staff, recruiting additional staff with the aim of reaching 60 staff⁶ for EFI in 2024.

Overview of the follow-up's main findings

With respect to independence from issuers, BaFin has put in place a framework applicable to all staff with respect to their financial holdings and transactions thereof with extensive prohibitions, declarations on an annual basis and on new assignments, specific absence of conflict of interests' declarations with respect to supervisory files (including for the EFI directorate), and both a centralised and decentralised system of controls. Despite the fact that BaFin is not empowered to obtain information on staff's financial holdings on an exhaustive basis, the design of BaFin's framework on financial holdings appears as a positive evolution. BaFin has similarly progressed with regards to staff cooling off periods and continues to work on harmonising its requirements across different categories of staff.

Regarding independence from the government, BaFin and the MoF have formalised their relationship in publicised principles of cooperation. They clarify to a certain extent what BaFin being 'subject to the legal and technical oversight of the MoF' means: BaFin is

¹ [esma42-111-5349 fast track peer review report - wirecard.pdf \(europa.eu\)](#)

² Both were the German Transparency Directive enforcement authorities.

³ In their 2014 version applicable at the time: [2014-ESMA-1293en \(europa.eu\)](#)

⁴ [esma32-50-218 guidelines on enforcement of financial information en.pdf \(europa.eu\)](#)

⁵ JC 2023 17 - Joint European Supervisory Authorities' criteria on the independence of supervisory authorities, 25 October 2023.

⁶ This is more than the double of the combined staff at BaFin and FREP at the time the FTPR was carried out.

operationally independent but reports to the MoF on certain cases. For instance, in cases of high public interest or expected media coverage, BaFin could inform the MoF before actions are taken over specific supervised entities. Additionally, the scope of requests for reports by the MoF to BaFin is rather broad and the risk of influence by the MoF cannot be totally excluded.

In the context of selection methods, BaFin has significantly beefed up its market monitoring and media analysis within the EFI directorate to not depend on other teams. In addition, the selection model based on both abstract and concrete risk was significantly revamped with analysis coming from various internal and external sources of information and an extensive scoring system. The design of the selection model fulfils the recommendations made in the FTPR. It is expected to apply in full in the course of 2024.

Regarding examination procedures, BaFin's system for handling and acting upon whistleblowers' information addresses the recommendations of the PRC.

In terms of timely detection of issues and taking of measures, BaFin's investigative powers were expanded as per the recommendation to enable forensic investigations with the right to publish information on enforcement proceedings, the right to request information from anyone as well as with expanded rights to entry and the possibility to search and of seizure. These apply now also to enforcement of financial information.

Regarding cooperation and exchange of information between authorities, following the FTPR, various institutions, including BaFin and the AOB, have been authorised to exchange information. They are also freed from confidentiality obligations including as regards personal data, to the extent necessary to enable each institution to fulfil their respective duties in line with the recommendations. In practice, BaFin and the AOB have agreed on principles of cooperation which specify the means and type of exchange of information.

Within BaFin, a specific division on coordination of supervision was set up under the Executive Board and single points of contact were appointed to enhance the exchange of information across teams and directorates and with supervised entities. These measures appear to improve the flow of information across the organisation to address the FTPR's recommendation.

Finally, the follow-up reports notes that legal impediments which prevented BaFin to declare full compliance with the GLEFI were removed, thus enabling BaFin to declare full compliance as of January 2022.

To conclude, the revised supervisory framework seems to address the recommendations set in the FTPR but will have to be fully and effectively implemented.

2 Introduction

1. This report provides an update on the actions undertaken further to the 2020 Fast Track Peer Review (FTPR) report on the application of the Guidelines on the Enforcement of Financial Information (ESMA/2014/1293) by the Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) and the Financial Reporting Enforcement Panel (FREP) in the context of Wirecard (ESMA42-111-5349).
2. In November 2020, ESMA published a FTPR report which examined how BaFin and FREP had supervised Wirecard AG, a fintech company included in the German DAX 30 index, which collapsed in June 2020. The FTPR was initiated upon request from the European Commission to carry out a fact-finding analysis of the events leading to the collapse of Wirecard and of the German authorities' supervisory response in the area of financial reporting.
3. The FTPR report covered how BaFin and FREP applied the Guidelines on Enforcement of Financial Information and possible impediments to the effectiveness of the German two-tier supervisory system for financial reporting in the specific context of the Wirecard case. It focused in particular on the following topics:
 - a) In relation to the Guidelines (GLs), (i) the sufficiency and adequacy of human and financial resources (GL 2), (ii) the independence from government, issuers and auditors (GL 3), (iii) the selection methods of issuers (GL 5), (iv) the examination procedures (GL 6), (v) the assessment of materiality (GL 8), (vi) the follow-up on actions acted upon (GL 9), and (vii) the emerging issues (GL 12);
 - b) In relation to the effectiveness of the supervisory system, the legal and procedural impediments to (i) the timely detection of issues and supervisory response, (ii) the cooperation and exchange of information, (iii) the efficient and effective flow of information within BaFin, and (iv) the compliance in full with the GLEFI.
4. The FTPR assessed the supervisory practices of BaFin and FREP looking at their on-going supervisory processes. It identified deficiencies and issued recommendations for all points above except GLs 2, 8, 9 and 12. The report made recommendations to address these deficiencies.

