

Unlocking financial data

Alexandru Chistruga ✉

Alexandru Ioan Cuza University of Iași, Romania

Abstract: The current research will concentrate on a legislative proposal that is awaiting approval, namely the proposal for a regulation of the European Parliament and of the Council on a Framework for Financial Data Access. The proposed legislation seeks to establish rules governing the use, sharing, and access of certain categories of customer data in financial services, such as mortgage credit agreements, loans, investments in financial instruments, or pension rights. We understand the European Union's desire to establish a framework for access to financial data, especially since access to data would allow businesses to offer tailored products to customers based on the information they collect, but the regulation, at least in its current form, entails a number of obvious risks. For instance, investors specializing in recovering non-performing loans, also referred to as vulture funds, would obtain a plethora of information, facilitating the identification of debts suitable for effective enforcement. Therefore, the proposed regulation appears to be a lifeline for vulture funds, increasing their efficiency rather than eliminating them, even though, as we will show, their practices may be regarded as unethical.

Keywords: data economy, framework for financial data access, vulture funds

Introduction

The purpose of this paper is to analyse the provisions of the European Parliament and Council's Proposal for a Regulation on a Framework for Financial Data Access. Special emphasis will be placed on the possible opportunities for vulture funds following its implementation. Consequently, the article will be structured into two parts. The first section will explain the concept of vulture funds, while the second will concentrate on the proposed regulation, identifying the most important dangers to individuals affected by vulture fund activity.

Before anything else, we note that vulture funds' activities have been examined and debated in the academic community (Fisch et al., 2004; Megliani, 2018; Wozny, 2018). However, the majority of studies prioritize vulture funds that target sovereign state debts (Blackman et al., 2010; Brutti, 2020; Sample, 2014). In other words, there are few authors who analyse the impact of vulture funds on private companies or individuals. For instance, recent studies about the category of vulture

✉ PhD Student, Faculty of Law, Alexandru Ioan Cuza University of Iași, Romania; e-mail: alexandruchistruga98@gmail.com.

funds that deal with private companies have predominantly concentrated only on the case of Sears Holding Corporation (Lehavy et al., 2011; Stowell et al., 2017), which demonstrates that this topic has not been thoroughly analysed.

As a result, the purpose of this research is to contribute to the analysis of understudied types of vulture funds, primarily those that purchase private non-performing loan contracts. In this sense, as the European Union prepares to establish a framework for financial data access, we anticipate that this category of vulture funds will play a larger role in the global economy. Furthermore, given the existing lack of research on the proposed legislation, this report tries to identify important risks that may require attention.

1. Unveiling the vulture funds. Definition and analysis

Significant acquisitions usually require signing loan contracts. These loans typically have longer payback terms and mortgage-style collateral guarantees. For example, a family wishing to buy an apartment might be eligible for a mortgage with a payback period up to 25 years. This long-term loan helps the family spread the cost of the apartment over a longer period of time, making monthly payments easier to manage. In a similar vein, companies frequently seek loans to buy equipment and fund expansion. This enables them to invest in infrastructure, increase manufacturing capacity, upgrade technology, and fund other important initiatives without using significant sums of their own resources.

Given these circumstances, there is a risk that unexpected events during the loan repayment period will damage the borrowers' financial situation, making it more difficult for them to meet their payment obligations. In this regard, recent global events such as the COVID-19 crisis and the war in Ukraine have significantly affected individuals and private businesses. Due to these unanticipated circumstances, some borrowers have had to renegotiate loan contracts as the rates have dramatically increased, damaging them.

Those who failed to renegotiate their loan arrangements went bankrupt, hurting both borrowers and commercial banks. In such cases, banks try to enforce credit agreements through foreclosure, a legal process that enables them to recover lent money. However, not all credit agreements include such guarantees, leading to unpredictability in the debt collection process. As a result, banks are forced to choose between pursuing debt recovery through legal action, which incurs attorney fees, time costs, and potentially lengthy execution periods, and selling non-performing loans on the secondary capital market.

Even so, not every creditor will be willing to buy credit contracts that are clearly non-performing. So, banks are forced to sell these contracts at a significant discount in the secondary capital market. This strategy allows them to recover part of their loaned funds. However, the number of creditors willing to purchase such

credits is limited, with speculative investment funds (also known as vulture funds) being the most widespread.

Vulture funds are defined as investment entities “*that buy up distressed sovereign debt at a low price and seek to secure a high return*” (Sookun, 2010). Another author says that the vulture fund business model consists of purchasing distressed debt on the secondary market, often at a steep discount, with the intent of suing or threatening to sue in order to recover the full amount (J.E. Fisch, 2004, pp. 1048-1116). So, vulture funds are investment funds that buy non-performing financial securities issued by distressed states or private companies on the secondary capital market with the intention of enforcing their claims either by blocking the debt restructuring procedure or by taking legal action in court (Soufraki, 2020). In general, the return on investment is the difference between the amount spent on purchasing financial assets and the actual price received from the debtor state or company. If a debtor fails to fulfil their obligations, the profit is made up of the interest that accrued until the end of the litigation.

According to the definitions, vulture funds are classified based on their “victims,” with some focusing on acquiring government or municipal bonds issued by states as they approach default, while others target struggling private companies. In this study, we are going to focus only on vulture funds that target private companies or individuals.

