

Luxembourg, 27 October 2023

Subject: ALFI's response to the EU Commission's 'have your say' on the proposal for a regulation on a framework for Financial Data Access

Introduction

The Association of the Luxembourg Fund Industry (ALFI) represents the face and voice of the Luxembourg asset management and investment fund community. The Association is committed to the development of the Luxembourg fund industry by striving to create new business opportunities, and through the exchange of information and knowledge.

Created in 1988, the Association today represents over 1,500 Luxembourg domiciled investment funds, asset management companies and a wide range of business that serve the sector. These include depositary banks, fund administrators, transfer agents, distributors, legal firms, consultants, tax advisory firms, auditors and accountants, specialised IT and communication companies. Luxembourg is the largest fund domicile in Europe and a worldwide leader in cross-border distribution of funds. Luxembourg domiciled investment funds are distributed in more than 70 countries around the world.

We thank the Commission for the opportunity to participate in this 'have you say' on the proposal for a regulation on a framework for Financial Data Access ('FiDA').

The evaluation of the impact on the fund industry of the application of the current proposal largely rely on a conjectural assessment due to the absence of manifest case studies and concrete applications. Nevertheless, ALFI's analysis has highlighted fundamental considerations and recommendations pertaining to the open finance framework when applied to investment fund managers and their stakeholders. These considerations are listed and detailed below in order of priority.

I. Customer definition encompassing natural and legal persons

The regulation proposes to establish a framework for the access, sharing and use of certain categories of customer data in financial services. The latter 'customer' is defined in Article 3(2) as:

a natural or a legal person who makes use of financial products and services

Accordingly, this implies that the data to be exchanged encompasses both individuals and corporations' data. In industries relying on intermediations and delegations to achieve provision of investors cost-efficient services, the inclusion of legal persons in the scope of the proposal poses challenges. The corporate counterparties (clients) are numerous and of fundamentally different nature. This translates into a case-by-case data model for virtually every corporate relationship calling into question the proportionality between the costs and benefits associated with the application of FiDA to these particular customers.

Accordingly, ALFI recommends the scope of FiDA to focus on natural persons and exclude legal persons. This proposed scope would capture the great majority of the categories of data listed in Article 2 and associated benefits without inducing disproportionate costs and complexities related to the management of distinct and idiosyncratic corporate data. Alternatively, a phased approach with an initial scope limited to natural persons and extended to legal persons as a second step could be a trade-off to consider. This approach would have the merit to give the possibility to assess whether objectives sought by the regulation are attained vis-à-vis natural persons prior to extending it to legal persons.

II. Effective costs and compensation

The proposal acknowledges for the fact that the mandatory provision of data is associated with costs incurred by the data holder. Such a compensation is foreseen in Article 5 paragraph 2 and determined according to a model whose parameters are provided in Article 10 paragraph 1(h). The modalities of this model are still to be defined under either the data sharing scheme or a Delegated Act (Article 11).

Past experiences on data exchange projects have highlighted the presence of substantial both explicit and implicit costs. A fair compensation model should capture exhaustively all these costs. An incomplete compensation scheme, would result in an unfair allocation of the costs to the data holder alone. Furthermore, due to inherent economies of scope and scales, different data holder would incur different level of costs for the provision of the same data. To the extent 99% of counterparts are SMEs according to the EC, it is therefore important to ensure that any potential cap on compensation would be limited to micro enterprises.

Because of the presence of implicit costs and diverging costs across entities (data holder), a model is unlikely to capture all costs accurately. For instance, the proposal clarifies that compensation can be obtained only if

the customer data is effectively made available (ex-post). However, some implicit costs related to investment in the infrastructure ('ex-ante transformation costs') pre-existing to any data transfer are substantial and should be compensated for. In many instances, the majority of the costs might be related to fixed-costs (investments). Similarly, implicit costs related to potential liabilities stemming from the provision of data are also to be accounted for and captured by the compensation.

