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# *The Path from Open Banking to Open Finance*

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## I. INTRODUCTION

The digitisation and datafication[1] of financial services are proceeding at a fast and resolute pace. The European Commission's Communication 'Digital Finance Strategy for the EU' leaves no doubt in this regard, as 'consumers and businesses are more and more accessing financial services digitally, innovative market participants are deploying new technologies, and existing business models are changing'.[2] Within the framework of the European Union's (EU) 2020 Data Strategy[3] and building on what EU Commissioner for Financial Stability, Financial Services and the Capital Markets Union, Mairead McGuinness, recently called the success of open banking,[4] legislation on an 'open finance framework' has been announced for mid-2022.[5] While little is known about the details of the future open finance framework, Commissioner McGuinness at a February 2022 conference explained that it is 'about making better and more conscious use of data' with the 'potential to spark new,

[1] V Mayer-Schönberger and K Cukier, *Big Data: A Revolution That Will Transform How We Live, Work and Think* (Houghton Mifflin Harcourt, 2013) 78 ('To datafy a phenomenon is to put it in a quantified format so it can be tabulated and analyzed'); UA Mejias and N Couldry, 'Datafication' (2019) 8 *Internet Policy Review* 4 ('Despite its clunkiness, the term datafication is necessary because it signals a historically new method of quantifying elements of life that until now were not quantified to this extent').

[2] European Commission, 'Communication: Digital Finance Strategy for the EU' COM(2020) 591 final (24 September 2020).

[3] European Commission, 'Communication: A European Strategy for Data' COM(2020) 66 final (19 February 2020).

[4] Mairead McGuinness, Speech delivered at the Conférence Europe des Services Bancaires et Financiers (24 March 2022).

[5] 'A European Strategy for Data' (n 3) 14. A new open finance framework was officially announced in 2021, seen as instrumental to the European Commission's ambition 'to make the most of the data economy for EU capital markets, consumers and businesses', see EU Commission, 'Capital Markets Union – Delivering One Year After the Action Plan' (25 March 2021) 7.

innovative products that are personalised to the individual consumer'. She also stressed that 'consumers will keep control over their data and how it is shared'.[6] The open finance framework is thus likely to enable access to new types of customer-permissioned financial data under certain conditions, thereby enhancing business to business (B2B) data sharing. In the context of a targeted consultation launched in May 2022, the European Commission describes open finance as 'third-party service providers' access to (business and consumer) customer data held by financial sector intermediaries and other data holders for the purposes of providing a wide range of financial and informational services'.[7] Parallel open finance initiatives are currently ongoing outside the European Union, for instance in the United Kingdom[8] and Australia.[9] As to the United States, a July 2021 Executive Order by the Biden Administration on promoting competition in the American economy encouraged the Director of the Consumer Financial Protection Bureau to consider 'commencing or continuing a rule-making under section 1033 of the Dodd–Frank Act to facilitate the portability of consumer financial transaction data so consumers can more easily switch financial institutions and use new, innovative financial products'.[10]

Unlike the first pioneering and isolated initiatives towards opening up banking data, open finance has now become a pillar of the broader policy objective in the European Union to create a single European data space 'balancing the flow and wide use of data, while preserving high privacy, security, safety and ethical standards'.[11] This (industrial) policy goal is promoted as a concrete alternative to the US way of leaving the organisation of the data space to the private sector and the Chinese way of combining government surveillance 'with a strong control of Big Tech companies over massive amounts of data without sufficient safeguards for individuals'.[12] The overarching ambition is to create a single market for data underpinned by suitable rules for access and use of data, clear data governance mechanisms, ensuring trust in data transactions and respect for European rules, in particular within data protection and competition law.[13]

Two years after the publication of the Data Strategy, much awaited horizontal data-sharing rules have been set out in the Data Act Proposal.[14] In line with

[6] European Supervisory Authorities, High-level conference on financial education and literacy (1 February 2022), recording, available at: youtu.be/82j5NIhyuUk.

[7] European Commission, 'Targeted Consultation on Open Finance Framework and Data Sharing in the Financial Sector' (May 2022).

[8] Financial Conduct Authority (FCA), 'Open Finance, Feedback Statement', FS21/7 (March 2021).

[9] *cf* Australian Government, 'CDR Sectoral Assessment for the Open Finance sector – Non-Bank Lending' (15 March 2022).