3 Follow-up process

5. This follow-up to the FTPR aims to check the progress made regarding cases of insufficient or partial compliance with the Guidelines and regarding deficiencies of the supervisory system that were identified.
6. The follow up was conducted in accordance with Article 30 of the ESMA Regulation and, for consistency purposes, follows the peer review methodology applied during the peer review. The assessment comprised a desk-based information gathering exercise followed by a discussion with BaFin representatives by video call. In this context, it should be reminded that, while the assessment in the context of the FTPR pertained to a specific case, it had some more systemic considerations and recommendations. Accordingly, this follow-up considers how BaFin addressed the recommendations through their current supervisory framework and not with respect to a specific case (for context see section 4.1). As such, the PRC did not request to review any documentation pertaining to specific enforcement files.
7. ESMA launched this follow-up in November 2023 by letter from the Peer review Committee (PRC) Chair addressed to BaFin.
8. The PRC considered the 2014 version of the GLEFI, considering that the 2020 changes do not materially impact the areas for assessment under this follow-up except in the area of selection (GL5) where the original guidelines were amended⁷ to require that:
 - a) Enforcers select issuers for examination not only based on risk but also based on random sampling and rotation (the original GL5 required selection based on risk, sampling and/or rotation) (emphasis added);
 - b) All issuers under an enforcer's supervision are examined during a specific period of time.
9. The FTPR report included recommendations addressed to FREP. As BaFin is now solely in charge of the process of enforcement of financial information (see paragraph 13), the PRC considered whether the recommendations formulated towards FREP are relevant in BaFin's new set up. The report identifies those recommendations addressed to FREP which are no longer relevant and those which are relevant and therefore assessed in BaFin's context.

⁷ [esma32-67-613 report on amendments to esma guidelines on enforcement of financial information.pdf \(europa.eu\)](#), paragraph 6.

10. This follow-up report has been submitted to the ESMA Issuers Standing Committee [and the Management Board] for consultation and has been approved by the Board of Supervisors.

4 Findings of the Follow-up

11. This section provides an overview of relevant changes that took place in Germany since the FTPR and presents the analysis of whether and how the relevant weaknesses and recommendations identified in the peer review report were tackled and whether some issues remain.

4.1 Overview of relevant changes in Germany

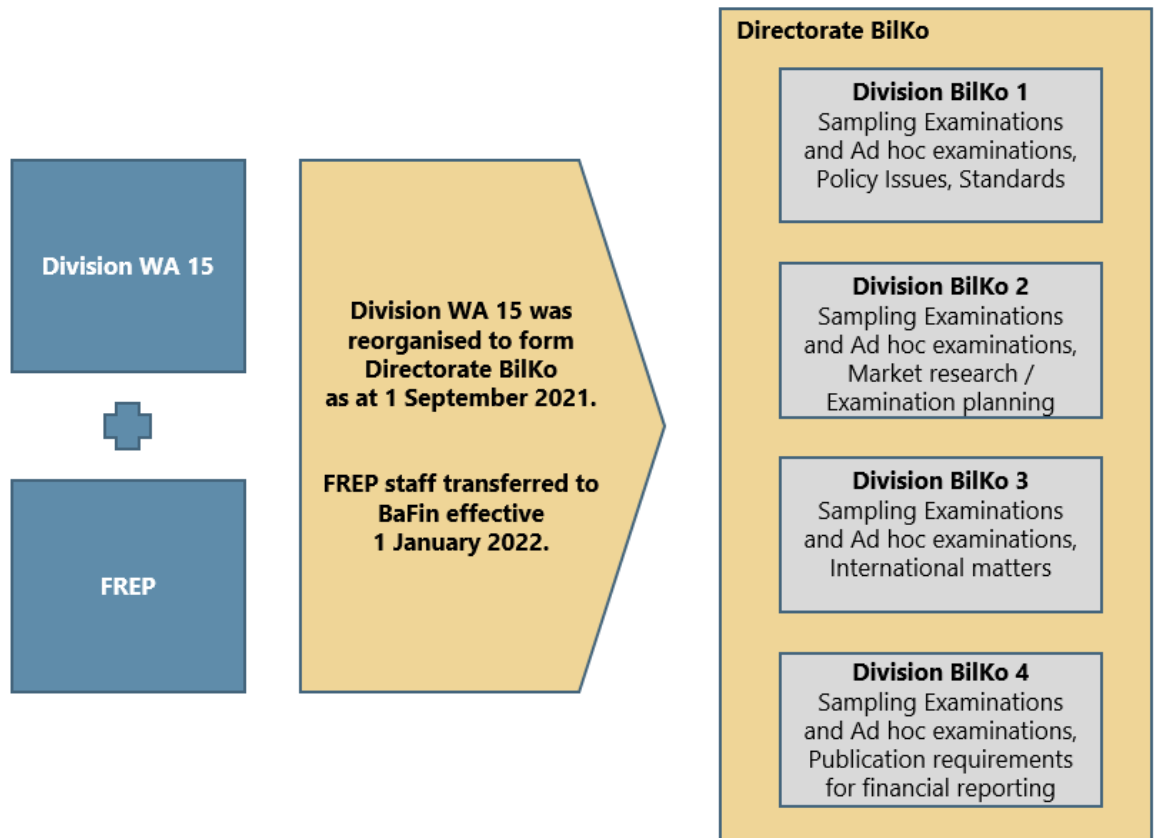
12. In June 2021, in the aftermath of the Wirecard case, the Bundestag passed the German Act to Strengthen Financial Market Integrity (Finanzmarktintegritätsstärkungsgesetz – FISG). The FISG laid the foundations for the reform of financial supervision in Germany. For BaFin, that meant more competencies, more resources, more powers of intervention and modernised structures. The aim was to increase BaFin's effectiveness in the supervision of issuers' financial information and of the financial market. Most of the changes brought about by the FISG became effective on 1 July 2021.
13. The FISG discontinued, as of 1 January 2022 the two-tier process which comprised (i) FREP that had been designated under the Transparency Directive⁸ to fulfil the task of enforcement of financial information in the first instance and, (ii) BaFin only intervening in specific cases. The enforcement of financial information (EFI) migrated to a single-stage process entrusted to BaFin solely, with those interested staff from FREP being transferred to BaFin.
14. BaFin has adapted its internal structures and processes to match its new responsibilities and established a new directorate for the enforcement of financial information (Directorate BilKo). Internally active since September 2021, the Directorate BilKo took over full responsibility for EFI on 1 January 2022.
15. The new Directorate BilKo is divided into four divisions. All divisions are responsible for the core tasks of enforcement such as selection of issuers and examinations with a couple of divisions specialised in specific industries. The other tasks such as policy,

