FiDA and PSR: Key Issues for Developing the EU Data Economy

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Executive Summary

The Association for Financial Markets in Europe (AFME) believes that the EU's proposed Financial Data Access (FiDA) framework and Payments Services Regulation (PSR), if designed correctly, have the potential to enhance the way banks operate, encourage innovation (even across sectors, if some provisions are met) and support a more effective and efficient data ecosystem and payments system. This paper provides views on the proposals and follows our September 2022 paper[1] which set out building blocks for a competitive, innovative secure, and consistent framework for EU data sharing. The focus is on two areas: implementation issues and compensation.

Ensuring successful implementation:

1. Data Scope: we support narrowing the scope of data under FiDA to capture only data provided by a customer and transactional data, and exclude inferred data. Given the specific nature of wholesale and corporate clients (including financial institutions, institutional clients and multinational corporates and their affiliated entities) and the services provided to them, data from these entities should not be included in the definition of customer data for the purpose of data sharing.
2. Regulation and Supervision of Financial Information Service Providers (FISPs): given that FISPs will be on the receiving end of large quantities of sensitive customer data, we advocate for the application of strong regulation, especially DORA and cybersecurity requirements, and effective supervision and controls to FISPs as well as the enforcement of restrictions on data usage to ensure they are not exploiting the competitive advantage of having access to such data where they (or entities within the same groups) have the licenses to provide services in scope of FiDA. We also welcome a general clarification that FISP authorisation does not automatically allow for the provision of regulated financial activities. In addition, given level playing field concerns, gatekeepers under the Digital Markets Act should be excluded from FISP authorisation until effective data sharing from these entities has been granted under the Digital Markets Act.
3. Real-time Data Provision: given the wide scope of data captured under FiDA, we view that the requirement to share all data in real-time is disproportionately operationally burdensome and does not yield commensurate benefits. We support the allowance of a limited and reasonable time lag in data sharing.
4. Implementation Timeline and Governance: given the complexity of scheme development and the technical build required, we propose an implementation period of at least 36 months for the schemes, followed by at least 12 months for the rest of FiDA, with a phased approach that begins with targeted use cases identified as delivering the most significant benefits and requiring limited development. This would also facilitate a more balanced and pragmatic decision-making process with regards to the governance of the data sharing schemes.
5. Impact Analysis: the proposal lacks a comprehensive impact assessment. Given the challenges highlighted above, we view further analysis is needed determine the impact of FiDA as a whole and to plan a suitable phased implementation approach.

[1] https://www.afme.eu/publications/reports/details/detail/open-finance-and-data-sharing---building-blocks-for-a-competitive-innovative-and-secure-framework

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Compensation:

1. Compensation Should Be Market-driven to Encourage Investment: to facilitate investments in innovation and data infrastructure, compensation under FiDA and PSR should be market driven and aligned the approach to compensation to that agreed under the Data Act, which *"may include a margin"* and takes into account *"the costs incurred for making the data available and the investment in the collection and production of data"*.
2. Any Compensation Cap Should Be Limited To the Extent Necessary, At Least To A Micro and Small Enterprises Cap: Small/Medium Enterprises (SMEs) make up 99% of EU businesses[2], and this makes the current proposed cap overly broad and liable to increase fragmentation in data markets and create asymmetries between different types of data holders. AFME recommends limiting the cap to only to small and micro enterprises.
3. Consistent Availability of Compensation is Key Across Financial Services Legislative Files: compensation should ensure fair distribution of value with incentives for all market actors, secure proper allocation and share of costs across the data value chain, and safeguard competition. Therefore, the provision of compensation should be mapped consistently across from FIDA to PSR.

