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Our position

Trilogues recommendations on the EU's framework for Financial Data Access (FiDA)

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Executive summary

In June 2023, the European Commission proposed a legislative package on a framework for financial data access (FiDA). Since then, co-legislators have worked to improve the proposal, aiming to make it fit for purpose and allowing the market to determine key aspects underpinning a secure and trusted data sharing ecosystem.

However, despite this progress, the coming interinstitutional negotiations still have significant concerns to address. First, key definitions (e.g., 'customer data' and 'customer') as well as the categories of customer data in scope require further clarification. Second, the text needs to better reflect the important operational and security challenges inherent to the creation of data sharing schemes. Third, policymakers must ensure fair and equitable treatment of financial services operators, avoiding asymmetric provisions that ultimately reduce consumer choice, disincentivise innovation and limit competition. Finally, the interplay of the proposed Regulation with other relevant EU legislations, such as the General Data Protection Regulation (GDPR), the Data Act, the Digital Markets Act and the Payment Services Regulation (PSR), should be clarified.

Introduction

A responsible data economy, driven by a competitive, innovative, and secure framework for data access, is integral to modernising the European Union's internal market. By providing a competitive, innovative and secure framework for data access, it empowers consumers with better control of their financial data. Emerging data access frameworks, including in particular the Commission's FiDA proposal, have complementary objectives and benefits such as improving financial products and services, fostering consumer empowerment and choice, promoting innovation and encouraging innovation. However, the potential benefits of 'open finance' frameworks can only be achieved by building trust and the proper incentives (e.g., compensation).

As preparation for interinstitutional negotiations commence, co-legislators should carefully reflect on the proposal's potential impact and how it can best help the EU reap the benefits of an Open Finance ecosystem. Many questions remain unanswered. Uncertainty over use cases and benefits, the substantial proposed changes to the scope, the framework's complexity, implementation timelines and obligations for data holders and data users, all highlight the need for further consideration. More time is needed to avoid unintended (and potentially negative) consequences, stemming from the proposal's overly broad scope and the design of the Data Access Schemes.

Addressing these issues is essential to maintaining trust in the broader data economy and data sharing ecosystem. Outlined below are key concerns with the proposals and recommendations ahead of interinstitutional negotiations.

FiDA's impact, objectives and how best to achieve them

In its impact assessment report[1], the European Commission has already acknowledged the complexity of assessing the impact of FiDA. In section 6.2 of the report, the Commission notes that "[g]iven the limited data availability and the nature of the 'open finance' initiative, it is inherently difficult to make quantitative predictions about its benefits at the whole economy level."

Given the inherent challenge of assessing the proposal's impact, as well as the several changes to FiDA's scope and to the obligations of data holders and data users, co-legislators are encouraged to assess further how best to achieve the objectives set for FiDA, and ultimately unlock data-driven innovation and improved consumer outcomes in digital finance. A comprehensive assessment of FiDA's impact should be undertaken, with careful consideration of how the Financial Data Access Schemes will be operationalised to ensure the framework is fit for purpose. This assessment should be conducted both prior to the start of and throughout the interinstitutional negotiations and throughout the process.

Recommendation:

- Conduct a thorough assessment of the impact of FiDA before and throughout the interinstitutional negotiations
- Ensure the design of the Open Finance framework is fit for purpose.
- Ensure legal certainty regarding overlapping provisions, negotiations should align with those of the Payment Services Regulation and Directive.

A well-defined scope for mandatory data access

A well-defined scope, supported by clear definitions, is of paramount importance to ensure the data access framework achieves the right balance between innovation, competition and trust in the market.

Definition of 'customer' – Article 3(2)

The definition of 'customer' (article 3(2)) in the Commission's proposal is particularly broad, and all client groups are included: retail, micro-, small- and medium-sized enterprises, as well as wholesale customers.

The framework should prioritise retail clients and investors, with institutional customers excluded from its scope. Institutional customers typically receive highly bespoke financial services and are unlikely to have significant demand for the data access provided under FiDA. This would likely result in minimal usage, if any, and impose unjustified costs on the financial services industry. In fact, establishing Financial Data Sharing Schemes (FDSS) for data categories with little to no use case would be disproportionately expensive for data holders, setting aside the challenges related to intellectual property, cyber security, market integrity and insider information.

