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# The Legal 500
# Country Comparative Guides

## Germany
## FINTECH


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This country-specific Q&A provides an overview of fintech laws and regulations applicable in Germany.

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# GERMANY
# FINTECH

## 1. What are the sources of payments law in your jurisdiction?

German payment law particularly derives from EU law, namely the Payment Services Directive (Directive (EU) 2015/2366, ‘**PSD2**’). Regulatory provisions of PSD2 for payment services are implemented in the Payment Services Supervision Act (*Zahlungsdiensteaufsichtsgesetz*, ‘**ZAG**’). Contractual, consumer protection and civil law provisions in general are implemented in the Civil Code (*Bürgerliches Gesetzbuch*, ‘**BGB**’).

Apart from and in addition to written laws, the competent supervisory authorities regularly publish guidelines such as Circulars from the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, ‘**BaFin**’) (*BaFin-Rundschreiben*) and Guidelines from the European Banking Authority (‘**EBA**’).

Despite the introduction of PSD2, regulatory standards still vary across the EU. The European legislator and EBA therefore seriously commit themselves to establishing a level playing field in payments law.

## 2. Can payment services be provided by non-banks, and if so on what conditions?

Notwithstanding a (partial or) full banking licence according to the Banking Act (*Kreditwesengesetz*, ‘**KWG**’), ZAG provides for payment services regulation which is subject to separate licences for payment services and e-money business granted by BaFin under a separate regulatory regime. ZAG provides for several activities qualifying as payment services and, unless an exception applies, require a licence. Whether such licence is required or not depends on a case-by-case assessment.

## 3. What are the most popular payment methods and payment instruments in your jurisdiction?

Not least the corona pandemic led to a rapidly growing online shopping behaviour. This led to an increasing demand for new payment methods. This can be seen from the latest payment behaviour study published by German Federal Bank (*Deutsche Bundesbank*) (‘Payment behaviour in Germany 2021’): Although payment methods in retail business are still dominated by cash payments, we see an accelerating decrease in cash payments (from 74 % of all payments in 2017 down to 58 % in 2021). In retail business, contactless payments become more and more popular – two-thirds of all debit card payments. Furthermore, 83% of girocards or other debit cards now have a contactless payment function, ten percentage points more than a year ago. In the case of credit cards, 58% of study participants report that their card is contactless, an increase of three percentage points. There is also an increase in the contactless payment function with use of smartphones or wearables payment solutions, which require a digital wallet. Between 23 % and 32 % of people have stored either a debit or a credit card in such a digital wallet. In the e-commerce business,29 % of all payments are invoicing-based, whereas PayPal is the most popular payment service of choice with approx. 45 % market share followed by account and credit transfers (approx. 18 % market share).

Although these statistics still paint a picture of a rather traditional payment behaviour, a rapidly changing payment behaviour is expected to fight for market shares. The two most interesting developments we expect to continue expanding in the payment market are so called Buy-Now-Pay-Later (‘**BNPL**’) models in e-commerce and invisible payments in retail businesses. The latter is largely technology driven since invisible payments will remove the go-to-counter-behaviour in a retail store.

For the past few years, the European Payments Initiative (‘**EPI**’) faces the dominance of US payment solutions (PayPal, Apple Pay, Google Pay, V-Pay, Maestro) by supporting own debit cards, the *Girocard*. Since Maestro will be discontinued as of July 2023, the debit card is likely to regain some popularity.

## 4. What is the status of open banking in your jurisdiction (i.e. access to banks' transaction data and push-payment functionality by third party service providers)? Is it mandated by law, if so to which entities, and what is state of implementation in practice?

Introduced by the PSD2 and implemented in German law (see answers 1 and 2 above), providing banking services is made available to non-bank third parties. These services can generally be categorised in (1) payment initiation services and (2) account information services. Whereas payment initiation services require a full licence, the provision of account information services requires prior registration by BaFin.

Since the inclusion of financial services into everyday life is a key impulse in the FinTech sector, both areas of services and their corresponding development are mainly driven by customer's needs (*customer-centric*) such as the ease of access of personal financial data as well as on demand payment initiations without the formerly required loop over the common bank ('***Hausbank***').

