

***University of New South Wales Law Research Series***

**Australia's Data-Sharing  
Regime: Six Lessons for the  
World**

**Ross P Buckley, Natalia Jevglevskaia and  
Scott Farrell**

[2021] *UNSWLRS* 67  
Forthcoming in *King's Law Journal*

UNSW Law  
UNSW Sydney NSW 2052 Australia

# Australia’s Data-Sharing Regime: Six Lessons for the World

Ross P Buckley\*

Natalia Jevglevskaia\*\*

Scott Farrell\*\*\*

*Open Banking is increasingly popular globally and is generally understood as the right of consumers to share their banking data with third parties of their choice so these can offer a better value for money service. While the EU and UK pioneered the development of Open Banking, Australia has adopted it and applied the concept of consumer data portability far more broadly. Its Consumer Data Right (CDR) regime, introduced in 2019, is unique in its intention to implement economy-wide data sharing across banking, energy, telecommunications, pensions, insurance, groceries, health, education, and other sectors. Although the legal frameworks in all three jurisdictions are in a state of flux, we analyse five lessons other countries can learn from Australia’s experience with its CDR regime to date and suggest a sixth lesson. We argue for nuanced regulation which promotes the benefits, while minimising the risks, of data sharing.*

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\* Ross Buckley is KPMG Law - King & Wood Mallesons Professor of Disruptive Innovation and a Scientia Professor at UNSW Sydney and an Australian Research Council Laureate Fellow (FL200100007). This Australian government funding has supported this research. The views herein are of the authors and not necessarily of the Australian government or Research Council. This article builds upon our analysis in an earlier article, by Natalia Jevglevskaia and Ross Buckley, entitled ‘The Consumer Data Right: A Transformative Reform Needing Careful Development’. Corresponding author: [ross.buckley@unsw.edu.au](mailto:ross.buckley@unsw.edu.au)

\*\* Natalia Jevglevskaia is a Research Fellow on the Australian Research Council Laureate Project at UNSW Sydney.

\*\*\* Scott Farrell is a partner at King & Wood Mallesons.

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## 1. Introduction

Open Banking is an increasingly popular area globally. It began with the adoption by the European Parliament of the revised *Payment Services Directive (PSD2)* in 2015<sup>1</sup> and the UK leading the development of Open Banking internationally since. While there is no single authoritative definition of the concept, Open Banking is generally understood as the right of consumers to share their banking data with third parties of their choice so these can offer a better value for money service.<sup>2</sup> Where a consumer instructs her bank to share certain financial data, the bank is required to open these data up to the chosen provider.

Hailed as a revolution in the financial sector, Open Banking offered novel ways of dealing with the twenty-first century's most sought-after resource – personal data.<sup>3</sup> Since its inception, the scope of Open Banking in the EU has been limited to payment services. The concept of Open Finance emerged later. While it builds on the idea of Open Banking, it also extends data sharing and third-party access to a wider range of financial services and products.<sup>4</sup>

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<sup>1</sup> *Directive 2015/2366/EU of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC* [2015] OJ L 337.

<sup>2</sup> But see section 3.1 below on the scope of Open Banking in the European context.

<sup>3</sup> Rowland Manthorpe, 'To Change How You Use Money, Open Banking Must Break Banks' (*WIRED*, 16 Oct 2017) <[www.wired.co.uk/article/psd2-future-of-banking](http://www.wired.co.uk/article/psd2-future-of-banking)> accessed 30 September 2021; Rowland Manthorpe, 'What Is Open Banking and PSD2? WIRED Explains' (*WIRED*, 17 April 2018) <[www.wired.co.uk/article/open-banking-cma-psd2-explained](http://www.wired.co.uk/article/open-banking-cma-psd2-explained)> accessed 29 September 2021.

<sup>4</sup> As shown below in section 3.1, the exact range of such products and services in the EU and the UK remains to be defined, as both frameworks are still under development. They may include, for example, savings, personal loans, mortgages, business financing accounts, investments, pensions, insurance products, and others, see FCA, 'Call for Input: Open Finance' (December 2019) para 3.12 <<https://www.fca.org.uk/publication/call-for-input/call-for-input-open-finance.pdf>> accessed 29 September 2021.

Both frameworks come with multiple benefits and promise to upend the way consumers and industry use financial services. They aim to drive and expand data-driven applications and digital innovation, promote competition among financial service providers and create new employment and business opportunities. Crucially, they focus on consumers by giving them greater control over their data. Instead of continuing to provide it to private and public sector entities for little to no return, consumers are offered opportunity to become proactive and determine how value is created and extracted from their financial data. Designed to induce businesses to offer consumers more favourable pricing models and products customised for the individuals' needs, Open Banking and Open Finance are set out to shape a new generation of 'smart customers' who know the value of one's data and are willing to take responsibility for the data-sharing decisions.

These benefits are significant. Yet, Open Banking and Open Finance regimes treat data as a commodity which could be constrained to the area of banking and finance respectively. Data, however, inherently defies boundaries and should not be constrained, as silos stymie value creation at all levels. For example, compartmentalisation and isolation of data within the units of a single organisation prevents cross-departmental collaboration, holding back the potential for holistic data analysis. As a result, opportunities for a better-informed decision-making, increasing customer's loyalty and the organisation's competitiveness on the market are missed.<sup>5</sup> As much as data silos discourage proper data understanding within an organisation, they also reduce intra- and cross-sectoral benefits offered by data sharing. Constraining data sharing to organisations and businesses in the same industry results in fragmented data-driven innovations

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<sup>5</sup> 'What Are Data Silos?' (*Talend*) <[www.talend.com/resources/what-are-data-silos/](http://www.talend.com/resources/what-are-data-silos/)> accessed 29 September 2021; Walter Scott, 'Why Data Silos Are Bad for Business', *Forbes* (19 November 2018) <[www.forbes.com/sites/forbestechcouncil/2018/11/19/why-data-silos-are-bad-for-business/?sh=378660ef5faf](http://www.forbes.com/sites/forbestechcouncil/2018/11/19/why-data-silos-are-bad-for-business/?sh=378660ef5faf)> accessed 29 September 2021.

or initiatives taking place only among a restricted circle of parties.<sup>6</sup> Inability to draw insights from data stored in other economy sectors equally decreases efficiency of operational processes, stymies development of better product and services and ultimately affects consumer satisfaction and welfare. A consumer's shopping data, such as preference for certain kinds of foods (organic, unprocessed, sustainably farmed), apparel brands (stemming from small local manufacturers), books and periodicals (focusing on high-quality information analysis), provides important insights about her lifestyle, education, health, and creditworthiness. If shared with relevant businesses, these data could secure her lower health insurance premiums, better-quality travel and entertainment offers and easier access to financial products. Building on this awareness, Australia has opted for an economy-wide data-sharing framework. The Consumer Data Right (CDR) regime has no international precedents and remains world leading.<sup>7</sup> After its initial roll-out in banking, it will be extended to energy and telecommunications in the near term, and plans are now being assessed for its extension into other sectors and data sets, such as pensions,<sup>8</sup> insurance, and other parts of the economy.<sup>9</sup>

In this paper, we compare data-sharing frameworks in the EU, the UK, and Australia and argue that Australia's CDR ecosystem offers a valuable 'watch-and-learn' opportunity for the wide

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<sup>6</sup> Deloitte, 'New Technologies Case Study: Data Sharing in Infrastructure: A Final Report for the National Infrastructure Commission' (November 2017) 8 <<https://nic.org.uk/app/uploads/Data-sharing-in-infrastructure.pdf>> accessed 29 September 2021.

<sup>7</sup> The framework CDR legislation came into effect on 1 August 2019, see *Treasury Laws Amendment (Consumer Data Right) Act 2019* (Cth) (*CDR Act*).

<sup>8</sup> Typically referred to as 'superannuation' in Australia.

<sup>9</sup> The Australian Government the Treasury, 'Implementation of an Economy-wide Consumer Data Right: Strategic Assessment (Consultation Paper, July 2021) 6 <<https://treasury.gov.au/sites/default/files/2021-08/c2021-182135-strat.pdf>> accessed 29 September 2021 (Australian Implementation of an Economy-wide Consumer Data Right). See also Anthony Lloyd and Alex Horder, 'Consumer Data Right Pipeline to Cast a Wide Net' (*Lexology*, 6 September 2021) <[www.lexology.com/library/detail.aspx?g=cd72bf3a-cc8a-4cb5-a593-ce708e3f5dde](http://www.lexology.com/library/detail.aspx?g=cd72bf3a-cc8a-4cb5-a593-ce708e3f5dde)> accessed 29 September 2021.

range of countries considering implementing data-sharing regimes. Expanding Open Banking to Open Finance and beyond presents unique prospects for consumers, businesses, and national economies. An economy-wide data-sharing system cannot mature overnight, however, and will require time. The process should be led by a policy agency, not a regulator, and focused on building ‘a living framework’ ready to adapt along with technological developments and changing demands of the market. Crucially, given that it is consumers who remain the beneficiaries of, and key success factor for, the economy-wide roll out of data-sharing schemes, they should be educated about the benefits and risks that such data-sharing initiatives involve. Finally, we explore how broad-based data sharing regimes coupled to action initiation could make business practices fairer.

We first discuss the nature of data and the challenges intrinsic in regulating data-sharing practices (section 2). We then analyse the status of regulatory developments in the EU, the UK (section 3) and Australia (section 4) and show how other countries could profit from Australia’s experience (section 5). Section 6 discusses some recent developments in data-sharing initiatives in the EU and UK. Section 7 concludes.

## **2. Data, its nature and value**

We are living in the Data Age where the Internet of Things (IoT) devices, 5G, AI, quantum computing and edge data centres<sup>10</sup> serve as catalysts for the creation and consumption of data in

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<sup>10</sup> These are data centres which are located closer to the end-user than the public cloud or centralised data centres. Edge data centres deliver faster services to their users with minimal latency and higher security. The concept derives from edge computing, which stands for a distributed IT architecture, where time-sensitive client data may be processed by an intermediary server as close to the originating source as possible. See Alexander S Gillis, ‘Edge Data Center’ (*TechTarget*, October 2020) <<https://searchdatacenter.techtarget.com/definition/edge-data-center>> accessed 29 September 2021; Daryl Walcroft, Greg Chiasson and Scott Cuthbertson, ‘Edge Data Centers: How to Participate in

the financial sector and beyond.<sup>11</sup> By late 2019, the new Consolidated Audit Trail initiative of the US Securities and Exchange Commission was processing on average over 105 billion financial transaction records per day with a recorded single-day peak of 182 billion records.<sup>12</sup> Experts project that by 2025, an astounding number of 175 zettabytes of data will be generated (that is created, captured or replicated) worldwide on a yearly basis – a tenfold increase from 2016 levels.<sup>13</sup> To put this number in perspective: using today’s aspirational internet connection speed of 100 Mb/s it would take one person 450 million years to download 175 zettabytes of data – a period that may extend well over 1000 million years at more common internet download speeds.<sup>14</sup>

While data is notoriously hard to define and means different things to different people, it is increasingly agreed that it represents a ‘treasure trove of digital gold’.<sup>15</sup> Data, however, is very different to gold, as value is not inherent in data but resides in the uses to which it can be put.<sup>16</sup>

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the Coming Boom’ (PwC, July 2019) <<https://www.pwc.com/us/en/industries/capital-projects-infrastructure/library/edge-data-centers.html>> accessed 29 September 2021.

<sup>11</sup> David Reinsel, John Gantz and John Rydning, ‘The Digitization of the World from Edge to Core’ (International Data Corporation White Paper, November 2018) 3, 6 <[www.seagate.com/files/www-content/our-story/trends/files/idc-seagate-data-age-whitepaper.pdf](http://www.seagate.com/files/www-content/our-story/trends/files/idc-seagate-data-age-whitepaper.pdf)> accessed 29 September 2021. See also Seagate, ‘State of the Edge: Data at the Edge (Spring 2019) 5, 7 <<https://www.seagate.com/www-content/enterprise-storage/it-4-0/images/Data-At-The-Edge-UP1.pdf>> accessed 30 September 2021.

<sup>12</sup> Hearing before the Committee on Banking, Housing, and Urban Affairs, US Senate, S. Hrg. 116-113 (22 October 2019), Statement of MJ Simon, Chair, CAT NMS Plan Operating Committee, <[www.congress.gov/event/116th-congress/senate-event/LC64742/text?s=1&r=40](http://www.congress.gov/event/116th-congress/senate-event/LC64742/text?s=1&r=40)> accessed 29 September 2021.