1.1. Vulture funds: *modus operandi*

Vulture funds’ strategies vary depending on their objectives. Personal loans have limited potential earnings, with credit contracts worth only thousands of euros. As a result, vulture funds prefer to buy mortgage-backed credits, the enforcement of which may grant them ownership rights to mortgaged properties, either directly or through affiliated companies. In some jurisdictions, such efforts have resulted in vulture funds obtaining ownership of a significant number of apartments, which helps them raise rental prices (Bulfin, 2023).

When dealing with private companies, vulture funds take a different approach, often seeking higher returns. Their first goal is to acquire debts from creditors of bankrupt firms, after which they adopt a passive strategy (M.J.P. Anson et al., 2011, pp. 313-342) and wait until the debtor’s financial situation improves (Brutti, 2020, pp. 1819-1854). Vulture funds typically stay out of the bankruptcy process, even though they have the potential to influence debt restructuring. If a company’s financial situation does not improve, they may decide to sell all their assets, often at a higher price than they first invested.

The most well-liked method used by vulture funds to acquire corporate debt is credit contract purchases. Unwilling to wait for debt restructuring, creditors sell these contracts for much less than they would have received if the debtors had completed their obligations (Casa et al., 2008 pp. 1-25). Due to the sellers’ steep

discounts, vulture funds are able to purchase the debt of numerous companies at a low cost.

Even in these conditions, vulture funds use their financial resources more prudently to minimize losses. They reduce their risks by purchasing loans from a range of companies. A single business's economic revival can greatly increase investment profitability, even if the other companies go bankrupt. At the same time, vulture funds prefer investing in companies with significant tangible assets that could be sold. Remarkably, a subset of vulture funds seeks bigger returns—between 12% and 15%—by purchasing the riskiest debts without planning to engage in the bankruptcy process (M.J.P. Anson et al., 2011, pp. 313-342). These funds typically pay an insignificant price for credit contracts that are supposed to be extremely difficult to enforce. If the companies start paying their debts, the vulture funds could make a huge profit.

Nowadays, vulture funds have changed their strategy, doing more than just buying debt and adopting a passive position (Zane, 2016, pp. 1-4). They developed a number of strategies with the purpose of improving profitability. For example, several vulture funds are accumulating at least one-third of a company's debt in order to block bankruptcy proceedings (Casa et al., 2008 pp. 1-25). These funds choose debts meticulously, taking advantage of creditors who are inclined to sell their unpaid debts at a huge discount. After acquiring a significant amount of debt, vulture funds start to negotiate restructuring terms, managing to obtain advantageous conditions even at the expense of the other parties involved.

However, in most cases, decisions made by vulture funds are insufficient to rescue the company, so they have to take more aggressive actions. For example, the new management starts to implement cost-cutting measures such as property leasing or contracting loans from companies affiliated with vulture investors. While these tactics may result in short-term economic gains that allow vulture funds to return their investments, they usually indicate the company's approaching collapse (Liberto, 2022).

We emphasize that vulture funds require comprehensive information about debtors in order to operate efficiently. In this regard, they have to identify the insolvent company before acquiring majority ownership. The procedure is usually simple because most countries have public sources that allow interested parties to get the names of companies involved in insolvency proceedings. For example, in Romania, this type of information could be found in the National Trade Registry Office's Insolvency Proceedings Bulletin, which is a public registry. After spotting a potential victim, vulture funds start to accumulate detailed information about the company's debts, creditors, and chances of recovery. This critical information is available through insolvency documents, which include reports from court liquidators summarizing the list of claims against the company and their holders. In addition, liquidators inventory the company's assets, providing vulture funds with vital information on its holdings.

2. Vulture funds in action: Kmart corporation case

Kmart Corporation is one of the most notable cases that involves each of the previously listed stages. Kmart Corporation filed for bankruptcy on January 22, 2002, under Chapter 11 of the US Bankruptcy Code, in the Northern District of Illinois (*In re Kmart Corp*, 2006). Kmart was the third-biggest discount retailer in the US at the time, with over 2,100 locations across the globe (Gilson, S.C., Abbott S., 2010, pp. 115-127).

Starting in the spring of 2002, an investment fund called ESL Investments began purchasing Kmart debt. The pattern persisted until the summer of 2002, when ESL Investments purchased Kmart's corporate bonds at much lower interest rates due to the bankruptcy proceedings. In addition, ESL Investments took a significant part of non-performing loans from other e-creditors. Furthermore, ESL Investments and Third Avenue, another investment fund, granted a loan of around \$140 million in exchange for 14 million shares of the reorganized company (S.C. Gilson, 2008, pp. 115-127).

As a result, by the summer of 2002, ESL Investments had obtained more than a billion dollars in financial securities, a sufficient amount of debt that provided it with the opportunity to participate in the Financial Institutions Committee, which made decisions about the company's restructuring (Delventhal, 2022). Kmart's restructuring plan was accepted in the spring of 2003. After the company emerged from bankruptcy, Eddie Lampert, the founder of ESL Investments, became CEO (Lehavy et al., 2011, pp. 391-419).

In a short time, the company implemented a number of structural adjustments that led to a \$276 million profit in a year. Furthermore, in November 2004, Kmart merged with another big retailer, Sears, with Eddie Lampert taking charge of the newly formed Sears Holdings Corporation. The merger was possible because ESL Investment held the controlling stake in Kmart Corporation, as well as 10% of the shares issued by Sears (J. Bienenstock, 2019).

