Alliance for the Freedom of CAR Repair in the EU

The Data Act – Analysis from the perspective of the Automotive Aftermarket & Mobility Services Sector

AFCAR Position paper

Brussels, 9th May 2022

Introduction

The AFCAR coalition welcomes the principles and underlying objectives of the Data Act, particularly with regard to the regulation of B2C and B2B data sharing. We fully endorse the principle of the data sovereignty of Users of connected products, including their right to assign access to the data generated through the use of their products to 3rd party service providers of their choice.

As providers of Aftermarket and Mobility Services in the Automotive industry we particularly welcome the recognition of how a manufacturer, as Data holder, can exert exclusive control on data generated by a product and can thereby hinder market entry and competition in competing services. We agree that empowering consumers to assign rights of access to data for the provision of such services will enhance consumer choice and support data driven innovation in services. It will also foster competition, innovation, and growth in the wider mobility sector.

This Paper outlines:

1) **Aspects to be defended against potential attempts to water down the Data Act;**
2) **Elements to be improved to make the Data Act more robust;**
3) **"One size does not fit all" – the need for complementary Sector-specific legislations, 'Automotive' being the first.**

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1. Aspects of the Data Act which should be defended

Generally speaking, AFCAR strongly supports the provisions of Chapters II, III & IV of the Data Act as a means of **establishing basic principles and stakeholder rights & obligations** as concerns the regulation of B2C & B2B Data Sharing. We also highly appreciate the clarifications provided under Chapter X as concerns **the non-applicability of the sui generis right defined in the Database Directive to databases** concerning data obtained from or generated through the use of a product or related service.

In Particular:

- Article 3.1 establishes the important principle that products shall be designed in a way that makes data generated through their use accessible, by default, easily, securely and were appropriate directly to the User.
- Article 4.6 whereby the data holder shall only use any non-personal data on the basis of a contractual agreement with the User. This requirement should be complemented by a right for the user to withdraw

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consent at any time (See 2.1 below). The prohibition in the same paragraph on the use by the data holder of the data generated to derive business intelligence on the activities of the User, which could undermine the commercial position of the User is extremely important.

- Article 5.1 under which the data holder shall make available the data generated by the use of a product or related service to a third party, without undue delay, free of charge to the User, of the same quality as is available to the data holder and, where applicable, continuously and in real-time is a vital provision in order to allow a competitive data driven market for services.
- Article 8.1 whereby Data Holders are required to make data available under FRAND terms. Such FRAND terms and the associated fairness tests (Article 13 paragraphs 2, 3 & 4) will need to be underpinned by sector relevant legal and technical measures, but none the less the principle is important. The requirement for data holders to not discriminate between comparable categories of data recipients, including partner enterprises or linked enterprises, is also very important in the automotive sector, given the increasing vertical integration of the services provided by vehicle manufacturers, in competition with those of aftermarket service providers.
- Article 9.1 and 9.4 whereby compensation agreed between the Data Holder and Data Recipient for the cost of making data available be reasonable, with an obligation on the data holder to furnish information on the basis of the calculation of the compensation is appreciated. The principle, as mentioned in Recital 42, whereby payments should not be understood as paying for the data itself, but for the costs incurred and investment required for making the data available are consistent with the principles of data ownership. Specific protections for SMEs under Article 9 and Article 13 are also appreciated, although these provisions should be extended to all data recipients (see 2.5 below).
- The prohibition in Article 11.1 for data holders to use technical protection measures, designed to prevent unauthorised access to data to hinder the User's right to effectively provide data to third parties pursuant to Article 5 is vital in the automotive context, where there is a real risk that vehicle manufacturers could use cybersecurity measures in such a manner.
- We also highly appreciate the clarifications provided under Chapter X as concerns the non-applicability of the sui generis right defined in the Database Directive to databases concerning data obtained from or generated through the use of a product or related service.

