Regulating Energy communities as new actors in the European energy market

Assessment of and justification for the legal treatment of energy communities compared to traditional market actors

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10.12.2021

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1 Introduction

1.1 Energy communities as new actors in the European energy market

In 2019 "energy communities" was recognized in legal terms for the first time in a European context, in the legislative package called Clean Energy for All Europeans Package (CEP).[1] Energy communities are introduced as collectively driven consumer initiatives, organized as legal entities which allow specific natural and legal persons to produce, store and sell self-generated energy. [2] These institutions, connected to the "prosumer centered approach"[3] to EU energy law, are regulated to facilitate citizens, small and medium-sized enterprises as well as local authorities to take active part in the energy market.[4] One of their *core* objectives is to distribute benefits to its members and the local community where it operates.[5] On these grounds, energy communities are representations of new actors in the energy market, subjected to different regulations and objectives than that of traditional market actors.

The rationale for engaging specific natural and legal persons to participate in the energy market is twofold. First, engagement is recognized as a means to facilitate and manage the energy transition[6] towards a decarbonized EU energy system.[7] Second, and what will be the focus of this thesis, activation has been recognized as a way to manage the transition *justly,* actualizing the term *energy justice.*[8]

Energy justice is about active participation in decision-making and fair distribution of costs and benefits for all.[9] The European legislator has acknowledged energy communities as vehicles for obtaining these objectives.[10] These entities are thus not only recognized as means to *manage* the energy transition. The legislator considers these as institutions suitable to manage the transition in a *just* manner, taking account for specific natural and legal persons, for which

[1]Directive (EU) 2018/2001 (Renewable Directive), Article 2 (16). Directive (EU) 2019/944 (Electricity Directive), Article 2 (11).
[2] Article 2 (16) and 22 Renewable Directive; Article 2 (11), Electricity Directive.
[3] Diestelmeier *(*2020), p. 12; Anchustegui and Formosa (2020), p. 1-17.
[4] Article 2 (16) (a) and (b); Article 2 (11) (a), Renewable Directive.
[5] Article 2 (16) (c), Renewable Directive; Article 2 (11) (b), Electricity Directive.
[6] Recital 3, Electricity Directive.
[7] COM (2016) 864 final/2, p. 5
[8] COM(2016) 860 final; Hanke, Guyet, and Feenstra, (2021) p. 3.; van Bommel and Höffken, (2021), p. 3.
[9] del Guayo and others (2020), p. 6.
[10] Recital 43 and 46, Electricity Directive; Recital 70, Renewable Directive; Diestelmeier (2021), p. 9.

active participation have previously not been a priority in the regulation of the European energy market.[11]

1.2 Thesis discussion

With this introduction as a backdrop, this research will be based on an analytical study of energy communities and their justification in the energy market. In my research I seek to identify energy communities' legal nature by analyzing the European legislation regulating these entities. The objective is to identify how the legislation distinguish these actors from traditional market actors in the energy market, as well as to detect what this entails in terms of their legal treatment at National level. Also, I seek to determine and assess why the legislator have made this distinction, from the perspective of energy justice.

As such, the aim of this research is twofold. Firstly, it intends to display that the European legislation implies preferential treatment of energy communities as opposed to traditional market actors. My discussion will identify the grounds for this legal treatment, based on the requirements in the Directives that Member States are to treat energy communities in a non-discriminatory manner[12], as well as to facilitate a level playing field[13] for these entities.

Secondly, I will investigate the rationale for why the legislator have subjected energy communities to distinct obligations and objectives compared to traditional market actors. The objective is to demonstrate that the justification for this has direct links to their distinct features, which make energy communities better suited to deliver energy justice than traditional market actors. Through the analytical lens of the energy justice framework[14], this thesis will seek to demonstrate exactly *how* these traits make energy communities suitable institutions to ensure more just outcomes for specific natural and legal persons. This will serve as a basis for the position in this research which argue that energy justice may serve as a justification for Member States to enable these institutions to get established in the European energy market, as well as to facilitate their uptake.

[11] Recital 43 and 46, Electricity Directive; Recital 70, Renewable Directive.
[12] Article 22 2. (c) and Recital 71, Renewable Directive; Recital 46, Electivity Directive
[13] Recital 43, 46 Electricity Directive. Referred to in the Renewable Directive as "equal footing"; Article 22 7. and Recital 26, 70, 71.
[14] Salter, Gonzalez, and KronkWarner (2018), p. 1

1.3 Contribution to current state of the art

Current research has touched upon the relation between the non-discrimination principle and the notion that this implies that energy communities could be afforded "special attention" in National legislation.[15] Also, existing research has pointed to the unique characteristics of energy communities and the fact that these traits challenge their ability to participate in the energy market on a level playing field.[16] Lastly, there are research which have discussed the links between energy communities and energy justice.[17]

However, there are still knowledge gaps in the current literature on this field. I have identified three areas in which the current research implies a need for a more detailed analysis. First, there seems to be a lacuna as to the *details* of what the non-discrimination principle and the objective to facilitate a level playing field entails for the legal treatment of energy communities, compared to traditional market actors. Second, existing research has not addressed the relation between these two requirements, and how this justifies preferential treatment of energy communities. Third, current literature has been criticized for assuming rather than demonstrating that energy communities deliver energy justice.[18]

These lacunas reveal a lack of justification for why Member States should put in place an enabling framework for energy communities, as well as to implement measures to make these compete on the same level as traditional market actors.[19] My contribution seeks to deliver a detailed analysis of what the current legislation demands of Member States in their legal treatment of these entities. Not least, I intend to deliver a thorough analysis of the justification for energy communities in an energy justice perspective.

1.4 Outline

In chapter 2 of this thesis, I will present and outline energy communities as legal concepts and point to the main differences between the two *types* of energy communities. This will establish the base for chapter 3, which will undertake an analysis of energy communities as legal

[15] Jasiak (2020), p. 51.
[16] REScoop (2020), p. 80.
[17] Hanke, Guyet, and Feenstra (2021); van Bommel and I. Höffken (2021).
[18] Bregje Van Veelen (2018), p. 645.
[19] Recital 43, 46 Electricity Directive; Article 22 4. And 22. 7, Renewable Directive.

institutions based on the traits that characterize them. Following, in chapter 4 I will use these traits to display how energy communities are distinct concepts from traditional market actors, based on an outline of the non-discrimination principle.

Moving on to chapter 5, the discussion will discuss the requirement in the Directives that Member States should facilitate a level playing field for energy communities and discuss what this entails regarding the legal treatment National legislators should apply to these institutions. In chapter 6 the discussion will move on to assess *why* energy communities are subject to different regulations and objectives than traditional market actors in the perspective of energy justice. This will serve as a basis for the position that energy justice could serve as a justification for their establishment and uptake at National level. Finally, chapter 7 is dedicated to conclusions and final reflections.

1.5 Methodology

1.5.1 Legal methodology

This research will be based on doctrinal method as well as teleological interpretation. Also, a central part of the research will deal with analysis based on the energy justice framework.[20]

Doctrinal method is based on carrying out thorough analyzes of legal concepts, values, principles and existing legal texts, based on legal doctrine and reasoning.[21] This method studies the law *as it is* rather than being concerned about how it *should* be.[22] Doctrinal analysis is appropriate for aims of the research to analyze and determine the legal content of the relevant provisions regulating energy communities.[23] The main purpose of doctrinal method is to analyze and determine the current state of the law, taking into account all relevant legislation and case law.[24] As such, this method is relevant for clarifying the legal status of energy communities and what the legislation implies in regard to how these should be treated legally as opposed to established market actors.

[20] Salter, Gonzales and Warner (2018); Hanke Guyet, and Feenstra (2021); van Bommel & I. Höffken (2021).
[21] Kharel, (2018), p. 2.
[22] Kharel (2018) p. 1.
[23]Craig and de Búrca (2015), p. 111.
[24] Terry Hutchinson, (2014), p. 584.

The teleological method is based on interpretation of legal terms in line with the purpose of the legal act in question.[25] This method of interpretation will be central for identifying the European legislators' intention behind introducing energy communities in the legislation. Also, it is suitable for identifying and analyzing the legislators' distinctive objectives regarding the legal treatment of the two different *types* of energy communities. I will use this method to identify that the legislator implies a preference for *renewable energy communities* as opposed to *citizen energy communities*.

In chapter 6 of this thesis, I discuss *why* the legislator have subjected energy communities to different obligations and objectives than that of traditional market actors. I connect the rationale for this to the recitals in the two Directives, which implies that energy communities are suitable to deliver energy justice. Next, I follow up by investigating how the traits of energy communities make these eligible to deliver justice outcomes. In this assessment, I will make use of the *energy justice framework*.[26] This framework is appropriate as an analytical instrument to assess whether regulation on energy matters is designed to obtain energy justice objectives.[27] The framework is not a legal method, but an acknowledged instrument which enables the legal understanding of energy regulation.[28] For this reason, the energy justice framework has been recognized as a vital part of energy legislation to enable critical analysis of whether the law is eligible to facilitate just outcomes.[29]

Sovacool and others[30] define energy justice as:

"a global energy system that fairly distributes both the benefits and burdens of energy services, and one that contributes to more representative and inclusive energy decision-making".[31]

This definition is put together by three energy justice tenets: *distributive justice*, *recognition justice* and *procedural justice*.[32] Aileen McHarg[33] describes these as follows.[34] Distributive

[25] Ammann (2020), p. 208.
[26] Salter, Gonzales and Warner (2018) p. 1.
[27] Salter, Gonzales and Warner (2018) p. 2.
[28] Salter, Gonzales and Warner (2018) p. 1.
[29] Salter, Gonzales and Warner (2018) p. 1.
[30] This interpretation is recognized by Hanke Guyet, and Feenstra (2021) p. 3 and van Bommel & I. Höffken (2021), p. 3.
[31] Sovacool and others (2017), p. 677.
[32] See generally McCauley and others (2013) p. 107-110.
[33] This understanding resonates with that of Salter, Gonzales and Warner (2018), p. 3; Hanke Guyet, and Feenstra (2021) p. 3 and van Bommel & I. Höffken, p. 3.
[34] McHarg, (2020), p. 20-21.

justice is about the "equitable distribution of the benefits and burdens of energy activity". Recognition justice constitute acknowledging "the various needs, rights and experiences of those affected by energy decisions". Procedural justice entails "requiring access to information about energy issues, meaningful participation in energy decision-making and access to legal procedures for obtaining redress or challenging decision-making processes".[35]

The energy justice framework is appropriate for aims of the research to assess the distinct features of energy communities and their ability to ensure justice outcomes.