[10] White House, 'Promoting Competition in the American Economy', Executive Order 14036 of 9 July 2021, Federal Register Vol 86, No 132, 36987, 36998.

[11] 'A European Strategy for Date' (n 3) 3.

[12] ibid.

[13] European Commission, 'Commission Staff Working Document on Common European Data Spaces' SWD(2022) 45 final, 24.

[14] 'Proposal for a Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act)' COM(2022) 68 final (Data Act Proposal).

recent remarks made by Commissioner McGuinness,[15] this chapter investigates how lessons learned from open banking on the one hand (section II) and the horizontal data-sharing regime as currently proposed by the Data Act on the other (section III) might shape the future EU open finance framework.

## II. OPEN BANKING IN THE EUROPEAN UNION: LESSONS LEARNED

Open finance derives from open banking.[16] Open banking refers to consumer-permissioned flow of data from banks to third parties. In the European Union, the second Payment Services Directive (PSD2)[17] enabled providers of account information and payment initiation to access and use payment account data held by banking institutions, with the customer's consent. While open banking within the scope of the PSD2 is currently limited to payment account data, the future open finance framework is likely to cover broader statutory data-sharing requirements for financial service providers.[18] In a call for advice[19] to the European Banking Authority regarding the PSD2, the European Commission asked about perceived opportunities and challenges 'with respect to the potential expansion from access to payment account data towards access to other types of financial data'.[20] While in the days when the idea of open banking was first making its way through the EU, banks could not be counted among its most ardent supporters, the tone of the discussions on open finance is now generally much more positive.[21] Supervisory authorities are also generally supportive, although they do not fail to highlight possible risks relatingd to data protection, cybersecurity, financial exclusion, poor consumer outcome and data misuse.[22] Among the many financial products that could benefit from an open finance approach, the European Central Bank lists retail investment products, pension products and life and non-life insurance products, as well as new financial

[15] McGuinness (n 4) ('Open finance has the potential to spark new, innovative products personalized to individual consumers – while those consumers keep control over their data. This framework will allow for better use of data across the EU financial sector. It will build on the horizontal rules on data sharing provided by the Data Act. And it will reflect lessons learned from PSD2').

[16] SMSG, Advice to ESMA, ESMA22-106-3473 (30 July 2021) 2.

[17] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L337/35.

[18] EIOPA, 'Open Insurance: Accessing and Sharing Insurance-Related Data – Discussion Paper' (2021).

[19] European Commission, 'Call for advice to the European Banking Authority (EBA) regarding the review of Directive (EU) 2015/2366 (PSD2)' (18 October 2021).

[20] ibid, 3.

[21] See, for instance, Dutch Banking Association, 'Towards Data-driven Digital Finance – Options for an Open Finance Framework' (May 2021).

[22] *cf* European Central Bank (ECB), 'ESCB/European Banking Supervision Response to the European Commission's Public Consultation on a New Digital Finance Strategy for Europe/FinTech Action Plan' (August 2020).

products to satisfy the latent needs of consumers, investors and businesses.[23] Similarly, the European Consumer Organisation, is in principle supportive of the idea of a new legislative framework allowing access to all types of financial information in a 'safe and ethical environment … under full control of the consumer' and with '[c]lear protections ensur[ing] data protection and privacy of users'.[24] Respondents to the European Commission's Consultation on a new Digital Finance strategy underlined the importance of having access to personal non-financial data from 'online platforms (eg, social media, e-commerce, and streaming), from public entities (eg tax and social security), utilities (eg, water and energy), telecommunications, retail purchases, mobility (eg, ticket purchases), cyber incident data, environmental data, and IoT data'.[25]

What are the lessons learned from the implementation of the PSD2 regime so far, of relevance also to the future open finance framework? It might be helpful to think of the still rather limited experience with open banking under the PSD2 as a kind of sandboxing of consumer-permissioned, mandated sharing of a specific type of data – something that open finance would create on a greater scale. Arguably, there is no shortage of reasons to look back with some satisfaction at the concrete impact of open banking under the PSD2, especially when compared with the more muted success of other regulatory interventions in the digital sphere thus far. As recently noted by Commissioner McGuinness, '[n]ew business models have emerged, including those based on the sharing of payment account data – so called "open banking"'.[26] A recent report commissioned by the Verbraucherzentrale, the Federation of German Consumer Organisations, covering a period of one year following the last stage of the PSD2 implementation in Germany, provides empirical evidence of the several new financial service providers that have emerged.[27] Within the still sensitive area of stimulating competition between incumbent financial institutions, dedicated services are now available that can facilitate switching between bank account providers.[28] The very imperfections of the PSD2, in particular the lack of application programming interface (API) standardisation, have stimulated the emergence of new business opportunities, such as a new breed of interface providers whose services are used by the banks themselves when accessing account data held by other banks (which is, perhaps, somewhat ironic).[29] The report highlights that consumers resorting to digital financial services enabled by the PSD2 were seeking services to help them plan their finances, gain a better understanding of

[23] ibid, 48.

