

Renewable and citizens energy communities in the European Union: how (not) to regulate community energy in national laws and policies

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Abstract

The paper covers regulating renewable energy communities (RECs) and citizens energy communities (CECs) within the EU. It offers ideas regarding RECs: to establish a register to tackle regulatory and administrative barriers, to adopt RECs national/European goals, to introduce the exemplary role of national authorities in their promotion. It also discusses creating a separate support scheme for RECs (e.g. a tariff supporting small RECs and a separate tender for other RECs); brings elements of legal recognition of CECs (membership condition, operational condition, and energy services condition); answers if renewable citizens energy communities are eligible under the EU law (yes, they are).

Keywords:

energy law; EU law; Renewable Energy Directive II; Fourth Energy Directive; energy regulation; community energy; renewable energy communities; citizen energy communities

1. Introduction

There are many reasons why energy communities grow in the world. Indeed, technological development and increasing accessibility of energy installations – mainly renewables with photovoltaics as a leading technology when it comes to price affordability – are essential drivers.¹ However, much depends on the legal framework;² if adequately created, can steer and support this development, or on the contrary, hinder, block, or even stop it. Besides these factors, community energy has other critical dimensions – environmental and social.³ I find one quote of Henry Ford (1863 – 1947) especially interesting (as it seems to gather all of these factors). ‘Coming together is a beginning. Keeping together is progress. Working together is success.’

However, Ford’s summary is just the beginning of this paper, not the end. What begins here is an introduction to a study on the current European regulatory framework on renewable and citizens energy communities in the EU. This paper aims to discuss issues which may appear at the crossroads of European – national law.

By providing detailed comments on renewable energy communities and citizen energy communities, one may find this paper as a manual on how to regulate community energy in

¹ See Emi Minghui Gui, Iain MacGill ‘Typology of Future Clean Energy Communities: An Exploratory Structure, Opportunities, and Challenges’ (2018) 35 *Energy Research & Social Science* 94, 96. Cf Chiara Candelise, Gianluca Ruggieri, ‘Status and Evolution of the Community Energy Sector in Italy’ (2020) 13 *Energies* 1888; Ariane Debourdeau, Alain Nadaï, ‘Autonomy and Energy Community: Realities to Reconsider?’ in Fanny Lopez, Margot Pellegrino, Olivier Coutard (eds) *Local Energy Autonomy: Spaces, Scales, Politics*, vol 1 (Wiley London 2019).

² See Annalisa Savaresi, ‘The Rise of Community Energy from Grassroots to Mainstream: the Role of Law and Policy’ (2019) *Journal of Environmental Law* 31, 487; Steffen Wirth, ‘Communities Matter: Institutional Preconditions for Community Renewable Energy’ (2014) 70 *Energy Policy* 236.

³ See Steven M. Hoffman, Angela High-Pippert, ‘Community Energy: A Social Architecture for an Alternative Energy Future’ (2005) 25 *Bulletin of Science, Technology & Society* 387; Jörg Radtke, ‘A Closer Look Inside Collaborative Action: Civic Engagement and Participation in Community Energy Initiatives’ (2014) 8 *People, Place and Policy* 235; Tineke Van Der Schoor, Bert Scholtens, ‘Power to the People: Local Community Initiatives and the Transition to Sustainable Energy’ (2015) 43 *Renewable and Sustainable Energy Reviews* 666; Stefano Moroni, Valentina Antonucci, Adriano Bisello, ‘Local Energy Communities and Distributed Generation: Contrasting Perspectives, and Inevitable Policy Trade-Offs, beyond the Apparent Global Consensus’ (2019) 11 *Sustainability* 3493. Moreover, one should also notice some negative perception of renewables, see Jodie West, Ian Bailey, Michael Winter, ‘Renewable Energy Policy and Public Perceptions of Renewable Energy: A Cultural Theory Approach’ (2010) 38 *Energy Policy* 5739.

national laws and policies or a non-compliance report on how not to address these entities at the national level.

In this context, the paper discusses energy communities established under the European law in Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources (Renewable Energy Directive II, RED II)⁴ as well as in Directive (EU) 2019/944 on common rules for the internal market for electricity (Fourth Electricity Directive, FED).⁵ Both entities derive from a long European tradition of local cooperation for energy needs, and the use of renewables.⁶ In this way, both renewable energy communities (Article 22 of RED II) and citizen energy communities (Article 16 of FED) derive from *acquis communautaire*. They are inscribed in the reform of the European common energy market. Both are discussed in the sections below (2 and 3). As far as the structure of the text is concerned, section 4 of this paper offers a discussion on renewable citizen energy communities (so the application of both framework and the needs of such a combined entity). Finally, section 5 concludes the provided evaluation.

2. Renewable energy communities and enabling framework

Renewable energy communities (RECs) are provided with a European approach aimed at harmonizing their position in national legislation.⁷ Under the common framework introduced by RED II, RECs should be recognized by the Member States – according to Article 22(4) of RED II; Member States are required to ‘provide an enabling framework to promote and facilitate the

⁴ Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources [2018] OJ L 328 [RED II].

⁵ 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 [2019] OJ L 158 [FED].

⁶ See Maciej M. Sokołowski, ‘European Law on the Energy Communities: a Long Way to a Direct Legal Framework’ (2018) 27 *European Energy and Environmental Law Review* 60; Maciej M. Sokołowski, ‘Local Public Energy Utilities: a Road to Improving Local Energy Security’ (2015) 17 *Network Industries Quarterly* 15.

