German Banking Industry Committee

Die Deutsche Kreditwirtschaft

Comments

on the EU Commission's draft Framework for Financial Data Access (FIDA)

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The **German Banking Industry Committee** is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public-sector banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks finance group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. Collectively, they represent approximately 1,700 banks.

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With the draft Framework for Financial Data Access (FIDA), the EU Commission aims to facilitate access to customer data for a wide range of financial services. This is intended to promote the exchange of data between companies in the financial sector as a whole. Thus, FIDA sets the regulatory framework for open finance.

The German Banking Industry Committee (GBIC) supports in principle a Framework for Financial Data Access that exploits the opportunities of the data economy for European consumers, companies and the EU economy as a whole. The German banks and savings banks want to play an active role: as data holders, enabling third-party providers to access customer data, and as users of external data in order to provide their customers with tailored offers. The top priority is, therefore, for FIDA to create a secure infrastructure for sharing customer data, to take account of customer and market needs, and to promote fair competition for open finance. Otherwise, there is a risk of acceptance problems on the part of the various market players as well as market distortions, such as for payment accounts which are excluded from FIDA. In this respect, we support the fact that the FIDA draft assigns a central role to schemes. However, it is to be expected that a parity governance model between data holders and data users, as envisaged in the FIDA draft, will lead to difficult negotiations between the parties, resulting in lengthy decision-making processes. In this respect, other forms of scheme governance should be considered that enable more efficient decision-making processes while still ensuring sufficient participation of data users. Ultimately, the successful establishment of financial data sharing schemes is in the interest of all stakeholders.

The present Commission draft for an open finance framework is in parts too ambitious to be successfully implemented under the formulated regulatory requirements and the specified implementation deadline. Experience from the Second Payment Services Directive (PSD2) shows that the implementation of the technical regulatory standards proved to be complex and time-consuming. As the scope of FIDA goes well beyond the scope of PSD2, implementation is expected to be more complex. We therefore advocate a step-by-step approach with successive expansion of the scope of FIDA, which should be subject to evaluation and possible adjustment before each further expansion stage. This is the only way to gain the necessary experience and avoid difficulties that would stand in the way of the legislator's intentions in the long term. The identification of the appropriate stages for the introduction of FIDA could be based, for example, on segmentation according to individual customer groups, or on feasibility analyses by the stakeholders concerned, who should enter into an open dialog about this.

In the following, we present our assessment of what we consider to be the key points.

1. The protection of customer data has top priority

- A positive aspect is that Art. 5 stipulates that companies wishing to provide open finance services must obtain the explicit consent of the customer. In an open finance ecosystem, the customer's interests are at the center, because ultimately it is the customer who decides who to entrust with his or her data. In our view, this is a key success factor for customer acceptance and use of financial data sharing in practice.

- The draft also stipulates in Art. 5 and 8 that data holders must make dashboards available to their customers. This is fundamentally positive, as it gives customers the opportunity to manage their consent simply and effectively. Information about the exact purpose of use usually results from data use provisions agreed between the customer and the data user, some of which are extensive and of which the data holder is not aware. Data holders therefore cannot and should not be subject to any further obligations than to indicate to the customer the purpose communicated by the data user.

- Art. 4 provides that a data holder shall, upon request of the customer, provide the data listed in Art. 2.1 without delay, free of charge, continuously and in real time. In our view, such a requirement can currently already be realized ideally via online banking as an established electronic customer interface. If customers do not (want to) participate in online banking, there should be no entitlement to use another electronic channel for lack of viable alternatives. This should be clearly stated and clarified in the legal text. This is without prejudice to the provisions of the General Data Protection Regulation (GDPR), which already stipulate extensive data access rights and a right to data portability and create uniform conditions horizontally, i.e., across sectors. The data access right under the FIDA Regulation cannot be regarded as a framework for sector-specific fulfillment of requirements under the GDPR, as different objectives are being pursued with this. This should also be clearly stated in the legal text.