[2] According to the Commission's own Impact Assessment for FiDA

Introduction

AFME welcomes the opportunity to engage with the EU on ongoing legislative initiatives to build a single market for data. In order to amplify its positive impact and avoid any unintended consequences, the future data market should be fair, competitive and safe. It should have the same rules for all participants, promote incentives (e.g. compensation) for innovation and fairly allocate liability to better protect consumers by creating an ecosystem that is safe, healthy and trustworthy. This would increase innovation, investment and legal certainty. With this in mind, this paper focuses on two key aspects of the FiDA and PSR proposals: implementation issues and compensation.

PART 1: FEASIBLE IMPLEMENTATION

1. Data Scope: FiDA Article 2(1) and Article 3(2) and (3)

The scope of the data to be included in FiDA, as set out in Article 2(1) and Article 3(3), is overly broad. As such, and given commercial considerations surrounding divergent business models and varying levels of investment in data processing by firms, we support narrowing the scope of data to capture only data provided by a customer and transactional data related to services in scope of FiDA where they are available (as aligned with the approach under PSD2) and exclude any inferred data.

For example, we note that Article 3(3) includes "*data generated as a result of customer interaction with the financial institution*". This is problematic for several reasons:

- First, it will include data processed, generated and analysed by financial institutions, some of which will have required significant investment by those institutions and constitutes their own intellectual property. In this vein, we support the policy objective of Recital 9 and Article 5(3)(e) in ensuring that data sharing should respect confidential business data and trade secrets, and view that Art. 3(3) should similarly reflect this aim.
- Second, it is unclear how deep into customer interaction to go – for example, we would not support extension into compliance processes (e.g. suspicious activity reports) and risks assessments (e.g. model outcomes).
- Third, much of the data would require contextual explanation to be helpful to the data user. Items such as suitability assessments are not standardised and depend on an individual institution's methods, models, Key Performance Indicators (KPIs), taxonomies or risk appetite. Sharing data such as assessment outcomes may create confusion more than benefit, as well as risk endangering business secrecy.
- Finally, there is a risk that customer interaction data could be used to "game the system", allowing customers to bypass assessments or manipulate outcomes.

We would therefore strongly support the exclusion of inferred and derived data. This category is also excluded from data portability provisions in Article 20 of the General Data Protection Regulation (GDPR)[3]. We therefore view that an amendment to Article 3(3) is needed to ensure that data generated by financial institutions, even if such data are obtained by processing data provided directly by the customer, should not, in any case, be considered as customer data. We also note that customer data may be collected and stored by entities other than financial institutions, so the definition under Article 3(3) should take into account such considerations.

In addition, we also view that the definition of "customer" Article 3(2) is overly broad. For instance, it would not be useful for wholesale and corporate clients (including financial institutions, institutional clients or multinational corporates and their affiliated entities) to be included. Such "customers" tend to use very

[3] Regulation (EU) 2016/679

specific products of services, have dedicated data access interfaces and would also likely have risk management policies which would prevent the use of a third-party provider for this purpose.

AFME Recommendations

- The scope of "customer data" in FiDA Article 3(3) should be clarified to encompass only non-refined and readily available data, including transactional data (this approach would also be aligned with PSD2). We deem that inferred data should not be in scope of FiDA.
- The definition of "customer" should exclude wholesale and corporates clients (including financial institutions, institutional clients or multinational corporates and their affiliated entities), which use specific institutional and corporate banking services and may have risk management policies against sharing data with third parties.

2. Regulation of and Supervision of Financial Information Service Providers

The proposed scope of FiDA in application to institutions as data holders and data users is broad ranging. We understand that this is with the intention of maximising the potential data sharing and benefits for the industry. However, we are concerned about the status assigned to the new category of entities – FISPs, defined as *"data user[s] authorised to access the customer data for the provision of financial information services"*. Given that FISPs will receive large quantities of highly sensitive customer data from in-scope financial institutions, we advocate for strong regulation and effective supervision and controls of FISPs (under Article 12-16) and obligations when receiving customer data (under Article 6). We support the full application of DORA to these entities, as well as the application of cybersecurity rules which currently apply to in-scope financial institutions. Given the high sensitivity of customer data which will be received by FISPs, we view that FISPs should be subject to the full scope of DORA and should not be able to benefit from DORA Article 16 (simplified ICT risk management framework). This is key from the perspective of strengthening the data security and operational resilience of the whole financial data ecosystem, as well as maintaining a level playing field between different market participants.

