

Guidelines for tailoring contractual arrangements

PROJECT ACRONYM	GRANT AGREEMENT #	PROJECT TITLE
V2Market	101033686	V2Market Valorising energy Efficiency and Flexibility at Demand-side using Vehicles to Grid (V2G) and Vehicle to building (V2B) Technology

D5.2 Guidelines for tailoring contractual arrangements

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DISSEMINATION LEVEL

- ✓ **P Public**
- C Confidential, only for members of the consortium and the Commission Services

Version History

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Statement of Originality

This deliverable contains original unpublished work except where clearly indicated otherwise. Acknowledgement of previously published material and of the work of others has been made through appropriate citation, quotation or both.

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Background and objectives

The main goal of V2Market is to make progress on the V2X services for the full integration of V2G in European countries as soon as the regulation is ready. The project intends to take advantage of the lessons learnt and the barriers identified in the few European countries that have V2G in place, namely Denmark, and use the forthcoming Spanish regulatory context as leverage for developing a more comprehensive business case for V2G for European markets, including several contractual possibilities for the end-user.

In this context, the contractual relations and tools between the key actors are of paramount importance, and the objective of the present work is to study the legal determinants and key aspects involved in the creation of standardized contract elements for V2G contract arrangements. The "static" parts of the contract will be identified while also assessing the key incentives for the aggregator and EV owner, which will serve as the "variable" parts of the contract tailored to each specific case. Additionally, this deliverable will take into account other important factors from work developed within the project in order to design an effective contract. Overall, the goal is to deliver a well-designed and tailored contract framework that meets the needs of both the aggregator and EV owners.

Approach

The present work has been subcontracted to the law firm “Cuatrecasas Gonçalves Pereira”¹ according to the work previously executed in the project, and specifically during the “Analysis of key contract elements for EV owner – aggregator contracts”.

The analysed scenario is based on the following assumptions:

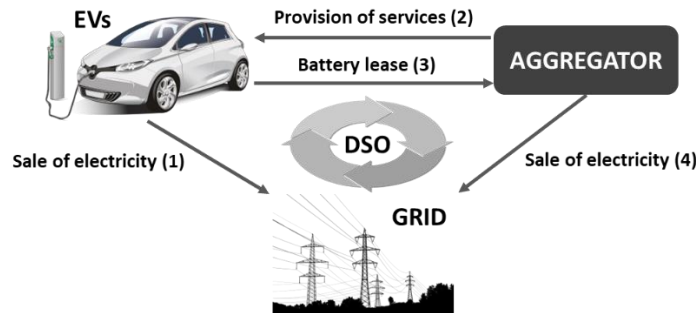
- The aggregator is the owner of the Recharging Point through which the EV will take energy or feed it back to the grid.
- The aggregator is the one selling the energy generated from the battery.
- The aggregator is the one contracting with the relevant energy supplier and acquiring the energy needed for recharging the battery.
- The EV Owner will allow the aggregator to use the EV battery while the EV remains connected to the Recharging Point. The aggregator will operate the battery for its own benefit.
- The aggregator will pay the EV Owner for the use of the EV battery.

EV owners temporarily lend their vehicles to the aggregator at a charging station, so that the aggregator can make use of their batteries, charging the batteries or injecting energy into the grid or a building on a discretionary basis.



¹ Juan Carlos Hernanz; Sara Mondelo; Antonio Barba; Marcos Ocampo; Albert Agustinoy; Paula Álvarez

The aggregator manages a pool of EV that allow it to supply flexibility services according to the flexibility needs of the DSOs.



The four main transactions that have been analysed are:

- 1) The delivery of electricity by EV owners to the grid or a building.
- 2) The provision of services by the aggregator in favour of the EV owners consisting of providing them with the know-how necessary to inject the electricity into the grid or a building.
- 3) The granting in favour of the aggregator of the right to use the EV battery while the EV remains connected to the Recharging Point.
- 4) The delivery of the electricity obtained by the aggregator as a consequence of transaction 3 to the grid or a building.

In general, only transactions 3 and 4 have been considered relevant to the V2Market contracts, and as such these are the only underlying the following contractual guidelines.

These guidelines have been drawn up based on Spanish law in force on the date of the Report and applicable to the V2M Contracts. But, when drafting the Guides attached as Schedule I and II, we did take into consideration the DIRECTIVE (EU) 2019/944 and checked that the proposed terms and conditions comply with such legislation. Therefore, even though (i) the DIRECTIVE (EU) 2019/944 provides a very succinct legal framework for the aggregator figure; and (ii) such Directive is still to be transposed and developed by EU Member States (including Spain), these Guides would still be a good basis and starting point for any parties from an EU country wishing to enter into this kind of commercial agreements.