- Art. 5.3.(e) and Art. 6.4.(b) also provide for an obligation for both data holders and data users to maintain the confidentiality of business secrets and intellectual property rights when accessing customer data pursuant to Art. 5.1. However, neither the data holder nor the data user could provide a guarantee for the protection of business secrets in relation to the customer data, since only the (business) customer knows whether access to certain data affects its business secrets or intellectual property rights. In addition, such a duty to check for business secrets and intellectual property would mean a great potential liability for the data holders and data users to a completely unclear extent. Moreover, a need for protection of trade secrets should rather exist for the data holder. After all, the collection

and processing of customer data to an extent individually specified by the data holder can be a differentiating feature in competition and thus affect its trade secrets or any IP rights. We therefore recommend clarifying that the aforementioned paragraphs in Articles 5 and 6 serve to protect the data holder.

2. The scope of FIDA should be set carefully. A graduated, evolutionary approach increases opportunities and limits risks.

An open finance system offers opportunities for customers and market participants, but also entails risks that must be considered by the legislator.[1] In GBIC's view, the scope of the data sources listed in Art. 2 for which a statutory data access right is to be introduced is too large to cope with the high level of complexity associated with the implementation. Also with a view to customer acceptance, new data access rights should be established in a first step where the customer benefit is immediately apparent, and further steps should be taken in the light of experience gained successively.

- Although Art. 2.1 defines the data categories for which access by the customer and third party data users is to be enabled, it is not clear for all categories who the actual data holder is and who is specifically affected by this obligation. Art. 2.2 names the financial institutions that fall within the scope of FIDA, but leaves open a clear allocation between data holders and data categories. In our understanding, a data holder is one who originally provides the respective product or service to the customer. Only by specifying the term "data holder" in this way can it be ensured that the data is always up to date and that there are no redundant access claims that lead to contradictory customer data depending on the data source, with negative effects on the data quality in the financial data space envisaged by FIDA. In this respect, a corresponding clarification is required.

  For some of the data categories mentioned under Art 2.1, this clear reference to a data holder in the sense of the "natural home" of the data is not given. This applies in particular to real estate, which is explicitly included under Art 2.1 (b) but does not embody financial assets but real estate assets. Unlike all other assets mentioned there, direct real estate assets cannot be attributed to a financial institution, as they do not represent a financial

[1] See ESMA (2022): Final Report on the European Commission mandate on certain aspects relating to retail investor protection, S. 55 ff., Link: *esma35-42-1227_final_report_on_technical_advice_on_ec_retail_investments_strategy.pdf

product and are not managed by a financial institution for the customer. The situation is different with fund shares in real estate assets, which are to be classified as a financial instrument. Therefore, real estate, as well as other physical assets, should be excluded from the scope of the regulation. The fact that real estate is regularly used as collateral for its loan financing should not be used as a reason to deviate from the principle of direct attributability of data to a data holder. This is because the valuation is based on a point in time consideration (usually when the loan is concluded) and says nothing about the current market value. It would be more obvious to constitute a corresponding access claim against the public bodies concerned, the real estate agent or other providers specializing in estimating the current market value, which, however, are not covered by the scope of application of FIDA.

- Furthermore, the draft regulation leaves open what exact information is to be provided by data holders. This varies from data category to data category and requires further clarification. While this information according to Art. 2.1 (a) for accounts and loans explicitly includes balances, transactions and conditions, this is not specified for the other data categories. In particular, the level of detail of the conditions to be made accessible via FIDA must not go beyond the very essential key points of the product. Otherwise, there is a risk of a sprawling scope of application that is not commensurate with the expected economic customer benefits and the implementation effort for data holders. This is because it must be borne in mind that the costs of implementing the technical and organizational requirements for data access can be considerable, depending on the depth of the data, especially if the scope of the data goes well beyond the existing online banking functionality. In this context, it must be taken into account that the data holder cannot necessarily expect adequate compensation under Art. 6. This is because there is only a prospect of compensation if there is customer demand for corresponding third-party services, and to a significant extent, since otherwise reasonable compensation "directly related to the provision of the data to the data user" will hardly be able to cover the implementation costs. Moreover, the term "conditions" is very broad and potentially includes extended terms and conditions that essentially include unstructured data and are not usable for the purported purpose of comparing products. Comparability of this information could only be achieved through product standardization, which would lead to a reduced variety of offerings in the market and fewer choices for customers. The provision of real-time access to all terms and conditions of a product contract does not appear to be intended, nor would it be justifiable from a cost/customer benefit perspective. In this respect, " conditions" should only be understood to mean data that allows direct comparison between products from different providers.