We agree with the obligations on data users for receiving customer data (Article 6), such that FISPs would be explicitly prohibited from sharing onwards its data without user consent to entities within their groups. We would also welcome a general clarification that FISP authorisation will not automatically allow for the provision of regulated financial institution services (which require authorisation under the relevant legislation). We also suggest that the legislation should clearly identify a list of illegitimate purposes for which the use of customer data is prohibited.

We are also concerned by the potential authorisation of institutions that are defined as "gatekeepers" under the Digital Markets Act[4] as FISPs, which would further increase their role and influence in the data markets. We note that such institutions are already excluded from receiving data under the final agreement of the Data Act, Article 5(2). In the context of FiDA, we view that gatekeepers should not be allowed to authorise as FISPs until the Commission has deemed that data sharing under the Digital Markets Act has been achieved. The Commission should be empowered to adopt a decision on this matter subject to consultation with the industry to ensure effective access subject to certain criteria (e.g. high data quality and good availability or searchability of APIs).

We would also like to draw to the attention of EU policymakers potential level playing field issues which may arise from the authorisation as FISPs of large technological companies with high quantities of data in their possession but which do not qualify as gatekeepers under the Digital Markets Act, and view that the

[4] Regulation (EU) 2022/1925. Gatekeepers are Alphabet, Amazon, Apple, ByteDance, Meta, Microsoft, per the Commission's list of September 2023.

Commission should be empowered to legislate on this issue (via delegated regulation) should competition issues arise.

Lastly, we support secure, cross-border data flows that respect the protection of the fundamental rights of EU citizens and firms, especially when the data concerned is of high sensitivity, such as financial or health data. Given that no other jurisdiction has adopted an open finance framework as comprehensive as that proposed in the EU, we would like to highlight the importance of the effective supervision of and the enforcement of requirements on third-country FISPs, especially when they do not have physical presence in the EU, to the equivalent outcome as the conditions for EU FISPs under FiDA.

AFME Recommendations

- We advocate for the strong regulation and supervision of FISPs (Article 12-16), including DORA and cybersecurity rules, and support the enforcement of obligations on them when receiving customer data (Art. 6). Furthermore, the legislation should clearly identify a list of illegitimate purposes for which the use of customer data is prohibited.
- We support a generation clarification that FISP authorisation does not automatically allow for the provision of regulated activities (which require authorisation under the relevant legislation).
- The authorisation of BigTech gatekeepers as FISPs should be prohibited until the clear implementation of data sharing under the Digital Markets Act has been achieved (subject to a Commission decision).
- Third-country FISPs should be regulated and supervised to the equivalent outcome as the conditions for EU FISPs under FiDA, especially when they do not have physical presence in the EU.

3. Real-Time Provision of Data: FiDA Article 4, Article 5(1) and Article 8(4)

We strongly oppose the requirement under FiDA that in-scope data should be made available to the customer in "real-time" given both the technical and operational challenges associated and also the limited value of real-time data sharing for customers and the data ecosystem. As an example, securities accounts held by investors are not used typically for day trading, and therefore we question the benefits of real-time data sharing from such accounts.

AFME Recommendations

- The requirements in FiDA Article 4, Article 5(1) and Article 8(4) to provide data in real-time should be removed from the Level 1 proposal. Instead, we would support a limited and reasonable time lag to be permitted for data sharing, so long as it is done without undue delay.