[24] European Consumer Organisation, 'A New Digital Finance Strategy for Europe/Fintech Action Plan, Response to the Commission's Consultation' (2020).

[25] European Commission, 'Consultation on a New Digital Finance Strategy, Summary' (September 2020).

[26] McGuinness (n 4) ('In many ways, PSD2 has been a success').

[27] Verbraucherzentrale, 'Gutachten zur PSD2-Umsetzung in Deutschland' (28 January 2021).

[28] ibid, 12 f.

[29] ibid, 22.

their spending, create savings goals and stick to them, make recurring payments transparent and easier to manage (eg, making cancellations), enable automated switching of bank accounts, initiate payments, etc.[30] The PSD2-related advantages that were intended for consumers were user-friendliness, enhanced security, more competition in the provision of traditional financial services, as well as the availability of new and secure services.[31] Overall, there has been a good deal of creativity and innovation in imagining new services of interest to bank account holders and others in the banking data value chain.

Despite some resistance from traditional banking actors,[32] open banking has also been widely recognised as a useful litmus test for banks to measure their ability to transform themselves and seize new business opportunities in the digital age. In particular, open banking initiatives have led banks and other financial service providers to embark on collaborative ventures with small and medium-sized enterprises with the required technical capabilities (FinTech), as well as with larger providers of digital services (BigTech). A recent joint report by the European Supervisory Authorities noted that 'the introduction of PSD2 has … contributed to the growth of FinTechs and BigTechs in the payments market'.[33]

However, there is also cause for concern. Consumers often encounter problems, especially in terms of harms arising from the conflicts of interest at the heart of the business models of many of the new services offered (eg, commissions influencing recommendations offered to consumers) and insufficient data protection.[34] A serious issue identified was that PSD2 providers were asking permission to access consumer data far beyond what would have been necessary for the provision of the services they offered. Thus, for instance, a consumer triggering a payment via a payment initiation service had roughly 30 days of her full turnover history disclosed – covering all other payments and revealing her lifestyle, habits, etc.[35] Additional issues were related to third-party data, such as what entities a customer had made payments to. The extent to which such data were successful shielded by employing technical measures and encryption technologies was highly unclear.[36] Secondary uses of data accessed via the PSD2-enabling framework were particularly problematic. Thus, for instance, payment service providers were processing account data to extract additional data such as personal credit ratings.[37] This processing is legally permissible only if there is separate data protection consent, but it was not possible to verify whether this was actually at hand. A broader risk in this respect is that

[30] ibid, 8 ff.
[31] ibid, 26 ff.
[32] See, for instance, the findings of the Autorité de la Concurrence, Opinion 21-A-05 of 29 April 2021 on the Sector of New Technologies Applied to Payment Activities, paras 329–36.
[33] ESAs, 'Joint European Supervisory Authority response, ESA 2022 01' (31 January 2022) 18.
[34] Verbraucherzentrale (n 27).
[35] ibid, 33 ff.
[36] ibid, 34.
[37] ibid, 35.

creditworthiness checks might become a condition for consumer market participation more broadly. Equally questionable were bundling practices combining basic banking functions with further analyses and recommendations, and related privacy-related permissions.[38] The involvement of the financial regulator in the enforcement of the privacy-related requirements enshrined in the PSD2, on top of the General Data Protection Regulation (GDPR) enforcement by data protection authorities, was also considered unsatisfactory.[39]