Against this background, we advocate a narrower definition of customer data (categories) in the scope of Art. 2 of the Regulation along the following criteria:

a) The access claim is limited to data that does not result in a reduction of the product offering in the market, e.g., through a standardization of product features or of institution-specific advisory or decision-making processes.

b) The access claim is limited to such products or services that are offered in mass business to consumers and companies. Accounts of other financial institutions incl. central banks, accounts of institutional customers as well as specialized products such as syndicated loans, should be excluded from the scope of application due to a lack of recognizable customer benefits.

In addition, the following criteria should be used in our proposed phased approach to implementing or expanding the data scope:

1) The expected benefits of data access for the customer.

2) The existing degree of standardization of the data concerned.

For the necessary concretization of the data scope and specification of the data content to be made accessible, GBIC believes it is absolutely advisable to take the expertise of the market participants into account in the process.

- In parallel to the need to concretize and specify the data scope according to Art. 2.1, we consider an adjustment of the definition of "customer data" in Art. 3 (3) to be imperative. This is because the scope of the current definition clearly exceeds what results from Art 2 (1) as the alleged data scope: *"'customer data' means personal and non-personal data that is collected, stored and otherwise processed by a financial institution as part of their normal course of business with customers which covers both data provided by a customer and data generated as a result of customer interaction with the financial institution."* In particular, data generated as a result of an interaction between a customer and a financial institution may contain a significant amount of expertise and know-how of the provider or data holder, which must not be subject to a data sharing obligation with third parties for competitive reasons. In addition, the scope of data collected, processed and stored in the course of business with a customer is escalating and would include any customer-related data processing, which goes far beyond the objective of an open finance framework as stated by the legislator. We therefore suggest that the definition of "customer data" should refer to the scope of data defined in more detail in Art 2 (1) and

should also include the explicit restriction that only data that does not relate to business secrets or other rights of the data holder should be considered customer data.

In addition, GBIC believes that the following points require a more detailed opportunity/risk assessment:

- The scope of investment data defined in Art. 2.1(b) is to be critically questioned. In particular, we reject the inclusion of data collected for the purpose of suitability and appropriateness assessment as defined in Art. 25(2) and Art. 25(3) of MiFID II. Currently, each bank and savings bank offers a unique range of products and services and uses different methods to assess the risk appetite and other suitability features of the product for the client.

  This is predominantly internal data of the institute, tailored to the respective in-house processes. In the case of one large German provider, these are, for example, customer risk propensity on a scale of 1 to 5, for the desired investment duration: short, medium and long term, or a low, medium or high investment in sustainable economic activities. Another large German provider uses a scale for customer risk appetite from 1 to 7, an investment duration in concrete annual figures and an indication in sustainable economic activities in percent from 1-100. These internal data are not usable for a third party due to the individuality of the internal process. On the contrary, if this data had to be provided automatically, third parties would be tempted to simply apply it to their own processes. This would create an enormous risk of incorrect advice or incorrect investment decisions for customers.

  In addition, the ability of each distributor to determine its own approach to customers drives competition and innovation within the industry. As such, the specific details of the assessment are a mark of quality, a differentiator of the investment advice provided by each institution. Complete standardization of these processes could potentially lead to a loss of quality in the assessment process and could hinder or even eliminate institutions' efforts to continuously improve the quality of these processes. The transfer of this data would therefore run counter to the regulation's objective of increasing the benefits and fit of financial services for individual customers.

  In this context, the concerns of the European Securities and Markets Authority (ESMA), which were expressed in an open letter to the EU Commission, must also be taken into account when designing the legislative framework. ESMA rightly points out that customers

are reluctant to share personal information such as investment history/transaction data and suitability profiles due to various factors, including cultural factors, lack of trust and fear of cyber risks, and that these fears need to be addressed.[2]

Banks and savings banks would also have to verify the data received and therefore interview the customer again. This is because product recommendations are made on the basis of the customer exploration data. For liability reasons in the context of the product recommendation, it must be ruled out that the information obtained has been misinterpreted or is incorrect. The re-verification with the customer takes away the advantage that the transfer of data is supposed to offer according to the proposal on the framework.