⁸ Article 24(1) of the Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004.

standards, market research/monitoring, examination planning, international matters, Transparency Directive obligations (such as filings) are assigned to individual divisions. BaFin has in addition set up various mechanisms to ensure that all divisions can make consistent decisions.

16. To further strengthen Directorate BilKo, in addition to the transfer of FREP's staff, BaFin organised internal and external recruitments. The directorate aims at having around 60 staff, which is about twice as many staff as previously at BaFin and FREP together. At 31 March 2024, it consists of 51 staff.

Figure 1: BaFin revised organisational structure⁹



⁹ https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Fachartikel/2021/fa_bj_2112_Bilanzkontrolle_en.html

4.2 Independence of BaFin from issuers and government (GL 3)

To ensure appropriate investor protection and avoid regulatory arbitrage, it is important that the enforcer is not unduly influenced either by members of the political system or by issuers and their auditors.¹⁰

The FTPR raised doubts about the robustness of BaFin's internal control system regarding conflicts of interest of its employees and recommended that it be strengthened. As regards FREP, whilst assessing its internal control system to be effective, the FTPR formulated some recommendations to further enhance it.

Regarding BaFin's independence from government, the FTPR noted that, given the frequency and detail of reporting to the Ministry of Finance, in some cases before taking actions, there was a heightened and inappropriate risk of influence by the MoF over BaFin's supervisory actions to be addressed.

GL3-1	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.
GL3-2	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.
GL3-3	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

¹⁰ GLEFI, paragraph 46.

	in substance nor in appearance. This was already recommended in the 2017 Peer Review. ¹¹
GL3-4	<p>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:</p> <ul style="list-style-type: none"> - 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; - 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; - 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.
GL3-5	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.
GL3-6	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.
GL3-7	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

¹¹ [20110000 \(europa.eu\)](https://www.europa.eu), recommendations formulated in the context of the DE onsite report in the context of the 2017 Peer Review in paragraph 214.

	staff employed in supervision activities. This may need to be addressed in the legal framework.
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4.2.1 Independence from issuers

17. The FTPR report included recommendations with respect to independence from issuers respectively to FREP and to BaFin. As BaFin is now solely in charge of the process of enforcement of financial information, the recommendation regarding FREP's Presidential Board¹² (GL3-3) is no longer relevant. However, the PRC considered the other recommendations formulated towards FREP as relevant to take into account in BaFin's new set up.
18. In addition to its assessment against the GLEFI as described in paragraph 8, the PRC was also mindful of its recommendations and assessment being consistent with the Joint European Supervisory Authorities' criteria on the independence of supervisory authorities¹³.

4.2.1.1 Conflicts of interest

19. New measures foreseen by the Act Establishing the Federal Financial Supervisory Authority (FinDAG) and supplemented by BaFin official instructions were implemented at BaFin-wide level pertaining to all staff regarding financial holdings in June 2021 with the aim to avoid conflict of interest. These measures entail:
 - a) The disclosure of financial holdings for newcomers and staff switching units within BaFin, before their new post assignment, to allow BaFin to consider the appropriate measures to be put in place (including a change of assignment);
 - b) The freezing of legacy financial holdings¹⁴ and pre-clearance by the immediate superior for the disposal of legacy financial holdings, that, to their knowledge, does not give rise to a conflict of interest, i.e. that (i), on the basis of the specific transaction, the

¹² The PRC recommended 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.

¹³ JC 2023 17 - Joint European Supervisory Authorities' criteria on the independence of supervisory authorities, 25 October 2023

¹⁴ Legacy holdings in the sense of this report are defined as financial holdings before assignment to a new post, inherited or gifted holdings and securities acquired prior to the new rules entering into force.

