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BDEW Bundesverband der Energie- und Wasserwirtschaft e.V.

Reinhardtstraße 32
10117 Berlin

www.bdew.de

Position Paper

European Commission Proposal for a Regulation on harmonised Rules on fair Access and Use of Data (Data Act)

Key Points

- BDEW welcomes the overall goals of the proposal for a Regulation on harmonised rules on fair access to and use of data (Data Act). BDEW supports the objective of further **developing a European data economy**. In the energy and water sectors, data sharing can help drive the twin digital and green transformations.
- The Data Act proposes a new and extensive legal foundation for data access rights and thus **has a direct influence** on all **existing and future business models** in the energy and water industry and on **the technical data infrastructure**. Therefore, several aspects require further clarification in order to assure the successful implementation of the proposed measures.
- In principle, new data access rights result in **additional potential for sector coupling** and new user-friendly business models that can **advance the energy transition**.
- In the energy and water sector, many sectoral specific requirements for data sharing already exist. Thus, the **relationship of the Data Act to existing legislative acts requires further clarification**.
- The **specificity of data of critical infrastructures** demands greater consideration under the Data Act and necessitates an assessment of potential risks created by increased data sharing through the Data Act.

Introductory Remarks

On February 23rd 2022, the European Commission published a new legislative proposal to facilitate the use and exchange of data in the context of business to business (B2B), business to consumers (B2C) as well as business to government (B2G) data sharing. With the proposal for a regulation on harmonised rules on fair access to and use of data (henceforth the Data Act), the Commission progresses in building a European data infrastructure in line with the goals set out in the European Strategy for Data.

The German Association of Energy and Water Industries (BDEW) represents a multitude of different stakeholders from every part of the value chain in the energy and water industry and aims at sharing insights into the impact of the foreseen provisions of the Data Act.

BDEW welcomes the proposal and the Commission's commitment to and prioritisation of data sharing. BDEW supports the objective of further developing a European data economy. In the energy and water sectors, data sharing can help drive the digital and green twin transitions and create a pathway to an even more sustainable and digital future in line with the goals of the European Green Deal and the various digital initiatives currently proposed by the Commission.

The Data Act will be imbedded in the context of multiple related initiatives and legislative acts, some of which are currently still under development. With its comprehensive scope and horizontal application to all economic sectors, the measures of the Data Act will be a major framework for data sharing in the context of connected products in the EU. The Data Act creates new legal foundations for data access rights and thus has a direct influence on existing and future business models and on the technical data infrastructure. It is therefore crucial to ensure the foreseen provisions achieve the desired outcomes across all relevant sectors and industries.

Overall, BDEW acknowledges the potential for data sharing in the energy and water sectors. At the same time, existing legislation with regard to data sharing should not be impeded by the provisions of the Data Act. A coherent interplay not only with initiatives such as the Data Governance Act, GDPR, NIS 2, Open Data, and ePrivacy but also with existing sectoral legislation (e. g. in the context of smart metering) has to be guaranteed in order to create legal certainty and achieve the ambitious digital goals such as the creation of European Data Spaces.

Moreover, as operators of critical infrastructures, BDEW members have a responsibility to handle their data with utmost care in order to avoid risks to the security of supply. The data held by companies of the energy and water sector therefore requires further safeguards compared to other economic sectors. The specificity of data of critical infrastructures demands greater consideration under the Data Act and necessitates an assessment of potential risks (e. g. cyber security risks, increased number of data interfaces etc.) created by data sharing through the Data Act.

In the following, BDEW would like to highlight the key concerns of the energy and water industry in relation to the Data Act. While the overall framework is welcomed, there are several key aspects that require further clarification and amendment. For the next steps of the legislative process, BDEW has drafted concrete recommendations, aiming at facilitating data exchange while taking into account sector-specific requirements and for the purpose of promoting the digital and green twin transitions.