From the information presented, it follows that in 2003, ESL Investments took over a company with nearly one billion dollars in debt. In a relatively short period, the company managed to repay the accumulated debts, starting 2004 with a profit of over \$200 million. Moreover, less than two years after emerging from insolvency, Kmart Corporation merged with another company, increasing the number of managed stores to over 3,500 (Stowell et al., 2017, pp. 1-22). The result is exceptional, with Kmart Corporation serving as one of the few examples demonstrating that the activities of vulture funds can be beneficial. We draw attention that there were no other creditors involved in restructuring Kmart Corporation's accumulated debt. Without the intervention of ESL Investments, Kmart Corporation, a company created in 1962, would have gone bankrupt, resulting in the closure of the 2,100 stores under its management, an event that would have had a direct impact on the United States economy.

2.1. Maximizing returns: how vulture funds extract value

Obviously, the billions of dollars invested by ESL Investments in the acquisition of Kmart Corporation needed to be paid back. In this regard, starting from 2004, Eddie Lampert initiated a drastic cost-cutting campaign, like firing a huge portion of employees or selling properties. At the same time, Sears Holding Corporation began borrowing from Edi Lampert's associated companies. In addition, in a letter to investors, Lampert stated that he would engage in stock buybacks rather than constructing and renovating facilities (Peterson, 2017). For example, between 2005 and 2010, Sears Holdings spent nearly \$5.8 billion on stock buybacks, while the company's earnings were only \$3.8 billion (Naidu-Ghelani, 2018). Despite a significant increase in stock price, the company's real earnings decreased from \$51 billion in 2006 to \$22 billion in 2016 (Sabanoglu, 2022).

To fund these buybacks, Sears Holdings liquidated key assets. As an illustration, the corporation sold the Sears Hometown and Craftsman brands for only \$900 million, despite their estimated value of \$2 billion (Pandy, 2018). Sears Holdings also sold the land where 266 of its most profitable stores were located for \$2.58 billion, which was less than the estimated market value (M. Gietzmann et al., 2017, pp. 1-27). However, the parties did not limit themselves to the sale of the land. Lampert's goal was to obtain additional income from rents. In this regard, the most profitable stores owned by Sears were located on the sold land, forcing the company to choose between closing them or signing lease contracts for the land they previously owned (Dayen, 2018). Obviously, Sears Holdings Corporation could not afford to give up the profit brought by the 266 stores, so it was forced to accept the unfavourable conditions imposed by Seritage Growth Properties (Peterson, 2017).

In the mentioned lease contracts, a series of clauses were stipulated that granted the lessor the right to re-rent 50% of the land to other companies without Sears Holdings Corporation being able to object in any way. Additionally, all contracts included penalty clauses obligating the lessee to pay an amount equivalent to 12 months' rent if they decided to close the stores located on the leased land (Richter, 2019). Given these circumstances, Sears Holdings Corporation was forced to pay the rent even when the stores were no longer profitable, as bearing the penalty clause was far too burdensome. This transaction was carried out with Seritage Growth Properties, another ESL Investments-controlled entity, so Eddie Lampert was the direct winner (Peterson, 2017).

We believe Lampert's control of Sears allowed for these harmful transactions to occur. Any good-faith administrator would have recognized the negative effects of selling such vital assets. In addition to selling assets, Sears Holdings made loans, with its largest creditor being ESL Investments. Between 2012 and 2018, Sears Holding borrowed more than \$2.6 billion in loans backed by mortgages on its assets from ESL Investments (J. Bienenstock, 2019). Loans typically had a minimum interest rate of 10% and a one-year maturity period. However, Eddie Lampert didn't

limit himself to providing loans through ESL Investment. He also funded Sears Holdings Corporation through other firms under his control. For example, “the Sparrow Lenders” issued mortgage-secured loans totalling more than \$624.2 million (Hove et al., 2019, pp. 1-168). The substantial debts and lack of profit resulted in a more than 95% reduction in stock value, which fell to 50 cents per share by 2018.

As a result, on October 15, 2018, Sears Holdings Corporation declared bankruptcy, claiming \$6.9 billion in assets and more than \$11.3 billion in debt (Kroll, 2018). The vast majority of loans from Lampert-affiliated companies were secured by mortgages, giving them priority in liquidation. Thus, for these funds, bankruptcy constituted a new financial opportunity.

In conclusion, the Sears Holdings Corporation case exemplifies how vulture funds can exert influence over businesses. Eddie Lampert’s activities were typical of these funds, resulting in short-term profits for investors but causing long-term damage to the firm. The funds managed by him acquired Kmart Corporation’s debts at a considerable discount, gaining control over the company. To emerge from insolvency, Eddie Lampert, as the administrator of Kmart Corporation, adopted a series of favourable short-term decisions, accumulating sufficient funds to merge with Sears. Subsequently, to recover his investments, Eddie Lampert began to promote a series of decisions that were catastrophic for the future of Sears Holdings Corporation but profitable for the investment funds he controlled. These decisions included selling assets, reducing staff, accumulating loans, and closing over 2,000 stores in less than 10 years (Spross, 2018).