From a regulatory perspective, open banking service providers are mainly concerned with data protection and security measures compliance. Apart from the General Data Protection Regulation ('**GDPR**'), open banking service solutions mostly require a so called strong customer authentication (*starke Kundenauthentifizierung*) according to the Delegated Regulation (EU) 2018/389. Being aware that PSD2 and GDPR regulations partly overlap, the European Data Protection Board published guidelines on the interplay of PSD2 and GDPR which provide further guidance (Guidelines 06/2020). The strict requirement of a strong customer authentication seems to retard the customer experience at first glance. However, requiring a 2-factor authentication is crucial from a data security perspective and is deemed to build trust in open banking products. This further supports innovation in the open banking field since strict requirements challenge market participants to be creative in their product developing endeavours.

This development is potentially disrupting well-established structures. German customers once tended (and still do tend) to stick to their *Hausbank*. The ever-growing opportunity to choose banking service providers other than their *Hausbank* is deemed to change the landscape of banking services.

## 5. How does the regulation of data in your jurisdiction impact on the provision of financial services to consumers and businesses?

Despite any fears prior to the GDPR introduction in 2018, the impact on payment services was comparably low. Market participants feared that the GDPR and accompanying new data protection rules would massively restrict data freedom. Approaching the fourth year with the GDPR, we feel that almost the opposite should be the case. The data protection regime in place leaves the design of the data protection level up to the contractual parties. The two most important cornerstones of current data protection regimes are (1) transparency and (2) consent:

(1) With the ever-growing quantity of data and the establishment of data-driven businesses, participants need to know how their data is processed and what it is used for. This, of course, triggers a significant implementation effort for FinTech platforms in the first place. This effort helps building trust and is likely to motivate market participants to help create a safer market environment.

(2) Having provided transparency in the first place, data protection restrictions are comparably low if the contractual partner consents to the data processing in question, e.g. the processing of data occurs on a contractual basis.

In our view, the GDPR provides flexibility and freedom, given that the two cornerstones above are considered.

## 6. What are regulators in your jurisdiction doing to encourage innovation in the financial sector? Are there any initiatives such as sandboxes, or special regulatory conditions for fintechs?

Federal Minister of Finance Christian Lindner founded the Digital Finance Forum ('**DFF'**) together with experts from Germany's digital finance industry with the aim of "Shaping the Future of Finance". The forum deepens the exchange between politics and practice in order to reinforce Germany as a digital finance location and prepare accordingly for the future. DFF regularly gathers at roundtables to discuss current topics such as payments, retail banking or investment and blockchain. DFF roundtable regarding the topic of payments discussed the implementation of a digital Euro. In July 2021 the Council of the European Central Bank (ECB) has decided to launch a two-year investigation phase on the digital Euro starting in October 2021. Future digital concepts for currencies are discussed in an advising committee to the Federal Ministry of Finance (*Bundesfinanzministerium*), (*FinTechRat*) initiated by the German Fintech Council. These discussions are expected to intensify in the next couple of years. Since the invention of a digital Euro replacing central bank money is rather unlikely, the invention of digital currencies by private providers possibly becomes an innovation that revolutionises the FinTech market.

Following the implementation of Anti-Money Laundering Directive (Directive (EU) 2018/843 '**AMLD5**'), the Electronic Securities Act (*Gesetz über elektronische Wertpapiere*, '**eWpG**') (see also questions 10 and 14) entered into force. The eWpG governs the digitisation of securities and enables the issuance of securities without the requirement of a physical securities certificate. The fungibility of securities is likely to increase and significantly speed-up. This goes hand in hand with the stronger demand of investing in securities that started in the pandemic .

In order to further promote Germany as a funding location, the Regulation on Crypto Fund Units (*Verordnung über Kryptofondsanteile* – '**KryptoFAV**') will extend the eWpG and open up the possibility for issuing crypto fund units to providers of investment funds.

The Regulation on European crowdfunding service providers for business (Regulation (EU) 2020/1503, '**Crowdfunding Regulation**') is not (yet) expected to materially impact the crowdfunding sector in Germany. As we read the Crowdfunding Regulation in its current form, crowdfunding providers may opt for submission to the regulation. In contrast to other regulatory provisions, the Crowdfunding Regulation does not find mandatory applicability. Crowdfunding businesses are already covered by existing German regulatory law and therefore, any added value of the Crowdfunding Regulation is questionable.