- Guidelines for tailoring contractual arrangements

	Issue	Comments	Static vs flexible variables
I. PARTIES			
I.1.	Client (EV Owner)	<p>The contract shall identify the Client properly, by including the following information:</p> <ul style="list-style-type: none"> - name, address and tax identification number, when the Client is a natural person; or - Corporate name and address, tax identification number and registration details with the relevant Commercial Registry if the Client is a legal entity. <p>In case the Client was acting through a representative, the contract shall include the identification details of the representative (name, surname, address and ID number) and the Power of Attorney (POA) by virtue of which the representative is acting. There is no need to attach a copy of the POA to the contract, but aggregator should keep one within its records.</p> <p>The contract will include standard wording and will refer to Schedule I of the Contract (Specific conditions to the contract), a pre-agreed model form with blank spaces for the Client to fulfil its own data.</p>	S
I.2	Aggregator	<p>In case the aggregator was a legal entity the Contract shall include the same information already mentioned above (including the one referring to the representative).</p> <p>In case the aggregator was a natural person, the contract should include at least the following information: name, surname, address, and ID number.</p>	S
II. RECITALS			
	Recital 1	The Client shall confirm ownership of the EV(s) affected by the contract. However, identification of such EV(s), including the relevant information on their batteries in Schedule I.	S
	Recital 2	The aggregator shall confirm ownership of the Bidirectional Recharging Points affected by the contract, including their location, in Schedule II.	S
	Recital 3	Brief summary of the activities carried out by the aggregator and why the aggregator is interested in using the EV battery.	S

	Issue	Comments	Static vs flexible variables
III. CLAUSES			
1.	Condition Precedent	<p>This clause would only be included in the Pool Contract in case (i) regulation was modified and the aggregator was allowed to accumulate several EVs in order to place bids in the primary auction market and (ii) the main reason why aggregator is entering into this commercial agreement is because the aggregator wishes to participate in such bids.</p> <p>In case the aggregator was mainly interested in auction for energy in the primary market, and a minimum bid was still required for decentralized resources a condition precedent should be included until the EV pool operated by the aggregator is big enough to give certainty regarding compliance of such minimum requirement.</p> <p>In case at the time of entering the first Pool Contracts the aggregator did not comply with this minimum requirement, a condition precedent should be agreed by virtue of which the contract shall only enter into force when such requirement is met.</p> <p>This clause would:</p> <ul style="list-style-type: none"> (i) Clearly identify the Condition Precedent and when it should be considered as fulfilled. Under Spanish Law, fulfilment of a condition precedent should not depend on the will of one of the parties. (ii) Set a maximum date by when the Condition Precedent needs to be met. If the Condition Precedent is not met at that time, the contract will be deemed as invalid. (iii) Regulate how the Aggregator shall evidence and notify the Client of the fulfilment of the Condition Precedent. (iv) Regulate when the contract enters into force once the Condition Precedent is met. 	<p>S</p> <p>(but only applicable to the Pool Contracts signed by the Aggregator when auction in the primary market is essential in the aggregator's business model and the pool it operates is not big enough to ensure compliance with the minimum offer requirement)</p>
2.	Definitions. Interpretation rules	<p>For an easier reading of the contract, we would recommend including a clause whereby terms in Schedule III have the meaning described in such annex.</p> <p>Schedule III will also include the interpretation rules applicable to the contract.</p>	<p>S</p>

	Issue	Comments	Static vs flexible variables
3.	Object	Automatic assignment of the use of the EV battery by the Client to the aggregator upon connection of the EV to the Recharging Point.	S
4.	Permitted use of the EV battery	This clause shall clearly explain the uses that the aggregator may make of the EV battery when connected to the Recharging Point.	
5.	Software	<p>Identification of the software used by the aggregator to operate the EV's battery².</p> <p>Appropriate wording regarding intellectual property rights shall be included in this clause. In this regard, this clause shall regulate:</p> <ul style="list-style-type: none"> (i) The specific ownership of the Intellectual Property (IP) rights over the software³, retaining all the rights over the software and the rest of the protected assets, if any. <ul style="list-style-type: none"> a. The Client acknowledges that it will not acquire any IP rights by virtue of this contract, except of those herein expressly granted, if any. b. Immediate notification in the event of any claim or violation of the IP rights to the software by third parties arises. (ii) Granting of a Software license, determining the scope of the license. An [exclusive or a non-exclusive], [personal and non-transferable], [territorial scope/ geographic area], [specific term/ unlimited term], [exploitation modality, content, and use of the software], [restrictions, if any, including which users will be authorized to use the software/on which terminals/computers/computer equipment the software may be run]⁴. 	S

