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EBF response to European Commission's Call for Evidence on an Open Finance Framework – enabling data sharing and third-party access in the financial sector

Key messages:

- Open Finance must be considered as **part of the data economy as a whole** and there must be a careful consideration of what policy option to pursue which, on the one hand, empowers and delivers new opportunities for customers and, on the other, stimulates innovation in the financial sector and data economy as whole.
- The approach to Open Finance should **set out a framework or a scheme** with provisions on how data could be share (incl. consumer protection, liability, compensation, technical obstacles) **to facilitate voluntary data sharing**, based on market needs. This would help to see for which use cases there is customer demand – for which there is the most added value – while supporting innovation in the market.
- **Trust** must be the **foundation of any data sharing framework** as the customer is at the centre. Consent management tools can play a role and can be provided by any party (data holder, third party or intermediary).
- **Technical obstacles** such as common **secure access and transfer mechanisms and standards** must be addressed. Efforts should be market driven and build on existing developments. Any Framework should remain technology neutral to allow for novel solutions to emerge.
- A **fair distribution of value** in the Framework is key. **Incentives** should be provided for all market actors, which will also result in **better outcomes for end users.**

I. Introduction

The European Banking Federation (EBF) welcomes the opportunity to comment on the European Commission's Call for Evidence on an "*Open Finance Framework – enabling data sharing and third-party access in the financial sector.*"

A **European data economy** which unlocks **new opportunities for customers** – individuals and firms – through increased data sharing is a priority that the European banking sector welcomes in **the process of its own continuing digital transformation**. It is the **combination of data from different sectors** which holds the greatest potential for delivering **new services and experiences for customers –** who must be at the centre of any data sharing.

In our view, and also in line with the **EBF response to the European Commission's Targeted Questionnaire on Open Finance**[1], this would be an approach that sets out a legal framework or a scheme with provisions on how data could be shared, covering issues such as consumer protection (including consent management) liability, compensation, technical obstacles to data sharing, and a level playing field among all market participants, with reciprocity in data access.

Data sharing would be voluntary, based on market needs and contractual arrangements, as necessary. Market-driven initiatives could help to develop any necessary technical standards (e.g. on data formats, exchange protocols and security), while also taking into account the work already done under other fora such as the SEPA Payment Account Access (SPAA) Scheme, the Berlin Group, and ISO.

Voluntary data sharing would help to see for which use cases there is customer demand and support innovation. It would keep the financial sector moving towards an open data economy, without creating further asymmetries with other sectors, and would also be consistent with the recent EU proposals on data sharing, which, except for very specific actors or datasets, aim to facilitate voluntary data sharing between firms. The Open Finance Framework should follow a similar approach, **thus being a voluntary and facilitator framework, allowing and stimulating innovation to emerge from the market itself while delivering new services and opportunities for customers.**

As long as there is no data sharing framework that includes all sectors of the economy, no new mandatory data access rights in the financial sector should be introduced. Any policy option that contemplates the introduction of new data access rights (e.g. policy option 2 in the Call for Evidence) will deepen existing data asymmetries and be counterproductive for innovation, with the risk of limiting new business models and not taking into account **the evolution of real customer demands and what type of data is really needed (e.g. data from different sectors).**

Comments on the specific sections of the Call for Evidence follow.

II. Comments on the sections of the Call for Evidence

A. Political context

The context presented in the Call omits several key factors when it comes to the current situation of data sharing in the financial sector and the wider data economy:

1. **Ongoing PSD2 review:** While the document mentions that the revised payment services Directive (PSD2) is currently under review, (it fails to add that this review is **essential to assess and analyse the impact, costs and benefits that the regime has brought**. Any decision to proceed with further data sharing initiatives in the financial sector must first consider these results to be able to **identify precisely what to replicate, what to avoid and what to do better**. In any case, we caution against merely rolling out PSD2 requirements across the whole financial sector especially as regards the asymmetries generated by the absence of a fair balance of interest between data holders and providers offering services based on access to that information. **There should be an interrogation whether the PSD2 has resulted in more competition and innovation**.
2. **The scope of open finance:** The context mentions that "*the open finance initiative covers all relevant financial services*." However**, the competitive conditions in each of the product markets must be thoroughly assessed** in any consideration of the scope. Each product market and service have **distinctive characteristics**, also when it comes to personal and non-personal data. Please

[1] EBF response to the European Commission's targeted questionnaire on Open Finance - EBF

see our response to Section II of the Commission's Targeted Questionnaire which illustrates the complexities of the investment use case.

Considering the existing state of play in each product area and the potential impacts any mandatory requirements would have on them is therefore crucial.

3. Data-sharing beyond PSD2 should be **pursued only on a cross sectoral level.** Moving beyond the PSD2 framework towards open finance without also acting in other sectors could deepen the existing data asymmetry faced by banks and heighten the risks associated with it. We therefore welcome the reference in the Commission's definition of Open Finance that **explicitly refers to data holders outside the financial sector**.

