Alliance for the Freedom of CAR Repair in the EU

The Data Act
The view of the Automotive Aftermarket & Mobility Services Sectors
AFCAR Position paper

Brussels, 6th September 2022

The AFCAR coalition, representing providers of Aftermarket and Mobility Services in the Automotive industry[i], welcomes the Data Act. We believe that the Data Act represents a significant step towards a more competitive European Data Economy and that it is crucial to unlock the value of data generated by connected products and related services for a more innovative mobility ecosystem. As such, AFCAR urges the European co-legislators to fully maintain the key principles and provisions for access to and sharing of data in the final Act. The Data Act also strikes the right balance between data sharing and protection of IPRs and calls upon the co-legislators to maintain that balance in the final text.

We fully endorse the principle of the data sovereignty of Users of connected products, including their rights to assign access to the data generated through the use of their products to third-party service providers.

AFCAR's members, Providers and Users of Aftermarket and Mobility Services in the Automotive industry, are aware of the risks present when a manufacturer, as Data Holder, can exert exclusive control on 'data' and can thereby hinder market entry and competition in competing services. It is essential empowering consumers to assign rights of access to data for the provision of such services. This will enhance consumer choice and support data-driven innovation in services. It will also foster competition, innovation, and growth in the wider EU mobility sector.

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1. Aspects of the Data Act which should be upheld

AFCAR calls upon the European co-legislators to maintain the key principles of the Data Act enumerated in Annex I at the end of this paper.

AFCAR strongly supports the provisions of Chapters II, III & IV of the Data Act as a means of **establishing basic principles and stakeholders' rights & obligations** concerning the regulation of business-to-consumer (B2C) & business-to-business (B2B) Data Sharing.

It is important to underline that the data to be shared should be those obtained from or generated through the use of a product or related service, and not (as suggested by some stakeholders), the data which the Data Holder decides to release (based on their own business models and commercial preferences or interpretation of who and/or how the data was generated).

Alliance for the Freedom of Car Repair, AFCAR Coordination Secretariat
Boulevard de la Woluwe 42, bte5, BE-1200 Brussels, Tel. : +32.2.761.95.10 – Fax : +32.2.762.12.55
Mail : afcar@afcar-alliance.eu - website : https://www.afcar.eu/

1.1 IPR should not be an obstacle to disclose machine-generated data

Some manufacturers argue that Intellectual Property Rights (**IPRs**) might be violated by the Data Act obligations. They put forward IPR and data protection laws as an argument preventing disclosure of data to other market participants.

AFCAR believes however, that **the Data Act strikes the right balance between data-sharing and protection of IPRs**. Data generated by sensors in a product are typically not subject to any IPR, as there are no patent rights or copyrights associated with such machine-generated data. This is true also for data that have undergone basic processing by algorithms connected with the sensors. In the exceptional cases in which data could be protected by IPRs[1], these rights will typically be exhausted with the sale of the product. In the very rare residual cases where IPR protection could still be invoked, manufacturers will still be able to demonstrate that protection and rely on it also under the Data Act. However, **this possibility should not hinder the general obligation of manufacturers to provide data to third parties in line with the goals of the Data Act.**

Trade secret protection is subject to specific conditions and will in most cases not apply to machine-generated data in the first place. Even where it does, the Data Act provides for protective measures to ensure that data constituting trade secrets can (and must) be shared while confidentiality stays intact.

Equally, data protection laws do not give rise to IPR and they do not grant ownership in data. They protect individuals from unauthorised processing of their personal data, but they do not allocate data ownership or rights to data.

In summary, neither IPR (including trade secret protection) nor data protection law are a valid legal justification for refusing to provide machine-generated data *altogether*.

2. Proposals to make the Data Act more robust and workable in practice

To ensure the practical implementation of the Data Act and avoid misinterpretations (hence disputes and lawsuits) which would undermine the intentions and effects of the Data Act**,** some aspects should be **further clarified**:

2.1. Interoperability requirements to be applied to Data Holders (Art. 28)

Art. 28 (1) lists a fundamental set of requirements to ensure the interoperability of Data Spaces. **These requirements should be applied to Data Holders in general**, as interoperability is needed by any third-party seeking access to data to develop independent services.

2.2. Non-discriminatory right to choose the means of access to data (Recital 21, Art. 3 and Art. 4)

The current text 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 – and as such to potentially discriminate against the third-party service provider through an imposed choice of the technological means.

[1] This would require that a) the data-generating process itself is protected by a registered patent, and b) the process is so complex that the data resulting from it has its own factual-technical properties.

Against this background, where **on-device access** is technically supported, an explicit requirement to make this accessible to third parties/users is needed. Only such access can technically enable the aspiration for real-time, continuous access to non-personal data and personal (subject to approval) by a connected product. Without such a provision, third-party service providers would always be kept at a serious structural competitive disadvantage, compared to the manufacturer who would enjoy full access while their competitors are deprived of it.

2.3 User requests (Art. 5)

The current legislative proposal insufficiently clarifies in Art. 5 *how* the User's request to a data holder should be submitted and processed. It must be clear that Users can request data to be shared with a third party and that such data shall be shared, continuously and in real time, until the User requests that data is no longer to be shared. In line with data portability principles, we would welcome the ability for Users to put forward general framework requests which would negate the need for continuous *ad hoc* request processing. It should also be possible for Users to make a request for such data sharing from multiple devices as 'one request' and not that the request must be made separately for each device. Similarly, they must be able to request such sharing from all devices owned or operated by them without specifying the individual device, so that as new devices are added, the User does not need to take additional actions for the data to be shared with their preferred third party. Furthermore, the proposed Act needs to detail the obligations of the Data Holder where the Data Holder does not have direct access to the User, which is generally the case with leases and vehicle rentals.

