



Brussels, 5 July 2022
CDO

EACB Position Paper on the targeted consultation on open finance framework and data sharing in the financial sector

The **European Association of Co-operative Banks** ([EACB](https://www.eacb.coop)) represents, promotes and defends the common interests of its 27 member institutions and of cooperative banks, with regard to banking as well as to co-operative legislation. Founded in 1970, today the EACB is a leading professional lobbying association in the European banking industry. Co-operative banks play a major role in the financial and economic system. They contribute widely to stability thanks to their anti-cyclical behaviour, they are driver of local and social growth with 2.700 locally operating banks and 52,000 outlets, they serve 223 million customers, mainly consumers, SMEs and communities. Europe's co-operative banks represent 87 million members and 705,000 employees and have an average market share in Europe of about 20%.

For further details, please visit www.eacb.coop

The voice of 2.700 local and retail banks, 87 million members, 223 million customers in Europe

EACB AISBL – Secretariat • Rue de l'Industrie 26-38 • B-1040 Brussels

Tel: (+32 2) 230 11 24 • Fax (+32 2) 230 06 49 • Enterprise 0896.081.149 • lobbying register sharing between all sectors
www.eacb.coop • e-mail : secretariat@eacb.coop



Introduction

The European Association of Co-operative Banks (EACB) welcomes the possibility to contribute to the discussion on open finance. This paper intends to summarise, and in some cases, complement the answers we provided to the European Commission's targeted consultation on open finance framework and data sharing in the financial sector run between 10 May and 5 July 2022.

Before going into the messages we believe the Commission should duly take into consideration for an open finance space, the EACB would like to note that providing comprehensive answers to the online questionnaire was challenging due to the way the questions were built. We think that subjective statements/closed questions that lead to respond yes/no/don't know without – in many cases – the possibility to provide comments, or fill in tables with multiple entries, are not beneficial (see questions 3, 14, 19, 23, 26, 28, 29, 35, 38, 40, 44, 46, 52, 62, and 88).

The position paper is divided into four sections:

- Part I summarises the EACB's main recommendations for the Commission's envisaged open finance space.
- Part II addresses the EACB's views on sharing of and access to data – which should be based on a voluntary approach driven by market participants, on a contractual basis and cross-sectoral – including remarks on the definitions, customer consent, the portability right under Art. 20 GDPR, compensation for making data available, liability, technical infrastructure and costs in an open finance context.
- Part III delivers messages regarding the Commission's two selected use cases relating to transferability and access to customer data on current and past investments and on access to SME data.
- Part IV reports the above-mentioned list of questions and related answers we were not allowed to provide in the online questionnaire.

Part I – EACB recommendations

We appreciate the European Commission's effort to create a more integrated and functional digital single market through the data strategy. We support the Commission's general principle of facilitating the sharing of data. Sharing should be based on free choice of private individuals and businesses, voluntary and on a contractual basis. Moreover, any further related applicable legislation (e.g., GDPR, national banking acts, banking secrecy, trade secrecy) should be carefully analysed and considered when establishing an integrated single market for data in the European Union.

In its thinking of an open finance framework, we recommend the Commission to factor in the following aspects:

The voice of 2.700 local and retail banks, 87 million members, 223 million customers in Europe

EACB AISBL – Secretariat • Rue de l'Industrie 26-38 • B-1040 Brussels

Tel: (+32 2) 230 11 24 • Fax (+32 2) 230 06 49 • Enterprise 0896.081.149 • lobbying register 4172526951-19
www.eacb.coop • e-mail : secretariat@eacb.coop



1. Co-operative banks consider that the experience with the second Payment Services Directive (PSD2) holds valuable lessons such as:

- a) **For a data sharing economy to be successful, it needs the right incentives.** It needs to allow all parties in the chain to derive benefits, for both customers and businesses. For retail and corporate customers, more tailored products, greater personalisation of services, better customer experience, developments of new digital tools and for businesses to develop and train AI systems that can be used to automate and improve existing processes. Sharing will increase the knowledge banks hold on their customers so they can better delivery on customers' expectations, foster a sound digital transformation, improve certain processes by pooling efforts (AML/KYC), and build a sustainable business model so as to create incentives to foster innovation.

There are limits to what a legislative approach can achieve. The PSD objective to open bank infrastructures and data to non-banks required a multilevel legislation. Level 1 to set high-level objectives, level 2 to define RTSs. Practice has shown, however, that those two levels were not enough. Many additional discussions between stakeholders and several additional guidelines and opinions were necessary to guide the market. Additionally, a multistakeholder initiative under the ERPB is presently working to further develop services beyond PSD2.

- b) **Benefits must be measured against costs.** All efforts put in place by market participants (IT, staff, expert group work, adjustment of T&Cs) to facilitate AIS services have not generated much demand. On the contrary, API usage in most countries is rather low. Even EACB members that act as AISP do not see many clients using their AIS services. This despite all the investments put in. Together with other payment compliance work, this has put pressure on banks' capacity to develop new services and new solutions for clients, without delivering the envisaged benefits.