The BDEW Recommendations on the Commission Proposal (COM 2022/68) in Detail

1 Relationship between the Data Act and Sector specific Legislation in the Energy and Water Sectors

First and foremost, BDEW would like to highlight the need for clarification of the relationship between the Data Act as horizontal legislation and the various sectoral legislative acts that already govern the access to, the use and exchange of data in many areas including the case for the energy and water sectors.

While the Data Act accounts for general provisions of data access and sharing, it is unclear how it interacts with sector legislation which might limit the access to data or only allow for data sharing within specified boundaries. BDEW would welcome clarification with regard to the legal hierarchy so as to create legal certainty. In this context, it has to be underlined that, in general, sectoral legislation is better suited to account for the particular needs of certain economic sectors. A one-size-fits-all approach could lead to undesirable side effects and legal uncertainty that could hinder the sharing of data instead of promoting it. It would therefore be beneficial to establish the Data Act not in competition or contradiction to such existing legislation but to apply its provisions in cases where sectoral legislation does not yet provide specified requirements for data sharing and data access. This would also ensure the coherence of European and national legislation and help to establish an appropriate European data infrastructure.

The implementation of Directive 2019/944/EU on common rules for the internal market for electricity ("Electricity Directive") is a concrete example for existing sector-specific requirements. According to its Articles 23 and 24, secondary legislation for an interoperable framework for an easier data access and exchange using harmonized EU standards are currently being drafted and will facilitate the full interoperability of energy services within the EU. This work is supported by a wide group of experts from the energy sector and shall serve as a reference for data exchange in the energy sector. For example, the way how smart meter data should be shared with third parties (see Art. 5 Data Act) shall be defined specifically in Implementing Acts to the Electricity Directive. Art. 6 Data Act provides clear rules on obligations of third parties receiving data at the request of the user which so far are absent in the Implementing Acts. In any case, a clarification seems important to avoid inconsistencies by multiple and potentially conflicting rules.

In that respect, it should be stressed that data exchange processes with eligible parties, including data consent management related to metering and consumption data are to be defined in the dedicated Implementing Acts, and that this shall be comprehensive. Therefore, smart meters shall not fall under the "product" definition pursuant to Art. 2(2). In the interest

of a faster energy transition, all additional requirements that could potentially delay the existing smart meter rollout should be prevented.

Another example is the Delegated Regulation 962/2015 (2014) with regard to the provision of EU-wide real-time traffic information services which is relevant for the e-mobility sector. The regulation specifies data points which need to be submitted to the respective national access points (NAP) in each Member State. It is important that double regulation and contradictory interpretations are prevented for instance on the access to data and the compensation for providing data.

Therefore, greater clarification concerning the relationship between the Data Act and other relevant sectoral legislation is required.

2 Data sharing in the Context of Critical Infrastructure

As the present legislative proposal constitutes a horizontal legislative act, a variety of economic sectors and activities fall within its scope. However, not all data of data holders can be seen as equal. Data held by operators of critical infrastructure requires greater safety and security measures so as to not endanger security of supply and access to essential services.

One approach to facilitate this as well as coherence between the various legislative acts could be the development and recognition of an overarching classification scheme for data defining which categories of data have to be handled in specific ways and why and which have to be protected especially if critical infrastructure is concerned. An open and transparent process involving all the main stakeholders (aggregators, retailers, generators, DSOs, TSOs, etc) to jointly define such “data classification schema” shall not jeopardize the development of energy and water services but establish:

1. Which are ‘highly sensitive data’ that shall be generally exempted from being shared such as:
(i) configuration parameters and settings, logs, software levels;
(ii) detailed geographical information about the network structure (transmission and distribution level), restoration or system defence plans (Regulation (EU) 2017/2196 establishing a network code on electricity emergency and restoration), contingencies (Regulation (EU) 2017/1485 establishing a guideline on electricity TSO); and
(iii) technical supervision and control data regarding central remote management of end-point devices;

2. Which are 'critical and sensitive data' that require to be aggregated and anonymized due to their impact on critical services supply, on fundamental rights, and on legislative obligations.