- probity of the staff in question is not impaired and (ii) the staff has no proper knowledge of insider information¹⁵ based on their official duties;
- c) The prohibition of staff engaging in private financial transactions giving rise to a conflict of interest;
 - d) The prohibition from trading in financial instruments (i) that are admitted to an organised market¹⁶, (ii) issued by undertakings supervised by BaFin or for which an undertaking of the group is supervised by BaFin, (iii) issued by financial corporations with a registered office or branch in the EU. In addition, the prohibition from (i) trading in investment funds with a predominantly investment (over 50% of the Net Asset Value) in the financial industry, (ii) short-term trading. The prohibition includes trading in derivatives qualifying as financial instruments;
 - e) The requirement for BaFin staff to disclose conflicts of interest (financial holdings and other aspects of conflict of interest (e.g. personal or economical relationships)) and to refrain from participating in administrative proceedings involving the subject of said conflict of interest;
 - f) The notification of all private financial transactions to BaFin's Central Compliance Office without undue delay after submitting the relevant order. A general principle set out for private financial transactions is that these should be moderate, non-speculative and proportionate to their income and assets available so that employees' financial independence is not jeopardised. Notification is also required when financial instruments are acquired through inheritance or as a gift;
 - g) An annual declaration of completeness with regard to the notification procedures, even if negative, by 31 January each following year;
 - h) Random checks on exhaustiveness of transaction notifications (annually or in suspicious cases of misconduct) run by BaFin's Central Compliance Office with extensive access rights to documents (as BaFin does not have the legal power to request, obtain and process on a regular basis information on the portfolios of staff).
20. Staff is categorised by the official instructions in two risk categories: Category 2 relates to all staff and Category 1 to staff who, through their duties, have or may have inside information or a conflict of interest in relation to financial instruments that are available in the domestic over-the-counter market. Further restrictions in relation to such financial

¹⁵ Art. 7 Market Abuse Regulation (MAR)

¹⁶ as defined in section 2(11) of the German Securities Trading Act (WpHG).

instruments are in place regarding Category 1 staff such as the Director-General, its substitute and the respective Administrative Office.

21. All members of BilKo staff are Category 2. BaFin implemented additional measures by onboarding FREP's declaration of independence with respect to financial holdings and other aspects of conflict of interest (e.g. personal or economical relationships) when staff are assigned to a specific examination file before the beginning of the examination. In addition, specific case proceedings are processed within a document management system with specific authorisation management limiting access to the supervisory files to the Bilko division the issuer is assigned to.

PRC assessment

22. Regarding BaFin's general requirements pertaining to financial holdings applicable to all staff, the PRC notes the significant and extensive improvements brought to the overall framework with respect to independence and conflict of interest of its staff. However, it also notes that, for the large number of current staff who were present before the new requirements were put in place, BaFin would only obtain the full detail of their financial holdings in two situations: (i) if staff were to change units or (ii) upon the random checks performed by BaFin's Central Compliance Office. In this respect, the PRC understands from BaFin that the German Parliament has opted not to provide BaFin with the legal power to request, obtain or process on a regular basis information on the portfolios of staff, unless there is cause to suspect a conflict of interest. The PRC notes that the change of the general requirements could have been a good trigger to request the submission of these details, thereby putting current and new staff on the same footing. At the same time, the PRC notes that both the preclearance of disposal of legacy holdings and the annual declaration of completeness of notifications enable BaFin to exercise the appropriate controls in case of doubt or on a randomised basis.
23. As regards the additional measures implemented in the BilKo Directorate, the PRC welcomes the requirement of the additional independence declaration to be filled in by staff assigned to a specific examination. In this respect, the PRC considers that the overall safeguards in place address the PRC recommendation (GL3-2) to extend the time period covered by the declaration of independence by making this specific aspect of the independence declaration no longer relevant. The PRC notes however that, similarly to FREP previously, the respective BilKo Division has equal access rights to all supervisory files in its remit whilst not having signed an independence form with respect to all those files. However, contrary to FREP, BaFin does have extensive prohibitions pertaining to trading in financial instruments as well as provisions relating to conflicts of

interest, which prevent division staff not involved in the supervision of an issuer from using the information to their personal advantage.

24. As mentioned above in paragraph 19 and further described in section 4.3 on selection methods, in view of the market monitoring implemented within the BilKo Directorate, the PRC notes that BaFin's MAR team no longer plays the pivotal role vis-à-vis EFI it used to at the time of the FTPR. Therefore, together with the extensive prohibitions pertaining to trading in financial instruments as well as provisions relating to conflicts of interest, the PRC's recommendation addressed to BaFin regarding its MAR team members (GL3-4) is addressed.
25. Given the above-mentioned extensive restrictions and obligations, the design of BaFin's general framework on financial holdings appears to generally be adequate.

4.2.1.2 Cooling off

26. As part of their onboarding process, all prospective new staff members are asked whether in the preceding two years they have worked for an issuer of financial instruments admitted to trading on a regulated market or the regulated unofficial market to assess whether there could be a conflict of interest and how to address it.
27. When BaFin staff leave, different cases arise:
 - a) Civil servants should notify BaFin of the employment taken up after service which BaFin can forbid for up to five years;
 - b) Employees are subject to a staggered notice period of maximum 6 months to the end of a quarter;
 - c) During the notice period of either civil servants or employees, they can be released of their duties should there be a conflict of interest.
28. BaFin has proposed a draft regulation to provide for a statutory regulation for a 6-month cooling off period for both groups of staff (civil servants and employees).

PRC assessment

29. In view of the above, the PRC considers that, with the draft regulation, the measures implemented by BaFin go in the right direction to fully address the recommendations to introduce cooling off periods as an important measure to increase supervisory independence (GL3-5 and GL3-7).

