

## POSITION PAPER ON THE FINANCIAL DATA ACCESS REGULATION

# Leveraging Open Finance to Boost the EU Economy

October 2023

In June 2023, the European Commission presented its proposal for a regulation on a framework for financial data access (FIDA).<sup>1</sup>

As a long-standing advocate of open markets, CCIA welcomes the advent of open finance and believes it has the potential to create a more competitive and innovative financial sector that puts the needs of consumers first.

Opening up a wide range of financial data, beyond payment data, will bring significant benefits to European businesses and consumers, who will enjoy greater choice and new innovative services. While the FIDA proposal goes in the right direction, it would benefit from further improvements in order to fully deliver its objectives.

The Computer & Communications Industry Association (CCIA Europe) offers the following recommendations to improve the FIDA proposal, in particular to safeguard small balance accounts and to maximise the positive effects of the regulation for European consumers and businesses.

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## I. Build a fair and inclusive open finance framework

*In order to leverage the benefits of open finance, the FIDA regulation needs to be fair and inclusive. The small balance accounts of European consumers should not be unnecessarily impacted, and the new framework should remain open and non-discriminatory.*

### Recommendations:

1. Clarify definitions to avoid unnecessarily capturing small balance accounts
2. Maintain equal access for all market players

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## II. Develop workable and future-proof rules

*In order for European consumers and businesses to fully benefit from the new framework, FIDA's rules need to be workable and fit for the future. Streamlining the establishment of financial data sharing schemes, and removing unnecessary data flow restrictions, will be essential to achieving this goal.*

### Recommendations:

3. Facilitate the establishment of financial data sharing schemes
4. Promote the development of user-friendly permission dashboards
5. Remove unnecessary restrictions on non-personal data flows

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<sup>1</sup> European Commission, proposal for a regulation on a framework for financial data access, 28 June 2023, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023PC0360>.

## Introduction

The Computer & Communications Industry Association welcomes the European Commission's objective of facilitating data sharing and third-party access across a broad range of financial services and products, while upholding data and consumer protection.

Open banking has spurred the entry of new firms and fostered innovation in financial services, resulting in more user-friendly technology and enhanced service for European consumers. The advent of open finance presents additional opportunities to promote competition, enhance innovation, and strengthen the EU single market.

An ambitious open finance framework would benefit the European economy at large, including SMEs, as well as enhancing consumer choice. CCIA is therefore encouraged to see that the FIDA proposal seeks to open access to many financial datasets, and to guarantee equal opportunities for all market players.

As the European Parliament and the EU Council are developing their respective positions, CCIA Europe offers the following recommendations to improve the FIDA regulation:

- Build a fair and inclusive open finance framework
  - Clarify definitions to avoid unnecessarily capturing small balance accounts
  - Maintain equal access for all market players
- Develop workable and future-proof rules
  - Facilitate the establishment of financial data sharing schemes
  - Promote the development of user-friendly permission dashboards
  - Remove unnecessary restrictions on non-personal data flows

## I. Build a fair and inclusive open finance framework

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*In order to leverage the benefits of open finance, the FIDA regulation needs to be fair and inclusive. The small balance accounts of European consumers should not be unnecessarily impacted, and the framework should remain open and non-discriminatory.*

### 1. Clarify definitions to avoid unnecessarily capturing small balance accounts

CCIA Europe fully supports the broad range of entities and financial datasets captured by the FIDA proposal, which reflects the proposal's commendable level of ambition. Indeed, this could greatly benefit consumers and the European economy as a whole.

However, the broad formulation of certain definitions, such as “customer data” and “accounts”,<sup>2</sup> would unnecessarily capture certain small balance accounts and services. In fact, bringing these services into FIDA's scope would impose a disproportionate burden on useful services without bringing any tangible benefits.

Recital (12) of FIDA clarifies that the regulation should cover customer data beyond payment accounts, as defined in the currently applicable directive on payment services in the internal market<sup>3</sup> (PSD2). The same Recital goes further by clarifying that FIDA covers the access to all types of accounts not falling within the scope of the PSD2. This wording is exceptionally and unnecessarily broad. As a result, the FIDA regulation would apply to so-called “collection accounts” as well as to small electronic money (e-money) accounts.

Collection accounts, which are explicitly excluded from the scope of the PSD2 and the recently presented proposal for a regulation on payment services<sup>4</sup> (PSR),<sup>5</sup> have the sole purpose of collecting payment orders on behalf of a group by a parent undertaking or its subsidiary for onward transmission to a payment service provider (PSP). In other words, such accounts are only used to collect and transfer money quickly to a payment account, and the holder of the account cannot use its balance to make any payments.