1.5.2 Legal sources

The main sources of analysis in this research are two of the Directives of the Clean Energy for All Europeans Package (CEP) regulating energy communities. These are the Renewable Energy Directive[36] (Renewable Directive) and the Internal Electricity Market Directive (Electricity Directive).[37]

These Directives are expressions of secondary law. The purpose of the secondary law is to "exercise the Union's competence", which entails enforcing the objectives of the Treaty Articles.[38] Any legislative act of the secondary law must therefore be enacted pursuant to a Treaty Article.[39] In the case of the Directives of the CEP, these are subject to Article 194 TFEU.[40] This Article express the main aims of the EU's energy policy as follows:

"to (a) ensure the functioning of the energy market, (b) ensure security of energy supply in the Union, (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy and (d) promote the interconnection of energy networks".[41]

In accordance with Article 288 TFEU, the regulation of energy communities and the purpose pursued by these must be in line with these objectives. As will be outlined in chapter 6, the objectives of energy justice resonate with Article 194 TFEU.

[35] McHarg (2020), p. 20-21.
[36] Directive (EU) 2018/2001.
[37] Directive (EU) 2019/944.
[38] Article 288 TFEU.
[39] Article 288 TFEU.
[40] COM (2016) 864 final/2, p. 9.
[41] Article 194 (2) TFEU.

The legal force of directives is binding on Member States "as to the results to be achieved".[42] This entails, as opposed to regulations which are directly applicable, that Member States must comply with the objectives of the Directives but are entitled discretion to decide *how* to achieve these objectives.[43] The CEP initially gave Member States until 2020[44] to transpose the definition of energy communities into domestic law. Still, one year later, no States have transposed the definitions as it appears in the CEP and most States are still far from completion.[45] A discussion on National rules will therefore be outside the scope of this research.

That said, as this research has its origin in Norway, I will briefly remark where Norwegian legislators stands on the transposition of the Clean Energy Package.[46] The State only recently (2019) implemented the Third Energy Package, nearly ten years after its introduction in the EU.[47] During the time Norway have spent on debating the Third Energy Package, the EU have successfully imposed the subsequent legislative package, the CEP, and is currently consolidating the Fit for 55 package.[48] To date, the EEA department is discussing the package's national relevance. As such, Norway is lagging behind on the legislative development in the European Energy market. To date, there is no regulation on energy communities in Norway.

As much is still unexplored in relation to the regulation of energy communities, my discussion intends to kickstart a study of these institutions at domestic level. This will be especially relevant for Norway, as much in this field is still unmapped in the Norwegian legislation.

[42] Article 288 TFEU.
[43] Article 288 TFEU.
[44] Until June 2020 for renewable energy communities, Renewable Directive, Art 36 (1) and until December 2020 for citizen energy communities, Electricity Directive, Art 71 (1).
[45] REScoop.eu, Transposition Tracker. Available at: https://www.rescoop.eu/policy#transposition-tracker.
[46] Norway is not a member of the European Union but is part of the European energy market through the Agreement on the European Economic Area (EEA-Agreement). This entails that Norway is not committed to the same transposition deadline as official Member States.
[47] Bjørnebye (2020), p. 4.
[48] Energi Norge, 2020.

2 Energy communities and traditional market actors

2.1 Energy communities

Energy communities are energy initiatives, organized as specific legal entities, which enables individual and collectively driven citizens and communities to become active participants in the energy market.[49] To date, there are approximately 3500 energy communities across Europe.[50] Different forms of community initiatives have existed in Member States before the official definition in the CEP. However, the CEP-definition reflects how specific forms of energy communities have received legal status at EU-level.[51] For those entities which are in line with the definition, this official recognition represents a change, as the Directives requires Member States to provide and enabling framework for these.[52]

According to the definition, energy communities can participate in energy activities such as "producing, consuming or sharing energy".[53] However, the main objective of energy communities is not to engage consumers to take part in a *specific* form of energy activity. Energy communities, as defined in the CEP, rather represent a possibility for citizens, small businesses and local authorities to *organize* themselves to take part in energy activities. As such, the intention of energy communities is to engage specific natural and legal persons in the energy market, rather than to regulate the exact activities they engage in.[54] The CEP-definition represent an option for these groups to take part in energy activities in such a way that they are themselves *active participators* in the decision-making and management of the entity.[55]

1.2.1 Types of energy communities

Energy communities are defined in two different ways in the CEP: as *renewable energy communities* (RECs) and *citizen energy communities* (CECs). The former is regulated in the Renewable Directive, while the latter is regulated in the Electricity Directive.[56] In the following sections, the term energy communities will be used in reference to both RECs and

[49] REScoop 2020 p. 12.
[50] Aura Caramizaru and Andreas Uihlein (2020), p. 4.
[51] Caramizaru and Uihlein (2020) p. 7.
[52] Recital 43, Electricity Directive; Article 22 4., Renewable Directive.
[53] Recital 43, IEMD
[54] REScoop 2020.
[55] Article 2 (11) (a), Electricity Directive; Article 2 (16) (a), Renewable Directive.
[56] Article 2 (11), Electricity Directive; Article 2 (16), Renewable Directive

CECs, while the terms RECs and CECs will be used when the discussion refers specifically to one of the concepts.

Similarities

Common for both RECs and CECs is that they are defined as "legal entities" in which participation is to be "open and voluntary", where the community is "effectively controlled" by "members or shareholders that are natural persons, SMEs[57] or local authorities, including municipalities" and where its primary purpose is "to provide environmental, economic or social community benefits rather than to generate financial profits".[58] What unites these two forms of legal entities are therefore the purpose of the community, its organizational form, how access to the organization is structured as well as their ownership model.[59]

An example of an energy community, to concretize the concept, in this case a REC, which resonate with the definition in the CEP is the Westmill Solar Co-operative.[60] This is a cooperative located in the Eastern part of Britain, which generate solar energy. The solar park is owned and controlled by equal members and the profits are returned to its members and the local community surrounding the development. Membership is open and voluntary, and the objective of the cooperative is to "provide local people and investors with a stable, reliable source of income and help the area transition to a low carbon future economy".[61]

Differences

Although there are significant similarities between RECs and CECs, there are also some distinct differences. I will identify four of them to help distinguish the concepts. *The first one* is dictated by the location of the members allowed to practice effective control of the energy development. While the members eligible to practice effective control in CECs can operate independent from where the energy development if located, the right to practice effective control of RECs is restricted to members located in the "proximity" of the renewable energy development.[62] This implicates that members of RECs are oriented around a unified location, while the members of

[57] Only small enterprises for CECs, Article 2 (11) (a).
[58] Article 2 (11), Electricity Directive and Article 2 (16), Renewable Directive.
[59] de Almeida and others (2020), p. 7
[60] Westmill Solar Park Limited, "About us". Available at: http://westmillsolar.coop/about-westmill/.
[61] Westmill Solar,"Home", Available at: http://westmillsolar.coop/.
[62] Article 2 (16) (a), Renewable Directive.

CECs are oriented around their shared values.[63] *The second difference* is linked to the technology and type of energy produced. CECs are technology neutral, while RECs are limited to renewable energy activity only.[64] *The third difference* is linked to the type of sector in which they operate. CECs are limited to activities in the electricity sector, as the Electricity Directive regulate the internal market for electricity.[65] RECs on the other hand are entitled to engage in activities in all energy sectors including production, consumption, storing and selling of renewable energy.[66] *The fourth and final difference* relates to who are entitled to become a member of the entity. While membership in CECs is open to anyone, membership in RECs is restricted to specific natural and legal persons.[67]

These differences between RECs and CECs as instruments connected to citizen participation in energy markets is not just conceptual. The legislator has included distinctions between them as they are regulated by different Directives, with different key objectives. This will be discussed further in chapter 5.

2.2 Traditional market actors

This dissertation seeks to identify differences between "traditional market actors" and energy communities to identify that Member States are required to take account for their differences in National legislation. Thus, in this section I will outline how "traditional market actors" are to be understood for the purpose of this thesis.

In the Renewable Directive it is highlighted that to avoid abuse, RECs should remain autonomous from "traditional market actors"[68] while the Electricity Directive states that community energy initiatives' prime focus is to provide "affordable energy of a specific kind" rather than on "prioritising profit-making like a *traditional electricity undertaking*".[69] As such both Directives compare energy communities to *traditional market actors* in the energy market, expressing that energy communities are to be portrayed as different from these.

[63] Jasiak (2020) p. 49.
[64] Article 2 (16) (a), Renewable Directive.
[65] CEER (2019), p. 12.
[66] Article 22 2. (a), Renewable Directive.
[67] Article 2 (16) (b), Renewable Directive.
[68] Recital 71, Renewable Directive.
[69] Electricity Directive, recital 43 (My highlighting).

None of the Directives include a definition of what the term "traditional market actor" should entail. However, the fact that these actors are compared against energy communities, implies that, in relation to the relevant Directives in question, they should be defined based on the traits that separate them from these. On this foundation, I have identified that the main differences between energy communities and traditional market actors lies in the legal restrictions imposed on the former.

As mentioned under section 2.1, energy communities are subjected to restrictions regarding what should constitute their main purpose, how access to the community should be organized, who may practice effective control of the entity as well as specific restrictions on membership for RECs.[70] These restrictions also have direct effects for the potential for energy communities to expand their business in terms of size. Energy communities are therefore most often small-scaled enterprises.[71] In comparison, traditional market actors are undertakings characterized by their primary purpose being profit-making through commercial activity.[72] Moreover, they are not imposed restrictions on who might carry out effective control of the entity and membership through shareholding or investment is not limited to certain legal persons. Lastly, traditional market actors are not restricted in their ability to expand in terms of size.

The term "traditional market actor" is not legally defined. Whenever I refer to these actors, I will therefore not point to any specific regulation, but to the general traits that characterize them. On this basis, for the purpose of this thesis, traditional market actors are to be understood as *large-scale energy undertakings which carries out activities in the energy market and which primary purpose is profit-making.*

[70] Article 2 (11), Electricity Directive; Article 2 (16), Renewable Directive.
[71] Small and medium-sized enterprises are defined as enterprises "which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million" In the (2003/361/EC), Article 2. Large scale undertakings are therefore to be understood as exceeding these parameters.
[72] As also emphasized in *Paint Graphos and others* [5C] C-78/08, paragraph 57.

3 Legal analysis of RECs and CECs

In this chapter I will analyze the legislation on RECs and CECs and display how the legislator has intended energy communities to be regulated domestically. The intention of the assessment in this chapter is to make the reader familiar with energy communities as legal concepts, based on the traits that characterize them. This chapter will also further outline the relevant differences between the regulation of RECs and CECs, which will be important to set the scene for the discussion in chapter 4.