4.2.2 Independence from government

30. The PRC recommended that BaFin introduce stricter limitations to the detail and frequency of reporting to the Ministry of Finance (MoF) in the context of ongoing examinations (GL3-6).
31. Similarly to the topic of independence of BaFin staff from issuers, in addition to its assessment against the GLEFI as described in paragraph 8, the PRC was also mindful of their being consistent with the Joint European Supervisory Authorities' criteria on the independence of supervisory authorities¹⁷.
32. The PRC sought to obtain an understanding of the following from BaFin:
 - a) The nature of the interactions and reports between BaFin and the MoF;
 - b) The amount and frequency of reports and the number of files concerned;
 - c) The nature of the issue prompting the reports;
 - d) The level of detail of such reports; and
 - e) The level and type of subsequent interaction with the MoF.
33. By virtue of law (FinDAG), BaFin is subject to the legal and technical oversight of the MoF, which bears the political responsibility for BaFin's activities. This was repeated and detailed to some extent in the principles of cooperation¹⁷ published on BaFin's website in May 2022. As such, "*BaFin is operationally independent in its supervisory measures and takes supervisory measures under its own responsibility*". Legal oversight pertains to assessing whether BaFin's actions comply with laws and regulations whilst technical oversight pertains to assessing the efficiency and competence of the organisation in carrying out its technical work as well as the quality of administrative decisions.
34. The principles of cooperation indicate that "to the extent that involvement of the MoF is not provided for by law, the supervisory measures taken by BaFin are not reviewed ex-ante by the MoF" (principle 2). However, the oversight of the MoF entails some reporting by BaFin to the MoF which can be either on a regular basis in the form of standardised reports or in the form of ad-hoc reports. The MoF may request the latter in specific circumstances such as where "there is concern about potential far-reaching impacts on the financial market as a whole or on individual sectors, if a critical infrastructure is affected, if there could be a risk of substantial losses for investors or consumers, in the case of actual or potential public interest, if responsibility for integration in EU matters is

¹⁷ JC 2023 17 - [Joint European Supervisory Authorities' criteria on the independence of supervisory authorities](#). 25 October 2023

¹⁷ [BaFin - Law & Regulation - Principles of cooperation](#)

affected, or if this is otherwise necessary for the MoF to fulfil its duties”. In addition, the principles of cooperation foresee that “BaFin informs the MoF of any politically important supervisory decisions, or any such decisions requiring publication, upon their issuance” Therefore, in situations referred to above, such reports could relate to individual issuers.

35. In terms of ongoing examinations, BaFin would also inform the MoF ex-ante in cases of high public interest as well as in case of expected media coverage to avoid the MoF being taken by surprise. In both cases the reports would be short and factual. Another case of ex-ante information would be to enable the MoF to fulfil its legal duty of information towards the German Parliament, in which cases the content of the report would be tailored to enable the MoF to respond to the inquiries by the German Parliament.
36. According to BaFin, all reports from BaFin to the MoF, also with respect to ongoing or planned examinations, are purely intended to inform the MoF about supervisory measures. In other words, they are not intended to consult, seek advice or approval by the MoF.

PRC Assessment

37. Based on the information provided by BaFin, apart from the reports pertaining to Parliamentary inquiries, the PRC understands that BaFin reports to the MoF have been provided in accordance with the agreed principles of cooperation and more specifically with an objective of only informing the MoF and were factual, limited in number (both of reports and issuers reported on) and content.
38. The PRC notes that its assessment in the context of the FTPR related to a specific case and that it is now following up on it by considering the framework put in place and not specific cases. With this in mind, although the PRC welcomes that principles of cooperation are formalised to support BaFin’s operational independence and responsibility in relation to the supervisory measures it takes, the PRC notes that some cases could exist where proposed supervisory measures are reported ex-ante to the MoF and that the scope of requests for reports by the MoF is rather broad. Therefore, the risk of influence by the MoF cannot be totally excluded.

4.3 Selection Methods (GL 5)

Selection should be based on a combination of a risk-based approach, random sampling and rotation¹⁸ to ensure that all issuers are selected within a reasonable period of time. Determination of risk should be based on the combination of the probability of infringements and the potential impact of an infringement on the financial markets¹⁹.

The FTPR identified weaknesses in the selection, by FREP, of Wirecard based on concrete and/or abstract risk over the period covered by the review and formulated the recommendations hereafter:

Guideline 5 Selection Methods	
GL5-1	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.
GL5-2	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.
GL5-3	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.
GL5-4	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

¹⁸ [esma32-50-218_guidelines_on_enforcement_of_financial_information_en.pdf \(europa.eu\)](#), paragraph 54.

¹⁹ [esma32-50-218_guidelines_on_enforcement_of_financial_information_en.pdf \(europa.eu\)](#), paragraph 55.

	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.
GL5-5	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.).
GL5-6	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.

39. The FTPR report included recommendations with respect to the selection of issuers respectively to FREP and to BaFin. As BaFin is now solely in charge of the process of enforcement of financial information, the PRC considered the recommendations formulated towards FREP as relevant to consider in assessing whether BaFin's new selection model addressed the shortcomings identified in the FTPR and generally conforms with the GLEFI.
40. In making its assessment of the follow-up of the FTPR recommendations, the PRC not only took into account the related guidelines foreseen by the GLEFI but also ESMA's supervisory briefing on selection methods.

4.3.1 Media analysis / Market monitoring

41. In the context of media analysis, i.e. reviewing information arising from media such as allegations arising by journalists and analysts, the PRC formulated two recommendations. The first one advised BaFin to review media and make their own assessments as to whether the allegations included therein should be pursued and should lead to examinations. The second one advised both FREP and BaFin to expand the media review coverage to international newspapers with widespread acceptance in the sphere of international finance. In particular the PRC recommended that, when the enforcement authority identifies allegations, it documents the analysis made and its

conclusions, notably, whether these allegations were grounded, specific or mere speculations.