Including such collection accounts in the scope of FIDA's data sharing obligations is unnecessary, as their balance in any case will be transferred to accounts that are already subject to FIDA's data sharing requirements. Imposing a data sharing obligation on collection accounts clearly is disproportionate, as it would entail substantial infrastructure costs without bringing any tangible benefits. CCIA therefore calls on the EU co-legislators to explicitly exclude collection accounts from the scope of FIDA's data sharing obligations.

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<sup>2</sup> See, for instance, Article 3(3) and Recital (12) of FIDA.

<sup>3</sup> Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, available at:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015L2366>

<sup>4</sup> European Commission, proposal for a directive on payment services and electronic money services in the internal market, 28 June 2023, available at:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52023PC0366> ; European Commission, proposal for a regulation on payment services in the internal market, 28 June 2023, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52023PC0367>.

<sup>5</sup> See, for instance, Article 3(m) PSD2 and Article 2(2)(m) PSR.

In the same fashion, small e-money accounts also risk being captured by FIDA's data sharing obligations, regardless of the value of the amounts deposited. This is likely to negatively impact businesses whose services rely on small e-money accounts that can only be used for limited purposes. Such accounts mostly have very low balances and are equivalent to gift cards. Bringing such small e-money accounts into the scope of the regulation would, on the one hand, impose disproportionate infrastructure costs on these services, while at the same time having no benefits for consumers or third parties.

Indeed, account information service providers (AISPs) can reasonably continue to provide their useful services without accessing data from such small balance e-money accounts. Against this background, we suggest introducing a de minimis provision that would exclude small balance accounts from these excessive requirements. A reasonable threshold could be set at stored values below €1.500, which would then effectively be exempted from the requirements.

## 2. Maintain equal access for all market players

The Commission's decision to open up access to financial data to a wide range of entities operating in the European Union (EU) is a step in the right direction. Maintaining the non-discriminatory architecture and design of FIDA will be key to maximise the effects of the regulation for European consumers and businesses. Because they are set to benefit from a broad range of innovative services competing on a level-playing field. This approach will prevent traditional players from enjoying potentially unfair competitive advantages and will encourage new entrants into the market. Ultimately, the Commission has presented a framework that will give more choice to consumers and promote innovation.

CCIA calls on the co-legislators to maintain this approach and to prevent the inclusion of any asymmetric and discriminatory restrictions on access to data under FIDA, as this would run against the very objectives of the regulation and have a detrimental effect on European consumers.

## II. Develop workable and future-proof rules

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*In order for European consumers and businesses to fully benefit from the new framework, FIDA's rules need to be workable and fit for the future. Facilitating the establishment of financial data sharing schemes, and removing unnecessary data flow restrictions, will be essential to achieving this goal.*

## 3. Facilitate the establishment of financial data sharing schemes

The FIDA proposal, and more specifically its Title IV section, sets out the requirements for the creation and governance of financial data sharing schemes, with the aim of bringing together data holders, data users, and consumer organisations.

These schemes will be tasked to develop their own comprehensive arrangements, ranging from the creation of data and interface standards, to governance and compensation rules, liability, and dispute resolution. Article 9 of FIDA provides that only members of such schemes can effectively access the data falling within the scope of the regulation, thus rendering the existence and membership of these schemes mandatory.

CCIA Europe welcomes the Commission's choice to give industry and civil society a prominent role in the establishment of these schemes. However, we note that numerous elements that will be essential for the establishment of financial data access schemes are either still missing or unclear. That's why these requirements would greatly benefit from further clarity.

In particular, Article 10(1)(g) of FIDA provides that such schemes must include the common standards for the data and the technical interfaces to allow customers to request data sharing in accordance with Article 5(1), but fails to provide any guidance on interoperability and scalability of such interfaces. These elements, however, will be essential to the functioning of FIDA and would need to be further clarified.

Moreover, Article 10(1)(h) of FIDA requests the schemes to establish a model to determine the maximum compensation that a data holder is entitled to charge for making data available through an appropriate technical interface, and sets out a number of principles for the underlying model. For example, Article 10(1)(h)(i) clarifies that the model should be limited to reasonable compensation, but fails to put in place any safeguards to ensure that the model is indeed fair to all parties involved. Additional safeguards and clarifications would ensure that FIDA is fairly implemented.

Finally, Article 11 empowers the European Commission to adopt delegated acts to specify the modalities under which a data holder shall make customer data available, if a financial data sharing scheme is not developed and there is no realistic prospect of such scheme being developed in a "reasonable" amount of time. In order to facilitate the establishment of such schemes and enhance legal certainty, we recommend clarifying what a "reasonable" amount of time would entail in practice.

CCIA calls on the co-legislators to further clarify these elements to enhance legal certainty and streamline the establishment of financial data sharing schemes, which are essential components of the regulation. Additional measures clarifying the Commission's role in supporting and promoting the creation of these schemes could be envisaged.