Sears Holdings Corporation later sued Lampert, accusing him of draining billions of dollars from the company while he was CEO. The parties reached an agreement that assumes the Sears company will earn only 175 million dollars, which is insignificant in contrast to Lampert’s gains. However, a part of \$125.6 million was covered by insurance companies, with the remaining amount paid by Eddie Lampert and his investment funds (Unglesbee, 2022). This particular case demonstrates how profitable vulture fund actions can be for investors while also highlighting the risks for the companies involved.

3. Vulture funds and individual debts: insights from Ireland

In the case of individuals, vulture funds face greater challenges in obtaining valuable financial information since they must follow a number of restrictions, the most important of which is the European Union’s General Data Protection Regulation (GDPR). Also, personal information is not as accessible as private company data. As a result, vulture funds tend to avoid dealing with individuals who default on their loans. However, we were able to identify several vulture funds that buy non-performing loans at a significant discount with the intention of enforcing at least some of them. Typically, banks aim to sell non-performing loans to “credit

recovery agents” in an effort to get rid of them, making the activity of vulture funds easier.

Following the 2008 property crisis in Ireland, the majority of banks were compelled to liquidate non-performing real estate loans. Vulture funds appear to be saviours, despite the fact that they purchase loans with a discount of up to 80% off their original value. The number of non-performing loans owned by these funds quickly exceeded 100,000 (Quinn, 2021), creating a new risk for Irish citizens: eviction (Tierney, 2019). Although contractual terms remained the same, creditors’ tactics changed.

While banks frequently take a more cautious public position, attempting to avoid unfavourable headlines and maintain their reputation, vulture funds are viewed as more aggressive and less concerned about public perception. They may use harsh debt collection practices, such as sending direct notifications to debtors and threatening to foreclose on their houses (Lyons, 2016).

At the same time, even if loan clauses remained identical, vulture funds gradually began renegotiating contracts in order to add higher interest rates, often exceedingly twice the market average (Deegan, 2023). Their strategy did not include a quick rate hike but rather a gradual increase of tens of dollars per quarter, causing debtors to discover the changes only after they became financially unsustainable (Treacy, 2024). As a result, many debtors are unable to satisfy their obligations; some are facing eviction from previously purchased properties. Also, through mortgage foreclosures, vulture investors have obtained ownership of thousands of apartments throughout Ireland (Debt and Development Coalition Ireland, 2017, pp. 1-20).

The aim of vulture funds was to gain a large enough number of apartments that could help them influence market prices. In achievement of this goal, these funds not only foreclosed on real estate mortgages but also purchased apartments in specific neighbourhoods of Irish cities. Rather than purchasing individual apartments, they sought to influence pricing in specific urban areas. With large ownership of apartments and huge bargaining power, these funds began to boost rental rates, causing financial hardship for some renters.

The housing crisis in Ireland has reached a point where legal firms that specialize in litigation between debtors and vulture funds have started to appear (Bell & Company, 2024). Their main priority is representing debtors in negotiations with these funds, with the goal of obtaining interest rate reductions. Essentially, debtors have no legal recourse to nullify contracts obtained by investment funds. In this regard, debtors appear as persons who refuse to execute their obligations, while vulture funds appear as creditors trying to enforce their rights.

However, in 2022, a judge allowed an Irish couple’s insolvency claim, cutting the interest rate from 8% to 2.5% and allowing them to repay the remaining balance of their loan over the next 25 years (Maguire, 2023). Usually, insolvency results in the loss of certain debtors’ rights. But adjusting the terms of credit agreements may allow debtors to stabilize their financial situation without being pressured by vulture

funds. So, other debtors that face similar problems with vulture funds may take this option to save their future.

The Kmart Corporation and the Irish housing crisis demonstrate how vulture funds may affect society. In this regard, many people lost their jobs, and others were evacuated from their houses. Meanwhile, as we have seen, vulture funds assisted banks in liquidating non-performing loans. Thus, their activities may benefit some involved parties.

4. The first steps in building a framework for financial data access in EU

To combat the widespread of non-performing loans, the European Parliament and Council approved Directive (EU) 2021/2167 on credit servicers and credit purchasers¹. According to recital 11 of the Directive, “*limited participation of credit purchasers has resulted in low demand, weak competition, and low bid prices for portfolios of credit agreements on secondary markets, which is a disincentive for credit institutions to sell non-performing credit agreements.*”

Article 3 of the directive defines a ‘credit purchaser’ as “*any natural or legal person, excluding credit institutions, who acquires creditor rights under non-performing credit agreements or the agreements themselves as part of their trade, business, or profession, in compliance with relevant Union and national laws.*” This definition includes vulture funds, which, as previously stated, are investment funds that purchase non-performing loan instruments.

Vulture funds frequently use aggressive techniques to induce debtors to meet their loan obligations ‘voluntarily.’ To discourage such behaviour, the directive requires credit purchasers to “*operate in good faith, equitably, and professionally.*” This involves providing “*information to borrowers that is not misleading, unclear, or false; respecting and protecting the personal information and privacy of borrowers; and communicating with borrowers in a way that does not constitute harassment, coercion, or undue influence.*” While these principles are theoretically valid, their broad formulation may enable vulture funds to disguise their debt recovery tactics, avoiding accusations of bad faith.

