

Towards Data-Driven Open Finance

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Summary

The purpose of this chapter is to analyze the regulation of access to financial data as an essential element of the data economy. It analyses the extension of Open Banking to the whole of finance (Open Finance) from the perspective of the proposal for a European Union Regulation on access to financial data (FIDA). This proposal foresees the creation of financial data exchange systems with their own governance by the entities holding and using the data. This analysis concludes that we are moving towards Data-driven Open Finance where financial platforms dominate the market. These platforms need appropriate regulation to ensure a proper balance between market development and respect for customer rights.

Keywords: Open Banking. Open Finance. FIDA. GDPR. Financial Services. Data-driven. BigTech. Financial data-sharing schemes

Index

I. FINANCIAL DIGITALISATION AND OPEN FINANCE. 1. From Open Banking to Open Finance. 2. European Data Strategy. 3. The Importance of Artificial Intelligence. 4. Lessons from Open Banking. II. PROPOSAL FOR A REGULATION ON ACCESS TO FINANCIAL DATA. 1. From Open Finance to FIDA. 2. Objectives and scope of FIDA. 3. Rights and obligations related to access to data. III. FINANCIAL DATA EXCHANGE SYSTEMS. 1. New market infrastructure. 2. Bottom-up approach. V. CONCLUSIONS V. BIBLIOGRAPHY.

I. FINANCIAL DIGITALISATION AND OPEN FINANCE

Finance is the nervous system of the economy. Without money and credit, the economy grinds to a halt. This was highlighted by the 2007 interbank lockout, which is at the heart of the recent financial crisis. This essential function is reinforced in an economy driven by data and artificial intelligence. The data economy drives financialization.¹ It should be noted that the financial sector is the largest user of data in the European Union. Banking has always been at the forefront of technological innovation and this strategic position is maintained in data-driven innovation. In turn, facilitating access to financial data is key to the success of the overall data strategy.

Against this background, the European Commission has put forward a set of proposals aimed at bringing payment services and the financial sector in general into the digital age.² The package of proposals aims to ensure that the EU financial sector is able to adapt to the digital transformation in an open finance environment. The proposals deliver on the commitments set out in the Digital Finance Strategy and the Retail Payments Strategy and are aligned with the European Data Strategy.³ This set of proposals aims to improve consumer protection, foster competition and ensure security and trust in financial services.

In this article we address Open Finance understood as the access and exchange of personal and non-personal data related to financial products and services, and we do so from the perspective of the proposed Financial Data Access Regulation (FIDA),⁴

¹ See LEQUETTE, Suzanne, *Droit numérique*, 2024, p. 22.

² See European Commission, *Financial data access and payments package*, 28 June 2023, available at https://finance.ec.europa.eu/publications/financial-data-access-and-payments-package_en.

³ Communication on a Digital Finance Strategy for the EU, COM(2020) 591 final, Brussels, 24.9.2020, Communication on a Retail Payments Strategy for the EU, COM(2020) 592 final, Brussels, 24.9.2020, and Communication on a European Data Strategy, COM(2020) 66 final, Brussels, 19.2.2020.

⁴ Proposal for a Regulation on a framework for access to financial data, COM(2023) 360 final, Brussels, 28.6.2023.

analyzing its effects on competition to offer some considerations for improving the governance of new financial platforms that can dominate the market.

1. From Open Banking to Open Finance

In 2015, the second Payment Services Directive, known by its acronym PSD2, gave way to open payment services, a true expression of what is known as Open Banking. This is a ground-breaking legislative change that will see banks lose their monopoly over payment services. Traditionally, financial regulation has prioritized stability over free competition; however, with Open Banking, competition takes precedence. In contrast to banking regulation through solvency rules for institutions and rules of conduct to protect customers, PSD2 is a market rule that facilitates free competition.

After the launch of Open Banking, the idea was to extend it to the rest of the financial services, under the name of Open Finance.⁵ This was programmed in the 2020 Digital Finance Strategy. This extension aimed to boost innovation and competition in the financial sector through digitization and standardization. With interoperability, the different systems can share data through interfaces (APIs). The idea is to boost competition by compelling financial institutions to share customer data with third-party financial service providers. Its purpose is to broaden the range of services on offer, reducing access barriers to the provision of financial services. In other words, it is a pro-competitive approach that has the effect of postponing customer protection. In principle, it contributes to financial inclusion by increasing the supply of low-cost services. However, the intense use of artificial intelligence generates harmful consumer biases that can lead to financial exclusion. Moreover, Open Finance also creates operational and data misuse risks. In the face of this threat, supervisors place appropriate cyber risk assessment at the top of their priorities.⁶

⁵ See VEZZOSO, Simonetta, "The Critical Journey from Open Banking to Open Finance", available at *SSRN 4150255*, 2022.