⁷ See Michiel A. Heldeweg, Séverine Saintier, ‘Renewable Energy Communities as ‘Socio-Legal Institutions’: A Normative Frame for Energy Decentralization?’ (2020) 119 *Renewable and Sustainable Energy Reviews* 109518, 3.

development of renewable energy communities.’ In this way, RECs should have the right to generate and use (consume, share, store, sell) renewable energy having non-discriminatory access to all suitable energy markets.⁸ Additionally, the final customers, in particular households, should have a possibility of joining RECs without losing their status (with all rights and duties coming from the status of final customers) only if their participation in a REC is not their main commercial or professional activity, as well as they should not be treated in an unjustified or discriminatory way.⁹

Further elements of the framework for RECs (‘enabling framework’), which should be implemented by the Member States, are delivered in Article 22(4) of RED II. Its main elements should be addressed in integrated national energy and climate plans and progress reports pursuant to Regulation (EU) 2018/1999. In this context, the ‘enabling framework’ for RECs covers removing of unjustified barriers (regulatory and administrative), providing adequate provisions for their energy activities (supply, aggregation or other commercial energy services), facilitating cooperation with distribution system operators (DSOs), establishing fair, proportionate, and transparent procedures (e.g. registration and licensing procedures), making grid fees cost-reflective, as well as balancing relevant charges, levies, taxes, and offering REC access to financing and information.¹⁰ Apart from it, Member States have to build their own REC-capacity in public administration to enable authorities direct participation in a REC. Lastly, Member States have to provide RECs non-discriminatory treatment (‘concerning their activities, rights, and

⁸ See Article 22(2), RED II.

⁹ See Article 22(1), *ibid.*

¹⁰ Cf Aviel Verbruggen, Manfred Fischechick, William Moomaw, Tony Weir, Alain Nadaï, Lars J. Nilsson, John Nyboer, Jayant Sathaye, ‘Renewable Energy Costs, Potentials, Barriers: Conceptual Issues’ (2010) 38 *Energy Policy*, 850; Jamil Ramsi Farkat Diógenes, João Claro, José Coelho Rodrigues, Manuel Valentim Loureiro, ‘Barriers to Onshore Wind Energy Implementation: A Systematic Review’ (2020) 60 *Energy Research & Social Science* 101337; Maciej M. Sokółowski, ‘Discovering the New Renewable Legal Order in Poland: With or Without Wind?’ (2017) 106 *Energy Policy* 68.

obligations as final customers, producers, suppliers, distribution system operators, or as other market participants’), as well as to secure equal and non-discriminatory treatment of consumers being members of RECs – here participation in a RES has to be available for all interested consumers, regardless of income. Nevertheless, a few issues need further discussion.

2.1. Tackling regulatory and administrative issues with a RECs barrier register

In terms of regulatory and administrative barriers, both may derive from inadequate provisions becoming burdens for the operation of RECs. As underlined in RED II, these barriers have no justification – ‘unjustified regulatory and administrative barriers to [RECs] are removed’ as stated in Article 22(4)(a). Does it mean that ‘justified regulatory and administrative barriers’ can be maintained? It seems that this was not the intention of RED II.¹¹ In fact, the Member States should eliminate all regulatory and administrative barriers to development of RECs – however, what should be sustained (or established) are adequate provisions on RECs – like those addressed directly in RED II, i.e., provisions on energy activities conducted by RECs, or procedures which should be fair, proportionate, and transparent.

How can we recognize that some provisions of regulatory approaches are barriers while others are justified or adequate? These issues could be resolved in a few ways.¹² First, this can be defined in the national legislation in a general way. One can imagine national legislation that implements RED II by utilizing the following wording: ‘any unjustified regulatory and

¹¹ See e.g. Recital 63, RED II.

¹² How to distinguish ‘justified’ from ‘unjustified’ barriers is an issue which has both an ethical dimension and a pragmatic one. This study explores the pragmatic dimension and saves the ethical dimension for future analysis (including mine). Cf John R. Commons, ‘The Problem of Correlating Law Economics and Ethics’ (1932) 8 *Wisconsin Law Review* 3; Benjamin K. Sovacool, Raphael J. Heffron, Darren McCauley, Andreas Goldthau, ‘Energy Decisions Reframed as Justice and Ethical Concerns’ (2016) 1 *Nature Energy* 1; Erik J.W. Laes, ‘On the Upscaling of Community Energy as an Empowering Dynamic’ (2020) *39th Dutch-Flemish Day of Philosophy*, 22 February 2020, Enschede, the Netherlands.

administrative barriers to renewable energy communities are prohibited'. This general solution, though seemingly reasonable, can cause practical problems. Due to this, more detailed solutions should be developed.

Second, some provisions, especially those at an executive level¹³ (e.g., when certain regulatory duties executed by energy operators or when local authorities have the power to decide specific issues related to the operation of RECs) could be formally classified as barriers. This can be contained in a register listing certain provisions ('black list') which should be (or are – depends on the power of this register) excluded from practice (and strengthened by a sanction).¹⁴ The RECs barrier register which I propose could be elaborated on the basis of individual cases coming from the practice of energy regulators that after evaluation decided to include them (*ex-post*) in this list, as well as can be proposed *ex-ante* – by the energy regulator (or any other relevant authority) and then supplemented by examples coming from practice, as presented above.¹⁵ Moreover, as RED II covers 'regulatory and administrative barriers,' one may need an institution, like national regulatory authorities (in terms of RECs). In this context, preparation of this type of register at the European level – e.g., the Commission or ACER could bring even more positive results than national action. However, the lack of a specific legal basis may be an issue; nevertheless, yet an appropriate report on inadequate practices in terms of RECs in place of a register, together with an impact of the soft law, would be helpful in this area.

¹³ Cf Maciej M. Sokołowski, *Regulation in the European Electricity Sector* (Routledge Abingdon–New York 2016) 210.

¹⁴ Cf Spencer Weber Waller, 'Understanding and Appreciating EC Competition Law' (1992) 61 *Antitrust Law Journal* 55, 65; H. Thomas Hefti, 'European Union Competition Law' (1994) 18 *Seton Hall Legislation Journal* 613, 624.

