Consultation response

AmCham EU response to the consultation on a new digital finance strategy for Europe

American Chamber of Commerce to the European Union
Speaking for American business in Europe

Avenue des Arts/Kunstlaan 53, 1000 Brussels, Belgium • **T** +32 2 513 68 92
info@amchameu.eu • amchameu.eu • European Transparency Register: 5265780509-97

Introduction

AmCham EU welcomes the European Commission's timely initiative to consult on its digital finance strategy. We welcome that this comes at the same time as the European Commission is also thinking about how to make Capital Markets Union and the Single Market for financial services a reality. In our response we have adopted a broad approach to the meaning of digital finance. We use this term broadly to mean the application of new technologies to financial services.

The use of technology in financial services is not new. In fact, the financial services industry has always been at the forefront of testing and adopting new technologies to transform the financial services industry, increase competition and efficiency, as well as offering new solutions to its customers. What is new is the speed of innovation we are seeing in recent years covering all aspects of the financial services sector and leading to the development of new business models, services and products.

This includes start-ups developing new solutions and business models alongside traditional financial institutions and mature technology companies who are themselves innovating and digitising the way they deliver financial products and services for their customers.

The application of technology to the financial services sector does not, in itself, alter the role of financial services for society: to provide investments, capital raising, risk transformation or the provision of effective payment and other services. Consequently, AmCham EU would argue that the introduction of technology does not require a radical rethink of Europe's regulatory and supervisory approach to financial services. By itself, digital finance does not require the existing regulatory framework for financial services in the EU to be rewritten.

Any new European regulation or supervisory approach should encourage and facilitate the adoption of digital business models by financial institutions and foster Europe's global competitiveness, while addressing, if appropriate, possible new risks to customers or the financial system arising from the speed or scale of adoption of new technologies. Not least COVID-19 and the events of recent months have shown how digital services can help maintain the resilience of the economy.

Bearing these objectives in mind, AmCham EU has developed a number of concrete recommendations that should govern the EU's digital finance strategy:

I. Ensuring a technology-neutral and innovation friendly EU financial services regulatory framework (questions 4 to 14)

1. **Non-discrimination**: Technological innovation is not tied to individual jurisdictions. Similarly, financial services are by their very nature international. AmCham EU is therefore highly critical of any attempts by governments to favour one technological solution or one financial institution or technology company over another. We believe that financial institutions should therefore have open, fair and non-discriminatory access to any relevant infrastructure and technology solutions based on proportionate compensation.
   We watch with concern any calls for data localisation, protectionism, pro-active industrial policies, the suspension of competition rules, unjustified state intervention or calls for economic sovereignty anywhere in the world. The EU has always prided itself on being an open economy. It has built its economic prosperity on its successful Single Market. This is characterised by a sound regulatory framework, open competition, the reliance on international standards and supervisory cooperation. The EU's digital finance strategy should clearly base itself on these same principles.
   In recent trade talks with the US and other third countries, the EU has rightly pointed out that the commercial success of individual companies, for example Europe's car industry, should not lead to defensive trade measures or protectionism. AmCham EU would urge the EU to adopt the same approach when assessing non-EU financial and technology companies offering digital finance solutions in Europe.

2. **Regulation should not hinder innovation**: The development of many technologies is still in its infancy. It is therefore important that any policy response does not implicitly limit or contain the ability of the financial

services sector to test and develop new applications. Further, AmCham EU supports a policy response that treats all current and future industry participants on an equal and fair basis. As a result, a one-size-fits-all approach is not conducive to technological innovation. Where the EU decides that policy intervention is merited, the EU should draw on its full policy toolbox. This includes self-regulation, supervisory guidance and best practices, the use of competition policy, standard setting and regulation. AmCham believes regulation should be evidence-based, and considered once a new technology has been widely adopted and any potential risks to customers and the financial system has been carefully assessed. Similarly, existing regulation should not hinder traditional financial institutions to also develop, test and launch innovative services and products.

3. **Determining the regulatory response - same activity, same risk, same regulation**: AmCham EU strongly believes in the principle of 'same activity, same risk, same regulation'. The introduction of digital financial services should not lead to regulatory arbitrage. It should not lead to lower customer protection, reduced safety or a risk to financial stability. Where regulation is required, this should be directed at individual activities and the risks that come with them, not specific technologies or companies. These new rules should be **proportionate** to the risks associated with the specific activities. AmCham EU welcomes moves by the EU to adopt new tailored rules and passporting rights where appropriate. The Payment Services or E-Money Directives have served as good examples of this approach. In as far as possible new regulation should be principle-based and outcome focussed, rather than imposing prescriptive rules. This allows for regulatory flexibility and adaptability over time.