For this reason, the German banking industry is also in favor of dispensing with the proposed obligation in the Retail Investment Strategy, which is related to the Open Finance Framework (Article 25 (1) subparagraphs (3) to (6) MiFID-E). The obligation states that a report in a standardized format on the information provided by the client should be made available to the client on request, both in the case of investment advice and in the case of non-advisory business with an appropriateness test. The German Banking Industry does not see any need for such a requirement. Particularly in the area of investment advice, the customer already receives a declaration of suitability that also contains detailed information on the customer and explanations as to how the advice was tailored to the preferences, objectives and other characteristics of the retail investor.

- The scope of the data pursuant to Art. 2 (1)(f) is unclear when checking the creditworthiness of a company for a loan application or for a rating. While the associated customer benefit is at best in the form of operational facilitation in the provision of data to multiple, potential lenders or rating agencies, the data used is also likely to vary in detail from institution to institution here, which can be explained by provider-specific rating systems and input variables. After all, the risk assessment of credit exposures is a core competence of lenders and an important competitive factor in the market, which, incidentally, must also be maintained in order to ensure a broad credit supply and diversity of offerings. Sharing input data among different lenders would only make sense if the data basis for the credit assessment were the same, which is not the case today and should not be intended for competitive reasons.

[2] ESMA (2022): Ref: Consultation on options to enhance the suitability and appropriateness assessments, Link: esma35-43-3112_letter_to_ec_on_mifid_suitability_consultation.pdf (europa.eu).

The scope of application of Art. 2 (1)(f) could potentially also affect data from credit reporting agencies that are exchanged on a contractual basis between the credit reporting agency and the creditor and are used to assess creditworthiness and measure credit and counterparty default risk. This data represents the intellectual property and essential business basis of the credit reporting agencies, which would be violated or called into question in the event of a customer access claim, which is why this data must be explicitly excluded from the scope of application. As a general rule, creditors are not free to dispose of data collected elsewhere than from the customer, but are bound by contractual obligations to the data provider, which may stand in the way of access to or disclosure of data.

If the legislator is primarily concerned with making it easier to port financial data and company records (such as data from balance sheets, profit and loss accounts, business analyses or extracts from the commercial register) of the company requesting credit, then tax advisors, auditors and, if applicable, public registers should be included in the group of data holders affected by FIDA who hold this data in their original form.

Moreover, the requirement to make data available must not lead to a situation in which data holders are obliged to retain information that is currently deleted in accordance with legal requirements, after certain deadlines have expired or a credit application has been rejected, for a possible future request.

- In addition, the customer's right to access data, particularly in the two cases mentioned above, may also affect the rights of the data holder to protect business secrets. This is because it may be possible to draw conclusions from the data collected about rating systems developed by individual banks, which represent a key differentiating feature in the competition between the various providers. In this respect, we advocate an explicit legal clarification in Art. 5(e) and 6.4(b) as proposed above, which limits the customer's or data user's right to access data in such a way that no business secrets of the data holder are affected.

- Art. 7 provides that EBA and EIOPA shall formulate guidelines for data categories for products and services related to the credit assessment of consumers, respectively for products and services related to the risk assessment and pricing of a consumer in the case of life, health and health insurance products. We are critical of Art. 7 for several reasons. First, credit scoring requirements for consumer loans are already comprehensively regulated in the Consumer Credit Directive. In addition, the EBA

> Guidelines on loan origination and monitoring (EBA/GL/2020/06 Guidelines on loan origination and monitoring) apply to new loans since June 30, 2021 (and to existing loans since June 30, 2022). These already include extensive regulations on data management, lending standards and customer relationships. We therefore do not see any additional need to mandate the EBA. Secondly, credit assessments as a whole may lose quality if the legislator or regulator stipulates which data must or must not be used for this purpose. It must be up to the individual lender to decide which data it considers suitable for the credit assessment.

In summary, we are in favor of subjecting the data categories included in the access claim under Art. 2.1 to a further cost-benefit analysis in order to narrow the scope to a feasible data scope as a first step.