As a conclusion, the current and still to be determined framework, is likely to result in a mismatch between allowed compensation and effective costs. ALFI recommends to allow for a more flexible and principle-based framework to determine compensation also acknowledging for the differences across entities.

III. Scope of data to be exchanged

Article 2 paragraph 1 defines broadly the categories of customer data included in the far-reaching scope of FiDA and subject to accessibility and sharing requirements. Other data exchange related regulatory frameworks benefit from a more targeted and standardized scope (e.g. PSD2). The far-reaching scope is interacting with the wide variety of possible and unstructured data within the fund industry. Furthermore, the current proposal does not distinguish between already existing data and data to be created/generated.

In order to operationally accommodate for this large scope, ALFI recommends to focus only on existing data. Accessibility and sharing requirement should be limited to already existing data. There is indeed a need to ensure that only "raw data" are included into the scope of FiDA as well as a limited list of transactional data. Treated or computed data should remain confidential as falling under banking confidentiality rules and intellectual property regulations. It should therefore be appropriate to clarify that "data generated as a result of the customer interaction" should exclude e.g., internal assessments/scoring.

It is also relevant to consider clarifying the treatment of data acquired to third parties. The definition is not clear on 'who' can generate such data and, in particular, whether they can also be third parties (e.g., appraisers, advisors) or an electronic tool (e.g., a financial calculator, AI chatbot), or only the staff of a financial institution. We suggest that it excludes third party data (e.g., purchased from a third party), as the data holder (e.g., a financial institution) may not be the 'original' data holder. This is important in terms of data accuracy and liability as well.

It is also important to clarify elements related to products in scope and the complexity in assessing for each product which information is relevant (position, transactions, characteristics). In particular, as far as it relates to

“investments in financial instruments” and “crypto-assets” it is important to be in a position to identify the type of products, the type of information/data and the related exclusions (i.e. everything that is necessary to have a clear and comprehensive understanding of these key notions including in terms of frequency, activities, etc). The definition of a data exchange model, considering the variety of financial instruments, is far more complex than exchanging information on cash balance as implemented in PSD2.

IV. Fragmented request possible

The Article 8 paragraph 2(a.iv) can be interpreted as a possibility for the data owner to request only a fragment of his data to be shared. The granularity offered to data owner interacting with the broad scope defined in III. Would result in dimensionality problems making each single request potentially unique. In this context, reducing complexity in order to have manageable requests is pivotal for the framework to be feasible and reap the promised benefits for the industry and customers. Accordingly, ALFI recommends to standardize the data range associated with the requests of single customer.

V. Potential side effect

The different considerations above detailed will impact data holder asymmetrically. Depending on the industry, business model, size and age of the entity, the costs related to compliance with the framework could greatly diverge. Indeed, the readiness of data models and portals still differs across players. The new requirements may provide some players with a competitive advantage built on possible economies of scales and scope, and up-to-dateness of IT infrastructure as well as on resource availability. In this context, consideration should be given to preserving diversity on the market by ensuring that the requirements do not overly favour some particular entities at the expense of others. This also relates to avoiding creating oligopolistic situations. Such situation could arise at the level of data holders because of the differences in costs of compliance. It may also be relevant in the context of gatekeepers applying for the status of financial services information providers (‘FISP’). For instance, an incompatibility between the gatekeepers and FISP roles could be contemplated. We would therefore suggest to exclude these entities from the list of entities being entitled to act as FISP. The approach would be aligned with the one adopted in the Data Act and the Digital Market Act. Clarifications around the notion of FISP also implies that the notion of “financial information service” be clarified within the regulation and that an appropriate supervision is in place, especially where FISP are based outside EU.

VI. Timing for implementing schemes

The proposed regulation currently foresees an 18 months period to create schemes, upon entry into force of the regulation. This timing appears to be highly unrealistic given the constraints, elements to clarify and operational aspects.