In general, it is of vital importance that the Data Act allows for a qualified rejection of data sharing requests – by a user, data recipient, and public sector body – in cases in which security of supply and access to essential services cannot be ensured. Ever increasing transparency and data sharing requirements regarding energy and water supply and infrastructure significantly increase the risk of physical attacks if access to the information is not protected adequately.

Companies of the energy and water industry represented by BDEW constitute critical infrastructure and are acknowledged as such nationally by the KRITIS Regulation and on European level by the NIS Directive (2016/1148/EU, currently under revision) and prospectively also the Directive on the Resilience of Critical Entities (2020/0365(COD)) currently proposed by the Commission. Consequently, requirements to provide and share data must not lead to a deterioration of the resilience of critical infrastructures.

BDEW therefore calls for a narrow, clearly defined clause that could be the basis to reject a sharing request. Of course, such a provision should in no way undermine the general intention of this proposal. However, already other legislative acts concerned with data and the provision of data, such as the INSPIRE Directive (2007/2/EC) currently under evaluation, account for the special nature of data of critical infrastructures. A similar provision to Article 13 of the INSPIRE Directive could also be included in the Data Act to create a comprehensive framework that enables the sharing of data in a protected and appropriate manner.

The specificity of data of critical infrastructures demands greater consideration under the Data Act and necessitates an assessment of potential risks. For example, the increased number of data interfaces caused by extended data sharing obligations possibly result in further cybersecurity risks. These possible additional cybersecurity risks must be further assessed in light of the criticality of the energy and water industry infrastructure.

In regard to B2G data access, BDEW welcomes the provision that data received by public sector bodies in cases of a public emergency does not fall within the scope of the provisions of the Open Data Directive (2019/1024/EU). This is an appropriate safeguard and respects the sensibility of data provided in the above-mentioned circumstances. Moreover, the possibility to exchange the received data is rightly restricted in Article 17.

It is crucial that data provided in the context of Chapter V of the present proposal receives differential treatment in comparison to data made available as part of existing monitoring and reporting obligations. It is thereby key that companies who have complied with access requests are informed when their data is exchanged with another public sector body. The same limitations as agreed upon in the access request must apply to the handling of this data by the

other involved bodies. Indiscriminate exchange and forwarding of data between public sector bodies should be avoided as it increases the likelihood of mistreatment of data and potentially even its publication.

3 Definitions (Article 2)

Article 2 of the legislative proposal sets out to define the key concepts of the Data Act. BDEW points out that several terms in this article lack clarity and sufficient delimitation to make them applicable in everyday use cases. The definitions provided by the Commission frequently leave too much room for interpretation, thereby creating legal uncertainty. To be applied uniformly and coherently, further clarification of the key concepts of the Data Act is required.

3.1 Misleading official German Translation of the Term "Data Holder"

In the official German translation of the legislative proposal, the term data holder was translated using the term "*Dateninhaber*" which, strictly speaking, means *"data owner"*. This could create incoherence with the original intention of the Data Act. According to the understanding of BDEW, the present legislative proposal does not intend to designate data ownership. Hence, BDEW suggests amending the German translation of *"data holder"* to "*Datenhalter"* to correctly represent the meaning of the English original.

3.2 Product (Paragraph 2)

Due to the transversal nature of the legislative act and the dynamically developing environment of digital products, the Commission proposes a broad definition for the concept of *product*. However, the ambiguity of the concept creates challenges for the correct and coherent implementation of the Data Act. The definition as it stands is too broad. A clearer demarcation of the attributes of a product is required.

Practically, the current definition raises the question of various borderline cases in the energy and water sector in which it is not clear whether data generated by such products would fall under the scope of the regulation.

Moreover, while the distinction that a product whose primary function is the storing and processing of data does not fall under the regulation, further clarification is needed as to what constitutes a primary function (e. g. in the case of Smart Meter Gateways).