42. BaFin indicated that they expanded, the media coverage to consider a wide range of newspapers including international newspapers and online platforms.
43. The new procedures entail a daily analysis of newspaper articles by two persons within the BilKo teams which are familiar with financial reporting requirements. The purpose is to understand if the content of these articles should prompt an examination with cause ('Anlasspruefung'). When articles in newspapers pointing to potential concrete risk of infringements in financial reporting are considered reliable and grounded, a third member of BilKo (senior officer) reviews them, subsequently deciding whether to send these relevant articles to the BilKo team in charge of the supervision of the issuer. The BilKo team in charge conducts a more detailed assessment and decides whether to initiate an examination with cause. According to BaFin, the decision to start an examination with cause is duly documented.
44. When articles addressing financial reporting features of specific issuers are identified during the media analysis but do not lead to an examination with cause, BilKo staff collect this information to complement the risk profile of an issuer (i.e. abstract risks analysis). BilKo staff collect data regarding (i) the main issues addressed, (ii) the date of occurrence and (iii) number of times that the issuer is referred to in the media. This data is subsequently factored into the annual selection of issuers subjected to examinations without cause ('Stichprobenartige Pruefung').

PRC Assessment

45. Based on the information received from BaFin the PRC considers that the recommendations aiming to broaden the monitoring of public information (GL5-1 and 2) were addressed. BaFin (i) undertakes its own analysis of media, (ii) has increased the media coverage and (iii) documents the analysis made and its main conclusions when decides to undertake an examination with cause.

4.3.2 Selection methods

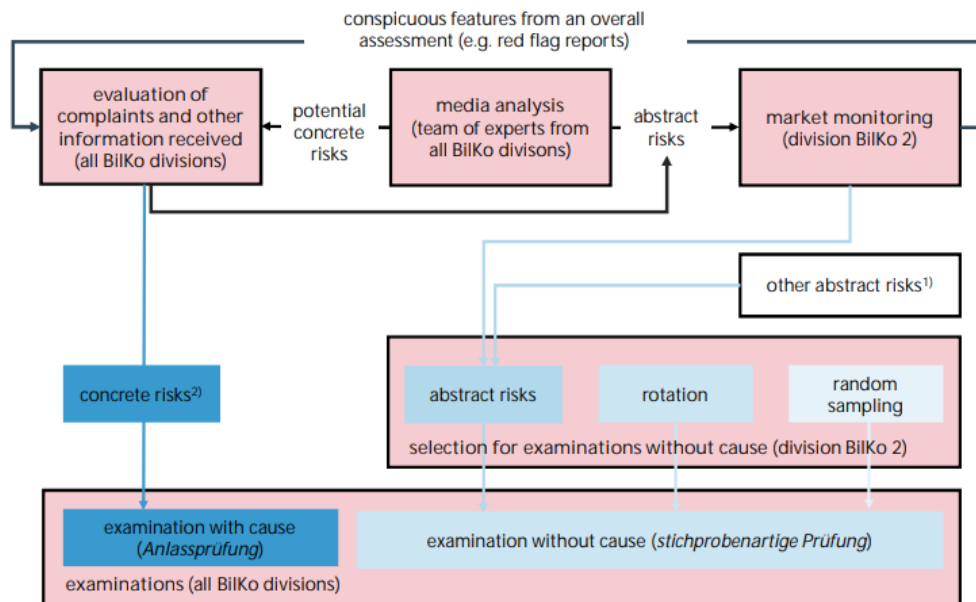
46. Following the Wirecard case and the reform of the enforcement system in Germany, BaFin has implemented a new model to select issuers for examination.

4.3.2.1 Risk-based selection

47. Similarly, to the risk approach followed by FREP, BaFin's new selection model considers two distinct risk components:

- a) Concrete risk: when grounded indications are identified through, amongst other means, the media analysis, whistleblowing complaints or third-party indications such as referrals from other authorities or auditors, BaFin should initiate an examination with cause.
- b) Abstract risk: when signals that may indicate a higher probability that the financial reporting may contain material misstatements [REDACTED] [REDACTED] are identified, BaFin collects such signals and takes them into account in the selection process for examinations without cause.

Figure 2: Issuer selection process chart



¹⁾ not covered by market monitoring

²⁾ here: *konkrete Anhaltspunkte* according to the definition of the German Securities Trading Act

48. The FTPR recommendations specifically related to the abstract risk component of the risk approach (item b above). Notably, the PRC recommended that FREP (i) include data to identify trends in accounting figures (accounting data), (ii) considered more prominently indicators representing the potential impact of an infringement on financial markets and (iii) assign a weighting of the different abstract risks or increase the percentage of issuers selected based on abstract risk. The PRC focused on these recommendations and, specifically, on how abstract risks are factored into BaFin's new selection model.
49. It is important to highlight that, as of 31 December 2023, some features of the new selection model were not completely implemented. However, BaFin provided explanations of the changes foreseen to the model (which were implemented from February 2024 onwards). The following paragraphs address the changes implemented in 2024 as described by BaFin as well as the features that were effectively in place in 2023.
50. According to BaFin, the 2024 selection model will take into account 33 risk indicators clustered into five distinct categories pertaining to:
- a) BaFin's internal supervisory data [REDACTED];
 - b) Issuers' accounting data [REDACTED];
 - c) Issuers' economic situation [REDACTED];
 - d) Issuers' corporate governance and audit;
 - e) Issuers' [REDACTED] impact on the financial markets.
51. Risk indicators representing the potential impact of an infringement on financial markets (item e in the above list) have equal weight than the combination of all the remaining categories (items a to d in the above list).
52. According to BaFin, from 2024 onwards, issuers admitted to trading on regulated market in Germany will be ranked according to all the above risk indicators and the riskier issuers will be selected for examination.