Article 15(1) requires Member States to ensure “*that a credit institution provides a prospective credit purchaser with necessary information regarding a creditor’s rights under a non-performing credit agreement, or the non-performing credit agreement itself, and, if applicable, the collateral.*” This information allows investors to evaluate the value of these rights and the likelihood of recovery before entering into a transfer agreement. The legislation also requires an enabling

¹ Directive (EU) 2021/2167 of the European Parliament and of the Council of 24 November 2021 on credit servicers and credit purchasers and amending Directives 2008/48/EC and 2014/17/EU (Text with EEA relevance) online at: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32021L2167>, accessed on 15.06.2024

framework in order to protect “*information made available by the credit institution and the confidentiality of business data*”.

As a result, vulture funds gain access to critical information about the non-performing credit agreements they may purchase. In this way, vulture funds may obtain a more accurate estimation of their potential profit. However, vulture funds are limited to the information included in loan agreements. They are unable to obtain further financial information, such as a history of debtors’ loans or other pertinent information, which could impact their decision to purchase or reject non-performing loan agreements.

4.1. Decoding the EU Framework for Financial Data Access: Initial Insights

In this context, the challenges that vulture funds face could be mitigated if the European Union approved the European Parliament and Council’s proposal on a framework for financial data access². As the name implies, the purpose of this legislative act is to provide a platform that will make it easier for credit institutions and their clients to share financial information. The regulation proposal underscores that “*the overarching goal of this proposal is to enhance economic outcomes for financial services customers (consumers and businesses) and financial sector firms by promoting digital transformation and accelerating the adoption of data-driven business models in the EU financial sector.*” A relevant example is that “*access to financial data would enable more user-centric services: personalized services could benefit consumers seeking investment advice, and automated creditworthiness assessments could facilitate SMEs’ access to financing.*”

Article 2(2) of the proposed regulation offers an outline of the entities within its jurisdiction. The primary subjects of interest in this study are “*financial information service providers, insurance and reinsurance companies, credit institutions, and investment firms*”. As long as they follow the regulations—most notably, the requirement to establish an office in one of the Member States—vulture funds may be considered investors and may benefit from the provisions of the proposed legislation.

We predict that vulture funds will easily meet these requirements, given that the proposed regulation aims to broaden rather than restrict access to clients’ financial information. Furthermore, vulture funds may collaborate with financial information service providers who specialize in providing information about individuals. This allows vulture funds to streamline their operations by focusing on key processes rather than managing every stage separately.

² Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a framework for Financial Data Access and amending Regulations (EU) No 1093/2010, (EU) No 1094/2010, (EU) No 1095/2010 and (EU) 2022/2554 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52023PC0360>.

4.2. Types of Information Governed by FIDA

The types of information vulture funds could access are detailed in Article 1 (1) of the proposal, covering “*mortgage credit agreements, loans, and accounts including balances, conditions, transactions, savings, investments in financial instruments, insurance-based investment products, crypto-assets, real estate, and other related financial assets and economic benefits derived from such assets, integral to assessing a firm’s creditworthiness gathered during loan applications or credit rating evaluations*”. This information is critical for vulture funds interested in buying non-performing contracts from individuals since it avoids the risk of getting contracts that cannot be fulfilled. This enables vulture funds to reduce the number of non-performing contracts that cannot be recovered, improve operations, and increase profitability.

Besides individuals’ data, the proposal also extends the opportunity for vulture funds to access information regarding the creditworthiness of companies. The proposal specifies that such information can be provided if a “*company applies for credit or if it is used for credit rating purposes by rating agencies*”. We point out that European Mortgage Federation-European Covered Bond Council (2023, p. 2) stated that “*the scope of data collected as part of a loan application process should not be in scope of the Regulation*”, because these data “*includes very sensitive commercial information*”, such as “*the different internal methodologies used by financial institutions for creditworthiness assessment purposes and the data linked to this activity (product data)*”. The concerns raised by EMF-ECBC appear to be valid, as there is currently no reasonable justification for third parties to have access to such sensitive data.

However, in addition to purchasing loans, vulture funds can directly lend to struggling companies, meeting the standards for accessing the necessary information. As seen in the case with Kmart Corporation, ESL Investment had supplied multiple credits via other investment funds, which is the usual practice of vulture funds. Access to company creditworthiness information would allow vulture funds to conduct full risk assessments, giving them access to all essential information. This ability reduces the previously noted inconvenience, as vulture funds can receive all relevant data with just a single request.

But, access to customer³ data depends on their consent. According to Article 5(1) of the proposed regulation, “*the data holder shall, upon request from a customer submitted by electronic means, make available to a data user the customer data listed in Article 2(1) for the purposes for which the customer has granted permission*”

³ According to Article 3(2) of the proposed regulation, “*customer means a natural or legal person who makes use of financial products and services*”. This category includes individuals or companies that have entered into credit contracts with financial institutions, which is why we will use the word debtor throughout the paper rather than customer.

to the data user. The customer data shall be made available to the data user without undue delay, continuously, and in real-time.” This implies that customers can choose to limit third-party access to only certain financial information rather than granting access to all of it. In practice, considering that debtors are often in a weaker position, it is likely that they will consent to credit collectors accessing all of their financial information.