BDEW Recommendation for Amendments to the Commission Proposal:

Article 2 (2) 'product' means a tangible, movable item, including where incorporated in an immovable item, that obtains, generates or collects, data concerning its use or environment, and that ~~is able to~~ communicate**s** data **directly or indirectly** via a publicly available electronic communications service and whose primary function is not the storing and processing of data;

3.3 User (Paragraph 5)

The definition for user offers a good understanding of the term. However, BDEW proposes a minor amendment to clarify the relation to services in connection to the product.

Moreover, the definition omits a clarification of whether the ownership, rental or leasing of the product is based on a renumerated exchange or if the product could also be owned, rented or leased without a financial compensation/acquisition from the side of the user. A clarification in this regard could further illuminate the intention of the definition.

BDEW Recommendation for Amendments to the Commission Proposal:

Article 2 (5) 'user' means a natural or legal person that owns, rents or leases a product or receives a **related** service~~s~~;

3.4 Public Emergency (Paragraph 10)

Paragraph 10 of Article 2 offers a definition of public emergency so as to demarcate incidents for which public authorities will have the right to request specific data from the private sector which exceeds data that is already shared as part of the existing reporting and monitoring framework of the EU and the Member States.

BDEW underlines that the definition of public emergency is, however, too broad and undifferentiated, thereby creating the opportunity for excessive access requests to data by public authorities. As it stands, climate change could be understood to fall under the presented definition of public emergency as it is an exceptional situation which negatively affects the population of the European Union with a risk of serious and lasting repercussions on living conditions

and economic stability. A blanket definition of public emergency should, however, not lead to unrestricted, continuous access requests by public authorities.

BDEW therefore calls on the Commission to specify which sorts of public emergencies and public sector bodies are encompassed by these definitions. It is suggested to offer concrete examples which underline the concept and further define the concept by providing time limits for what counts as a public emergency and which specific authorities have a legitimate interest so as to avoid excessive access requests.

4 Access to Data by Public Sector Bodies (Chapter V)

In addition to measures for data sharing between users and data holders as well as data recipients and data holders, the Data Act proposes provisions for further access to data of data holders in the case of an exceptional need. These access requests do not impact existing reporting and monitoring regimes of the EU and the Member States but rather concern data that would under normal circumstances not be included when fulfilling these obligations.

The energy and water sector and their generated data are already subject to comprehensive reporting and monitoring requirements. Creating further requirements to share data with public sector bodies therefore must be carefully considered.

In general, data sharing requirements should only be introduced if the respective public sector bodies are actually able to process the shared data with added value in the case of public emergencies.

4.1 Access Requests (Article 17)

BDEW welcomes the provisions of Article 17 concerning the contents of access requests of public sector bodies to data holders. Currently, it is not always communicated in a transparent manner for which purposes data provided to public authorities is used. It is therefore beneficial for the trust between public authorities and data holders to determine in advance the purpose of the request, specify the intended use and its duration. BDEW also acknowledges favourably the provision of Article 19, obliging public sector bodies to destroy the received data as soon as it is no longer needed as defined by the access requests. With these provisions, the Commission has established the necessary foundation to ensure that access to data by public sector bodies in case of exceptional need is transparent and based on the required boundaries.

It is, however, crucial that the provisions of Chapter V as a whole do not create the need for further data collection for the case of public emergencies. As is foreseen in Article 18 (2) a), only already available and collected data can be requested in the case of public emergencies.

4.2 Definition of exceptional Need (Article 15)

BDEW would like to highlight that not only is the definition of public emergency as proposed in Article 2 too broad, the provisions, that set out what constitutes an exceptional need, equally require clarification. This pertains in particular to Article 15 c) which states that data can be requested if its absence prevents the public sector body from fulfilling a specific task in the public interest as provided by law. Arguably, all tasks of public sector bodies should be in the public interest. This clarification therefore does not add the intended specification but instead creates a vague basis for far-reaching requests to access data from data holders.

