

# CEER Response to the European Commission Public Consultation on the Data Act

3 September 2021

## 1 Introduction

The following section (2) consists of CEER's response to the European Commission's public consultation on the Data Act<sup>1</sup>. According to the European Commission, "The objective of the Data Act is to propose measures to create a fair data economy by ensuring access to and use of data, including in business-to-business and business-to-government situations."<sup>2</sup> The public consultation consists of both a questionnaire to which stakeholders can respond to questions of interest and the possibility to upload a response that consists of a position paper or other such document. CEER has chosen to respond with this document rather than responding to individual questions. CEER's response is found in the following section.

## 2 Response

Digitalisation goes hand in hand with the green economy and data plays a key role in achieving the goals of the European Green Deal. CEER welcomes the European Strategy for Data as profound changes are underway in the energy sector, affecting the ways energy is produced, transported and consumed. Energy regulators have the two-fold task of ensuring that these changes are efficient and beneficial to the system and consumers alike. In order to fully unlock the potential of digitalisation in this sector, it is not only sufficient to incentivise the roll-out of technology, but it is also necessary to enable the use of the multiple types of data generated. Issues such as data portability, data access rights for third parties and government, data control and cybersecurity as well as privacy issues must be addressed within a harmonised framework. CEER anticipates that the European Commission's action plan on the digitalisation of the energy sector will also further contribute to tackling these issues.

Digitalisation makes up one of the three pillars of CEER's "[3D Strategy](#)" for the period 2019-2021, as European regulators were quick to realise the fundamental implications of the digital revolution on energy systems. As a sweeping process, digitalisation can enable new services, bring new platforms and marketplaces, and ultimately alter energy demand (also see the [CEER Conclusions Paper on Dynamic Regulation to Enable Digitalisation of the Energy System](#) (C19-DSG-09-03)). CEER, therefore, recognised that digitalisation must be governed properly in order to produce positive outcomes for the power and gas systems as well as consumers from all backgrounds and levels of digital literacy. With particular regard to the latter, and recognising the vast existing differences in levels of engagement in the retail market, CEER set forth a series of recommendations on how the green transition can be inclusive for all consumers. Digitalisation can, among other things, bolster cost savings, convenience, consumer choice and participation as well as overall quality and security of supply of the system.

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<sup>1</sup> See <https://data.europa.eu/en/news/public-consultation-data-act>

<sup>2</sup> <https://digital-strategy.ec.europa.eu/en/consultations/public-consultation-data-act>

Besides guaranteeing adequate levels of protection, focus should be placed on empowering consumers who wish to take part in these processes by ensuring equal access to the value propositions resulting from increased digitalisation of the energy sector. This can only be possible, however, when it comes to data generated by smart technologies, if such data is accessible and useful. In other words, data needs to be collated and made available not only to network operators but also to current and potential market participants. Furthermore, data must be interoperable, subject to appropriate cost-benefit analysis and lastly, secure, in line with cybersecurity and data protection requirements.

On the other hand, governing the process also implies creating a regulatory framework that is adaptable and responsive to innovation. This means removing barriers to create a level playing field for new entrants (whether distributed resources or new retail business models), so that they are not at a competitive disadvantage through lack of access to industry data. Thus, how the data is processed and made available for actors to use will be critical to the success of digitalisation. Where data is an increasingly valuable asset in a competitive market, unless there is adequate oversight, it can actually increase barriers to entry and expansion and make innovation more difficult.

Concerning business-to-government (B2G) situations (Section I), it is clear that in the energy sector, access to private-sector data can provide public authorities in the EU with valuable insights, for example, to improve public transport, make cities greener and in general to advance the energy transition. Therefore, a framework to bring certainty to B2G data sharing for the public interest could bring greater transparency and certainty for actors involved, including network operators and new actors offering innovative services. However, given the characteristics of the energy system, mandates for B2G data sharing should be put in place in accordance with national data sharing models already defined and reflective of national market arrangements.