The PSD2 report from the Verbraucherzentrale concluded by identifying a need for action from the consumer viewpoint, with regard specifically to: (1) tackling the well-known conflicts of interest at the core of PSD2-enabled business models and beyond; (2) providing clear rules specifying what data should be accessed for the provision of the service required by the customer and the employment of adequate technological solutions to implement them (eg, filtering techniques that limit data access via the PSD2 interfaces); (3) promoting more and better cooperation between data protection and financial authorities in the dual enforcement of the PSD2/GDPR, as instances of data protection violations are likely to remain mostly under the radar or unremedied, possibly at least in part due to the relative novelty of the open banking mechanism; and (4) simplifying and streamlining consent/assent management, enabling more granular and truly informed consent and unbundling services (eg, the option to choose a version of an app providing basic multi-banking services, but not additional recommendations based on extensive data processing).[40]

These and other insights gained from the concrete experience with the open banking implementation under the PSD2 are extremely useful in directing a spotlight towards those aspects of the relationships between consumer and data holder and third party, respectively, which the new framework will have to devote particular attention to. It is also evident that open finance, which inspires the mobilisation of larger financial data flows than those currently allowed by PSD2, must be accompanied by technological solutions that aid consumers in making informed, granular and genuinely value-adding choices. From the point of view of the interface regulating data flows, it seems inevitable that regulation will have to intervene in a careful way to indicate which types of data should be used to provide the service expressly requested by the consumer.

Given the extreme dynamism and complexity of the sector, further reports and analyses are required, complemented by comprehensive consumer surveys, as the preparatory work for the proposal of a new open finance framework continues. Importantly, the future EU open finance framework should reflect a much more mature approach to data governance than in the comparatively early days when open banking was conceived, based on our increased understanding

[38] ibid, 35 f.
[39] ibid, 39.
[40] ibid, 37 ff.

of the variety of regulatory options in terms of data access regimes, as well as, more generally, of the possible huge benefits but also manifold risks of a data-driven economy.[41]

## III. OPEN FINANCE IN LIGHT OF THE DATA ACT

As the PSD2 was for open banking, the open finance framework will be a sector-specific regulation. The Commission has already made clear that the new data-sharing regime will have to be built on 'the horizontal rules on data sharing provided by the Data Act'.[42] The proposal presented in late February 2022 by the European Commission is very broad in scope, with the underlying ambition being that it will serve as a 'data sharing enabling' regulatory instrument for the whole economy, industrial data included. The proposed Data Act has close links especially to the Data Governance Act,[43] which aims to improve data sharing across the European Union, including by strengthening data-sharing mechanisms (eg, setting out rules on the re-use of public data) and by reinforcing trust in data-sharing intermediaries. Of particular interest here are Chapter II of the Data Act Proposal, which introduces new rights and obligations related to the Internet of Things (IoT) ('co-generated')[44] data created in both industrial and consumer settings, without regard to the specificities of individual sectors (eg, agriculture, mobility, health, etc) and Chapter III, which contains obligations that apply to all situations where data holders are legally obliged to make data available under other Union law or national legislation implementing Union law.[45]

In keeping with the Commission's overarching data strategy, the future vertical (sectoral) open finance framework will be resting on the horizontal plane of the proposed Data Act. In principle, the Data Act does not affect already applicable EU legal regimes regulating data sharing, such as open banking under the PSD2. However, Recital 87 of the Proposal specifies that '[T]o ensure consistency and the smooth functioning of the internal market, the Commission should, where relevant, evaluate the situation with regard to the relationship

[41] Important reflections emerging from the literature on informational and surveillance capitalism include those from, among others, JE Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (Oxford University Press, 2019); S Zuboff, *The Age of Surveillance Capitalism* (Hachette, 2019).

[42] McGuinness (n 4).

[43] Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act) [2018] OJ L152/1.

[44] *cf* ALI-ELI, Principles for a Data Economy – Data Transactions and Data Rights, adopted by the ELI Council in September 2021, 134 ff, available at: europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ALI-ELI_Principles_for_a_Data_Economy_Final_Council_Draft.pdf.

[45] Ch III applies only in relation to obligations to make data available under Union law or national legislation implementing Union law, which enter into force after the Data Act enters into force.

between this Regulation and [those earlier data sharing provisions] … in order to assess the need for alignment'.[46] As to safeguarding coherence with future sectoral data-sharing legislation, the Data Act aims to address cross-sectoral issues, while sector-specific needs should be addressed by complementary rules.[47] Needs specific to individual sectors acknowledged by the Data Act Proposal include 'additional requirements on technical aspects of the data access, such as interfaces for data access, or how data access could be provided, for example directly from the product or via data intermediation services' as well as 'limits on the rights of data holders to access or use user data, or other aspects beyond data access and use, such as governance aspects'.[48]

