HU24EU
HUNGARIAN PRESIDENCY
OF THE COUNCIL OF THE EU 2024

Working Party on Financial Services and Banking Union

Regulation on a framework for financial data access (FIDA)

Brussels, 4 September 2024

Presidency discussion note

1. Introduction

The Commission presented its proposal for a framework for Financial Data Access on 28 June 2023. During the past months, the Spanish, the Belgian, and the following Hungarian Presidencies have held 8 Working Party meetings to discuss the details of the legislative proposal. At this stage of the negotiations, the Hungarian Presidency considers it useful to present a first global amended text (annexed to this Presidency note) to provide an overview of the changes proposed by the Spanish, Belgian, and Hungarian Presidencies.

The Presidency emphasizes that several critical issues remain unresolved, further discussions are needed to gain a comprehensive understanding. These topics are also clearly indicated in the text, the Presidency has put these parts in [square brackets], and the explanatory parts are highlighted with light red. These issues are the following:

- Treatment of occupational pension schemes: Article 2(1)(c)
- Interplay between Title II and Title IV: Article 6(1) and the relevant recitals
- Exclusion of third-country financial information service providers (Article 13)

The following section of the Presidency note provides a more detailed overview of these topics. To help delegations assess the latest amendments proposed by the Hungarian Presidency, the changes are indicated in **blue** and the corresponding explanatory parts are highlighted in light yellow.

2. Items for further discussion

2.1. Treatment of occupational pension schemes

This issue was discussed again at the 8th Working Party meeting, based on the non-paper presented by the Commission services. As a reminder, the Commission argues that the partial exclusion proposed by the Belgian Presidency [*(c) pension rights in **officially recognised** occupational pension schemes, in accordance with Directive 2009/138/EC and Directive (EU) 2016/2341 of the European Parliament and of the Council **insofar as they are accessible for all interested consumers**;]* could potentially exclude virtually all occupational pension schemes from the scope. However, pension rights held in occupational pension schemes form a core part of a consumer's financial profile, and consumers would have greater oversight over their pension rights. Moreover, occupational pension data are essential for the development of pension tracking systems. Information on pension rights would also contribute to better investment advice. The arguments of the Commission services were supported by some Member States during the working party and in the following written comments.

In the meantime, several Member States have emphasised that they prefer a full exclusion of occupational pension schemes. As occupational pension plans are generally not accessible to the interested consumers/employees, a full exclusion is necessary to prevent an unlevel playing field between the different occupational pension schemes, and any administrative cost increase due to the inclusion in the scope of FIDA will ultimately be borne by beneficiaries through reduced pension benefits. Moreover, pension tracking systems have already been developed, or are currently being developed in many MS. FIDA risks seriously undermining these pension tracking systems by duplicating costs and reporting requirements.

Based on the written comments, the majority of Member States supported the exclusion of most occupational pension schemes (**Option 1**) as proposed by the Swedish delegation (and shown in the box):

> Drafting proposal (original COM proposal, **BE PRES 3rd amendments,** **proposals of the Swedish delegation**)
>
> "(c) pension rights in **officially recognized** occupational pension schemes, ~~in accordance with~~ **falling under the scope of** Directive 2009/138/EC and Directive (EU) 2016/2341 of the European Parliament and of the Council**, with the exception of pension schemes resulting from negotiation of collective bargaining, national legislation, pension rights directly related to terms of employment and data derived from sickness and health cover of a member or beneficiary**;"

However, an alternative proposal (**Option 2**) emerged during the discussion, the possibility of an opt-in/opt-out, which could serve as a middle ground between the different views. To facilitate the discussion, the Hungarian Presidency would invite Member States to consider the following alternative proposal along the following lines which would feature in Article 2(3):

> Drafting proposal (COM original proposal, **HU PRES 1st amendments**) in Article 2, paragraph (3):
>
> 3. This Regulation shall not apply:
>
> **vi. This regulation shall not apply to institutions for occupational retirement provision registered or authorized in their territories in accordance with Directive (EU) 2016/2341 where data that is held by these institutions is made available through a pension tracking system to members and beneficiaries of occupational pension schemes and data users to whom the member or beneficiary has granted permission, in standardized form without undue delay, continuously and in real-time. However, Member States shall be able to apply the regulation also to these institutions. Where Member States do so, this shall be notified to the Commission.**

This proposal would exclude IORPs in Member States with a national pension tracking system, provided the system is equivalent in effect to the legal obligation to access and share customer data under Title II of FIDA. To ensure legal certainty, it is suggested the exclusion be entity-based and cover data held by occupational pension schemes that are registered or authorised in the Member State under the IORPs II Directive. This alternative proposal would allow Member States to exclude IORPs from scope while giving policy room to other Member States to apply the FIDA framework to IORPs if they choose to do so.