[1] Commission Staff Working Document Impact Assessment report accompanying the proposal for a Regulation of the European Parliament and Council on a framework for Financial Data Access - https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2023:0224:FIN:EN:PDF

The European Commission's impact assessment[2] refers exclusively to the impact and benefits of the Open Finance framework for SMEs (e.g., Box 1 in Annex 7) while still including the other legal persons in the scope of the proposal. In its presentation of the general objectives (Section 4.1), it notes that "[c]orporates, notably SMEs, would enjoy wider access to financial products and services." This is the only mention of "corporates" throughout the impact assessment. This raises the concern that the inclusion of wholesale clients and large corporates has not been adequately assessed or evaluated in terms of FiDA's potential impact.

The European Parliament's approach, which acknowledges the challenges of harmonising wholesale customer data and emphasises the added value and benefits of facilitating access for retail consumers and micro-, small-, and medium-sized enterprises, is a positive step. However, co-legislators should still clarify the meaning of '[SME] that is a party to an agreement' in the proposed amendments to Article 3, paragraph 1, point 2. It should be specified that an existing contractual relationship with the SME must be in place to mandate access.

Recommendations:

- Support the European Parliament's amendment to Article 3(2).
- Clarify in Article 3(2) that an existing contractual relationship between the data holder and the micro, small or medium-sized enterprise should be existing to mandate data access.

Definition of 'customer data' – Recital 9 and Article 3(3)

Some progress has been made, with strong support for the amendments to recital (9) introduced by both the Council and the European Parliament. These amendments, which accompany the definition of 'customer data,' clearly limit the proposal to so-called 'raw data' while excluding data derived from confidential business information, significantly enriched data or data generated using proprietary algorithms. The additional safeguards, proposed by the Council, that aim to mitigate the risk of reverse engineering are also welcome. However, it is important that co-legislators further clarify Article 3(3) to explicitly exclude any confidential business data and trade secrets, as well as data that is inferred or derived.

In addition, certain categories of customer data under FiDA's scope overlap with instruments covered by the EU's Market Abuse Regulation (MAR – Regulation 596/2014). Any data that might constitute 'Inside Information' as defined in MAR, including confidential information received from third parties, should be explicitly and entirely excluded from the scope of the regulation (Articles 2 and 3). Requiring disclosure of such information through the FDSS could lead to breaches of MAR, other applicable laws prohibiting such disclosure and confidentiality obligations to third parties. Furthermore, granting access a large number of data users to this type of information could significantly increase cyber risks, data manipulation and potential abuse, jeopardising market integrity and financial stability.

The definition of customer data should explicitly clarify that only 'personal' and 'business' data of natural persons and SMEs falls within its scope. The current definition includes both 'personal' and 'non-personal' data, and the term 'non-personal data' could be interpreted to encompass anonymised data. Such an interpretation risks restricting the use of anonymised data, thereby hindering innovation

[2] *Ibid*.

and fraud prevention activities. To ensure legal certainty, it is recommended to revise the definition of customer data in Recital 9 to include only 'personal' and 'business' data.

Recommendations:

- Support the European Parliament and the Council's proposals in Recital 9 which clarify that the proposal only applies to so-called 'raw data'.
- Further clarify Recital 9, as well as Article 3(3) where possible, to ensure that anonymised data are excluded from scope to limit unintended consequences on fraud prevention activities.
- Support the Council' proposal in Article 3(3) which explicitly excludes "*confidential business data and trade secrets*".
- Further clarify Article 3(3) to explicitly exclude 'inferred or derived data', as well as any data which might constitute 'Inside Information' under the MAR.

Scope of the categories of customer data – Article 2

The scope of application of the proposed legal framework and the categories of data in scope should be proportionate, keeping in mind a well-defined objective. It is paramount to assess which data is suitable for access, for what purpose and for what use case.