⁶ See Bank of Spain, *Strategic Plan 2024* for whom "technological change introduces new challenges, associated with the emergence of new intermediaries that provide alternative sources of funding and have the potential to alter the market structure, and brings with it additional risks, such as those associated with cybersecurity, which is an important operational risk".

Financial services are provided by an increasingly concentrated banking sector with greater market power. Not always in the best interest of the client as can be seen from the rising number of complaints.⁷ In addition, there is a risk of business concentration on the platforms that handle data better.⁸ Bigtechs can combine data, generating profiles that are not affordable to other operators. They pose an existential challenge to traditional banking.⁹ It is paradoxical that, as Open Finance is a regulation that seeks to foster competition, its main risk is the creation of oligopolies. For this reason, we propose a specific regulation of financial platforms that guarantees competition and the stability of the system.

2. European Data Strategy

The European Data Strategy proposes to create "a seamless digital area with the scale that will enable the development of new products and services based on data".¹⁰ This Strategy comprises various regulatory initiatives,¹¹ among which the European Data Spaces,¹² that frames various sectoral regulations on health, industry and energy data,

⁷ We have gone from 14,638 complaints in 2019 to 34,146 in 2022 (Banco de España, Memoria de Reclamaciones 2022, p. 84), although there has been an increasing judicialization of banking disputes.

⁸ See FCA, *The potential competition impacts of Big Tech entry and expansion in retail financial services*, Discussion Paper DP22/5, October 2022, available at <https://www.fca.org.uk/publication/discussion/dp22-5.pdf>; and for its impact on insurance see GARCIA OCAMPO, Denise; TANEJA, Jatin; YONG, Jeffery, and ZHU, Juli, *From clicks to claims: emerging trends and risks of big techs' foray into insurance*, FSI Insights, No 51, 31 August 2023, available at <https://www.bis.org/fsi/publ/insights51.pdf>.

⁹ DE LA MANO, Miguel; PADILLA, Jorge, "Big Tech banking", *Journal of Competition Law & Economics*, 2018, vol. 14, no 4, p. 519.

¹⁰ See Communication "Towards a Common European Data Space", COM(2018) 232 final Brussels, 25.4.2018.

¹¹ To create a single data market in the European Union, a Data Governance Regulation of 30 May 2022 and a Data Regulation of 13 December 2023 have been adopted. This framework is completed by the *Digital Markets Act* of 14 September 2022 and the *Digital Services Act* of 19 October 2022.

¹² Regulation (EU) 2023/2854 of 13 December 2023 on harmonized rules for fair access to and use of data (Data Act), Regulation (EU) 2022/1925 of 14 September 2022 on contestable and fair markets in the digital sector (Digital Markets Act), Regulation (EU) 2022/2065 of 19 October 2022 on a single market for

Now, specific regime for the financial sector have been added. This Strategy represents a change in legislative policy. Instead of extending *Open Banking* to *Open Finance*, the European Commission has considered it preferable to create a specific sectoral area within the framework of the European data strategy. To this end, it has formulated FIDA, a proposal for the setting up of a Financial Data Space as an integral part of the European Data Strategy, under the umbrella of the General Data Protection Regulation (GDPR), incorporating the lessons provided by PSD2.

3. The importance of artificial intelligence

FIDA considers the context of technological innovation. Artificial intelligence combines computer science, data analysis and statistics to create systems capable of simulating human intelligence processes. It is a powerful digital financial tool that optimizes financial operations to make them more efficient. It brings improvements in risk management and assessment, transaction monitoring and the detection of fraud or unusual activity. It can also detect deviations in regulatory compliance and improve anti-money laundering supervision.

