

OPINION OF THE EUROPEAN SECURITIES AND MARKETS AUTHORITY

of 18 February 2019

on a proposed emergency measure by BaFin under Section 1 of Chapter V of Regulation (EU) No 236/2012

In accordance with Article 44(1) of Regulation (EU) No 1095/2010, the **Board of Supervisors** has adopted the following opinion:

I. Legal basis

1. According to Article 27(2) of Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps¹ (the Regulation), the European Securities and Markets Authority (ESMA) shall within 24 hours of the notification made by a competent authority under Article 26 of that Regulation, issue an opinion on whether it considers the measure or proposed measure is necessary to address the exceptional circumstances.
2. ESMA's competence to deliver an opinion is based on Article 29(1) (a) of Regulation (EU) No 1095/2010 (ESMA Regulation). In accordance with Article 44(1) of the ESMA Regulation the Board of Supervisors has adopted this opinion.

II. Background

3. In accordance with Article 26 of Regulation (EU) No 236/2012, the Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) notified ESMA on 17 February 2019 of its intention to make use of its powers of intervention in exceptional circumstances and to introduce an emergency measure under Article 20(2)(a) and (b) of that Regulation.
4. The concerned emergency measure bans opening or increasing net short positions on shares issued by Wirecard AG (ISIN DE0007472060, hereinafter 'Wirecard'), either directly or through related instruments relevant for the calculation of the net short position determined in Annex I, part 1, Articles 5 and 6 of Commission Delegated Regulation (EU)

¹ OJ L 86, 24.3.2012, p. 1–24.

No 918/2012 and irrespectively of the trading venue or market in which the transactions leading to those positions are conducted.

5. The measure applies to any natural or legal person domiciled or established within the Union or in a third country.
6. The proposed measure will not apply to trading in index-related instruments. Furthermore, BaFin specified that market making activities are exempt from the restrictive measure.
7. BaFin indicates in their notification that convertible bonds and subscription rights in shares which are not yet issued should not be included in the calculation of the short or long side for the purposes of calculating the net short positions, as foreseen in Article 7(b) of Commission Delegated Regulation 918/2012.
8. The proposed measure is expected to enter into force on 18 February 2019 at 06:00 am CET and to be applicable until close of day on 18 April 2019. The proposed measure may be lifted before the deadline or extended depending on the market conditions.
9. BaFin justifies the proposed measure by the existence of specific adverse situations or circumstances that constitute a serious threat to market confidence in appropriate price determination in Germany.
10. Wirecard has experienced severe share price falls in the preceding two weeks: from 30 January 2019 to 15 February 2019, the price of the shares dropped from €167,00 (opening on 30 January) to €99,90 (close on 15 February), reducing the market cap by 40 percent. In particular, the prices of Wirecard shares fell after press reports about alleged fraud committed by several employees of Wirecard subsidiaries in Singapore had been published.
11. The negative press reports coincided with increased net short positions and with a corresponding high level of price volatility of Wirecard's shares.
12. Wirecard is a payment service provider with an international presence, headquartered near Munich. It is admitted to trading on the Frankfurt Stock Exchange and is included in the DAX 30, the most relevant German index that tracks the price development of the 30 largest and most actively traded German equities. Wirecard was included in the index on 24 September 2018. Its market capitalisation on 15 February 2019 was €12.6 billion with 123,5 million shares issued. The turnover was €897 million in the first half of 2018 and €1.489 million in 2017.
13. Wirecard offers its customers electronic payment transaction and risk management solutions, as well as the issuing and processing of physical and virtual cards, it has connections to more than 200 international payment networks (banks, payment solutions, card networks), which results in 34,000 customers from various industries, and offers its services in over 100 transaction currencies. One of its subsidiaries is Wirecard Bank AG,

which holds a German banking license. Wirecard is also the parent company of Wirecard Card Solutions Limited, a firm that received permission by the UK Financial Conduct Authority to issue electronic money (e-money) and provide payment services. In March 2017, Wirecard acquired Citi Prepaid Card Services and created Wirecard North America, thereby becoming active in the US market.