Given that specific use cases and consumer demand for 'open finance' services remain largely untested, the co-legislators should strengthen the market-driven approach within FiDA. This can be achieved by complementing the framework with a comprehensive quantitative readiness assessment of the readiness of the data categories in scope. Such an assessment would ensure sufficient market demand for specific data categories, facilitating a smoother rollout of the Open Finance framework in the EU. This assessment could also consider the relevant client group, and further inform the timeline for application provided in Article 36 (on entry into force and application).

A clear example of a use case for data access and sharing that has not been demonstrated relates to the data "collected as part of […] a request for a credit rating" (Article 2(1)[f]). This data, supplied by the rated entity itself, is specifically tailored to the methodologies of individual credit rating agencies (CRAs). CRAs primarily serve listed companies and large firms with multiple suppliers, which typically receive bespoke financial services and have shown no demand for the type of data access envisioned under FiDA. The European Parliament rightly acknowledged this by deleting Article 2(1)[f], thereby excluding CRAs from the scope of the regulation.

Furthermore, a clear distinction should be made in the definitions between the assessment of the creditworthiness of natural persons and that of institutional or wholesale entities. Here again, FiDA should focus and be limited to retail clients and investors.

Finally, the clarifications provided by both the European Parliament and the Council to Article 2 that FiDA is without prejudice to the freedom of data holders to establish voluntary agreements or contracts for data access and sharing are welcomed. This is particularly important to ensure that data holders can share access to customer data with entities that are not data users under FiDA, either based on exiting voluntary agreements or in case of voluntary agreements which go beyond the scope of FiDA (e.g., cross-sectoral data sharing).

Recommendations:

- Ensure FiDA remains without prejudice to the freedom of data holders to establish voluntary agreements or contracts for data access and sharing.
- Further embed the market driven approach adopted by the proposal in the definition of the categories of data in scope, including through a more comprehensive assessment taking into account readiness of the data category, market demand and client groups.

Support the Parliament's amendment to Article 2(2)(l) and the exclusion of credit ratings agencies from scope.

Refined data sharing schemes – Article 10

To maintain trust in the broader data economy and ensure the successful implementation of FiDA, it is crucial to establish adequate timelines for implementation and operationalisation. The more practical discussions and agreements in both the Council and Parliament on a 'phased-in' or 'staggered' approach to data access prioritisation are important steps. However, it remains essential for policymakers to continue their reflections and carefully consider the numerous challenges entities within the scope will face during implementation. These challenges include data standardisation, updating legacy systems, creating data sharing schemes, establishing robust governance structures and reaching agreements on the design of data access schemes and the elements outlined in Article 10.

Based on the industry's experience with implementing other schemes, it is critical that the timeline for FiDA reflects the complexity involved in FDSS development. Adequate time is necessary for stakeholders to establish optimal governance, compensation and technical arrangements, to ensure schemes implement robust data security and protection measures. FiDA should provide sufficient flexibility for the industry to develop schemes within appropriate regulatory guardrails, defined by minimum horizontal principles and desired outcomes. Such flexibility will support the creation of innovative solutions that enhance customer experiences while maintaining regulatory compliance.

Furthermore, as stated above in the 'scope of categories of customer data' section, the framework provided in Article 10 and Article 36 (on implementation timeline) should be complemented by comprehensive quantitative assessment of the readiness of the data categories in scope, market demand and client group. At the very least, and as was discussed in the Council, a market-driven consultative forum or platform could be established (without necessarily being regulated in detail in the legislation) to allow market participants to share best practices, develop standards and support the efficient delivery of the Open Finance ecosystem.

Incentives are a crucial factor in the success of data sharing frameworks. Recital 29 highlights the importance of compensation to "ensure that data holders have an interest in providing high-quality interfaces for making data available to data users" and to "ensure a fair distribution of the related costs between data holders and data users in the data value chain." The proposals by both the Parliament and the Council to align the compensation elements of the FiDA proposal with the Data Act are welcome, including the clarification allowing compensation to include a margin. Additionally, the European Parliament's proposal to consider investments in the production and collection of data when determining the compensation model is critical, as it provides a holistic recognition of the monetary value of such efforts in the data value chain.