<sup>13</sup> Seagate (n 11) at 7. See also ‘Data Age 2025: The Datasphere and Data-Readiness from Edge to Core’ (*i-Scoop*) <[www.i-scoop.eu/big-data-action-value-context/data-age-2025-datasphere/](http://www.i-scoop.eu/big-data-action-value-context/data-age-2025-datasphere/)> accessed 29 September 2021.

<sup>14</sup> Reinsel, Gantz and Rydning (n 11) 7. See also ‘Worldwide Broadband Speed League 2021’ (*Cable.co.uk*) <<https://www.cable.co.uk/broadband/speed/worldwide-speed-league/>> accessed 30 September 2021.

<sup>15</sup> Manthorpe, ‘To Change How You Use Money, Open Banking Must Break Banks’ (n 3).

<sup>16</sup> Luciano Floridi, *Information: A Very Short Introduction* (Oxford University Press 2010) 90. ACS, ‘Data Sharing Frameworks’ (Technical White Paper, September 2017) 21 <<https://www.acs.org.au/insightsandpublications/reports-publications/data-sharing-frameworks.html>> accessed 29 September 2021. See also European Commission, ‘A European Strategy for Data’ (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2020) 66 final, 19 February



In other words, data is valuable not because of what it is, but because of what can be done with it to create value.<sup>17</sup> To illustrate, consumer data produces value for the consumer when it is used to her benefit. When data, such as raw account transaction records held by a bank, are structured using Open Banking standards (see section 3.2 below), data are turned to information which can be used to determine the creditworthiness of the consumer and guide the bank’s decision on offering her a better loan.

The non-rivalrous nature of data means that different uses of the same data can generate different value for those it serves.<sup>18</sup> Rivalrous goods or services are those the use of which benefits only one party at a given time, such as a piece of sporting equipment or a medical service. Financial capital is also ‘rivalrous’: a dollar can only be invested in one opportunity at a time. Akin to an idea, an invention, or a piece of information, data, in contrast, can be used by multiple parties simultaneously in, for example, training algorithms, performing data analysis or designing mobile applications.<sup>19</sup> The value of data is thus subjective. Using the example above, the account transaction data is valuable to the consumer because its assessment for creditworthiness purposes may lead to the grant of the desired loan. In contrast, a lender which is a data holder or recipient – eg, a bank – will not be able to assess the competitiveness of a given loan product based on a

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2020) 6 <[https://ec.europa.eu/info/sites/default/files/communication-european-strategy-data-19feb2020\\_en.pdf](https://ec.europa.eu/info/sites/default/files/communication-european-strategy-data-19feb2020_en.pdf)> accessed 29 September 2021.

<sup>17</sup> Peter Leonard, ‘The Good Oil on Valuing “The New Oil”’ (2018) 24(7) *Computer and Telecommunications Law Review* (2018) 167.

<sup>18</sup> Bertin Martens, ‘The Impact of Data Access Regimes on Artificial Intelligence and Machine Learning’ (JRC Technical Reports, December 2018) 11. See also MIT Technology Review Custom, ‘The Rise of Data Capital’ (Report, 2016) 5 <[http://files.technologyreview.com/whitepapers/MIT\\_Oracle+Report-The\\_Rise\\_of\\_Data\\_Capital.pdf?\\_ga=2.13656311.1961173073.1632968837-1466509010.1629450322](http://files.technologyreview.com/whitepapers/MIT_Oracle+Report-The_Rise_of_Data_Capital.pdf?_ga=2.13656311.1961173073.1632968837-1466509010.1629450322)> accessed 30 September 2021.

<sup>19</sup> *ibid.*

single customer's data. Rather, it will generate far more value from using consumer data at scale. Just as a navigation service provider will generate value – the ability to identify road hazards and manage traffic congestion – from aggregating vehicle navigation data, high volumes of customer data will enable analysis of the viability of certain financial products or services. Crucially, owing to accessibility of advanced and low-cost data analytics tools, the amounts of consumer data allow its holders (or those who can access it) to derive new insights from that data and concurrently create novel products and services which have the potential to outperform those offered by competitors.<sup>20</sup>

This informative role of data serves as the driving force of scientific and technological innovation and the world's modern economies.<sup>21</sup> It represents 'the new currency for businesses',<sup>22</sup> where the ability to swiftly analyse and process data enhances productivity and defines business success. In Australia, for example, data-driven innovation has been estimated to contribute up to \$64 billion per annum to the economy.<sup>23</sup> The data market in the UK (ie money made from products or services derived from digitised data) is the largest in Europe.<sup>24</sup> UK

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<sup>20</sup> Productivity Commission, 'Data Availability and Use' (Inquiry Report No 82, 8 May 2017) 192 (Data Availability).

<sup>21</sup> UK Government, Department for Digital, Culture, Media & Sport, 'National Data Strategy' (Policy Paper, 9 December 2020) <[www.gov.uk/government/publications/uk-national-data-strategy/national-data-strategy](http://www.gov.uk/government/publications/uk-national-data-strategy/national-data-strategy)> accessed 29 September 2021 (UK's National Data Strategy).

<sup>22</sup> International Telecommunication Union, 'Powering the Digital Economy: Regulatory Approaches to Securing Consumer Privacy, Trust and Security' (Thematic Report, ITU Publications 2018) 4 <[https://www.itu.int/dms\\_pub/itu-d/opb/pref/D-PREF-BB.POW\\_ECO-2018-PDF-E.pdf](https://www.itu.int/dms_pub/itu-d/opb/pref/D-PREF-BB.POW_ECO-2018-PDF-E.pdf)> accessed 30 September 2021.

<sup>23</sup> See Commonwealth of Australia, Department of the Prime Minister and Cabinet, 'The Australian Government's Response to the Productivity Commission Data Availability and Use Inquiry' (Government Response, 2018) 1 <[www.pc.gov.au/inquiries/completed/data-access/data-availability-use-government-response.pdf](http://www.pc.gov.au/inquiries/completed/data-access/data-availability-use-government-response.pdf)> accessed 29 September 2021.

<sup>24</sup> European Commission, 'The European Data Market Monitoring Tool' (Report, 8 July 2020) 8, 36, 61 <<https://op.europa.eu/en/publication-detail/-/publication/9fb0599f-c18f-11ea-b3a4-01aa75ed71a1/language-en>> accessed 29 September 2021.

technology sector grew dramatically in 2019,<sup>25</sup> with the UK securing 33 per cent of European investment in technologies.<sup>26</sup>

As data is the ‘lifeblood of economic development’,<sup>27</sup> it is becoming increasingly accepted that hoarding and isolating data in public and private sector businesses stifles innovation (the creation of new data-driven products and services that improve consumer outcomes<sup>28</sup>) and thus undermines competition. Yet the use of data remains limited by barriers to its access. Although data is a non-depletable resource in theory and can be replicated at close to zero cost, data assets are frequently localised and unavailable to potential competitors.<sup>29</sup> For example, the digital economy in the EU is characterised by unprecedented concentration of data in the hands of a few powerful entities.<sup>30</sup> The report on the UK market study on online platforms and digital advertising highlights data concentration as a critical factor for weak competition and slow innovation in digital markets.<sup>31</sup> Privatised markets, such as banking and finance, energy and telecommunications in the UK have been found to face similar challenges, where data is too often locked away in a manner that works against consumers and innovators, rather than for them. Inability to access consumers’ current tariffs, their usage and other available deals

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<sup>25</sup> ‘UK Tech Sector Beats Both US and China to Lead Global Growth in 2019’ (*Tech Nation*, 15 January 2020) <<https://technation.io/news/2019-a-record-year-for-uk-tech/>> accessed 30 September 2021.

<sup>26</sup> UK’s National Data Strategy (n 21).

<sup>27</sup> European Commission, ‘A European Strategy for Data’ (n 16) 2.

<sup>28</sup> Australian Implementation of an Economy-wide Consumer Data Right (n 9) 7.

<sup>29</sup> UK’s National Data Strategy (n 21).

<sup>30</sup> See Summary of the Opinion of the European Data Protection Supervisor on EDPS Opinion on the European Strategy for Data [30 September 2020] OJ C 322/11 <[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XX0930\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XX0930(01)&from=EN)> accessed 29 September 2021.

<sup>31</sup> The study was conducted by the Digital Competition Expert Panel and the Competition and Markets Authority (CMA), see CMA, ‘Online Platforms and Digital Advertising’ (Market Study Interim Report, 2019) 40, 196-8, 226-7 <[https://assets.publishing.service.gov.uk/media/5dfa0580ed915d0933009761/Interim\\_report.pdf](https://assets.publishing.service.gov.uk/media/5dfa0580ed915d0933009761/Interim_report.pdf)> accessed 29 September 2021.

obstructs the development of innovative services.<sup>32</sup> The reasons for data concentration and insufficient business-to-business (B2B) data sharing in the EU are manifold. As observed by the European Commission, they range from ‘a lack of economic incentives (including the fear of losing a competitive edge), lack of trust between economic operators that the data will be used in line with contractual agreements, imbalances in negotiating power, the fear of misappropriation of the data by third parties, and a lack of legal clarity on who can do what with the data (for example for co-created data, in particular IoT data).’<sup>33</sup>

This existing situation is deeply sub-optimal. The EU, the UK, and Australia each consider regulatory intervention as necessary to unleash the economic potential of data for the benefit of society. Each of these jurisdictions are striving to become global champions of data use and leading digital economies. The UK’s National Data Strategy projects a future where the UK acts as ‘a world leader in data’ and ‘a nation of digital entrepreneurs, innovators and investors, the best place [globally] to start and grow a digital business, as well as the safest place in the world to go online’.<sup>34</sup> The EU’s ambition is – by 2030 – to ‘enable the EU to become the most attractive, most secure and most dynamic data-agile economy in the world – empowering Europe

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<sup>32</sup> UK Government, Department for Business, Energy and Industrial Strategy, ‘Modernising Consumer Markets’ (Consumer Green Paper, April 2018) 21 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/699937/modernising-consumer-markets-green-paper.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/699937/modernising-consumer-markets-green-paper.pdf)> accessed 29 September 2021. See also UK Government, Department for Business, Energy & Industrial Strategy and Department for Digital, Culture, Media & Sport, ‘Smart Data Review: Terms of Reference’ (Policy Paper, 11 June 2019) <<https://www.gov.uk/government/publications/smart-data-review/smart-data-review-terms-of-reference>> accessed 29 September 2021.

<sup>33</sup> European Commission, A European Strategy for Data (n 16) 7.

<sup>34</sup> UK’s National Data Strategy (n 21). See also UK Government, Department for Digital, Culture, Media & Sport, ‘Consultation Outcome: Government Response to the Consultation on the National Data Strategy’ (*GOV.UK*, 18 May 2021) <<https://www.gov.uk/government/consultations/uk-national-data-strategy-nds-consultation/outcome/government-response-to-the-consultation-on-the-national-data-strategy>> accessed 29 September 2021.

with data to improve decisions and better the lives of all of its citizens.’<sup>35</sup> Australia has set the same deadline to evolve into ‘a leading digital economy and society’.<sup>36</sup>

This however is easier said than done. While data policy is a rapidly evolving area globally, many questions are yet to be meaningfully formulated, let alone answered.<sup>37</sup> Data regulation is challenging: data regimes should neither be unnecessarily complex nor vague and should allow one to capitalise on the benefits offered by data while minimising the risks and challenges that data sharing entails. Furthermore, they need to ensure ‘secure, fair, ethical, sustainable and accountable use of data’.<sup>38</sup> Each of the regulatory data-sharing frameworks adopted or under development in the EU, the UK, and Australia discussed below are grappling with these challenges.

### **3. Data sharing as part of Open Banking and Open Finance in Europe**

#### ***3.1 The concepts of Open Banking and Open Finance***

The number of jurisdictions around the world that have adopted, or are adopting, data sharing in banking and finance is steadily growing.<sup>39</sup> As well as the EU, the UK and Australia, the list currently includes Brazil, Canada, China, France, Hong Kong, India, Israel, Italy, Japan,

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<sup>35</sup> European Commission, *A European Strategy for Data* (n 16) 25.

<sup>36</sup> Australian Implementation of an Economy-wide Consumer Data Right (n 9) 7.

<sup>37</sup> UK’s National Data Strategy (n 21).

<sup>38</sup> *ibid.*

<sup>39</sup> The Paypers, ‘Open Banking Report 2019: Insights into the Global Open Banking Landscape’ (Report, September 2019) 10–18 <<https://thepayers.com/reports/the-open-banking-report-2019-insights-into-the-global-open-banking-landscape-2/r780814>> accessed 29 September 2021 (Open Banking Report 2019).