2. The risks versus the benefits of data access should be considered. We strongly believe that a careful risk assessment should be done to estimate whether the benefits are greater than the risks for the various actors in the ecosystem. Just to name a few, risks such as financial exclusion, data protection (both in terms of privacy and 'informed consent'), misuse of data, data leak, fraud, insufficient security measures, cybersecurity breaches, ID theft and misleading advice should be factored in both from costumers' and companies' perspectives. An open saving/insurance/investment framework shouldn't lead to consumers losing control over data, and the banking and financial sector facing unintentional administration, development and legal uncertainty. The latter will cause a loss of economic activity from data holders' data processing that so far has not been proved to be compensated by an equivalent or higher level of new economic activity derived from sharing. Linked to this last sentence, we believe that the assessment for setting up an open finance framework for accessing and sharing of customer data should especially include a market analysis that proves the actual existence of a viable 'secondary market' benefitting from data sharing.

The voice of 2.700 local and retail banks, 87 million members, 223 million customers in Europe

EACB AISBL – Secretariat • Rue de l'Industrie 26-38 • B-1040 Brussels

Tel: (+32 2) 230 11 24 • Fax (+32 2) 230 06 49 • Enterprise 0896.081.149 • lobbying register 4172526951-19
www.eacb.coop • e-mail : secretariat@eacb.coop



3. **Data sharing from other parties towards the financial sector should also be strongly considered.** The assumption seems to be that open finance should be about the financial sector again opening up its data to other parties. However, we believe that data usage, access and sharing should be considered in a broad context, with a focus on cross-sectoral data sharing between all sectors of society. There are several use cases in which the financial sector would benefit from data shared by for example public bodies and other types of companies.
4. **The European principles of a market economy**, with freedom of contract to allow for sustainable business models to be developed and a level playing field for all economic actors that is fair for all participants.

Part II - EACB views on sharing of and access to data

As a general observation, co-operative banks do share customer data based on applicable legal grounds, e.g., contracts with their contract partners (companies or individuals), customers' consent, legal obligation or legitimate interest, when applicable, and also based on national and sectoral legal requirements.

- **Data sharing and access should be based on a voluntary approach driven by market participants, on a contractual basis and cross-sectoral.**

We believe that the Commission should not consider proposing new data access rights in the area of open finance.

In our understanding, in the Digital Finance Strategy, the Commission's objective for open finance is to support data-driven innovation and not to create an instrument for regulating competition (as PSD2). The data economy shouldn't be seen as simply increasing a right of access to data. For the proper functioning of a data economy able to support digital innovation that brings efficiencies for consumers, businesses and authorities, we are in favour of a voluntary approach driven by market participants and based on contracts between two or more economic actors (data holders and data recipients). This will allow for a fair distribution of risks and values for all actors in the chain.

We believe that **there are indeed benefits in data sharing and access that are voluntary, on a contractual basis and cross-sectoral.**

Voluntary approach

The banking sector has showed its willingness and commitment on many occasions in this regard. A concrete example of self-regulation is given by Euro Retail Payments Board (ERPB). EACB members support the efforts of the ERPB (chaired by the European Central Bank) to promote the development of market-oriented business models, by involving all relevant stakeholders. The EACB is actively involved in the work of the relevant ERPB and EPC working groups. EACB members are also adhering to various EPC payments schemes. In addition, the EACB and its

The voice of 2.700 local and retail banks, 87 million members, 223 million customers in Europe

EACB AISBL – Secretariat • Rue de l'Industrie 26-38 • B-1040 Brussels

Tel: (+32 2) 230 11 24 • Fax (+32 2) 230 06 49 • Enterprise 0896.081.149 • lobbying register 4172526951-19
www.eacb.coop • e-mail : secretariat@eacb.coop



members presently follow the ERPB and EPC work on SEPA API Access Scheme for payments. This scheme would be a first scheme that also covers data. And this is a market-driven initiative.

Based on contracts

EACB members support the development of market-oriented contractual schemes without regulatory intervention.

Contractual frameworks have the benefit of allowing arrangements to be laid down between different parties in a financial transaction chain to provide the right-fit offer for products and services, up to customers' needs, and manage errors, mistakes, queries, customer complaints and responsibilities.

In situations where a contractual scheme among the parties exists, it can be clearly defined who is responsible for what when things go wrong and/or when consumers complain. Contractual schemes can improve accountability among parties involved in a transaction and can set the parameters of cooperation, e.g., which security measures have to be applied when handling data.

A concrete example of a market-oriented contractual scheme is represented by the ERPB and EPC work on SEPA API Access Scheme for payments, which the EACB and its members presently follow (see also our previous section).

We would welcome a broad information campaign about market-oriented contractual schemes such as the SEPA API Access Scheme for payments.

In addition, there are already horizontal pieces of law dealing with fairness of contract, the most recent dealing with data being the Data Act proposal.

Cross-sectoral

For an open finance to express its feasibility and potential, the Commission should duly look at both process/content and cost-benefit perspectives drawn from PSD2 (see our recommendations). Sharing of and access to customer data should not be based on an obligation on one side of the market like it has been for PSD2, to avoid market distortions and resulting costs for one set of market players, inevitably reducing possible benefits for retail and corporate customers.