Question 1: *Which option would the Member States prefer? Maintaining the proposal of the Swedish delegation (Option 1) or excluding the IORPs in Member States where is a pension tracking system, with an opt-in possibility (Option 2)?*

2.2. Financial Data Sharing Schemes (FDSS)

During the 8th Working Party on 9th July, the Commission services presented a non-paper on the interplay between Title II (Data access) and Title IV (Financial data sharing schemes). The non-paper highlighted that Title II and Title IV are separate chapters of the FIDA proposal that serve different but complementary purposes. Title II contains autonomous, self-standing data access provisions and ensures that customers are in control of their data by empowering them to decide whether their data should be shared or not for the purpose of obtaining financial

information services. Title IV is the tool that facilitates effective and high-quality data sharing. The non-paper argues that financial data sharing schemes should become the main channel for data sharing in practice for the following reasons:

i) Due to the sequencing under the phased approach, obligations under Title IV enter into force six months before obligations under Title II.
ii) There is a clear requirement in Article 9(1) that all data holders and data users (including FISPs) are obliged to join a scheme. Infringing on this obligation would subject a data holder or use to administrative penalties, as per Article 20(1)(c).
iii) There are incentives to participate in scheme-based access. The most important of these is the reasonable compensation for data holders.

The Commission non-paper argues that, although this scenario is not the preferred avenue, it is important that the legislator allows for data access to occur outside Title IV. This ensures that customers remain in control of their data and provides legal certainty to data users that the data are in scope and not necessarily dependent on the existence of schemes. Against this background, the amendment of Article 6(1) proposed by the Belgian Presidency, as indicated in the box, would depart from the logic of the FIDA by making data sharing dependent on the establishment of the schemes, i.e. on the market and not the decision of customers. To address concerns about data sharing outside of the schemes and to ensure that scheme-based access through Title IV becomes the main and preferred route for data sharing, the Commission non-paper included additional safeguards in Article 5 and the corresponding Recital 10.

While a number of Member States agreed with the reasoning of the Commission and supported both the originally proposed version of Article 6(1) and the suggested modifications of Article 5 as proposed by the Commission, they still asked for further clarification on the interplay of Title II and Title IV, the need to analyse the cost aspect of sharing data through alternative means, and the importance of discussing whether the proposed set-up of the framework contains sufficient incentives.

Another group of Member States remains sceptical about the original proposal of the Commission and wants to directly link Title II access to Title IV as suggested by the drafting of the Belgian Presidency. Some Member States argue that data sharing outside of the schemes would be problematic because of the risks involved in sharing customer data in an ad-hoc manner without using common and secure standards for data sharing developed jointly by data holders and data users. There is a risk that data holders and data sharing itself would not meet the requirements of the schemes. The creation of a new form of bilateral data access rights for data users would raise issues related to reasonable compensation, data standardisation, level playing field, and other elements to be determined within the FDSS. Some Member States argued that data sharing outside the FDSS would lead to a situation similar to PSD2, with the same challenges. Each data holder would create its own technical interface, especially if the scheme is to be set up at a later stage according to the phased approach. This would be a disincentive to participate in an FDSS, as a “minimum” data holder specific API would already have been developed. This would lead to fragmentation and a lack of scalability for data users' business models. One Member State raised a consumer-oriented concern: how consumers could distinguish between data sharing within and outside of schemes, especially since the provision of a dashboard is not linked to the establishment of the schemes.

The Presidency would like to provide additional comments for the discussion. It should be underlined that Article 9 contains a legal obligation for data users and data holders to join a financial data sharing scheme. In case of non-compliance, there are administrative sanctions

in place. The Commission non-paper also indicates that based on the logic of the staggered approach in Article 36, the schemes are to be set up for a given category of data 6 months before FIDA is applied for a given data category. This means that there is no data sharing obligation under Title II before this deadline, but when the obligation "kicks-in" the schemes would be set up already. According to the assessment of the Presidency this also reduces the possibility of data sharing outside of the schemes. Moreover, Article 11 serves as an important safeguard of last resort. If no FDSS is set up for a given category of customer data, the Commission is empowered to adopt a delegated act to define the modalities of the data sharing between data holders and data users. This eliminates those possible cases where there is no scheme to participate in, thus the data sharing would occur outside of the schemes.