3. Schemes play a central role for the success of open finance

The draft stipulates that so-called financial data sharing schemes are to play a central governance role in an open finance system. The fact that data access is to take place on the basis of schemes is understood as a commitment of the legislator to a market-driven approach as far as possible, which should permit innovative data-based business models. However, we criticize the fact that Art. 10 only provides for a parity governance model for schemes, which in our view entails the risk of inefficient negotiations between data holders and data users. Therefore, we advocate that FIDA leaves room for alternative governance models, which e.g. also allow for free, bilateral agreements between market players on compensation. FIDA should create the right incentives for schemes to emerge in the market. As GBIC, we believe that too strict governance model requirements are contrary to this goal and should therefore be avoided.

From the point of view of the GBIC, there are still further open questions regarding the exact role, mode of operation and construction of the schemes. For example, there are uncertainties in connection with the right of data access formulated in Art. 5. The draft stipulates that data access is to be based on schemes. In Art. 9.1, data holders and data users are obliged to become members of one or more schemes within 18 months of the regulation coming into force. From this, we understand that data users only have a right to access data if they are a member of one or more schemes through which the data is made available. This is supported by the recitals formulated by the Commission. Thus, the draft states on p. 10:

„Article 9 provides that the data falling within the scope of this Regulation must be made available only to members of a financial data-sharing scheme, rendering the existence and membership to such schemes mandatory (FIDA 2023, S. 10).”

- Art. 5.1. must be adapted along the recital cited above so that membership in schemes is a legal prerequisite of a data access right for data users. Such an adaptation of Art. 5.1 is necessary to establish legal certainty and to prevent false incentives in the market. If a data access right is not directly linked to membership in schemes, the text could be interpreted in such a way that data users automatically receive free data access and they would thus no longer have an incentive to participate in the establishment of schemes. For data holders, these false incentives are ruled out, as the EU Commission would otherwise specify regulations for data access as well as for compensation in a "Delegated Act" (Art. 11), should market-based schemes not emerge in time.

- Art. 5.2 should be reworded accordingly, as it otherwise refers to a situation that is de facto excluded by the mandatory membership in schemes (either market-based schemes or compensation schemes prescribed by the Commission by means of a "Delegated Act"). Art. 5.2 should be worded as follows:

  “A data holder may claim compensation from a data user for making customer data available pursuant to paragraph 1 in accordance with the rules and modalities of a financial data sharing scheme, as provided in Articles 9 and 10, or if it is made available pursuant to Article 11.”

We therefore share the intention of the Commission to create a regulatory framework with the mandatory membership of data holders and data users in schemes. From GBIC's point of view, however, the Commission's draft interferes in some places with the design of already existing or future schemes without there being any need for this.

- Art. 10 prescribes concrete requirements that schemes have to fulfill. As GBIC, we are in favor of FIDA specifying certain minimum standards. However, we find the restriction of Art. 10.1 (d) problematic, which prohibits the Schemes from imposing additional conditions on the granting of data access that go beyond the requirements of this regulation or other EU law. This blanket restriction would deprive the Schemes of the opportunity to react to requirements in terms of customer protection and to avert risks that only become apparent at a later point in time, e.g., during operations. This would effectively rule out any adjustments that might become necessary at a later date, for

example with regard to the required customer authentication or proof of the existence of customer consent.

In addition, the requirements for the schemes, including the governance requirements, should only apply to customer data that is also covered by the regulation. Schemes, as well as individual data holders, should be free to determine for other data under what conditions it is shared with third party data users on a voluntary or contractual basis, provided that in doing so they do not infringe on the rights of their customers. Otherwise, data sharing schemes already in existence or in the process of being established would be disincentivized to open up to the role as a FIDA scheme, making it more difficult to establish them in a timely manner. We suggest a clarification to this effect in the regulation.

- As examples of market-driven open finance schemes, the Commission mentions, among others, the API Framework of the Berlin Group and the SEPA Payment Account Access (SPAA) Scheme.[3] From GBIC's point of view, it is important that schemes developed in the national market also fall within the scope of FIDA and can be used as a set of rules for data exchange between data holders and data users. Art. 10.1(a)(i) should therefore be interpreted in such a way that nationally developed schemes are also covered by FIDA.