One of the specificities that characterises the energy sector is that many types of data – both system and private or personal – are collected as a public task (i.e. the processing of said data is necessary to perform a task in the public interest or for official functions, and the task or function has a clear basis in law). In this scenario, system (or network) data exchange on a European level is disciplined by EU Regulation 2017/1485<sup>3</sup>, which sets forth the rules and responsibilities for the coordination and data exchange between European TSOs, between TSOs and DSOs, and between TSOs or DSOs and SGUs (significant grid users). A second specificity concerns the subject responsible for collecting and processing said data: a network operator, typically obligated to operate in a non-discriminatory manner. As such, network operators should already guarantee a high degree of neutrality and non-discriminatory access to authorised third parties who process this type of data for legitimate interests.

A second type of energy data, consumption data, on the other hand, is also collated and many Member States have developed articulated national data collection and processing models, e.g. through centralised data hubs, decentralised data hubs or B2B (business-to-business) models. These models have commonly been expanded to include access to other interested – or eligible – third parties. This ultimately means that for network operators – or where established data hubs – there may be few-to-no barriers impeding B2G data sharing. However, in both cases, or rather for both types of data (system data and consumption data), opening access to government would imply creating a third channel for data flows. This is precisely why CEER believes mandates should be flexible enough to take into consideration the data collection and processing models already established at a national or regional level.

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<sup>3</sup> Commission Regulation (EU) 2017/1485 of 2 August 2017 establishing a guideline on electricity transmission system operation. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017R1485>

Energy consumption data, however, is being exchanged not only on the basis of public obligations but also, increasingly, on the basis of B2B contractual provisions. This data may also be processed for the legitimate interests of a third party. Though many innovative smart contracts and payment technologies, such as blockchain, are already penetrating energy systems at increasing rates, a clear and certain framework for B2B data exchange could further the application of such technologies by harmonising horizontal modalities for data access and targeting potential imbalances in negotiating power. Indeed, as private data will pass through more and more hands, in the cases of e-mobility or smart energy services, issues such as lack of legal clarity on who can do what with data (for example, co-generated data) must be addressed.

The ability of consumers to obtain, transfer, copy, and reuse their personal energy usage data across different services and IT environments in a structured, commonly used, machine-readable format, as foreseen by Article 20 of the General Data Protection Regulation (GDPR) has important implications for the energy sector (Section VI). As data may be transferred to any third party/service provider and may be reused for multiple and potentially very different purposes, the space for the development of new and competitive services, even across sectors, grows exponentially. Portability is not only an individual right; by removing certain entry barriers for new actors it is also a regulatory tool to shape and define markets. However, for consumers to exercise their right to portability, underlying contractual, economic and technical hurdles in the energy sector – such as interoperability – must be tackled.

The GDPR addresses data hostage contractual clauses, leading to clear switching requirements for operators – i.e. it must be easy and free of charge. From a technical perspective, however, in the energy system, lack of interoperability requirements means that for some services portability could remain merely theoretical if users are unable to actually exchange and transfer data, leading to lock-ins concerning both supplier and other market participants e.g. aggregators. The Electricity Directive 2019/944<sup>4</sup> introduces interoperability requirements for different data sets, including, among others, near-real time data, in order to support automated energy efficiency programmes, demand response and other services. However, these requirements are limited to the communication between the smart meter and devices. The world “beyond the meter”, namely communication between devices for which the flow of energy is undetected by the meter, (e.g. wall box or other devices installed by third parties), is yet to be fully addressed. Here, a rapid revolution of new services is occurring at an increasing pace.

In the case of e-mobility (which pertains partly also to the domain of Section III of the questionnaire), for example, portability could imply different things. Firstly, it could mean that the identification information of public charging stations, including location and availability, is always visible for users and is unaffected by commercial aspects, i.e. change of suppliers. In this case, portability refers to a public device and the interests of the affected parties coincide. In other words, consumers benefit from simplicity and the right of choice – e.g. they use one app to access all stations independently of the supplier – while suppliers have explicit economic incentives to maintain visibility.