BaFin and the legislator currently deny the introduction of a regulatory sandbox in Germany. Sandboxes are quite popular in other jurisdictions and market participants, particularly start-ups with yet small resources, demand the introduction of such sandboxes also in Germany. Although denying such regulatory sandbox, BaFin is well aware that young players are required to breathe under all the regulatory requirements and tends to adjust the intensity of the supervision depending on the risk associated with a given business model, taking into account the principle of proportionality: While for identical risks and identical business models identical regulatory standards should apply, BaFin at the same time wants to give new players the room to grow into their regulatory status.

Furthermore, BaFin establishes special divisions for concentrating specific expertise, for example in connection with discussing the upcoming Markets in Crypto Assets Regulation ('**MiCAR**') on an EU level and a continuously updated catalogue regarding FinTech.

## 7. Do you foresee any imminent risks to the growth of the fintech market in your jurisdiction?

One of the major concerns for FinTechs probably is data security. The number of cybercrimes in Germany rises approx. 8 to 15 % each year – which an exponential increase during the pandemic. The aggregated damage is estimated to exceed 100 billion Euros. The more cyberattacks become publicly known, the more likely customers lose trust in the affected sector. The prevention of cyber-attacks is therefore essential to scale digital banking products. This, in turn, leads to rising costs for this prevention.

Not necessarily in conjunction with a cyber-attack but no less harmful to the market are money laundering and terror financing activities. German neobanks have been massively criticised not least by BaFin but the entire industry. Neobank services were used for money laundering and the AML prerequisites were not deemed sufficient. In our view, the German FinTech market provides for a variety of customer onboarding and KYC tools that fully comply with legal requirements and provide a certain convenience to customers – and also effectively safeguard the interests at stake.

The downside of providing most of the population with flexible payment solutions such as BNPL products could be a credit default increase. Should more and more defaults realise, yields would shrink in the short term. In the long term, we see at least a potential cluster risk should, for example, the refinancing of more and more FinTechs fail.

## 8. What tax incentives exist in your jurisdiction to encourage fintech investment?

Although there is no FinTech-specific tax incentive, German tax law provides for certain easements for employee shareholding. Apart from the tax perspective, this could help motivating employees and retaining talents (see questions 11 and 12 in this regard).

## 9. Which areas of fintech are attracting investment in your jurisdiction, and at what level (Series A, Series B etc)?

Total fintech investment in the EMEA region (Europe, Middle East, Africa) rose to a record USD 77 billion in 2021, with Nordic countries at the top (total of USD 18.5bn) followed by Germany (USD 5.4bn) in 2021, mainly driven by growing venture capital investments. This represents more than the aggregated investments of the past three years. In the first half of 2021, Trade Republic increased its capital by USD 900m and Wefox by USD 650m, just to give two prominent examples. Particularly notable in the second half of 2021 was a capital raising of USD 900m by the German neobank N26.

Furthermore, German FinTechs get more and more attraction by US venture capital funds. Two prominent examples are the two Berlin-based FinTechs Mondu (B2B BNPL) and Moss (corporate credit cards): Both of them received significant funding from Valar Ventures – the VC investment fund of Peter Thiel.

We see FinTech financings in Germany in all financing stages. For example, the High-Tech Founderfund (*High-Tech Gründerfonds*), a venture capital investment firm sponsored by the Federal Ministry of Economics and Technology (*Bundesministerium für Wirtschaft und Energie*), the KfW investment and development bank and a group of 39 industrial partners, provides Seed financings for rather young startups. Series A and B financings are mostly provided by venture capital investment firms. Since the German market currently counts for 7 FinTech unicorns (Trade Republic, N26, Raisin DS, Mambu, wefox, Solarisbank and Scalable Capital), also Series C financings are likely to become more frequent.

A key driver for investments in German FinTechs is the continuously growing venture capital market in Germany. While payments are expected to remain a dominant argument for investing, FinTechs are eager to develop more revenue-based financing solutions, particularly in the B2B sector which is likely to further attract venture capital investments.