Finally, concerns about the lack of legal certainty provided by the new Council amendments to Article 6(1) and the questions it raises around the status of data sharing and access between the entry into force of FiDA and the establishment of financial data sharing schemes (FDSS) remain. There should not be any provisions that explicitly prohibit making data accessible outside of the FDSS, at least until there is a fully functioning and consolidated scheme for a certain product or service. Given past experiences with schemes such as the European Payments Council's SEPA Payment Account Access, it is imperative that the market has the flexibility to adapt and fall back to other data access mechanisms to make customer data accessible where needed. Failure to do so could create more harm than good as there would be a clear bottleneck and no clear alternative or contingency, giving rise to a negative experience for consumers and FiDA participants.

Recommendations:

- Support the Parliament's proposal in Article 10(1)(h)(i) which specify that compensation model shall take into account, among other things, the costs necessary for the formatting of the data, dissemination via electronic means and storage and investments in the collection and production of data.
- Support the Parliament and the Council proposed amendments to Article 10(1)(h)(ii) specifying that compensation 'may include a margin'.
- Support the Parliament's proposal in Article 10(1)(h)(v) which clarifies that the compensation model to be established by the schemes should ensure that there are sufficient incentives to foster market adoption and effective competition.
- Further embed the market driven approach adopted by the proposal in the definition of the categories of data in scope, including through a more comprehensive assessment taking into account readiness of the data category, market demand and client groups.
- Clarify the sequencing of data sharing outside and within FDSS and oppose the Council amendments to Article 6(1) until legal certainty is provided for the interim period.

Fair and equitable treatment

For the data access framework to flourish, any regulation introduced must be both consistent and appropriate, as this is essential to fostering innovation and competition. The clarity provided by the Parliament and the Council on the definition of 'financial information service' is a critical prerequisite for the consistent application of the proposal. However, concerns remain regarding certain elements that aim to limit participation in data access schemes.

Some of the proposed amendments raise concerns as they appear to extend beyond the provisions and principles established under the General Data Protection Regulation (Regulation 2016/679 - GDPR) and the Data Act (Regulation 2023/2854). Specifically, the requirement for an establishment within the EU to be eligible for data access and sharing schemes, rather than relying on the presence of a legal representative for enforcement and supervision purposes, diverges from existing frameworks. Alignment with current legislation in the data space is critical to ensure legal certainty and to avoid data localisation requirements, which could have adverse effects on the financial services sector and consumers.

The European Parliament's current position would prevent gatekeepers, designated under the Digital Markets Act (Regulation 2022/1925 - DMA) from applying to a FISP license and therefore from fully operating under FIDA. Separately, the Council introduced a specific and additional assessment by both

National Competent Authorities and the relevant European Supervisory Authorities before allowing gatekeepers to apply for such a license. These exclusions and restrictions, which aim at preventing gatekeepers designated under the DMA from being eligible data users, constitute an asymmetric measure which is not properly justified. The carryover of the gatekeeper concept, which was developed to address specific concerns on digital markets, in such a different context raises questions which are not answered, since it bears no relationship to the market position of designated companies in the financial services space. This could make it impossible for or entirely disincentivise these companies to invest in the Open Finance ecosystem, thereby limiting the choice and innovative services European consumers will ultimately get access to. A practical and efficient approach to addressing the concerns related to data accumulation would be to ensure alignment with the DMA's specific and detailed provisions on data aggregation and profiling (and particularly articles 5, 6, and 15).

Recommendation:

- Ensure alignment with the DMA's provision on data aggregation and profiling to appropriately address the concerns related to data accumulation while avoiding asymmetric rules which could disincentivise innovation and competition.

Legal certainty and alignment with other regulations

Coherence between new and existing regulation is essential to ensure legal clarity and fairness, while fostering a responsible data economy built on a competitive, innovative, and secure framework for data sharing. This also empowers consumers to have greater control over access to their financial data. To achieve this, co-legislators must thoroughly assess the interplay of the FiDA proposal with other relevant EU legislation, including the GDPR, the Data Act, the Digital Markets Act (DMA), the European Single Access Point (ESAP), the Market Abuse Regulation (MAR), the Payment Services Regulation (PSR), the third Payment Services Directive (PSD3) and the Open Banking provisions.