¹⁵ See Maciej M. Sokołowski, 'Regulatory Dilemma: Between Deregulation and Overregulation' in Jacek Jagielski, Dariusz Kijowski, Marek Grzywacz (eds), *Prawo administracyjne wobec współczesnych wyzwań. Księga jubileuszowa dedykowana profesorowi Markowi Wierzbowskiemu* [Administrative Law Facing Contemporary Challenges: Jubilee Anniversary Publication Dedicated to Professor Marek Wierzbowski] (Beck Warsaw 2018) 591.

Third, the decision to identify something as a barrier to REC can simply be left to the court (or to the regulator – if the administrative way of resolving it is allowed by law). Here, much depends on the effectiveness of the judicial proceedings, including the time from bringing the case to obtaining judgment (including appeal). Nevertheless, as one may observe, all three discussed elements can be included in the relevant legal environment – their compact character is their value.

What could be covered by this legislation? Noticing its broad character (and therefore offering the idea of a register as discussed above), some general categories of barriers can be determined by examples to clarify their nature. First, RECs may face barriers related to their establishment and operation. This may concern excessive initial criteria for creating RECs, including, *inter alia*, membership requirements, e.g. a minimum number of members needed to establish REC (especially, if it is much higher than other comparable structures like agriculture cooperatives): financial requirements like the necessity to provide bank or insurance guarantees (similarly, if comparable legal entities are not obliged to provide them): or legal requirements related to specific documentation needed to create a REC (number and types of documents required) or complexity of the documentation itself (e.g. simplicity of forms). As one may notice, besides barrier-qualifications, these examples also represent issues related to procedures like registration and licensing, which should be fair, proportionate, and transparent.¹⁶

2.2. *Non-discriminatory treatment of RECs and the exemplary role of public administration*

This corresponds to general non-discriminatory treatment which has to be provided to RECs, both internally (i.e. within a given REC – this concerns treatment of its own members, especially

¹⁶ See Article 22(4)(d) of RED II.

consumers, also those new members willing to join a REC – here broad access has to be available without entry barriers) and externally in relations with other participants of the energy market. Issues that may occur with this respect are related to already-mentioned excessive conditions for the operation of RECs. To evaluate these conditions (whether they are excessive or not; whether a given treatment is a discriminatory or not), a legal position of REC should be juxtaposed with a view of other comparable structures – especially those under national energy law. The assessment covers the rights and obligations of energy customers, energy producers, and suppliers, as well as distribution system operators (DSOs). Here three main elements should be considered: (i) local character of RECs, (ii) renewable nature of these types of communities, and (iii) scale of RECs operation.¹⁷ As typically RECs are local, small-scale renewable sources,¹⁸ they should be treated in an adequate manner with regard to these characteristics.¹⁹ The understanding of ‘[t]he specific characteristics [of RECs]... in terms of size, ownership structure, and the number of projects [which] can hamper [RECs’] competition on an equal footing with large-scale players, namely competitors with larger projects or portfolios’²⁰ is a key to providing them the correct legal recognition.

Second, specific problems may occur during the operation of a REC, including its start. Besides issues that could be classified as regulatory and administrative barriers, one should apply those provisions of RED II, which address energy activities of RECs (supply, aggregation, or

¹⁷ Cf Wojciech Sałabun, Jarosław Wątróbski, Andrzej Piegat, ‘Identification of a Multi-criteria Model of Location Assessment for Renewable Energy Sources’ in Leszek Rutkowski, Marcin Korytkowski, Rafal Scherer, Ryszard Tadeusiewicz, Lotfi A. Zadeh, Jacek M. Zurad (eds), *Artificial Intelligence and Soft Computing. ICAISC 2016. Lecture Notes in Computer Science*, vol 9692 (Springer Cham 2016).

¹⁸ Naturally, this does not mean that larger communities such as regionals do not exist. See Sabine Löbbe, André Hackbarth, Thies Stillahn, Luis Pfeiffer, Gregor Rohbogner, ‘Customer Participation in P2P Trading: A German Energy Community Case Study’ in Fereidoon Sioshansi, *Behind and Beyond the Meter* (Academic Press London 2020) 99.

¹⁹ See Van Der Schoor, Scholtens (n 3).

²⁰ Recital 71, RED II.

other commercial energy services), as well as facilitating DSOs – RECs relations.²¹ Problems that may appear here concern, *inter alia*, connection to the grid (so the beginning of the REC's operation), i.e., its cost (too high), timing (too long), and applications for connection (too complicated). To some extent, Article 17 of RED II could be applied by offering a simple-notification procedure for grid connections of installations or aggregated production units having 10.8 kW – 50 kW of power installed.

Continuing this discussion, let us move on to grid fees and other relevant charges, levies, and taxes. The main rules for them introduced by RED II are cost-reflectiveness (in terms of grid fees) and adequate, fair, and balanced contribution to the overall cost-sharing of the system.²² In this way, these are the costs that matter. Therefore, on the one hand, the financial responsibilities of RECs are closer to the market-driven approach than the support-driven approach in which Member States could e.g., adequately remunerate grid fees. On the other hand, charges, levies, and taxes stipulated for RECs should be adjusted to RECs' nature (local character and aims of operation including environmental and social benefits for shareholders or members) as well as to the market position and strength of RECs (a number and the capacity of RECs) in the national energy system. These twofold circumstances establish the ground for a reference to public law regulation as a balanced legal form of a state's impact on the energy market of a day-watchman style.²³

The day-watchman type regulation is also a good clarification and a background of another duty imposed on the Member States under the enabling framework.²⁴ This relates to the

²¹ Cf Hannah T. Kruimer, 'Non-Discriminatory Energy System Operation: What Does it Mean?' (2011) 12 *Competition and Regulation in Network Industries* 260.

²² Recital 71, RED II.

²³ Cf Sokołowski (n 13) 88–89.