Netherlands, New Zealand, Mexico, Poland, Singapore, South Africa, United Arab Emirates, and the United States.<sup>40</sup> No single approach prevails: depending on the state of the economy and policy objectives, existing frameworks vary as to (1) scope of products and services, (2) levels of standardisation (eg, in relation to interfaces, messaging protocols, data security, etc), (3) implementation timelines, (4) type of regulatory or advisory institutions, and (5) accredited data holders and recipients.<sup>41</sup> These approaches can, however, be broadly divided into prescriptive<sup>42</sup> (with designated authorities regulating the ways and means of data sharing and supervising the implementation progress), facilitative<sup>43</sup> (providing legally non-binding guidance and standards on data disclosure and transfer), and market-driven<sup>44</sup> (with no explicit rules or guidance on sharing customer data).<sup>45</sup>

Despite the terms ‘Open Banking’ and ‘Open Finance’ being well-entrenched in financial circles, neither of the concepts are clearly defined and are often even used interchangeably,<sup>46</sup> creating

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<sup>40</sup> See Norton Rose Fulbright, ‘Open Banking Around the World: A Global Comparative Guide’ (July 2020) (on file with authors). See also Oana Ifrim, ‘Open Banking – A Very Global Business’ (*The Paypers*, 19 December 2019) <<https://thepaypers.com/expert-opinion/open-banking-a-very-global-business--1240033>> accessed 29 September 2021; The Australian Government, the Treasury, ‘Review into Open Banking: Giving Customers Choice, Convenience and Confidence (Report, December 2017) appendix C <[https://treasury.gov.au/sites/default/files/2019-03/Review-into-Open-Banking-\\_For-web-1.pdf](https://treasury.gov.au/sites/default/files/2019-03/Review-into-Open-Banking-_For-web-1.pdf)> (‘Review into Open Banking’). See also ‘Open Banking’, (*Banco Central do Brasil*, 2021) <[https://www.bcb.gov.br/en/financialstability/open\\_banking](https://www.bcb.gov.br/en/financialstability/open_banking)> accessed 29 September 2021.

<sup>41</sup> See Deloitte, ‘Shaping the Future: Consumer Data Right’ (Submission to the Inquiry into Future Directions for the Consumer Data Right, 21 May 2020) 12–13.

<sup>42</sup> Followed, for example, by EU, UK, and Australia. Note, some include Hong Kong under ‘prescriptive’ approaches, see *ibid*.

<sup>43</sup> Adopted by Singapore, South Korea, and Japan. Note, some also include Hong Kong, see Basel Committee on Banking Supervision, ‘Report on Open Banking and Application Programming Interfaces’ (Bank for International Settlements Report, November 2019) 10.

<sup>44</sup> Followed, for example, by the United States, Argentina and China: *ibid*.

<sup>45</sup> *ibid* 4–5, 12. Others distinguish broadly between ‘regulatory-driven’ and ‘market-driven approaches’, see Deloitte, ‘Shaping the Future: Consumer Data Right’ (n 41) 12–13.

<sup>46</sup> ‘From Open Banking to Open Finance: Adding Value to the Customer Experience’ (*BBVA API Market*, 29 July 2021) <<https://www.bbvaapimarket.com/en/api-world/open-banking-open-finance-adding-value-customer-experience/>> accessed 29 September 2021. See also ‘From Open Banking to Open Finance’ (*Open Banking Europe*,

confusion in the literature and public discourse about how data-sharing ideas and processes have emerged and evolved, how they could and should continue advancing in the finance sector and be (potentially) extended to other sectors of the economy in the future. This confusion is facilitated by the lack of exact statutory or administrative definitions of Open Banking in many of the above jurisdictions, including a few where Open Banking is well advanced (for example, in Germany).<sup>47</sup>

Some sources suggest that from the pan-European perspective ‘Open Banking’, at a minimum, includes products and services based on the sharing of ‘payment account data’ as mandated by the revised Payment Services Directive.<sup>48</sup> The regulator of the UK open banking framework, the Financial Conduct Authority (FCA), explains the concept of Open Banking similarly.

Accordingly, Open Banking has introduced ‘a secure environment that enables customers to consent to third parties accessing their payment account information or making payments on their behalf.’<sup>49</sup>

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28 May 2021) <<https://www.openbanking-europe.eu/open-banking-europe-insights/from-open-banking-to-open-finance/>> accessed 29 September 2021.

<sup>47</sup> Norton Rose Fulbright (n 40) 2.

<sup>48</sup> See, for example, European Commission, ‘A European Strategy for Data’ (n 16) 30: ‘the revised Payment Services Directive marks an important step towards open banking, where innovative payment services can be offered to consumers and businesses on the basis of the access to their bank account data’ and ‘Questions and Answers: Digital Finance Strategy, Legislative Proposals on Crypto-Assets and Digital Operational Resilience, Retail Payments Strategy’ (European Commission, 24 September 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/QANDA\\_20\\_1685](https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_1685)> accessed 29 September 2021: ‘PSD2 has enabled the emergence of new business models based on the sharing of payment account data (‘Open Banking’), such as payment initiation and account information services.’

On the revised Payment Services Directive (PSD2), see section 3.2.1 below. The directive, however, does not refer to or define ‘Open Banking’ or ‘Open Finance’.

<sup>49</sup> FCA, ‘Open Finance’ (Feedback Statement FS21/7, March 2021), paras 1.4, 2.1 <[www.fca.org.uk/publication/feedback/fs21-7.pdf](http://www.fca.org.uk/publication/feedback/fs21-7.pdf)> accessed 29 September 2021. Note that the two instruments forming the legal foundation for the Open Banking framework in the UK – *Retail Banking Market Investigation Order 2017 (CMA Order)* and the *Payment Services Regulation (PSR)* (see below, section 3.2.2), do not refer to or define ‘Open Banking’ or ‘Open Finance’.

In contrast, and as most recently alluded to in the *Digital Finance Strategy for the EU*<sup>50</sup> and the FCA's Feedback Statement on Open Finance,<sup>51</sup> the concept of Open Finance extends Open Banking-like data sharing and third-party access to a wider range of financial services and products. Having said this, drawing a clear line between the concepts or identifying the scope of Open Finance in more precise terms is presently challenging. The concept is still evolving, and national authorities may amend or extend it further in the future, depending on the domestic market situation and the extent of discretion allowed under the European law.

As will be shown in section 5.1, the scope of Open Banking in Australia is significantly broader than in the EU and the UK and includes elements which are likely to fall under the concept of Open Finance in Europe (for example, sharing of data on mortgage and savings accounts). The following section analyses the regulatory Open Banking landscape in the EU and the UK.

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<sup>50</sup> European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a Digital Finance Strategy for the EU' (COM(2020) 591 final, 24 September 2020) section 4.3 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0591&from=EN>> accessed 29 September 2021 ('Communication on a Digital Finance Strategy for the EU'). See also European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a Retail Payments Strategy for the EU' (COM(2020) 592, 24 September 2020) 16 <[https://ec.europa.eu/transparency/documents-register/detail?ref=COM\(2020\)592&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=COM(2020)592&lang=en)> ('COM(2020) 592, 24 September 2020'). European Commission, Opinion of the European Economic and Social Committee on 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a Retail Payments Strategy for the EU' (COM(2020) 592 final, 24 March 2021) OJ C 220/72 para 4.13 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020AE5186&qid=1632892354929&from=EN>> accessed 29 September 2021.

<sup>51</sup> FCA, 'Open Finance' (n 49) paras 1.10, 1.11.



## 3.2 Regulatory frameworks

### 3.2.1 The EU

The idea of empowering consumers with the right to determine who will gain access to their data and when emerged in the banking sector in Europe. The European single market guarantees the free movement of goods, people, services, and capital within the European Economic Area (EEA) which has led to unprecedented economic activity across public and private sector institutions, businesses, and individuals.<sup>52</sup> With the continued growth of digital technologies and increasing reliance on electronic means for payment transactions, demand grew for a payment services and processing infrastructure to enable fast, cost-efficient and secure execution of cross-border payments. To promote further market integration a regulatory regime was required to guide the activities of service providers and assure consumers the system was safe and efficient.<sup>53</sup>

The Single Euro Payments Area (SEPA) established under the *Payment Services Directive 2007/64/EC (PSDI)* harmonised the way cashless payments in euro – including credit transfers,

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<sup>52</sup> The European Economic Area was created by the Agreement on the European Economic Area [1994] OJ L1/3 which came into force on 1 January 1994. Designed to promote trade and economic relations between its parties with equal conditions of competition for individuals and businesses within the EEA, it brings together the EU Member States and the three EEA European Free Trade Association (EFTA) States — Iceland, Liechtenstein and Norway — in a single market. On ‘four freedoms’ (ie free movement of goods, people, services, and capital), see also arts 4(2)(a), 26, 28, 45, 56, 63, 114 and 15 of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU).

<sup>53</sup> Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (in force since 25 December 2007), Preamble, para. 4 (‘PSDI’). See generally European Banking Industry, ‘PSD: Guidance for The Implementation of the Payment Services Directive’ (August 2009) <[www.ebf.eu/wp-content/uploads/2017/01/Brochure-\\_24-08-09-PSD-Web-2009-01152-01-E.pdf](http://www.ebf.eu/wp-content/uploads/2017/01/Brochure-_24-08-09-PSD-Web-2009-01152-01-E.pdf)> accessed 29 September 2021; Herbert Smith, ‘Financial Regulatory Developments’ (2009) 3(1) *Law and Financial Markets Review* 79, 82-86.

direct debits and card payments – were executed across Europe.<sup>54</sup> In order to make such cross-border payments as easy as national payments, the directive mandated standardisation of certain rights and obligations of payment service providers (PSPs)<sup>55</sup> and users of payment services.<sup>56</sup> To address the problem of poor competition between PSPs, it further required Member States to ensure that the rules governing PSPs’ access to payment systems were ‘objective, non-discriminatory and proportionate.’<sup>57</sup>

With effect from 13 January 2018, a revised *Payment Services Directive (PSD2)* repealed PSD1.<sup>58</sup> While building on the former’s objectives to create a level playing field between different payment service providers, thus boosting innovation and competition in the single market, PSD2 also widened its scope to include innovative payment product and services that did not fall entirely, or in part, within the scope of PSD1. Specifically, the directive opened up the EU and EEA payment market to a larger group of PSPs, ie non-bank entities (colloquially known as FinTechs) which offered consumer- or business-oriented payment services based on access to data from payment accounts.<sup>59</sup> It regulates and harmonises two types of services that became

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<sup>54</sup> For the full list of payment services covered by the directive, see arts 4.3 and Annex. The geographical scope of SEPA covers the EU Member States, as well as Andorra, Iceland, Norway, Switzerland, Liechtenstein, Monaco, San Marino, United Kingdom, Vatican City State, Mayotte, Saint-Pierre-et Miquelon, Guernsey, Jersey and Isle of Man.

<sup>55</sup> Six specified categories of payment service providers are listed in *PSD1*, art 1(1).

<sup>56</sup> See ‘Payment Services in the EU’ (*EUR-Lex*, 24 May 2016) <<https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX:32007L0064>> accessed 29 September 2021.

<sup>57</sup> *PSD1*, art 28. See also Herbert Smith (n 53) 83.

<sup>58</sup> *Directive 2015/2366/EU* (n 1).

<sup>59</sup> For a definition of PSP, see *PSD2*, arts 1, 4(11). See also European Banking Federation, ‘PSD2 Guidance’ (Guidance for implementation of the revised Payment Services Directive, 20 December 2019) <<https://www.ebf.eu/wp-content/uploads/2019/12/EBF-PSD2-guidance-Final-December-2019.pdf>> accessed 29 September 2021. See also ‘Revised Rules for Payment Services in the EU’ (*EUR-Lex*, 26 July 2019) <<https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=celex:32015L2366>> accessed 29 September 2021.

increasingly popular in the years following the adoption of PSD1: Account Information Services (AIS) and Payment Initiation Services (PIS).<sup>60</sup>

AIS collate information on the consumer's multiple bank accounts in a single place allowing her to better manage personal finances. They provide a consolidated overview of the financial situation and ability to analyse spending patterns and financial needs in a user-friendly manner.<sup>61</sup>

PIS facilitate online payments. They are based on the idea that a consumer should be able to initiate a payment from her bank account without having to use the bank's own payment interface each time she makes an online purchase.<sup>62</sup> Instead, a payment initiation service provider acts as an intermediary between the consumer's financial institution and a merchant by providing an interface, or 'bridge', between the consumer's account and the merchant's account.<sup>63</sup> Thus, instead of logging into her bank account or providing the merchant with her credit card details and also being charged credit card fees, the consumer benefits from an integrated payment flow, while the merchant has the assurance that the payment has been made.