4. **Accommodating a Single Market for crypto assets:** Crypto assets serve as a good example for the proposed regulatory approach. At present, this is still a nascent market. As the market for crypto assets, tokenisation and stable coins continues to evolve, AmCham EU welcomes plans by the European Commission to consider the EU policy implications. Any decisions about possible regulation should be carefully considered. Where a crypto asset mirrors an existing financial instrument in form or affect, the concept of same activity, same risk, same regulation should apply. Where crypto assets are being operated outside the regulated space, AmCham EU favours a risk-based assessment before any policy action is taken. Any policy response should be proportionate to the risks identified. In addition, any relevant horizontal legislation equally remains applicable, such as anti-money laundering/anti-terrorism financing laws or data privacy.

5. **Balancing cross-sectoral regulation with financial services regulation**: AmCham EU supports a uniform and balanced application of the GDPR across Europe. One of the main goals of the GDPR is to achieve greater harmonisation in data protection rules and practices across the EU in favour of the Single Market and in order to make business more efficient, improve legal certainty and provide data subjects with the same protection across the EU. The European Data Protection Board (EDPB) has a crucial role to play in this regard. Its guidance has been important in helping companies understand their compliance obligations. However, uncertainty has been triggered by diverging interpretations with guidance that sometimes goes beyond what the GDPR prescribes. This is regrettable and limits the benefits that harmonised rules would provide. It is therefore essential that the rules around cooperation between EU Data Protection Authorities (DPAs) are fully respected to ensure that they are interpreting the GDPR in a harmonised way and that enforcement proceedings are taking place in accordance with the mechanisms described in the GDPR. Similar cross-sectoral initiatives are now underway in areas such as cyber security, artificial intelligence, non-personal data and digital platforms. If adopted in a proportionate way, these initiatives can contribute to EU-wide harmonisation and facilitate digital commerce in the Single Market. It nonetheless remains important that these cross-sectoral initiatives are carefully assessed for their impact on digital finance. Horizontal legislation should not lead to the duplication of rules or conflicts between different rules. They should also not become a barrier to market access or the ability of the financial sector to innovate.

6. **Promote the use of cloud services**: The transition to cloud service providers can help financial institutions, especially smaller organisations, to innovate and have access to technology that they otherwise would not have while at the same time improving their security. Nonetheless, the general uptake of cloud computing

by financial institutions is still modest. AmCham EU believes a structured dialogue between financial supervisors, cloud service providers and financial institutions can contribute to a better understanding of the fact that storing data in the cloud can be as secure as housing data in the organisation's own servers. This is also a good example where financial supervisors should work with their supervisory counterparts on the data privacy and cyber security. Furthermore, cloud services can improve the resilience and stability of the financial system because cloud services are flexible, dynamic and subject to rigorous ICT risk management system and testing.

II. Removing fragmentation in the Single Market for digital financial services framework (Questions 15 to 25)

7. **Reaping the benefits of disintermediation – clear home state rules:** Digital financial services facilitate the cross-border provision of financial services in the Single Market, including to end-customers. AmCham EU applauds the foresight the EU had when adopting the E-Commerce Directive in 2002, which enshrined a clear home state supervision and passporting regime. The underlying principle of the E-Commerce Directive remains valid today. In an online environment, the Single Market can only function effectively if the supervisory responsibility across borders is clearly assigned. AmCham EU would argue that the same home state principle should apply to digital finance. This is to be accompanied by strong supervisory cooperation and more harmonised cross-border consumer protection, anti-money laundering, anti-terrorism financing or fraud rules.

8. **Clarification around outsourcing regimes**: With the advent of digital finance, financial institutions are working with third party technology providers to buy in expertise, services and partner with to develop new solutions. One example of this is the growing importance of cloud services providers but there are many other reasons for cases where financial institutions rely on the ecosystem of third party providers for external expertise, including to improve their risk management applications, meet their reporting obligations or to strengthen their fraud prevention. Few of these partnerships do or should fall under the existing outsourcing regimes in EU law. While increasing efficiency, these arrangements seldom lead to a transfer of material risks from the financial institution to the third party provider. The Guidelines by the three European Supervisory Authorities on outsourcing have helped harmonise requirements across the EU but differences remain between the national competent authorities. When assessing the use of third party providers by financial companies, supervisors should apply a clear materiality test before imposing outsourcing rules on these arrangements.