BDEW Recommendation for Amendments to the Commission Proposal:

Article 15 (c) where the lack of available data prevents the public sector body or Union institution, agency or body from fulfilling a specific task in the public interest that has been explicitly provided by law **in order to respond to, to prevent or to assist the recovery from a public emergency**; and (…).

5 Exemptions for micro, small, and medium Enterprises (Articles 7-9, 13 and 14)

BDEW commends the Commission for acknowledging the special role of micro, small and medium enterprises in the legislative proposal. With the special provisions and exemptions foreseen for SMEs, the Data Act creates valuable opportunities for Europe's smaller enterprises to use the data economy in its full potential and develop SME-appropriate business models. At the same time, SMEs should not be overburdened by administrative requirements and financial obligations which could hinder the potential of the sharing of and access to data for SMEs. BDEW therefore strongly supports the exemption of micro and small enterprises from the provisions of Chapter II and V.

Furthermore, it is appropriate to facilitate the greater sharing of data between SMEs and larger enterprises by limiting the financial compensation which SMEs might have to provide when acting as the data recipient (Art. 9). SMEs can be faced with a power imbalance in

negotiations over data access with bigger stakeholders. Therefore, the special protection accorded to them in Article 13 in the case of unfair contractual terms unilaterally imposed on them is also beneficial and proportionate. To achieve the EU's digital goals, SMEs have to be supported in developing their digital potential. The above-mentioned exemptions and provision of the Data Act is in line with these ambitions.

BDEW therefore welcomes the definition for SMEs as proposed in the Data Act by referring exclusively to Article 2 of the Annex to Recommendation 2003/361/EC. As many small and medium enterprises in the energy and water sector are at least partially publicly owned, it is crucial to ensure that they can nevertheless benefit from the proposed exemptions. Ownership structures should rightly not be a deciding factor when considering if SMEs can benefit from the provisions of the Data Act. BDEW therefore supports the Commission's proposed definition for what constitutes a micro, small or medium enterprise in the Data Act and the refraining from including an ownership criterium from that definition.

6 Further Need for Clarification (Chapter II and III)

Chapter II and III of the legislative proposal sets out the general provisions for business to consumer and business to business data sharing. While the general concepts and interactions between the different actors in the exchange of data are introduced, BDEW would like to highlight some ambiguities which result from the measures, and which require further clarification in order to guarantee legal certainty and thereby create an effective basis for data sharing.

6.1 Trade Secrets (Articles 4 and 5)

The relationship between data sharing obligations under the Data Act and existing European and national legislation concerning trade secrets (e. g. the Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, 2016/943/EU) needs to be clarified.

The Data Act states that, in principle, measures should be taken regarding the exchange of sensitive data that protect trade secrets. However, the concrete form of these measures remains unclear. Currently, confidentiality measures between data holder and user are included as a mere possibility and thus create a potential source of ambiguity. BDEW suggests that a classification system should apply to all data that is released, indicating how sensitive the data is in each case and what the consequences are for the further treatment of the data, in particular with regard to the question of liability. Information classified as "confidential" or higher

by the information owner should be covered by the same protection proposed by BDEW in Chapter 2 (Data Sharing in the context of critical infrastructure).

6.2 Responsibilities in Cases with multiple Data Holders (Articles 4 and 9)

Following the definitions for the different addressees, Article 4 establishes the obligation of data holders to make data available to the user in cases where generated data cannot be directly accessed by the user by design. It is the task of the data holder to make the data available upon request.

However, it remains undefined who holds the responsibility for making data available to the user in cases where multiple data holders could be identified. For example, if a product within the scope of this Regulation is produced and owned by two different actors with the former developing and producing the product and the latter leasing or renting it to the consumer while both maintain access to the generated data and de facto establishing both as data holders, which actor bears the responsibility to accommodate the request of the user? As this involves a certain degree of administrative burden on the side of the data holder, is it left to the arbitrary decision of the user which data holder has to provide the data?