² We assume the aggregator will manage the EV pool through a software and applications, to be downloaded by the Client, whereby aggregator will be informed at every time of the charging level of the EV pool, and whereby the Client may notify the aggregator of any changes in the expected availability, any special request of additional charging, etc.

³ Please review articles 95 and subsequent articles of the IP Act.

⁴ Under the article 43 of the IP Act a software license agreement should include provisions regarding the transfer of the software's exploitation rights, which allows for the transfer of exploitation rights. Please note that the lack of specific terms regarding time and territorial scope will limit the transfer to five years and

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		<ul style="list-style-type: none"> (iii) The license granted under this contract includes does not include the Client’s right to enter into sublicense agreements with third parties⁵. (iv) Reference to integration of new functionalities or developments in the software, if applicable, including the prohibition to copy or transform the software, improve it, develop updates or any adaptation, without the prior consent of the Aggregator. (v) Unless expressly accepted by Aggregator, the license to the Software does not grant to the Client any right to access or use the Source Code. (vi) Section regarding the delivery of the software to clients, stating that it is provided “AS IS” and without any warranty except for any representations or guarantees expressly made in the contract. (vii) Contractual obligations applicable to the Aggregator, which developed the software, among others, include the following: <ul style="list-style-type: none"> a. Deliver the software and all the Technical Specifications and Functionalities subject to the conditions provided, and adapt, if necessary, the software accordingly. b. Correct any malfunction in the Software both detected and reported. c. Inform in case of any improvements, developments, enhancement, or new versions of the Software. 	

the country in which the transfer takes place (in particular, Spain). Additionally, the transfer of exploitation rights does not extend to non-existent or unknown methods of utilization or means of dissemination at the time of the transfer.

⁵ According to article 99.4 of the IP Act, where the right to use the software is assigned, it shall be understood, unless there is proof to the contrary, that such assignment is of a non-exclusive and non-transferable nature, it also being presumed that it is for the sole purpose of satisfying the needs of the user. Moreover, please note that the first sale in the European Union of a copy of a program by the owner or with his consent shall exhaust the right of distribution of that copy, except for the right to control the subsequent rental of the program or a copy thereof.

	Issue	Comments	Static vs flexible variables
		<ul style="list-style-type: none"> d. Take measures needed to defend its IP Rights to the Software and will diligently take all such actions that may be necessary before the relevant authorities, institutions, or courts, against any claims or violations by third parties, assuming the costs derived from such actions. (viii) Contractual obligations applicable to the use of the license by the Client such as: <ul style="list-style-type: none"> a. Compliance with the Technical Specifications and Functionalities, if applicable. b. Minimum security requirements. c. Refraining from translating, adapting, or creating versions or works derived from the Software or using it for any other purposes. d. No copies of the software, except the back-up copy cause to is needed to use the software. (ix) Non-exclusivity license. Aggregator will be entitled to grant licenses for use of the Software to third parties or use the Software in any manner anywhere in the world. (x) Rights on software output (e. g. data generated, key performance indicators), ensuring that Aggregator retains the intellectual property rights on the results generated by the software, including any modifications or improvements. This means that Client should not have the right to modify, distribute, or reproduce the software output without prior consent of the Aggregator. 	
6.	EV Availability	<p>This clause refers to the EV availability undertaking assumed by the Client (that is, the periods where the Client agrees to connect the EV battery to the Recharging Point and, therefore, to allow the aggregator to use the battery for the permitted use set forth in clause 4 above). Therefore, it should regulate, at least, the following:</p> <ul style="list-style-type: none"> (i) The Client’s obligation to have the EV connected to the Recharging Point at the agreed “Availability Slots.” Availability Slots shall be reflected in Schedule IV. 	S