In a pioneering move, the European Union has passed an Artificial Intelligence Act to establish global standards that allow its development while respecting human rights.¹³ This general law applies to the financial sector. In other words, it facilitates, with some caveats, the use of artificial intelligence in the creation and distribution of financial products and services. It identifies among high-risk systems the assessment of creditworthiness in the credit market (*credit scoring*) and systems intended to be used for risk assessment and pricing in the insurance sector. With these caveats, it facilitates the development of Data-Driven Open Finance. However, it is a combination of innovation and market opening that affects market competition. It facilitates market access for new

digital services (Digital Services Act) and Regulation (EU) 2022/868 of 30 May 2022 on European data governance (Data Governance Act).

¹³ See Regulation (EU) 2024/1689 of 13 June 2024 laying down harmonised rules on artificial intelligence, to be implemented "facilitating the protection of individuals, businesses, democracy, the rule of law and the protection of the environment, while boosting innovation and employment and making the Union a leader in the adoption of trusted AI".

market entrants, among which Bigtech, with Chinese and US dominance, stands out.¹⁴ In principle, it is the competition authorities that are called upon to defend the correct and fair competition in the market.¹⁵ But most competition authorities lack the knowledge and experience in digital finance needed to reach solutions and apply them effectively. At the end of the last century, they failed to respond adequately to the oligopoly of card schemes.¹⁶ At the same time, early reports on the impact of *Fintech* innovations on competition in financial services downplayed the relevance of this phenomenon, maintaining that it was a wait and see approach. According to a 2018 European Parliament report on competition in financial technology: "Current policy efforts should focus primarily on research and close monitoring of market developments".¹⁷ In turn, according to a CNMC study, technological innovations contribute to "general welfare" and "regulators should welcome this phenomenon".¹⁸ With the corollary that "public intervention must be justified by a market failure or other overriding reason of general interest".¹⁹ To the point of claiming that the emergence of fintechs is a correction of market failures.²⁰ In particular Insurtech "produces pro-competitive effects and improves

¹⁴ See LETTA, Enrico, *Much more than a market - Speed, Security, Solidarity Empowering the Single Market to deliver a sustainable future and prosperity for all EU Citizens*, April 2024.

¹⁵ The AI Regulation should not affect practices prohibited by Union law, including Union competition law, although the AI Council should cooperate with competition authorities. However, it obliges remaining Bigtechs to assess potential systemic risks generated by the operation of their platforms and to take risk mitigation measures while respecting fundamental rights.

¹⁶ In Spain, faced with the inoperability of the competition authority to deal with the abuse of interchange fees, it was the Bank of Spain that took on the role of mediator.

¹⁷ FRAILE CARMONA et al, *Competition issues in the Area of Financial Technology (FinTech)*, European Parliament, Directorate-General for Internal Policies, PE 619.027, July 2018, concluding that: "Technology has an important potential to disrupt established markets and unleash pro-competitive forces by lowering barriers of entry". Current efforts at the policy level should primarily focus on research and a close monitoring of market developments (p. 103).

¹⁸ See *CNMC Study on the impact on competition of new technologies in the financial sector*, E/CNMC/001/18, 13 September 2018, p. 90.

¹⁹ *Ibidem*, p. 91.

²⁰ *Ibidem*, p. 91.

efficiency and consumer welfare",²¹ with "great potential for alliances between incumbents and new entrants"²², to recommend the extension of Open Banking to insurance. These reports demonstrate that competition authorities behave more as enthusiasts of technological innovations than as authorities in charge of ensuring competition and the welfare of citizens. It was not until the emergence of artificial intelligence that we saw a certain change of attitude among the authorities, with warnings of risks of algorithmic collusion in Fintech.²³

4. Lessons from Open Banking

Open Banking has fulfilled its main objective of boosting competition in payment services by opening the market to third-party providers of new services related to payment services, such as the management of payment account information through the use of applications. However this regulatory framework has its limitations. PSD2 does not require a contract between the bank and the third-party provider as a condition for data sharing, nor does it include contractual liability rules. Nor does it include an obligation to compensate the holding bank for access to customer data by third-party providers. Nor does it make clear how to move towards standardization of APIs. The reform includes a PSD3 proposal that aims to address the shortcomings of PSD2. The two main novelties of PSD3 are the regulation of contractual liability and the provision of compensation for the use of APIs.

The reform is complemented by a Payment Services Regulation (PSR) tackling payment fraud. In recent years, new types of fraud have emerged beyond the PSD2 regime. In this regard, PSR addresses the prevention of identity theft fraud known as *spoofing*. This type of fraud blurs the distinction between unauthorized and authorized transactions, as the consent given by the customer is manipulated through the bank's

²¹ Ibidem, p. 79.

