Date: October 9th, 2023

EACRA Position paper on the proposed Financial Data Access regulation

On June 28th, 2023, the European Commission tabled a legislative proposal for a framework for Financial Data Access[1] ("FIDA"). FIDAs aim is to establish rights and obligations to manage customer data sharing in the financial sector beyond payment accounts.

According to Article 2 (2) (i), credit rating agencies, when acting as data holders or data users, are covered by FIDA. We are therefore pleased to publish in this position paper the views of our association, which represents European Credit Rating Agencies ("CRAs") registered under the 1060/2009 Regulation (as amended) with ESMA. In this paper, we argue that the inclusion of CRAs in FIDA poses material challenges to the business of CRAs but also contradicts the fundamental principles of the CRA Regulation. In addition, we provide our preliminary views on the Financial Data Sharing Schemes envisaged by FIDA and comment on the link to the ESAP legislation and the ESG Ratings proposal. Before doing so, we give a brief introduction on the business of CRAs.

Introductory comment: business of credit rating agencies

CRAs are regulated entities under the supervision of ESMA whose occupation includes the issuing of credit ratings on a professional basis. In order to issue such credit ratings, CRAs collect a high quantity of information from rated entities and also from the market. CRAs may be contracted directly by the rated entity ("issuer-pays" model) or by investors ("investor-pays model). The current legislative framework on CRAs require CRAs to disclose the rating to the rated entity ahead of the general publication of the rating. The rating and the accompanying press releases or rating reports are the final outcome (the product) of the rating process. CRAs are required to monitor ratings issued and to review these at least once a year. In order to ensure the integrity and quality of credit ratings, the CRA regulation 1060/2009 (as amended) lays down strict organisational, procedural and process requirements.

FIDA and CRAs business models

Article 2 (1) (f) defines as one data category subject to FIDA, "data which forms part of a creditworthiness assessment of a firm which is collected as part of a loan application process or a

[1] Available at: eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023PC0360

request for a credit rating". However, the definition of "customer data" under Article 3 (3) is far wider as it states (underlining done by ourselves):

> "customer data' means personal and non-personal data that is collected, stored and otherwise processed by a financial institution as part of their normal course of business with customers which covers both data provided by a customer and data generated as a result of customer interaction with the financial institution;"

We are particularly concerned with the last part of the definition as it could potentially be interpreted as also covering the credit ratings generated as a result of the rating process carried out by the CRA. Such an outcome would fundamentally undermine the business models of EU registered Credit Rating Agencies which we do not believe is the intention of the legislation.

We are concerned with the other provisions of FIDA, which would require CRAs to share the credit ratings with a potentially very large number of data users.

First, CRAs may produce upon request of the customer (rated entity) so called "private ratings" according to Article 2 (2) (a) of the CRA regulation. Such private credit ratings are not intended for public disclosures or distribution by subscription. According to FIDA, if the legal text is not amended, a customer may require a CRA to share such a private rating, the related report and the related underlying data with other data users. This would contradict the CRA regulation and the subsequent guidelines issued by ESMA relating to the distribution of such private ratings to a limited number of users[2]. This would potentially place CRAs in a position where they could only comply with FIDA by breaching the CRA Regulations and vice-versa.

Second, CRAs may produce credit ratings under the investor-pays model, where the user of the ratings pays for receiving the credit rating(s) and accompanying information (rating report). Given that rated entities are informed on such ratings ahead of general disclosure, the rated entity (the customer under the FIDA terminology) could require the CRA to share this rating with other entities. Such a requirement would make the investor-pays model impossible to operate as CRAs would lose the commercial incentives for such an activity.

Third, issuer pays CRAs receive the information needed for the rating process directly from the customer. This information package may include privileged confidential information such as management plans or financial projections, which may also be covered by the Market Abuse Regulation. In a case where a customer wishes to receive services from other potential providers, that customer could himself share this information with that provider, thereby having full control over the information. A customer would therefore likely not use the complex system under FIDA to allow the sharing of information with other providers. Moreover, in many situations the entities rated by CRAs are themselves data holders or data users as defined in Article 2(2) (in some instances,

[2] See $ 14 and 15 of the ESMA Guideline on the Scope of the CRA Regulation dated October 28th, 2022 available at: https://www.esma.europa.eu/sites/default/files/library/esma80-196-6345_guidelines_on_the_scope_of_the_cra_regulation.pdf

this will be the exclusive client base of a CRA). It is not at all clear, why such an entity would choose to direct a third party to contact a CRA to provide information that they themselves could provide. Indeed, for many CRAs it is difficult to envisage a scenario in which they would ever be requested to provide such information. Consequently, those CRAs would be forced to incur the considerable administrative costs and burdens of complying with FIDA with little or no prospect of recouping any of that cost. It should also be noted that such costs and burdens are being introduced at the same time as other initiatives such as the Digital Operational Resilience Act. It is worth noting that the EU CRA Market is dominated by three CRAs who have a market share of 91.6%. [3] The costs of complying with FIDA will disproportionately impact smaller-medium CRAs and will serve to further undermine competition in the sector. Consequently, we would suggest that all CRAs with a market share of under 10% should be exempt from the proposals[4].

