

Feedback and input on the Discussion Paper Data Mobility and the Financial Sector

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To AFM and DNB
From Dutch Fund and Asset Management Association

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Introduction

On September 15, 2022 the AFM and DNB jointly published a preliminary policy vision for data mobility in relation to the financial sector and invited stakeholders to respond to this discussion paper. The Dutch Fund and Asset Management Association (DUFAS) welcomes the initiative of the AFM and DNB and likes to use the opportunity to respond to the preliminary policy vision.

DUFAS agrees that data and access to data is becoming increasingly important in modern digital society, and therefore also in the financial sector. We see benefits of data sharing in terms of efficiency, competition and innovation, and we understand the strategic importance of data access. For this reason, DUFAS generally supports the idea of Open Finance and of Open Data. However, it is also a complicated topic, because the possibilities within data sharing and data usage are endless and the consequences cannot always be overseen.

It is therefore challenging to take a position on a subject that is currently still abstract. For this reason, DUFAS has not formulated its response as answers to the questions posed in the discussion paper, but in this writing we highlight a few general points of attention/concern we think is relevant to take into account.

Data holders and privacy

Rights of data holders. Of great importance that data sharing is based on informed consent of the data holder.

DUFAS considers it of great importance that data sharing is based on informed consent of the data holder. Data holders must be able to keep control of their data, even after they have given permission to share data. Any policy or regulation governing the data mobility, should also make clear who legally owns the data shared which may range from a private individual when it concerns personal data to data for example related to establishment an investor risk profile owned by a financial market party.

When it comes to data of individuals, many relevant rights for data holders are already included in the General Data Protection Regulation (GDPR). For example, the GDPR already provides a framework for the processing of personal data, whereby the consent of the data holder is an important ground for data processing and sharing. Other rights from the GDPR are also important in this context, such as the right regarding automated decision-making and profiling, the right to restrict processing, the right to rectification, and – most importantly - the right to data portability.

DUFAS therefore considers it of great importance that the above and other rights as included in the GDPR are taken into account in the context of data mobility when it comes to the rights of individuals.

This also means that sharing data controlled by public authorities to the benefit of private/commercial parties is potentially highly concerning, because there is a chance that the data holder no longer has control over which data is shared with which recipient. Consent of the data holder remains the most important ground for sharing data.

Types of data holders. We believe that the private individual as data holder should be distinguished from a business or regulated undertaking that owns the data.

DUFAS wants to emphasize that the sharing of data should relate to different types of data holders, both of individuals and other data holders (such as businesses and institutional investors), because benefits can also be gained in terms of efficiency and innovation when sharing data from these types of data holders.

This means that in addition to the existing rights for data subjects as included in the GDPR, rights for corporate data and other data that does not qualify as personal data, must also be considered.

In terms of making policies and defining policy interventions, we believe that the private individual as data holder should be distinguished from a business or regulated undertaking that owns the data.

Data ethics. The regulatory framework may need to consider and specify potential limits to what data may be shared.

In addition to strict rules and regulations, incorporating data ethics is also important. As stated in the discussion paper, access (or the refusal of access) to data can also lead to negative effects for the data holder, such as price discrimination and financial exclusion. When introducing rules and regulations, but also when developing products or services that make use of shared data or sharing data, negative effects should be carefully considered. For this reason, DUFAS agrees statutory regulation and supervision are considered desirable for the moment. Moreover, the regulatory framework may need to consider and specify potential limits to what data may be shared and whether such limits may alter in the course of time. For example when additional safeguard ensuring the protection of such data will come into place.

Concentration and level playing field

Broader data sharing could lead to an unlevel playing field and data concentration. Large technological platforms, such as the BigTechs, are gaining more and more data power, specifically if they also have access to even more data sources. They have the size and capacity to process data on a large scale, and at the same time they are not bound by the same rules as financial institutions, leading to a competitive advantage resulting in concentration of providers and data. Such concentration could lead to significant risks, such as abuse of an oligopolistic position which could ultimately damage the interest of (retail) investors, and to systemic risks.

It is therefore important that a level playing field is created both in terms of countries and sectors, which should lead to less concentration.