## 10. If a fintech entrepreneur was looking for a jurisdiction in which to begin operations, why would it choose yours?

Although German laws and the regulator are known to be rather strict, particularly with respect to consumer protection and risk mitigation requirements, this could have a positive effect on the German FinTech as an attractive entry market. Many regulatory requirements derive from EU law or are influenced by EU-wide developments. The German legislator tends to implement EU requirements into national laws and guidance rather strict. This could push the German market as entry market for business development efforts in the EU. By complying with German regulatory and legal requirements, FinTechs could certainly trust to comply with the regulatory standards in foreign jurisdictions as well. Companies that master the German regulatory framework are therefore deemed well positioned for EU-wide scaling.

Furthermore, Germany managed to become an important technology centre that offers excellent research and development conditions. The German legislator is eager to improve innovation and it seems as if it is understood nowadays that by being quick, there is a chance to lead the way. The introduction and extension of the Electronic Securities Act (*Gesetz über elektronische Wertpapiere*, '**eWpG**') (see also questions 6 and 14) is a good example: The eWpG aims to provide a secure legal framework for tokenisation. This pioneer-like development already led to increasing numbers of digital assets start-ups.

The financial centres, particularly Frankfurt, Berlin, Hamburg and Munich, attract talents and skilled experts to work and research in the finance and digitisation area.

Last but not least, being the largest economy in Europe, the German market provides for lots of business opportunities. German legal and judicial environment is said to be reliable and credible – a high legal certainty can be expected from market participants.

## 11. Access to talent is often cited as a key issue for fintechs – are there any immigration rules in your jurisdiction which would help or hinder that access, whether in force now or imminently? For instance, are quotas systems/immigration caps in place in your jurisdiction and how are they determined?

Since Germany is part of the EU, access is given to the EU-wide employee market. Same applies to EEA countries. Regarding third countries, however, the flexibility depends on respective visa requirements. In practice, however, there is still some room for improvement regarding the accessibility and transparency for international talents to enter the German market, i.e. obtain a working permit.

Many important institutions are located in Germany, e.g. the European Central Bank (*ECB*) and the European Systemic Risk Board (*ESRB*) or the European Insurance and Occupational Pensions Authority (*EIOPA*) in Frankfurt, many expatriates are being attracted to work in Germany.

Furthermore, the corona pandemic possibly has helped to cover distances. Both employees and employers offer and use more often remote working solutions. It can in our view be expected that restrictions free employee movement will further reduce in the future.

## 12. If there are gaps in access to talent, are regulators looking to fill these and if so how? How much impact does the fintech industry have on influencing immigration policy in your jurisdiction?

Specialist shortage is a well-known problem in Germany and the legislator Is concerned about improving the immigration efforts for specialists. In March 2020, the German Skilled Immigration Act (*Fachkräfteeinwanderungsgesetz*) came into force to tackle this exact issue. This regulation aims to the migration of non-EU specialists. According to the Federal Ministry of Ecnomics and Technology (*Bundesministerium für Wirtschaft und Energie*), Germany issued approx. 30.000 visa on the basis of the said regulation in the year of the pandemic 2020 which was the first year after coming into force.

## 13. What protections can a fintech use in your jurisdiction to protect its intellectual property?

The available protection for intellectual property (‘**IP**’) rights can be distinguished into the following two sectors: (1) The protection of trademark and patent and copyright protection. Trademark protection prohibits competitors to use the same (or confusingly similar) corporate design, such as brand names and logos or layouts. Patent protection prohibits competitors to copy inventions. Since patent protection is more relevant to manufacturing and production industry, trademark protection is recommended to consider for FinTechs. (2) The German Copyright Act (*Urheberrechtsgesetz*, ‘**UrhG**’) protects IP in a narrow sense. For FinTechs, protecting source codes and app interfaces but also texts, audios, videos, pictures etc. could be of interest.

Other than trademarks, IP protected under the UrhG cannot be transferred or assigned whatsoever and always remain with the originator. However, the use of IP rights under the UrhG by third parties can be contractually agreed on.