In order to facilitate information exchange on a technical level, the European Banking Authority (EBA) was mandated to develop draft regulatory technical standards specifying, *inter alia*, the

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<sup>60</sup> As defined in PSD2, arts 4(16) and 4(15) respectively.

<sup>61</sup> PSD2 Preamble, para 28.

<sup>62</sup> PSD2, Preamble, para 29. See also 'Introduction to Payment Initiation' (*Tink*) <<https://docs.tink.com/entries/articles/introduction-to-payment-initiation>> accessed 29 September 2019.

<sup>63</sup> See 'Payment Services Directive: Frequently Asked Questions' (*European Commission*, 12 January 2018) <[https://ec.europa.eu/commission/presscorner/detail/fr/MEMO\\_15\\_5793](https://ec.europa.eu/commission/presscorner/detail/fr/MEMO_15_5793)> accessed 29 September 2021.

requirements for common and secure open standards of communication.<sup>64</sup> Standardised application programming interfaces (APIs) for data access and transfer purposes, while not explicitly mentioned in the directive, were regarded as the preferred technology to facilitate secure and reliable access to the accounts of payment services users.<sup>65</sup> APIs enable software applications to communicate with each other over a network, using a common language and without using intermediaries which makes them an attractive technology for businesses that wish to securely and efficiently connect services and transfer data.<sup>66</sup>

Consumer consent underpins PSD2.<sup>67</sup> In accordance with the data minimisation principle, PSPs can offer their services only where these are based on consumer's explicit consent and are not authorised to access any data from the consumer's account beyond the data necessary to run the specified service.<sup>68</sup> This means that the data recipient must not ask for ongoing access to, for example, consumer's transaction data in order to assess her eligibility for loan at some future point in time.<sup>69</sup> To ensure the provision of a valid consent without compromising consumer

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<sup>64</sup> PSD2, art 98(1)(d) and Preamble, para 93.

<sup>65</sup> Markos Zachariadis and Pinar Ozcan, 'The API Economy and Digital Transformation in Financial Services: The Case of Open Banking' (Working Paper No 2016-001, SWIFT Institute, 15 June 2017) 4.

<sup>66</sup> See Andrea Moriggi, 'Open Banking and Competition. How APIs Are Shaping the Future of Financial Institutions', (Cyberlaws, 9 March 2018) <[www.cyberlaws.it/en/2018/open-banking-api-competition/](http://www.cyberlaws.it/en/2018/open-banking-api-competition/)> accessed 29 September 2021 ('Open Banking and Competition'). On APIs generally, see 'What is an API?' (Red Hat, 31 October 2017) <[www.redhat.com/en/topics/api/what-are-application-programming-interfaces](http://www.redhat.com/en/topics/api/what-are-application-programming-interfaces)> accessed 29 September 2021 and Neil Madden, *API Security in Action* (Manning, 2020) 298.

<sup>67</sup> PSD2, chapter 2, particularly arts 64, 66, 67.

<sup>68</sup> PSD2, arts 66(3)(f) and (g) and 67(2)(e) and (f).

<sup>69</sup> The principle is also embedded in the UK's Open Banking frameworks and the Australian CDR regime, see UK: *PSR*, regulation 70(3)(f); Australia: *CDR Rules*, rule 1.8. See also *GDPR*, art 5(1)(c). See also Australian Competition and Consumer Commission, 'Explanatory Statement: Proposed Competition and Consumer (Consumer Data Right) Rules 2019' (August 2019) 19 <[www.accc.gov.au/system/files/Proposed%20CDR%20rules%20-%20Explanatory%20Statement%20-%20August%202019.pdf](http://www.accc.gov.au/system/files/Proposed%20CDR%20rules%20-%20Explanatory%20Statement%20-%20August%202019.pdf)> accessed 29 September 2021 ('Explanatory Statement').

security, PSD2 requires that PSPs apply a series of strong authentication measures.<sup>70</sup> To protect the processing of personal data by payment systems and PSPs, the directive also mandates compliance with the General Data Protection Regulation (GDPR).<sup>71</sup>

Incumbent financial institutions, such as banks, have long held an extensive record of consumer spending, lending and borrowing activities, from electricity and water bills to mortgage payments to daily expenditures on food and travel. This data has traditionally been hoarded, stored, and barely reused. PSD2 unbundles services provided by incumbents, by forcing them to open their customer databases to the use by authorised third parties. Prior to PSD2, FinTechs faced many barriers to offering their solutions to payments in different EU/EEA Member States. With these barriers removed – provided that PSPs are duly registered, licensed and supervised by the competent authorities – more competition is enabled in this single market comprising 450 million consumers and 22.5 million small and medium-sized enterprises (SMEs).<sup>72</sup>

### 3.2.2 *The UK*

The development of the UK’s legal framework on data sharing in banking was spurred by a market investigation into the supply of retail banking services to personal current account

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<sup>70</sup> PSD2, arts 4(30) and 97, as further specified in *Commission Delegated Regulation (EU) 2018/839 Supplementing Directive (EU) 2015/2366 of the European Parliament and of the Council with Regard to Regulatory Technical Standards for Strong Customer Authentication and Common and Secure Open Standards of Communication OJ L69/23*. On strong customer authentication (SCA), see European Banking Federation (n 59) 68 *et seq.* See also ‘Payment Services Directive: Frequently Asked Questions’ (n 63).

<sup>71</sup> PSD2, art 94. *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJL 119* (adopted 4 May 2016, came into force on 25 May 2018). On the interaction between PSD2 and GDPR, see European Banking Federation (n 59) 83 *et seq.*

<sup>72</sup> ‘The European Single Market’ (*European Commission*) <[https://ec.europa.eu/growth/single-market\\_en](https://ec.europa.eu/growth/single-market_en)> accessed 29 September 2021.

customers and to SMEs in the UK launched by the Competition and Markets Authority (CMA) in November 2014. In 2016, the CMA published the final report which revealed that the incumbent banks hardly had to compete to gain customers' business, while newer banks faced significant challenges in accessing the market.<sup>73</sup> Open Banking was recommended as a solution to this problem.<sup>74</sup> The legal foundation for the UK Open Banking framework is formed by Part 2 of the *Retail Banking Market Investigation Order 2017 (CMA Order)*<sup>75</sup> and Part 7 of the *Payment Services Regulation (PSR)*,<sup>76</sup> which translated PSD2 into UK legislation. The *CMA Order* established an Open Banking Implementation Entity (OBIE)<sup>77</sup> to create standards for data sharing (UK Open Banking Standards).<sup>78</sup> These standards were required to cover APIs, data formats, and security as well as governance arrangements and customer redress mechanisms<sup>79</sup> and not 'include provisions which are incompatible with the requirements in *PSD2*'.<sup>80</sup> The *PSR* imposes data-sharing obligations on 'account servicing payment service providers' (ASPSP) – ie data holders or banks – with respect to requests made by 'account information service providers' (AISP) – ie accredited data recipients. ASPSPs must comply with a Regulatory Technical

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<sup>73</sup> See CMA, 'Retail Banking Market Investigation: Final Report' (9 August 2016) 3 <<https://assets.publishing.service.gov.uk/media/57ac9667e5274a0f6c00007a/retail-banking-market-investigation-full-final-report.pdf>> accessed 29 September 2021. The Report builds upon previous reviews of the UK retail banking sector going back to 2000 (see CMA, 'Retail Banking Market Investigation: Final Report' 11).

<sup>74</sup> *ibid*, 441. See also 'Learn More About Open Banking' (*Open Banking*) <<https://www.openbanking.org.uk/about-us/>> accessed 29 September 2021.

<sup>75</sup> *Retail Banking Market Investigation Order 2017 (UK) ('CMA Order')*. The order is made under the *Enterprise Act 2002 (UK) ('Enterprise Act')*.

<sup>76</sup> *Payment Services Regulation 2017 (UK) ('PSR')*. *Payment Services Regulation 2017 (UK) ('PSR')*.

<sup>77</sup> Also known as Open Banking Limited.

<sup>78</sup> *CMA Order*, art 10.1.

<sup>79</sup> *CMA Order*, art 10.2. See also Open Data Institute and Fingleton, 'Open Banking, Preparing for Lift Off' (Report, July 2019) 23 <<https://www.openbanking.org.uk/wp-content/uploads/open-banking-report-150719.pdf>> accessed 29 September 2021.

<sup>80</sup> *CMA Order*, art 10.2.

Standard of the EU for strong customer authentication and secure open standards of communication (SCA-RTS)<sup>81</sup> which also provides the basis on which the UK Open Banking Standards are approved for compliance with the *PSR* for a UK bank.<sup>82</sup> With the departure of the UK from the EU, it is possible that the relevance of *PSD2* to the UK framework will diminish and there will be further development of the UK Open Banking Standards in its place.<sup>83</sup>

### 3.2.3 *Current limitations*

The scope of the EU and the UK legal frameworks is narrow: they neither offer consumers a holistic view of their financial situation, nor allow them to reap the benefits of data sharing beyond banking. *PSD2* is focused on payment accounts and applies to payment services – defined as a business activity listed in Annex I (eg, direct debits, credit transfers, money remittance and others)<sup>84</sup> – provided within the EU and EEA.

The UK framework is similarly limited to payment systems. The *CMA Order* requires access to be provided to transaction information for ‘personal current account products’, including personal current accounts (with or without an overdraft facility), basic bank accounts, packaged accounts, reward accounts, student or graduate accounts and youth accounts,<sup>85</sup> and ‘business current account products’, including business current accounts and ‘standard tariff unsecured

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<sup>81</sup> *Commission Delegated Regulation (EU) 2018/389 Supplementing Directive (EU) 2015/2366 of the European Commission and of the Council with regard to Regulatory Technical Standards for Strong Customer Authentication and Common and Secure Open Standards of Communication* OJ L69/23 (‘*SCA-RTS*’). See also *PSR* reg 70(2)(a).

<sup>82</sup> *SCA-RTS*, art 30.

<sup>83</sup> ‘[I]t is intended that the *PSD II* will eventually be replaced by Open Banking after Brexit’: Victoria Dixon (ed), *Goode on Payment Obligations in Commercial and Financial Transactions* (4th ed, Sweet & Maxwell 2020) [5-77].

<sup>84</sup> *PSD2*, art 4(3) and Annex 1.

<sup>85</sup> *CMA Order*, art 12.4.1.

business overdrafts'.<sup>86</sup> The *PSR* requires access to be provided to data from a 'payment account', which is 'an account held in the name of one or more payment service users which is used for the execution of payment transactions'.<sup>87</sup> Such payment accounts include 'current accounts, e-money accounts, flexible savings accounts, credit card accounts and current account mortgages'.<sup>88</sup> Notably, mortgage and loan accounts, fixed term deposit accounts and cash savings accounts are not subject to the UK framework.<sup>89</sup> Restated, the UK framework cannot assist a customer with switching between different mortgages or swapping funds between current accounts and savings accounts when needed.<sup>90</sup>

In contrast, as will be shown in the next section, the Australian framework does not have any similar legislative constraints.

## **4. CDR in Australia**

### ***4.1 Regulatory framework***

CDR gives consumers a right to determine whether the data businesses hold about them is released to other providers of their choice so these can offer better and less costly products and

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<sup>86</sup> *CMA Order*, art 12.4.2.

<sup>87</sup> *PSR*, regulation 2.

<sup>88</sup> FCA, 'Payment Services and Electronic Money – Our Approach' (Approach Document, June 2019) 213, para 17.13 <<https://www.fca.org.uk/publication/finalised-guidance/fca-approach-payment-services-electronic-money-2017.pdf>> accessed 29 September 2021.

<sup>89</sup> *ibid.* See also 'FCA Handbook PERG 15.3 Payment Service' (*FCA*, 1 January 2021) <<https://www.handbook.fca.org.uk/handbook/PERG/15/3.html>> accessed 29 September 2021.