²⁴ Cf *ibid.* 89.

requirement to provide RECs tools, facilitating them access to financing and information. Among them, the Member States could e.g., provide RECs with dedicated credits on preferential terms including low-interest rates, subsidies for loan installments, or coverage (full, partial) of their own contribution, organise information campaigns or launch an online REC platform or application.

Last but not least, to enable direct public participation in RECs under the enabling framework Member States must build their REC-capacity in public administration. To a certain degree, this could be compared to the leading role of the public sector in the field of energy efficiency.²⁵ According to Article 5 of Directive 2012/27/EU (EED)²⁶ Member States are obliged to ensure that buildings owned and occupied by central government (3% of total floor area) are renovated to meet minimum energy performance requirements as well as conduct other pro-efficiency actions what derives from a general approach offered by EED under which ‘[p]ublic bodies at national, regional and local level should fulfill an exemplary role as regards energy efficiency’.²⁷ In my opinion, the framework adopted in EED could be used as a benchmark for RECs. In this context, Member States could be obligated to set up a precise amount of RECs with participation of public administration entities. This could be measured by capacity (volume of MW of power installed) or by a share of electricity in renewable / general energy mix of each Member State produced in RECs. These could be either individual targets, adjusted to national possibilities and efforts, or one pan-European goal without specific national redistribution.

²⁵ See European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Energy Efficiency Plan 2011’ COM(2011) 109 final (8 March 2011). Cf Krzysztof Żmijewski, Maciej M. Sokołowski, ‘The Main Frameworks of the National Programme for the Reduction of Emissions: Towards the National Programme for Low-Emission Economic Development. The Public Board’s Role’ (2011) 4 *Yearbook of Antitrust and Regulatory Studies* 23.

²⁶ Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC [2012] OJ L 315 (EED).

²⁷ Recital 15, *ibid.*

Additionally, Member States could encourage public bodies, including regional and local levels to: (i) adopt plans on developing RECs containing specific objectives and actions, with a view to following the exemplary role of central governments in the promotion of RECs,²⁸ (ii) establish new or join existing RECs. As a result, instead of a current soft approach established by RED II, a more certain legal environment for the development of RECs would be introduced.

2.3. Designing support schemes for RECs: a support manual

Furthermore, one should also notice the possibility of cross-border cooperation introduced in Article 22(6) of RED II. According to these provisions, Member States may provide for RECs the option of cross-border participation correlated with Article 5 of RED II, establishing rules for support schemes for electricity from renewable sources. As stated in Article 5(1) of RED II ‘Member States shall have the right ... to decide to which extent they support electricity from renewable sources produced in another Member State’. Moreover, in terms of national support schemes, the ‘specificities’ of RECs should be considered by the Member States when designing them to allow RECs to compete for support on an equal basis with other market participants.²⁹ Let us focus on this aspect of support systems.

According to Article 4(3) of RED II support schemes for electricity from renewable energy sources have to be created maximising their integration into the electricity market as well as maximising their revenues, however in a market way, i.e. by responding to price signals where ‘[e]lectricity from renewable sources should be deployed at the lowest possible cost to consumers

²⁸ Cf Article 5(7), *ibid.* See Maciej M. Sokołowski, ‘Priorities of Energy Policy of Japan under Abenomics’ in Magdalena Sitek, Michał Łęski (eds), *Opportunities for Cooperation between Europe and Asia* (Alcide De Gasperi University of Euroregional Economy Józefów 2015); Maciej M. Sokołowski, ‘When Black Meets Green: A Review of the Four Pillars of India’s Energy Policy’ (2019) 130 *Energy Policy* 60.

²⁹ See Article 22(7), RED II.

and taxpayers.³⁰ This could on the basis of direct price support schemes offering a sliding of fixed market premium.³¹ Regarding the distribution of the support, it has to be delivered in an ‘open, transparent, competitive, non-discriminatory and cost-effective manner’³² via tendering procedure which meets those criteria (‘[m]arket-based mechanisms, such as tendering procedures, have been demonstrated to reduce support cost effectively in competitive markets in many circumstances’).³³

Nevertheless, small-scale installations and demonstration projects due to their more limited capabilities are offered exemptions, both from the market character of the support, including tendering as a way of granting it.³⁴ According to current Guidelines on State aid for environmental protection and energy 2014–2020 (GSA)³⁵ this concerns renewable installations with an installed electricity capacity lower than 500 kW / 1 MW or demonstration projects (except for wind energy with an installed capacity of 3 MW / 6 MW or 3 / 6 generation units) are generally exempted from conditions of the operating aid granted to energy from renewable sources (these concern installations having maximally 500 kW of power installed, 3 MW or 3 generation units) or the competitive bidding process does not apply to them (installations having maximally 1 MW of power installed, 6 MW or 6 generation units).³⁶ This distinction creates a possibility for establishing a support scheme dedicated to small renewable installations, including those owned by RECs.³⁷

³⁰ Recital 19, *ibid.*

³¹ See Article 4(3), *ibid.*

³² Article 4(4), *ibid.*

³³ Recital 19, *ibid.*

³⁴ See Articles 4(3) and 4(4), Recital 19, *ibid.*

³⁵ Communication from the Commission – Guidelines on State aid for environmental protection and energy 2014–2020 [2014] OJ C 200 [GSA].

³⁶ See Paragraphs 125 and 127, *ibid.*

³⁷ Cf Ole Langniss, ‘Instruments to Foster Renewable Energy Investments in Europe a Survey Under the Financial Point of View’ (1996) 9 *Renewable Energy* 1112, 1115.

In this context, on the one hand, creating a separate scheme offered for RECs – e.g., a tariff supporting small RECs (those under 500 kW) could be possible.³⁸ This would be support defined by actors – RECs using renewable technologies of a small scale could be offered a specific scheme. The same support could cover sources below 1 MW operated by RECs. However, in case of the latter RECs, the additional conditions would apply. These would be the GSA’s requirements to sell electricity directly in the market with market obligation (together with designing support scheme as a premium added to the market price) and standard balancing responsibilities (unless the lack of liquid intra-day markets); besides such scheme could not incentivize generation of electricity under negative prices.³⁹ In both cases, also scenarios for dividing the support into smaller baskets – e.g., RECs using wind or solar technologies could be considered.