With respect to the GDPR, it is recommended that FiDA explicitly state that all legal bases for processing personal data under GDPR remain applicable. Furthermore, Article 6 of FiDA should avoid introducing more restrictive requirements than those already established in GDPR, as this could conflict with the technological and operational realities of data flows.

Regarding the PSR, PSD3, and Open Banking provisions, there is notable overlap between the permission dashboards to be created under FiDA and those outlined in the PSR (Article 43 – Data access management by payment services users). Ensuring consistency between the obligations for permission dashboards under both proposals is crucial. Permission dashboards are valuable tools for empowering consumers to better control their data and fostering trust in data sharing. However, their development is highly complex, and additional clarity is needed regarding the respective responsibilities of 'data holders' and 'data users' in this context. Furthermore, clarity on the supervisory authorities, as well as their respective responsibilities, would be welcome to ensure that there are no duplications or conflict within the EU single market for data.

Recommendations:

- Further clarify Article 3(3) to explicitly exclude any data which might constitute 'Inside Information' under the Market Abuse Regulation (MAR).
- Further align FiDA with the GDPR by not limiting the legal basis for processing of data (Article 6 FiDA/ Article 6 GDPR): *support Council proposed amendments to Recital 48 and further amend Article 6 FiDA.*
- Ensure alignment between Article 8 FiDA and Article 43 PSR on permission dashboards.

Conclusion

The FiDA proposal's market-driven approach the progress made during negotiations are seen as important steps towards a trusted data sharing ecosystem. However, significant concerns remain given the limited data available to fully assess the proposal's impact. Additionally, the scope of the proposal is overly broad and lacks clarity, which poses challenges to fostering a competitive, innovative and secure data sharing ecosystem within the European Union. The proposal should provide further clarification on the roles and responsibilities across the data value chain. It must also establish the right incentives and implement appropriate safeguards to mitigate risks and protect consumers, financial services providers and the broader market.

Summary of recommendations:

- Conduct a thorough assessment of the impact of FiDA before and throughout the interinstitutional negotiations and ensure the design of the Open Finance framework is fit for purpose and align the negotiations process with the Payments Services package.
- Support the European Parliament and the Council's proposals in Recital 9 which clarify that the proposal only applies to so-called 'raw data'.
- Further clarify Recital 9, as well as Article 3(3) where possible, to ensure that anonymised data are excluded from scope to limit unintended consequences on fraud prevention activities.
- Support the Council' proposal in Article 3(3) which explicitly excludes '*confidential business data and trade secrets*'.
- Further clarify Article 3(3) to explicitly exclude 'inferred or derived data', as well as any data which might constitute Inside Information under the Market Abuse Regulation.
- Support the Parliament's amendment to Article 2(2)(l) and the exclusion of credit ratings agencies from scope.
- Ensure FiDA remains without prejudice to the freedom of data holders to establish voluntary agreements or contracts for data access and sharing.
- Support the European Parliament's proposals in Article 10(1)(h)(i) and (v) which specify that compensation model shall take into account, among other things, investments in the production and collection of data as well as ensuring that there are sufficient incentives to foster market adoption and effective competition.
- Support the European Parliament and the Council proposed amendments to Article 10(1)(h)(ii) specifying that compensation 'may include a margin'.
- Further embed the market driven approach adopted by the proposal in the definition of the categories of data in scope, including through a more comprehensive assessment taking into account readiness of the data category, market demand, and client group.
- Clarify the sequencing of data sharing outside and within Financial Data Sharing Schemes (FDSS) and oppose the Council amendments to Article 6(1) until legal certainty is provided for the interim period.
- Ensure alignment with the DMA's provision on data aggregation and profiling to appropriately address the concerns related to data accumulation while avoiding asymmetric rules which could disincentivise innovation and competition.
- Further align FiDA with the GDPR by not limiting the legal basis for processing of data (Article 6 FiDA/ Article 6 GDPR).
- Ensure alignment between Article 8 FiDA and Article 43 PSR on permission dashboards.