



POSITION PAPER

Brussels, 26/04/2023

CECE key recommendations for trilogues on the Data Act

The construction machinery sector is strongly committed to the digital transformation of the construction industry with a view to enabling data sharing at the service of productivity and sustainability. The exchange of data is an integrated element of business relations and models based on the principle of contractual freedom. It is therefore essential that regulations aimed at establishing new data-based business relations, such as the Data Act, do not undermine the existing consolidated business practices and models.

CECE welcomes the work of the European Parliament and the Council on many aspects of the proposal. However, we warn the EU co-legislators against possible unintended economic consequences across data value chains. We call on the European Parliament and the Council to consider the following aspects in the context of the inter-institutional negotiations phase.

I. CECE welcomes the definition of data proposed by the Council

The notion of **data readily available to data holders** provides legal certainty on the type of data covered by data sharing obligations of Chapters II and III. It implies that data is first accessible to data holders without going beyond a simple operation. On the contrary, the European Parliament's approach to *accessible data* leaves room for interpretation as data that is "accessible" is not always necessarily readily available to data holders. In addition, depending on the manufacturer's willingness, data can be either accessed or not by users. Derived or inferred data should not be disclosed in any case, as it is the most investment- and IPR/trade secret-sensitive information.

II. CECE supports Council's approach on trade secrets' protection towards third parties

We acknowledge the progress made in relation to trade secrets' protection and Intellectual Property rights: trade secrets are to be identified by data holders and disclosed only upon their consent. Council's general approach allows **data holders to refuse the request for data access** in certain circumstances. We recommend maintaining this provision in the final text of the Data Act as users' right to access data must be balanced vis-à-vis rights to property and freedom to conduct business.

III. CECE recommends extending the non-competition clause to related services

We welcome the new formulation of the **non-competition clause**, which now prohibits users from using the data to undermine the manufacturer's economic situation and from sharing it with third parties to circumvent the clause. However, **the provision should also cover related services in scope of the Data Act**. Consequently, the reference to product that "*directly*" competes proposed by the European Parliament in

Article 4(4) should be modified to read “product and related services that compete” to ensure legal certainty in line with the objectives of the Regulation.

IV. CECE welcomes the approach of the Council on reasonable compensation

As proposed by the Council, the mechanism of determining the level of **reasonable compensation for the data holder to make data available** should include the costs incurred and investment required for making data available, plus a margin. CECE believes that data holders are always entitled to compensation for the costs incurred to make data available. Specifically, in business-to-business relations, companies should be enabled to find mutually beneficial data-driven relationships by recognising the central role of flexible contractual terms, including compensation.

V. CECE endorses the European Parliament’s approach to exclusivity agreements

CECE stresses the need to ensure the freedom of contract principle. Voluntary agreements on data sharing, including on exclusivity, should remain unaffected. We therefore welcome the approach of the European Parliament on **exclusivity agreements between data holders and data recipients**. As proposed by the Parliament’s mandate, Article 8(4) should be removed as it prohibits data holder from concluding contract on an exclusive basis with data recipients. From a commercial perspective, losing rights on exclusivity will hamper investment in innovation and the development of new and innovative services. Players in industrial data sharing contexts should always be entitled to freely negotiate the terms of their contractual relationships.

VI. CECE strongly advocates for the extended transition period proposed by the Council

A transition period of 24 months after the entry into force, followed by a delay in the application of the design and manufacturing obligations equal to 12 months will enable construction equipment manufacturers to make their products compliant with the new data sharing requirements. On the contrary, **CECE is concerned about the 5-year retroactivity clause proposed by the European Parliament**, which it strongly opposes. For construction machinery manufacturers the retroactive application of data holder’s obligations towards users will have an impact on the provision of services related to their products. The data these machines collect is first stored on high-performing servers to ensure fast processing and grant easy access. Over time, this data is transferred to archives as the requests for such access gradually diminish. As such, making available to the user 5 years of retroactive data will require significant efforts, and therefore generate substantial infrastructure costs. In addition, our manufacturers pay for the telematics and telecommunications subscription, which is provided by their suppliers. The customers can always get the telematics services and access to the related data for a fee. The retroactive application of the Data Act will create an unfairness for the customers that have historically paid for the telematics services and related data: the manufacturer would then need to refund the fee that they already charged to their customers for such services in the last 5 years, thus creating an unfair financial burden on the manufacturers and potential legal issues.

About CECE

CECE, the Committee for European Construction Equipment, represents the interests of 1,200 construction equipment manufacturers through national trade associations in Europe.

CECE manufacturers generate €40 billion in yearly revenue, export a sizeable part of the production, employ around 300.000 people overall. They invest and innovate continuously to deliver equipment with highest productivity and lowest environmental impact. Efficiency, safety and high-precision technologies are key. See also www.cece.eu.