On the other hand, such an actor-based support scheme (where entities having specific renewable technologies are given support) could not be allowed under a fully competitive support scheme like a separate tender dedicated to the production of electricity in RECs of over 1 MW of power installed. This derives from the conditions provided for such type of support in the GSA. Therefore, organising bidding only for a specific type of producers – like RECs (so not technology is a criterion but type of entity) – could be challenged as being discriminatory as ‘competitive bidding processes are open to all generators producing electricity from renewable energy sources on a non-discriminatory basis’.⁴⁰

³⁸ Cf Rob W. Saunders, Robert J.K. Gross, Joanne Wade, ‘Can Premium Tariffs for Micro-Generation and Small Scale Renewable Heat Help the Fuel Poor, and If So, How? Case Studies of Innovative Finance for Community Energy Schemes in the UK’ (2012) 42 *Energy Policy* 78, Colin Nolden, ‘Governing Community Energy – Feed-in Tariffs and the Development of Community Wind Energy Schemes in the United Kingdom and Germany’ (2013) 63 *Energy Policy* 543.

³⁹ Paragraph 124, GSA.

⁴⁰ See Paragraph 126, *ibid.*

However, meeting these conditions (competitiveness, openness, non-discrimination) in a bidding process aimed at supporting the generation of electricity from renewables is just a presumption under which ‘the aid is proportionate and does not distort competition to an extent contrary to the internal market.’⁴¹ Hence, a Member State willing to introduce a tender for RECs could try to extend this presumption. In my view, this would be possible as a lot depends on understanding what ‘open to all generators producing electricity from renewable energy sources on a non-discriminatory basis’ means.⁴² In fact, bidding offered for all RECs below a capacity threshold of e.g., 5 or 10 MW of power installed would meet the criteria of openness and non-discrimination as all generators would be chosen from a specific category – so all in a selected group. This would be easier if other groups also exist (are distinguished) in the support scheme (e.g. prosumers) – so the support is delivered to actors of the energy market in a similar way as discussed here, although in my opinion, it is not a necessary condition and support scheme where only RECs are offered dedicated support that could be recognized as complying with European law on the state aid.

In comparison, the introduction of a bidding process limited to specific technologies is more accessible than the above-mentioned actor-based delivery of support. Such an option clearly derives from the GSA.⁴³ In my opinion, linking actor-based and technology-based divisions in the support schemes for renewable energy sources would be possible, too (taking into account available ‘lessons learned’).⁴⁴ In this light, tenders for support could be limited both to RECs (in general) of specific capacity, using a specific technology. Hence, organizing an auction for a

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ See Kerstin Tews, ‘The Crash of a Policy Pilot to Legally Define Community Energy. Evidence from the German Auction Scheme’ (2018) 10 *Sustainability* 3397.

long-term contract for energy sales from RECs of a given capacity (e.g., between 1 – 2 MW of power installed) using a specific technology (e.g., wind or solar) should be assessed as legitimate under the EU law.

3. Citizen energy communities and European recognition

The recently adopted (June 2019) Fourth Electricity Directive (FED) provides a broad recognition of citizen energy communities (CECs).⁴⁵ This regulatory response derives from technological development and raising awareness of energy consumers as ‘[d]istributed energy technologies and consumer empowerment have made community energy an effective and cost-efficient way to meet citizens’ needs and expectations regarding energy sources, services and local participation’.⁴⁶ One of the main elements of this recognition is the definition of CEC which, as introduced in FED, are legal entities that meet three groups of conditions.⁴⁷ These are conditions on membership, operation, and energy services. Let us analyze them one by one.

3.1. Defining CECs in the national law: mistakes to avoid

The first of the conditions which a community has to fulfill in the national law implementing FED’s is to meet the qualifications for CEC under the EU legislation is the membership condition. It is based on four main assumptions: the membership in CEC is voluntary (i), this membership is an open option for all interested in participation (ii), the community is effectively controlled by members or shareholders, and (iv) its members or shareholders are natural persons,

⁴⁵ See Maciej M. Sokołowski, ‘Renewable Energy Communities in the Law of the EU, Australia, and New Zealand’ (2019) 28 *European Energy and Environmental Law Review* 34, 36 – 38. Cf Mikołaj Jasiak ‘Energy Communities in the Clean Energy Package’ (2018) 8 *European Energy Journal* 29.

⁴⁶ Recital 43, FED.

⁴⁷ Article 2(11), *ibid.*

local authorities (including municipalities), or small enterprises.⁴⁸ What does each of them mean? How to define them in national legislation? What mistakes may occur? Answers to these and other questions are presented below.

Voluntary membership means that no one can be forced to join a citizen energy community. Hence, national legislation imposing an obligation to join a CEC does not comply with European law. However, how to qualify public tools addressing some entities with a goal to join CECs? This would be allowed until it is facultative and natural persons, local authorities, and small enterprises can decide on their own about becoming a member or shareholder of a given CEC. All tools for encouraging them to do so are allowed. Therefore, e.g., a governmental strategy addressing wider participation of natural persons in citizen energy communities, tax deductions for small entrepreneurs when joining this type of energy communities, or grants for local authorities for establishing them – if being in line with the GSA – would be legitimated.⁴⁹

Open membership prohibits restricting access to CECs. These communities should be as open as possible. ‘As possible’ does not mean that there are no conditions for joining these structures. Despite referring to the open nature of these communities, even the FED tends to limit it to ‘local actors’ as underlined in the preamble.⁵⁰ This local approach also appears in the context of authorities, which may join CECs – these are ‘local authorities’ (not central), which may do it. Moreover, under the operational condition discussed below, CECs have to benefit local areas where they operate. Therefore, providing some local conditions for their operation, and by them adjusting the membership in CECs to local actors, including local authorities, seems to be

⁴⁸ Article 2(11)(a), *ibid.*

⁴⁹ Cf Jens Lowitzsch, Christina E. Hoicka, Felicia J. van Tulder, ‘Renewable Energy Communities under the 2019 European Clean Energy Package – Governance Model for the Energy Clusters of the Future?’ (2020) 122 *Renewable and Sustainable Energy Reviews* 109489, 10–11.

