

Contractual guidelines for aggregators – BRPs

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Contractual guidelines for aggregators – BRPs

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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This deliverable contains original unpublished work except where clearly indicated otherwise.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 develop a service 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.

Approach

The present work has been subcontracted to the law firm “Cuatrecasas Gonçalves Pereira”¹ according to the information provided by the consortium partners, and particularly the UK “Transition flexibility services agreement”².

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.
- The BRP requires the aggregators’ services depending on their own variable needs and for a specific zone.

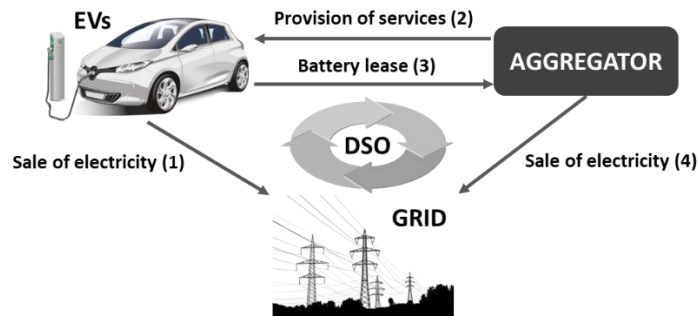
EV owners temporarily lend their vehicles to the aggregator at a charging station, so that the aggregator can make use of their batteries, charging the batteries or injecting energy into the grid or a building on a discretionary basis.



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

² https://ssen-transition.com/wp-content/uploads/2021/10/TRANSITION-Flexibility-Services-Agreement_23August2021.pdf

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



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 “Guidelines for tailoring contractual arrangements” and “Contractual guidelines for aggregators – BRPs”, 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.

- **Contractual guidelines for aggregators – BRPs**

	Issue	Comments	Static vs flexible variables
<i>I. PARTIES</i>			
I.1.	DSO	<p>Bearing in mind that the DSO shall receive an invoice from the aggregator, the contract shall identify the DSO properly, by including at least the minimum information required under applicable law³: corporate name and address, tax identification number and registration details with the relevant Commercial Registry.</p> <p>In addition, the contract shall include the identification details of the representative (name, surname, address and ID number) and the powers 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, a pre-agreed model form with blank spaces for the DSO 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 shall include at least the following information: name, surname, address and ID number.</p>	S
<i>II. RECITALS</i>			
	Recital 1	Brief standard summary of the activities carried out by the DSO.	S

³ Article 6 of Royal Decree 1619/2012, of November 30, 2012, which approves the Regulation governing invoicing obligations.

	Issue	Comments	Static vs flexible variables
	Recital 2	Brief standard wording by virtue of which the aggregator declares that it has control over an EV and bidirectional recharging points (the “Recharging Points” and, together with the EVs, the “Pool”) that may be used in order to provide the DSO with flexibility services.	S
	Recital 3	The Aggregator shall state that it has the technical, material and human resources to provide the services object of this contract.	S
	Recital 4	DSO will state it is interested in receiving the flexibility services provided by the aggregator in the zone(s) identified in Schedule II.	S
III. CLAUSES			
1.	Definitions. Interpretation rules	For an easier reading of the contract, we would recommend including a clause whereby terms in Schedule III shall have the meaning described in such annex. Schedule III will also include the interpretation rules applicable to the contract.	S
2.	Object	Clause by virtue of which the aggregator undertakes to provide the DSO, on an ongoing and regular basis, with the services specified in Schedule IV in accordance with the standards agreed therein (the “ Services ” and the “ SLAs ”, respectively). This clause shall state whether the aggregator will provide any of the Services to the DSO on an exclusive basis (or not).	S
3.	Aggregator’s available resources. EV	3.1. Identification of the EV and Recharging Points resources affected by the contract This clause will include a reference to Schedule V, where the aggregator will list and include identification details of the Pool affected by the contract. However, as the Pool will necessarily change from time to time, this clause shall also include standard wording on how the aggregator shall proceed in order to include/exclude, as the case may be, new EVs and/or Recharging Points to the Pool. Regulating such procedure implies:	S