Some good examples of data sharing and its potential benefits are the following two:

- 1) The energy and climate footprint use case described in Annex to the consultation. This use case has several benefits for consumers: defending the value of their property; saving on energy consumption; improving their carbon footprint.
- 2) The pension use case represents a privately set-up platform connecting all pension providers from pillars 1-3 in Denmark. It gives customers of pension providers an overview of their pensions from all 3 pillars and the possibility to initiate sharing of their data between the participating pension providers, with the goal to optimise pension planning, achieve better calculated general credit rating and get investment advice. This use case clearly shows that a cross-sectoral approach based on the principle of voluntary data

The voice of 2.700 local and retail banks, 87 million members, 223 million customers in Europe

EACB AISBL – Secretariat • Rue de l'Industrie 26-38 • B-1040 Brussels

Tel: (+32 2) 230 11 24 • Fax (+32 2) 230 06 49 • Enterprise 0896.081.149 • lobbying register 4172526951-19
www.eacb.coop • e-mail : secretariat@eacb.coop



sharing and adequate annual fees for pension providers is a viable one as the offered platform is used by 1.6 million Danes who got 20.5 million personal pension data deliveries to PensionsInfo.Dk in 2021.

'Same business/service, same risks, same supervision, same rules'

What is of crucial importance is that the **principle 'same business/service, same risks, same supervision, same rules' should apply**. This principle alone ensures a level playing field and a high level of consumer protection. A third party that operates in the same sector should be licensed and consequently regulated and supervised, especially in the data sharing area, where data protection and information security need to be treated carefully and are of greater importance for all actors in the chain.

A third party coming from another sector should have in place the same level of security measures the financial institution applies. Financial institutions categorise their data in risk levels (e.g., low, medium, high, and very high/confidential). Personal data is always high risk/confidential). Any information security measures are based on these categories and cover integrity, authenticity, availability and confidentiality. According to these information security standards and regulatory requirements, financial institutions must ensure that the aforementioned security level will be maintained if they provide data to third parties. Furthermore, financial institutions will not be compliant with the requirements of their national authority if they cannot ensure the set security measures for their data.

Other conditions

Other conditions to take into account are: ensuring consumers do not lose control over data; relying on the proper legal basis for data sharing beyond consumer consent (see the relevant section); factoring in all the legal or contractual obligations linked to data (banking secrecy, non-disclosure agreements, information security aspects) that could limit data sharing. Regarding information security, please refer to the above-mentioned point.

➤ **Definitions in open finance**

Definitions of actors

When talking about open finance, **defining the various actors in the data value chain is of paramount importance**. In the questionnaire we noted that sometimes the definition of who is the third party was not clear (for example, see our answer to question 14, part IV).

Definitions of type of data

We notice that the questionnaire lacks clarity regarding which types of data (personal data, non-personal data or both?) are covered by the concerned question. **We believe that discussion on the scope of what kind of data should be shared is necessary**. The scope should be clear and defined.

➤ **Data sharing and access rights should not be limited to customer consent and the portability right under Art. 20 GDPR in an open finance context**

The voice of 2.700 local and retail banks, 87 million members, 223 million customers in Europe

EACB AISBL – Secretariat • Rue de l'Industrie 26-38 • B-1040 Brussels

Tel: (+32 2) 230 11 24 • Fax (+32 2) 230 06 49 • Enterprise 0896.081.149 • lobbying register 4172526951-19

www.eacb.coop • e-mail : secretariat@eacb.coop



Customer consent

Customer permission/consent and its declinations are recurrent in the Commission's questionnaire.

The relevant questions seem to imply that consent is the only lawful ground in an open finance context. However, we believe that all legal grounds can and must be pursued equally in an effort to enable more data sharing. The customer's consent is only one legal bases of data sharing. The consent of a natural person is not a widely used lawful ground to share data. The most frequently lawful grounds for financial institutions are legal obligations or contracts.

We should be careful not to repeat the mistakes denounced by the former Article 29 Working Party (WP) in its opinion 15/2011 on the definition of consent of 13 July 2011, which we believe is still relevant in the context of open finance. The opinion states "some Member States see [consent] as a preferred ground" (page 7). The European Commission should be aware that "the order in which the legal grounds are cited [...] does not mean that consent is always the most appropriate ground to legitimise the processing of personal data" (WP29 opinion, page 7). The Commission should consider all the legal bases in the context of open finance on a case-by-case basis, with no preconceived ideas or preference about the different legal bases.

Portability right under Article 20 GDPR

We do not see any meaningful limitation pertaining to the portability right established under Art. 20 GDPR.

By contrast, we find that the absence of a contract between the data user and the data holder in the data portability model leads to several problems, and in particular responsibility issues and consumer protection issues. Moreover, under the GDPR's portability model, the data subject must always be the initiator of the sharing process, which minimises the effectiveness of sharing and de facto reduces the available legal bases to consent, which should be avoided.

➤ **GDPR and interplay with other legislation**

We strongly believe that the GDPR provides a source of trust for consumers that, while challenging at times, allows for sufficient flexibility to enable data sharing under the right safeguards.

What we encounter the most in practice is a lack of clarity on the interplay of GDPR with other legislation, such as the current PSD2, or the recent Data Act proposal (in the latter case, as clearly evidenced by the joint EDPS-EDPB Opinion).

In the case of any new legislation, it is important for the relationship between the various laws to be clear. Our preference is for either law or the other to be given clear priority, rather than stating that both apply simultaneously.



➤ **Compensation for making data available**

As stated in our position paper on the Data Act proposal, there are two important aspects for the relationship between the data holder and the data recipient. Preventing any negative impact on the data holder's business opportunities and compensating the costs of making data available.

When it comes to the latter, we believe that cost levels should not be defined in legislation, as in any free market economy financial firms shall have the possibility for a reasonable return.

