

Decision in case 339/2022/SF on how the European Banking Authority (EBA) examined the role of the German Banking Supervisor (BaFin) in the collapse of financial and payment services company Wirecard

Decision

Case 339/2022/SF - Opened on 29/03/2022 - Decision on 29/03/2022 - Institution concerned European Banking Authority (No maladministration found) |

Dear Mr X,

You recently submitted a complaint to the European Ombudsman against the European Banking Authority (EBA) concerning the above issue.

As a preliminary remark, please note that the Ombudsman must follow certain rules for dealing with complaints. One of these rules is that the complainant must first have contacted the EU institution concerned about the problem before turning to the Ombudsman. This is to give the EU institution itself an opportunity to deal with the problem, without the need to involve the Ombudsman.

In its email of 28 January 2022, the EBA offered you the opportunity to comment, within two weeks, on its conclusion not to open an investigation following your request. According to the information you have sent us, it appears that you have not submitted any comments to the EBA. Normally, this would mean that the Ombudsman cannot deal with your complaint. In this case, however, we consider that it was not clear from the information the EBA provided in its email of 28 January that you had to submit comments to the EBA **before** being able to turn to the Ombudsman. We are also aware that, as the two-week period for submitting comments has elapsed in the meantime, you no longer have the possibility to turn to the EBA about this issue. We will inform the EBA that the information it provides in this regard could be improved.

Having said that, after a careful analysis of all the information you provided with your complaint, we consider that there was no maladministration by the EBA when it decided not to open an investigation following your request.

According to the rules establishing the EBA (the 'EBA Regulation'), the EBA can investigate only cases where the national supervisory authorities of financial and credit institutions have allegedly breached Union law falling within the scope of the EU legal acts referred to in Article



1(2) of the EBA Regulation.

The EBA thus correctly informed you that it could investigate only possible breaches of Union law committed by competent authorities - in this case, the BaFin - that fall within the scope of the EBA Regulation. [1] Therefore, the EBA could not assess the aspects of your complaint concerning the Sparkasse Fulda and statutory audits.

Furthermore, we note that the EBA Regulation requires the EBA to outline how it intends to proceed with a case of an alleged breach of EU law and, **where appropriate**, investigate the alleged breach. This means that the EBA has **discretion** in deciding whether to open an investigation, as the Court of Justice of the European Union recently confirmed in the context of the European Securities and Markets Authority. [2]

The role of the Ombudsman in such cases is thus limited. The Ombudsman can verify if the EBA explained properly how it has exercised its discretion in a given case, but cannot interfere in EBA's exercise of its discretion.

In this context, we note that the EBA informed you why it considers that there are no grounds to conclude that the BaFin breached its supervisory duties in relation to the issues you raised. In addition, the EBA stated that the Wirecard case had already been investigated by the German Parliament, leading to the adoption of the Finanzmarktintegritätsstärkungsgesetz [3] widening the BaFin's competences and powers, and by the European Securities and Markets Authority, leading to recommendations addressed to the BaFin.

In view of this, we consider that there is nothing in your complaint, which would suggest that the EBA abused its discretion not to open an investigation.

We have therefore decided to close the case.

I appreciate this may not be your desired outcome, but I hope you find these explanations helpful. Thank you for having contacted the European Ombudsman.

Yours sincerely,

Rosita Hickey

Director of Inquiries

Strasbourg, 29/03/2022

[1] Articles 17, 4 Nr. 2 EBA Regulation

[2] Case T-760/20 Jakeliunas v. ESMA, order of the General Court of 10 August 2021, point 29.



[3] Gesetz zur Stärkung der Finanzmarktintegrität, abrufbar unter

https://www.bundesfinanzministerium.de/Content/DE/Gesetzestexte/Gesetze_Gesetzesvorhaben/Abteilungen/Abtei

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