²² Ibidem, p. 83.

²³ See Comisión Nacional de los Mercados y la Competencia (CNMC) and Autoritat Catalana de la Competència (ACCO), *Artificial Intelligence and Competition*, 2020, p. 3, note 8.

telephone number or email address. This is a social engineering fraud, where a fraudster manipulates a payment service user into performing a certain action, such as initiating a payment transaction or handing over security credentials to the fraudster. PSD2's strong authentication is insufficient to prevent this type of fraud. As a novelty, the reconciliation of the account holder's name with the IBAN is a requirement that can help prevention this. Along these lines, the proposal provides for reimbursement rights for consumers who have experienced failures in the verification of their name with the IBAN.

Payment service providers have more means than consumers to stop *spoofing*, through adequate prevention and robust technical safeguards developed with providers of electronic communications services, such as mobile network operators or internet platforms. With PSR, electronic communications service providers are obliged to cooperate with payment service providers in the fight against fraud. If they fail to do so, they will be held jointly liable in case of fraud". Thus, as an important novelty, the proposal extends the liability for digital banking fraud to communications service providers.

II. PROPOSAL FOR A REGULATION ON ACCESS TO FINANCIAL DATA

1. From Open Finance to FIDA

As we have advanced, in 2023, the European Commission changes its strategy on open finance and moves to address it as a sectoral regulation in the European data strategy through FIDA.²⁴ Under this proposal, users will be able to contact the customers of banks and other data holders to allow them to access their financial data through a dashboard. In turn, banks and other data holders would be required to provide access to data in return for reasonable compensation, oriented “towards the lower levels prevalent on the market, while ensuring that there are sufficient incentives to foster market adoption and effective competition”. To be reasonable, compensation should include the costs incurred in

²⁴ For the analysis of FIDA we use the text adopted by the plenary of the European Parliament on 30 April 2024.

providing access to data and those related to the creation and maintenance of APIs. This compensation scheme is in line with the general principles of data sharing set out in the Data Act proposal.

2. Objectives and scope of FIDA

FIDA's main objective is to give customers power over their data so that they can share it securely with other providers to access better and cheaper financial products and services. This power is intended to be exercised through a dashboard that controls both access and end-use of the data. In this way, it is intended to build confidence in customers to share data without fear that access to their personal data will harm them or be beyond their control. The proposal states: "Ensuring customers' effective control over their data contributes to innovation, as well as to customers confidence and trust in using alternative service providers."

In order to facilitate access to data, a data access infrastructure is created on a pay-per-access basis for the shared data service. Within this framework and with this infrastructure, banks and other data holders must make data available to users.

Another objective of FIDA is the standardization of customer data and the technical interfaces necessary for data exchange. It foresees compensation as an incentive for data-holding entities to create high-quality interfaces available to users.

Furthermore, FIDA complements a system of liability sharing to enhance legal certainty, including a civil liability regime together with a data security breach regime and dispute resolution mechanisms.

As a novelty, access to data related to financial products and services covers both personal and non-personal data.²⁵ However, as fundamental rights are compromised, data

²⁵ This breadth and lack of precision of the data that can be shared has been criticised by stakeholders. See e.g. Insurance & Pension Denmark, *IDP messages on Commissions proposal for a framework for*

relating to health and health insurance and data on consumers' life insurance products are excluded from its scope. It also does not apply to data collected in the framework of a consumer creditworthiness assessment.

FIDA does not repeal the Open Banking regulation. In order not to interfere with the application of Open Banking, and to avoid further costs for banks, the reform maintains Open Banking as a differentiated system, without prejudice to its necessary updating. Thus, FIDA applies to all data relating to financial products and services marketed by financial institutions, except those relating to payment accounts, which will be regulated by PSD3.

3. Rights and obligations related to access to data

FIDA regulates the relationship between the data holder and the customer and between the data holder and the users. The data holder is obliged to make the data available to the customer upon request. It must do so through the API that they usually use in their communications "without undue delay, free of charge, on a continuous basis and in real time". In turn, the data holder, upon explicit request of the customer, must make the data available to the user, but "only for the purposes related to the specific service for which the customer has given explicit permission for the use of his data". Such permission cannot be limited to 'ticking the box'. This limits the re-use of data. It is a system that limits the use that can be made of the data. Data must be shared in the best interest of the client.