If the Commission's intention is to set up an open finance framework, it should take into consideration the various elements that constitute the cost for a data holder to make data available to third parties. We believe that a compensation scheme should consider the following costs: data collection and structuring; data quality; data sharing infrastructure (APIs need to be developed and maintained, and this requires IT work); maintenance; cybersecurity; and overhead

➤ **Liability**

In situations where a contractual relation among the parties exists, it can be clearly defined who is responsible for what when things go wrong and/or when consumers complain. On the other hand, where there is no contractual relation, data sharing can only rely on existing legislation. In this case, we believe that it is crucial to have a clear overview of how the current rules (GDPR, MCD, PSD2, CCD, etc.) deal with liability, responsibility, and accountability of different parties and to identify potential shortcomings. If the current framework is sufficient, it could then suffice to recall its main principles to facilitate the development of a data sharing economy.

If once again we use PSD2 as reference, to our knowledge, ADR procedures under PSD1 and 2 have been effective (customer-bank space). Whereas dispute settlement mechanisms in the third party-bank space (only courts) seem ineffective as enforcement is often not cost proportionate.

Finally, the fact that legislation addresses liability does not solve the question of where the consumer has to go with a complaint or a problem. For the comfort of the consumer, it might be preferable to set a clear responsibility and accountability framework. But such framework always needs to be followed by underlying agreements between different parties in the chain on who does what/who is liable for what.

➤ **Technical infrastructure and costs**

Standardised APIs

EACB members support a market-driven approach regarding the adoption of standardised APIs.

In case the Commission decides to establish an open finance framework, we believe that the regulatory framework should provide incentives to implement good APIs and promote standardisation, and not impose them. It is crucial to have a flexible and market-driven approach.

Co-operative banks consider that the experience with PSD2 holds valuable lessons. All efforts put in place by market participants (IT, staff, expert group work, adjustment of T&Cs) to facilitate AIS services have not generated much demand. On the contrary, API usage in most countries is rather low. Even EACB members that act as AISP do not see many clients using their AIS services.

The voice of 2.700 local and retail banks, 87 million members, 223 million customers in Europe

EACB AISBL – Secretariat • Rue de l'Industrie 26-38 • B-1040 Brussels

Tel: (+32 2) 230 11 24 • Fax (+32 2) 230 06 49 • Enterprise 0896.081.149 • lobbying register 4172526951-19
www.eacb.coop • e-mail : secretariat@eacb.coop



We believe that the SEPA API Access Scheme for payments, the BerlinGroup standard with the current elaborations on openFinance Framework, and STET in France represent examples of self-regulation that support the development of market-oriented business models, by involving all relevant stakeholders.

Costs of APIs

In an open finance scenario, costs for data standardisation and creating APIs to all financial firms, while complying with already applicable legislation related to the underlying data, can be considered much higher than possible benefits received by customers. Lessons should be learned from PSD2 experience. We believe that open finance could represent an opportunity to recognise the value added by various actors involved in the chain.

EACB members leveraging or planning to leverage the PSD2 API for other use cases reported that cost savings might come from synergies based on the use of already established standardisation initiatives, e.g., BerlinGroup API standard and STET in France. Building on already established API standards promises the realisation of synergies with regard to implementation costs and dissemination in the market by benefitting all participants compared to the development of completely new standards. Indeed, in case of completely new standards, there will be no cost savings or synergies for all stakeholders.

We note that the benefits of existing APIs are that they would enable shorter time to market, which is hard to quantify as pure cost saving.

We cannot provide an estimate of costs for setting up an API for access to customer data and the ongoing costs for running it that can be representative of the size of the institution, the level of centralisation, the quality of IT systems across Europe. Infrastructures used by financial institutions typically do have many interfaces to connect different IT systems and to enable the processing of (customer) data. Related costs depend on many parameters, e.g., type of infrastructure, number of interfaces and systems, volume of data, number of users, etc. In addition to building an API, data holding companies need to build capabilities (e.g., to manage scope of services/access, authorisations and authentications) as well as organisational structures to support the services. In multi-service companies, these costs might be service specific (e.g., banking, insurance).

Part III – Commission’s selected use cases on transferability and access to customer data on current and past investments and on access to SME data

➤ **Transferability of customer-profile data**

We believe that portability of customer-profile data should not be pursued.

The risk profile of a customer relies on input and output data. With regard to the former, the risk profile is established on the basis of information provided in compliance with the regulatory

The voice of 2.700 local and retail banks, 87 million members, 223 million customers in Europe

EACB AISBL – Secretariat • Rue de l’Industrie 26-38 • B-1040 Brussels

Tel: (+32 2) 230 11 24 • Fax (+32 2) 230 06 49 • Enterprise 0896.081.149 • lobbying register 4172526951-19

www.eacb.coop • e-mail : secretariat@eacb.coop



framework, but more importantly from the ongoing trust relationship established with the advisor, provided voluntarily by the customer each time. Concerning output data, the risk profile depends on the timing (new source of revenues, adverse events requesting funding), the products (some products can be used to finance retirement, others studies or a mix with a different risk appetite) and the assessment performed by each financial intermediary (some financial institution will consider 5 levels of risks whereas others 3; some institutions will consider 20% of equity max whereas for a similar level of client appetite others will consider 25%).

As a general remark, making a personal investment plan or any investment advice or conclusions based on clients' investment profile answers requires careful client-based considerations.