The Presidency proposes another suggestion to balance the incentive structure in favour of schemes, namely to remove the requirement to provide high-quality standardised data in Article 5(3) of Title II, thus outside of the schemes. Currently, the obligation to standardise customer data is found both in Title II in Article 5(3) and Title IV in Article 10(1)(g). The Presidency would propose to limit access to high quality standardised data by removing the obligation to provide data based on common standards in Title II.

Drafting proposal (COM original proposal, **HU PRES 1st amendments**) in Article 5, paragraph (3).

[…]

1. When making data available pursuant to paragraph 1, the data holder shall:

~~(a) make customer data available to the data user in a format based on **common** generally recognised standards and at least in the same quality available to the data holder;~~

This would ensure that data holders would not be required to share high quality data outside of schemes, thus further incentivising data users to join schemes. This would further restrict the residual risk that certain data users rely too heavily on data access outside of Title IV.

Some Member States have asked for further discussion on the schemes, including how schemes should work in practice and how the governance structures should work to ensure that innovative data users (in particular FISPs) have sufficient influence in the scheme discussions. The Presidency is ready to provide the opportunity for Member States to discuss these elements in the Working Party. The slides of the Commission services on interventions presented in previous Council Working Parties on financial data sharing schemes will serve as a solid foundation for this discussion.

As a contribution to the discussion, the Presidency notes that it is important to strike a delicate balance between being overly prescriptive at the level of the Regulation and allowing market participants and potential future FDSS members to set the rules that are most appropriate and suitable for an efficient financial data sharing scheme. The idea behind the mix of legislator-led and market-based approaches is that the legislator sets the specific deadlines by which schemes must be in place for certain data sets, but the exact modalities are the result of discussions by the scheme participants while respecting the provisions included in the Regulation. The number of schemes, the scope of the data sets included, and the geographical scope will be at the end dependent on the scheme members. The ability of the market to flexibly self-regulate based on Article 10 is the added value of schemes.

In light of the above, there is also the question of how to facilitate the establishment of the schemes. In the view of the Presidency, a market-driven consultative forum/platform could be set up at the EU level to provide a forum for the exchange of information and the sharing of

best practices, involving the various stakeholders. The Presidency considers that such a consultative forum can be established through cooperation between the relevant stakeholders without necessarily being regulated at the level of the Regulation. Article 26 also allows supervisory authorities to cooperate on the notification of schemes. This could allow for the sharing of best practices between supervisors on scheme development and notification.

The Presidency proposes an additional round of discussions on the following fundamental questions:

Question 2.1: *Do Member States consider it necessary to align FIDA with the basic customer-centric principles of other EU legislative acts that facilitate data access, namely that access to customer data must be initiated by the customer in order to ensure that customers are in control of the data sharing?*

Question 2.2: *What are the risks that Member States identify regarding the data sharing outside of schemes? Do Member States have any proposals to mitigate such risks?*

Question 2.3: *What additional incentives do the Member States consider necessary to ensure that data holders and data users join an FDSS? Do Member States agree that removing the standardisation obligation in Article 5(3)of Title II would ensure that high quality data could only be accessed through schemes in Title IV?*

Question 2.4: *What additional governance rules, if any, would Member States concretely suggest to introduce to Article 10?*

Question 2.5*: What is the Member States view on a potential market-driven consultative forum/platform? Do Member States agree that such an arrangement could be established without necessarily being regulated at the level of the Regulation?*

2.3. Establishment criterion for third-country financial information service providers

Based on the discussions held during the 8th Working Party and the subsequent written comments, the Presidency notes that there is still a strong majority in favour of excluding third-country financial information service providers and requiring an establishment within the EU for entities providing such services.

A majority of the Member States agreed with the Presidency's previous assessment, thus the Presidency drafted a new recital 34a (see the box below) to include the justification for the need to impose an establishment requirement in the EU for financial information service providers.

Drafting (**HU PRES 1st amendments**)

[(34a NEW) The establishment of a genuine, efficient, and functioning framework for financial data sharing in the EU requires the provision of specific rules and obligations for access to the EU market. It would undermine the market for financial data sharing and would undermine the level playing field if financial information service providers established in third countries were not subject to the same level of requirements for providing financial information services in the territory of the EU as those applicable to financial information service providers established in the EU. The customer data under the scope of this Regulation concerns detailed financial information on customer, and data directly related to the protection of investors, depositors, or policyholders. Accessing to the customer data under the scope requires a robust prudential framework to ensure the high quality data sharing which helps to build customer confidence in data sharing and contributes to the integrity of the financial system of the EU. In order to ensure effective supervision,

authorization may only be granted for financial information service providers if they are established in the EU. The Financial Services Annex (paragraph 2, point a)) to the GATS agreement sets out that a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. In addition, Article XIV (General Exceptions, point (c) (ii)) of the GATS provides for exemptions relating to the protection of the privacy of individuals with respect to the processing and dissemination of personal data and the protection of the confidentiality of individual records and accounts. It should also be noted that the right to data protection is recognized as a fundamental right in the EU Charter of Fundamental Rights (Article 8).]