4. Timing of Implementation and governance: FiDA Article 10-11 and Article 36

The implementation of FiDA faces many challenges surrounding data standardisation, updating of legacy systems, creating data sharing schemes, and ensuring their governance structures are robust. Given the scale of FiDA as noted above, along with the current fragmented nature of the data landscape, the implementation of FiDA will be amongst the largest upcoming technical builds for many institutions. In addition, reaching agreement on the design of data access schemes and their implementation will take time. In particular, the schemes will require consultation and agreement with a large number of diverse stakeholders.

As with any other regulation, industry implementation cannot begin until the legislation has been finalised and the schemes have been designed. Therefore, it is crucial that a suitable, realistic implementation timeframe is set in the Level 1 text. The current proposed timeline of 18 months from entry into force for the provisions on financial data sharing schemes and FISP authorisation is extremely short, as is the 24 months envisaged for the rest of FiDA. We view that, instead, a minimum implementation period of 36 months should

be granted for the development of schemes, followed by an additional 12-month period for the remaining FiDA provisions.

We also believe that a phased implementation should be considered, accompanied by a specific impact assessment for each targeted use case, delivered through pilot programmes. This should begin with use cases where benefits have been identified, where data is commonly available among market participants, and for which limited development is required. In this context, we note that the industry continues work on making such assessments and identifying use cases. Given the ongoing development of Open Banking and the evolutions in this space, including the industry's experience with the EPC SEPA Payment Account Access (SPAA) scheme, we view that significant challenges remain for the agreement on creation of new schemes for data sharing under FiDA. We note that in its current form, the SPAA scheme (covering only payments) is not able to accommodate for changes proposed under FiDA, and broadening its scope would necessitate renewed negotiations with more players and diverse interests and require the identification of the entity that will manage the scheme.

In addition, we welcome continued engagement on the implementation criteria of the schemes (under Art. 10) in order to strike the right balance between the schemes' stakeholders, their interests and responsibilities. Given the investments required from firms, there should be very reliable mechanisms and metrics to assess the added value of schemes and IT developments for customers.

Finally, we would welcome clarity from the Commission as to its timeline for assessing whether Art. 11 (Empowerment for a Delegated Act in the event of absence of a financial data sharing scheme) would need to be invoked, as it is clear that this process would need to begin in advance of the deadline for a scheme(s) to be developed not being met. In addition, we view that the technical expertise required for setting up such schemes would necessitate the involvement of the industry and technical experts.

AFME Recommendations

- The implementation timeline for FiDA should be no less than 36 months from the publication of the final text to the deadline for the development of a scheme(s), followed by at least 12 months for implementation of the rest of FiDA. There should be a staggered implementation, beginning with targeted use cases identified as delivering the most significant benefits.
- We welcome clarity from the Commission on its assessment plans for when Article 11 would need to be invoked.

5. Further Impact Analysis is Required

As acknowledged Commission's Impact Assessment of the FiDA proposal, *"Given 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…the costs of each policy option are already challenging to estimate, its isolated benefits are even more difficult to gauge"*. We are therefore concerned that there has not been enough analysis of the scale of the proposed requirements and their impact on the industry. This will exacerbate the challenges of defining the scope and setting an appropriate timeframe for implementation, which we outline above.

Furthermore, as outlined above, the scope of the data covered by FiDA is very significant. We have suggested above a phased approach accompanied by impact assessment of the specific use cases within scope, as well as a suitably extended implementation timeframe to allow for this.

AFME Recommendation

- It is imperative that a further impact assessment is carried out, both to determine the impact of FiDA overall and to assess the individual use cases to be targeted during a phased approach.

PART 2: COMPENSATION

1. Compensation Should be Market-Driven to Encourage Investment

The principle of the data holder being able to receive reasonable compensation for making the data available to a data user is an important step forward to create a fair distribution of value in any data sharing frameworks and an incentive structure that is aligned with the policy objective of developing data markets and enabling innovation. In our view, the FiDA proposal's more restrictive stance on compensation should be changed to be aligned with the more market-driven approach under the Data Act.