	Issue	Comments	Static vs flexible variables
		<p>(i) Setting the legal and technical requirements⁴ that any EV and/or Recharging Point needs to meet in order to be included in the Pool.</p> <p>(ii) Setting the procedure⁵ for the aggregator to request the inclusion or exclusion of an EV or Recharging Point from the scope of this contract, as well as the consequences of such inclusion/exclusion.</p> <p>(iii) Setting the procedure⁶ to answer the aggregator’s request. In particular, wording should make it clear whether DSO has the right or the obligation, in any particular case, to accept the inclusion/exclusion requested by the aggregator. In addition, wording should confirm whether silence from the DSO should be understood as acceptance or rejection of the aggregator’s request.</p> <p>(iv) Setting the procedure for inclusion/exclusion, once agreed by the DSO.</p> <p>This clause might include standard wording and, deadlines and specific information to be filled by the parties may be referred to Schedule VI.</p> <p>3.2. Constant reporting on the Pool capacity.</p> <p>Depending on the Pool Contracts entered into by the Aggregator and the EV owners, the capacity to provide the flexibility services offered to the DSO may vary constantly, on a daily basis. The contract should specify the procedure⁷ under which the aggregator shall provide</p>	

⁴ Location, capacity, etc.

⁵ Timing, formalities and communication channels.

⁶ Timing, formalities and communication channels.

⁷ Timing, formalities and communication channels.

	Issue	Comments	Static vs flexible variables
		the DSO with updated information on the capacity of the Pool to provide the Services on any given time ⁸ .	
4.	DSO's request for Services	<p>This clause shall include standard wording on the procedure under which the DSO will request the performance by the aggregator of a specific service.</p> <p>This clause shall refer to Schedule VII, where the specific terms and conditions for each request of Services is to be included in a detailed manner.</p>	S
5.	Services performances	<p>5.1. Remedies</p> <p>Standard wording whereby parties agree on the consequences derived from the Services not meeting their relevant SLAs.</p> <p>This clause may state the remedies available to the DSO in case all or part of the KPI's are not met. Such remedies may vary (for example, from fee's reduction, services credits or termination for repeated failure). The different consequences may be described in this clause, with standard wording. And the specific KPIs to which some or part of the described remedies apply would be identified in Schedule VIII.</p> <p>5.2. Penalties.</p> <p>In addition to the remedies described above, the contract may contemplate specific penalties for breach of the SLAs. If this was the case, standard wording in this regard would be included in this clause and specific penalties agreed by DSO and aggregator would be included in Schedule IX.</p>	S

⁸ For instance, this will depend on the limits to charging/recharging agreed by the aggregator with each of the EV owners.

	Issue	Comments	Static vs flexible variables
6.	Software	<p>Identification of the software used by the DSO to provide the aggregator with the relevant instructions and requests for Services⁹.</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 rights over the software¹⁰ retaining all the rights over the software and the rest of the protected assets, if any, at all times. <ul style="list-style-type: none"> a. Aggregator acknowledges that it will not acquire any IP rights. b. Immediate notification in the event of any claim or violation of the IP rights to the software by third parties arises. (i) Granting of a Software license, determining the scope of the license¹¹. (ii) The license granted under this contract does not include the aggregator's right to enter into sublicense agreements with third parties¹². 	S

⁹ We assume the DSO will operate through a software and applications, to be downloaded by the aggregator.

¹⁰ Please review articles 95 and subsequent articles of the IP Act.

¹¹ 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 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.

¹² 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
		<p>(iii) 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 DSO.</p> <p>(iv) Unless expressly accepted by DSO, the license to the Software does not grant aggregator any right to access or use the Source Code.</p> <p>(v) Section regarding the delivery of the software to DSOs, stating that it is provided "AS IS" and without any warranty except for any representations or guarantees expressly made in the contract.</p> <p>(vi) Contractual obligations applicable to DSO, which developed the software, among others, include the following:</p> <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. 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. <p>(vii) Contractual obligations applicable to the use of the license by the Aggregators, such as:</p>	

