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Comments

on trilogue negotiations on a framework for Financial Data Access (FiDA) Regulation

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Current FiDA proposal must be fundamentally reviewed

The key aims of the regulation establishing a framework for financial data access (FiDA) are to promote competition and innovation in the European financial market by making access to customer data easier and by maximising the potential of a data economy. Based on the current draft by the co-legislators, however, the German Banking Industry Committee (GBIC) believes these aims are in jeopardy and is therefore calling for a critical review and major amendments.

The main criticism is that the actual demand for customer data is not considered thoroughly, which disproportionately burdens financial institutions and does not create a sustainable open finance ecosystem. Instead of setting out meaningful framework conditions for data access and thus for associated innovations, which are geared to the needs of customers and data users, FiDA threatens to add new bureaucracy. This would clearly run counter to the political goal of strengthening EU competitiveness and reducing regulatory burdens.

Given the current geopolitical uncertainties and growing investment requirements, Europe needs a strong banking and financial sector that can focus on financing the economy as a core task and developing market-driven innovations. It is therefore all the more important to carefully weigh up the costs and benefits of regulating ex ante and choose a measured approach. The current proposal is too broad and undifferentiated with regard to the data/-categories and customer segments in scope for it to take adequate account of the different market needs that are still evolving. This will not provide any meaningful stimuli for competition and growth for a European data economy.

Furthermore, the proposal is not fully developed in many areas and there is still a need for further clarification given the complexity of some of the issues involved. Unless these questions are considered in detail, there is a danger that the implementation of FiDA would fail or lead to patchy implementation across Europe which would not achieve the desired objectives. Sufficient time is therefore needed both for the legislative process and for the subsequent concretisation and implementation by market participants. A more iterative approach would be essential.

Against this background, we believe it is imperative to once again fundamentally scrutinise the current proposal as part of trialogue negotiations. When FiDA comes, it must be done the right way and be in line with the broader aims of pursuing a strong and competitive EU.

In the opinion of the German Banking Industry Committee, the proposal should be revised at least on the following key points:

1. Narrowing down the scope whilst taking benefits and costs into account

A much more targeted approach is needed for FiDA, one that focuses on basic data that is already largely standardised and therefore offers benefits from data exchange. Access alone does not create any added value for consumers and the economy, but initially generates costs that need to be paid off by future customer benefits and sustainable business approaches.

Without limiting the scope, innovation and the emergence of new service and product offers will be hindered rather than helped. This is because every FiDA use case requires technical coordination and negotiation on i) data scope, ii) data standards and iii) data exchange infrastructure as part of a data sharing scheme. A virtually unlimited data pool would significantly hinder the success of this coordination between participants with different business interests, especially as the legal obligations would initially affect data holders only.

Furthermore, FiDA must allow the exchange of additional data – on a voluntary basis – in order to create space for evolving customer needs and progress on industry-wide data standardisation as well as not compromising already established market structures for multilateral data sharing.

1.1 Exemption of unsuitable data/categories from FiDA

No standardisation is envisaged for the following data/categories or there is a legal framework that requires data users to collect these data directly from the customer and not from third parties. Consequently, these data should be **exempted from a data sharing obligation**.

a) Exemption of data collected for the assessment of suitability and appropriateness in accordance with Article 25 of Directive 2014/65/EU (MiFID II)

We strongly advocate deleting the data collected for the purpose of the suitability and appropriateness assessment within the meaning of Articles 25(2) and 25(3) of MiFID II, including data on sustainability preferences. These data are not standardised but are collected according to the individual methodology of the respective data holder, which is why they are not applicable for data users without the specific context.

Comparability of this information, as a prerequisite for an added value of data sharing, could only be achieved through future standardisation. However, standardisation would require revising all investment processes, from product classification to client assessment and documentation. This bureaucratic effort cannot be intended. As well as requiring a considerable restructuring of investment services, it would also compromise

non-price competition for advisory services and ultimately reduce the variety of offers for customers.

Reusing these data also poses the risk that wrongly interpreted and incomplete information from customers could lead to incorrect advice from the data user and/or an incorrect investment decision by the customer. Since investment recommendations are made on the basis of the suitability and appropriateness assessment data, and/or control mechanisms take effect, the data user would have to verify the data received. This eliminates the benefit of transferability.