As already stated in the [EACB's responses](#) to the Commission's targeted consultation on options to enhance the suitability and appropriateness assessments to which we refer, we strongly oppose a standardisation of customer-profile data and personal investment plan (PIP) for the different reasons mentioned. Among other things, with a standardisation of customer-profile data and a PIP it would not be possible to suit every client's specific needs. ESMA in its April 2022 letter to DG FISMA's Director-General stated in particular that 'the proposal to apply a unique and standardised retail investor assessment regime that no longer differentiates among the various investment services might raise questions of whether a 'one size fits all' approach can effectively serve all different types of retail investors and situations'.

Furthermore, money laundering questions and any considerations relating to those (such as client due diligence (CDD)/ know your customer (KYC) procedures) are strict responsibility of the service provider who is providing services to clients. Regulated financial entities are not able to rely on information that is gathered by third parties. The Commission does not explain how the AML/CFT and CDD/KYC requirements would be adhered to with such standardisation and portability of customer data. We doubt that service providers would be exonerated from civil requirements in order to achieve such aim.

It should also be noted that liability issues can arise from investment advice that is grounded on derived data from other intermediaries. Such cases would then have to be clarified in a framework, if such a proposal was to go ahead. Should the Commission in its proposal not tackle liabilities issues, this could lead to undesirable situations in terms of fragmentation of the jurisdictions within the internal market.

In addition, already at present, retail customers of financial institutions as of any other company are entitled to data portability of their personal data as investment account data are personal data. If one would agree that access shall be based on APIs, the question emerges as to who will bear the costs for setting up and maintaining such APIs and what effects this will have on companies' pricing strategies. Repeating the experience of PSD2 where one part of the economy has been forced to bear the costs of all market players must be excluded as an option in open finance.

The voice of 2.700 local and retail banks, 87 million members, 223 million customers in Europe

EACB AISBL – Secretariat • Rue de l'Industrie 26-38 • B-1040 Brussels

Tel: (+32 2) 230 11 24 • Fax (+32 2) 230 06 49 • Enterprise 0896.081.149 • lobbying register 4172526951-19
www.eacb.coop • e-mail : secretariat@eacb.coop



Finally, we invite you to refer to the concerns expressed in the EACB answers to the Commission's targeted consultation on options to enhance suitability and appropriateness assessments. We believe that portability of client information would not have any added value.

Risks associated with sharing customer-profile data between financial intermediaries

We find it seriously dangerous for a provider to make recommendations that are based on third-party recommendations. This may also give rise to civil law risks. There are different product offers, market analyses, market data sets, etc. between intermediaries and so it is highly likely that an intermediary would perform its own suitability assessment rather than incorporate the original assessment. This is not to mention GDPR limitations that may arise from data portability. Moreover, it is unclear how liability risk would be addressed in case there are issues with the original assessment in a portable setting.

Sharing customer-profile data between financial intermediaries can also be risky for the following reasons:

- It can go against clients' interests: abusive standardisation of needs that constantly varies along the client's life. If standardisation is cheaper, it is also less diversified and represents a loss of opportunity for clients and companies to be financed.
- Another adverse effect lies with the liability attached to the risk assessment and the risk of over-representation of adverse-risk profiles (limitation of liability of the financial intermediary who establishes it).
- Up-to-date data cannot be guaranteed; risks arise when old data is used.
- Data availability at any given time cannot be guaranteed.
- Possible conflicts (and resulting liability risks for the data holder) with data protection laws must be resolved and avoided.
- The misuse of data, including fraud and financial crime.
- False sales under the pretence of making the consumer an optimal offer using their data.
- Building up sales pressure by ultimately dubious providers.

In addition to the above, ESMA in its recent [final report](#) on the European Commission mandate on certain aspects relating to retail investor protection mentions risks, summed up risks, which include:

- The misuse of client data, including the use of client data without the consent, which could lead to an increased risk of fraud and incorrect advice to clients (where incomplete or outdated data is shared and used) and generally lead to poor consumer outcomes. Furthermore, the use of personal data can also lead to more discrimination, for example increased prices for certain consumers.
- An increased risk connected to data breaches, privacy and security risks associated with the sharing of consumers' financial data.
- Possible damage to consumer confidence due to a lack of information or non compliance with data protection requirements. The over-simplification of products for comparison purposes could also lead to poor consumer outcomes.
- The risk of exclusion for the consumers that do not to participate in data sharing.

The voice of 2.700 local and retail banks, 87 million members, 223 million customers in Europe

EACB AISBL – Secretariat • Rue de l'Industrie 26-38 • B-1040 Brussels

Tel: (+32 2) 230 11 24 • Fax (+32 2) 230 06 49 • Enterprise 0896.081.149 • lobbying register 4172526951-19
www.eacb.coop • e-mail : secretariat@eacb.coop



- Risk of an un-level playing field for companies in the financial sector:
 - Regulatory unequal treatment / regulatory arbitrage vis-à-vis non regulated companies;
 - No (or insufficient) compensation for data preparation and storage by companies that access and use data;
 - Disclosure of trade secrets;
 - Unequal treatment of data exchange compared to other industries (“lack of reciprocity”). In fact, asymmetrical information access requirements could disadvantage incumbent firms in favour of ‘big tech’ companies as, by requiring certain entities to share data with third parties without reciprocation, these initiatives could limit the ability for incumbent firms to invest in innovative technologies and may have negative implications on their ability to maintain and continuously improve their technical infrastructure and business model;
 - Data exchange can strengthen the market position of data-driven platforms / technology providers and thus advance oligopolisation through to monopoly (“winner takes it all”).