Therefore, the Proposal tabled by the European Commission should be assessed especially with regard to the Data Act's cross-sectoral, horizontal and foundational function in terms of data governance within the European Commission's EU data strategy. With regard to the rules foreseen in Chapter II on the sharing of IoT data, it should be kept in mind that, at least in some sectors, these rules will be complemented by more tailored regimes. The European Commission has already made clear that specific provisions are likely necessary for the automotive sector, setting the conditions for accessing and using in-vehicle generated data.[49] Most remarkably, besides introducing a new data access right for the IoT data, Chapter III of the Data Act contains general rules for B2B data sharing in all economic sectors, including B2B sharing of financial data, and is therefore directly applicable within a future open finance framework establishing new data access rights. Moreover, it is still an open question whether and to what extent the IoT data access right in Chapter II of the Data Act will serve as a model for further EU-level data-sharing initiatives, such as the provision of new financial data access rights. The Commission itself hints at this possible role played by Chapter II provisions when it, in a recent targeted consultation, asks whether new data access rights in the area of open finance should provide an exclusion for financial institutions which are small or medium-sized enterprises holding customer data, thus mirroring Article 6(d) of the Data Act Proposal as it would apply to the new IoT data access right.[50] This is a crucial question, also taking into account that Chapter II rules on IoT access rights might be only a limited fit for data-governance regimes in other areas, depending on the nature of the data involved, the specific data-value chain, different combinations of market failures, etc.

[46] Recital 87.

[47] See 'Accompanying Commission Staff Working Document – Impact Assessment Report' SWD(2022) 34 final (Impact Assessment Report) 65.

[48] Recital 87.

[49] European Commission, 'Access to Vehicle Data, Functions and Resources: Call for Evidence for an Impact Assessment' (29 March 2022).

[50] 'Targeted Consultation' (n 7) 17.

We must now await the Proposal of a data-sharing regime for the financial sector to be tabled by the Commission. The remainder of this section presents some initial reflections on the intersection of the Data Act Proposal and the future open finance framework.

### A. Data within the Scope of the New Access Right

Chapter II of the Data Act establishes a new data access right. The provisions contained in Chapter II apply to personal and non-personal data generated through the use of connected devices or related services. Data are defined as 'any digital representation[s] of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audio-visual recording'.[51] A connected product is 'any tangible, movable[52] item that obtains, generates or collects data concerning its use or environment, and that is able to communicate data via a publicly available electronic communications service'. The tangible item in question could be anything from huge manufacturing machinery to the smallest fitness tracker. By means of its physical components, the connected device generates data concerning its performance, use or environment. Sometimes, a device can be accompanied by a service, such as the lifestyle advice provided by a fitness tracker. A related service under the Data Act is 'a digital service, including software, which is incorporated in or inter-connected with a product in such a way that its absence would prevent the product from performing one of its functions'.[53] The new access right does not cover free-standing online services such as for instance internet banking. Moreover, data stemming from interactions between the user and the connected device through a virtual assistant and related to the use of the device also fall within the scope of the Data Act.[54]

The Impact Assessment accompanying the Data Act Proposal explains that by granting users new IoT data access and portability rights 'data holders (eg manufactures of data collecting devices) cannot continue to enjoy a "de facto" exclusivity over the data at the expense of users and other companies, as is currently the case'.[55] The clear objective is to avoid lock-in effects as well as to open up more opportunities to generate value from IoT data. The Commission recognises that IoT data are an important input for aftermarket, ancillary and other services. Open banking under the PSD2 serves as a prior example of a sector-specific regulation aimed at tackling a similar problem of de facto data

[51] Art 2(1).
[52] Including where incorporated in an immovable item, see Art 2(2).
[53] Art 2(3).
[54] Recital 22.
[55] See 'Impact Assessment Report' (n 47) 67.

exclusivity with regard to customer bank account data.[56] An incremental policy step along the same lines could extend the open banking mandate to include non-PSD2 accounts, such as savings accounts.[57] The categories of data considered by the Targeted Consultation range from savings and securities accounts to insurance and pension products.[58] In a March 2021 Statement, the UK Financial Conduct Authority (FCA) suggested that the implementation of open finance in the United Kingdom should be 'proportionate, phased and ideally driven by consideration of credible consumer propositions and use-cases'.[59] The choice of the financial data to open up should be made through a multi-pronged assessment of their potential in terms of increased competition, innovation and true value for consumers through for instance improved (eg, less biased) advice, financial inclusiveness and surveillance, decreased cybersecurity risks, etc. Respondents to a 2019 Call for Input from the FCA agreed that 'a transparent approach to data ethics that recognises the benefits and costs to consumers of sharing their data would support the growth of open finance'.[60]