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		<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. <p>(viii) Non-exclusivity license. DSO 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.</p> <p>(ix) Rights on software output (e. g. data generated), ensuring that DSO retains the intellectual property rights on the results generated by the software, including any modifications or improvements. This means that the aggregator should not have the right to modify, distribute, or reproduce the software output without prior consent of the DSO.</p>	
7.	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) Providing the Services at the time and in the manner agreed in the contract, acting with due commercial care, under the principal of good faith and in the DSO’s best interest. (ii) Acting as a businessperson with a separate legal personality, avoiding any association or confusion with the DSO, with the aggregator undertaking to comply 	S

	Issue	Comments	Static vs flexible variables
		<p>with the legal obligations pertaining to its status as an independent business owner.</p> <ul style="list-style-type: none"> (iii) Providing the human and material resources required for optimal provision of the Services. (iv) Holding all the legal permits and authorizations required under applicable law for the rendering of the Services. (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 providing the Services. (vi) Assisting the DSO with all matters related to the Services. (vii) Complying with any other obligation established in the contract. (viii) Complying with any specific additional obligation listed in Schedule X. 	
8.	DSO's obligations	<p>This clause would list all of the general obligations undertaken by the DSO. Our understanding is that, at least the following, shall be included:</p> <ul style="list-style-type: none"> (i) Pay the Fees for the Services within the term and in the manner established in the Agreement. (ii) Supply all the information, documents, and assistance reasonably required for the aggregator to provide the Services. (iii) Comply with all other legal obligations and those established in the contract. (iv) 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 providing the Services. 	S

	Issue	Comments	Static vs flexible variables
		(v) Complying with any additional specific obligation included in Schedule XI.	
9.	Fees	Standard wording to be included in this clause, with reference to Schedule XII where the fees applicable to each of the services. An availability fee (not linked to the services effectively provided) may be included too.	S
10.	Invoices and payment terms	This clause shall establish when the aggregator's fees shall be invoiced. It shall also state when the aggregator's invoices must be paid. In this regard, it is important to highlight the limitations under Law 3/2004 on measures to combat late payment in commercial transactions, by virtue of which, as a general rules, fees for the rendering of the services shall be paid within a maximum term of 60 days.	S
11.	Guarantee	Consider whether any of the parties shall provide a guarantee. In such case, specific guarantee(s) applicable to the contract would be specified in Schedule XIII.	S
12.	Liability	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. 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>).	S
13.	Term of the Agreement.	This clause shall state when the contract enters into force, and duration of the contract. .	S
14.	Termination of the Agreement	This clause should list all causes and consequences for early termination of the contract:	S

	Issue	Comments	Static vs flexible variables
		(i) At any of the parties 'request' ¹³ ; (ii) At the Aggregator's request; (iii) At the DSO's request; or (iv) Automatic termination.	
15.	Force Majeure	Standard wording would be included.	S
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 contract.	S
19.	Data processing	This clause shall state: Information on personal data processing ¹⁴ , providing the data subject with the following information: (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 officer ¹⁵ , where applicable;	S

¹³ 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.

¹⁵ 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 RGPD requires to inform about the contact details of the DPO if he/she has been appointed (not all companies are obliged to appoint

	Issue	Comments	Static vs flexible variables
		<ul style="list-style-type: none"> (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; (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 Area¹⁶. <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/> <ul style="list-style-type: none"> (i) The period for which the personal data will be stored; (ii) The existence of the data subject rights; (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; (iv) The existence of automated decision-making, including profiling, providing meaningful information about the logic involved, as well as the significance and the 	