Next steps regarding access and sharing of data should be taken in international context.

It is conditional that next steps regarding access and sharing of data are taken in a European and even global context. Open data could lead to a concentration and competitive advantage among non-EU market parties (such as non-EU Big Tech companies that are already active in the EU), which can increase dependence on parties that are not based in the EU. This can weaken the competitive position of the EU and the grip on data of EU data holders. This could represent a systemic risk for the EU.

Although geographical reciprocity is not the immediate solution to the concentration among non-EU market parties, it is essential for more competitive opportunities: if data sharing is allowed in the EU to be accessible by non-EU players, it should be reciprocal, i.e. access by EU-players to data of non-EU consumers.

Rules and regulation should cover broader than financial sector.

Equal rules on data sharing should apply to the entire financial sector and non-financial sector, so rules should not differ per type of institution or type of license. Eventually, similar rules should apply to more sectors, not just the financial sector. In this way it can be prevented that the non-financial sector benefits from being able to receive and use financial data, without being subject to rules similar to the rules that are applicable for the financial sector. In the view of DUFAS the primary aims of financial legislation and in particular legislation expanding the ability to share financial data (Open Finance) should be protecting investors and consumers. This should not be prejudiced nor be overridden by competition considerations.

Role of financial policymakers

The discussion paper specifically asks about the role that the policymaker should play in the discussion on enhancing data mobility. In line with the points of concern mentioned above, we see the following role/focus areas for the policymakers:

- *Ensure data holder protection*
Investor protection should be put over any commercial relation. Consent and control over the data by the data holder is crucial.
- *Ensure financial stability*
EU financial policymakers, as an overarching principle, should guarantee financial stability. The occurrence of EU systemic risks should be avoided.
- *Ensure competitiveness*
Policymakers should focus on a level playing field. Special attention should be paid to the competitiveness of EU based service providers and products, amongst others to preserve EU sovereignty.

Preconditions for successful data mobility

Overlapping laws and regulations.

There are already existing laws and regulations regarding data sharing. DUFAS would like to emphasize that different existing and new laws and regulations should not be contradictory, which could lead to a lack of clarity in their implementation. Other recent legislative processes have shown that proper phasing is crucial in this regard.

Data quality.

Sharing data only makes sense if data quality can be guaranteed. This should be taken into account when drafting legislation and establishing a framework for data sharing processes.

Data safety.

Data holders who want to share data must be confident that their data is safe and their privacy is guaranteed. Existing and new legislation must respond sufficiently to data security to ensure this safety.

Method and financial compensation of data sharing.

Using a uniform framework for data exchange benefits the success of data mobility. However, account must be taken of existing systems and data sharing methods. If system adjustments have to be made to enable data portability in a unified sense, this comes at a cost. We can therefore agree with the proposal as included in the discussion paper that under Open Finance, compensation to data providers for the use of their data-sharing infrastructure - although not for the shared data itself - should be permitted. In addition, we also believe that the financial market party sharing this data should be compensated for making data available. This also prevents financial institutions (or other institutions that have to share data) from having to bear the costs of sharing data, but not having any benefits themselves. However, the mechanism should ensure that such compensation should not be the incentive for sharing this data.

Ongoing dialogue

DUFAS offers to be available as discussion partner for the supervisory authorities with regard to this theme. We would also like to point out the need for a good dialogue with the sector and other supervisors, such as the Authority for Consumers and Markets (ACM) because of the risk of data concentration, the Dutch Data Protection Authority because of privacy risks and the National Cyber Security Center because of cyber risks associated with further developments on Open Finance and Open Data.

DUFAS: Dutch Fund and Asset Management Association

Since 2003, DUFAS has been committed to a healthy asset management sector in the Netherlands. DUFAS has more than 50 members: from large asset managers who invest Dutch pension and insurance assets to smaller, specialist asset managers. DUFAS increases awareness of the social relevance of investing, helps to develop sector standards and represents the sector in the implementation of new laws and regulations. In addition, DUFAS is committed to a single European market with equal regulations.

More information

Would you like to respond, or should you have any questions? Please feel welcome to e-mail Manouk Fles, DUFAS manager regulatory affairs, at mf@dufas.nl.