- Art. 10 (1)(h)(v) provides that the compensation for data access specified in schemes should be based on the lowest market level. Such a provision would restrict the design sovereignty of the Schemes and thus remove the incentive for their creation. This is because recitals (7) and (24) rightly emphasize the importance of a high quality of data exchange and APIs, which should also be reflected in the level of possible compensation. In addition, the formulation of the "lowest market level" is strongly open to interpretation and could, in case of doubt, also refer to offers that individual data holders make outside of schemes, which could thus unilaterally, consciously or unconsciously, prescribe the maximum compensation level in the market. Since market-based schemes bring data holders and data users together, the pricing of data access should be left to the market players organized in the schemes.

- Micro, small and medium-sized enterprises acting as data users are to be granted access to customer data in return for reduced compensation limited to pure costs, in line with

[3] EU Commission (2023):
COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT REPORT, S. 127., Link: COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT Accompanying the Proposal for a Regulation of the European Parliament and of the Council on a framework for Financial Data Access (europa.eu).

Art. 9.2. of the Data Act (Art. 10 (h)(vi)). At the same time, the EU Commission does not provide equivalent protection for corresponding data holders. This unequal treatment is detrimental to fair competition. We are fundamentally opposed to a differentiated, regulatory requirement for the pricing of data sharing depending on the size of the data user, as this contradicts the basic idea of our market-based approach. Separate protection through purely cost-based compensation should be limited, if at all, to microenterprises. In any case, the legislator would have to ensure that any size thresholds cannot be circumvented by data users, e.g. via subsidiaries, in order to obtain discounted data access. It is questionable whether this is already guaranteed by Art. 6(4)(f). According to this, FISPs are not allowed to transfer data to the parent company, but they could receive non-sector-specific data from the parent company and thereby gain a competitive advantage. Special protection in the form of reduced compensation would not be justified in this case.

- Article 36 stipulates that data holders and data users must join schemes within 18 months of the regulation coming into force and that customers can exercise their access rights after 24 months. In light of the experience of the EPC SPAA scheme cited as an example in the draft regulation, which has a comparatively much smaller scope of data, we consider these implementation deadlines to be significantly too short. Instead, we argue that market participants should first be given 18 months to establish schemes, plus a further 12 months to negotiate the conditions for data exchange. Subsequently, all participants in a scheme should be given at least 12 months to implement the scheme rules and create the necessary technical, organizational and legal conditions for this.

4. FIDA reinforces cross-sector asymmetries

The FIDA draft obliges regulated financial institutions to open up to authorized companies (so-called Financial Services Information Providers, FISPs). In doing so, the regulation leaves open the purposes for which FISPs use the data and whether they derive benefits from it, e.g. in combination with data from other industry contexts that are not accessible to financial institutions. From the perspective of the German Federal Financial Supervisory Authority (BaFin), however, reciprocity must be a central principle of FIDA in order to guarantee fair competition

between financial institutions and authorized companies and to create incentives for investment in innovative technologies.[4]

Art. 3.5 defines the term "customer data" to refer only to data held by financial institutions under Art. 3.8. Art. 2.2(a)-(n) defines "financial institutions" and explicitly excludes FISPs. Entities that are not financial institutions under Art. 2.2.(a)-(n) but hold a FISP license are thus legally only data users and not data holders. This means that companies from other sectors (e.g., energy companies) with a FISP license may access bank data, but banks and savings banks do not have legal access to data from these companies. The Commission points out in its Impact Assessment Report that reciprocity is established by the Digital Markets Act (DMA), as large platform gatekeepers are obliged to grant simplified access to their data.[5] As GBIC, we consider the DMA a milestone of fair competition of a European data economy. At the same time, however, it is not sufficient to establish fair competition. The obligation of the DMA currently applies exclusively to seven companies (Amazon, Apple, Microsoft, Samsung, Alphabet, Meta and Bytedance). Thus, no reciprocity is established with other companies that hold a FISP license. This limits fair competition, as banks could offer their customers much more tailored products if they had access to customer data in other industries, such as energy, telecommunications and mobility.