3.1 Primary purpose

Both the Renewable Directive and the Electricity Directive emphasize in their definitions of energy communities that their "primary purpose is 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".[73] This presuppose that energy community projects should not be driven by commercial motives, but rather by the intention to bring specific advantages to the ones participating in an energy community or the ones affected by its presence.[74]

That said, this definition does not restrict energy communities from generating profits on their project, as long as the profits are reinvested into the community.[75] Energy communities are also not limited from making a return on investments for its members.[76] The exact thresholds for profits and investment returns energy communities should be allowed to generate is left for Member States to decide.[77] However, an important guideline for Member States in this regard is that energy communities are considered non-commercial market actors by the CEP.[78] As will be discussed in chapter 5, this requirement implies that Member States may have to implement beneficial measures for energy communities.[79] In order to be in line with the motives of the Directives, Member States must set the thresholds for return on investments such that

[73] Article 2 (16) (c), Renewable Directive; Article 2 (11) (b), Renewable Directive.
[74] REScoop (2020) p. 17.
[75] REScoop (2020) p. 17; de Almeida and others (2020), p. 31.
[76] de Almeida and others (2020), p. 31.
[77] de Almeida and others (2020) p. 31.
[78] Article 2 (16) (c), Renewable Directive; Article 2 (11) (b); de Almeida and others (2020), p. 31.
[79] REScoop (2020) p. 63.

commercial actors cannot take advantage of this beneficial treatment, provided by the frameworks.[80]

One way of making sure profit making is a secondary objective of energy communities could be for Member States to set requirements on the legal form energy communities can take. The Directives do not pose any restriction in this regard.[81] However, private companies and public limited companies will be less suitable to be recognized as energy communities as these are driven mainly by profit-making.[82] As such, although energy communities *in theory* are free to take any legal form, their main objective may restrict this freedom, as some legal structures are less consistent with a non-commercial motive.

Exactly what should constitute environmental, social or economic community benefits are not specified in the Directives. As examples REScoop points to economic benefits such as return on investments to members, environmental benefits such as increased production of locally developed energy and social benefits such as education and training for members, school children or the broader public.[83] Although such suggestions could be guiding, it is left to the discretion of the Member States to decide exactly what these benefits should constitute.

Connected to this discussion is the importance of *who* the beneficiaries of the generated positive effects are. In the case of energy communities, community benefits are restricted to the "members or shareholders" of the entity as well as to the "local area where it operates", meaning the local community living near the development.[84] To what extent a given project provides benefits therefore have to be interpreted in light of who it is supposed to deliver benefits *for*. Internally energy communities should bring benefits to "its members or shareholders" (internal community benefits), while it externally should deliver benefits to the "local areas where it operates" (external community benefits).[85] Internal community benefits relates to the internal organization of the entity, such as direct influence by citizens and local communities on the

[80] de Almeida and others (2020) p. 31.
[81] Recital 44, Electricity Directive; Recital 71, Renewable Directive.
[82] REScoop (2020) p. 16.
[83] REScoop (2020) p. 20.
[84] Article 2 (11), (b), Electricity Directive; Article 2 (16) (c), Renewable Directive.
[85] Described by Savaresi as intra-and extra community relations; Savaresi (2019), p. 505.

decision-making of an entity.[86] External benefits are benefits delivered *by* the entity to the local community, such as local investments in the community or access to cheaper electricity.[87]

3.2 Membership model and control

The membership-requirements for CECs and RECs differ in the sense that membership in CECs is open to everyone, while membership in RECs is restricted to "natural persons, SMEs or local authorities, including municipalities".[88] As such, membership in a REC is limited to specific natural and legal persons.[89] Membership restriction is a means to avoid abuse by commercially driven actors, for RECs to remain autonomous from these market participants.[90]

That said, although membership in CECs is open to everyone, an important distinction is that the only members or shareholders which are allowed to practice "effective control" over the entity are "natural persons, local authorities, including municipalities, or small enterprises".[91] This restriction entails that, even though membership is not limited to non-commercial actors, energy actors with commercial interests are constrained from taking control over the decision-making process of the entity.[92] As with CECs, also the Renewable Directive requires RECs to be "effectively controlled" by its members or shareholders. An important distinction, however, is that in RECs only the members located in the "proximity" of the development have the right to practice "effective control" of the entity.[93] Consequently, both RECs and CECs restrict the right to practice effective control to specific members. However, while CECs restrict effective control by the *size* of the participant, RECs confine this right based on *localness*.[94]

What constitutes "effective control" is however not defined in the Directives. In the Electricity Directive it is included a definition of "control", which is defined as

[86] Savaresi (2019) p. 507.; REScoop, p. 20.
[87] Savaresi (2019) p. 506.
[88] Article 2 (16) (b), Renewable Directive.
[89] REScoop (2020) p. 26.
[90] Recital 71, Renewable Directive.
[91] Article 2 (11) (a), Electricity Directive.
[92] REScoop (2020) p. 30.
[93] Article 2 (16) (a), Renewable Directive.
[94] REScoop (2020), p. 27.

"(…) rights, contracts or other means which (…) confer the possibility of exercising decisive influence on an undertaking, in particular by: (a) ownership or the right to use all or part of the assets of an undertaking; (b) rights of contracts which confer decisive influence on the composing, voting, or decisions of the organs of the undertaking".[95]

It is not clear from the Directives whether the EU-legislators intended this definition to be applied to the understanding of "effective control". That said, this interpretation is in line with the definition of "control" in general company law as well as EU merger control law. Here, "control" is generally described as a situation in which a shareholder or a group of shareholders wields "significant influence" or "decisive influence" over the management or decision-making of a company.[96] As such, although Member States will have the discretion to decide whether they will implement the same definition of "control" as in the Electricity Directive, "control" would in any case imply majority influence over the companies' decisions and or management.[97] Such influence could come into play in the form of majority voting rights, by having the majority number of shares or by having the power to wield veto powers against other members or shareholders.[98]

3.3 Access to the community

Both the Renewable Directive and the Electricity Directive require access to the energy community to be "open and voluntary".[99] In the Renewable Directive the openness criterion is outlined as a standard to ensure participation is "based on objective, transparent and non-discriminatory criteria."[100] This entails that any citizen eligible for membership, restricted to certain groups for RECs and limitless for CECs, are entitled to enter an energy community as a member or shareholder. The openness-criterion does however not restrict energy communities from setting conditions for participation such as opt-in fees or a criterion to buy shares to become a member. Such criteria are lawful, as long as they are not conducted in an arbitrary manner.[101]

[95] Article 2 (56), Electricity Directive.
[96] Regulation (EC) 139/2004, Article 3.2.; REScoop (2020) p. 25; Regulation (EU) 575/2013.
[97] REScoop (2020) p 25.
[98] Directive 2001/34, Article 87; REScoop (2020) p 25.
[99] Article 16 (a), Electricity Directive and Article 2 (16) (a), Renewable Directive.
[100] Recital (71), Electricity Directive.
[101] REScoop (2020) p. 21

4 Non-discrimination of energy communities

I have now analyzed energy communities as legal institutions based on the traits that characterize them. Next, I will use these traits to display how energy communities are distinct concepts from traditional market actors, based on the non-discrimination principle. In addition to the traits already outlined, I will point to the size of energy communities, as this is an essential characteristic separating these two institutions. This analysis is important because, according to the non-discrimination principle, Member States are obliged to take these differences into account when regulating energy communities, in order to prevent discriminatory treatment.[102]

Before I move on to the comparison, I will outline the content of the non-discrimination principle in line with how it has been interpreted by the EU-Courts.

4.1 Outline of the non-discrimination principle

In the Renewable Directive it is emphasized that Member States are required to provide renewable energy communities with access to energy markets in a "non-discriminatory manner".[103] Renewable energy communities should also not be subject to discriminatory treatment with regard to their activities"[104]. Equally, in the Electricity Directive it is highlighted that the rights and obligations of other electricity undertakings should be applied to citizen energy communities in a "non-discriminatory and proportionate manner".[105]

In line with longstanding and settled case-law from the Court of Justice of the European Union (CJEU), non-discrimination entail that "comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified".[106] This requires that "matching factual circumstances be treated identically in their legal consequences".[107] And vice versa, dissimilar circumstances shall be treated contrary to each other in their legal consequences. The assessment of whether a situation is comparable to

[102] *S.P.C.M. and Others* [GC] C-558/07 paragraph 74.
[103] Article 22 2. c), Renewable Directive
[104] Article 22 4. e), Renewable Directive
[105] Recital 46, Electivity Directive
[106] *S.P.C.M. and Others* [GC] C-558/07 paragraph 74. See also *International Air Transport Association*, C-344/04 [GC] paragraph 95. The non-discrimination principle is referred to as the same as the equal-treatment principle.
[107] McCrudden and Prechal (2009), p. 24.

that of another shall consider the specific elements which characterize the legal persons and their respective situations.[108] As such, in order to establish whether a situation differentiates from that of another, the specific characteristics of each actors' situation has to be compared to each other.

In accordance with case law from the CJEU, treating comparable situations differently would entail "subjecting some persons to disadvantages as opposed to others".[109] Equally, treating different situations the same would mean that those who are in a different legal or factual situation would be subject to disadvantages. As such, discrimination is not only a fact when actors in like situations are treated differently, but also when actors in unlike situations are treated the same. To ensure non-discrimination in these situations, different treatment could mean implementing preferential measures for the benefit of one actor, given that this actor is in a disadvantageous position.[110] This will be discussed further in chapter 5.

Different treatment in identical situations or identical treatment in different situations can however be regarded as legal if such treatment is "objectively justified".[111] The wording of "objectively justified" implies that the treatment should be reasonable based on legitimate and non-arbitrary criteria.[112] In accordance with CJEU case-law, the extent that differential treatment of actors in like situations can be justified, depends on whether the treatment "relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment".[113] This means that differential treatment of actors in like situations and like treatment of actors in different situations is only justified if it is based on an objective pursued by the relevant legal act in question.[114] A breach of the principle would amount to discrimination.[115]

Lastly, the treatment should also be proportionate in comparison to the desired result of the treatment, meaning that differential or non-differential treatment would defeat its purpose if it resulted in unequal treatment for the other part.[116] This means that non-discrimination work

[108] *Industrie du bois de Vielsalm & Cie SA* [C5] C-195/12, paragraph 51.
[109] *Société Arcelor Atlantique et Lorraine* and Others [GC], C-127/07, paragraph 39.
[110] *Marschall*, C-409/95, paragraph 4, 5 and 12.
[111] *S.P.C.M. and Others* [GC] C-558/07 paragraph 74.
[112] McCrudden and Prechal (2009) p. 12.
[113] *Société Arcelor Atlantique et Lorraine* and Others [GC], C-127/07, paragraph 47.
[114] Also described by the Courts as a breach of the equal treatment-principle; Société Arcelor Atlantique et Lorraine and Others [GC], C-127/07, paragraph 47 and 58.
[115] *Société Arcelor Atlantique et Lorraine* and Others [GC], C-127/07, paragraph 47.
[116] de Almeida et. al, 2021, p. 27.

both ways: any measure implemented to ensure equal treatment should not result in unfair treatment of another actor. The CJEU have referred to non-discrimination as an expression of a general principle of EU law.[117] This entails that the Courts are obliged to respects its content, whenever relevant, even if the parties do not refer to it before the Courts.[118]

4.2 Analysis of legal characteristics of energy communities compared to traditional market actors

In the following sections I will compare the characteristics of energy communities to that of traditional market actors. Four different characteristics differentiating these actors will be identified. These are their different main motives, how their government-structures are organized, to what degree participation in the entity is open for the public and their respective abilities to expand in terms of size. This assessment will serve as a basis for the conclusion that these distinct features require Member States to treat energy communities differently from traditional market actors.