This concern is exacerbated when a financial compensation from a data recipient is foreseen as is the case in Article 9. Which data holder is tasked with provision of the data and thereby also entitled to the financial compensation as agreed on with the data recipient?

Questions also remain unclear how the obligations and roles of the data act interact with the existing roles of the German smart meter infrastructure. Here, additional clarification is needed.

Another example is related to the e-mobility sector. In some business constellations the charge point operator (CPO) and the owner of a charging station are two different entities, for instance when retailers commission a CPO or backend provider to operate their charging infrastructure.

6.3 Data Access continuously and in Real-Time and Consent Management (Article 4 and 5)

The Commission's proposal foresees the provision of data by the data holder to the user and/or data recipient where applicable continuously and in real-time. The fulfilment of this measure would necessitate the creation of an extensive administrative and technical

infrastructure to potentially comply with a multitude of access requests at the same time and on a rolling basis.

This would furthermore not only require significant bandwidth but also continuous monitoring of all such agreements and a regular evaluation of whether the provision of data still serves the purpose of the user or the agreed upon purpose of the data recipient. BDEW therefore suggests replacing the notion of continuous and real-time data access with data access within a reasonable and achievable time span and during an agreed upon timeframe. This would create greater certainty for all actors involved in the data exchange while at the same time avoiding protracted and potentially extensive data provision obligations.

Moreover, BDEW suggests that technical feasibility needs to be taken into account when considering how data has to be made available to the user. Obligations should be limited to technical compatibility, meaning the ability of goods to function with hardware or software with which goods of the same type are normally used, without the need to convert the goods, hardware or software.

In general, concerning the request of users to access data, it should be emphasized that electronic means are sufficient, especially in cases where all other communication with the user is usually done through electronic means.

BDEW Recommendation for Amendments to the Commission Proposal:

Article 4

(1) Where data cannot be directly accessed by the user from the product, the data holder shall make available to the user the data generated by its use of a product or related service **in a common format chosen by the data holder and** without undue delay, free of charge ~~**and**~~, ~~**where applicable, continuously and in real-time**~~ **after a reasonable and achievable time span, and during an agreed upon timeframe**. This shall be done on the basis of a simple request **by the user** through electronic means where technically feasible.

Article 5

(1) Upon request by a user, or by a party acting on behalf of a user, 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**~~ **after a reasonable and achievable time span, and during an agreed upon timeframe**.

6.4 Aggregated Data

While the definition of data in Article 2 paragraph 1 already encompasses the compilation of digital representation of acts, facts or information, BDEW would like to underline that the treatment of aggregations of data remains to be discussed. It is so far unclear, how aggregated data has to be made available under the present provisions. Often, data is aggregated into bigger data sets. This raises the question whether a data holder would be obliged to disaggregate such data sets in case the user requests access. This could lead to significant administrative burden for the data holder.

6.5 Relationship with Data Protection Law

Contradictions between data protection law and the Data Act must be avoided. It needs to be clarified what would happen, e.g., in case the data holder is unable to grant access to data to the user because it contains mixed data sets that include also personal data? This could lead to legal uncertainty as it might be (i) legally impossible for the data holder due to the absence of an agreement (DPA) with the user or (ii) factually impossible since the data may be inextricably linked to each other.
In the first case, the user may simply refuse the data access for legal reasons.

7 Implementation (Article 42)

In light of the comprehensive new measures and requirements laid out in the present proposal, BDEW suggests to amend the foreseen date of application in order to allow all concerned parties sufficient time to establish the required structures to comply with the Data Act.

BDEW Recommendation for Amendments to the Commission proposal:

Article 42 It shall apply from [~~12~~ **24** months after the date of entry into force of this Regulation].

Contact

Sandra Struve
Representation to the EU
Phone: +32 2 774 5119
sandra.struve@bdew.de

Johannes Imminger
Representation to the EU
Phone: +32 2 774 5114
johannes.imminger@bdew.de

Hannah Seiß
Headquarters Berlin
Phone: +49 30 300199-1425
hannah.seiss@bdew.de