However, during the Working Party meeting and in the subsequent written comments, some Member States suggested an alternative option for consideration, which would explore ways to ensure that third country FISPs meet the same standards and obligations for the provision of financial information services in the EU as those established within the EU. This approach would be similar to equivalence decisions in financial services legislation or adequacy decisions in Chapter V of the GDPR on transferring personal data to third countries or international organisations. GDPR adequacy decisions are one way to allow the transfer of personal data into third countries if they ensure adequate protection equivalent to the EU.

Under this alternative solution, the Commission could assess whether the legal framework of a third country where a financial information service provider is established provides the same level of protection as under the FIDA. If the Commission's assessment is positive, entities established in third countries could provide financial information services in the EU, provided that they have a legal representative (or registered office) and they joined an FDSS. If the legal framework of the third country is not equivalent to the EU, an entity can only provide financial information services if it establishes a subsidiary in the EU.

Question 3: *Which option would the Member States prefer? Maintaining the establishment requirement and Recital 34a (**Option 1**) or developing an equivalence regime (**Option 2**)?*

3. Overview about the main changes by Titles

Under this section, the Presidency provides an overview title by title on the main changes made to the text of the Belgian Presidency, which was annexed to the Progress Report.

Title I - Subject Matter, Scope, and Definitions

In Recital 15, the Presidency proposes to add clarification as suggested by COM and define more narrowly which **'consumers' can share occupational pension data** under FIDA to grant more proportionality for IORPs. Moreover, the Presidency proposes to add the part as suggested by COM non-paper (8th WP) to confirm that occupational pension schemes, which are covered by the social security coordination are also excluded from the FIDA scope.

Since the majority of Member States supported it, the definition of **customer data** remains unchanged in Article 3(3). However, in response to suggestions by a few Member States, Recital 9 clarifies that only 'raw data' shall be considered as customer data under FIDA.

Additionally, Recital 10, which has received majority support, clarifies the situation where **more than one customer is involved** concerning a given financial data set covered by this Regulation. It explicitly states that sharing such relevant financial data requires the consent of all concerned customers. Moreover, Recital 21 provides an obligation for data holders to put

in place the necessary mechanisms to allow separate permission dashboards for individual customers, where relevant. The design of the relevant interface should enable each customer to have access to their data. Permission dashboards should allow each customer to delete their data related to them and could allow customers to terminate data access, use, or sharing, or submit requests to terminate.

To ensure legal clarity, the Presidency proposes to add certain data categories in Article 2(2) to which the **regulation shall not apply**. These are the customer data collected as part of a creditworthiness assessment of consumers (this is moved from paragraph 1 to paragraph 3); the existing national pension tracking systems. Since the Member States showed openness to exclude **historical data** from the FIDA scope, the Presidency proposes the exclusion of data related to financial services contracts, which are not in force at the time of the data sharing.

The Presidency proposes the deletion of the Member State option in Article 2(3a) to apply FIDA to **micro and small insurance intermediaries**. These entities do not apply DORA as per Art 2(3)(e), and should therefore not be in FIDA scope. Leaving the possibility as proposed would cause an ICT security loophole.

The Presidency suggests an alternative approach for **insurance-based investment products** to avoid any confusion with the already existing definition in Article 2(17) of Directive (EU) 2016/97. The original reference to the definition used in IDD is maintained and a new definition is proposed for 'insurance-based individual pension products in Article 3 paragraph (8c), since the Member States intended to capture these with the modification of the original IDD definition: *'insurance-based individual pension product' means an individual pension product for which a financial contribution from the employer is required by national law and where the employer or the employee has no choice as to the pension product or provider*. This is in line with the definition of Article 2(17)(e) in IDD. Article 2(1)(b) and Article 3(8b) is amended in this vain.

Member States supported closely aligning the **definition of 'financial information services'** with the definition of 'account information services', so the Presidency aligned this with the modified version in the PSD3 negotiations. The previously proposed "handling" is changed to "processing," as proposed by some Member States. The last 'negative part' is kept, since the majority of Member States supported it for legal clarity.