## 14. How are cryptocurrencies treated under the regulatory framework in your jurisdiction?

In Germany, cryptocurrencies are not treated as currencies. However, Bafin qualifies cryptocurrencies as accounting units and therefore financial instruments. Following the implementation of AMLD5 into German law, offering cryptocurrency services in Germany such as crypto custody services (*Kryptoverwahrgeschäft*) qualify as financial services according to German Banking Act (*Kreditwesengesetz*). In addition to this, the recently enacted Electronic Securities Act (*Gesetz über elektronische Wertpapiere*, ‘**eWpG**’) provides for an electronic securities register. This is intended to provide a reliable legal and regulatory framework for token issuance. For managing such register, a crypto securities registry management (*Kryptowertpapierregisterführung*) licence is required.

Using cryptocurrencies as an accounting unit, i.e. for payments, does not require a regulatory licence. Distribution, custody and trade services, such as broking, trading for the account of others or exchanging activities might, as the case may be, trigger a licence requirement.

## 15. How are initial coin offerings treated in your jurisdiction? Do you foresee any change in this over the next 12-24 months?

Apart from the regulatory implications mentioned above, initial coin offerings (‘**ICO**’) are not specifically regulated. Regulatory requirements in the context of an ICO mainly depend on the classification of the respective token, e.g. crypto token. These regulatory requirements could affect both the issuance as well as trading and secondary market activities. The issuance is, as the case may be, regulated by a prospectus obligation according to the Securities Prospectus Act (*Wertpapierprospektgesetz*) as well as the Investment Act (*Vermögensanlagengesetz*). Secondary market activities possibly require broking licences according to the Banking Act (*Kreditwesengesetz*), Securities Trading Act (*Wertpapierhandelsgesetz*) or Commercial Code (*Gewerbeordnung*).

In our view, predicting upcoming changes is difficult, if not impossible, to predict. Probably the most important development is the recent extension of the Electronic Securities Act (*Gesetz über elektronische Wertpapiere*, '**eWpG**'). In our view, it is of essence to wait and see how the eWpG has become somewhat established.

## 16. Are you aware of any live blockchain projects (beyond proof of concept) in your jurisdiction and if so in what areas?

Following the German federal election, the designated governing parties recently published their letter of joint negotiations in preparation to form a government. As part of this letter, they explicitly mentioned the intention to continue the token economy support programme of the previous government (Blockchain Strategy). The Federal Ministry for Economic Affairs and Climate Action has also published other blockchain information reports, such as on the use of blockchain in medium-sized businesses, sustainability in the context of blockchain and token economy in Germany regarding potentials, obstacles and fields of action.

The most prominent and assumingly the most discussed blockchain project is the invention of a digital blockchain-based currency, the *Euro 2.0*. Putting all concerns aside, we expect a growing discussion on blockchain-based currencies over the next couple of years.

Another prominent example of a live blockchain project is Lukso, a blockchain focused on digital fashion and digital lifestyle products. Furthermore, we are aware of several security token issuances. These issuances showed that BaFin exercised a liberal supervisory practice allowing public token offerings accompanied by prospectuses, although the recently introduced Electronic Securities Act (*Gesetz über elektronische Wertpapiere*, '**eWpG**') was not introduced yet.

We are further aware of several blockchain trial issuances by banks, particularly the issuance of bonds over the blockchain technology. Such trial runs let assume an experimental environment. However, a potential issue could be the settlement of such bond issuances. Since tokens will be paid with fiat money, conversion issues could arise for as long as there is no digital Euro.

## 17. To what extent are you aware of artificial intelligence already being used in the financial sector in your jurisdiction, and do you think regulation will impede or encourage its further use?

Artificial Intelligence ('**AI**') becomes more and more relevant for the financial sector and its participants. Given the fact that handling the rapidly increasing amount of data challenges market participants, this should be no surprise. On 21 April 2021, the EU Commission published a draft European AI Regulation which is currently still in the legislative process and which forms the world's first legal framework for AI. This regulation is intended to fuel the AI development while at the same time ensuring a high level of public interests protection and trust. The endeavours of the EU Commission in the context of big data are to be welcomed since the established big tech firms from both US and China seem to be far ahead and there will no longer be the chance for Europe to catch up.

In Germany, AI is already used in data-driven concepts such as robo advisors, customer behaviour prediction tools and in the customer support area. The German regulator already uses an AI that searches securities transaction notifications for possible violations, particularly insider trading (so-called *Intelligent Crawler*).