Financial Data Access, 26.10.2023, available at <https://fogp.dk/media/umxn3esy/ipd-messages-on-commissions-proposal-for-a-framework-for-financial-data-access.pdf>. The financial industry proposes to include that "customer data does not include trade secrets, company sensitive information or proprietary data that the financial institution has generated, analysed or enriched" (Insurance Europe, *Key messages on the EC's proposed framework for financial data access (FIDA)*, October 2023, available at <https://insuranceeurope.eu/publications/3004/insurance-europe-views-on-the-ec-s-proposed-framework-for-financial-data-access-fida/download>).

The holding entity has the right to be compensated under the terms established by the access system. The holder must provide the customer with a control panel over his data to manage the permissions. Through this panel, control over their financial data and the possibility to access a wider range of "more competitive, customer-oriented and cheaper" financial products and services will become effective, according to the explanatory memorandum of the proposal. It is an enthusiastic market proposal for data-driven finance. However, the proposal itself mentions the risk of financial exclusion of the most vulnerable, such as people on low incomes, as the opening of data "may increase the risk of unfair conditions or differentiated pricing practices such as charging differentiated premiums".

Access to the data-sharing system is not free. Only financial institutions or "financial information service providers", a new entrant in the financial market, are entitled to access the data. The proposal includes the status of these providers. They need administrative authorization and to comply with strict prudential, operational and internal control requirements. It is up to EBA to develop regulatory technical standards (RTS) for these providers. Large market gatekeeper platforms, such as Bigtech, will be banned from acting as providers of financial information services.²⁶ This prohibition creates an asymmetry in access to information, as banks can access Bigtech information, but Bigtechs will not be able to access information held by banks as holders of their customers' data.²⁷

Under PSD2, banks had justifiably complained about the asymmetry of being forced to share data with Bigtechs at the customer's request, without reciprocity, as Bigtechs did not have to share their customers' data with banks. To overcome this discrimination, Bigtechs are forced to share their data with banks, but Bigtechs are excluded from access to financial data, creating a new asymmetry. This is a protectionist measure against

²⁶ Under the proposal, only the Bigtech group entity acting as data user would be able to access customer data.

²⁷ This limitation does not prevent them from offering their services, as voluntary agreements between gatekeepers and data holders will not be affected.

Bigtech's market dominance, given the risk that they could extend their dominance through access to financial data. But instead of putting up barriers to Bigtech, the right thing to do is to regulate data-driven financial platforms, including Bigtech.²⁸

III. FINANCIAL DATA EXCHANGE SYSTEM

1. New market infrastructure

FIDA creates a regime for infrastructures that facilitate data exchange. As is already the case for payment or settlement systems, it envisages the existence of "Financial Data Exchange Systems" open to competition. Importantly, the proposal does not use the term Data Space. It prefers to concentrate on the regulation of the systems that constitute its infrastructure. The initiative for the creation and development of these infrastructures lies with the data holders and users. However, in the absence of private initiative, the European Commission assumes the power to regulate the system that facilitates the exchange of financial data.

In turn, it is left to the participants in each System to approve their own organisational and operating rules, always subject to the principles set out in the regulation. These are voluntary agreements between data holders and data users on data sharing standards and the technical characteristics of APIs, compensation to the holding bank and contractual liability.

FIDA is silent on the nature of the entity in charge of the infrastructure. Data holders and users can be members of the system when they have a significant position in the market whose data is shared. The representation of each member must be "fair and equitable". It is the market position that determines voting power in the system.

FIDA provides for an agreement that creates each system and regulates its minimum content. It is an agreement to establish and operate a financial data exchange

²⁸ See PALMIERI, Alessandro, NAZERAJ, Blerina, "Open banking and competition: an intricate relationship", *EU and comparative law issues and challenges series (ECLIC)*, 2021, vol. 5, p. 217-237.

infrastructure. Like trading or settlement systems, financial data exchange systems are market undertakings that must operate on an arm's length basis, with the possibility for their members to participate in several systems. They are systems of general interest which are subject to oversight and have a corresponding sanctioning regime.