14. BaFin reports that the price movements mentioned above need to be considered in the context of past experiences in German markets, where several German issuers have been the targets of increased short-selling activity, which in BaFin's opinion endangered market integrity and the trust of investors in an appropriate and efficient price determination.
15. BaFin reports that Wirecard specifically experienced this in 2008 and 2016, which led BaFin and the public prosecutor's office to investigate whether market manipulation took place. The public prosecution office has recently applied at the court for a penalty order because of market manipulation in the context of the event in 2016.
16. The recent events once again prompted the public prosecutor of Munich to launch an investigation regarding possible market manipulation. The public prosecution office also confirmed that currently no investigation has been opened against Wirecard.
17. BaFin indicates that the current situation may lead to reduced confidence of investors active in the German market for the investors active in the German market, as reliable price determination may no longer be taken for granted. An additional problem identified by BaFin is the potential contagion risk, with the lack of confidence regarding an appropriate price determination extending to other issuers, including DAX issuers and financial institutions.

III. Opinion

18. ESMA considered the information provided by BaFin and is adopting the following opinion on the notified measure, on the basis of Article 27(2) of the Regulation:

On the adverse events or developments

19. ESMA considers that the circumstances described above are adverse events or developments which constitute a serious threat to market confidence in Germany, as described in Article 20(1)(a) of Regulation (EU) No 236/ 2012 and as further specified in Article 24 of the Commission Delegated Regulation No 918/ 2012.
20. First, as indicated above, Wirecard is among the 30 largest and most actively traded German equities, with connections to more than 200 international payment networks. Moreover, a subsidiary of Wirecard, Wirecard Bank AG, holds a German banking license, and another subsidiary, Wirecard Card Solutions Limited, received permission by the UK Financial Conduct Authority to issue electronic money (e-money) and provide payment services.

21. Wirecard was already the target of increased short selling activities in 2008 and 2016.
22. In particular, a 40% decrease in the Wirecard share price occurred between 30 January and 15 February 2019. In this time-period, the share price movements followed a pattern of suddenly dropping a the few minutes after the news reports in the media. Concomitantly to the news reports (taking place on 30 January, 1, 7 and 8 February) BaFin observed a steep increase in the net short positions in Wirecard shares, particularly evident from 7 February onwards.
23. ESMA agrees with BaFin that the increase in the volatility observed in Wirecard shares is noteworthy. In particular²:
 - a. In the three-months period preceding 30 January 2019, the historical volatility was quite stable, with a decrease of approximately 15 points at the beginning of January 2019 and reaching the minimum value of 49.13% on 29 January 2019. The historical volatility considerably increased from 30 January to 14 February 2019. In particular, it reached 57.45% on 30 January, decreased to 55.73% on 31 January, reached 82.09% on 1 February, 93.94% on 7 February, 97.52% on 8 February and 99.07% on 14 February 2019.
 - b. As regards the implied volatility, it closely follows the pattern of the historical one until 1 February 2019: it was quite stable in the three months preceding 30 January 2019, reaching the minimum value of 38.66% on 22 January 2019 and 40.81% on 29 January 2019. The implied volatility considerably increased from 30 January to 14 February 2019. In particular, it was 46.36% on 30 January, reached 80.20% on 1 February, decreased in the following days, reaching 61.26% on 5 February and then increased again, reaching 77.96% on 7 February, 100.15% on 8 February and then decreased in the coming days, reaching 81.50% on 14 February 2019.
24. ESMA believes that the price drop, the sharp increase in the net short positions and the high volatility observed in the prices of Wirecard shares constitute a threat to the orderly markets and to market confidence if those circumstances have not been caused by the release of fundamental information related to Wirecard. ESMA also notes that BaFin reports a risk of contagion to other shares of the DAX.
25. The possibility that the large short positions and the severe declines in price observed over the last weeks might correspond to manipulative practices constitutes in ESMA's view a clearly adverse scenario for market confidence, as it risks undermining investors' trust in the price formation mechanism.
26. ESMA also notes that the coincidence in time of the building up of significant net short positions, the publication of the news reports and the abrupt price declines described by

² Source: Bloomberg data.