<sup>90</sup> See Open Data Institute and Fingleton (n 79) 37.



services in return.<sup>91</sup> It is intended to be the cornerstone of Australia’s new data economy.<sup>92</sup>

Businesses are also required to publicise data on the goods and services they provide, thereby empowering comparison websites and consumers with up-to-date information.<sup>93</sup>

The decision to introduce CDR in Australia was announced in November 2017,<sup>94</sup> following recommendations in a series of sector-specific reviews and inquiries commissioned between 2014 and 2017.<sup>95</sup> In particular, the Productivity Commission’s report on data availability and use released in May 2017 recommended a fundamental reform to Australia’s competition policy by facilitating better use of consumer data.<sup>96</sup> Emphasising that piecemeal adjustments to existing regulatory framework would not be sufficient, the Productivity Commission advocated a

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<sup>91</sup> See *CDR Act* (n 7) s 56AA. Note, the *CDR Act* speaks of the right of consumers to request disclosure of their own data to themselves – see s 56AA(a)(i) – however, this right is not yet operative, as no standards have yet been devised to implement it in practice; and furthermore, presumably most consumers lack access to the technology to safely access the data via the application programming interfaces (‘APIs’) through which that data is provided.

<sup>92</sup> Kendra Fouracre and Cheng Lim, ‘Lights on for the CDR in the Energy Sector’ (*King & Wood Mallesons*, 25 August 2021) <<https://www.kwm.com/en/au/knowledge/insights/lights-on-for-the-cdr-in-energy-sector-20210825>> accessed 29 September 2021.

<sup>93</sup> *ibid.*

<sup>94</sup> See Angus Taylor, Assistant Minister for Cities and Digital Transformation, ‘Australians to Own Their Own Banking, Energy, Phone and Internet Data’ (Media Release, Parliament of Australia 26 November 2017) <[https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/5656429/upload\\_binary/5656429.pdf;fileType=application%2Fpdf#search=%22media/pressrel/5656429%22>](https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/5656429/upload_binary/5656429.pdf;fileType=application%2Fpdf#search=%22media/pressrel/5656429%22>); see also Treasury, *Treasury Laws Amendment (Consumer Data Right) Bill 2019* (Digest No 68 of 2018–19) 3–7.

<sup>95</sup> The most significant influencers of the CDR framework were the 2014 Financial Systems Inquiry: The Australian Government the Treasury, ‘Financial Systems Inquiry’ (Final Report, 7 December 2014) 190 *et seq*, 283 <<https://treasury.gov.au/sites/default/files/2019-03/p2014-FSI-01Final-Report.pdf>>, accessed 29 September 2021 (The Murray Inquiry)); the 2015 Competition Policy Review (The Australian Government the Treasury, ‘Competition Policy Review’ (Final Report, March 2015) 54, 238 <[https://treasury.gov.au/sites/default/files/2019-03/Competition-policy-review-report\\_online.pdf](https://treasury.gov.au/sites/default/files/2019-03/Competition-policy-review-report_online.pdf)> accessed 29 September 2021 (The Harper Review)); the 2016 Report of the House of Representatives Standing Committee on Economics: Review of the Four Major Banks (Standing Committee on Economics, Parliament of Australia, ‘Review of the Four Major Banks’ (Report, 24 November 2016) v, 21–60 <[www.aph.gov.au/parliamentary\\_business/committees/house/economics/four\\_major\\_banks\\_review/report](http://www.aph.gov.au/parliamentary_business/committees/house/economics/four_major_banks_review/report)> accessed 29 September 2021 (The Coleman Report)); the 2017 *Independent Review into the Future Security of the National Electricity Market* (Department of Industry, Science, Energy and Resources, Parliament of Australia, ‘Independent Review into the Future Security of the National Electricity Market’ (Final Report, 9 June 2017) 181 <<https://www.energy.gov.au/sites/default/files/independent-review-future-nem-blueprint-for-the-future-2017.pdf>> accessed 29 September 2021 (The Finkel Report)). See also Explanatory Memorandum, Treasury Laws Amendment (Consumer Data Right) Bill 2019, [1.11]–[1.12] (CDR Explanatory Memorandum).

<sup>96</sup> Productivity Commission, ‘Data Availability and Use’ (Inquiry Report No 82, 8 May 2017) 2.

comprehensive catalogue of rights for individuals and small and medium businesses to allow them easier access to and usage of their data.<sup>97</sup>

With the banking sector designated as the first sector of the economy to which this set of rights would apply, the government commissioned the review into Open Banking in Australia in July 2017. In December 2017, the review presented recommendations on the design and implementation of Australia's Open Banking system; crucially, it included proposals on legal and regulatory arrangements for an economy-wide CDR.<sup>98</sup> In August 2019, the Australian Parliament passed the bill which amended the *Competition and Consumer Act 2010*, *Australian Information Commissioner Act 2010*, and *Privacy Act 1988*.<sup>99</sup> This enabling legislation outlined the overarching objectives and principles of CDR, set out the role and functions of the regulatory bodies charged with establishing and enforcing CDR rules, enshrined minimum privacy protections and empowered the Treasurer to apply CDR to economy sectors by designation through legislative instrument.<sup>100</sup> The *Consumer Data Right (Authorised Deposit Taking Institutions) Designation 2019* (Cth) made such a designation for the banking sector.<sup>101</sup> The Australian Competition and Consumer Commission (ACCC) elaborated and issued the *Competition and Consumer (Consumer Data Right) Rules 2020*<sup>102</sup> which set out the application

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<sup>97</sup> Ibid 15.

<sup>98</sup> 'Review into Open Banking' (n 40).

<sup>99</sup> *CDR Act* (n 7). See also Treasury, *Treasury Laws Amendment (Consumer Data Right) Bill 2019* (Digest No 68 of 2018–19) 3–7.

<sup>100</sup> The Australian Government, the Treasury 'Consumer Data Right Overview' (Booklet, September 2019) 9 <[https://treasury.gov.au/sites/default/files/2019-09/190904\\_cdr\\_booklet.pdf](https://treasury.gov.au/sites/default/files/2019-09/190904_cdr_booklet.pdf)> accessed 29 September 2021 (CDR Booklet).

<sup>101</sup> *Consumer Data Right (Authorised Deposit Taking Institutions) Designation 2019* (Cth) ('Open Banking Designation').

<sup>102</sup> For the current version of the rules see the Federal Register of Legislation: *Competition and Consumer (Consumer Data Right) Rules 2020* (Cth) <<https://www.legislation.gov.au/Details/F2021C00076>> accessed 29 September 2021 ('CDR Rules').

of CDR rules to banking and mandate a single set of standards for data sharing.<sup>103</sup> Together, the two instruments build the legal framework for Open Banking in Australia which became operational in July 2020.

#### ***4.2 One-of-a-kind regime***

As mentioned earlier, an increasing number of jurisdictions globally already have or are in the process of adopting data sharing as part of Open Banking and more are expected to follow in the future (section 3.1). Along with the EU and the UK, Australia has chosen a top-down model with regulatory bodies guiding and supervising the process of data sharing. Australia's approach is unique, however, in its commitment to implement *economy-wide* standardisation of consumer data with the only limits to the range of services enabled by CDR being 'the imagination of entrepreneurs'.<sup>104</sup> CDR is already operational in the banking sector. The extension to the energy sector is underway<sup>105</sup> and telecommunications have been identified as the next priority area with a sectoral assessment to be completed in 2021.<sup>106</sup> In due course, the plan is to extend CDR to superannuation (pensions), insurance, groceries, health, education, and other areas.<sup>107</sup>

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<sup>103</sup> The *CDR Rules* require that requests by accredited persons for consumer data, requests for the consumer to authorise the disclosure of customer data, and the disclosure of consumer data in response to a request, must all be made in accordance with the CDR standards (see *CDR Rules*, rules 4.4(3), 4.5 and 4.6).

<sup>104</sup> The Australian Government the Treasury, 'Consumer Data Right: Giving Customers Greater Control over Their Data', *Treasury* (September 2019) <[https://treasury.gov.au/sites/default/files/2019-09/20190904\\_cdr\\_handout.pdf](https://treasury.gov.au/sites/default/files/2019-09/20190904_cdr_handout.pdf)> accessed 29 September 2021.

<sup>105</sup> 'CDR Rules Amendments (Version 4)' (*Australian Government The Treasury*) <<https://treasury.gov.au/consultation/c2021-200441>> accessed 29 September 2021. See also Wolters Kluwer Australia, 'Draft Legislation to Rollout Consumer Data Right to Energy Sector' (*Lexology*, 18 August 2021) <<https://www.lexology.com/library/detail.aspx?g=d32f547f-9b8f-4bce-9182-34a630247d5f>> accessed 29 September 2021.

<sup>106</sup> Australian Implementation of an Economy-wide Consumer Data Right (n 9) 6.

<sup>107</sup> See, for example, Productivity Commission, 'Superannuation: Assessing Efficiency and Competitiveness' (Inquiry Report No 91, 21 December 2018) 40. See also Julian Lincoln, David J Ryan and Audrey Vong, 'CDR: Challenges and Opportunities in the Superannuation Sector', (*Herbert Smith Freehills*, 22 November 2019) <[www.herbertsmithfreehills.com/latest-thinking/cdr-challenges-and-opportunities-in-the-superannuation-sector](http://www.herbertsmithfreehills.com/latest-thinking/cdr-challenges-and-opportunities-in-the-superannuation-sector)>.

CDR thus stands out by its promise to increase socio-economic inclusion and consumer welfare like no other jurisdiction to date. Regulatory regimes in States with open banking systems are based on the benefits they provide to consumers and businesses. Data sharing in banking promotes innovation in products and services, encourages competition, opens up new employment and business opportunities and provides a secure and seamless payment experience.

A data-portability system that goes beyond banking *multiplies these benefits*. CDR enhances competition and innovation across economy sectors transforming the way services are designed and delivered to best meet a diverse range of customer needs and circumstances, simultaneously reducing time, effort, and costs. A manual internet search may, for example, uncover the cheapest electricity plan for the typical consumption of a mid-sized family. CDR, in contrast, will allow service providers to analyse the actual electricity usage of a given family to tailor an offer specifically for them. In the long run, combining data sets across the economy and expanding potential use cases, CDR should assist consumers to monitor not just their finances, but their utility bills and other needs and ultimately help them move towards more sustainable and affordable lifestyles.<sup>108</sup>

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See also Minter Ellison, 'Expanding the Consumer Data Right' (*Lexology*, 12 August 2021) <<https://www.lexology.com/library/detail.aspx?g=239d4354-f788-4406-b2c1-0f680678889d>> accessed 29 September 2021. See also Australian Implementation of an Economy-wide Consumer Data Right (n 9) 6.

<sup>108</sup> Australian Competition and Consumer Commission, 'Explanatory Statement' (n 69) 13 [1.55].

With its government strongly driving this reform, Australia may be well placed to drive global data-sharing standards and be a leader in digital trade.<sup>109</sup> By making it easier for domestic financial services providers to cooperate with offshore partners, CDR promises to reduce barriers to international collaboration and may position Australia as a leading FinTech export hub and ‘a gateway between Asian and European markets’.<sup>110</sup> Other States are beginning to look to Australia for lessons about national cross-sectoral CDR models.<sup>111</sup>

## 5. Lessons from Australia

The EU and the UK pioneered Open Banking. However, Australia has taken the concept and run further with it, applying the concept of consumer data portability broadly. Early lessons can thus be learned from Australia’s experiences to date, and doubtless these lessons will multiply in the coming years. Although data-sharing regimes in all three jurisdictions are in a state of flux, there are five clear lessons for other countries from Australia’s experience to date.

These lessons are: (i) the desirability of expanding Open Banking to Open Finance; (ii) the desirability of expanding the data-sharing regime to other economic sectors; (iii) the need for the process to be led by a policy agency; (iv) the need for data-sharing to be ‘a living framework’ ready to adapt to advances in technology and changes in market demands; and (v) the need for timely consumer education.

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<sup>109</sup> KPMG, ‘30 Voices on 2030: The New Reality for Financial Services’ (Report, 22 February 2021) <<https://assets.kpmg/content/dam/kpmg/au/pdf/2021/30-voices-on-2030-new-reality-financial-services.pdf>> accessed 29 September 2021.

<sup>110</sup> *ibid* 40.

<sup>111</sup> See, for example, ‘Consumer Data Right’ (*Ministry for Business, Innovation and Employment, New Zealand Government*, 9 July 2021) <<https://www.mbie.govt.nz/business-and-employment/business/competition-regulation-and-policy/consumer-data-right/>> accessed 29 September 2021.

In addition, we would add one lesson Australia is yet to establish, but which we believe exists, which is the potential of action initiation (also termed ‘write access’) to incentivise fairer commercial dealings.