4.2.1 Non-commercial motive and distribution of benefits

An essential characteristic of energy communities is that generation of profits shall be a secondary objective of these entities.[119] In contrast, traditional market actors are characterized by mainly being driven by commercial motives.[120] This way of organizing an entity, based on shared values rather than on maximization of profits, has direct links to the business model of cooperatives.[121] As with energy communities, cooperatives are organized in the interest of its members, rather than in the interest of outside investors.[122] Profits being secondary implies, as emphasized by the Commission, that the performance of the entity is measured by the level of service it provides to its members, instead of the return on investment it achieves.[123] The main objective of energy communities is to ensure community benefits. Internally to its members or externally to the local community where it operates.[124] This facilitates members to be *solely*

[117] *Ruckdeschel*, Cases 117/76 and 16/77.
[118] *Mangold*, C-144/04 [GC], paragraph 75, as sited in McCrudden and Prechal (2009) p. 5.
[119] Article 2 (11) (b), Renewable Directive; Article 2 (16) (c), Electricity Directive.
[120] See the discussion in *Paint Graphos and others* [5C] C-78/08.
[121] REScoop and others, "A sustainable future - with cooperatives", 2020, p. 2.
[122] COM, (2004), 18 final, 1.1.
[123] COM, (2004), 18 final, 4.3.
[124] Article 2 (16) (c), Renewable Directive; Article 2 (11) (b), Electricity Directive.

committed to obtaining the values of its members or of the wider community. Thus, this research identifies that, contrary to traditional market actors, the main objective of energy communities creates strong incentives for its members to make sure internal as well as external community benefits are ensured.

That said, energy communities are not the only market actors eligible to deliver community benefits to local communities. In fact, "community benefits" as a legal concept or policy instrument is not a new idea in the energy sector.[125] The notion that traditional market actors are suitable to deliver benefits to the community surrounding an energy development has emerged over some time in different States such as Denmark, the UK and the Netherlands.[126] In relation to traditional market actors, community benefits have been defined as schemes initiated by commercial developers to local communities living in the proximity of a development. [127] The objective is to offer "some form of additional, positive provisions for the area and people affected by major developments".[128] As opposed to more broadly defined benefits brought by energy developments in general, such as access to energy, community benefits are defined as compensation directly targeted towards a local community, as a means to make up for the impact the development imposes on these residents.[129]

There have evolved a range of different community benefit schemes brought by traditional market actors over the years in different Member States. Some of which involve community funds initiated for the good of the community, local investments, as well as discounts on energy prices.[130] These types of benefits coincide with the understanding of external community benefits delivered by energy communities, as introduced in chapter 2. As such, both energy communities and traditional market actors are qualified to ensure benefits to local communities. Moreover, these benefits will often overlap, such that both actors may offer the same sorts of benefits.[131] This indicate that the situation of energy communities and those traditional market actors which offers external community benefits, is similar when in comes to the ability to provide benefits for local communities.

[125] Barrera-Hernández and others (2016), p. 11.
[126] Rønne (2016), p. 190.
[127] Cowell, Bristow and Munday (2011), p. 539.
[128] Cowell, Bristow and Munday (2011) p. 539.
[129] Ignacio Herrera Anchustegui (2020), p. 4.
[130] Rønne (2016), p. 187.
[131] McHarg (2016), p. 299-300.

However, an important distinction, identified in this research, lies in that the structure of energy communities makes these better suited to deliver *internal* community benefits. The organization of energy communities, with profit-making being a secondary objective, have proven to be successful to enable previously excluded groups to run businesses.[132] As with cooperatives, because these entities can operate on a break-even or cost-plus basis, this facilitates persons, who otherwise would not have access to the labor market, to create and run energy communities.[133] As the main objective is to fulfill the interests of its members, this is also a more democratic business model than that of capital companies. This is because members are actively involved in the decision-making of the entity and directly influence how to achieve its own interests.[134] On this basis, the different leading objectives of energy communities as opposed to traditional market actors, is an essential differentiating characteristic.

4.2.2 Government-model: "effective control"

As outlined under chapter 3, the right to exercise "effective control" of energy communities is limited to citizens, small to medium-sized enterprises[135] and local authorities in both RECs and CECs.[136] In line with the analysis in chapter 3, effective control implies a decisive degree of influence on the decision-making and management of the entity. As such, the *majority* influence of an energy community is limited to a specific group of legal persons, which excludes bigger enterprises and centralized authorities**.**

In comparison, traditional market actors are not subject to restrictions on who is allowed to effectively control the entity. Accordingly, these institutions can be managed in the interest of outside investors.[137] This indicates that energy communities are not in a comparable factual and legal situation to that of commercially driven actors.

This is in line with case-law from the CJEU, in the *Paint Graphos* case.[138] The question referred to the court was if tax exemptions for cooperatives distorted the competition within the meaning

[132] COM (2004) 18 final, 3.2.4.
[133] COM (2004) 18 final, 3.2.4
[134] COM (2004) 18 final 3.2.4.
[135] Only small enterprises for CECs; Article 2 (11) (a), Electricity Directive.
[136] Article 2 (16) (a) and (b).
[137]See as an example the Council Regulation (EC) No 1435/2003. Here, cooperatives are distinguished from "economic agents" by the fact that control of the cooperatives should be vested equally in members (Recitals 8 and 10 of the Preamble).
[138] *Paint Graphos and others* [5C] C-78/08, paragraph 48-61.

of Article 87 (1) TFEU. In the assessment of whether the tax exemption was a "selective measure" according to the general State aid rules, the Court compared the factual and legal situation of cooperatives to that of "capital companies". This led to the conclusion that one of the main differences between these companies was the fact that the "control of cooperatives should be vested equally in members" as opposed to capital companies, which were managed in the interest of outside investors. Considering this special characteristic, cooperatives were not in a factual and legal comparable situation to that of commercial companies.

This case has direct implications for the assessment of whether there is a requirement to treat energy communities differently than commercial companies.[139] Cooperatives are subjected to the same restriction as energy communities regarding who the entity shall be managed in the interest of, namely its members.[140] According to the Courts, exactly this trait is a characteristic which separates cooperatives from traditional market actors. Energy communities are also subject to an additional restriction, namely the limitation on which members and shareholders who lawfully can practice effective control of the entity. Only members and shareholders that are natural persons, small to medium-sized enterprises and local authorities are entitled such influence.[141] Essentially, these characteristics put energy communities in a different legal and factual situation to that of traditional market actors.

4.2.3 "Open" access to the entity

As outlined in chapter 3, any natural and legal person eligible for membership, restricted to certain groups for RECs and limitless for CECs, are entitled to participate in an energy community as a member or a shareholder.[142] In comparison, access to participation in corporate companies depends on whether the company is publicly listed or not.[143] In publicly listed companies the public will have access to participate in the company through shareholding.[144] This is usually connected with the right to vote on the affairs of the company.[145] As such, access for the public to enter and actively participate in energy activities is *open* in both publicly listed companies, thus commercially driven companies, and in energy communities.

[139] As also highlighted in Roberts (2019), p. 17-18; de Almeida (2021), p. 27.
[140] Article 2 (16) (a), Renewable Directive, Article 2 (11) (a).
[141] Article 2 (16) (a), Renewable Directive; Article 2 (11) (a), Electricity Directive.
[142] Article 2 (16) (b), Renewable Directive; Article 2 (11), Electricity Directive.
[143] See for example Directive 2013/50/EU.
[144] Directive 2013/50/EU, Article 1 (1) (d).
[145] Directive 2013/50/EU, Recital (12).

However, as identified by Antonio Fici, there is a distinct difference between the requirement to ensure "open" access for all new members and the openness related to the circulation of shares in publicly listed companies.[146] Fici relates this to cooperatives, but it is natural to apply this argumentation also to energy communities, as both institutions practice "open" membership.[147] He highlights that, contrary to organizations who can choose to open up for membership, the members of cooperatives are obliged by law to share the utility it produces with third parties wanting to become a member.[148] Publicly listed companies are therefore open to a *certain degree*, as the opportunity to participate depends on whether another shareholder sells his or her shares or whether the organization chooses to issue new shares. This entails that, while access to participation through shares in publicly listed companies is *transferable*, the access to participation in cooperatives, thus also in energy communities, is *open* to all potential new members willing to commit to the rights and obligations connected to membership.[149]

On this basis, in relation to energy communities, I have identified that the consequence of requiring energy communities to have an open membership-structure for the legal persons eligible for membership, is that open participation for these is *ensured.* This has repercussions for the ability for natural persons and small- to medium sized enterprises as well as local authorities to enter into and actively participate in energy activities. While traditional market actors can choose to open up membership for these legal persons, energy communities are *obliged* to fulfill this objective.

Another important distinction between participation in publicly listed companies and the participation available for the public in energy communities, is the fact that participation in an energy community is not restricted to a *limited portion of the owner*.[150] In publicly listed companies the owners have the right to decide how much of their ownership shares they wish to issue to the public. By contrast, participation in energy communities entails a right to the total amount of the ownership shares, which is equally distributed between the members. This implicates, as identified by Fici in relation to cooperatives, that the existing members of energy

[146] Fici (2012), p 14.
[147] As stated in the 1th principle of the International Co-operative Alliance (2020, p. 15.
[148] Fici (2012), p. 14.
[149] Fici (2012). p. 15.
[150] Fici (2012), p. 14.

communities are not the *exclusive* beneficiaries of the utilities it produces.[151] As such, energy communities, as distinct from corporate companies, constitute a "social function" in that new members are entitled an *equal amount* of the total benefits produced by the entity, as already existing members.[152]

The last important distinction, connected to the requirement outlined above, is that participation in energy communities is linked with the right to practice *effective control* for specific natural and legal persons. This entails that, by acting collectively, these members have the potential to possess the *majority* influence on the entity. To highlight this difference the Danish mandatory scheme introduced by the Government in 2008 is relevant.[153] The Government required corporate companies to offer 20 percent of its shares to citizens living at a 4,5 km radius from their development.[154] As the scheme *required* corporate companies to offer parts of its shares to citizens, these individuals were guaranteed the opportunity to influence corporate developments in their vicinity. However, the actual opportunity for natural persons to influence the entity was limited upwards to 20 percent. As such, this research identifies that, although participation may be open for natural persons, small and medium-sized enterprises as well local authorities in both corporate companies and energy communities, only membership in energy communities ensures that participation is associated with the ability to practice a decisive degree of influence on energy activities.