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<sup>4</sup> Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L0944>

On the other hand, where there is a lack of economic incentives for effective interoperability, forms of external or regulatory oversight might be warranted in order to safeguard consumer portability rights. This appears to be the case for privately installed wall boxes, for example, where further questions arise concerning the technical aspects of portability and economic incentives to guarantee the interoperability of these devices. Devices, in this case, are installed and operated by third parties on the free market and do not benefit from the alignment of private interests or interoperability by design. Issues such as how to balance the interest of different actors involved, and more particularly, how far interoperability should be pursued, or should there be obligations to transfer data to all actors will need to be addressed. Effective portability would require clear and transparent technical interoperability requirements, such as the use of an open communication protocol. Thus, portability is not just a contractual issue.

These are merely some of the aspects that must be carefully evaluated when addressing portability rights in the energy sector and, more in general, the implementation of the provision of the Electricity Directive 2019/944 concerning the consumer's right to switch and rules on switching-related fees (Article 12), which comprises not only suppliers but market participants engaged in aggregation.

In conclusion, CEER believes that a harmonised framework for digitalisation must be based on, among other things, making the data of the energy system accessible and useful for actors interested. This was one of CEER's priority areas defined in its "3D Strategy". In practice, this implies that, where appropriate, relevant network and consumption data should be made available to current and potential market participants in an accessible manner. Furthermore, the opportunity to improve the interoperability of data and institutional arrangements for holding and sharing the data should be further explored. This framework, moreover, must ultimately benefit the system and consumers alike. As consumers are ultimately the heart and pulse of the green transition, CEER stresses the importance of ensuring that digitalisation empowers energy consumers through new services and products and does not create additional hurdles or worsen the digital divide. Regulators have thus pledged to reserve particular attention to distributional issues, that is, whether some parts of society are being "left behind", through continuous market monitoring and adaptable regulatory frameworks that balance innovation and data protection needs. The European Strategy for Data could contribute to pursuing these objectives by providing a clear and transparent framework for data exchange and governance.

### **3 About CEER**

The Council of European Energy Regulators (CEER) is the voice of Europe's national energy regulators. CEER's members and observers comprise 39 national energy regulatory authorities (NRAs) from across Europe.

CEER is legally established as a not-for-profit association under Belgian law, with a small Secretariat based in Brussels to assist the organisation.

CEER supports its NRA members/observers in their responsibilities, sharing experience and developing regulatory capacity and best practices. It does so by facilitating expert working group meetings, hosting workshops and events, supporting the development and publication of regulatory papers, and through an in-house Training Academy. Through CEER, European NRAs cooperate and develop common position papers, advice and forward-thinking recommendations to improve the electricity and gas markets for the benefit of consumers and businesses.

In terms of policy, CEER actively promotes an investment friendly, harmonised regulatory environment and the consistent application of existing EU legislation. A key objective of CEER is to

facilitate the creation of a single, competitive, efficient and sustainable Internal Energy Market in Europe that works in the consumer interest.

Specifically, CEER deals with a range of energy regulatory issues including wholesale and retail markets; consumer issues; distribution networks; smart grids; flexibility; sustainability; and international cooperation.

More information is available at [www.ceer.eu](http://www.ceer.eu).

#### **4 Relevant CEER publications**

CEER Report on Innovative Business Models and Consumer Protection Challenges, C20-CRM-DS-03-03, *to be published soon*.

CEER 2022-2025 Strategy Empowering Consumers for the Energy Transition, C21-SSG-06-05, June 2021.

CEER Conclusion paper on Dynamic Regulation to Enable Digitalisation of the Energy System, C19-DSG-09-03, October 2019.

Implementing Consumer Rights of the Clean Energy for All Europeans Package, C19-CEM-120-03, August 2019.

Implementing Technology that Benefits Consumers in the Clean Energy for All Europeans Package, 22 July 2019, July 2019.

Regulatory Aspects of Self-Consumption and Energy Communities, C18-CRM9\_DS7-05-03, June 2019.

CEER Report on Smart Technology Development, C17-RMF-101-04, June 2018.

Roadmap to 2025 Well-Functioning Retail Energy Markets, C17-SC-59-04-02, February 2018.