### ***5.1 The desirability of expanding Open Banking to Open Finance***

Expanding data sharing beyond payment accounts offers far more competitive financial products for customers and spurs innovation across the finance sector. While PSD2 and the UK Open Banking framework have been designed to make payments more competitive, transparent, secure, and versatile, they remain constrained in that a range of financial products and services, such as mortgage or savings accounts, are not included (section 3.2). In contrast, Open Banking in Australia is much broader in scope and, requires access to be provided to 29 different bank accounts (including savings, current, cheque and transaction accounts, debit, charge and credit card accounts, home loan, mortgage and personal loan accounts, and business financing accounts, such as lines of credit, overdrafts and asset finance accounts).<sup>112</sup> The breadth of coverage was designed to ensure that the Australian framework applied to banking products which are ‘widely available to the general public’<sup>113</sup> and includes products and services which, in due course, may fall under the concept of Open Finance in Europe (see section 3.1 above).

This Australian approach is advantageous. For example, including mortgage accounts in a consumer-directed data-sharing regime, leads to more competitive home loans. Research data

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<sup>112</sup> *CDR Rules*, schedule 3 clause 1.4.

<sup>113</sup> ‘Review into Open Banking’ (n 40) 36.

suggests that consumers are often hesitant to switch providers even when it costs them more. In the UK, for example, a significant share of customers earns uncompetitive interest rates on savings accounts or pay higher mortgage rates either because of the inconvenience associated with switching or lack of visibility into better alternatives.<sup>114</sup> Similar concerns have been raised in Australia where home loans have been found to be ‘the most difficult product to switch while being the product with the highest savings potential’.<sup>115</sup> Someone with a variable rate home loan over four years old is typically paying \$1,000 more each year in interest than they need to be paying, for every \$250,000 outstanding on their loan.<sup>116</sup> CDR-facilitated data sharing is designed to assist consumers to obtain these savings by making a switch to a better home loan faster and easier.

Whether they include banking or other financial products (insurance, pensions, etc), Open Finance applications enable a broader range of services tailored to the consumer preferences and needs. Such needs can include increased savings. In Australia, a survey of some 2000 retail bank customers showed that around 90% of respondents considered they would share their data to obtain better value for banking services.<sup>117</sup> The ability to compare one’s current financial arrangements with alternatives on the market should help consumers make educated choices as

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<sup>114</sup> Chandana Asif et al, ‘Financial Services Unchained: The Ongoing Rise of Open Financial Data’ (*McKinsey & Company*, 11 July 2021) <[www.mckinsey.com/industries/financial-services/our-insights/financial-services-unchained-the-ongoing-rise-of-open-financial-data](http://www.mckinsey.com/industries/financial-services/our-insights/financial-services-unchained-the-ongoing-rise-of-open-financial-data)> accessed 29 September 2021.

<sup>115</sup> The Australian Government the Treasury, ‘Inquiry into Future Directions for the Consumer Data Right’ (Report, October 2020) 24 <<https://treasury.gov.au/sites/default/files/2021-02/cdrinquiry-final.pdf>> accessed 29 September 2021 (‘Inquiry into Future Directions’).

<sup>116</sup> Australian Implementation of an Economy-wide Consumer Data Right (n 9) 24.

<sup>117</sup> See Deloitte, ‘Open Banking: Switch or Stick? Insights into Customer Switching Behaviour and Trust’ (Survey, October 2019) 3, 70 <[https://images.content.deloitte.com.au/Web/DELOITTEAUSTRALIA/%7B15b9dc7b-49eb-49b9-a7f8-3148e6ef4fb4%7D\\_20200330-fsi-open-banking-survey-2019-report.pdf?utm\\_source=eloqua&utm\\_medium=lp&utm\\_campaign=20200330-fsi-open-banking-survey-2019&utm\\_content=cta](https://images.content.deloitte.com.au/Web/DELOITTEAUSTRALIA/%7B15b9dc7b-49eb-49b9-a7f8-3148e6ef4fb4%7D_20200330-fsi-open-banking-survey-2019-report.pdf?utm_source=eloqua&utm_medium=lp&utm_campaign=20200330-fsi-open-banking-survey-2019&utm_content=cta)> accessed 29 September 2021.

to whether to stay with their current financial services provider because of other benefits it may offer (for example, better customer service), even if this comes with a higher cost.

As opposed to information limited to one or more payment accounts under the PSD2 framework,<sup>118</sup> Open Finance applications also offer the possibility of accessing consolidated information on all financial products centrally from a single platform. In Australia, such personal financial management (PFM) tools are offered, for example, by the Frollo app. By bringing together data on a variety of financial services used by a consumer along with publicly available data about the range of financial products she might be interested in, the app is designed to give a more holistic view of personal finances, keep track of expenses, identify options for savings, investments, pension funds, and so on.<sup>119</sup>

The risk to be aware of is, however, that incumbent institutions may not readily support the extension of data sharing beyond payment accounts. Australia's banking sector, for example, is an oligopoly where 'the major banks have significant market power that they use to protect shareholders from regulatory and market developments'.<sup>120</sup> With Open Banking frameworks designed to challenge this concentration and upend the long-standing relationships that incumbent institutions have with their customers, the major banks have to shift away from legacy thinking, upgrade and/or overhaul their legacy technology and adjust to higher expectations of their customers who could easily switch over to new market entrants, capable of offering them

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<sup>118</sup> PSD2, article 4(16).

<sup>119</sup> See 'Personal Finance Management' (*Frollo*) <<https://frollo.com.au/enterprise/personal-finance-management/>> accessed 30 September 2021. See also 'From Open Banking to Open Finance: Adding Value to the Customer Experience' (n 46).

<sup>120</sup> The Coleman Report (n 95) 4.



valuable differentiated propositions that are difficult for established banks to quickly copy.<sup>121</sup> In light of the generally high concentration in the banking sector in Europe<sup>122</sup> – particularly in smaller jurisdictions, such as Iceland, Estonia, Andorra, Malta, Lithuania, Finland, and Denmark<sup>123</sup> – regulatory authorities on both supra- and national levels need to be mindful of and attentive to the challenges incumbent market players may need to overcome to make Open Finance work.

## ***5.2 The desirability of expanding data sharing beyond finance***

The EU and the UK’s shared ambitions to become frontrunners among digital economies are unlikely to materialise without overarching legislative and regulatory data-sharing frameworks that apply broadly across economy sectors. Well-functioning payment services are vital for socio-economic activity. However, limiting data sharing to information on payment accounts can only partially stimulate economic growth. Conversely, expanding data sharing beyond finance extends the benefits of increased competition, innovation, new employment and business opportunities and efficiency gains which would otherwise be constrained to one economy sector across the spectrum of socio-economic activities, leading to sustained economic growth. Instead of ‘greater’ control over their financial data, consumers are given ‘comprehensive’ control over all their key data sets, which should lift consumer welfare to much higher levels.

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<sup>121</sup> See Ross Buckley, in KPMG (n 109) 68. See also Deloitte, ‘Open Banking: Switch or Stick? Insights into Customer Switching Behaviour and Trust’ (n 117) 5.

<sup>122</sup> ‘EU Structural Financial Indicators: End of 2020’ (Press Release, European Central Bank 26 May 2021) <[www.ecb.europa.eu/press/pr/date/2021/html/ecb.pr210526~7469dedaaf.en.html](http://www.ecb.europa.eu/press/pr/date/2021/html/ecb.pr210526~7469dedaaf.en.html)> accessed 29 September 2021.

<sup>123</sup> ‘Banking System Concentration in Europe’ (*theGlobalEconomy.com*) <[www.theglobaleconomy.com/rankings/banking\\_system\\_concentration/Europe/](http://www.theglobaleconomy.com/rankings/banking_system_concentration/Europe/)> accessed 29 September 2021.

In contrast to Europe, Australia's approach is more sensitive to the practical reality of how data operates in the real world, as it does not discriminate between the origins of data. As explained earlier, data cannot and should not be locked up in one sector, as it permeates and influences decision-making in other sectors. Merging banking data with pensions and insurance data offers a richer picture of a consumer's financial circumstances. Moreover combining this information with data from other sectors may allow each individual dataset to be more valuable, leading to an outcome that is 'greater than the sum of its parts'.<sup>124</sup> For example, sharing a consumer's broadband data with her bank could facilitate evaluation and monitoring of the affordability of her broadband arrangements.<sup>125</sup> Combining energy and banking data would allow a data recipient to determine which electricity deal is best for a consumer based on her usage, when payments are due, and whether the consumer's direct debit bank account must be topped-up to settle monthly bills. As CDR expands to further economy sectors, these interactions will become more regular and fruitful.<sup>126</sup>

Concentration and market prices provide major indicators for the economy sectors that could immediately benefit from being covered by data-sharing arrangements. One of the key motives for regulating or facilitating data-sharing in the banking sector across jurisdictions has, indeed, been its high concentration and, as a result, elevated prices. In Australia, for example, the ACCC found that the sustained high profits of the largest four banks in Australia – ANZ,

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<sup>124</sup> Australian Implementation of an Economy-wide Consumer Data Right (n 9) 13.

<sup>125</sup> See also Explanatory Memorandum, *Treasury Laws Amendment (Consumer Data Right) Bill 2019*, [1.88].

<sup>126</sup> Also, from the consumer's perspective, restricting her use of data by reference to the sectors in which the data holder originally transacted with the consumer could seem both artificial and confusing.

Commonwealth Bank, NAB and Westpac – were less likely to be traced to their exceptional performance than to the market conditions in which their competitors were frequently handicapped in their ability to effectively compete.<sup>127</sup> For the same reason, energy and telecommunications have been identified in Australia as priority sectors to which CDR will be applied after banking. The Australian energy sector is currently dominated by the ‘big three’ providers – AGL Energy, Origin Energy and Energy Australia – which supply over 68 per cent of small electricity customers and 75 per cent of small gas customers. This market has developed in a manner ‘not conducive to consumers being able to make efficient and effective decisions about the range of available retail offers’.<sup>128</sup> It is estimated, for example, that, a residential electricity consumer in South Australia could, on average, be saving up to \$442 annually by switching to a more cost-effective offer.<sup>129</sup> The situation in the UK is similar. In 2018, 57 per cent of energy customers remained on a standard variable tariff, with those at the six largest suppliers spending over £300 each year more than they need to.<sup>130</sup> In 2020, the CMA confirmed that more than 28 million UK consumers were paying a so called ‘loyalty penalty’ of £3.4 billion as a result of staying with their current provider in five essential markets, including mobile and broadband.<sup>131</sup>

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<sup>127</sup> See Australian Competition and Consumer Commission, ‘Productivity Commission Inquiry into Competition in the Australian Financial System: Australian Competition and Consumer Commission Submission’ (Submission, September 2017) 8 <[www.pc.gov.au/\\_\\_data/assets/pdf\\_file/0019/221860/sub017-financial-system.pdf](http://www.pc.gov.au/__data/assets/pdf_file/0019/221860/sub017-financial-system.pdf)> accessed 29 September 2021.

<sup>128</sup> Australian Competition and Consumer Commission, ‘Restoring Electricity Affordability and Australia’s Competitive Advantage: Retail Electricity Pricing Inquiry’ (Final Report, June 2018) 134 <[www.accc.gov.au/system/files/Retail%20Electricity%20Pricing%20Inquiry%E2%80%94Final%20Report%20June%202018\\_0.pdf](http://www.accc.gov.au/system/files/Retail%20Electricity%20Pricing%20Inquiry%E2%80%94Final%20Report%20June%202018_0.pdf)> accessed 29 September 2021.

<sup>129</sup> Australian Implementation of an Economy-wide Consumer Data Right (n 9) 12.

<sup>130</sup> Department for Business, Energy, and Industrial Strategy (n 32) 14.

<sup>131</sup> ‘Loyalty Penalty Update – Progress Two Years on from the CMA’s Super-Complaint Investigation’ (Press Release, Competition and Markets Authority 1 December 2020) 1 <[https://assets.publishing.service.gov.uk/media/5fc52bdcd3bf7f7f591e141e/Loyalty\\_penalty\\_Dec\\_2020\\_\\_-.pdf](https://assets.publishing.service.gov.uk/media/5fc52bdcd3bf7f7f591e141e/Loyalty_penalty_Dec_2020__-.pdf)> accessed 29 September 2021; see also Competition and Markets Authority, ‘CMA Publishes Loyalty Penalty

### ***5.3 The need for a policy agency to lead the process***

Another discrete lesson offered by the Australian experience is that the development of cross-sector data-sharing processes should be driven by a policy agency, not a regulator. The design of a radically new system is not merely a regulatory issue. It involves a holistic understanding of the domestic economy, its complexity and the desired trajectory for its growth. It must be built on the knowledge and appreciation of the specific strengths, demands and challenges that the individual economy sectors may be facing. It calls for the readiness to think laterally and, where necessary, take risks. Leadership of this process requires ability and experience in analysing policy issues with a whole-of-economy perspective, and necessitates more than a regulatory mindset.