Limiting the entitlement to solely accessing raw data, as proposed by the Council in recital 9 of the Council's proposed text on protecting the data holder's trade secrets, does not change this conclusion. This is because the input data provided by the customer at the request of the data holder already follows the underlying methodology of the data holder, in this case the investment firm. The information provided by the customer is only useful for the data holder, as it only leads to a meaningful evaluation outcome in the evaluation system of the individual provider. There is also no discernible need for real-time provision to the customer.

A reporting obligation, as provided for in the Commission proposal on the Retail Investment Strategy (RIS) Directive and which, according to the Council proposal (on the RIS Directive), will not be subject to standardisation, would take sufficient account of the customer's need for information.

Furthermore, a data user who is required by law to collect these data would still be forced to request them directly from the customer as long as it is not legally binding under MiFID II to obtain data from another provider. The obligation to conduct a client assessment applies to every investment firm that provides investment advice or executes non-advised orders.

b) Exemption of derivative products

The European Parliament's proposal to explicitly exclude derivatives used for hedging purposes from the scope of Article 2(1)(b) would be an important improvement in terms of focussing on relevant customer data. Over-the-Counter (OTC) derivatives, for example, are financial contracts traded directly between two parties. They are not standardised and are characterised by high complexity and low comparability, which raises questions about the practical benefits of sharing this data. However, the EP's proposed reference to Annex I, Section C of MiFID II would have to be concretised such that only the financial instruments in paragraphs 1 to 3 and 9 would fall under the scope of FiDA. For financial instruments according to paragraphs 4-8 and 10 to 11, the same restrictions apply as to the derivatives for hedging mentioned above. They should therefore be explicitly listed and exempted in Article 2(1)(b), especially as the

assessment of a "derivative transaction used for risk management purposes" is not legally defined and is subject to a clearly subjective interpretation. For example, there is uncertainty as to whether this refers to a macro or micro hedge and what qualifies it as such.

c) Exemption of real estate and other related financial assets

We endorse the Council's proposal not to include real estate in the scope of the regulation due to its lack of relevance. In contrast to all other assets listed, real estate assets cannot be assigned to a financial institution as the data holder, as they are neither a financial product nor are they managed by a financial institution for the customer. This also casts doubt on whether the data are complete and up to date and thus calls into question the benefits of access within the framework of FiDA, the maintenance of which is not the responsibility of the financial institution.

d) Exemption of data collected as part of a creditworthiness assessment of a firm

The expectation of the legislator is presumably that the inclusion of this data category in FiDA could improve access to finance, especially for small and medium-sized enterprises, but this fails to address the actual cause. Financing does not fail because of the effort required to provide the necessary documents and information, but because of the creditworthiness of the business requesting the loan. In the absence of a clear connection, Article 2 (1)(f) should be completely deleted. Moreover, the data used to assess creditworthiness differs in detail from institution to institution, which is due to the provider-specific rating systems and input variables. Sharing input data between different lenders would only provide a benefit in terms of process simplification for the customer if the data bases for the creditworthiness assessment were the same, which is not the case and cannot be the intention for reasons of competition. Rather, the chances of accessing a loan are increased by the fact that lenders make their decisions based on an institution-specific assessment, thereby avoiding systematic exclusion effects. Conversely, this means that a standardisation of processes can lead to a deterioration in credit opportunities for small and medium-sized enterprises, as banks would not be able to assess default risks using their proven internal models.

e) Exemption of data used by data holders to meet the requirements of Know Your Customer

We believe the proposal by the European Parliament (under Article 2(1)(fa) new) to include data used in connection with meeting KYC requirements for business customers in the scope is misguided. This includes, for example, data on customer identity or data from commercial and transparency registers. These originate from other primary sources whose importance as records offices would be undermined by decentralised data sharing. In addition to the risk of compromising the quality and timeliness of the data through indirect access via data sharing instead of retrieving them from the

original data source, this would also compromise existing business models or undermine political projects such as the EUDI wallet.