2. Proposals for improvements – Making the Data Act more robust

We do see several aspects of the Data Act where we think **further clarity** is required in order **to avoid misinterpretations of the provisions or wilful distortions** of the intentions of the Data Act to limit or restrict the access the Data Act is designed to achieve. We also would suggest including **additional measures to address the privileged position of the Data Holder as gatekeeper of access to data**, particularly when they have a dual role as both gatekeeper for access and as a service provider in direct competition with 3rd parties seeking access to data.

Specific concerns we have identified would include:

2.1. Undue privileged position granted to the manufacturer

AFCAR has a particular concern over the privileged position granted to the manufacturer which risks creating a log-in situation, undermining consumers' right of data access.

There is an inherent tension between the requirement under Article 3.2(d) for the manufacturer (data holder) to *inform* the User of the data they intend to use, and Article 4.6 whereby non-personal data may only be used based on a contractual agreement with the user. For connected products, it is likely that, in practice, the only effective choice the user will have is to accept the conditions the manufacturer declares for access to data or otherwise not to purchase, lease or rent the product. Once the contract has been

concluded, the manufacturer/ data holder will have full rights of access to the data generated by the product or service. **This effectively gives the manufacturer an institutionalised right under to use the data the machine generates for its own business purposes, creates an easy "lock-in" of the consumer and generates an undue advantage over competing service providers.**

Solution: Under the Data Act, the User should have a genuine right to opt out of giving this right to manufacturer, notwithstanding their right to opt-in and assign use access to another third party of their choice. This is particularly important in the case of **complex, long-service-life industrial consumer goods**.

Furthermore, **in the case of mobile assets, which rely on connectivity typically provided by the manufacturer, there should be a requirement to unbundle the connectivity contract from the data holder services contracts.** Without this, competing third party services would have no chance to develop and flourish.

2.2. Better definition of 'non-personal data'

For the avoidance of doubt, explicit guidelines as to what constitutes non-personal data, both in the case of natural and legal persons using the product is required. Defining such explicit guidelines for generic sectors may not be possible and so this could be addressed in sector specific legislation.

2.3. Non-discriminatory right to choose the means of access to data

The current draft leaves open the option for the manufacturer to either make certain data *directly* available from an *on-device* data storage or from a *remote (off-board) server* which can be manufacturer's own local server capacity. This leaves the possibility for the manufacturer to impose a means of access of their preference. Where on-device access is technically supported, **an explicit requirement to make this accessible to 3rd parties of the User's choice should be included. Only such access could technically enable the aspiration for real time, continuous access to the full extent of data generated by a connected product.** Without such a provision, 3rd party service providers would always be **kept at a serious structural competitive disadvantage,** compared to the manufacturer. This undermines the effectiveness of the consumer choice intended by the Data Act.

2.4. Interoperability requirements to be applied to Data Holders

Article 28 (1) lists an excellent set of requirements to ensure the **interoperability of Data Spaces**. **These requirements should be applied to Data Holders in general**, as the requirements outlines will be required by a party seeking access to data generated through the use of a product. Particularly Art. 28(1) (b) & (c) would be required, as they require the disclosure of data structures, formats vocabularies etc along with information on the technical means to access data. Such information is essential in order to give effect to users rights of access to data, as without it development of a means of access is not possible.

2.5. The application of fairness tests where there is a clear imbalance in negotiation power

In certain industry sectors not only SMEs, but also bigger companies experience real challenges in negotiating 'fair and reasonable' terms in contracts for access to data. That is the case for example in the automotive market where even larger aftermarket enterprises will not have sufficient bargaining power towards vehicle manufacturers, because these latter each hold a single source and have no incentive to provide smooth access to their competitors. In such situations, extending the protections afforded to SMEs would be justified and should be addressed.