⁵⁰ As mentioned in Recital 44 of preamble of FED, ‘[c]itizen energy communities are considered to be a category of cooperation of citizens or local actors that should be subject to recognition and protection under Union law.’

justified under the European law. Besides these local criteria, I see some possibilities for establishing other conditions of joining CEC (e.g., entry fee, own contribution in the form of shares); however, this cannot be excessive – community energy is also a way to combat energy poverty – therefore this model should promote inclusion of energy-poor households.⁵¹ In this context, the FED limits the decision-making powers within CECs. These powers cannot be granted to ‘bigger players’ (i.e. ‘members or shareholders that are ... engaged in large-scale commercial activity and for which the energy sector ... [is] a primary area of economic activity’).⁵² Additionally, open membership includes an option for leaving a CEC.⁵³

The above-mentioned operational condition is a second from the conditions for defining CECs. It concerns aims of communities’ activities. The FED lists ‘environmental, economic, or social community benefits to its members or shareholders’ as primary purposes of communities’ activity together with already addressed benefits to local areas.⁵⁴ Those aims cannot be covered by a generation of profits by CECs. Despite being allowed, generating profits has to be a secondary action conducted by CECs. Hence, a given CEC cannot exist only for profit needs – what is legitimate are economic benefits which are listed among the primary purposes of their operation. However, the financial benefits may materialize in ‘providing affordable energy of a specific kind, such as renewable energy, for their members or shareholders rather than on prioritizing profit-making like a traditional electricity undertaking’ as highlighted in the preamble

⁵¹ See Raphael J. Heffron, Anita Rønne, Joseph P. Tomain, Adrian Bradbrook, Kim Talus, ‘A Treatise for Energy Law’ (2018) 11 *The Journal of World Energy Law & Business* 34, 42. Cf Jakub Sokołowski, Piotr Lewandowski, Aneta Kielczewska, Stefan Bouzarovski, ‘A Multidimensional Index to Measure Energy Poverty: The Polish Case’ (2020) *Energy Sources, Part B: Economics, Planning, and Policy* DOI: 10.1080/15567249.2020.1742817.

⁵² Recital 44, FED.

⁵³ Article 16(1)(b), *ibid.*

⁵⁴ Article 2(11)(b), *ibid.*

to FED.⁵⁵ Thus, such a distinction between benefits and profits should be made in national legislation when providing a framework for CECs, together with highlighting the environmental or social aspects of CECs' operation. The lack of such provisions or the imbalance of profits to benefits should be considered a faulty implementation.

I recommend distinguishing it clearly by adopting concrete provisions that would exclude profit-driven entities from a category of CECs and would introduce environmental/social goals as necessary elements of internal documents constituting the operation of these entities (e.g., their statutes, foundation act). Nevertheless, this approach does not limit the possibility for Member States from choosing different legal forms for CECs. Thus choosing a legal form suited for CEC from well-established legal forms like associations, foundations, cooperatives, partnerships, non-profit organisations, small or medium-sized enterprises would be allowed if such legal forms enable it to exercise rights and be subject to obligations in own name.⁵⁶ Moreover, CECs can be established as independent legal forms i.e., CECs, if they can exercise rights and be subject to obligations in their own name – these include e.g., meeting the benefit-driven condition as well as other elements of CEC's definition.

Finally, the third condition (energy services condition) concerns a specific catalog of energy activities in which CECs should be allowed to engage in a variety of activities in the energy sector. These range from the generation of energy (also from renewable energy sources), its distribution, supply (sale of electricity to customers, including the resale), and consumption as well as aggregation and storage to services on energy efficiency, on the charging of electric

⁵⁵ Recital 43, *ibid.* Cf Stefano Moroni, Valentina Alberti, Valentina Antonucci, Adriano Bisello, 'Energy Communities in the Transition to a Low-Carbon Future: A Taxonomical Approach and Some Policy Dilemmas' (2019) 236 *Journal of Environmental Management* 45.

⁵⁶ Recital 44, *ibid.*

vehicles or other energy services to its members or shareholders.⁵⁷ Limiting these possibilities e.g., to one, or two, etc. (or excluding some) of the listed energy services would undermine the assumption of this condition based on providing broad access to energy services that could be offered by CECs. Moreover, although a reference to members or shareholders of CECs as those to whom other energy services may be provided – one may not exclude offering some of the energy services offered by energy communities to non-members or non-shareholders. However, this has to be in line with the already-mentioned operational condition under which general profits cannot exceed benefits to CECs’ members or shareholders. Accordingly, this type of activity would be legitimate until gains from outside activity (not offered to members or shareholders) are used for the needs of environmental, economic, or social community benefits of CECs’ members or shareholders or to local areas where a given CEC operates.⁵⁸ Nevertheless, the operational condition may be the reason for introducing some restrictions on the mentioned outside activities. This may concern, e.g., the scale of outside activity which does not directly benefit members or shareholders of CECs – same concerns the site where it is conducted. In this context, CECs may be limited to offer some of their services in geographical proximity – as it should benefit local areas, e.g., developing of nationwide charging services for electric vehicles by a given CECs could be challenged on this basis, while local charging services for electric vehicles offered for members and non-members of this CEC would be in line with FED.