4.2.4 Ability to expand in terms of size

According to the Renewable Directive one of the specific characteristics of RECs is their size.[155] The size of an entity is decided based on the number of employees as well as its turnover and/or balance sheet.[156] Neither the Renewable Directive nor the Electricity Directive pose restrictions on the legal form energy communities can take.[157] As such, *in theory*, energy communities are free to expand their entity as they wish. However, due to the specific restrictions opposed on energy communities in terms of who might enter as a member and

[151] Fici (2012), p. 15.
[152] Fici (2012), p. 15.
[153] Anchustegui (2020) p. 14.
[154] Anchustegui (2020) p. 14. The scheme was put to an end in 2020 because it was unsuccessful in reducing local opposition to renewable developments.
[155] Recital 71, Renewable Directive.
[156] European Commission recommendation (2003/361/EC), Article 2.
[157] Recital 71, Renewable Directive; Recital 44, Electricity Directive.

practice effective control of the entity, this theoretical freedom is in practice more restricted. As the characteristics of RECs and CECs differ in this area, I will start by discussion how this unfolds in relation to RECs.

RECs are subject to a geographical restriction on who's allowed to practice effective control of the entity. Only member that are "located in the proximity of the renewable energy project that are owned and developed by the legal entity" are allowed to practice such influence.[158] As natural and legal persons outside this geographical scope are restricted from having a majority influence, this reduces the incentive for these to become a member of the REC. As such, the potential for RECs to expand their business by attracting investors beyond a local level is limited.[159]

Additionally, RECs are subject to restrictions on who are entitled to access the energy community as members. Although this restriction does not exclude commercial- and large-scale utilities from entering into financial agreements with RECs, it excludes these actors from participating directly in the entity as investors or shareholders.[160] As such, this research identifies that investor in RECs are likely to be limited to natural persons, SMEs and local authorities which are in the proximity of the renewable development. The membership restriction substantially limits the number of legal persons with an actual incentive to put resources into a REC. Moreover, the likelihood that these members have access to sizeable resources is limited, as they only operate at a local level.[161]

As highlighted under 3.2, also CECs are imposed a restriction on the natural and legal persons that may practice effective control of the entity, explicitly excluding traditional market actors and centralized authorities.[162] In the Electricity Directive it is stated that "the decision-making powers within a citizen energy community 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*."[163] Although these restrictions do not pose any specific limitations on the size of the entity, also this has the potential to reduce the

[158] Article 2 (16) (a), Renewable Directive.
[159] Verde F. and Rossetto (2020), p.74.
[160] REScoop (2020) p. 24.
[161] Verde F. and Rossetto (2020) p 29.
[162] Article 2 (16) (a), Renewable Directive and Article 2 (11) (a), Electricity Directive
[163] Recital 44, Electricity Directive. (My highlighting).

incentive for others than natural persons, small-to medium sized enterprises and local authorities to become members of the entity. Not least, this restriction has the potential to reduce the incentive for larger scaled entities and private investors, that have their primary area of economic activity in the energy sector, to invest in energy communities. These actors are typically investors with more robust finance. A lesser incentive for these to invest may therefore reduce the potential for energy communities to expand their entity financially.

In essence, I have established that the restriction imposed on both RECs and CECs on who are allowed to effectively control the entity, as well as a specific proximity restriction for the members allowed to influence RECs, implies that energy communities are less able to increase in terms of access to finance and members. As stated under 2.2, traditional market actors are not subject to such restrictions and will therefore be better suited to expand their entity than energy communities.[164]

4.3 Conclusion

In conclusion there are four characteristics separating energy communities from traditional market actors. These are their non-commercial purpose, their government model, how access to the entity is organized as well as their ability to expand in terms of size.[165] I have identified that there are two traits which are similar for both actors in relation to these characteristics. First, both traditional market actors and energy communities can ensure external community benefits. Second, both institutions may offer participation to their entity to different degrees.

However, it has been identified that the organizational form of energy communities means that their members have a bigger incentive to guarantee that community benefits are provided. Also, the structure of energy communities indicate that these are more suitable to ensure *internal* community benefits to its members or shareholder. Finally, in contrast to traditional market actors, the Directives require energy communities to ensure open participation and effective control by specific natural and legal persons.[166] This means that energy communities enable

[164] As also highlighted in *Paint Graphos and others* [5C] C-78/08.
[165] Article 2 (11), Electricity Directive, Article 2 (16), Renewable Directive; de Almeida and others (2020), p. 7.
[166] Article 2 (11) (b), Electricity Directive and Article 2 (16) (a), Renewable Directive.

these to take part and actively engage in the decision-making and management of energy activities.

To summarize, these characteristics entail that Member States, to prevent discrimination of energy communities, are required to take account for these specific features in National legislation, by treating these differently. As will be discussed in the following chapter, what "different" treatment should constitute, must be interpreted in line with the requirement in the Directives to ensure a *level playing field* for these entities.

5 A level playing field and an equal footing for energy communities

In addition to the requirement to ensure non-discrimination of energy communities, the Directives also oblige Member States to provide a level playing field and an equal footing for these entities.[167] In the following sections I will outline the content of these requirements, as well as what these entails in relation to how the legislator has intended Member States to treat energy communities as opposed to traditional market actors. My discussion will display that the objective to achieve a level playing field for energy communities, in some cases implies that these entities must be treated favorably.[168] This is because their specific characteristics put these in a disadvantageous position compared to already established actors in the market.[169] The CJEU and the European Council have referred to such preferential treatment as "positive action"-measures, as means to achieve equal treatment.[170] As such, preferential treatment is lawful under the non-discrimination principle.[171]

5.1 A level playing field: justification for preferential treatment

In the Renewable Directive it is stated that the specific characteristics of RECs hamper their ability to compete with large-scale players. To this end, Member States should be allowed to implement measures to allow them to compete on an *equal footing* with these actors.[172]

[167] Recital 26 and 71, Renewable Directive; Recital 46, Electricity Directive.
[168] Jasiak (2020), p. 49; Preferential treatment based on differences was justified in *Paint Graphos and others* [5C] C-78/08.
[169] Recital 46, Electricity Directive. Article 22 7., Recital 26 and 71, Renewable Directive.
[170] Council Recommendation 84/635 on the promotion of positive action for women; *Lommers*, Case C-476/99; *Griesmar*, Case C-366/99.
[171] McCrudden and Prechal (2009), p. 38.
[172] Recital 26 and 71, Renewable Directive.

Similarly, in the Electricity Directive it is emphasized that CECs "should be allowed to operate on the market on a *level playing* field without distorting competition".[173]

"Equal footing" and a "level playing field" are not legally defined in the two Directives.[174] The wording of both terms assumes competition on fair terms[175] and the objective is to "reduce "actual instances of inequality".[176] However, the perception of how inequality should be reduced, depends on what the legislator seeks to accomplish.[177] The motivation to secure a level playing field is emphasized in a range of different legislation at European level.[178] Nevertheless, the perception of how the term should be interpreted is conflicting, depending on the meaning the legislator applies to it.[179]

In essence, two different interpretations are applied, a rules-based interpretation and an outcome-based interpretation.[180] A rules-based interpretation is based on the perception that all market actors should be treated the same, such that a level playing field implies *the same treatment of all actors*.[181] In contrast, an outcome-based level playing field is based on the perception that market actors in a disadvantageous position should be entitled compensation in order to make up for the disadvantage.[182] According to this interpretation, a level playing field is obtained by applying favorable treatment to the actor in the disadvantageous position, in order to ensure equal opportunities.[183]

It is the outcome-based interpretation that is intended for the regulation of energy communities. Both Directives recognize that their characteristics lead to a less competitive standing for these actors.[184] I have established that energy communities differ from traditional market actors on

[173] Recital 46, Electricity Directive.
[174] In Article 65 of the Electricity Directive, it is referred to "level playing field". However, this is not a definition. The Article merely outlines that the measures which could be taken to ensure a level playing field have to be in line with the TFEU.
[175] Council recommendation 84/635/EEC, referred to as "equal opportunities". As both terms are expressions of the same objective and legal meaning, in the following, I will compile "equal footing" under the term "level playing field" and refer to the principle by the latter.
[176] *Kalanke,* C-450/93, paragraph 18.
[177] Lijesan and others (2007), p. 17-18.
[178] COM (2013) 122 final; Recital 1, Directive 2014/67/EU; Recital 2, 43, 46, 65, Article 3 and Article 65, Electricity Directive.
[179] Lijesan and others (2003), p. 14.
[180] Lijesan and others (2003), p. 21.
[181] Lijesan and others (2003) p. 21.
[182] Lijesan and others (2003) p. 22.
[183] Lijesan and others (2003), p. 22.
[184] Recital 46, Electricity Directive. Article 22 7., Recital 26 and 71, Renewable Directive.

four distinctive traits. Exactly these traits are also what makes these entities less able to compete in the energy market on the same level as traditional market actors.[185] Because of these legal features, the fulfillment of a level playing field may require the State to take specific measures to make up for these disadvantages.[186]

Essentially, to obtain a level playing field for energy communities, it has been identified that differential treatment in some cases may have to constitute *preferential* treatment of these entities. A level playing field in relation to the regulation of energy communities is therefore an expression of an objective, which, because of these actors' disadvantageous position, may require favorable treatment of them compared to traditional market actors.[187] As such, the non-discrimination principle, and the obligation to enable a level playing field for energy communities are intertwined. Treating energy communities preferentially to ensure a level playing field is a means to take account for their differences in accordance with the non-discrimination principle.[188] Such favorable treatment may entail, in example, the right to implement special measures in the form of support schemes or state aid.[189] This will be further elaborated in chapter 7.

An essential distinction however, identifiable in the Directives, is that the legislator expresses different objectives for Member States in their facilitation for RECs as opposed to CECs. This has repercussions for the measures which may be implemented by Member States for each of these entities.

5.2 Legislators' intention for the facilitation of RECs as opposed to CECs

As both RECs and CECs are characterized by legal features which hamper their ability to compete in the market, there may be a need for special measures to be implemented for both of these entities to achieve a level playing field.[190] However, the Renewable Directive also requires Member States to "provide an enabling framework to *promote and facilitate* the development of renewable energy communities.[191] In contrast, the enabling framework for

[185] Recital 71, Renewable Directive. Recital 46, Electricity Directive
[186] REScoop (2020), p. 63.
[187] See in this regard *Kalanke*, C-450/93, paragraph 19; Council recommendation 84/635/EEC.
[188] Favorable treatment has also referred to as positive action measures. See Council recommendation 84/635/EEC.
[189] Renewable Directive, Article 2 (5) and Article 107 TFEU.
[190] REScoop (2020), p. 63.
[191] Article 22 4., Renewable Directive.