On the other hand, there are several entities that believe the category of data they are required to provide is too broad. For example, the Association of Mutual Insurers and Insurance Cooperatives in Europe (2023, p. 8) argues *“that companies, including insurers, should not be obliged to share trade secrets, business-sensitive information, or proprietary data resulting from their analytical and enrichment processes.”* In this regard, the association (2023, p. 8) considers that *“such data is not only integral to a company’s competitive edge but also encompasses valuable expertise, know-how, and sensitive pricing information, whose disclosure could pose significant competitive risks.”* As AMICE, we believe that companies should be required to give only data submitted by customers, excluding inferred data.

Additionally, the second part of the legal provision states that data holders must provide real-time access to financial information without specifying whether they are entitled to compensation for this service. In this regard, the following paragraph clarifies that *“a data holder may claim compensation from a data user for making customer data available pursuant to paragraph 1 only if the customer data is made available to a data user in accordance with the rules and modalities of a financial data sharing scheme, as provided in Articles 9 and 10, or if it is made available pursuant to Article 11.”*

Vulture funds must not only obtain the debtor’s consent to access financial information, but they must also cover the associated fees. The exact amount of the costs cannot be determined until the proposed regulation is adopted. However, article 9 specifies the criteria for determining compensation: *“it must be reasonable and directly linked to the expenses of providing data to the funds, based on comprehensive market data collected from both data users and holders, clearly identifying each cost element in line with the model, and structured to reflect the lowest prevailing market rates”*.

Thus, based on the interpretation of the legal provisions, it is clear that the expenses associated with accessing financial information should be minimal. However, the Association of Foreign Banks in Germany (2023, p. 1) states that *“the obligation of the holders of customer data to make this data available to data users by setting up the necessary technical infrastructure (interfaces) will affect almost all institutions and companies in our association.”*

Therefore, we believe that Article 9 will be adapted based on recommendations from affected entities. For example, the Association for Financial Markets in Europe (2023, p. 7) recommends that *“approach to compensation should be aligned with that agreed under the Data Act, such that it allows for a margin and*

takes into account the costs incurred for making the data available and the investment in the collection and production of data”.

Anyway, we believe that these costs will not exceed the present expenses charged by vulture funds to access databases holding financial information, notwithstanding the additional time required to find critical data compared to the scenario in which the regulation proposal is implemented.

In summary, while the proposed regulation is not specifically meant to improve the behaviour of credit recovery agents, certain legal features will have this impact. When combined with the rules governing the trading of non-performing credit contracts, vulture funds could become significantly more efficient. As a result, it is vital to determine how their activities will affect the parties involved.

3.3. Potential consequences of FIDA implementation

Commercial banks are under pressure to minimize non-performing loans in their portfolios, which has driven their desire to establish a market for these debts. The directive on non-performing loans is an important first step in establishing this secondary market, and the proposed regulation is a significant component of that endeavour. However, vulture funds may interpret the legal provisions in their own particular manner. Currently, these funds have only a restricted access to financial information and have to purchase non-performing loan contracts in bulk, with only a small percentage of them being enforceable.

The proposed regulation will grant vulture funds access to critical debtor information, allowing them to select which loan contracts to buy while avoiding those that are clearly disadvantageous. Establishing a financial data sharing system will improve vulture funds' negotiation power with commercial banks, allowing them to choose loan contracts to buy or demand big discounts.

Also, the proposed regulation will have a considerable impact on debtors. Negotiating with vulture funds will be extremely difficult once they have access to all relevant information. For example, if a company requires a loan, it will find itself in a weak negotiation position. Currently, failing companies are forced to accept unfavourable terms, such as higher interest rates. With the proposed regulation, this situation could become even more difficult because vulture funds are given more power to impose severe restrictions on companies. Essentially, if a company wants to escape insolvency, it may have few options except to rely on vulture funds because other creditors refuse to take such risks. It remains to be seen whether the regulation will increase the number of corporate bankruptcies.

From the standpoint of vulture funds, their actions are perfectly legal because debtors do not execute their obligations. Unanticipated occurrences, such as a family member losing their job or making poor business decisions, might force debtors to default on payments. Because debtors are usually in difficulties that are not entirely their fault, vulture funds' tactics in pursuing debt recovery may raise ethical

concerns. However, vulture funds have the legal authority to seek repayment regardless of the borrowers' economic status. Vulture funds normally do not pursue debts immediately, giving debtors time to improve their financial situation.

Also, enforcement tactics are subject to judicial examination, and debtors have the right to appeal decisions, including claims of unjust terms. In this regard, debtors in the European Union have access to a number of legislative safeguards that normally prevent vulture funds from acquiring individual loans. At the same time, corporate bankruptcy laws have been enacted in each country to protect the rights of debtors and creditors in insolvency procedures. The primary objective is to save the company, and creditors are focused on recovering their investments and keeping the company operational to support the market. As a consequence, we believe that vulture funds are likely to remain cautious and prefer countries in which the rights of creditors are more protected, such as the US, even in the face of proposed regulation.

Separate from vulture funds, we believe that access to debtors' financial information may result in their segregation. Depending on the available debtor information, banks may offer favourable credit terms to some while imposing rigorous conditions on others, such as shorter repayment periods or higher interest rates. Simultaneously, despite the anticipated decrease in remuneration for supplying information, these expenses are likely to be shifted to banking service fees, aggravating the difficulty of obtaining loans.