2.6. Clarity needed on impact of IPRs and trade secrets

There is unclarity as to the **impact of Industrial Property Rights (IPRs) or trade secrets on the rights of access to data.** Recital 14 (' … information derived or inferred from this data, where lawfully held, should not be considered within scope of this Regulation ' and Recital 17 'Data generated by the use of a product or related service include …. but not pertain to data resulting from any software process that calculates derivative data from such data as such software process may be subject to intellectual property rights'. These statements create significant legal uncertainty as to what data falls into scope of this Regulation. For example, a predictive maintenance algorithm will generate information based on the processing of machine-generated data. As the result of a software process such information is also machine generated and as such is not protected by IPR. The predictive maintenance algorithm itself is being used for the process for which it was intended and the rights of the patentee exhaust after the first sale of the vehicle. Further clarity is required as to the scope of data covered by this Regulation.

Article 8.6 on trade secrets would provide for a "trade secrets exception". This exception is not required as the Data Act foresees secrecy measures and would lead to parties claiming trade secrets prevail over the data sharing obligation. There is a need to prevent "strategic use" of trade secret protection and as such we would advocate for Article 8.6 to be deleted. Obligations to disclose trade secrets are provided for in Articles 4(3), 5(8), 19(2) and these articles provide for sufficient protection of trade secrets. If a default priority is being given to trade secrets over legitimate access claims of the Data Act, trade secrets would ultimately be treated equal to property rights and manifest the existing de facto monopolies of the data holders. This would be in contradiction of the objectives of the Trade Secrets Directive, including amongst others, recitals 16 and 18 of the directive. In addition invoking Article 8 (6) would lead to considerable delays in the provision of data, irrespective of the burden of proof. However, especially in the fast-moving IoT sector, it is important to provide data quickly and as simultaneously as possible.

2.7. Better definition of 'reasonable compensation'

Terms such as a '**reasonable compensation'** for the costs incurred by manufacturers in providing access will lead to too much legal uncertainty which will be most advantageous for the one holding the data. Even more transparency on the details of the calculation will not give sufficient guidance to obtain enough legal certainty to resolve a dispute between parties on what is 'reasonable' quickly. While sector specific legislation made be more prescriptive, providing more explicit definitions of what constitutes 'reasonable compensation' within the Data Act would be beneficial.

To prevent discussion on what is "reasonable" we could be analogue to the Telecom sector on roaming charges (wholesale roaming charges) as described in the Regulation (EU) 2022/612 in item 14, 31, 42 and also on Art. 11 'Wholesale charges for regulated data roaming services'.

2.8. Separation of Duties

In order to avoid abuse and protect the security and integrity of the product, where authorisation for access to data is required, a clear separation of duties is required. Different entities should be responsible for providing authorisation, authentication and resource provisioning. It should not be the Data Holder who fulfils all of these roles. Independent authorisation of legitimate service providers, under a harmonised authorisation scheme in combination with the use of a trust centre for the authentication of such users would mitigate the risk of abuse of their dominant position by Data Holders, while protecting the interests of Users and the integrity of their products.

3. "One size does not fit all" – The need for complementary Automotive Sector-specific legislation

While the provisions of the Data Act are very welcome, we see a real need for specific legislation for the Automotive sector, to support the implementation of the principles enshrined in the Data Act.

The Automotive Aftermarket and Mobility Services Ecosystem needs sector-specific automotive legislation translating the principles and provisions of the Data Act into concrete, legal and technical measures for the automotive sector (e.g. access to vehicle functions, or the Human-Machine-Interface). They currently leave too much room for interpretation, creating legal uncertainty and a high risk of litigation.