The most important measure would be to further keep contractual freedom as the key pillar of the market economy and our democratic society in the EU and ensure a level-playing field especially regarding non-regulated entities having potential access to data of regulated entities’ customers.

Costs for an investment firm in setting up data access points, e.g., in the form of APIs

We cannot provide an estimate of costs as this cannot be done without precise information on the perimeter of the shared data and the level of security that will be agreed between the parties. Moreover, it can be complex to assess when dealing with customers’ loss of confidence if the investment turns out not to be adequate.

If we take PSD2 as an example once again, there was some standardisation with a few big API initiatives that are established in the market, and banks invested a lot in implementing those API standards. All the efforts put in place by market participants (IT, staff, expert group work, adjustment of T&Cs), notably to facilitate AIS services, have not generated much demand. API usage in most countries is rather low. Even EACB members that act as AISP do not see many clients using their AIS services.

Setting up data access points, e.g., in the form of APIs, would require IT systems and infrastructure totally different compared to information gathered from investment service clients nowadays. It would mean investment of millions of euros from financial institutions in Europe. Smaller service providers might have to give up business.

In this context, it is also worth mentioning again that the ESMA [final report](#) on the European Commission mandate on certain aspects relating to retail investor protection highlights that ‘implementation costs are likely going to be high and may probably even limit the access of retail



investors to investment services and therefor may have an effect that is contrary to the intended purpose.'

➤ **Access to customer data on current and past investments**

We believe that there may be some limited benefits from 'open finance' to retail investors on current investment.

If these retail investors are using many banks and/or service providers and have their investments in many places, they could get a picture of their whole investment portfolio from many service providers through one service provider. However, most retail investors are most likely using only one investment service provider and they would not benefit from this opportunity at all. We do not see that retail clients would be willing to pay for these kinds of services.

Also, collection and evaluation of customer data is part of the bank's business secrets. Each bank has its own specific methods of evaluation. This data should not have to be made available to TPPs.

In addition, tools can already be developed on the basis of data voluntarily shared by customers themselves and not intermediated by digital players.

It is also worth saying that the development of a new tool for the benefit of the customer does not require access to any customer data. It can be developed using purely synthetic data and building models upon these.

The client here should not be the product and benefit from cheaper services against the value of personal data. This is the only way to prevent conflicts of interests and to preserve long-term interest for investment. Otherwise, this is an opened door to predictive trading benefiting big digital players but not end-consumers. This bias already exists in the crypto-asset trading world. The transfer of raw and basic data needs to remain voluntary and actively managed by the client. Any additional information should depend on the situation, the timing, the level of advice requested by the client at the time of the investment.

Since the provision of corresponding interfaces would be associated with considerable costs, access to data on the customer's current investments with a financial service provider should take place exclusively on a voluntary basis, if the financial service provider offers this of its own accord.

The questionnaire also addresses a question on past investments, in this specific situation and adding to what we said for current investments, it is also not clear what the benefits of this approach would be for the customer. We see it as something that will surely generate big efforts for service providers (data storage and processing).

We believe that financial institutions should not be obliged to make it possible to access data on customers' past investments and share it with third parties.



➤ **SME financing**

With regard to whether steps would be necessary to harmonise data formats and access conditions to ensure adequate quality of SME data (accurate, reliable, complete, etc.), we believe that it would be necessary to know all relevant existing data formats and access conditions for SMEs. It would be more helpful to gather and examine these first, before judging upon their harmonisation.

Part IV – EACB comments to specific questions of the targeted consultation

Q3. In your opinion, is there an adequate framework for data access rights in place in the financial sector beyond payment accounts?

We believe that question 3 in itself is misleading; that is why in the online questionnaire we selected 'I don't know' as there were no other choices except from answering 'yes' or 'no', and we believe that providing a comment here is important.

The PSD2 represents the most relevant piece of sectoral legislation with regard to access to (payment account) data.

Co-operative banks consider the PSD2 model not the right one to be used in an open finance framework for other accounts, as PSD2 imposed data access by one side of the market for the benefit of the other side. We are aware that PSD2 is currently undergoing a review assessment and it represents a good starting point to draw lessons from it.

As said earlier, we are in favour of a voluntary approach driven by market participants and based on contracts. The banking sector has showed its willingness and commitment on many occasions in this regard. A concrete example of self-regulation is given by Euro Retail Payments Board (ERPB). EACB members support the efforts of the ERPB (chaired by the European Central Bank) to promote the development of market-oriented business models, by involving all relevant stakeholders. The EACB is actively involved in the work of the relevant ERPB and EPC working groups. EACB members are also adhering to various EPC payments schemes. In addition, the EACB and its members presently follow the ERPB and EPC work on SEPA API Access Scheme for payments. This scheme would be a first scheme that also covers data. And this is a market-driven initiative.

Q14. As a financial firm holding customer data, do you make any data available to third parties beyond the data that you are required to share under PSD2, GDPR or other laws?

Responding to question 14 represented a challenge because of:

- The impossibility to provide comments, which limited our choices among the three possibilities (yes, no, don't know/no opinion/not applicable) and decided to then select the 'not applicable' options considering that we are an association.
- The terminology used in the question:
 - The third-party definition seems not clear in this context. Does third-party refer to the GDPR (i.e., 'natural or legal person, public authority, agency or body other than the data subject, controller, processor and persons who, under the

The voice of 2.700 local and retail banks, 87 million members, 223 million customers in Europe

EACB AISBL – Secretariat • Rue de l'Industrie 26-38 • B-1040 Brussels

Tel: (+32 2) 230 11 24 • Fax (+32 2) 230 06 49 • Enterprise 0896.081.149 • lobbying register 4172526951-19
www.eacb.coop • e-mail : secretariat@eacb.coop



direct authority of the controller or processor, are authorised to process personal data') or the third-party providers (TPPs) as understood under PSD2? We believe that when talking about open finance, defining who is a third party is of paramount importance, and more in general defining the various actors in the data value chain.