2.4 The application of fairness tests and the limitations on 'reasonable costs' to be charged should be extended to all companies where there is a clear imbalance in negotiating power (Art. 13, Art. 9)

In certain industry sectors, it is not only SMEs but also bigger companies experience real challenges in negotiating 'fair and reasonable' terms in contracts (i.e. contractual terms) for access to data. This is the case in the automotive market, where even larger enterprises do not have sufficient bargaining power with vehicle manufacturers, as each of them hold the single source of data and have no incentive to provide ready access to their competitors. **In such situations, extending the protections afforded to SMEs to all companies would be justified** and should be enacted as such.

In addition, terms such as a '**reasonable compensation'** in Art. 9 for the costs incurred by manufacturers in providing access will lead to too much legal uncertainty, which will be most advantageous for the party holding the data. Even more transparency on the details of the calculation will not give sufficient guidance to obtain enough legal certainty to quickly resolve a dispute between parties on what is 'reasonable'. Providing more explicit definitions of what constitutes 'reasonable compensation' within the Data Act would be beneficial. Requiring compensation to be based on the direct costs incurred in providing access, as specified for SMEs, would provide a robust solution for all types of companies.

2.5 IPRs and trade secrets (Art. 8)

Art. 8, as currently drafted, would favour an interpretation for a general "trade secrets exception", which could be used in a way that the Data Holder can point to (alleged or actual) trade secrets and deny generally access to data on this basis. This exception is, however, not required, as Art. 4(3) and Art. 5(8), do already provide for secrecy protection measures. However, we believe that according to the intention of the Data

Act, Art. 8 (6) should only stress that trade secrets are not questioned and that access to data may be made subject to adequate protective measures if the Data Holder wishes to do so.

2.6 Avoid an extension of the non-compete clause to services – maintain for products only

There are currently discussions **to extend the non-compete clause in Art. 4(4) and Art. 6(2) to 'services'**. The Data Act rightly applies the non-compete clause to 'products' only. An extension to services would lead to significant uncertainty around mobility services.

Such possible extension to 'services' would prevent third-party service providers from developing services, which compete with those of the vehicle manufacturer, running contrary to the intention of the regulation, and stifling data-driven innovation in the sector. **Therefore, AFCAR strongly disadvises to extend the non-compete clause to 'services'.** Third-party automotive and mobility service providers have no incentive or intention to develop a product that competes with the product from which the data originate but would rather use the data generated by the product to develop services in keeping with the main essence of the Data Act.

Conclusion

In conclusion, we wholly support the aspirations of the Data Act and believe that it can provide a solid framework for "data access" rights for private and commercial users. We understand that the Data Act, as a horizontal legislative instrument, needs to be broad and robust enough to reflect the needs of a variety of market segments.

The Data Act will also apply to the automotive and mobility sectors. As such, AFCAR calls for such complementary sector-specific automotive/mobility legislation on "access to data & resources" to address specific technical features (such as e.g., access to the Human-Machine-Interface for communication with the driver). While the overall provisions of the Data Act are very welcome, there are specific issues that need addressing for "complex industrial consumer goods with a long service life", such as vehicles. Such products require servicing and repair over their lifetime, including the respect of specific safety and security features. These should be addressed in a dedicated sector-specific legislation to make the Data Act practically implementable to automotive products and related services.

ANNEX I

Provisions of the Data Act to be retained:

- **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 non-personal data based on a contractual agreement with the User.** 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.**
- **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 based on the calculation of the compensation is vital. 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 welcome, although these provisions should be extended to all data recipients.
- **The prohibition in Article 11.1 for Data Holders to use technical protection measures, designed to prevent unauthorized 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 vehicle manufacturers use of cybersecurity protection measures should not hinder access by legitimate market participants.
- **We also highly appreciate the clarifications provided under Chapter X – Sui Generis Right under Directive 1996/9/EC as concerns the non-applicability of the sui generis right defined in the Database Directive to databases containing data obtained from, or generated through, the use of a product or related service.** We would like to point out that the ECJ upheld in 2004[2] that the sui generis right does not apply to databases that are only by-products of a business' general activities. Investments into the compilation and organisation of data in a database are protected; the generation of data as such is not.

[2] The ECJ clearly stated that to enjoy protection, the investment must "refer to the resources used to seek out existing independent materials and collect them in the database. It does not cover the resources used for the creation of materials which make up the contents of a database". Cf. Fixtures Marketing Ltd v. Oy Veikkaus Ab (C-46/02, 9/11/2004), Fixtures Marketing Ltd v. Svenska Spel Ab (C-338/02, 9/11/2004), British Horseracing Board Ltd v. William Hill (C-203/02, 9/11/2004), Fixtures Marketing Ltd v. OPAP (C-444/02, 9/11/2004).

[i] **About AFCAR**

AFCAR's mission is to ensure competition in the automotive aftermarket and mobility services sectors, enabling competitive and innovative services and solutions. Its members are:

	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, the AFCAR Alliance represents a wide range of European stakeholders in the Automotive Aftermarket and Mobility Services Sectors, as well as vehicle dealers, operators in the mobility value chain and consumers. 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).