9. **Supervisory capabilities**: AmCham EU welcomes that the powers of the European Competent Authorities have been strengthened in the area of digital finance. In the future, EU supervisors will have to scale up their capabilities and understanding of new technologies. Only in doing so can the supervisory process keep pace with developments and not inadvertently become a barrier to financial services innovation. Similarly, the emergence of new technologies means that financial services supervisors will need to find ways to strengthen their cross-sectoral and cross-disciplinary cooperation with data privacy and cyber security supervisors, as well as relevant law enforcement agencies. Digital finance requires that the financial sector is given greater guidance and certainty, as well as to ensure consistent rules in relation to data and the use of new technologies.

10. **Support sandboxes**: Innovative businesses face uncertainty on how different regulations and supervisory expectations apply to them and how authorities will interpret the rules and respond to their new business models. AmCham EU believes in the benefits of supervisory sandboxes where financial companies can test innovative solutions with guidance from the respective supervisor but without being subject to the full regulatory framework. These have the potential to facilitate robust dialogue between banks, non-bank

FinTechs and supervisors on barriers to partnerships and deploy innovative services and/or technologies. It is important that any such initiatives allow for voluntary participation in order to ensure that the activity of market participants is not unintentionally hindered.

III and IV. Promote a well-regulated data-driven financial sector and broader issues (Questions 26 to 47)

11. **Technology as an enabler – this should be fostered**: Digital finance offers huge opportunities for the financial sector to improve their engagement with the customer, processes and service delivery, risk management, fraud detection, anti-money laundering, anti-terrorism financing and compliance with regulation (so called Reg Tech). In this regard the adoption of new technologies help to reduce and mitigate risks across the industry, reduce costs and ultimately lead to lower costs and better services for the customer. The EU should encourage and support this continuous investment by the industry. AmCham EU would urge the EU to conduct fitness checks to assess whether existing regulation remains technology neutral and can for example accommodate new reporting practices or modern risk and fraud management techniques. In addition, the EU might consider greater levels of harmonisation in its regulatory regimes with regard to rules on anti-money laundering, customer due diligence, EU digital identity/verification, eID that could be used by the private sector or the access and use of both personal and non-personal data.

12. **A consistent approach to the access and use of data**: In the new digital economy financial institutions leverage data to innovate and build and maintain digital trust. The ever-increasing ability to collect volumes of data and the rapidly evolving analytical technologies are revolutionising the way financial services companies improve their insights across customers and markets, and tailor financial products and services to meet the customers' needs. As already pointed out, access to data also facilitates better risk management and regulatory compliance.

    However, financial services companies often face legal uncertainty over the use of data. Under the GDPR personal data can only be processed under certain conditions, including on the basis of client consent or 'legitimate interests'. There is a need to bring legal certainty and transparency to when legitimate interest for accessing and processing of personal data can apply, particularly for highly regulated sectors such as the financial services industry in relation to economic and/or commercial matters. AmCham EU believes this is also a precondition for the EU to develop a consistent approach to open architectures, such as open finance. Data portability will encourage an explosion of innovation as more intuitive and tailored products are developed for customers. There are currently no obligations on data controllers to adapt processing systems to make access to data feasible. Therefore, it is important to foster standardisation of formats for data sharing akin to the provisions under the Payment Services Directive, as well as to promote the use of open APIs to enable customers to share their data between organisations on a cross-industry basis – including from financial services, energy and healthcare providers to social media and online market places.

    The financial services sector relies heavily on data; not least for risk management purposes and to meet its reporting obligations. The ability to access, use and share data responsibly at a global level is of critical importance for the financial services industry. AmCham EU is therefore extremely concerned about recent trends internationally but also in the EU to impose data localisation rules on financial services companies. One of the big achievements of the outgoing European Commission had been the adoption of EU legislation on the free flow of data. The European Commission has also negotiated a ground-breaking trade agreement with Japan on the free flow of data between these two jurisdictions. The financial services sector in particular relies heavily on global data flows. AmCham EU would urge that the upcoming EU Data Strategy, while further opening data flows within the EU, does not close itself to such data flows at the international level.

13. **Digital finance - making sustainable finance a reality**: In few areas is the need for digitalised, machine-readable data more relevant than in the area of sustainable finance. Data collected and generated with public funds, in particular data on climate but also related to road safety and public health should be considered open data and therefore made available as a basis for product development, pricing, underwriting or other decisions. This data should as far as possible be standardised and comparable. AmCham EU therefore welcomes the EU work on a Data Strategy for non-personal data.