### B. Consumer in Control

Building on the data portability right under the GDPR, the Data Act aims to put consumers (data subjects) more in control of their data. The Impact Assessment Report[61] accompanying the Data Act Proposal notes that this enhancement is required for at least two reasons. The first is that Article 20 GDPR does not entitle the data subject to continuous or real-time access to their data. The second is that the recent Final Report on the sector inquiry into the consumer IoT has shown that exercise of the data portability described in Article 20 GDPR is fraught with difficulties.[62] Similarly, Commissioner McGuinness already made clear that 'consumers will keep control over their data and how it is shared'.[63] The Targeted Consultation asks respondents their opinion about the most significant obstacles preventing the portability right under Article 20 GDPR from being fully effective in the financial sector.[64] It is very likely that the answers from the respondents will lead the Commission to conclude that the new open finance framework might be necessary to put consumers more in control of their data. The 'enhancements' to the data portability right at the

[56] See also S Vezzoso, 'Fintech, Access to Data, and the Role of Competition Policy' in V Bagnoli (ed), *Competition and Innovation* (Scortecci, 2018) 32.
[57] FCA, 'Open Finance: Feedback Statement' (March 2021) 24.
[58] 'Targeted Consultation' (n 7) 17.
[59] 'Open Finance' (n 57) 30.
[60] ibid, 19.
[61] 'Impact Assessment Report' (n 47) 4.
[62] See Commission Staff Working Document accompanying the 'Final Report – Sector Inquiry into Consumer Internet of Things' SWD(2022) 10 final (20 January 2022).
[63] McGuinness (n 4).
[64] 'Targeted Consultation' (n 7) 19.

core of the IoT data access right are substantial. Article 20 GDPR foresees a right of the data subject to receive and transmit personal data concerning him or her 'which he or she has provided to a controller', where the legal basis for processing is consent or contract. Instead, under the Data Act, the right of the user to access ('receive') and make available ('transmit') to a third party concerns 'any data generated by the use of a product or related service, irrespective of its nature as personal data, of the distinction between actively provided or passively observed data, and irrespective of the legal basis of processing'.[65] Moreover, contrary to data portability under the GDPR,[66] the user is entitled to access, use and share the data 'where applicable, continuously and in real-time',[67] as is already the case under the PSD2 and might be required also under the open banking framework, depending on the type of financial data falling under its scope.[68] A further difference between the Data Act and the GDPR concerns the technical obligations relating to data sharing. Pursuant to Article 20 GDPR, data subjects shall have the personal data transmitted directly from one controller to another, but only where technically feasible. Recital 68 GDPR clarifies that controllers are not obliged 'to adopt or maintain processing systems which are technically compatible'. Recital 31 Data Act states that unlike Article 20 GDPR, that Regulation 'mandates and ensures the technical feasibility of third party access to all types of data falling within its scope, whether personal or non-personal'. The operational part of the Proposal, however, is silent on the scope of the obligation to guarantee technical feasibility. This could be explained by the fact that the preferred policy option emerging from the Impact Assessment Report accompanying the Data Act Proposal did not contemplate mandatory technical means for data access, instead leaving room for 'vertical legislation to set more detailed rules addressing sector specific technical aspects of data access, for example cyber-security, data formats or covering issues going beyond data access as such'.[69] However, this does not answer the question of how those technical obligations should play out in *non*-sector regulated contexts, which might require further clarification in the Data Act itself.[70] Setting up the appropriate technical infrastructure will be key to the success of the future open finance framework. As the Commission itself acknowledges, 'putting in place such an infrastructure might be costly and involve many steps, including the standardisation of data and the access technology itself'.[71]

[65] Recital 31.

[66] J Cremer, Y-A de Montjoye and H Schweizer, 'Competition Policy for the Digital Era. Report of the Special Advisors to Commissioner Vestager' (2019) 81.

[67] See Arts 4 and 5 Data Act.

[68] 'Targeted Consultation' (n 7) 19 ('machine-readable access and machine-to-machine communication').

[69] 'Impact Assessment Report' (n 47) 67.