Furthermore, this would also undermine the principle set out in Section 10 of Germany's Anti-Money Laundering Act (Geldwäschegesetz, GwG, transposing Article 13 Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing) that data must be collected directly from the customer as part of meeting general due diligence obligations.

1.2 Restricting scope to retail products or services for consumers and SMEs

With regard to the standardisation and scaling of financial data sharing, an implicit objective of creating a data economy, the legal entitlement to access data should be limited to products and services offered in mass retail business. Accordingly, the term "customer" should refer exclusively to consumers and micro, small and medium-sized enterprises, as proposed by the European Parliament. Larger businesses, including those in the new category recently announced by the EU Commission, "small mid-caps", should also be exempt from the scope.

Otherwise, the general term "customer" in the Commission proposal would also include e.g. financial institutions including central banks, institutional customers, group companies as well as highly specialised products in these customer segments, which would add additional complexity thus significantly slowing down the speed of implementation. For this customer group, it can be assumed that there are no asymmetries in the relationship between customer and financial service provider and that existing data access requirements can largely be covered on a contractual basis. There is therefore no legal need for action. Nevertheless, these customer relationships are also likely to benefit indirectly from FiDA-related standardisation, even if they are not included in the scope.

Insofar as the scope of FiDA is not further restricted and data collected to assess suitability and appropriateness in accordance with Article 25 of Directive 2014/65/EU (MiFID II) and data on financial instruments held (see section 1.1, a and b above) continue to be covered, the definition of "customer" with regard to these data categories should be limited to customers classified by financial institutions as "retail clients" in accordance with Article 4(1)(11) of Directive 2014/65/EU (MiFID II) for the same reasons mentioned above.

1.3 Specifying the term "customer data"

The amendments proposed by the Council and the EP to the term "customer data" (Article 3(3)) do not provide for the necessary clarity. This concerns the question of whether there is always only one data holder for data relating to one and the same product or service who must grant access in accordance with FiDA. Anything else would lead to different data holders being unnecessarily obliged to provide access to the same customer data, which poses a high risk of inconsistencies or outdated data being used. Only the original data holder should have the obligation to give access to the raw data. Data that have been enhanced by financial

institutions or that are generated based on data provided by the customer should be clearly exempted from the scope. Examples of this include risk-adjusted performance indices, sensitive scenario analyses, such as stress tests.

2. Gradual introduction with realistic implementation deadlines

The introduction of statutory access to financial data at the same point in time fails to take into account the variability of the data in terms of "FiDA readiness". This misses the opportunity for an agile approach that links the point in time from which the data can be accessed to current availability and suitability of the data in order to quickly generate added value, e.g. on the basis of common standards that are already widely used.

The implementation deadlines proposed by the European Parliament and the Council are also too short in view of the undifferentiated nature of the proposal and its wide scope of applicability, and are not feasible in practice. Experience from current examples in the EU, such as the EPC SPAA and the GBIC giroAPI scheme, shows that setting up promising schemes takes a minimum of three to five years. Shorter deadlines reduce the likelihood of success, as the necessary competences are limited and there is not enough time for the stakeholders involved to develop and then implement an appropriate design. This would push the European financial sector beyond its limits, especially when it must already devote significant resources to implementing regulatory projects in parallel during these economically challenging times. It also means that necessary investment in innovative projects falls by the wayside. It is therefore imperative to take a step-by-step approach.

The obligation to provide access at a single point in time ("big bang") also poses risks for the European financial market. FiDA covers sensitive customer data which must be appropriately protected against unauthorised access by non-European actors or against giving them an undue advantage. Providing access at a single point in time makes this difficult. A step-by-step approach, on the other hand, makes it possible to gradually gather experience and to respond to unintended and/or undesirable developments.

Sufficient implementation deadlines are also required in order for the relevant market participants to coordinate with one another and weigh up appropriate technical and geographical distinctions for the design of schemes, which would have a positive effect on the efficiency of the emerging European scheme landscape in the medium term. In addition, once FiDA comes into force, the supervisory authorities must first define the "significant market share" that schemes must fulfil, which further shortens the implementation period.

