

RegCORE Client Alert

New rules for BaFin employees on private financial transactions in force

September 2022

Reforming BaFin

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New rules take effect

In the summer of 2020, following the downfall of the DAX-listed company Wirecard, BaFin rapidly tightened its formerly lax rules for financial transactions by its employees by introducing “transition arrangements” on 16 October 2020. During the course of the scandal, it was revealed that some BaFin employees had traded in Wirecard derivatives just prior to the company's demise. The authority reported one employee for insider trading suspicions and then released him. The most recent information from BaFin indicates that “all suspicions have been cleared” in this case.

On 1 September 2022, new “service instructions” pursuant to Section 11a of the Financial Services Supervision Act (**FinDAG**)¹ setting restrictions of private financial transactions by employees of the Federal Financial Supervisory Authority (**BaFin**) entered into force.² The new BaFin President Mark Branson emphasised that these new regulations are some of the strictest in existence. These service instructions require that:

- Trading in financial instruments relating to any credit institutions, insurance companies, or other financial institutions based in the European Union is prohibited for all BaFin employees in supervisory areas (this affects 90 percent of employees).
- Trading in financial products that are traded on a domestic organised market is prohibited for all BaFin employees.
- All BaFin employees are prohibited from engaging in speculative financial transactions, also referred to as short-term trading, such as with derivative financial instruments or stocks.
- From the first euro transacted, every BaFin employee is required to report financial transactions.

¹ Available [here](#) (in German only).

² Available [here](#) (in German only).

BaFin has furthermore used the option provided in Section 11a (2) FinDAG to extend the trading bans governed by Section 11a (1) FinDAG to ban on financial instruments traded on the domestic over-the-counter market, which will also apply to some employees, primarily those involved in market surveillance.

Despite the wide-reaching and strict bans introduced, there is little clarity on what this means for transactions in cryptoassets as well as transactions that are not conducted by an employee of BaFin but by a connected person of that employee.

What the new rules to clarify and reinforce is that affected staff are required, in addition to ex ante and ex post trading, to also provide an annual compliance statement in relation to their private financial transactions. This also applies to disclosure of discretionary portfolio management arrangements, which also need to be provided to BaFin.

Trends in private financial transactions activity

In the first half of 2022 compared to the first half of 2021, the total amount of private financial transactions at BaFin are reported to have nearly decreased by half. Orders for individual stocks decreased by 78% (from 56% in 2021 to just 23% in 2022) while orders for funds/ETFs increased by 4%. (23 percent in 2021 and 45 percent of orders in 2022).

Following the events related to Wirecard, the BaFin had established there were indications of a violation the EU's Market Abuse Regulation in connection with 42 employees (as of July 31, 2022) in the course of the BaFin's subsequent additional checks and in the course of the BaFin's regular reviews of transactions from the years since 2018. The primary charge in these cases is a failure to comply with the requirement to report right away (37 cases). Three of the cases focused on speculative trading, and one included both insider trading and a breach of the obligation to cooperate.

Of these 42 suspected cases, official proceedings have been completed in eleven, administrative proceedings in twelve more are still on-going, and the opening of proceedings in 19 more are still being considered. Seven of the eleven closed cases were dropped after further clarification as minor misconduct, while four of the closed cases led to action against employees, including fines. In the lone instance where evidence of illegal insider trading was discovered, all rumours could be proven false. As a result, the German criminal justice system's investigations into prohibited financial dealings of BaFin employees have come to an end.

Outlook

The BaFin's newest rules on restricting private financial transactions of its employees follow similar efforts of those undertaken by a range of other EU national competent authorities as well as reforms to the rules binding upon staff of the European Central Bank, in particular for those staff acting in their supervisory functions in the context of the Banking Union's Single Supervisory Mechanism.

While supervised firms that provide various financial services to supervisory staff as well as other staff employed by (and seconded to) the various national and EU-level authorities that make up the European System of Financial Supervision do not have a direct compliance obligation to comply with such internal rules of the authorities, there is nevertheless a general supervisory expectation that such firms review the dealings/transactions of their clients that are employed by such authorities as well as those that are their connected persons. This is an important consideration for financial services firms, in particular in relation to cross-border business and in circumstances where rules and restrictions that apply to such persons may differ between authorities as well as where business is executed.

With further harmonisation of such internal rules across various national and EU-level competent authorities on the horizon (and the same is happening also globally in notably the US, UK and in Asia) financial services firms may want to ensure that they can evidence that they are not being indirectly complicit in dealings or transactions that such internal rules explicitly and/or implicitly seek to prohibit. Furthermore, while these rules all largely aim to limit transactions that are directly or indirectly linked to supervised financial instruments, they are in certain instances, less clear as to how they might apply to "real economy" corporate financial assets. This is particularly problematic for transactions involving staff of such authorities that may relate to the corporate financial assets that are also being purchased in the context of monetary policy activity and whether this might present a potential or actual conflict of interest or other ethical questions about trading activity of staff while at the same time not curtailing their legitimate financial interests.

About us

PwC Legal is assisting a number of financial services firms and market participants in forward planning for changes stemming from these developments.

If you would like to discuss any of the developments mentioned above, or how they may affect your business more generally, please contact any of our key contacts or PwC Legal's EU RegCORE Team via de_regcore@pwc.com or our [website](#).

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