CECs simply requires Member States to create a level playing field for these entities, in order for them to get access to and participate in the energy market.[192] These different objectives imply that the measures for RECs may entail privileges which are not relevant to implement for CECs.[193]

This distinction is manifested in the Directives, as the Renewable Directive explicitly encourage Member States to enable RECs to compete for support schemes at the same level as traditional market actors.[194] Member States may implement measures for these such as tailored bidding windows or direct support.[195] In contrast, the Electricity Directive does not suggest such measures for CECs, demonstrating that the European legislator acknowledges RECs as entities in which Member States are required to ensure more favorable conditions for in their domestic frameworks.[196]

In essence, the Directives imply that special measures may have to be implemented to facilitate a level playing field for both RECs and CECs.[197] However, the legislation discloses an essential distinction in relation to what the enabling frameworks for RECs and CECs should seek to obtain. To this end, the Directives indicate that that the measures which may be implemented for RECs could entail privileges which are not appropriate to implement for CECs. Based on an interpretation in line with the overall objectives of the two Directives, this implies that the justification for this preference relates to the fact that the Renewable Directive seeks to obtain the promotion of Renewables.[198] As RECs are restricted to the production of renewable energy, these are more in line with this overall objective than CECs.

[192] Recital 46, Electricity Directive.
[193] REScoop (2020) p. 63.
[194] Article 22 7. and recital 26, Electricity Directive.
[195] Recital 26, Renewable Directive.
[196] REScoop (2020), p. 63.
[197] REScopp (2020), p. 63.
[198] Directive 2018/2001.

6 Rationale and justification for energy communities: analyzed from an energy justice perspective

What is left to be assessed in this research is *why* the legislator has regulated energy communities to be distinct from traditional market actors. The following discussion will establish that the legislator links the rationale for this to the three energy justice tenets, implying that energy communities are eligible to deliver justice outcomes.[199] In the following assessment I will substantiate this implication by identifying *how* the traits of energy communities are suitable to deliver energy justice, more so than traditional market actors. This is not to say that the possible obstacles for energy communities to achieve justice outcomes, as identified by other authors[200], is disregarded. What this research seeks to identify is simply that the unique characteristics of energy communities represent a greater possibility to ensure justice outcomes compared to already established actors in the energy market.

Heffron and Talus describe energy justice as an expression of the fifth stage in the evolution of energy law - the stage we are currently embarking on.[201] This stage revolves around the climate crisis and the need to manage the energy transition.[202] The climate crisis has uncovered that a successful energy transition, which requires profound interventions in the daily life of citizens, is dependent on public acceptance.[203] Energy justice is a means to bring the public on board with the transition and for them to actively engage in how to manage it.[204] As such, energy justice resonates with the objectives of article 194 TFEU to preserve and improve the environment, to ensure security of supply as well as to promote energy saving and the development of renewables.[205] This is also in line with Goal 7 of the United Nations Sustainable Development Goals to "ensure access to affordable, reliable sustainable and modern energy for all".[206] Energy justice is therefore not just a pretty word, it serves as a prerequisite for managing the energy transition successfully.[207] This research argue that energy communities are regulated

[199] Recitals 43 and 46, Electricity Directive; Recital 70, Renewable Directive.
[200] Hanke, Guyet, and Feenstra, (2021).; van Bommel and Höffken, (2021).
[201] Heffron and Talus, (2016), p. 8.
[202] Heffron and Talus (2016), p. 8.
[203] McHarg (2020), p. 18.
[204] Recital 70, Renewable Directive; Recital 4, Electricity Directive.
[205] Article 194 TFEU.
[206] UN General Assembly, Sustainable Development Goals, A/RES/70/1 Goal 7.
[207] European Commission, COM(2016) 860 final, p. 9-10.

to deliver justice outcomes.[208] To this end, it maintains that energy justice may serve as a justification for their establishment and uptake in the energy market.

The reason why this section is separated from the discussion on non-discrimination is that energy justice, in contrast to the non-discrimination principle, is not an expression of a legal principle, formally recognized by the Courts. As such, it is not certain whether members of energy communities could claim their rights based on energy justice. The objective of obtaining energy justice is still highly relevant, as this resonates with the overall objectives of both the CEP[209], the European Union[210] and the United Nations[211].

In the following I will divide the discussion relative to the three justice tenets and connect each of these to the specific characteristics of energy communities to demonstrate how these are suitable to deliver justice outcomes.

6.1 Procedural justice

In the recitals of the Electricity Directive, it is emphasized that energy communities offers an "*inclusive option* for all consumers to have a *direct stake* in producing, consuming or sharing energy". [212] This is in line with the procedural justice tenet, which constitutes meaningful participation in energy decision-making.[213] As such, the recitals of the Electricity Directive assume that energy communities ensure procedural justice by engaging the consumer directly in the management and decision-making of an energy entity. Although not explicitly highlighted in the Renewable Directive, it is assumed that this assumption also applies to RECs, as the potential to practice effective control is available also for the members in these institutions.

As outlined above, the legal organization of energy communities guarantees that direct participation is warranted for specific natural and legal persons. The participation is also made

[208] Recitals 43 and 46, Electricity Directive; Recital 70, Renewable Directive; Diestelmeier (2021), p – 9-10.
[209] European Commission, COM(2016) 860 final, p. 9-10.
[210] Article 194 TFEU.
[211] SDGs Goal 7.
[212] Recital 46, Electricity Directive. (My highlighting).
[213] McHarg (2020), p. 20-21.

meaningful by the fact that "effective" entails a potential to practice a decisive degree of influence on the management and decision-making of an entity.

However, this research argues that in relation to the procedural justice tenet, the most relevant aspect in regard to energy communities is the fact that the right to practice effective control ensures that these specific natural and legal persons can remain autonomous from commercial actors.[214] By limiting the right to practice effective control to specific natural and legal persons, this ensures that larger-scaled companies with commercial interests are excluded from taking over the management and decision-making of the entity.[215] As such, the degree of control in energy communities is not influenced mainly by the interests of outside investors, for which main concern is profit-making.[216] The members of energy communities are therefore ensured freedom of choice to decide *how* the benefits produced by their energy community should be distributed, as well as what the benefits should be. In sum, these effects imply that there are strong indicators for that effective control in energy communities ensures a greater degree of procedural justice compared to that delivered by traditional market actors.

6.2 Distributive justice

The Electricity Directive express that where CECs have been successfully operated such initiatives have delivered "economic, social and environmental benefits to the community that go beyond the mere benefits derived from the provision of energy services."[217] Similarly, the Renewable Directive highlights that local involvement has resulted in "substantial added value in terms of local investment, more choice for consumers and greater participation by citizens in the energy transition."[218] This is consistent with the distributive justice tenet, which is about equal distribution of the benefits and hazards of energy activities.[219]

As outlined in chapter 4, the organization of energy communities ensures effective control by members and focus on their common values rather than on maximization of profits. This implies

[214] Article 2 (11) (a), Electricity Directive, Article 2 (16) (a), Renewable Directive.
[215] This is in line with the 4th principle of autonomy of the International Co-operative Alliance; International Co-operative Alliance, "A People-Centred Path for a Second Cooperative Decade 2020–2030: Strategic Plan" (2020) p. 1-16, p. 15.
[216] As also outlined regarding cooperatives in Fici (2012), p. 13.
[217] Recital 43, Electricity Directive. (My highlighting).
[218] Recital 70, Renewable Directive.
[219] McHarg (2020) p. 20-21.

a greater ability to secure *internal community benefits* compared to traditional market actors. Such benefits may constitute inclusion in the energy sector by previously excluded groups, strong personal links between members, as well as a greater sense of democracy internally, such that all members have an equally important voice in decision-making processes in the energy company.[220]

Additionally, the proximity requirement, relevant for RECs only, implies that RECs are able to ensure a greater sense of distributive justice than traditional market actors. As effective control of RECs is restricted to local residents[221], these members are likely to have more insights into what sorts of benefits that are most appropriate to distribute in each specific community than traditional market actors. Corporate companies are less likely to have such natural ties to the community. Proximity indicates that the community benefits delivered by RECs will be more likely to be able to target the specific needs of the community.[222] This organizational structure, with members being both suppliers and users of its own services, has been highlighted by the Commission as an effective means for members to "influence the business that serves them, ensuring that it responds directly to their needs."[223] Lastly, the proximity requirement also has the potential to create a stronger incentive to make sure that community benefits are ensured. This because the ones responsible to ensure that benefits are delivered to the community externally, are themselves part of the same community.

6.3 Recognition justice

Vulnerable or energy poor consumers and consumers exposed to energy poverty, are often excluded from participating in the energy market.[224] According to the recitals of the Electricity Directive, energy communities represent an opportunity for change for these groups as they offer a voluntary and open approach for them to have a direct stake in managing energy activities.[225] This is directly linked to the recognition justice tenet which is about

[220] As also outlined regarding cooperatives in COM (2004) 18 final, 1.1 and 4.3.
[221] Article 2 (16) (a).
[222] This advantage is also highlighted by the Commission in relation to cooperatives; COM (2004) 18 final, 2.1.1.
[223] COM (2004) 18 final, 2.1.1.
[224] Hanke, Guyet and Feenstra (2021) p. 3; Van Bommel and I. Höffken (2021) p. 6; Haushofer and Fehr (2014), p. 862; Shafir (2017), p. 133.
[225] Recital 43, Electricity Directive. An open and voluntary approach is ensured also in RECs: see the discussion under 4.2.3.

acknowledging that energy injustice cannot be separated from other social ills, such as poverty.[226]

Although energy communities are constructed to be "open and voluntary"[227] for all natural persons, the definition does not *require* energy communities to specifically address underrepresented groups to participate. Research on energy communities, which have been operative in Member States before the introduction of the CEP-definition, have uncovered that vulnerable and energy poor consumers are underrepresented in energy communities.[228] Money, time and know-how are well known barriers for these groups to engage in such institutions.[229]

That said, there are examples of energy communities which address procedural justice issues by encouraging underrepresented groups to participate, although this is not required by them. A community project in Belgium have as one of their objectives to fund "groups and communities that are normally excluded*"*.[230] Saintier also points to a community project in the UK, that seeks to educate and empower vulnerable consumers, while they at the same time have initiated a successful fuel poverty campaign.[231]

In essence, the requirement that participation in energy communities should be "open" represent a potential for energy communities to achieve procedural justice by engaging underrepresented groups. However, this potential is not fully utilized, as the definition does not *obligate* energy communities to address this issue. One possible solution to fully utilize this potential would be for Member States to *require* energy communities to engage or protect vulnerable consumers. As an example, Greece has specifically integrated alleviation of energy poverty as one of the objectives for energy communities in their definition of the concepts.[232] This requirement proclaims that energy communities are responsible to take on a social role.

[226] Guayo and others (2020) p. 6.
[227] Article 16 1. (a), Electricity Directive, Article 2 (16) (a), Renewable Directive.
[228] Hanke, Guyet and Feenstra (2021) p. 2; Yildiz and others (2015), p. 64; C. A. Johnson and Hall (2014), p. 158.
[229] Hanke, Guyet and Feenstra (2021) p. 2.
[230] Van Bommel and I. Höffken (2021) p. 6.
[231] Saintier (2017), p. 10
[232] REScoop (2020) p. 48.

6.4 Conclusion

In this chapter I have identified the rationale for why the legislator has subjected energy communities to different objectives and obligations than traditional market actors. This has been connected to the fact that their unique characteristics make these more suitable to achieve energy justice. I have identified that the characteristics of both CECs and RECs are qualified to fulfill all three of the energy justice tenets. For this reason, this research argues that energy justice may serve as a justification for facilitating their establishment and uptake in the energy market.