53. In addition to selection of issuers based on the scoring system and in accordance with paragraph 57 of GLEFI, where necessary, BaFin determines a separate sample to assess issuers' adherence with enforcement priorities such as the European common enforcement priorities (ECEP)²⁰ as well as BaFin enforcement priorities.
54. As of 31 December 2023, BaFin had in place a selection model which considered 14 (out of 33) risk indicators [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].
55. Nevertheless, although subject to a limited number of risk indicators, in 2023, issuers were already ranked for the purpose of selection.

PRC Assessment

56. Based on the above and provided that the changes foreseen for 2024 to the selection model are effectively implemented, the PRC considers that, overall, BaFin has addressed recommendations GL5-2 to GL5-6.

4.3.2.2 Random and rotation selection

57. The new selection model implemented by BaFin comprises, as prescribed by the GLEFI²¹, both rotation and random components in addition to risk-based selection. As such, the PRC considers that the approaches of random and rotation set out by BaFin within the new selection model are aligned with the GLEFI principles in this regard.
58. With regards to the priorities of examinations derived from the selection model in place, BaFin confirmed that when planning the examinations within a given year, the priority is given to (1) examinations based on concrete risk, (2) examinations based on abstract risk, (3) examinations based on the random component and (4) examinations based on

²⁰ To promote supervisory convergence, enforcers under ESMA coordination should identify common accounting matters for enforcement of financial information in the EEA which should be made public sufficiently in advance of the end of the reporting period ([esma32-50-218 guidelines on enforcement of financial information en.pdf \(europa.eu\)](#), paragraph 79). These common accounting matters are made public in a statement called European Common Enforcement Priorities (ECEP).

²¹ As revised in 2020.

the rotation component (the last three representing examinations without cause or sampling examinations). The PRC considers this list of priorities adequate.

4.4 Examination procedures (GL 6)

According to the GLEFI, grounded complaints should be considered for enforcement examinations²².

The FTPR noted that FREP had considered it was not able to directly interact with a whistleblower due to legal impediments and recommended this be addressed.

Guideline 6 Examination procedures

	If there are indeed any legal impediments to FREP interacting with a whistle-blower, 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.
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4.4.1 Interaction with whistleblower

59. In the course of the FTPR, the PRC was made aware of the fact that there could be impediments preventing FREP from interacting with whistleblowers and recommended that this be addressed from a legal point of view.
60. As BaFin is now solely in charge of EFI, the PRC's recommendation with respect to FREP is no longer relevant. However, with respect to BaFin, the PRC notes that BaFin has a whistleblowing system in place which offers absolute anonymity yet enables BaFin to interact with the whistleblower, subject to agreement by the whistleblower to such interaction.

²² [esma32-50-218_guidelines_on_enforcement_of_financial_information_en.pdf \(europa.eu\)](#), paragraph 56.

61. In this respect, BaFin also mentioned that, if a whistleblowing complaint is received during an ongoing examination, this complaint is forwarded to the team in charge of the examination to be considered as part of the examination procedures pursued.

PRC Assessment

62. In view of the above, the PRC considers that BaFin has an adequate system in place enabling it to take into account and handle complaints, whistleblowing complaints and interact with the whistleblower when possible.

4.5 Timely detection of issues and taking of measures

In accordance with the Transparency Directive²³, competent authorities should have all investigative powers that are necessary to the exercise of their functions.

The FTPR noted that FREP and BaFin may not have had 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. This situation led to formulating the following recommendations:

Legal or procedural impediments that prevented BaFin and/or FREP from, on a timely basis, detecting, supervising/examining financial information published	
EF1	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.
EF2	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.
EF3	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

²³ Article 24 (4a)

	FREP conducts a specific examination. This may need to be addressed in the legal framework.
EF4	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.

63. As a result of the FTPR, the PRC formulated four recommendations with respect to timely detection of issues and taking of measures.
64. The first recommendation, EF1, related to the legal framework enabling BaFin and/or FREP to use general powers pertaining to monitoring compliance with and enforcing legal acts (including publications of warnings, prohibiting trading or suspending trading), requesting information from any person, entering property and business premises, performing searches as described in legislative mandates²⁴ in the context of supervision of financial reporting. The FISG expanded BaFin's investigative powers to enable forensic investigations with the right to publish information on enforcement proceedings, the right to request information from anyone, as well as with expanded rights to entry and the possibility to search and seizure in additional paragraphs of the Securities Law. These powers are equivalent to those referred to in the FTPR's recommendation.
65. The other three recommendations related to the interactions between FREP and BaFin. With BaFin now solely responsible for the enforcement of financial information, these recommendations are no longer relevant.

PRC Assessment

66. The PRC therefore considers all recommendations formulated with respect to timely detection of issues and taking of measures to be addressed.