4. **Cross-sectoral data:** It is welcome that the political context mentions the Data Strategy for Europe, as it is crucial to see Open Finance as part of a wider EU data sharing economy. The Commission's **focus should not only be on banking and finance.** Cross-sectoral data use is mentioned (and use cases highlighting its value have been added in the annex of the Targeted Questionnaire), which presumably refers to the Data Act. Yet the Data Act does not deliver an "across the board" horizontal data sharing requirement– **data from telecom or energy sectors, for example, is missing – despite the potential cross-sectoral use cases they could enable.** This is important when looking at Open Finance as there needs to be a broader vision – one which considers not only financial services data but relevant data from other sectors. While the Call for Evidence does mention non-financial data later, it should form **an integral part** of the context for the discussion.

   Bringing in the angle of cross-sectoral data also points to the importance of **coordination among sectors,** including **interoperability on data standards**. The **European Data Innovation Board**, created under the Data Governance Act, could be a possible forum to drive this alignment and to help cross-sectoral standardization, particularly as the use of cross sectoral standards and cross sectoral interoperability will be one of the Board's tasks, along with proposing guidelines for common European Data Spaces, where cross sectoral standards are also a topic to cover. Meanwhile, coordination across sectoral regulation is needed to achieve a coherent approach to consent management, notably with Data Protection Authorities and the European Data Protection Board.

5. **Security and data protection risks**: Sharing data with third parties can expose customers to security and data protection risks, as well as an increased risk of fraud **Trust** therefore needs to be at the **base of any framework** and **adequate safeguards** need to be considered. This includes:

   - Building consumer awareness and education, so that consumers understand more about what specific services do and do not do/enable.
   - Informing customers on how/when their data are used and what data they are sharing and with whom, including information on revoking permissions. This is important for building secure and user-friendly services.
   - Foreseeing cybersecurity measures in order to prevent cybercrime, fraud and data breaches.

6. The **recommendations of the European Supervisory Authorities (ESA) on the Commission´s call for advice on Digital Finance**[2] should be explicitly dealt with prior to the proposal for an Open Finance Framework to avoid the risks already observed in the implementation of PSD2, including the variety and sometimes divergence of requirements introduced by Regulators over time which creates

[2] EBA, EIOPA, and ESMA, Joint European Supervisory Authority Response to European Commission's February 2021 Call for Advice on digital finance and related issues, January 2022

operational difficulties and fragmentation. Several of the ESA´s recommendations would require lengthy legislative processes (e.g. application of prudential rules to mixed activity groups offering financial services) that could result in an unlevel playing field in Open Finance if the initiatives are not synchronized across sectors.

B. Problem the initiative aims to tackle

As a general comment, we would like to underline once more that, before proceeding with the Open Finance initiative, **the results of the PSD2 review must be thoroughly assessed**.

The Call outlines that one of the problems the initiative would tackle is *the difficult access to and reuse of customer data for third party providers, which hinders business innovation*. While PSD2 has led to more standardised data access and financial institutions have also widely started to make more data available, there is an imbalance with regards to the availability of data held in other sectors.

More specifically, on page 2, the Call sets out four legal, contractual or technical obstacles that need to be addressed on page 2. Taking each of the obstacles in turn *(the listed obstacles are the ones from the Commission's call for evidence text)* **:**

1. *Lack of clarity on contractual or statutory obligations with regard to accessing data, notably non-personal data. Lack of data availability in appropriate quality (e.g. as regards the breadth of data) and frequency (e.g. real-time access vs ad hoc requests). Lack of interoperability in the absence of harmonised standards across data holders.*

A mention of common **secure data sharing mechanisms** (e.g. APIs) is missing even though it is one of the main technical obstacles. To address this, what has already been done under existing initiatives should be left as it is and further developed (e.g. APIs and PSD2) while keeping the framework technology neutral so other secure solutions can emerge and co-exist. **This should be market driven**. An outcome where industry is locked into existing regulated technologies that can be outdated by rapid technology development, should be avoided.

The **lack of common standards** is a key obstacle. There are ongoing market initiatives, such as those of the SPAA Scheme and Berlin Group, which should be taken into account to maximise synergies and ensure interoperability. **Detailed technical standardisation should be market led –** this is also one of the main lessons learned from PSD2. Furthermore, supervisory convergence is needed as standards can also be perceived differently by supervisors and result in fragmentation (the cross-sectoral perspective is important here as well).

With regards to **interoperability**, the cross sectoral dimension must be taken into account. The Data Act includes provisions on interoperability under Chapter VIII and developing cross-sectoral interoperability is one of the tasks of the European Data Innovation Board under the Data Governance Act. Addressing **the lack of interoperability should be done** with view to the **entire data economy** to prevent fragmentation between sectors. The interplay between the Data Act, the Data Governance Act and any future sectoral initiatives, such as Open Finance, should therefore be clarified from the start.