However, it has been displayed that the fulfillment of the distributive justice tenet is more relevant for RECs than CECs, because these are subject to a specific proximity requirement. Also, the assumption that energy communities deliver recognition justice is the least grounded. For energy communities to achieve recognition justice, I have suggested that Member States could follow the example of Greece and incorporate an obligation to include vulnerable groups in their National definitions of Energy communities.

7 Conclusion

This research has assessed and analyzed energy communities as legal concepts compared to what have been defined as traditional market actors. Four distinctive features of energy communities have been identified: their non-commercial motive, their government model, their open membership structure as well as their ability to expand in terms of size. Based on an outline of the non-discrimination principle, it has been established that this principle requires Member States to take account for these differences in domestic legislation. To prevent discrimination of energy communities, these have to be treated differently. Because of these distinct characteristics, energy communities are also exposed to a disadvantageous position in the market. To this end, it has been identified that to level the field for these compared to traditional market actors, this may require implementing special measures for energy communities, such that *different treatment* may have to amount to *favorable treatment.* The research has showed that favorable treatment is lawful in line with the non-discrimination principle and is also *required* in instances where energy communities are in a disadvantageous position compared to traditional market actors.

This discussion has served as a basis for establishing that the non-discrimination principle and the requirement to facilitate a level playing field are interconnected. Treating energy communities preferential to ensure a level playing field is a means to take account for their differences, and as such, to prevent discrimination of these institutions. Also, it has been pointed to an essential distinction connected to the objectives of the two Directives in that the legislator implies a preference for RECs over CECs. The analysis has identified that the measures which may be applied to RECs could entail advantages which may not be relevant to implement for CECs.

These reflections have served as a backdrop for the analysis of why the legislator have subjected energy communities to different objectives and restrictions than traditional market actors. The research has identified that the rationale for this is connected to the fact that the characteristics of energy communities make these better equipped to ensure energy justice. I have identified that the characteristics of both CECs and RECs are qualified to fulfill all three of the energy justice tenets. As energy justice is a prerequisite for a successful transition, this research argues that this could serve as a strong argument for Member States to facilitate the uptake of these actors. This would be in line with the objectives of Article 194 TFEU, which objectives resonated with energy justice.

7.1 Final reflections and outlook

Finally, I will present some final reflections regarding how Member States could obtain a level playing field for energy communities, as well as to facilitate the uptake of these. Also, I will point to some possible obstacles in current legislation for how to obtain this objective. Suggestions for how Member States could enable a level playing field and the uptake of energy communities could be to implement supportive measures, in example through support schemes or State aid.[233] Support schemes are restricted to renewables and could include means such as "investment aid, tax exemptions or reductions, tax refunds, renewable energy obligation support schemes including those using green certificates, and direct price support schemes including feed-in tariffs and sliding or fixed premium payments".[234] As support schemes are restricted to facilitate the promotion of renewable sources, these are only available for those CECs that engage in activities related to renewables. Also, both the Treaty rules on state aid

[233] TFEU Article 107.
[234] Article 2 (5), Renewable Directive.

and the EU competition rules apply to these schemes, such that their implementation must be subjected to these.[235] State aid on the other hand is not restricted to the promotion of renewables. This measure is therefore available also for those CECs which do not engage in activity related to renewable sources. State aid could entail measures such as "net payments, subsidies, loans, or direct investment, but also negative benefits, such as the relief from the payment of taxes or fiscal charges."[236]

Although State aid and support schemes are recognized as suitable measures to facilitate the establishment and uptake of energy communities in the energy market, the newly drafted Guidelines on State aid may represent a possible obstacle for such a development.[237] The Guidelines on State aid for Environmental Protection and Energy determine specific forms of aid which are considered unproblematic and consistent with the Treaty rules.[238] The current Guidelines are in the process of being revised for the period of 2022-2027. In June 2021 the Commission issued its draft of the revised Guidelines.[239] Surprisingly, this draft does little to align with the ambitions in the CEP to achieve a level playing field for energy communities.[240] There is no reference in the Guidelines to these institutions, which implies a lack of acknowledgement of the specific characteristics of energy communities. Also, there is a strong focus on competitive bidding for support schemes, without recognizing any exemption for energy communities.[241] Competitive bidding is challenging for these institutions, as this requires significant know-how and access to finance.[242] As such, if this draft is to be implemented, it will be contrary to the requirement in the Renewable Directive that Member States should enable energy communities to compete for support schemes on the same level as traditional market actors.[243] Also, competitive bidding has the potential to create difficult conditions for energy communities to enter the market, also this contrary to the Directives.[244]

[235] Vedder and others (2016), p. 322.
[236] Anchustegui and Bergqvist (2019), p. 5.
[237] Communication from the Commission, Guidelines on State aid for environmental protection and energy 2022- 2027, Draft, 2022, p. 1-97.
[238] Anchustegui and Bergqvist (2019), p. 11.
[239] Guidelines on State aid for environmental protection and energy 2022- 2027, Draft, 2022, p. 1-97.
[240] REScoop (2021), p. 2
[241] REScoop (2021), p. 2.
[242] Amazo and others (2020), p. 6.
[243] Article 22 7., Renewable Directive.
[244] REScoop (2021), p. 2.

This leaves Member States with conflicting signals from the legislators, indicating a possible obstacle for the establishment and up scaling of energy communities at National level.[245]

At the end of the day, although Member States are obliged to ensure non-discriminatory treatment and a level playing field for energy communities, much is left to the Member States in relation to the regulation of these new actors in the energy market. However, as this research has intended to display, energy communities are suitable to bring justice outcomes for natural and legal persons which previously has been disregarded in the regulation of the EU energy market. At the fifth stage in the evolution of the energy law, in the midst of the climate crisis, the time has come to facilitate institutions which offer an inclusive approach for all actors in the market. As Martha Roggenkamp expressed already in 2016: the time of tolerance without direct participation by the citizens is long gone.[246] Energy communities offer Member States the possibility to act on this statement. The CEP has laid the foundation for the establishment and up scaling of these institutions at National level. Now it is up to domestic legislators and policy makers to choose which road to take ahead.

[245] REScoop (2021), p. 2.
[246] Roggenkamp (2016), p. 205.

8 References

Official Sources

European Union Documents

Council recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women. OJ L 331.

Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities. OJ L 184.

Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE). OJ L/207.

Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation). OJ L 24/1.

Consolidated version of the Treaty on the Functioning of the European Union, 6.10.2012, p. 47–390. OJ C 326.

Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012. OJ L 176/1.

Directive 2013/50/EU of the European Parliament and of the Council of 22 October amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC. OJ L 294/13.

Directive 2014/67/EU of the European Parliament and of the Council of May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'). OJ L 159/11.

EU Directive 2019/944 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast), OJ L 158, 14.6.2019, p. 125–199.

EU Directive 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 (recast), OJ L 328, 21.12.2018, p. 82–209.

European Commission

Commission Recommendation, Concerning the definition of micro, small and medium-sized enterprises, (2003/361/EC). OJ L 124/36.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions, On the promotion of co-operative societies in Europe, COM (2004) 18 final.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions, Smart regulation – Responding to the needs of small and medium-sized enterprises, COM (2013) 122 final.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, Clean Energy for All Europeans. COM(2016) 860 final.

European Commission Proposal for a Directive of European Parliament and of the Council on common rules for the internal market in electricity, COM (2016) 864 final/2.

Unpublished Documents

Draft, Communication from the Commission, Guidelines on State aid for environmental protection and energy 2022, 2022, p. 1-97. Available at: https://ec.europa.eu/competition-policy/system/files/2021-06/CEEAG_Draft_communication_EN.pdf.

United Nations

Resolution adopted by the General Assembly on 25 September 2015, Transforming our world: the 2030 Agenda for Sustainable Development. A/RES/70/1

Case Law

Court of Justice of the European Union

Judgement of October 1977, *Ruckdeschel*, Joined Cases 117/76 and 16/77, EU:C:1977:160.

Judgement of October 1995, *Kalanke*, C-450/93, EU:C:1995:322, paragraph 18.

Judgement of November 1997, *Marschall*, C-409/95, EU:C:1997:533, paragraph 4, 5 and 12.

Judgement of the November 2001, *Griesmar,* Case C-366/99, EU:C:2001:648.

Judgement of March 2002, *Lommers,* Case C-476/99, EU:C:2002:183.

Judgment of March 2004, *Danske Busvognmænd*, T-157/01, EU:T:2004:76, paragraph 57.

Judgement of November 2005 [GC], *Mangold*, C-144/04, EU:C:2005:709, paragraph 75.

Judgement of January 2006 [GC], *International Air Transport Association*, C-344/04, EU:C:2006:10, paragraph 95.

Judgement of December 2008 [GC], *Société Arcelor Atlantique et Lorraine* and Others, C-127/07, EU:C:2008:728, paragraph 47.

Judgement of 7 July 2009 [GC], *S.P.C.M. SA*, C-558/07, EU:C:2009:430, paragraph 74.

Judgement of September 2011 [GC], *Paint Graphos and others*, C-78/08, EU:C:2011:550, paragraph 48-61.

Judgement of September 2013 [G5], *Industrie du bois de Vielsalm and Cie SA*, Case C-195/12, EU:C:2013:598, paragraph 39 and 51.

Judgement of 4 June 2015 [G5], *P and S*, C-579/13, EU:C:2015:369, paragraph 41.