But most importantly: **There is a critical need for a stand-alone right for service providers to access the information, tools and resources required to develop competing services.** Under the Data Act approach, all these service providers would only get a derived right, which completely neglects that these parties need, in the first instance, to know and test **in advance** what data and functions are in principle available and will be at their disposal**. Therefore, only an autonomous and stand-alone access right to the tools and resources required to develop the means of access will enable the independent service providers to develop competing digital services in advance so that these can be offered, marketed and advertised to the consumers or other data co-generators**. Access rights must be backed by proper means to exert them. **The need for this stand-alone 'ab initio' right must be elaborated in sector-specific legislation under Type-approval.**

The vehicle manufacturer holds a dual role as Data Holder and gatekeeper to the brand-specific aftermarket and as a competitor of 3rd parties requesting data access, competing vertically and horizontally with these service providers. Given this dual role with conflicting interests, the effective control of the end-user over these data, under the provisions of the Data Act, would remain limited, while the manufacturer would be granted an institutionalised competitive advantage of data use, to the detriment of competing parties. This also needs to be mitigated in sector specific legislation.

The AFCAR coalition therefore calls on the European Commission to swiftly propose robust sector-specific legislation on access to in-vehicle data and resources so that co-decision procedure can proceed as from October 2022 and be completed before the end of this parliamentary term in April 2024.

Conclusion

In conclusion, we appreciate the aspirations of the Data Act and believe that is can provide a solid framework, within which sector specific legislation can be enabled. While we understand that as a horizontal legislative instrument, the Data Act needs to be broad and robust enough to reflect the needs and constraints of a variety of market segments, there are a number of areas where more precise definitions or legal provisions *including resources and functions* could provide more legal certainty and ensure that the full intent of the Data Act is reflected in sectorial legislation.

	ADPA- the European Independent Data Publishers Association aims to ensure fair access to automotive data and information and to provide competitive framework conditions for independent data publishers. This will allow the publishers to be able to design and provide competitive, innovative and multibrand products and services to operators of the automotive aftermarket.
	AIRC- stands for Association Internationale des Réparateurs en Carrosserie. Formed in 1970, the AIRC is the global federation of leading national organisations in the area of vehicle repairs**.** These member organisations together represent more than 50,000 vehicle repair and vehicle builder companies in many countries.
	CECRA- the European Council for Motor Trades and Repairs- is the European Federation representing the interests of the motor trade and repair businesses and European Dealer Councils on behalf of vehicle dealers for specific makes. Its main aim is to maintain a favourable European regulatory framework for the enterprises of motor trade and repair businesses it represents.
	EGEA- the European Garage and test Equipment Association represents both manufacturers and importers of tools and equipment for the repair, servicing and technical inspection of vehicles, as an integral part of supporting the automotive industrial value chain. Its role is to provide a healthier environment for the garage and test equipment industry throughout Europe and a stronger support to ensure competitive consumer choices for affordable mobility against the background of the increasing vehicle technology and complexity.
	The Fédération Internationale de l'Automobile (**FIA**) Region I is a consumer body representing European Mobility Clubs and their 37 million members. The FIA represents the interests of these members as motorists, riders, pedestrians and passengers. FIA Region I is working to ensure safe, affordable, clean and efficient mobility for all.
	FIGIEFA is the international federation of independent automotive aftermarket distributors. Its members represent retailers and wholesalers of automotive replacement parts and components and their associated repair chains. FIGIEFA's aim is to maintain free and effective competition in the market for vehicle replacement parts, servicing and repair.
	Leaseurope - the European Federation of Leasing Company Associations- represents both the leasing and automotive rental industries in Europe. The scope of products covered by Leaseurope members' ranges from hire purchase and finance leases to operating leases of all asset categories (automotive, equipment and real estate). It also includes the short term rental of cars, vans and trucks.
	AFCAR - Alliance for the Freedom of Car Repair in the EU. Created in 1997, AFCAR is an alliance of the independent European associations with the aim is to promote fair competition in the market for vehicle servicing and repair. Members of AFCAR are: ADPA (European Independent Data Publishers Association), AIRC (Association Internationale des Réparateurs en Carrosserie), CECRA (European Council for Motor Trades and Repair), EGEA (European Garage Equipment Association), FIA (Fédération Internationale de l'Automobile), FIGIEFA (International Federation of Automotive Aftermarket Distributors), Leaseurope (European Rental and Leasing Industry).