5. There is a need for clear rules on the relationship between the application of FIDA and other EU legal acts

For reasons of legal certainty, clear rules are needed on the relationship between FIDA and other EU legal acts. Due to its broad scope of application, the regulation has a large number of points of contact with other existing or planned EU regulatory acts that have independent requirements for the professional handling of data. However, it remains largely unclear in the draft regulation how FIDA relates to these legal acts. With the exception of the GDPR, which is explicitly mentioned in some regulatory areas, the remaining text of the regulation - if at all - only contains a few vaguely worded references, especially in the recitals. These ambiguities must be remedied. Without clarification, there is a risk of unmanageable liability risks, particularly for data holders, which could significantly jeopardize the success of the regulation.

In detail:

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[4] See BaFin (2022): Paving the way towards open finance in the European Union, Link: BaFin - Expert Articles - Paving the way towards open finance in the European Union.

[5] EU Commission (2023): Impact Assessment Report on FIDA, S. 51., Link: COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT Accompanying the Proposal for a Regulation of the European Parliament and of the Council on a framework for Financial Data Access (europa.eu).

Data Act

Of particular importance is the relationship between FIDA and the planned Data Act. In particular, it is unclear to what extent the individual provisions of the Data Act can be used to specify corresponding provisions in FIDA. Recital (47) seems to be of only limited help here. According to this, both regulations are to be applied mutually in the area of data sharing. On the one hand, FIDA is intended to supplement and clarify the provisions of the planned Data Act. On the other hand, the provisions of the Data Act, in turn, are intended to round out the provisions of FIDA in the relationship between data holders and data users for certain regulatory areas. These areas include dispute resolution, compensation, liability, technical safeguards, and international access and transfer of data. It is not clear whether this list should be considered exhaustive here. This is because the Data Act also has specific regulations in the area of copyright (Art. 35) or the protection of trade secrets (Art. 4(3) or Art. 5(8)), which FIDA does not provide for in this way. It merely states that the requirements for the protection of trade secrets and copyright are to be taken into account for the joint use of data (Art. 5(3)(e) FIDA).

EU Database Directive

It is also unclear how FIDA relates to the existing EU database protection directive 96/9/EC. At the very least, it cannot be ruled out from the outset that the collection and processing of the data covered by FIDA by the data holders fulfills the requirements of a database protected by copyright within the meaning of Art. 1 (2) of the EU Database Directive (Art. 87a UrhG). Consequently, the ancillary copyrights §§ 87 a-e UrhG would apply. These intellectual property rights are intended in particular to protect the database producer against unauthorized extraction of data from the database he has created, because he has made considerable investments in its creation. In order to prevent possible frictions with the EU database protection directive, the Data Act, for example, provides for certain restrictions of this directive in Art. 35.

EU Trade Secrets Directive

It is equally unclear whether and to what extent the protection of trade and business secrets based on the Trade Secrets Directive (EU) 2016/943 (GeschGehG) is to be observed in the context of FIDA. Only a few indications can be taken from FIDA that provide information about the relationship of the draft regulation to the protection of trade secrets. In this regard, the same

wording for copyright protection states that the requirements for the protection of trade secrets are to be taken into account in the context of data sharing. The protection of trade secrets is likely to play a role in particular in the creditworthiness checks carried out by the data holder, namely to what extent the protection of trade secrets applies with regard to the data used to determine creditworthiness. The fact that the large volume of data used for creditworthiness assessment also includes data originating from third-party credit agencies (e.g., the SCHUFA score), which may itself be protected as a trade secret of the third party, could prove problematic in this regard. Without clear regulations, this leads the data holder into a dilemma with not inconsiderable liability risks: If the data holder infringes the trade secrets of a third party by accessing certain data, the data holder is obliged to compensate the third party (Section 10 (1) GeschGehG). In addition, failure to provide information to a third party about a breach of a trade secret, or providing this information late, can also lead to an obligation on the part of the data holder to pay damages (Section 8 (2) GeschGehG). Whether the relevant provisions of the Data Act apply here is again unclear.

Other EU legal acts within the meaning of recital (50) FIDA

At first glance, Recital (50) FIDA contains an extensive catalog of other EU legal acts that - insofar as they have a reference to data access or data sharing - are to remain unaffected by the scope of FIDA. A second look, however, shows that the references of recital (50) FIDA are partly imprecise. For example, the recital refers to certain provisions in the Money Laundering Directive (EU) 2018/843 ("provisions on outsourcing and reliance"), which are not readily included in the Directive. Here, too, there should be clarification.