Since AI regulation mainly focuses on data protection and the prevention of data misuse, further restrictions for the AI industry are to be expected in this area. The impact and outcome of regulations on the AI sector is in our view difficult to predict. However, since the invention and development of AI is considered one of the key technologies impacting everyday life, further restrictions possibly slow down the AI establishment in the first place but ensure a safe and prosperous environment for this technology to mature and establish.

## 18. Insurtech is generally thought to be developing but some way behind other areas of fintech such as payments. Is there much insurtech business in your jurisdiction and if so what form does it generally take?

Indeed, the German InsurTech sector seems to lack somewhat behind the FinTech sector. This prejudice could be misleading. The InsurTech sector grew from 2018 to 2020 by 42 %. After a halt or even decrease during the pandemic, the InsurTech sector shows a rising trend and some founder mentality comes back to the industry. From 2020 to 2022, the sector grew by another 22 %. With Clark and Wefox, Germany even provides for two unicorns.

While the actual provision of insurances still remains with established insurance companies holding a respective licence, offering complementary insurance services to financial services seems a growing industry to us. Banking or trading apps offer insurance products such as travel, title or smaller health insurances that can be activated right through the app. Also, the list of offered insurance products gets longer, for example e-commerce insurances. Approx. 85 % of InsurTechs cooperate with insurers and insurance brokers. Other than actual insurance products, the insurance broker market is deemed established in Germany.

A key driver in the InsurTech sector is expected to be data analysing capacities and the utilisation of big data to predict risks ever more accurately. The availability of precise data also impacts established insurance products such as car insurances: For quite a while, car drivers can choose an insurance that is linked to their driving behaviour. With the appropriate technical device installed in the car, the insurance premium depends on how fast you accelerate, drive, brake, tailgate or – particularly – exceed speed limits or ignore road rules.

## 19. Are there any areas of fintech that are particularly strong in your jurisdiction?

Determining FinTech champions depends on the respective focus. The German FinTech unicorns (see question 9 above) are led by 3 neobanks followed by 2 neobrokers, 1 InsurTech and 1 banking service provider.

In the broader FinTech landscape, FinTechs in the crowdfunding area, for example, real estate financing (so-called *PropTechs*) seem well-established to us. In addition to these, scalable FinTech products are in the area of payments, reaching from online and POS checkout systems to BNPL solutions.

## 20. What is the status of collaboration vs disruption in your jurisdiction as between fintechs and incumbent financial institutions?

Although FinTechs offer several advantages compared to incumbent financial institutions, the latter are in the capacity of keeping up when it comes to the actual product of financial services. Recent studies prove that incumbent financial institutions and FinTechs cooperate increasingly. The main reason for such collaboration is regulatory concerns. Meeting the regulatory requirements, maximising customer experience and, at the same time, operate efficiently gets more and more challenging.

From the viewpoint of the incumbent financial institutions, such collaboration is often concluded to move towards more digital and thus more promising business models. The disruptive payment platform market with players such as paydirekt, Giropay, VPay and the recently discontinued Maestro service is just one example of this trend. Both incumbent financial institutions and FinTechs require this collaboration to remain competitive.

Another, in our view promising, example for collaborative FinTech areas is BNPL products or, more generally, structures in which FinTechs require refinancing. It is worth noting that several FinTechs are active in the area of big data processing and offer digital banking solutions. The most prominent example for disruption is deemed to be the area of blockchain and/ or distributed ledger technology.

## 21. To what extent are the banks and other incumbent financial institutions in your jurisdiction carrying out their own fintech development / innovation programmes?

Established banks in Germany do engage in the FinTech area, however, this does not always become apparent at first sight. FinTech products are often designed in a customer-centric way, focused on the *look-and-feel*, it is intended to give customers a new user experience in contrast to the well-known. Therefore, distancing from FinTech projects at first sight could possibly be part of established banks' strategy.

## 22. Are there any strong examples of disruption through fintech in your jurisdiction?

Not least by the pandemic, the German investment market has seen, and still sees, an investor and investment boom. It can well be assumed that this boom was driven by FinTechs enabling customers to manage their investments in a simply and in a user-friendly way.

The disruption of this development becomes apparent, for example, by the GameStop case which resulted in trading suspensions on large FinTech trading platforms such as Trade Republic. Another important aspect resulting to a massive shift in market shares of trading providers are the significantly lower customer-facing charges for trading activities.

 

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