Advancing on legal and technical data sharing issues within the silo of Open Finance may become a barrier to the seamless integration with other sectors if design issues are not decided from the onset. It may also prevent from introducing data sharing on an industrial scale.

2. *Lack of confidence and autonomy of consumers holding back customer agreement on data access, including due to data hacks, risk of data misuse and financial crime.*

Trust is at the **core of the bank customer relationship and it needs to be at the foundation of any framework for data sharing**. Customers should be the ones that decide whether, when, with what commercial or public parties, and for what purposes their data is shared. Data recipients, in turn, need to apply the appropriate safeguards for the protection of that data. It is about empowering the consumer versus only providing assurances that data holders and data recipients are doing the right thing.

The GDPR provides the framework for data protection. Each market participant is a data controller who is responsible for complying with the Regulation and should respect its requirements, especially concerning providing clear information about how the data will be processed and by whom. **Further clarifications of the responsibilities of all participants in the framework, especially concerning consent and the processing of data will help to ensure a high level of consumer protection and prevent potential gaps around management of non-personal data as this is not covered under GDPR.**

Rules on **consent management** should also be **clearly defined** and be consistent across members states; data subjects need to understand what it means if and when consent is required for sharing of their data (what data will be processed, who will use it and how it will be used, the identity of the controller, etc). From our members experience with the PSD2, **alignment with the GDPR is crucial from the start**. For example, differences in essential points such as "explicit consent" under PSD2 versus that under GDPR caused legal uncertainty for all market participants. Cooperation among the relevant authorities at an early stage is therefore necessary.

For customer confidence, tools can be explored to enable customers to control their data. The **choice of tool** must **remain** with the **data holder, third party or intermediary, depending on who is providing it.** Maintaining this **discretion and flexibility** for operators to **define and develop consent management tools** with different technologies is of utmost importance to better reflect specific needs. At the same time, there needs to be a common ground for consent management among providers, relying on basic rules and clearly defining accountability. This includes defining responsibilities in consent management, liability and the rules and conditions that apply.

Finally, the focus on security, integrity and privacy must apply to all financial service providers, including third parties involved in the digital financial market, in order not to damage established trust and confidence in digital financial services from end to end (the transfer, storage and reuse of data).

3. *Lack of incentives and/or possible lack of reasonable compensation for developing high quality APIs and to address possible recurring costs.*

There is one key word missing in the description of this obstacle – it is lack of incentives and or possible lack of reasonable compensation for developing ***and implementing*** high quality APIs. **The investment also has an impact/opportunity cost on available funds to spend on other services for end users.**

Nevertheless, the mention of this obstacle **is very welcome** as any future framework **must ensure a fair distribution of value and risks across all market participants.** This will incentivize them to meet the highest quality data standards and, importantly, help ensure funding for programmes to design, deliver and implement the required technical infrastructure. The European Banking Authority (EBA) in its response to the European Commission's Call for Advice on the Review of the Payment Services Directive[3] found that "*the success of Open Finance will also depend on having high quality APIs for the sharing of data* ***on firms having commercial incentives to invest and participate in the Open Finance ecosystem."***

[3] EBA replies to European Commission's call for advice on the review of the Payment Services Directive | European Banking Authority (europa.eu)

As mentioned above, the premise of PSD2 where access by some market participants to data held by other markets participants, free of charge **must be avoided**. We have observed that such an approach is not producing the expected market outcomes and therefore the best outcomes for end-users, potentially hindering innovation.

In any future framework, data management and the possibility to develop sustainable business models must be ensured for all parties involved. In this context, the principles in the Data Act should be respected and the possibility to remove compensation in sectoral legislation (currently under Art. 9(3) of the Act) should be limited to exceptional cases.

4. *Asymmetrical competitive position of data users compared to data holders and the latter's reluctance to make data available in the absence of full knowledge of data users' processing technology.*

We read this obstacle as the one of the level playing field. The Commission's Capital Markets Communication of November 2021 rightly identified that the principle of a level playing field for existing and new entrants should be part of the next framework. This must include companies from other sectors who are active within or adjacent to financial services, **such as technology companies providing financial services**.

C. Objectives and policy options

i. Objectives

Open Finance should be part of the wider data economy. The ability to access **non-financial data** that is relevant for the provision of financial **services should therefore be part of the framework**. This section in the Call mentions that digital innovation can help to support sustainable activities – this means enabling access to data from other sectors, such as energy or mobility. Potential use cases include:

- Data from households on their energy use and property could facilitate the provision of advice on greener energy choices or green financing for renewable energy installation.
- Data from real estate transactions and energy efficiency for buildings could allow credit institutions to offer better financing options.
- Data from transport-related purchases (e.g., vehicles, fuel, public transport tickets) could allow for recommendations on money-saving or greener options.
- Data from e-commerce can enable banks to do more accurate and faster credit risk assessments for SMEs and expand access to finance for underserved segments.