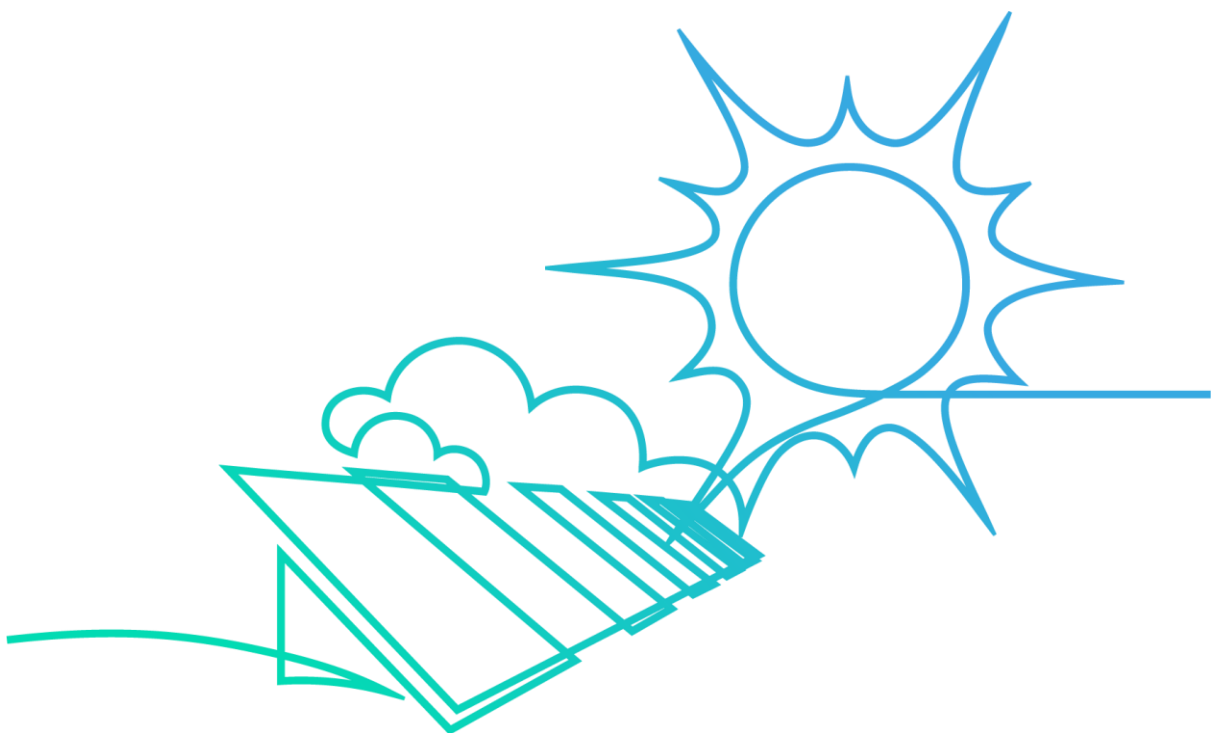
one). It is not necessary to indicate the name of the DPO, it is sufficient to indicate his or her contact details. The contact details should include a postal address and, if available, an e-mail address.

¹⁶ In the event that personal data is transferred to a third country outside the European Economic Area with which the EU has entered into 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).

	Issue	Comments	Static vs flexible variables
		<p>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 signed¹⁷.</p> <p>If applicable, the DPA must contain the following obligations to the data processor:</p> <ul style="list-style-type: none"> (i) Process personal data only on documented instructions from the data controller. (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.	S

¹⁷ 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

	Issue	Comments	Static vs flexible variables
IV. SCHEDULES			
	Schedule I	Identification details of the DSO.	F
	Schedule II	Identification of the zone where Services are to be provided.	S
	Schedule III	Definitions and interpretation rules	S
	Schedule IV	Description of each of the services to be provided by aggregator. Regarding each service, this schedule should clearly state: <ul style="list-style-type: none"> - Description of the services to be provided. - Service level agreement (SLA) defining the service standards the aggregator is obligated to meet and the metrics that will be used to measure the aggregator's performance ("KPIs"). 	F
	Schedule V	Initial Pool.	F
	Schedule VI	Specific agreements by the parties regarding the inclusion/exclusion of EV(s) and Recharging Points to the pool affected by the contract.	F
	Schedule VII	Specific terms and conditions applicable to the DSO's request for services.	F
	Schedule VIII	Specific remedies applicable to the agreed KPIs.	F
	Schedule IX	Specific penalties agreed by the parties.	F
	Schedule X	Additional specific obligations of the DSO.	F
	Schedule XI	Additional specific obligations of the aggregator	F
	Schedule XII	Aggregator's fees	F
	Schedule XIII	Guarantee(s)	F



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