[70] Max Planck Institute for Innovation and Competition, 'Position Statement on the Commission's Proposal of 23 February 2022 for a Regulation on harmonised rules on fair access to and use of data (Data Act)' (25 May 2022) 107 f.

[71] 'Targeted Consultation' (n 7) 19.

### C. Compensation

The aforementioned 'complements' to Article 20 GDPR that the Data Act introduces might indeed turn out to be true enhancements, empowering the user's access and usage of its co-generated data. However, Article 9 of the Data Act in Chapter III introduces the more 'ambiguous'[72] possibility for the data holder legally obliged to make data available to set a reasonable compensation to be given by third parties for any cost incurred in providing direct access to the data generated by the user's product. The making available of IoT data to a third party should be free of charge to the user,[73] and this is likely to be the case also for consumers or businesses within the open finance framework. The compensation rule falls under Chapter III and it is therefore a general B2B data-sharing rule. Where the data recipient is a microenterprise or a small or medium-sized enterprise, the Data Act establishes that reasonable compensation should not exceed the costs directly related to making the data available to the data recipient and attributable to the request and should not be discriminatory. Moreover, the data holder has to provide the data recipient with information setting out the basis for the calculation of the compensation. At any rate, this rule could be derogated by sectoral legislation where appropriate (ie, no or lower compensation).[74] Recital 43 adds that '[i]n justified cases, including the need to safeguard consumer participation and competition or to promote innovation in certain markets, Union law or national legislation implementing Union law may impose regulated compensation for making available specific data types'. As with the discarded option to impose detailed technical specifications for data access seen above, the Impact Assessment Report to the Data Act Proposal acknowledges that if data holders were to be prevented from requiring compensation from third parties, this would boost innovation through data use.[75] Conversely, the Impact Assessment considers that 'under more stringent technical conditions with less possibilities to recuperate investments, data holders would be disincentivized to invest in data generation'.[76]

By contrast, on the one hand, open banking under the PSD2 is not structured as a data portability right of the bank account holder, but as a right of the payment user to make use of the third-party payment services covered by the legislation. On the other hand, the PSD2 foresees the legal obligation between the bank (the holder of the account data) and the bank account holder not to discriminate payment orders 'other than for objective reasons, in particular in terms of timing, priority or charges vis-à-vis payment orders transmitted directly

[72] For legal and economic arguments against the possibility for a data holder to charge a price for the making available of data to a third party, see, in particular Max Planck Institute (n 70) 28 f.
[73] See Art 5(1).
[74] Art 9(3).
[75] 'Impact Assessment Report' (n 47) 29.
[76] ibid, 47.

by the payer'.[77] In this respect, the bank is not entitled to additional charges from the bank account holder, while it is much debated if the bank could charge an additional fee from the third party.[78]

Whether or not the future open finance framework is going to include a compensation rule remains to be seen. In the Targeted Consultation, the Commission asks respondents if they would support an obligation on third parties to compensate financial firms holding customer data for making the data available in appropriate quality, frequency and format and, if so, how this should be designed.[79]

### D. FRAND

Chapter III contains another obligation that will be particularly relevant as part of the open finance framework. Article 8 states that '[W]here a data holder is obliged to make data available to a data recipient under Article 5 or under other Union law or national legislation implementing Union law, it shall do so under fair, reasonable and non-discriminatory terms and in a transparent manner' (FRAND). If a data recipient considers the conditions under which data have been made available to it to be discriminatory, it shall be for the data holder to demonstrate that there has been no discrimination. Both data holders and data recipients have access to certified dispute settlement bodies. Beyond the FRAND obligations, there are other interesting horizontal data-sharing provisions, such as a data exclusivity ban.[80]

### E. Derived and Inferred Data

Recital 14 states that the data within the scope of the Data Act representing the digitalisation of user actions and events 'are potentially valuable to the user and support innovation and the development of digital and other services protecting the environment, health and the circular economy, in particular through facilitating the maintenance and repair of the products in question'. However, information derived or inferred from such data is not covered by the Data Act. Thus, for instance, the aggregated data relative to the use of a specific connected machinery would not be within the scope of the IoT data access right. With regard to the IoT context, this restriction has already been much criticised

[77] Art 66(4) lit c) PSD2.