In this regard, Australia has had to learn from its own initial miscalculation, as only in 2021 was the Federal Treasury, as the central policy agency, put in charge of sectoral assessments and rule-development for CDR. The original set up did not give Treasury rule-making authority. Because CDR covers competition and consumer matters, as well as privacy and confidentiality protections applicable to the use of data, it was initially devised to be administered by multiple authorities.<sup>132</sup> The ACCC was mandated to analyse sectors of the economy that should be subject to CDR and develop sector-specific consumer data rules.<sup>133</sup> The Office of the Australian

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Update' (*GOV.UK*, 21 January 2020) <[www.gov.uk/government/news/cma-publishes-loyalty-penalty-update](http://www.gov.uk/government/news/cma-publishes-loyalty-penalty-update)> accessed 29 September 2021; Temi Ogunye et al, 'The Cost of Loyalty: Exploring How Long-Standing Customers Pay More for Essential Services' (Citizens Advice Report, 2018) 3 <[www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Citizens%20Advice%20-%20The%20cost%20of%20loyalty.pdf](http://www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Citizens%20Advice%20-%20The%20cost%20of%20loyalty.pdf)> accessed 29 September 2021.

<sup>132</sup> CDR Booklet (n 100) 9-10.

<sup>133</sup> *ibid* 10.

Information Commissioner (OAIC) was put in charge of matters of privacy and confidentiality.<sup>134</sup> The task of devising standards for the format and processes by which data would be provided to consumers and ADRs was given to Data61 of the Commonwealth Scientific and Industrial Research Organisation (CSIRO).<sup>135</sup>

However, soon after the roll-out of Open Banking, a legislative amendment shifted responsibility for sectoral assessments and rule-development from the ACCC to the Treasury.<sup>136</sup> This was in response to concerns that the CDR framework is unnecessarily fragmented with the ACCC, Treasury, OAIC, and Data61 all sharing responsibilities.<sup>137</sup> Under the terms of the amendment, the Secretary of Treasury (head of the government department) must now consult on the sectors to be designated under CDR and report to the Minister, who may designate the sector. The rule-making responsibility has also been shifted to Treasury with obligations on it to consult with the ACCC, OAIC, or the person or body the Secretary of the Treasury believes to be the primary regulator of the sector, and (where so required by legislation) other stakeholders.<sup>138</sup> This functional reorganisation allows for a more streamlined and unified approach to the development and implementation of CDR policy, rules, and standards.<sup>139</sup>

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<sup>134</sup> *ibid.*

<sup>135</sup> CDR Explanatory Memorandum (n 95) [1.15].

<sup>136</sup> See *Treasury Laws Amendment (2020 Measures No. 6) Act 2020* (Cth) sch 2 ('Amendments of the Consumer Data Right') ('*Treasury Laws Amendment (2020 Measures No. 6)*').

<sup>137</sup> See, for example, Denham Sadler, 'Consumer Data Right Powers Shifted from ACCC' (*InnovationAus*, 6 November 2020) <[www.innovationaus.com/consumer-data-right-powers-shifted-from-acc/](http://www.innovationaus.com/consumer-data-right-powers-shifted-from-acc/)> accessed 29 September 2021; 'Frydenberg Takes Back Some Ground from the Regulators' (*BankingDay*, 3 December 2020) <[www.bankingday.com/login?p=%2ffrydenberg-takes-back-ground-from-regulators](http://www.bankingday.com/login?p=%2ffrydenberg-takes-back-ground-from-regulators)> accessed 29 September 2021.

<sup>138</sup> See *Treasury Laws Amendment (2020 Measures No. 6)* sch 2 ('Amendments of the Consumer Data Right') [31], [34].

<sup>139</sup> See Paul Franklin, 'Consumer Data Right Newsletter: 3 March 2021' (*Australian Competition and Consumer Commission*, 3 March 2021) <<https://mailchi.mp/acc.gov.au/consumer-data-right-newsletter-3-march-2021>> accessed 29 September 2021.

#### *5.4 The need to ensure a ‘living framework’*

Regardless of which sectors will be involved in the domestic data-sharing frameworks, these frameworks should be ‘living’, that is ready to admit their errors and change. This is because shifts in consumer and business preferences and technological innovation are likely to occur faster than the development of regulatory regimes. Furthermore, of its nature, regulation of data-sharing processes is a continuous ‘learning by doing’ exercise, requiring a careful balancing of attendant risks and benefits.

In Australia, the need to ensure ongoing improvements of the CDR system was implicit in the recommendation to allow for competing approaches to Open Banking.<sup>140</sup> Since CDR was launched in July 2020, it remains in flux with constructive critique repeatedly offered by its stakeholders. Some government responses were significant, including the transfer of rule-making authority from the ACCC to the Federal Treasury (see section 5.3 above). Others include, for example, changes in the data access model for the energy sector or the planned introduction of tiered accreditation. Initially, the Designation Instrument for the energy sector, designated the Australian Energy Market Operator (AEMO) as a gateway for certain classes of data, setting AEMO to act as a conduit between businesses that hold consumer data (ie energy retailers) and third parties which can make use of that data to offer products and services to consumers. Subsequently, however, it was realised that the gateway model may not be able to leverage existing National Electricity Market systems as intended, raising total cost for AEMO and thus

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<sup>140</sup> See Review into Open Banking (n 40) xii, 10 (Recommendation 1.1 [‘Allowing for Competing Approaches’]).

retailers.<sup>141</sup> In April 2021, the government therefore determined that a peer-to-peer (P2P) model with AEMO acting as a ‘secondary data holder’ is a more effective data access model for the energy sector.<sup>142</sup>

Likewise, the inaugural version of the CDR Rules had set out one general level of accreditation for data recipients which was subsequently heavily criticised for unfairly benefitting large incumbent financial institutions.<sup>143</sup> In July 2021, Treasury released and consulted upon amendments to the CDR Rules aimed at reducing barriers for businesses and other trusted professional advisers, such as brokers, financial counsellors, and lawyers, willing to participate in the regime. The final rules are expected to be confirmed in October 2021.<sup>144</sup> Even if arguably less significant, these changes, too, served to enhance the regime. Currently, Treasury are undergoing a strategic assessment of the implementation of CDR across the Australian economy including whether the sector-by-sector approach should change to one focussed on the inclusion of particular datasets which will have the greatest impact on consumers.<sup>145</sup>

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<sup>141</sup> See The Australian Government the Treasury, ‘Peer-to-Peer Data Access Model in the Energy Sector’ (Design Paper, 30 April 2021) 2 <[https://treasury.gov.au/sites/default/files/2021-05/c2021-168954-cdr\\_design\\_paper\\_peer\\_to\\_peer.pdf](https://treasury.gov.au/sites/default/files/2021-05/c2021-168954-cdr_design_paper_peer_to_peer.pdf)> accessed 29 September 2021 (‘Peer-to-Peer Data Access’).

<sup>142</sup> See *Consumer Data Right (Energy Sector) Designation 2020* (Cth). See also ‘Developments in Australia’s Consumer Data Right in Response to Community Feedback’, (*Australian Government The Treasury*, 30 April 2021) <<https://treasury.gov.au/media-release/developments-australias-consumer-data-right-response-community-feedback>> accessed 29 September 2021 (‘*Developments in Australia’s Consumer Data Right*’); and The Australian Government the Treasury, ‘Peer-to-Peer Data Access’ (n 141) 5.

<sup>143</sup> *CDR Rules* pt 5 div 5.2. See also see Harrison Astbury, “‘Zero Consumer Benefit’ in Open Banking So Far”, (*Savings.com.au*, 19 January, 2021) <[www.savings.com.au/savings-accounts/zero-consumer-benefit-in-open-banking-so-far](http://www.savings.com.au/savings-accounts/zero-consumer-benefit-in-open-banking-so-far)> accessed 29 September 2021.

<sup>144</sup> See The Australian Government the Treasury, ‘Competition and Consumer (Consumer Data Right) Rules 2020 with Proposed Amendments’ (Mark-up Version, Exposure Draft, 1 July 2021) r 5.1B and sch 1 <[https://treasury.gov.au/sites/default/files/2021-06/187223-cdr\\_rules\\_amendments\\_mark-up.pdf](https://treasury.gov.au/sites/default/files/2021-06/187223-cdr_rules_amendments_mark-up.pdf)> accessed 29 September 2021. See also Frolo, ‘A Practical Guide to Tiered Accreditation’ (July 2021) 2 <<https://frollo.com.au/open-banking/practical-guide-tiered-accreditation/>> accessed 29 September 2021.

<sup>145</sup> Australian Implementation of an Economy-wide Consumer Data Right (n 9) 6.

Evolving data-sharing regimes face many challenges, as do most transformative innovations. These include the need to rigorously protect consumer data to ensure the system's trustworthiness without imposing regulatory burdens that could deter new market entrants, and the need to be intelligible to users and consumers. As data sharing commonly involves issues of competition, consumer protection, and information privacy, to name just a few, States that follow prescriptive data-sharing approaches will need to ensure that the relationship between the data-sharing regime and other applicable laws and regulations are clear to users. Notably, the complexity of the existing data-sharing systems has been criticised both in Australia and the UK. The lack of transparency or precision of the CDR framework and its relationship with other legislative and regulatory instruments have been pointed to at various stages of the consultative process on the scope and substance of CDR.<sup>146</sup> In the UK, complaints about 'confusing regulatory picture', created by certain overlaps between the *CMA Order*, *PSR*, *SCA-RTS*, and *GDPR* have been raised by users, urging the FCA to consider them when developing the Open Finance framework.<sup>147</sup>

The foremost challenge thus lies in developing a framework which is sufficiently clear, yet not overly detailed, and appropriately favours experimentation over heavy-handed ex ante regulation.<sup>148</sup> Admittedly, adapting its legislative or regulatory framework in response to

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<sup>146</sup> For a list of regulatory issues requiring further clarification, see Maddocks, *Update 2 to Privacy Impact Assessment Update* (Report, 8 February 2021) 6-7, 59 *et seq* <<https://www.accc.gov.au/system/files/CDR%20v2%20Rules%20%E2%80%93%20Update%20to%20Privacy%20Impact%20Assessment.pdf>> accessed 29 September 2021.

<sup>147</sup> FCA, 'Open Finance' (n 49) para 2.38.

<sup>148</sup> See also Department for Business, Energy & Industrial Strategy, 'Smart Data Working Group: Spring 2021 Report' (June 2021) 7 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/993365/smart-](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/993365/smart-)



consumer and industry demands is easier for a mid-sized economy like Australia than for a regulatory behemoth like the EU. The latter's ongoing challenge remains finding a balance between preventing fragmentation of the internal market through inconsistent actions of Member States while staying mindful of their varying degrees of economic and technological development and thus readiness for implementing further-reaching data-sharing systems. And yet, addressing these challenges cannot be postponed for long. The data-sharing schemes to date developed and tested in the UK and Australia could, however, meaningfully inform future regulatory instruments in the EU.

### ***5.5 The need for timely consumer education***

Consumers are placed at the centre of data-sharing (policy) developments in all three jurisdictions discussed in this paper. They will only be able to exercise their rights effectively once they understand them. Notably, from a consumer perspective, the suggestion of 'more control' of one's data involving its being shared with a larger circle of interested parties may seem counterintuitive. Given that they remain the beneficiaries of, and key success factor for, the economy-wide roll out of data-sharing schemes, consumers should therefore be adequately informed about the benefits and risks that such data-sharing initiatives involve.

Consumer awareness of the aims and goals of CDR and its application in the banking sector in Australia is poor. A survey of about 2,000 consumers published in October 2019 revealed that public knowledge about Australia's sweeping Open Banking regime was dramatically low: 'A

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data-working-group-report-2021.pdf> accessed 29 September 2021 (Smart Data Spring Report): noting that it is important to ensure that the data-sharing 'ecosystem remains responsive to changing user attitudes and technological developments'.

quarter of people had heard the term “open banking”, but only a quarter of this group (27%) were confident that they could say that they understood what open banking was about – i.e. just 7% of all those surveyed’.<sup>149</sup>

These numbers are unlikely since to have changed substantially. Given Australians are, by and large, regarded as technologically savvy,<sup>150</sup> such a lack of enthusiasm about the many forthcoming benefits of Open Banking is striking. It is however explainable -- as in contrast to industry participants, consumers were largely left out of the consultation process on the development of CDR. Even though some organisations spoke on behalf of consumers,<sup>151</sup> they were few and, while raising important consumer protection issues, such organisations focused on informing and steering the regulatory debate, rather than conducting large-scale consumer education campaigns.