3.2. Catalogue of CECs’ rights and obligations: well-defined or just defined?

Besides the analyzed three conditions, FED – similarly to renewable energy communities – provides them an ‘enabling framework’ based on ‘fair treatment, a level playing field, and a ...

⁵⁷ Article 2(11)(c), *ibid.*

⁵⁸ See Article 2(11)(b), *ibid.*

catalogue of rights and obligations.⁵⁹ This framework is essentially through by Article 16 of FED. As in the case of RECs under RED II, CECs do not lose their rights and obligations deriving from their other status: final consumers, as in RED II and household customers or active customers, according to FED.⁶⁰ Accordingly, CECs have to be treated in a non-discriminatory, fair, proportionate, and transparent way with respect to procedures and charges, including those regarding registration and licensing; in the same way grid charges have to be transparent, non-discriminatory, and cost-reflective to ensure an adequate and balanced contribution to the overall cost-sharing of the energy system.⁶¹ Similarly, CECs should be treated in a non-discriminatory and proportionate manner and should have access to electricity markets.⁶² Limiting this access would be contrary to EU law. Moreover, like RECs, also CECs may be open to cross-border participation.⁶³

What should be noted is that within this legal environment are provisions on energy distribution with an obligation imposed on relevant DSOs to cooperate with CECs.⁶⁴ In comparison to RECs-DSOs relations under RED II,⁶⁵ the framework of FED brings a more specific regulatory regime. According to Article 16(1)(e) this cooperation should cover the facilitation of electricity transfers within CECs with ‘fair compensation as assessed by the regulatory authority.’ As energy regulator is addressed, this compensation could be included in tariffs for DSO approved by regulator. Moreover, CECs may be entitled to own, establish,

⁵⁹ Recital 43, *ibid.* Parenthetically, the full quote ‘a well-defined catalogue of rights and obligations’ with underlining the ‘well-defined catalogue’ in my opinion represents not the best wording, as this should be left for external evaluation (whether it is well-defined or not).

⁶⁰ See Article 16(1)(c), *ibid.*

⁶¹ Cf Article 22(4)(d), RED II.

⁶² See Article 16(3)(a)–(b), FED. Cf Luis R. Boscán, ‘European Union Retail Electricity Markets in the Green Transition: The Quest for Adequate Design’ (2020) 9 *Wiley Interdisciplinary Reviews: Energy and Environment* e359.

⁶³ See Article 16(2)(a), *ibid.*

⁶⁴ See Article 16(1)(c), *ibid.*

⁶⁵ Cf Article 22(4)(c), RED II.

purchase or lease distribution grid and to autonomously manage them.⁶⁶ If CECs are given the right to manage the distribution grid in their area of their operation (together with and establish the relevant procedures), Member States have to adjust their regulatory framework.⁶⁷ The adjustment covers three types of issues: first, contracts on grid operation between a given CEC and relevant operators: DSO or TSO to which a CEC's grid is connected; second, appropriate grid charges have to be applied so that electricity fed into the distribution grid and the electricity consumed from this outside the CEC is accounted for separately; third, the customers who remain connected to the distribution system are not discriminated against or harmed.⁶⁸

In terms of above-mentioned closed distribution systems, Article 38(1) of FED defines it as an electricity distribution system operating within a geographically confined industrial, commercial or shared services site generally not supplying household customers except a small number of households linked with the owner of a distribution system by employment or similar relation who use this system incidentally.⁶⁹ In terms of wording, the provisions of FED do not differ from the previous common rules for the internal market in electricity established by Directive 2009/72/EC (Third Electricity Directive, TED).⁷⁰ However, by referring to this established institution to new provisions on CECs, when discussing the issue of closed distribution systems and their applicability to CECs one should notice that the employment relation being the reference for the household – owner of the distribution system ‘similar relationships’ gives a possibility to include relations of members of CEC as eligible. Moreover, the possibility of granting the status of a closed distribution system operator to CEC is clearly

⁶⁶ See Article 16(2)(b), FED.

⁶⁷ Cf Krzysztof Żmijewski, Maciej M. Sokołowski, ‘Power Grid Development in Poland in the Context of EU Climate and Energy Package’ (2010) 5 *Acta Energetica* 87, 94.

⁶⁸ Article 16(4), FED.

⁶⁹ Article 38(4), *ibid.*

⁷⁰ 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 [2019] OJ L 158 [TED]. Cf Article 28, TED.

addressed in the preamble to FED.⁷¹ This option should be considered as an alternative to the general status of DSO, which may be granted to a given CEC.

Further elements of CECs' position in energy system concerns,⁷² their balance responsibilities, consumption of self-generated electricity, as well as sharing electricity produced within the CEC. In terms of balance responsibilities, Article 5 of Regulation on the internal market for electricity (Third Electricity Regulation, TER)⁷³ applies. Under it, '[a]ll market participants shall be responsible for the imbalances they cause in the system,'⁷⁴ which implies financial responsibility for caused imbalances. TER enables the establishment of three kinds of exemptions. Besides installations commissioned before 4 July 2019, which received approved state aid,⁷⁵ theoretically, two of these derogations could be applied to CEC.⁷⁶ This concerns demonstration projects for innovative technologies and smaller renewable energy sources having maximally 400 kW of power installed (from 1 January 2026 this level will be twice as low, i.e., only 200 kW renewable energy sources could be exempted from balancing duties).⁷⁷ In practice, preferably the latter derogation (than the one on innovative technologies – although it would be advantageous if CECs also developed these kinds of solutions) could be broadly applied to CECs meeting these criteria for their electricity production capacities.

⁷¹ As highlighted in Recital 47 of preamble of FED '[t]his Directive empowers Member States to allow citizen energy communities to become distribution system operators either under the general regime or as 'closed distribution system operators'.'

⁷² Article 16(3)(d)–(e), *ibid.*

⁷³ Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity [2019] OJ L 158 [TER].