Following a request of some Member States, the Presidency suggested a **definition for 'sensitive data'**, which is based on the GDPR.

Title II - Data Access

The Presidency suggests to add a new 2a paragraph in Article 5 from the COM non-paper (8th WP) to clarify the situation where the **data user and data holder are not part of the same scheme.**

The Presidency proposes to further **distinguish the permission under FIDA and the consent given under GDPR**. Therefore recital 24 is amended that the granting of permission by a customer under FIDA is without prejudice to the definition of consent as defined in Article 4 (11) of Regulation (EU) 2016/679, as well as the requirements on the legal basis for processing under Article 6 of Regulation (EU) 2016/679. Also, in Article 6(4a)(e), the consent is changed to permission.

The Presidency proposes to delete the obligation in Article 6(2) from the operative text that data access cannot be designed in a way, which is not in the **best interest of the customer**. Also the wording in paragraph (4a)(a) is removed, which state that data user must be able to demonstrate that the use of data is in the best interest of the customer. These are subjective

obligations according to the assessment of the Presidency and it is difficult to enforce. Recital 21 clarifies instead that the data user should respect the best interest of the customer.

Article 6(4a)(g) is modified to have explicit requirement **business to business authentication**.

Recital 9 contains further safeguards to avoid **reverse engineering**, as the majority of Member States supported this. Article 6(4) (b) also includes safeguards, as it was supported by Member States.

Title III - Responsible Data Use and permission dashboards

The majority of Member States supported that **individual and granular data related to climate risk and damages caused by natural disasters** shall not be excluded, but the Data use perimeter in Article 7(3) could be reinforced. First, the mandate for guidelines is extended to the non-life insurance products as well, and EIOPA is also mandated to prepare a report to assess the impact of certain climate risk and natural disaster-related data on the insurance sector. Recital 19 is also amended accordingly. Moreover, a new Recital 19a is added on how the referred data could be used in products and services related to a risk assessment and pricing of products.

Title IV - Financial Data Sharing Schemes

The Belgian Presidency amended Recital 26 to clarify the **significant proportion of the market condition** under Article 10(1)(a)(i). Data holders of a given scheme should together represent at least 25% of the customers served for the given product or service in the given geographical market. However, based on the feedback provided by Member States, it is unclear how this proportion should be calculated, especially in a cross-border context. The Presidency concluded that the European Supervisory Authorities should develop guidelines for calculating a significant portion of the market condition. This requirement is added in Article 10 paragraph (1) second subparagraph. The Presidency also added a reference in Article 10(4) that the notifications must provide information on the range of products or services covered by the system, the geographical scope, and a calculation demonstrating that the system represents a significant part of the market. This should make it easier for the competent authority to verify the condition.

Furthermore, in response to the majority of the Member States' support, Article 10(1)(g) has been amended to specify that a financial data sharing scheme shall agree on the **level of standardisation** of data points at a level that is accepted by all members. The corresponding Recital 25 has also been amended.

Title V - Eligibility for Data Access and Organisation

During the PSD3 negotiations, the majority of Member States supported the deletion of the possibility for AISPs to hold initial capital as an **alternative to professional indemnity insurance**. To ensure alignment with PSD3, the Presidency proposes to delete this option for FISPs as well, so Article 12(3) 2nd subparagraph is deleted.

Title VI - Competent authorities and Supervision Framework

Since the majority of MSs support it, the Presidency maintains the proposal from the Belgian Presidency in Article 18b to grant **specific powers to competent authorities concerning data users designated as gatekeepers** or owned or controlled by gatekeepers. However, following the Member States' suggestions, a number of changes have been made to the text. Based on the Member States' comments, the reference to data users is preserved, and the assessment is not limited to financial information service providers. At the request of several Member States, the deadlines have been changed from calendar days to working days. In paragraph 4 the deadline for the opinion of the ESAs has been increased from 30 to 60 working days. In paragraph 4, the text made it clear that it is the national authorities who need to explain the deviation from the ESA's opinion. The Presidency have deleted the last sentence of paragraph 5, which did not have sufficient legal justification, in line with Member States' positions.

Title VII - Cross Border access to data

The Presidency suggests to **remove the concept of branches** in Article 28(2)(c), since FIDA aims for a full harmonisation, and the data users can access data across the whole EU. Moreover, given the nature of the activity, FISPs will be digital and won't have a physical presence in the form of branches.

Title VIII - Final provisions

Based on the comments received from Member States, the Presidency maintains the **phased approach** as proposed by the Belgian Presidency with one change. The insurance based investment products data category is moved to Phase 3 from Phase 2.