- The 'any data' wording. Are we talking about personal data, non-personal data or both? We believe that discussion on the scope of what kind of data should be shared is necessary. Scope should be clear and defined.
- Co-operative banks do share data based on applicable legal grounds, e.g., contracts with their contract partners (companies or individuals), customers' consent, legal obligation or legitimate interest, when applicable.

Q19. In your opinion, should the scope of account information service provider licenses put in place under PSD2 be extended to cover all financial services where new data access rights for third-party service providers would be introduced?

Question 19 is unclear and required extensive discussions within our membership. We interpret it as implying that the scope of Account Information Service Provider licences (AISPs) is extended to all other non-payment financial services. Should this be the right interpretation, our answer is 'no'. We believe that different licences should be required for different services because of different requirements. An extension of existing licences (Account Information Services) to other account types (e.g., savings account, etc.) would not be desirable, since the risks of offering information services regarding other account types are different from information services regarding payment account.

Q23. Do you believe that licensed firms in open finance should be required to provide operational tools to enable customers to manage their right of consent with respect to the various financial services they are using?

Question 23 is one of the questions that we found unclear and misleading.

There are three elements to address:

- 1) The meaning of 'licensed firm'. Does it include data holders? Data recipients? Both?
- 2) The 'should be required' wording, which implies imposing an obligation on 'licensed firms'.
- 3) Whether the question, by only mentioning 'consent', implies that consent is the only lawful ground in an open finance context.

For the three above main reasons, we decided to respond 'don't know'.

Based on market demand, we believe that consent management tools should not be imposed to 'licensed firms' but be voluntarily provided.



Q28. Is there a need for additional rules in the financial sector to clarify the attribution of liability for the quality of customer data that is shared?

We answered 'no' to this question of the online questionnaire. We believe that data should be provided on a best-effort basis. Data holders cannot be held responsible for how data quality is assessed in the context of purposes and services provided by data recipients. No additional rules in the financial sector should be introduced.

If this question implies that in a possible open finance framework liability rules should be considered, we believe that is crucial to have a clear overview of the current rules in place by conducting an inventory and identifying potential shortcomings. If the current framework is sufficient, it could then suffice to recall its main principles to facilitate the development of a data sharing economy.

Q29. In your opinion, should an open finance framework need a dispute settlement mechanism to mediate and resolve liability disputes and other customer complaints?

We answered 'yes' to this question of the online questionnaire.

In situations where a contractual relation among the parties exists, it can be clearly defined who is responsible for what when things go wrong and/or when consumers complain. On the other hand, where there is no contractual relation, data sharing can only rely on existing legislation. In this case, we believe that is crucial to have a clear overview of how the current rules (GDPR, MCD, PSD2, CCD, etc.) deal with liability, responsibility, and accountability of different parties and to identify potential shortcomings.

If once again we use PSD2 as reference, to our knowledge, ADR procedures under PSD1 and 2 have been effective (customer–bank space). Whereas dispute settlement mechanisms in the third party–bank space (only courts) seem ineffective as enforcement is often not cost proportionate.

In addition, the fact that legislation addresses liability does not solve the question of where the consumer has to go with a complaint or a problem. For the comfort of the consumer, it might be preferable to set a clear responsibility and accountability framework. But such framework always needs to be followed by underlying agreements between different parties in the chain on who does what/who is liable for what.

Q35. Are you a member of any contractual scheme or expecting to become one in the next few years?

EACB members support the efforts of the Euro Retail Payments Board (chaired by the European Central Bank) to promote the development of market-oriented business models, by involving all relevant stakeholders. For example, the EACB is actively involved in the work of the relevant ERPB and EPC working groups. They are also adhering to various EPC payments schemes. EACB and its members presently follow the ERPB and EPC work on SEPA API Access Scheme for payments.

The voice of 2.700 local and retail banks, 87 million members, 223 million customers in Europe

EACB AISBL – Secretariat • Rue de l'Industrie 26-38 • B-1040 Brussels

Tel: (+32 2) 230 11 24 • Fax (+32 2) 230 06 49 • Enterprise 0896.081.149 • lobbying register 4172526951-19
www.eacb.coop • e-mail : secretariat@eacb.coop



This scheme would be a first scheme that also covers data. Once in the market, EACB members would need to decide whether to participate.

Q38. Would you agree with the following statement: without any regulatory intervention, I would expect that any contractual challenges linked to open finance would be resolved within the next 3-5 years by stakeholders themselves?

This question not only doesn't allow a different answer than the common 'agree, disagree, and don't know/no opinion/not applicable' options, but is also misleading and subjective.

EACB members support the development of market-oriented contractual schemes without regulatory intervention. The EACB and its members presently follow the ERPB and EPC work on SEPA API Access Scheme for payments. This scheme would be a first scheme that also covers data. Once in the market, EACB members would need to decide whether to participate.