	Issue	Comments	Static vs flexible variables
		<p>(ii) Consequences for any deviation to the agreed Availability Slots (consequences may be different, depending on the deviation degree, or on whether such deviation is occasional or recurrent). In particular, the contract may provide for penalties applicable to the Client in case the availability obligation was not met.</p> <p>(iii) Procedure to be followed by the parties if any of them wishes to amend the Availability Slots.</p>	
7.	<p>Battery management. Load levels and charging rates.</p>	<p>This clause would regulate issues such as:</p> <p>(i) Minimum/maximum load levels that the EV needs to have:</p> <ul style="list-style-type: none"> - when first connected to the Recharging Point, - while it remains connected to the Charging Point; and - when charging finishes. <p>Any such requirements shall be set forth in Schedule V.</p> <p>(ii) Charging rates allowed by the EV owner⁶.</p> <p>(iii) The agreed charging rates would be set forth in Schedule V.</p> <p>(iv) Mechanism by virtue of which, when requested in advance, the aggregator shall deliver to the Client additional battery load levels at a certain moment.</p> <p>(v) Consequences for any deviation to the agreed battery levels (consequences may be different, depending on the deviation degree, or on whether such deviation is occasional or recurrent). In particular, the contract may provide for penalties applicable to the party whose obligations under this clause were not met.</p>	<p>S</p>

⁶ Whether the EV battery is recharged at a certain speed may affect how the battery works in the long term. Therefore, EV owner may wish to limit the capacity of the aggregator to charge/discharge the EV battery at certain speeds.

	Issue	Comments	Static vs flexible variables
		(vi) Procedure to be followed by the parties if one of them wishes to amend the agreed battery load levels.	
8.	Aggregator's obligations	<p>This clause would list all the general obligations undertaken by the aggregator. Our understanding is that, at least the following, shall be included:</p> <ul style="list-style-type: none"> (i) Paying the agreed remuneration for the use of the EV battery, in accordance with the terms and conditions of the contract. (ii) Refraining from using the EV battery for any use different to the permitted uses included in clause 4. (iii) Acting as a businessperson with a separate legal personality, avoiding any association or confusion with the Client, with the aggregator undertaking to comply with the legal obligations pertaining to its status as an independent business owner. (iv) Holding all the legal permits and authorizations required under applicable law for the operation of the EV battery. (v) Taking out professional indemnity insurance with a reputable insurance company at its own expense, and keep it in full force, to cover any liabilities the aggregator may incur when operating the EV battery. (vi) Complying with any other obligation established in the contract. (vii) Complying with any specific additional obligation listed in Schedule VI. 	S
9.	Client's obligations	<p>This clause would list all the general obligations undertaken by the Client. Our understanding is that, at least the following, shall be included:</p> <ul style="list-style-type: none"> (i) Provisions regarding maintenance of the EV and, in particular, the EV battery. (ii) Comply with all other legal obligations and those established in the contract. (iii) Prevent other EVs different to the ones identified in Schedule I to be connected to the Recharging Point. 	S

	Issue	Comments	Static vs flexible variables
		<p>(iv) Immediately notify the aggregator of any malfunctioning or failure of the Recharging Point or the Smart metering System that the Client may have noticed.</p> <p>(v) Complying with any additional specific obligation included in Schedule VII.</p>	
10.	Remuneration	Standard wording to be included in this clause, with reference to Schedule VIII, where remuneration for the use of the EV battery shall be specified.	S
11.	Invoices and payment terms	This clause shall establish when remuneration should be paid.	S
12.	Liability	<p>Standard wording by virtue of which each party agrees to indemnify the other party for any damages suffered as a result of breach of their obligations under the contract, wilful intent or gross negligence.</p> <p>Consider whether the contract shall include any liability cap. However, please note that any liability cap, even when expressly agreed in writing in the contract, would not apply, under Spanish law, to damages due to wilful intent (<i>dolo</i>).</p>	
13.	Term of the Agreement.	<p>This clause shall state:</p> <p>(i) When the contract enters into force, and</p> <p>(ii) Duration of the contract.</p>	S
14.	Termination of the Agreement	<p>This clause should list all causes and consequences for early termination of the contract:</p> <p>(i) At any of the parties 'request⁷; or</p> <p>(ii) At the Aggregator's request⁸.</p>	S
15.	Force Majeure	Standard wording would be included.	S

⁷ For example, at any time, by sending a prior notice of termination; or due to a fundamental breach of the other party's obligations, when notified and not remedied within an agreed period of time.

⁸ For example, in case the aggregator failed to comply with applicable law requirements to operate as an aggregator.