Financial data exchange systems should have rules approved and amended by their members. The promoters of the system should adopt rules of organization and operation. These rules should include membership rules, including the requirements for membership. All holders and users of the data being shared are entitled to join the system as members. The systems are open to all eligible entities. The rules should ensure the transparency of the system and the right of information of its members. There must be a contract between the bank holding the data and the third-party users to regulate the exchange of data and contractual liability. These contractual aspects should be provided for in the organizational and operational rules of the System. This is one of the main novelties of FIDA compared to PSD2. It is a technical improvement that reaches private law.

2. Bottom-up approach

FIDA formulates a hybrid system of *hard law* and *soft law* based on a public-private partnership. It requires financial institutions holding the data and companies intending to use the data to develop common standards and APIs for secure data sharing, including contractual liability rules. Within this co-regulatory framework, it is up to the financial institutions holding the data to establish these APIs and to facilitate their use by third party providers in return for compensation. It is a very sophisticated legal framework that contrasts with the diversity of business models, which will make it difficult to implement,²⁹ and with a very high compliance cost only within the reach of large institutions.

²⁹ A labyrinth for the companies that have to implement it, as highlighted by COCHE, Eugénie, KOLK, Ans, DEKKER, Martijn, "Navigating the EU data governance labyrinth: A business perspective on data sharing in the financial sector", *Internet Policy Review*, 2024, vol. 13, no 1, p. 1-32.

IV. CONCLUSIONS

The development of the data economy, including data finance, requires consumers to be aware of its benefits and risks and to make informed decisions about when and to what extent they share their data with third-party providers of goods and services. It is based on consumer trust. To strengthen this trust, data privacy and security must be ensured with a good digital identity system. The so-called "customer experience" is essential. Bigtech is the best positioned to capture the customer. Hence the importance of coordinated action by financial and competition authorities, within the framework of the guidelines set by the data protection authorities.

With the financial data access system provided by FIDA, an essential step is taken to integrate finance into the data economy.. With this infrastructure, financial products and services are opened to competition in a data-driven market. In this framework, the right of access to financial data is seen more as a development of the freedom of establishment and freedom to provide services than as a new Community freedom.³⁰

This transition to open finance builds on the lessons learned from PSD2. An industry-driven co-regulatory framework is proposed, which guarantees compensation to banks for access to their databases and include a liability regime. It is complemented by a major reform of payment services that aims to combat fraud, extend consumer rights and harmonize the conditions of competition between banks and non-banks. To achieve these objectives, it promotes standardization, improves open banking and facilitates the availability of cash in shops and ATMs.

In sum, the reform is positive. The open finance emerging from FIDA strengthens competition by overcoming sectoral barriers. It is Data-driven Open Finance that facilitates the horizontal integration of financial services. This gives rise to a new business

³⁰ See CHOMCZYK PENEDO, Andres, "The Regulation of Data Spaces under the EU Data Strategy: Towards the 'Act-ification' of the Fifth European Freedom for Data? *European Journal of Law and Technology*, vol. 15, no. 1, 2024.

model of *embedded finance*, in which the financial service loses its autonomy, a favourable terrain for Bigtech. However, we are in a transition towards a financial space that does not guarantee reciprocity in the exchange of data between banks and Bigtechs. There is no symmetry. Banks will be able to access Bigtech customer data, but Bigtechs will be barred from accessing financial data held by banks. This is the first expression of the protectionism outlined in the Letta report, which is part of the radical change proposed by Dragui,³¹ to address the market power of the Chinese and US platforms. It facilitates the creation of data exchange infrastructures to boost the competitiveness of the European financial economy but closes off access to the Bigtechs that currently dominate the market. It is a bad option, contrary to market freedom. The European Union has established itself as a standard-setting region in data protection, artificial intelligence and open banking.³² Setting standards that protect human and user rights is the European Union's calling card. It is the "Brussels effect" that guarantees European competitiveness. To renounce these values of an open economy, opting for reactive protectionism, would be to enter a cul-de-sac.

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³¹ Mario DRAGHI, *A radical change is necessary*, 16 April 2024, available at <https://legrandcontinent.eu/es/2024/04/16/un-cambio-radical-es-necesario-la-union-revisada-por-mario-draghi/>.

³² Without prejudice to the adaptation of these principles to the idiosyncrasies of each jurisdiction. See REMOLINA, Nydia, "Open Finance: Regulatory Challenges of the Evolution of Data Sharing Arrangements in the Financial Sector", *Banking & Finance Law Review*, 2024, vol. 40, no. 1, pp. 35-66.

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