Last but not least, one explicit target of this FIDA proposal[5] is to facilitate automated creditworthiness assessments (produced e.g. by FinTechs) on SMEs in order to improve access to finance for these. While we agree that the large number of SMEs and small Corporates is currently unrated[6], we are highly surprised that the proposal targets to fill this gap with assessments steaming from unregulated entities. This idea contradicts the fundamental principle of the CRA regulation allowing the issuance of credit ratings only to entities registered under the CRA regulation and supervised by ESMA.

A potential reason for the inclusion of CRAs in the scope of FIDA may be linked to the practice of the Dominant 3 agencies who apply the "everybody-pays model" and charge high fees for their rating data feeds to data users. These rating data feeds are distributed by unregulated sister companies of these CRAs and therefore don't fall under the scope of the CRA regulation. It follows, that these sister companies would not be covered by the FIDA proposal. If the goal is to capture these companies, it would be more meaningful in our view to amend the CRA regulation accordingly.

Financial data sharing schemes

Articles 9 to 11 envisages the establishment of Financial Data Sharing Schemes (FDSS) bringing together data holders and data users governing the access to customer data.

The governance rules for such FDSS are rather vague and it is unclear how customer organisation or a consumer associations shall be involved there. It is further unclear what a "significant proportion of the market of the product or service concerned" is (Article 10 (1) (a) (i) – while the side for data holders could be assessed, the other side – the data users – is rather difficult to predict and may substantially evolve over time as new services are being developed. It is further foreseen that

[3] ESMA Report on CRA Market Share 2022 (p6).
[4] The proposed 10% market share threshold is already applied in the CRA regulation under Article 8d to distinguish between dominant players and small to medium-sized CRAs.
[5] See page 6 of the proposal.
[6] Note that Cerved Rating Agency has a vast coverage in Italy.

common standards for the data and technical interfaces shall be developed, but it remains unclear who would have the responsibility to build and manage them (as these may be developed by other parties or bodies as foreseen in Article 10 (1) (g)). Finally, the envisaged compensation for data holders shall only be "reasonable" and "geared towards the lowest levels prevalent on the market", thereby disincentivizing data holders to take part in such a scheme. This final requirement is moreover in contrast with the CRA regulation: in fact, Regulation EC1060/2009, in Annex I Section B) requires that " fees charged to its clients for the provision of credit rating and ancillary services are not discriminatory and are based on actual costs." Therefore registered credit rating agencies are not allowed by the applicable regulation to change rating prices applied to their clients in application of Article 10 of FIDA.

Link to other legislative files

FIDAs stated goal is to facilitate access to information and the widespread of it to the potential benefit of customers. In this context, we would like to point to the recently agreed European Single Access Point (ESAP) equally targeting the same goal. Given that the set-up and administration of ESAP has been entrusted to an European Authority in collaboration with National Competent Authorities, ESAP should equally ensure a high level of data security. Additionally, a key feature of the planned ESAP is the download of information by potential users. We therefore believe that FIDA is a duplication of the same effort. Given that FIDA would require data holders to implement data access dashboards for each customer, FIDA creates additional burdens to data holders without providing any additional benefits beyond ESAP.

While we note that recital 13 of the FIDA proposal mentions sustainability related information (which should equally be available at ESAP on a voluntary basis), we note that the envisaged scope of the regulation does not cover the recently tabled proposal on ESG rating agencies.

About EACRA

The European Association of Credit Rating Agencies (EACRA), set up in November 2009 and registered in Paris, was established to act as a platform for cooperation for EU-based Credit Rating Agencies (CRAs). Our mission is to support and facilitate the compliance of CRAs with regulatory requirements through effective communication, cross-border know how, and the promotion of best practices. In addition, EACRA seeks to promote Credit Ratings and the interests of CRAs across Europe, as well as enhance the financial community and general public's understanding of Credit Ratings.