Litterature

de Almeida and others (2021)	de Almeida, Lucinda, Cappelli Viola, Klausmann, Nikolas and van Soest, Henri. "Peer-Peer Trading and Energy Community in the Electricity Market - Analysing the Literature on Law and Regulation and Looking Ahead to Future Challenges" (2020), p. 1-49.
Amazo and others (2020)	Amazo, Ana, von Blücher, Felix, Lotz, Bastian and Jakob, Martin. "Auctions and renewable energy communities: measures to support RES communities in auctions – Country experiences and lessons learnt, Aures II (2020), p. 1-32.
Amman (2020)	Ammann, Odile. "The Interpretative Methods of International Law: What Are They, and Why Use Them?*" Developments in International Law* 72 (2020), p. 191-222.
Anchustegui (2020)	Anchustegui, Ignacio Herrera. (2020). "Distributive justice, community benefits and renewable energy: The Case of Offshore Wind Projects" (2020) In Fleming, Ruven, Huhta, Kaisa, Reins, Leonie (Eds.) *Sustainable Energy Democracy and the Law* (p. 1-21). Brill Publishers.
Anchustegui and Formosa (2020)	Anchustegui, Ignacio Herrera and Formosa, Andreas. *Regulation of electricity markets in Europe in light of the Clean Energy Package: Prosumers and demand response,* Routledge 2020, p. 1-17.
Anchustegui and Bergqvist (2019)	Ignacio Herrera Anchustegui and Christian Bergqvist, "The Role of State Aid Law in Energy". In Hunter s. T, Herrera Anchustegui, I, Crossley, P and Álvarez, G (eds), *Handbook of Energy Law*, Routledge, 2019 – Forthcoming.
van Bommel and Höffken (2021)	van Bommel, Natacha, Höffken, I. Johanna. "Energy Justice within, between and beyond European Community Energy Initiatives: A Review", *Energy Research and Social Science* 2021". https://doi.org/10.1016/j.erss.2021.102157.
Barrera-Hernández and others (2016)	Barrera-Hernández, Lila, Barry Barton, Lee Godden, Alastair Lucas and Anita Rønne (Eds.), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities,* Oxford University Press (2016).
Bjørnebye (2020)	Bjørnebye, Henrik. "Hva betyr EUs ren energi-pakke for Norge?: Juridiske betenkning om innlemmelse av ren energi-pakken i EØS-avtalen og ACERs rolle.", Rapport nr. 03/2020, p. 1-44. Available at: https://klimastiftelsen.no/wp-content/uploads/2020/05/NK3_2020_ren-energi.pdf.
Caramizaru and Uihlein (2020)	Caramizaru, Aura and Uhlein, Andreas. "Energy communities: an overview of energy and social

innovation", *Science for Policy report by the Joint Research Centre (JRC)* 2020, p. 1-59. 10.2760/180576

CEER (2019) — CEER. (2019) "Customers and Retail Markets and Distribution Systems Working Groups: Regulatory Aspects of Self Consumption and Energy Communities", p. 1-53.

Cowell and others (2011) — Cowell, Richard, Bristow, Gill and Munday, Max. "Acceptance, acceptability and environmental justice: the role of community benefits in wind energy development", *Environmental Planning Management* (2011), 54 (2011) no. 4, p. 539-557.

Co-operative Alliance (2020) — Co-operative Alliance; International Co-operative Alliance, "A People-Centred Path for a Second Cooperative Decade 2020–2030: Strategic Plan" (2020) p. 1-16.

Craig and de Búrca (2015) — Craig, Paul and de Búrca, Gráinne. *EU Law: Text, Cases, and Materials,* 6th edition., Oxford University Press 2015.

Diestelmeier (2021) — Diestelmeier, Lea. "Citizen Energy Communities as a Vehicle for a Just Energy Transition in the EU – Challenges for the Transposition", *Oil, Gas & Energy Law Intellegence* 2021, p.1-12.

Diestelmeier (2020) — Diestelmeier, Lea. "Regulating residential prosumers", In Martha Roggenkamp and others, *Elgar Encyclopedia of Environmental Law (*2020), p. 729-740. https://doi.org/10.4337/9781785369520.

Fici (2012) — Fici, Antonio. "Cooperative Identity and the Law," Eurisce Working Paper No 23/12 (2012).

Fredriksen og Mathisen (2018) — Fredriksen, Halvard Haukeland og Mathisen, Gjermund. *EØS-rett*, 3 utg., Fagbokforlaget 2018.

Guayo and others (2020) — Guayo, Iñigio del, Godden, Lee, Zillman Donald N., Montoya, Milton F. and González José Juan, *Energy Justice and Energy Law*. First edition, Oxford University Press 2020.

Hanke and others (2021) — Hanke, Florian, Guyet, Rachel and Feenstra, Marielle. "Do Renewable Energy Communities Deliver Energy Justice? Exploring Insights from 71 European Cases." *Energy Research & Social Science* 2021, 1-12. https://doi.org/10.1016/j.erss.2021.102244.

Haushofer and Fehr (2014) — Hausthofer, Johannes and Fehr, Ernst. "On the psychology of poverty Science", *Science* (2014) no. 6186, p. 862-867. 10.1126/science.1232491

Heffron and Talus (2016) — Heffron, Raphael J. and Talus, Kim. "The evolution of energy law and energy jurisprudence: Insights for energy analysts and researchers" *Energy Research & Social Science,* 19 (2016) p. 1-10.

Hutchinson (2020) — Hutchinson, Terry. “Valé Bunny Watson? Law Librarians, Law Libraries and Legal Research in the Post-Internet Era” *Law Library Journal* (2014), p. 579-592.

Jasiak (2020) — Jasiak, Mikolaj. "Energy Communities in the Clean Energy Package: Assessment of the Adopted Regulatory Frameowork”*European Energy and Climate Journal* (2020), p. 48-55.

Johnson and Hall (2014) — Johnson, Victoria C. A, Hall, Stephen. “Community energy and equity: The distributional implications of a transition to a decentraliced electricity system”, *People, Place and Policy Online* 8 (2014) no. 3, p. 149-167. 10.3351/ppp.0008.0003.0002

Kharel (2018) — Kharel, Amrit. (2018)"Docrinal Legal Research", 1-16. http://dx.doi.org/10.2139/ssrn.3130525

Lijesan and others (2003) — Lijesan, Mark, Appelman, Marja, Gorter, Joeri, Onderstal, Sander, Venniker, Richard. (2003). “Equal rules or equal opportunities? Demystifying level playing field”, (p. 1-97).

Lowitzsch and Hanke (2019) — Lowitzsch, Jens and Hanke, Florian. (2019). Renewable Energy Cooperatives. In Lowitzsch, Jens (Ed.), *Energy Transition* (p. 139-162). Springer Publishing.

McCauley and others (2013) — McCauley, Darren, Heffron, Raphael James, Stephan, Hannes and Jenkins, Kirsten. “Advancing Energy Justice: The Triumvirate of Tenets”, *International Energy Law Review* (2013), 107 (2013) no. 3, p. 107-110.

McCrudden and Prechal (2009) — McCrudden, Christopher and Prechal, Sacha. “The Concepts of Equality and Non-Discrimination in Europe: A practical approach”, European Network for Gender Equality and non-discrimination, (2009).

McHarg (2020) — McHarg, Aileen (2020). In del Guayo, Iñigio, Godden, Lee, Zillman Donald N., Montoya, Milton F. and González José Juan (Eds.), *Energy Justice and Energy Law* (p. 15-30) (First edition). Oxford University Press.

McHarg (2016) — McHarg, Aileen. (2106). “Community Benefit & Ownership in Scotland”, In Lila Barrera-Hernández, Barry Barton, Lee Godden, Alastair Lucas and Anita Rønne (Eds.), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (p. 297-316). Oxford University Press, p. 297-316.

REScoop (2020) — REScoop. (2020). “Energy communities under the Clean Energy Package: Transposition Guidance”, (p. 1-99).

REScoop (2021) — REScoop. (2021) “Renewable energy communities: why they deserve support & how the CEEAG can help: REScoop.eu’s response to the public consultation on the draft CEEAG", (p. 1-12).

Roberts (2019)	Roberts, Josh. Josh Roberts, "What energy communities need from regulation", *European Energy Journal,* 8 (2019) nr. 3/4 p. 13-27.
Roggenkamp (2016)	Roggenkamp, Martha. (2016). Citizens` Position in Energy Production: Netherlands, In Lila Barrera-Hernández, Barry Barton, Lee Godden, Alastair Lucas and Anita Rønne (Eds.), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (p. 193-205). Oxford University Press. (2016), p. 193-205.
Rønne (2016)	Rønne, Anita. (2016). Opposition to Wind Farms and the Possible Responses of the Legal System. In Lila Barrera-Hernández, Barry Barton, Lee Godden, Alastair Lucas and Anita Rønne (Eds.), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (p. 173-191). Oxford University Press.
Saintier (2017)	Saintier, Séverine. "Community Energy Companies in the UK: A Potential Model for Sustainable Development in "Local" Energy?", *Sustainability* 9 (2017) no. 1325, p. 1-18. https://doi.org/10.3390/su9081325.
Salter and others (2018)	Salter, Raya,Gonzalez, Carmen G and Kronk Elizabeth Ann Warner. "Energy Justice: Frameworks for Energy Law and Policy" *Energy Justice* (2018), p. 1-11. https://doi.org/10.4337/9781786431769.00008.
Savaresi (2018)	Savaresi, Annalisa. "The Rise of Community Energy from Grassroots to Mainstream: The Role of Law and Policy." *Journal of Environmental* (2019), p. 487–510. https://doi.org/10.1093/jel/eqz006.
Shafir (2017)	Shafir, Eldar. "Decisions in poverty contexts", *Current Opinion in Psychology*" 18 (2017), p. 131-136. 10.1016/j.copsyc.2017.08.026.
Sovacool and others (2017)	Sovacool, Benjamin K, Burke, Matthew, Baker, Lucy, Kumar, Katikalapudi, Chatinaya Kumar, Wlokas, Holle. "New frontiers and conceptual frameworks for energy justice"*Energy Policy* (2017), p. 677-691. https://doi.org/10.1016/j.enpol.2017.03.005.
Talus (2016)	Talus, Kim, *Introduction to EU Energy Law*, Oxford University Press 2016.
Van Veelen (2018)	Van Veelen, Bregje. "Negotiating Energy Democracy in Practice: Governance Processes in Community Energy Projects." *Environmental Politics* (2018), p. 644–65. https://doi.org/10.1080/09644016.2018.1427824.
Vedder and others (2016)	Vedder, Hans, Rønne, Anita, Roggenkamp, Martha, del Guayo, Iñigo. (2016). EU Energy Law. In Roggenkamp, Martha, Redgwell, Catherine, Rønne, Anita and del Guayo, Iñigio (Eds.), *Energy Law in Europe; National and International Regulation* (p.187-366), Third Edition, Oxford University Press.

Verde and Rossetto — Verde, Stefano F. and Rossetto, Nicolò. “The future of renewable energy communities in the EU. An investigation at the time of the Clean Energy Package”, Florence School of Regulation, Research Report 2020 (p. 1-98).

Yildiz and others (2015) — Yildiz, Özgür, Rommel, Jens, Debor, Sarah, Holstenkamp, Lars, Mey, Franziska, Müller, Jakob R., Ratke, Jörg and Rognli, Judith. “Renewable energy cooperatives as gatekeepers or facilitators? Recent developments in Germany and a multidisciplinary research agenda” *Energy and Social Science* 6 (2015), p. 59-73. https://doi.org/10.1016/j.erss.2014.12.001.

Webpages

Energi Norge (2020) — Energi Norge. (2020). *Ren energi-pakken: Norge trenger en rask implementering av Ren energi-pakken*. Ren energi-pakken. https://www.energinorge.no/publikasjoner/dokument/posisjonsflak--ren-energipakken-2020/.

REScoop (2021) — REScoop. (2021). *Transposition Tracker.* Accessed November 10, 2021. Available at: https://www.rescoop.eu/policy#transposition-tracker.

Westmill Solar Park (n.d) — Westmill Solar Park. (n.d). *Passionate about Community Renewable Energy: Who we are.* About Westmill. http://westmillsolar.coop/about-westmill/.

Westmill Solar Park (n.d) — Westmill Solar Park. (n.d). *Home.* http://westmillsolar.coop/.