We believe the following minimum implementation deadlines are necessary, provided they are accompanied by greater restrictions on the scope of (see section 1):

Data categories of	Period until joining scheme (after the regulation comes into force)	Minimum period until data access for customers and for data users comes into effect (after the regulation comes into force)
Stage 1	24 months	36 months
Stage 2	33 months	45 months
Stage 3	39 months	51 months

3. Synchronisation of data accessibility for customers and data users

In addition to specifying differentiated and realisable implementation deadlines for data access, it is essential to ensure that access is introduced at the same time for customers (pursuant to Article 4) and data users (pursuant to Article 5). If these requirements are introduced separately, as is currently the case in the proposals from both the European Council and the European Parliament, the relief provided by a step-by-step introduction would be negated; in fact, this would most likely result in additional burdens for data holders. Data holders would not just be required to provide the online customer interface for all customer data/categories earlier, which, on its own, would require at least as much technical effort and planning as the implementation of the data user interfaces. They would also have to make adjustments at a later date, due to decisions regarding scheme-level specifications (for example the relevant data fields to be adjusted for the customer interface). This would of course increase the overall amount of work required. In addition, there is a risk that earlier availability of data via the customer interface could pique data users' interest in earlier, unregulated access to customer data outside of a scheme, which would counteract the objective of the Regulation, that is to create a binding legal framework. It is therefore essential that customer access and data user access become effective at the same point in time.

4. Appropriate right of access to historical data

FiDA proposes a right to access different types of data: status data (balances and conditions), transaction data and data generated as a result of customer interaction with the data holder. The European Commission's draft proposal does not specify the date from which data generated in the past must be provided. This date will have a significant influence on implementation costs. The European Council has addressed this question and is of the opinion that there should be no limit on the provision of past data (see Article 2(1)(b) new), only providing the option, subject to very strict requirements, for limiting access to past data to ten years on the level of the scheme.

This type of broad, retroactive data access would be entirely disproportionate and represents a misconception regarding FiDA's primary purpose, which is to allow customer data to be used across financial institutions for business transactions that provide added value. Provision of historical data in the customer or data user interface would be associated with significant costs,

while the value of said provision to customers is highly questionable. In addition, there is a need for a differentiated approach for different types of customer data.

Even taking into account long-term contracts, surely it is up-to-date status data (balances or conditions) that will primarily be of use, perhaps with the addition of transaction data and interaction data from the recent past. This applies to both customers and third-party data users. Real-time access to historical contractual data within a similar time frame or even beyond that required by legal documentation periods is simply untenable given the cost-benefit ratio, and would seriously overstep the mark. The availability of past data pursuant to FiDA must remain appropriate and be based on what data is plausibly required. We believe that an appropriate requirement would be to provide access to transaction and interaction data for a period of at most 13 months in the past, with the option of specifying a different time period on the level of the data sharing scheme if necessary.

5. Further material concerns

In addition, we assess the proposed amendments listed below, suggested either by the European Council or the European Parliament, as follows:

5.1 Data access linked to participation in a data sharing scheme (Article 6(1))

We welcome the European Council's clarification that legally required data access pursuant to FiDA must take place in accordance with the rules and modalities of a financial data sharing scheme or in accordance with requirements from a delegated act pursuant to Article 11. Without this provision, there would be no legal certainty, as well as reduced incentives for data holders and data users to take part in the creation of a scheme. Agreements to share data on a contractual basis should remain unaffected by these requirements.

5.2 The "Follow the data holder" principle (Article 6(2)(a) new)

We welcome the fact that the European Council has specifically clarified that the data user is required to join the notified financial data sharing scheme that the data holder is a member of in the event that the data user and data holder are not already members of the same notified scheme.

5.3 Disproportionate personal liability for experts (Article 20(3))

In the FiDA proposal, the European Commission introduces personal liability for infringements against FiDA for every employee of an organisation subject to FiDA regulations. This is unprecedented and contradicts a variety of national labour laws across the EU. It will also exacerbate the shortage of skilled labour in the financial sector, particularly in areas such as the data economy. If this provision remains in place, it will negatively affect FiDA's political objectives in terms of personnel, even before it comes into effect. We therefore recommend deleting this provision.