BaFin deserve further investigations, in particular since similar situations took place in 2008 and 2016, that were subject to scrutiny by BaFin and German public prosecutors.

On the appropriateness, necessity and proportionality of the measure

27. ESMA considers that the emergency measure under Article 20(2)(a) and (b) of Regulation (EU) No 236/2012 and Article 24(1)(c) of Commission Delegated Regulation 918/2012 in relation to Wirecard shares is appropriate, necessary and proportionate to address the existing threat to market confidence in the German market.
28. Wirecard has experienced severe share price falls (40%) and a sharp increase in net short positions in its shares over the last two weeks. Whereas there have been a number of press reports over that period that might justify increasing selling pressure on the Wirecard shares and the opening and increase of net short positions, the circumstances identified (namely, the short timeframe within which the building of net short positions, the publication of the different press reports and the corresponding price declines took place and the concurrence of similar events back in 2008 and 2016) raise reasonable questions about the possibility of a coordinated action aimed at manipulating the market in Wirecard's shares.
29. Given the circumstances highlighted by BaFin and explained in the background section, substantial selling pressure and unusual volatility in the price of shares issued by Wirecard could continue to occur, as market participants may be pushed to take out new short positions in order to profit from further price falls, which may in turn exacerbate the falls experienced in past weeks.
30. ESMA notes that in case such downward spirals continue there might be further implications both for the level of the confidence in the German market and potentially for the wider financial system.
31. As regards the overall confidence in the price formation process in German market, ESMA agrees that it is necessary to address the intensified short-selling activity in Wirecard shares and the surrounding events, in particular since similar events have been identified in the past, in order to limit the risk of possible contagion to other issuers.
32. The potential impact on the financial system are based on Wirecard's status as a payment service provider with a network of connections to customers in multiple economic sectors, among them the banking sector. Moreover, ESMA notes that Wirecard operates through subsidiaries in the US market (Wirecard North America), Brazil (Wirecard Brasil) and Asia (Wirecard Asia Pte Ltd.), and is the parent company of Wirecard Card Solutions Limited, a firm that received permission by the UK Financial Conduct Authority to issue electronic money (e-money) and provide payment services. ESMA notes as well that BaFin has expressed concerns about the possibility of similar practices (in case the suspicions of market manipulation were confirmed) extending to other DAX 30 issuers some of which are financial institutions and market infrastructure providers.

33. ESMA considers that the measure is necessary because it appears to be the least stringent of all the measures that could adequately address the threat to confidence in the German market. A temporary restriction on short selling according to Article 23 of the Regulation (EU) No 236/2012 would not address the threat to market confidence as it would remain applicable for a few days only (i.e. a maximum of three trading sessions if renewed). A mere prohibition of short sales would not cover activities concerning derivatives leading to the build-up of net short positions.
34. The measure will not in ESMA's view have a detrimental effect on the financial markets that is disproportionate to its benefit. The reason is that the measure would mitigate and prevent substantial selling pressures and the unusual volatility causing a significant downward spirals in Wirecard's share prices having an impact on overall market confidence in the German market at the expense of only limiting the ability of market participants to enter into new short positions or increase existing net short positions for a certain period of time.
35. ESMA considers that BaFin also limits the impact of the ban, and any potential detrimental effects on financial markets by not extending the prohibition to index-related instruments and to market making activities, and by allowing covered short sales that do not increase a market participant's net short position.

On the duration of the measure

36. ESMA considers that the two months duration of the measure, instead of the maximum period of three months allowed by the Regulation, is adequate, also considering that BaFin may lift the measure ahead of its expiry, taking into account market conditions.
37. In light of the above, ESMA recommends BaFin to closely monitor the market conditions and to consider lifting the measure before the initial deadline if the situation so permits, to ensure that the restrictions remain in place for the shortest possible time.

This opinion will be published on ESMA's website.

Done at Paris, 18 February 2019

For the Board of Supervisors

Steven Maijoor

Chair