In relation to the calculation of compensation, we note the differing approaches taken by FiDA from that of the final agreement of the Data Act. Article 10(1)(h)(i) of the FiDA proposal states that compensation *"should be limited to reasonable compensation directly related to making the data available to the data user… it should be devised to gear compensation towards the lowest levels prevalent on the market"*, whereas the final agreement on the Data Act regulation states in Article 9 that *"Any compensation agreed upon between a data holder and a data recipient…should be non-discriminatory and reasonable and may include a margin… [taking into account] in particular the costs incurred for making the data available and the investment in the collection and production of data"*.

As the goal of a large, secure and trusted EU data sharing framework will require the development of new services and investment in innovation, compensation should allow for a margin and be market-driven, recognising the legal, organizational and operational costs to make data available, and not limited only to creating and maintaining the infrastructure, or to covering the investments related to collecting and structuring the data. We view that so long as compensation practices are agreed in schemes with equal representation of data holders and data users, they should ensure fair representation of interests.

AFME Recommendation

- The calculation of compensation in FiDA and PSR should be market driven and not only "directly" linked to making the data available. The approach to compensation should be aligned with that agreed under the Data Act, such that it allows for a margin and takes into account "*the costs incurred for making the data available…and the investment in the collection and production of data".*

2. The Positive Incentives set by Reasonable Compensation would be Best Supported by a Micro and Small Enterprises Cap

AFME supports the Commission's objective towards a level playing field for participants in the EU data economy. We also acknowledge the importance of supporting Europe's SMEs.

Within these aims, the overall objective of the Commissions data proposals is, and should be, to promote data-driven financial services and move away from a fragmented approach to data within the sector. However, we believe that the SME cap, as currently proposed in FiDA Article 10(1)(h), runs contrary to this aim. The asymmetries between different participants in the data economy will naturally result in fragmentation of data markets and uneven allocation of costs across the data value chain.

Many SMEs, including some mid-sized start-ups and tech companies, are strategic participants in the data economy. Introducing a cap for the whole SME population, would be a *de facto* cap to cost, as SMEs make up

99% of businesses within the EU. We therefore view that medium sized companies (with between 50-250 staff headcount and turnover of 10-50mn, or balanced sheet total of 10-43mn) should not be subject to the compensation cap.

AFME Recommendation

- We recommend focusing any compensation cap on small and micro enterprises. This will target support towards the greatest need, while ensuring a level playing field for the majority of participants in the EU data economy.

3 . Consistent Availability of Compensation is Key Across Financial Services Legislative Files

AFME strongly supports the introduction compensation for data sharing within FiDA, and this principle should also be reflected in PSR to ensure regulatory coherence between the two files. While access to data had to be provided for free in the past, the cost of investment and for the provision and maintenance of the infrastructure and data standardisation have been, and continue to be, significant on the side of the data holders under PSD2. We would also highlight that voluntary agreements between banks and third-party providers are being developed as part of the SPAA scheme to drive "open payments" in the EU and include compensation. These are a strong indicator that compensation is a driver for innovation and quality.

While the PSR is part of a continuum of legislation on payments, we do not agree with the reasoning in draft PSR Recital 55 that introducing compensation for payments data would be disruptive to the established payments ecosystem. On the contrary, we consider that introducing compensation for payments data, which would support and incentivise security and innovation, would help to address the well understood challenges with the existing payments ecosystem and allow for a fairer distribution of value and risk between market participants. There are also a number of ways to address this risk, for example through staggered approaches, setting reasonable timelines for introducing compensation in the payments space or the creation of schemes.

Finally, we note that improving customer access to data, and its associated benefits, is rightly at the heart of this legislative package on data. Taking an inconsistent approach to the availability of compensation would lead to differing incentives for innovation and investment across the EU data economy, and ultimately undermine the best end results for customers.

AFME Recommendation

- We recommend that provisions on the availability of compensation be consistently included under FiDA and PSR. If necessary, a staggered introduction for PSR could be considered to minimise disruption risks.

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