The data on consumer sentiment and awareness in the UK is similar. Two Which? Surveys conducted in 2019 found that only 25% of the respondents had heard of Open Banking. Those that were aware of it saw a lack of perceived benefits and expressed concerns about data security.<sup>152</sup> The results of the surveys prompted appeals to the FCA to run a consumer education

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<sup>149</sup> See Deloitte, ‘Open Banking: Switch or Stick? Insights into Customer Switching Behaviour and Trust’ (n 117) 3, 86.

<sup>150</sup> See The Harper Review (n 95) 22.

<sup>151</sup> For example, Consumer Action Law Centre (CALC) actively drew attention of the stakeholders to the risks of consumer data released under the CDR framework to be misused, see: Financial Rights Legal Centre and Consumer Action Law Centre, ‘Submission to the Select Committee on Financial Technology and Regulatory Technology’ (Submission No 36, December 2019) <[https://consumeraction.org.au/wp-content/uploads/2020/01/191223\\_FinTechInquiry\\_Sub\\_FINAL.pdf](https://consumeraction.org.au/wp-content/uploads/2020/01/191223_FinTechInquiry_Sub_FINAL.pdf)> accessed 29 September 2021.

<sup>152</sup> See ‘From Open Banking to Open Finance: Much Ado About Nothing, for Now.....’ (Ashurst, 30 March 2021) <<https://www.ashurst.com/en/news-and-insights/legal-updates/from-open-banking-to-open-finance-much-ado-about-nothing-for-now/>> accessed 30 September 2021.

campaign setting out a consumer's rights to share banking data.<sup>153</sup> As data sharing expands to other economy sectors, the scope of education campaigns would need to be regularly revised.

We are not suggesting that consumer education should become the foremost priority in either the UK, the EU or elsewhere today. Devising and appropriately testing and evaluating the rules and standards on data sharing in a given economy sector rightly takes precedence. Nevertheless, since a lack of awareness will represent a significant barrier to consumer uptake, consumer education should not be postponed for too long.

### ***5.6 The potential of action initiation to incentivise fairer commercial dealings***

Expanding data-sharing to further sectors provides the potential to do away with loyalty penalties and reinstitute a commercial morality, a basic fairness, that modern businesses no longer seem to prioritise. Thirty years ago, most businesses seemed to believe the same price should be offered to all customers. Today, however, customer loyalty is often exploited. By enabling consumers to benefit from more streamlined switching between products and services, economy-wide data sharing forces providers to treat all customers fairly or risk losing them to competitors.

The energy sector provides a better example of the power of this reform than banking because moving one's energy account is typically far simpler than changing banks. As indicated above, many consumers in many markets pay more than they need to for their electricity. This is not due to want of trying by smaller energy companies as much as it is due to the time poverty of consumers. When someone rings to offer a better energy plan, most of us say no thanks. We are

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<sup>153</sup> FCA, 'Open Finance' (n 49) para 2.30.

often too busy to talk, or if we have time, rightly think it is going to be difficult to compare what is being offered with what one is paying today.

But once CDR, coupled to action initiation, is applied to the energy sector in Australia one won't have to answer annoying unsolicited phone calls to change providers. One will simply click on a button on a website or email to direct one's energy usage data to a selected, potential new supplier. CDR will then enable that supplier to compare what one is now paying against what they are offering on the basis of the consumer's precise consumption patterns. The problems of comparing apples and oranges, so prevalent particularly in mobile phone plans, should be resolved as the regime will reward comparability. If one prefers the new arrangements the competitor offers, one will simply click another button, initiate the transaction and change provider.

In many contexts, changing providers will be as easy as clicking on a few buttons. A consumer would not have to give a potential new provider lots of information about them, and to switch to a new provider, would not have to call and disconnect from the current provider. Clicking one button will accept the new offer and authorise the new provider to action the change in suppliers. This will deny the current provider the opportunity to reclaim the customer by offering a better deal when they call to cancel the contract. It will be too late. The cancellation will have happened. Providers will be forced to treat customers fairly upfront – or risk losing them.

Banks today routinely offer new customers better terms on home loans than existing customers. Energy companies routinely do the same to existing customers. Action initiation as part of a data-sharing regime will make such exploitative practices mostly ineffective.

Thirty years ago, most businesses in many countries thought charging existing customers more than new customers was unfair. Most thought all customers should be offered the same prices. Those standards of behaviour seem to have today fallen away. In many contexts, broadly applied data sharing regimes that incorporate action initiation should reinstitute a commercial morality, a basic fairness, that modern business practices have set aside.

## 6. Recent developments in Europe

Some recent developments suggest that the EU and the UK may follow in the footsteps of Australia. It is, however, too early to adjudge the scope and promises of potential reforms.

To begin with, the European Commission recognises the advantages of Open Finance as well as the importance of a ‘balanced regulatory framework for the sharing of data on financial products’ which ‘will support the financial sector in fully embracing data-driven finance, and effectively protect data subjects, who must have full control over their data.’<sup>154</sup> It intends to use the experience gathered from the implementation of PSD2 to inform its work on ‘a broader open finance framework’.<sup>155</sup> A comprehensive review of the application and impact of PSD2 is scheduled for the end of 2021. As announced in the *Digital Finance Strategy*,<sup>156</sup> the European

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<sup>154</sup> European Commission, ‘Communication on a Digital Finance Strategy for the EU’ (n 50) section 4.3.

<sup>155</sup> *ibid.*

<sup>156</sup> *ibid* section 4.2: ‘The purpose of the digital finance strategy is to ensure that the EU regulatory framework for financial services is fit for the digital age’. *ibid* section 5: ‘This strategy identifies key priorities and objectives for digital finance in Europe over the four years to come [i.e. 2020 – 2024]’.

Commission plans to present a legislative proposal by mid-2022 so that the EU has an Open Finance framework in place by 2024.<sup>157</sup>

Another priority for the five-year period between 2020 and 2025 is to create a horizontal cross-sector legislative initiative for data access and use which ‘should create the necessary overarching framework for the data-agile economy’ and may be complemented by initiatives for the individual sectoral data spaces.<sup>158</sup> As mentioned, the drafting of a legislative proposal for Open Finance is scheduled to be completed by mid-2022. Apart from the payment area, specific legislation on data access and sharing has already been adopted in several other fields with identified market failures, such as smart metering and electricity network data.<sup>159</sup> At the time of writing, the extent to which these and other economy sectors will be addressed is, however, as vague as the details and degree of control over their data that consumers will be entitled to under respective instruments.

In the UK, too, it is increasingly agreed that for the full potential of Open Banking to be realised, it must continue to evolve into Open Finance.<sup>160</sup> In its 2019/2020 business plan, the FCA committed to leading public discussions on the subject and setting up an advisory group to help drive the initiative forward.<sup>161</sup> Responses to the FCA’s *Call for Input* – which explicitly pointed

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<sup>157</sup> European Commission, ‘COM(2020) 592, 24 September 2020’ (n 50) 15.

<sup>158</sup> European Commission, ‘A European Strategy for Data’ (n 16) 12.

<sup>159</sup> Directive 2019/944 for electricity, Directive 2009/73/EC for gas meters; Commission Regulation (EU) 2017/1485, Commission Regulation (EU) 2015/703.

<sup>160</sup> Faith Reynolds et al, ‘Consumer Priorities for Open Banking’ (*Open Banking*) 10 <<https://www.openbanking.org.uk/wp-content/uploads/2021/04/Consumer-Priorities-for-Open-Banking-report-June-2019.pdf>> accessed 29 September 2021.

<sup>161</sup> See FCA, ‘Our Business Plan 2019/20’ (Corporate Document, 17 May 2019) 22 <[www.fca.org.uk/publication/business-plans/business-plan-2019-20.pdf](http://www.fca.org.uk/publication/business-plans/business-plan-2019-20.pdf)> accessed 29 September 2021.

to CDR in Australia for guidance<sup>162</sup> – identified savings, credit, and mortgage accounts as obvious choices for the inclusion in the national data-sharing scheme,<sup>163</sup> with a ‘phased approach’ to implementation preferred to a wholesale (or ‘big bang’) model comprising the full range of financial products and services.<sup>164</sup> It remains to be seen, however, whether at all and how these proposals will be taken over in the UK’s Open Finance ecosystem.

The UK is noticeably more advanced in its plan to expand data sharing across economy-sectors than the EU and is further down the road Australia is travelling. However, there is still a long way for it to go. The *UK National Data Strategy*, published in September 2020, highlighted Smart Data as a key initiative that would support the delivery of government’s mission to unlock the value of data across the economy. The aims of this initiative are reflective of the CDR goals and involves the secure sharing of data with third-party providers.<sup>165</sup> Following Open Banking (regarded as the most advanced Smart Data accomplishment in the UK), the government has committed to supporting initiatives in other sectors such as finance, energy, telecommunications and pensions. When parliamentary time allows, the plan is to introduce primary legislation providing legislative footing for and mandating industry participation in respective Smart Data initiatives.<sup>166</sup> So further lessons for Europe should also become apparent from the UK in time.

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<sup>162</sup> See FCA, ‘Call for Input: Open Finance’ (n 4) para 1.10.

<sup>163</sup> FCA, ‘Open Finance’ (n 49) para 3.65.

<sup>164</sup> *ibid* paras 3.68, 3.70.

<sup>165</sup> See UK’s National Data Strategy (n 21).

<sup>166</sup> Smart Data Spring Report (n 148) 5 and 8.

It appears that at the earlier stage of the Smart Data conceptualisation in the UK, regulators were expected to assume a key role in its development, by initiating necessary activities, setting expectations and standards, and stimulating the engagement of industry and consumers in data sharing.<sup>167</sup> Today, however, the Department for Business, Energy and Industrial Strategy (BEIS) bears overall responsibility for Smart Data policy coordination, as consultations on data sharing in different UK sectors are running in parallel.<sup>168</sup> In light of concerns that the current governance arrangements enable sectoral Smart Data initiatives to develop independently of one another and at various speeds,<sup>169</sup> efforts are currently directed at developing arrangements to harmonise the timing and stages of policy development in different sectors (including extending the duration of the existing cross-sector working group which serves as a forum for discussion primarily between government departments and regulators, or establishing a cross-sector Smart Data Council which would include a wider cross-sector membership comprising industry, consumer interest groups and technical experts).<sup>170</sup>

While it is too early to predict which pathway will eventually be chosen by the EU, both the Australian and the UK experience suggest that there is an important role for policy agencies in setting a clear strategic vision and driving desired outcomes for national data-sharing regimes.

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<sup>167</sup> UK Government, Department for Business, Energy and Industrial Strategy, 'Modernising Consumer Markets' (n 32) 23, para 63.

<sup>168</sup> With FCA leading the development of data-sharing arrangements in banking and finance, Ofcom in communications, Ofgem in energy, and DWP (Department for Work and Pensions) in pensions. See also Smart Data Spring Report (n 148) 7.

<sup>169</sup> Smart Data Spring Report (n 148) 7, 25-28.

<sup>170</sup> *ibid* 8, 25-28.



## 7. Conclusion

In *A European Strategy for Data*, the European Commission has formulated its vision for the data economy where data flows between Member States and sectors, is available for use in full respect of European values, and with fair, practical and transparent rules.<sup>171</sup> The UK government believes that ‘unlocking the value of data is key to driving growth both within the digital sector and across the economy’<sup>172</sup> and is determined to follow through on this task.

As we have sought to demonstrate in this paper, Australia’s experience with CDR to date offers some valuable lessons for the EU and the UK. One should not forget, however, that the development of the CDR Rules for the banking sector in Australia drew on the ideas and concepts previously trialled in Europe. As shown, the EU, the UK, and Australia all aspire to become ‘global leaders’ in data sharing and use. Yet, in a growing move towards regulating data portability for the benefit of consumers a worthier goal could be to focus on becoming ‘strong peers’. Establishing robust national data sharing frameworks is a challenging task and will remain a learning-by-doing undertaking for years to come. However, as data defies boundaries and wants to move freely, approaches to its regulation need to be consistent and well thought through across jurisdictions. The sooner national policy-makers find themselves on the same page, the more control consumers will have over their data at home, and also abroad.

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<sup>171</sup> European Commission, ‘A European Strategy for Data’ (n 16) 5.

<sup>172</sup> UK’s National Data Strategy (n 21).