In a contractual scheme, it can be clearly defined who is responsible for what when things go wrong and/or when consumers complain. Contractual schemes can improve accountability among parties involved in a transaction and can set the parameters of cooperation, e.g., which security measures have to be applied when handling data.

We would welcome a broad information campaign about market-oriented contractual schemes such as the SEPA API Access Scheme for payments.

In addition, there are already horizontal pieces of law dealing with fairness of contract, the most recent dealing with data being the Data Act proposal.

Q40. In your opinion, should the Commission consider to propose new data access rights in the area of open finance?

We believe that the Commission should not consider to propose new data access rights in the area of open finance.

In our understanding, in the Digital Finance Strategy, the Commission's objective for open finance is to support data-driven innovation and not to create an instrument for regulating competition (as PSD2). The data economy shouldn't be seen as simply increasing a right of access to data. For the proper functioning of a data economy able to support digital innovation that brings efficiencies for consumers, businesses and authorities, we think that the best option should be voluntary data sharing resulting in a contractual agreement between two or more economic actors (data holders and data recipients). This will allow for a fair distribution of risks and values for all actors in the chain.



Q44. Have you made use of Article 20 GDPR to access financial data or been requested such data access under Article 20 GDPR in the financial sector, and if so how frequently?

Question 40 limits the answer to one possible choice and doesn't allow an association like the EACB to provide comments. The range of responses from EACB members goes from never to rarely.

Q46. In your opinion, what lawful grounds for the processing of personal data would be most useful for the purpose of open finance?

We decided not to provide preferences into the questionnaire table. We believe that all legal grounds can and must be pursued equally in an effort to enable more data sharing.

We should be careful not to repeat the mistakes denounced by the former Article 29 Working Party (WP) in its opinion 15/2011 on the definition of consent of 13 July 2011, which we believe is still relevant in the context of open finance. The opinion states that "some Member States see [consent] as a preferred ground" (page 7). The European Commission should be aware that "the order in which the legal grounds are cited [...] does not mean that consent is always the most appropriate ground to legitimise the processing of personal data" (WP29 opinion, page 7). The Commission should consider all the legal bases in the context of open finance on a case-by-case basis, with no preconceived ideas or preference about the different legal bases.

Q52. Would you agree with the following statement: even without any regulatory intervention, within the next 3-5 years I would expect most if not all larger financial institutions in the EU to provide consent-based access to key customer data via standardised APIs.

We are not in a position to answer this question because question 52 not only doesn't allow a different answer than the common 'agree, disagree, and don't know/no opinion/not applicable' options, but is also misleading and subjective ("even without any regulatory intervention"). It seems to imply that consent is the only lawful ground for accessing customer data.

As said earlier, EACB members support a market-driven approach. We believe that the regulatory framework should provide incentives to implement good APIs and promote standardisation, and not impose them.

The EACB and its members presently follow the ERPB and EPC work on SEPA API Access Scheme for payments. This scheme would be a first scheme that also covers data. Once in the market, EACB members would need to decide whether to participate.

Q62. Have you already developed an API for data access by customers and third parties on behalf of customers? And Q62.1. If you have already developed an API for data access by customers under PSD2, to what extent do you (plan to) leverage it for other open finance use cases?

The voice of 2.700 local and retail banks, 87 million members, 223 million customers in Europe

EACB AISBL – Secretariat • Rue de l'Industrie 26-38 • B-1040 Brussels

Tel: (+32 2) 230 11 24 • Fax (+32 2) 230 06 49 • Enterprise 0896.081.149 • lobbying register 4172526951-19
www.eacb.coop • e-mail : secretariat@eacb.coop



Question 62 and 62.1 don't allow an association like the EACB to respond and chose only one choice and a possibility to add a comment.

Regarding question 62, EACB members have indicated that they have already developed an API for data access by customers and third parties on behalf of customers under PSD2 but also outside the scope of PSD2.

Concerning question 62.1, the answer to this question is diverse. Some EACB members indicated that they plan to leverage the API for data access by customers under PSD2 for other use cases; other members indicated that they already used it; and some others said that the API is not used or planned to be used for other use cases.

Q88. Would you consider it useful to provide for similar 'enabling clauses' for other types of information exchange among financial institutions?

Responding to question 88 represented a challenge because of:

- The impossibility to provide comments, which limited our choices among the three possibilities (yes, no, don't know/no opinion/not applicable). We consequently decided to select the 'don't know' option.
- The terminology used in the question: 'other types of information exchange'. It is not clear what other type of information exchange the question refers to.
- As a general observation, with regard to data sharing, we don't see any major obstacles for anonymised and aggregated data sharing. Nevertheless, the usefulness and scope of the type of data should be clear.
- AML-related data exchange could also help the fight against money-laundering.

Contact:

The EACB trusts that its comments will be taken into account.

For further information or questions on this paper, please contact:

- Ms Marieke van Berkel, Head of Department Retail Banking, Payments, Financial Markets (marieke.vanberkel@eachb.coop)
- Ms Chiara Dell'Oro, Senior Adviser for Digital Policies (chiara.delloro@eachb.coop)

The voice of 2.700 local and retail banks, 87 million members, 223 million customers in Europe

EACB AISBL – Secretariat • Rue de l'Industrie 26-38 • B-1040 Brussels

Tel: (+32 2) 230 11 24 • Fax (+32 2) 230 06 49 • Enterprise 0896.081.149 • lobbying register 4172526951-19
www.eachb.coop • e-mail : secretariat@eachb.coop