#### **4. Promote the development of user-friendly permission dashboards**

Article 8 of the FIDA proposal mandates data holders to establish financial data access dashboards to ensure that customers can monitor their data permissions by being able to access an overview of their data permissions, grant new ones, and withdraw permissions if necessary.

While Article 8 lists essential requirements for such permission dashboards, the FIDA proposal remains largely silent on the exact role of the regulators and the industry in developing, maintaining, and implementing them. Further clarifying these elements would help stakeholders and regulators to establish such dashboards.

Furthermore, we note that no specific mechanisms or measures have been considered by the Commission to encourage and promote the creation of user-friendly, innovative dashboards that would place customer experience at the heart of their design. Additional measures to improve the customer experience could be envisaged.

## 5. Remove unnecessary restrictions on non-personal data flows

Article 6(4)(c) of the FIDA proposal obliges data users to put in place adequate technical, legal and organisational measures in order to prevent the transfer of, or access to, non-personal customer data that “is unlawful under Union law or the national laws.” Data users can otherwise not receive customer data under the regulation.

This requirement is likely to seriously undermine the functioning of FIDA, as there is no reasonable possibility for data users to comply with this requirement. As a consequence, data users outside the EU would find themselves in a position where they cannot receive data under FIDA. This requirement follows a concerning trend of similar restrictions on flows of non-personal data in EU regulations, such as the Data Governance Act<sup>6</sup> (DGA) and the Data Act proposal<sup>7</sup>.

In its current shape, Article 6(4)(c) – read together with Recital (47) of the FIDA proposal and the data transfer provision of the Data Act<sup>8</sup> – creates a separate regime for the transfer of non-personal data that could conflict with the transfer of personal data under the General Data Protection Regulation<sup>9</sup> (GDPR). Furthermore, the open-ended nature of the requirement puts a disproportionate and discriminatory burden on any European or international company subject to non-EU laws. Indeed, it looks like the very objective of this requirement is to introduce a general obligation for companies to demonstrate that they are effectively immune to the reach of foreign extraterritorial laws.

In practice, this requirement means that companies first would have to conduct a comparative constitutional and legal analysis of third-country legislation with national and EU laws in areas related to intellectual property (IP), trade secrets, fundamental rights, and the “fundamental interests” of Member States related to national security or defence. Only then will companies be able to determine whether foreign laws actually conflict with EU and national laws and those “fundamental interests” of Member States.

In other words, this exercise boils down to assessing the adequacy of any number of foreign laws with all kinds of EU and national laws. Such assessment would take years for the Commission to conduct for each foreign jurisdiction in the field of data protection alone. Companies cannot be reasonably expected to conduct these assessments themselves, especially since neither the FIDA proposal nor the relevant provisions of the Data Act provide any clear criteria, evidence, or process for identifying conflicts with EU or national laws. CCIA calls on the EU co-legislators to remove this disproportionate and discriminatory

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<sup>6</sup> Regulation (EU) 2022/868 of 30 May 2022 on European data governance (Data Governance Act), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32022R0868>.

<sup>7</sup> European Commission, proposal for a regulation on harmonised rules on fair access to and use of data (Data Act), 23 February 2022, available at:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2022%3A68%3AFIN> ; See, for the recent agreement reached between EU institutions, EU Council, proposal for a regulation on harmonised rules on fair access to and use of data - analysis of the final compromise text in view to agreement, 7 July 2023, available at:

<https://data.consilium.europa.eu/doc/document/ST-11284-2023-REV-1/en/pdf>.

<sup>8</sup> See Recital 77 and Article 27(1) Data Act.

<sup>9</sup> Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), available at: <https://eur-lex.europa.eu/eli/reg/2016/679/oj>.

provision entirely, or to further list the concrete “technical, legal and organisational measures” that companies can take in order to demonstrate compliance with this provision.

## Conclusion

The advent of open finance presents major opportunities to promote competition, enhance innovation, and streamline harmonisation across the EU single market. An ambitious open finance framework would bring major benefits for the European economy, including SMEs, and improve consumer choice.

The European Commission’s FIDA proposal is a step in the right direction. Building a fair and inclusive framework, with workable and future-proof rules, will be key for the success of this regulatory framework. CCIA Europe stands ready to support European institutions in delivering an ambitious open finance framework.

## About CCIA Europe

The Computer & Communications Industry Association (CCIA) is an international, not-for-profit association representing a broad cross section of computer, communications, and internet industry firms.

As an advocate for a thriving European digital economy, CCIA Europe has been actively contributing to EU policy making since 2009. CCIA’s Brussels-based team seeks to improve understanding of our industry and share the tech sector’s collective expertise, with a view to fostering balanced and well-informed policy making in Europe.

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