Conclusions

To summarize, vulture funds are investment funds with extensive control over the debtors they target. While the European Union intends to provide a platform to improve the financial services provided by commercial banks and other financial institutions, the legal requirements of the regulatory framework may be used for a variety of reasons. Primarily, vulture funds can improve their operations by gathering debtors' financial information prior to acquiring non-performing loans and periodically monitoring their financial status. However, we consider that vulture fund activities should be governed by national legislation that must provide more protection to those in financial distress, rather than modifying the proposed regulation only for this purpose.

Despite the perception that vulture funds harm all parties involved, it is critical to recognize their role in helping many companies emerge from bankruptcy. Furthermore, despite purchasing multiple apartments in Ireland, vulture investors did not just hike rents without improving living conditions; they renovated the apartments first. As a result, it is critical to develop a balanced approach that optimizes the benefits of vulture funds' activities while reducing their negative consequences.

References

- Anson, M. J. P., Fabozzi, F. J., & Jones, F. J. (2010). *The handbook of traditional and alternative investment vehicles: Investment characteristics and strategies*. <https://doi.org/10.1002/9781118258248>
- Association for Financial Markets in Europe. (2023). *FiDA and PSR: Key issues for developing the EU data economy*. <https://www.lobbyregister.bundestag.de/media/f7/d1/322948/Stellungnahme-Gutachten-SG2406260023.pdf>
- Association of Foreign Banks in Germany. (2023). *Position paper of the Association of Foreign Banks in Germany (VAB) on the proposal for a regulation of the European Parliament and of the Council on a framework for financial data access and amending regulations (EU) No 1093/2010, (EU) No 1094/2010, (EU) No 1095/2010 and (EU) 2022/255 [COM (2023) 360]*. <https://www.vab.de/wp-content/uploads/2023/11/090166e503b73f9b1.pdf>
- Association of Mutual Insurers and Insurance Cooperatives in Europe. (2023, November 1). *AMICE position paper on the proposed regulation for financial data access (FIDA)*. <https://amice-eu.org/app/uploads/2023-11-01-AMICE-Position-paper-on-FIDA.pdf>
- Bell & Company. (2024). *Has your mortgage been sold to an Irish vulture fund?* <https://www.bellcomp.co.uk/personal-debt/property-debt/mortgage-sold-to-irish-vulture-fund/>
- Bienenstock, J., Fitzgerald, R., Glasser, M., & Kim, K. (2019). The downfall of Sears: Examining Sears' decline from being the largest US retailer to bankruptcy. *NYU Stern School of Business*, 1–28.
- Blackman, J., & Mukhi, R. (2010). The evolution of modern sovereign debt litigation: Vultures, alter egos, and other legal fauna. *Law and Contemporary Problems*, 73(4), 47–61.
- Brutti, D. (2020). Sovereign debt crises and vulture hedge funds: Issues and policy solutions. *Boston College Law Review*, 61(5), 1819–1854.
- Bulfin, A. (2023, July 18). Explained: Vulture funds Ireland 2023. *Sys Group*. <https://sysgroup.ie/explainedvulture-funds-ireland/>
- Casa, T. D., Rechsteiner, M., & Lehmann, A. (2008). *Hedge fund investing in distressed securities: Capturing the unique value created by corporate and economic turnarounds*. Research, Analysis and Strategy Group, MAN Investments. https://www.opalesque.com/files/ManDistressed_investing_Final.pdf
- Dayen, D. (2018, October 17). How Sears was gutted by its own CEO. *The American Prospect*. <https://prospect.org/economy/sears-gutted-ceo/>
- Deegan, L. (2023, November 10). Dáil hears dramatic revelations about US vulture funds and Irish courts. *IrishCentral*. <https://www.irishcentral.com/news/politics/vulture-funds-dail>