Regarding data from financial services beyond PSD2, there must be a thorough assessment of the competitive conditions in each of the markets (as illustrated above with an example of an investment use case).

The five objectives listed appear to be the right ones, **but their implementation must be carefully studied**. Specifically:

1. **Facilitating access to data and their reuse:** this should not include the introduction of new data access rights but instead should be on facilitating data sharing (please see policy approach below) and must include non-financial data.
2. **Enhancing the confidence and data autonomy of customers:** trust and security must be the basis of any data sharing. Consent management tools can play a role, but the tool should be the choice of the party providing them (as opposed to being mandated top down).
3. **Addressing risks related to data reuse:** when sharing data with third parties, customers are potentially exposed to risks related to consumer protection and privacy e.g. an increased threat of fraud, ID theft, cybersecurity breach or data

leak. At the same time, in case of banks, there is the risk of compromising their reputation and losing the trust of their customers. It is also important to consider banking confidentiality rules that go beyond GDPR – also applying to corporate customers – as well as trade secrets.

4. **Establishing a fair commercial model:** we would instead shift the focus to "establishing an **appropriate"** commercial model. The ability for data holders to receive compensation for making the data available to a data recipient needs to be an essential part of Open Finance. This should include the possibility to go beyond compensation for providing the infrastructure to access the data. Collecting data, structuring it, providing data of a high quality – this comes with a cost.
5. **Establishing a level playing field:** This should include technology companies that are providing financial services. Reciprocity on data accessibility is also a necessary condition, that is, only firms providing access to their own relevant data should be able to access data held by third parties.

ii. Policy Options

As stated in the introduction, an Open Finance framework would set out a legal framework or a scheme with provisions on how data could be shared covering issues such as consumer protection (including consent management) liability, compensation, technical obstacles to data sharing, and a level playing field among all market participants, with reciprocity in data access. Taking a cross-sectoral view in this approach is important.

Data sharing would be voluntary, based on market needs and contractual arrangements, as necessary. Market-driven initiatives could help to develop any necessary detailed technical standards (e.g. on data formats, exchange protocols and security), while also taking into account the work already done under other fora (SPAA Scheme, Berlin Group, and ISO).

Voluntary data sharing would help to see for which use cases there is customer demand and would support innovation.

In the EBA response to the Commission's Call for Advice on the Review of the Payment Services Directive, it also noted that Open Finance "*should first and foremost focus on* ***viable consumer propositions, business models and use cases to avoid setting requirements that require substantial costs to implement for a solution that is hardly used in the end."***

This flexible approach would help **respond to market demand and help to support innovation**. It would also allow different market participants to define their participation in the future framework. This policy option also allows for better interaction with the data spaces that are being developed in other sectors, to consider their specific characteristics and to enable the development of cross-sectoral use cases (since non-financial data is needed for the innovative development of financial services) and would not create unjustified barriers to the development of a European data space that empowers customers.

Furthermore, proceeding with other types of use cases in Open Finance **must be conditional on introducing data sharing in a substantial number of other sectors first, such as energy and telecoms,**– this is where the proposal for a Data Act falls short (and sectoral initiatives for the moment are in health and mobility in the future).

D. Likely impacts

The Call mentions that "*the initiatives might also involve costs for data holders to be able to make the data available with appropriate quality."* We would like to stress that **the higher the quality, the higher the cost**. The focus should be on **how to create the conditions for sharing quality data and supporting innovation**. Appropriate quality, frequency and format is more expensive. Allowing for a reasonable return on investment for collecting and structuring the data is therefore key and it should not be limited to it.

Another cost that needs to be considered is the scaling of existing services (e.g. data storage and APIs) to meet demands for data.

Other elements that must be considered in view of likely impacts are governance, risk mitigation (e.g. implementing appropriate security measures in view of risk to data security), liability, dispute settlement, and a level playing field. These are elements which should be addressed by the Framework.

III. Conclusion

Increased sharing of data can unlock new opportunities for customers, including within the financial sector. Yet to build a data driven financial sector, there must be a careful reflection on the part of the Commission and all relevant stakeholders on the policy option to do so. A framework or a scheme which sets out rules on how data could be shared while leaving data sharing as voluntary, will allow to see for which use cases there is customer demand. What is the service that will bring most value to them and empower them as participants in the data economy? It can also help to integrate non-financial data. A policy option that proceeds with new data access rights risks compounding the existing asymmetries in the financial sector when it comes to data sharing beyond PSD2.

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About the EBF

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