⁷⁴ Article 5(1), *ibid.*

⁷⁵ See Article 5(2)(c), *ibid.*

⁷⁶ See Article 5(2)(a)–(b), *ibid.*

⁷⁷ Article 5(4), *ibid.*

4. Discussion: are renewable citizens energy communities eligible?

Yes, they are. In these simple words, the discussion on renewable citizen energy communities (RCECs) under the EU law could start and end. However, let us provide some argumentation for this affirmative answer – this comes in Table 1 below.

main features	renewable energy community	citizen energy community
status	legal entity	legal entity
membership	open and voluntary participation; the shareholders or members are natural persons, SMEs or local authorities, including municipalities	voluntary and open participation; members or shareholders are natural persons, local authorities, including municipalities, or small enterprises
management	autonomous; effectively controlled by shareholders or members that are located in the proximity of the renewable energy projects that are owned and developed by CEC	effectively controlled by members or shareholders; the decision-making powers should be limited to those members or shareholders that are not engaged in large-scale commercial activity and for which the energy sector does not constitute a primary area of economic activity
primary purpose	to provide environmental, economic or social community benefits for its shareholders or members or for the local areas where it operates, rather than financial profits	to provide environmental, economic or social community benefits to its members or shareholders or to the local areas where it operates rather than to generate financial profits
other	-	may engage in generation, including from renewable sources, distribution, supply, consumption, aggregation, energy storage, energy efficiency services or charging services for electric vehicles or provide other energy services to its members or shareholders;

Table 1. RECs and CECs in the EU law

As one may observe, not only are RECs and CECs based on the same assumption of empowering prosumer movement in the EU, but also the way how they are defined in the EU law is almost the same (see Table 1). The regulatory frameworks of RED II and FED in terms of RECs and CECs' status, membership, management, and primary purposes differ slightly. The discussed third condition (energy services condition) of CECs in part of the generation of electricity in renewable energy sources is a link between CECs and RECs. Hence, meeting the conditions for creating CEC together with the mentioned renewable element of energy service condition would result in a possible REC-qualification for a given CECs.⁷⁸

As a result, a RECS would be established, and both legal, regulatory regimes would be combined. What if – due to this double application – some inaccuracy would occur? This should be resolved in the spirit of both directives, FED and RED II: in favor of the so-established RCECs.⁷⁹ Both legal regimes should be decoded together – it is an inclusive disjunction. This theoretical double qualification of the eligible framework having a basis in RED II or FED is not inappropriate – in practice, it does not matter from which basis RECS should have access to energy markets or Member States have to prevent their discrimination. Accordingly, RECS would be eligible for a support scheme offered for RECs, etc.

⁷⁸ In this way RECs can be qualified as a form of CECs, see Jens Lowitzsch, 'Consumer Stock Ownership Plans (CSOPs) – the Prototype Business Model for Renewable Energy Communities' (2020) 13 *Energies* 118, 5. Cf Inês Campos, Guilherme Pontes Luz, Esther Marín-González, Swantje Gährs, Stephen Hall, Lars Holstenkamp, 'Regulatory Challenges and Opportunities for Collective Renewable Energy Prosumers in the EU' (2020) 138 *Energy Policy* 111212, 2.

⁷⁹ Cf Maciej M. Sokołowski, *European Law on Combined Heat and Power* (Routledge Abingdon–New York 2020) 232.

5. Conclusion: a regulatory carrot

‘[W]e are promoting a move to a more decentralised energy system where consumers and local communities play an active role. This means more democracy and more choice: people can decide for themselves which type of energy they want to use’ stated at the COP 25⁸⁰ Kadri Simson, the EU Commissioner for Energy (2019 – 2024).⁸¹ Like in democracy also the choice drives the current EU regulatory framework on renewable and citizens energy communities. In this way the structure is quite flexible – and is a carrot instead of a stick (with all the carrot’s flexibility). It gives Member States the possibility (the choice) to adjust their national legal environment not only to ambitious assumptions of the European Green Deal but also to local needs of citizens willing to produce electricity in co-owned installations. If rightly established, the framework may be a tool that addresses both. However, as with carrots, the framework can be healthy and fresh, bitten, or unripe.⁸² A lot depends on who and how cultivates it.

Due to the advantages of energy communities, it is worth focusing on a maximally open approach. As discussed in this paper, such an approach stems from the European legislation – RED II and FED. What can help to provide this broad approach is a regulatory toolkit proposed in this study. It includes the register to tackle regulatory and administrative barriers, national or

⁸⁰ 25th Conference of the Parties to the United Nations Framework Convention on Climate Change (COP25) held from 2 – 13 December 2019 in Madrid.

⁸¹ European Commission ‘EU Energy Days at COP25 – Opening Speech by Commissioner Kadri Simson’ (2019) https://ec.europa.eu/commission/commissioners/content/eu-energy-days-cop25-opening-speech-commissioner-kadri-simson_en accessed 18 April 2020.

⁸² Cf Jason Scott Johnston, ‘Regulatory Carrots and Sticks in Climate Policy: Some Political Economic Observations’ (2018) 6 *Texas A&M Law Review*, 107. The comparison to carrot seems to be justified also because of the agricultural origins of many energy communities, see Diana Süsser, Martin Döring, Beate M.W. Ratter, ‘Harvesting Energy: Place and Local Entrepreneurship in Community-Based Renewable Energy Transition’ (2017) 101 *Energy Policy* 332.

European goals on RECs, the exemplary role of national authorities in the promotion of RECs, the separate support scheme for RECs, as well as a combined framework for RCECs.

The choice is the essence of democracy, including energy democracy. A real move to more decentralized energy systems with active consumers and local communities needs the option. The carrots are ready in the basket. The question is, will anyone pick them up? To answer this question, please let me once again return to Henry Ford. Regulatory framework on energy communities is a beginning. Implementation is progress. Producing energy under this framework is success.

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