- Delventhal, S. (2022, December 22). Who killed Sears? Fifty years on the road to ruin. *Investopedia*. <https://www.investopedia.com/news/downfall-of-sears/>
- Debt and Development Coalition Ireland. (2017). *From Puerto Rico to the Dublin Docklands: Vulture funds and debt in Ireland and the global south. Financial Justice*. <https://www.cadtm.org/From-Puerto-Rico-to-the-Dublin-Docklands>
- European Mortgage Federation-European Covered Bond Council (EMF-ECBC). (2023). *Response to the European Commission’s public consultation on “Open Finance Framework – enabling data sharing and third-party access in the financial sector”*. <https://www.hypo.org>
- Fisch, J. E., & Gentile, C. M. (2004). Vultures or vanguards?: The role of litigation in sovereign debt restructuring. *Emory Law Journal*, 53. Fisch, Jill E. and Gentile, Caroline M., Vultures or Vanguards?: The Role of Litigation in Sovereign Debt Restructuring. Available at SSRN: <https://doi.org/10.2139/ssrn.583041>
- Gietzmann, M., Isidro, H., & Raonic, I. (2018). Vulture funds and the fresh start accounting value of firms emerging from bankruptcy. *Journal of Business Finance & Accounting*, 45(3-4), 410–436. <https://doi.org/10.1111/jbfa.12303>
- Gilson, S. C., & Abbott, S. (2010). Kmart and ESL investments. *Harvard Business School Case 209-044*, 115–128. <https://doi.org/10.1002/9781119204589.ch4>
- Hove, D., Smith, T., & Yang, B. (2019). Sears bankruptcy: From Roebuck to no bucks. *University of Tennessee College of Law, Legal Scholarship Repository: Chapter 11 Bankruptcy Studies, Issue 57*, 1–168.
- In re Kmart Corp. (2006). Case No. 02 B 02474, Adv. Nos. 04 A 00126, 04 A 00094, 04 A 00087, 04 A 02898, 04 A 00158, 04 A 02775, 04 A 02865, 04 A 02785, 04 A 02874, 04 A 02102, 04 A 02436, 04 A 02. *United States Bankruptcy Court*. <https://casetext.com/case/in-re-kmart-corporation-281>
- Kroll. (2018). *Sears Holdings Corporation, case No. 18-23538*. <https://restructuring.ra.kroll.com/sears/Homie-Index>
- Lehavy, R., & Udpa, S. (2011). Kmart: Predicting bankruptcy, fresh start reporting, and valuation of distressed securities. *Issues in Accounting Education*, 26(2), 391–419. <https://doi.org/10.2308/iace-10017>
- Liberto, D. (2022, May 3). Vulture capitalist: Meaning, criticism, example. *Investopedia*. <https://www.investopedia.com/terms/v/vulturecapitalist.asp>
- Lyons, T. (2016, April 3). The human cost of vulture funds. *FM Auditors, Tax & Business Advisers*. <https://www.fmaccountants.ie/human-cost-vulture-funds/>
- Maguire, M. (2023, May 10). McGrath welcomes ruling ordering Pepper Finance to lower mortgage rate for borrower in insolvency. *The Journal*. <https://www.thejournal.ie/mcgrath-pepper-finance-mortgage-ruling-ireland>
- Megliani, M. (2018). For the orphan, the widow, the poor: How to curb enforcing by vulture funds against highly indebted poor countries. *Leiden Journal of International Law*, 31(2), 363 - 381. <https://doi.org/10.1017/S0922156518000067>

- Naidu-Ghelani, R. (2018, October 19). Former Sears CEO Alan Lacy on what brought down the retail icon. *BNN Bloomberg*. <https://www.bnnbloomberg.ca/former-sears-ceo-alan-lacy-on-what-brought-down-the-retail-icon-1.1155309>
- Pandy, E. (2018, August 29). The cannibal of Sears. *Axios*. <https://www.axios.com/2018/08/29/sears-department-store-closings-lampert-esl>
- Peterson, H. (2017, May 21). Sears CEO blames the media for company’s decline – but his obsession with Wall Street set it up for failure. *Business Insider*. <https://perma.cc/UT46-3JPZ>
- Peterson, H. (2017, May 14). Sears CEO’s master plan to profit from the demise of his stores is taking a turn for the worse. *YahooFinance*. <https://www.yahoo.com/news/sears-ceo-master-plan-profit-off-demise-his-stores-taking-turn-worst-221236205.html>
- Quinn, E. (2021, December 9). Central Bank: 100,000 home mortgages owned by vulture funds or sub-prime lenders. *Irish Examiner*. <https://www.irishexaminer.com/business/economy/arid-40762719.html>
- Richter, W. (2019, April 18). Here are Sears Holdings five “fraudulent transfers” and why “culpable insiders” Lampert, Mnuchin, et al. got sued. *Wolf Street*. <https://perma.cc/DN4E-HYBP>
- Sabanoglu, T. (2022, November 30). Sears Holdings: Global sales 2005-2020. *Statista*. <https://www.statista.com/statistics/292990/global-revenue-of-sears-holdings/>
- Samples, T. (2014). Rogue trends in sovereign debt: Argentina, vulture funds, and pari passu under New York law. *Northwestern Journal of International Law & Business*, 35, 49-86. <https://doi.org/10.2139/ssrn.2403342>
- Sookun, D. (2010). *Stop vulture fund lawsuits*. Commonwealth Secretariat.
- Soufraki, A. (2020). A beginner’s guide to the vulture fund. *Finance Focused*. <https://finfoc.com>
- Spross, J. (2018, October 16). How vulture capitalists ate Sears. *The Week*. <https://www.theweek.com/articles/801927/how-vulture-capitalists-ate-sears>
- Stowell, D. P., & Stowell, P. (2017). Kmart, Sears, and ESL: How a hedge fund became one of the world’s largest retailers. *Kellogg School of Management Cases*, 1–22. <https://doi.org/10.1108/case.kellogg.2016.000176>
- Tierney, C. (2019, November 14). Vulture funds and a coming “tsunami” of Irish evictions. *IrishCentral*. <https://www.irishcentral.com/news/vulture-funds-irish-evictions>
- Treacy, M. (2024, January). A closer look at the mortgage vulture funds and their Irish operations. *Gript*. <https://gript.ie/a-closer-look-at-the-mortgage-vulture-funds-and-their-irish-operations/>
- Unglesbee, B. (2022, August 11). Sears Holdings reaches \$175M settlement with Lampert and company. *Retail Dive*. <https://www.retaildive.com/news/sears-holdings-175m-settlement-eddie-lampert/629425/>
- Zane, E. (2016). Sovereign debt restructuring: Lessons learned from legislative steps taken by certain countries and other appropriate action to reduce the vulnerability of

sovereigns to holdout creditors. *United Nations Conference on Trade and Development*.

Wozny, L. (2018). National anti-vulture funds legislation. *Columbia Business Law Review*, 2017(2), 697–747. <https://doi.org/10.7916/cblr.v2017i2.1722>