²⁴ Sections 6(2), (3), (11), (12) of the Securities Law (WpHG - Wertpapier-Handelsgesetz)

4.6 Cooperation and exchange of information

The supervisory system should be efficient regardless of how supervision is organised. Relevant information should be shared between relevant parties and acted upon adequately²⁵.

The FTPR uncovered that legal or procedural impediments, amongst others pertaining to confidentiality regimes or agreements, prevented BaFin and/or FREP from cooperating and exchanging information between themselves and other relevant authorities (e.g. Audit Oversight Body (AOB)). Accordingly, the FTPR made the following recommendations:

Legal or procedural impediments preventing BaFin and/or FREP from cooperating and exchanging information between themselves and other relevant authorities.	
CO1	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.
CO2	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.
CO3	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.

67. In the context of the FTPR, the PRC formulated three recommendations in relation to external cooperation, the first (CO1) in relation to the Audit Oversight Body (AOB) with the other two relating to the cooperation between BaFin and FREP.

²⁵ FTPR mandate paragraph 27, [esma42-111-5349 fast track peer review report - wirecard.pdf \(europa.eu\)](#), page 145.

68. As BaFin is now solely responsible for the enforcement of financial information, the latter two recommendations are no longer relevant and the PRC therefore focused on the recommendation pertaining to the interaction of BaFin with the AOB.
69. The FISG authorises exchanges of information between various institutions, including BaFin and the AOB, and frees them from confidentiality obligations including as regards personal data to the extent necessary, to enable each institution to fulfil their respective duties. BaFin reported that, with this formal obstacle removed, BaFin and the AOB agreed on principles of coordination in December 2022. Such principles identify points of contact, foresee the organisation of meetings at least twice a year and the exchange of information on supervisory priorities. They also include ad hoc exchange of information and documents on specific supervisory cases where (potential) accounting infringements may exist but also where issues are encountered with respect to auditing requirements.

PRC Assessment

70. Given the information provided by BaFin and in view of the increased, more frequent and qualitative sharing of information between BaFin and the AOB, the PRC considers its recommendation CO1 to be addressed.

4.7 Efficient and effective flow of information within BaFin

To ensure efficient and effective supervision, relevant information should be shared between different departments²⁶ of a supervisory authority.

The FTPR identified lack of coordination and/or procedural inefficiencies within BaFin which led to the following recommendations:

CO1	The PRC recommends improving internal communication at BaFin, especially with regards to complaints and media articles dealing with allegations about companies' accounts.
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²⁶ FTPR mandate paragraph 27, [esma42-111-5349 fast track peer review report - wirecard.pdf \(europa.eu\)](#), page 145.

71. Regarding the flow of information within BaFin, the PRC had recommended that internal communication, especially with respect to complaints and media articles dealing with allegations about companies' accounts be improved to remove inefficiencies.
72. To enhance cooperation and communication between the Bilko Directorate and other BaFin Directorates and sectors and to better and earlier identify risks, BaFin indicated that it implemented Single Points of Contact (SPOCs). The purpose of SPOCs is to facilitate the implementation of supervisory measures with respect, for instance, to the supervision of banks and credit institutions as well as that of insurance companies. Each SPOC collates all information with respect to a supervised entity and coordinates the exchanges with the supervisory authority. In addition, as BaFin is an integrated supervisor, BilKo staff also join prudential bank or insurance coordination meetings.
73. In addition, BaFin set up a new Division called 'Coordination of Focused Supervision & Task Force' (KFT). This division advises the Executive Board on strategic and analytical matters. It is responsible to coordinate the cross divisional supervision of selected institutions and companies of particular relevance and the mobile intervention force that carries out on-site inspections at short notice, thus enabling the facts to be clarified quickly. This Division supports the individual Divisions/Directorates by setting standards, analysis, control and quality management. It can inform the BilKo Directorate where it identifies indications of potential breaches of accounting standards through its activities. The KFT organises supervisory conferences and meetings for direct exchange between supervisors and top management level.
74. BaFin's BilKo Directorate implemented processes to scrutinise the media (see above under section 4.3.1) for its specific purposes and independently from BaFin's general market monitoring. It also coordinates with the newly established division "Market Analysis/Coordination with KFT and DIU" (WA 13) regarding market signals and in dealing with complaints.

PRC Assessment

75. It is the PRC's understanding that BaFin has implemented measures which appear to improve the flow of information across the institution to address its recommendation.

4.8 Compliance in full with the GLEFI

<p>To ensure supervisory convergence across the European Union, all competent authorities should comply with the Guidelines applicable to them. In the case of enforcement of financial information, competent authorities should comply to the GLEFI.</p> <p>Legal or procedural impediments that prevented BaFin and/or FREP from complying in full with the GLEFI.</p>	
	<p>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 the GLEFI. This may need to be addressed in the legal framework.</p>

76. In the FTPR report, the PRC noted that Germany was still not fully compliant with the GLEFI, in particular with Guidelines 7 and 17 on enforcement actions and publication of enforcers' decisions respectively, due to legal impediments pertaining to the lack of enforcement powers and the confidentiality regime. The FTPR recommended this to be addressed.
77. The FISG expanded BaFin's powers in terms of requiring reissuance and corrections in future financial statements and introduced the possibility that BaFin enforcement decisions are published on an anonymous basis in ESMA's extracts of EECS decisions.

PRC Assessment

78. The PRC welcomes the fact that BaFin declared full compliance with the ESMA's GLEFI in January 2022.