	Issue	Comments	Static vs flexible variables
16.	Confidentiality	Standard wording would be included.	S
17.	Notices	This clause shall regulate (i) form of notices; (ii) addresses; and (iii) procedure for any changes to the addresses and contact persons.	S
18.	Expenses and taxes	This clause shall state how parties will pay the expenses and taxes arising from negotiating, executing, and performing the Pool Contract.	S
19.	Data processing	<p>This Clause shall state:</p> <p>Information on personal data processing⁹, providing the data subject with the following information:</p> <ul style="list-style-type: none"> (i) The identity and the contact details of the controller and, where applicable, of the controller's representative; (ii) The contact details of the data protection officer¹⁰, where applicable; (iii) The purposes of the processing for which the personal data are intended as well as the legal basis for the processing; (iv) The legal basis of the processing; (v) The recipients or categories of recipients of the personal data, if any; 	S

⁹ According to article 13 of the GDPR the Aggregator and the Client shall inform to data subjects about the processing of their personal data. Contracts contain personal data of the natural persons involved. Each party will keep the contract and will therefore be processing the data of these natural persons (the representatives of the other parties, as well as those intervening on their own behalf). Therefore, each Party shall inform to those data subjects about the way in which they will process their data, with all the details required by Article 13 GDPR. The purpose of this clause is to use the contract itself to inform data subjects of these details.

¹⁰ To be included only in the event that one or more Parties have a Data Protection Officer (DPO). If no party has a DPO appointed, the phrase does not have to be included. Art. 13 RGD requires to inform about the contact details of the DPO if he/she has been appointed (not all companies are obliged to appoint one). It is not necessary to indicate the name of the DPO, it is sufficient to indicate his or her contact details. The contact details should include a postal address and, if available, an e-mail address.

	Issue	Comments	Static vs flexible variables
		<p>(vi) Where applicable, the fact that the controller intends to carry out an international transfer personal data to a third country outside the European Economic Area¹¹.</p> <hr/> <p>In addition to these points of information, the controller shall, at the time when personal data are obtained, provide with the following information:</p> <hr/> <p>(i) The period for which the personal data will be stored;</p> <p>(ii) The existence of the data subject rights;</p> <p>(iii) Whether the provision of personal data is a statutory or contractual requirement, or a requirement necessary to enter into a contract, as well as whether the data subject is obliged to provide the personal data and of the possible consequences of failure to provide such data;</p> <p>(iv) The existence of automated decision-making, including profiling, providing meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.</p> <p>Where processing is to be carried out on behalf of Controller, a Data Processing Agreement (hereinafter “DPA”) must be signed¹².</p> <p>If applicable, the DPA must contain the following obligations to the data processor:</p> <p>(i) Process personal data only on documented instructions from the data controller.</p>	

¹¹ In the event that personal data is transferred to a third country outside the European Economic Area with which the EU has entered into in an adequacy decision, this document will be the legal coverage. Notwithstanding the above, if the transfer is made to another third country without an adequacy decision, it shall be mandatory to put in place the corresponding legal measures and tools, such as the those provided for in the article 49 GDPR (e. g. Standard Contractual Clauses).

¹² Under Article 28 paragraph 3 of the GDPR, when a data controller engages a data processor to process personal data on its behalf, the parties are required to enter into a written contract that sets out the specific requirements for processing that data.

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		<ul style="list-style-type: none"> (ii) Ensure confidentiality and take appropriate security measures. (iii) Assist the data controller in ensuring compliance, including responding to data subject requests. (iv) Guarantee the confidentiality of the personal data treated by the authorized persons. (v) At the choice of the controller, erase or return all personal data upon termination of the provision of the processing services, and erase existing copies unless the retention of the personal data is required under any EU regulation in force. (vi) Make available to the controller all information necessary to demonstrate compliance, as well as permit and assist in audits, including inspections. 	
20.	Applicable law	Spanish law.	S
21.	Dispute resolutions	We recommend including out-of-court mechanisms for the settlement of disputes concerning rights and obligations established under the contract, as requested by article 26 of DIRECTIVE (EU) 2019/944.	S
IV. SCHEDULES			
	Schedule I	Identification details of the Client, the EV(s) and the Recharging Point(s)	F
	Schedule II	Identification of the Recharging Points	S
	Schedule III	Definitions and interpretation rules	S
	Schedule IV	Availability undertakings	F
	Schedule V	Battery load levels agreed by the parties	F
	Schedule VI	Additional specific obligations of the Client	F
	Schedule VII	Additional specific obligations of the aggregator	F
	Schedule VIII	Remuneration	F