[78] *cf* J Hoffmann, 'Safeguarding Innovation in the Framework of Sector-specific Data Access Regimes: The Case of Digital Payment Services' in German Federal Ministry of Justice and Consumer Protection Max Planck Institute for Innovation and Competition (eds), *Data Access, Consumer Interests and Public Welfare* (Nomos, 2021) 374 ff.

[79] 'Targeted Consultation' (n 7) 19.

[80] Art 8(4).

because, in many instances, it would not allow the third party to provide high quality aftermarket services to the user.[81] Similarly, some financial services provided by third parties to consumers and business might in some instances require access to inferred and derived data, and this is something that should be considered carefully in the context of the future open finance framework. Moreover, there might be instances in which it would appear fair for a consumer to have access not only to the raw data, but also to the individual-level insights that the data holder has generated based on the consumer's financial data.

### F. Data Use Limitations

Of particular interest are the provisions of the Data Act Proposal which focus specifically on limitations regarding what the different data stakeholders can do with respect to the co-generated data that they *hold* (data holder), *have obtained/access to* (user) or *receive* (third party) under the Data Act. Thus, for instance, the user cannot use the data obtained to develop a product that competes with the product from which the data originate. Similarly, the third party cannot use the data it receives to develop a product that competes with the product from which the accessed data originate or share the data with another third party for that purpose. Moreover, the third party cannot use the data it receives for the profiling of natural persons within the meaning of Article 4(4) GDPR, unless it is necessary to provide the service requested by the user. There is also a ban to derive specific insights – a farm/user of IoT devices should not see its position in the contractual negotiations on the potential acquisition of the user's agricultural produce undermined by the specific insights that the data holder could gain from the use of the product.[82] It remains to be seen how these provisions can be tailored to the open finance setting. Thus, limits on the use by data holders and third parties of certain insights about the consumer could be adequate in order to avoid unfairly losing out on core financial opportunities (eg, an affordable bank loan for purchasing real estate).

### G. Third-Party Eligibility as a Data Recipient

The Data Act contains very few eligibility rules regarding third parties as recipients of IoT data, possibly because of the horizontal nature of the instrument. It is plausible, however, that sectoral regulation will introduce forms of accreditation,

[81] See W Kerber, 'Governance of IoT Data: Why the EU Data Act Will Not Fulfil Its Objectives' (2022), available at: papers.ssrn.com/sol3/papers.cfm?abstract_id=4080436; Max Planck Institute (n 70).

[82] Recital 25.

as already foreseen by the PSD2. Based on Article 5(2) of the Proposal, undertakings designated as gatekeepers pursuant to the Digital Markets Act cannot be recipients of user-permissioned data generated by IoT products or related services.[83] Moreover, a third party receiving data at the request of the user cannot make the data available to a designated gatekeeper (Article 6(2)). It is to be expected that some restrictions on the use of customer-permissioned financial data by designated gatekeepers will be included in the open finance framework. In their joint response to the European Commission's February 2021 Call for Advice on digital finance and related issues,[84] the European Supervisory Authorities[85] provided an in-depth assessment of BigTech's inroads into financial services against the background of the growing digitisation and datafication of the sector.[86] The Targeted Consultation Article 6(d) of the Data Act asked whether large gatekeeper platforms requesting data access should be excluded from being able to benefit from such data access rights.

## IV. CONCLUSION

The new open finance framework will build on the experience from open banking, which has been positive, but has also shown that consumers often encounter problems – especially in terms of harms arising from the conflicts of interest at the heart of the business models of many of the new services offered, the lack of adequate solutions empowering them, and insufficient consumer and data protection. The new open finance framework should draw on the lessons learned from open banking, take advantage of its successes, and strive to overcome the difficulties that have arisen along the way. The Commission's plan to introduce new data access rights in the financial sector is ambitious and bound to reflect our increased shared understanding of the possible benefits and risks of a data-driven economy. At any rate, it should be clear that the access and usage right introduced for co-generated data in an IoT setting can only partially serve as a model for financial data access rights. Taking the Data Act as a starting point, substantial efforts are still needed to frame tailored solutions aiming to empower consumers and help them benefit from substantially better financial choices.

[83] Art 5(2).

[84] European Commission, 'Request to EBA, EIOPA and ESMA for Technical Advice on Digital Finance and Related Issues' Ref Ares(2021)898555 (2 February 2021).

[85] Following the European system of financial supervision (ESFS) introduced in 2010, the three European Supervisory Authorities are the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA).

[86] ESAs (n 33) 15.